BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **CARLA BAZEMORE** From one step reduction in salary for 24 months from the position of Janitor with the Department of General Services at Sacramento	SPB Case No. 34755 **BOARD DECISION** (Precedential) **NO. 96-02** March 5, 1996

Appearances: Richard J. Burton, Attorney, on behalf of appellant, Carla Bazemore; Teresa L. Boron-Irwin, Senior Staff Counsel (Specialist), Department of General Services, on behalf of respondent, Department of General Services at Sacramento.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This decision is before the State Personnel Board (SPB or Board) after the SPB rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the appeal of Carla Bazemore (appellant), a Janitor with the Department of General Services (Department). Effective April 1, 1994, the Department reduced appellant's salary one-step for 24 months based upon repeated instances of unapproved tardies and absences over a three year period, one instance of misconduct while vacuuming a carpet, several threats made to her supervisor, as well as general allegations of overall poor performance. These allegations were charged as constituting cause for discipline under Government Code section 19572 subdivisions (d) inexcusable neglect of duty, (h)

intemperance[1], (j) inexcusable absence without leave, (m) discourteous treatment of the public or other employees, and (t) other failure of good behavior, on or off duty, which causes discredit to the agency.

After a hearing on the merits of the appeal, the ALJ found cause to discipline appellant for the absences, the vacuuming incident, and the threats, but modified the penalty to a one-step salary reduction for 18 months on the grounds that the original penalty was too severe since the allegations relating to appellant's general performance problems were dismissed as being too non-specific to constitute cause for discipline.

After a review of the entire record, including the transcript, exhibits, and the oral and written arguments of the parties, the Board concurs with the ALJ's findings that there was cause to discipline appellant for her absences, the vacuuming incident and the threats, but concludes that a one-step reduction in salary for 24 months is a just and proper penalty.

FACTUAL SUMMARY

Appellant's Employment History

Appellant has been employed with the Department since 1984. She has no record of formal discipline. Effective July 15, 1987, the Department medically terminated appellant. That termination,

[1] Cause for discipline under section 19572(h) was withdrawn at the hearing.

however, was revoked by the Board on June 28, 1988 in SPB Case No. 22671 and appellant was reinstated.

General Allegations of Poor Performance

The Notice of Adverse Action charged appellant with general deficiencies in work performance as noted in her annual performance reviews given 1993 and 1994. These performance reviews, however, merely noted that appellant needed improvement in several different categories of performance, but did not provide specific information or details concerning how appellant's work performance was deficient. As a result, the ALJ concluded in her Proposed Decision that these allegations were too vague to constitute cause for formal discipline under L[redacted] K[redacted] (1991) SPB Dec. No. 91-04. We agree with the ALJ's conclusion and dismiss these charges.

Unexcused Absences and Tardies

Beginning in 1989, the Department placed appellant on attendance restriction because of her poor record of attendance. The restriction required that appellant report all absences to her supervisor, call in between 5:00 p.m. and 5:30 p.m. if unable to work her shift, and substantiate all unapproved absences for illness with a doctor's note. The attendance restriction was reiterated to her by memoranda dated January 24, 1992, August 24, 1992 and April 12, 1993.

The Department charged appellant with being inexcusably absent without leave for at least a portion of each day on May 28, May 29,

June 28, August 12, and August 28, 1991 based on her failure to comply with the attendance restriction. After each of these absences, the Department issued triplicate preprinted State forms entitled "Counseling Memorandum", notifying appellant that she was going to be marked as either AWOL or unapproved dock, reminding appellant of her attendance restriction and of the availability of the Employee Assistance Program, and finally warning her that if the behavior continued, adverse action would be taken.[2] No adverse action was taken against appellant in 1991.[3]

In 1992, appellant's unexcused absences and tardies continued. The Department charged appellant with being inexcusably absent without leave, for at least part of the day, on fifteen days in

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[2] The Department used the terms "AWOL" (absence without leave) and "unapproved dock" inconsistently through the years to record instances when appellant's absences or tardies were not approved, either because she never asked ahead of time for approval or because she failed to adhere to her attendance restriction or other departmental policy on absences. Regardless of how the absence was defined on appellant's timesheet or pay records, discipline may be appropriate when an employee is tardy or absent from work without prior approval or fails to adhere to a department's reasonably-imposed attendance policies or restrictions of which the employee is made aware. L[redacted] R[redacted] A[redacted] (1995) SPB Dec. No. 95-06.

[3] On September 4, 1991, the Department did issue another Counseling Memorandum recapping all of appellant's unexcused absences and tardies previously addressed in the earlier counseling memoranda stating that adverse action would be recommended. Despite this memorandum, adverse action was not taken until almost three years later.

1992.[4] Again, each of these absences or tardies was the subject of a Counseling Memorandum issued by the Department. The memoranda again generally stated that appellant was going to be marked as either AWOL or unapproved dock for the absence, reminded appellant of her attendance restriction, and finally warned appellant that if her behavior continued in the future, adverse action would be taken against her. Again, despite appellant's many unexcused absences after previous warnings, no adverse action was taken against appellant in 1992.

In 1993, the unexcused absences and tardies continued without significant improvement. Appellant was marked as either AWOL and/or unapproved dock on thirteen days in 1993.[5] Again, each of these absences was addressed by the Department in a Counseling Memorandum noting again, in essence, that appellant was going to be marked as either AWOL or unapproved dock for the absence, reminding appellant of her attendance restriction, and warning appellant that if her behavior continued in the future, adverse action would be taken. As in the previous two years, no adverse action was taken against appellant.

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[4] The unexcused absences and tardies were alleged to have occurred on February 10, April 23, April 27, May 4, May 28, June 24 through 26, July 1 through 3, August 14, September 21, November 9 and November 10, 1992.

[5] The dates charged are January 26 through 28, February 4, February 9, February 19, March 2, May 4, August 30, August 31, September 2, September 3, and September 22, 1993.

In 1994, appellant was charged with eight hours AWOL on February 4 and received a Counseling Memorandum shortly thereafter containing basically the same admonition as the dozens of other counseling memoranda. Three weeks later, the instant adverse action was issued against appellant, listing all of the absences and tardies mentioned herein as charges upon which the action was based.

At the hearing, the Department presented substantial documentary evidence and testimony concerning the unexcused tardies and absences, which tardies and absences the appellant did not dispute. She did, however, make several arguments in her defense. First, she contended that most of her absences were the result of her medical condition of chronic allergies and the medication she was forced to take as a result of those allergies which made her drowsy. Second, she contended that many of the dates for which she was charged with being inexcusably absent without leave should have been excused as she had a note from her doctor excusing her from work on those days.[6] Finally, the appellant argued that adverse action was improper because of the Department had already addressed with finality each incident in a Counseling Memorandum and informed

[6] The Department refused to accept many of appellant's doctors' notes to excuse her absences on the grounds the notes gave no medical diagnosis other than what the patient "said" to the doctor. We believe the propriety of the Department's rejection of such notes solely on the ground stated is questionable. Even assuming, without deciding, that the notes should have been accepted by the Department as adequate, we nevertheless find the discipline imposed warranted based upon the remaining awol charges, the vacuuming incident and the numerous threats.

her that adverse action would be taken only if the behavior continued.

Vacuuming Incident

Appellant was also charged in the adverse action with misconduct based upon an incident which occurred almost three years earlier, on July 17, 1991. On this date, appellant was assigned to vacuum the Employment Development Department (EDD) offices after the carpets had been shampooed. Her supervisor, Donald Marshall (Marshall), directed her to replace the furniture that had been placed on the desks so that the employees could return to their work areas. When Marshall checked on appellant, she was vacuuming and had told the EDD workers to replace the furniture themselves. Marshall told appellant that her conduct was not appropriate and that she should not expect EDD employees to do her work. Appellant became angry and began dropping wastebaskets onto the floor. In the presence of two other janitors and several EDD employees, appellant stated, "He pissed me off."

Shortly thereafter, appellant was issued a Counseling Memorandum detailing the incident. At the conclusion of the memorandum, it stated, "If you continue to behave this way, I will ask that an adverse action be taken against you."

Threats Against Her Supervisor

In late 1993, appellant was alleged to have made several threats against her supervisor, Ken Doose, causing Doose a great

deal of anxiety. Specifically, on or about October 14, 1993, during a counselling session, appellant told Doose "I'm going to tell you one thing. God gave me this job, and if I lose it, I'm going to take all of management down with me. Sorry Ken, I mean all of management." When Doose cautioned appellant against making such threats appellant responded "I don't care, I mean it. I'd have nothing to lose. My father's gone. This job is all I have." Appellant's threat caused Doose a great deal of anxiety. Appellant denied making the threat.

The following month, on November 24, 1993, appellant had a meeting with Doose to discuss her work performance. Present at the meeting was Bennie Griffin, one of appellant's previous supervisors. Griffin testified that during the course of this meeting, appellant stated, "If I lose my job, someone is going to go with me. God gave me my job back, and no one is going to take it away from me. Ken, you'll get yours." Griffin also testified that appellant had made similar threats in the past. Griffin asked appellant if she knew she could be written up for her making such threats and appellant did not respond. Griffin urged Doose to report appellant's threats to Department management, which Doose later did.

Shortly thereafter, on November 29, 1993, appellant attended a meeting with Doose and Doose's supervisor Ethel Harvey (Harvey) to discuss appellant's work performance, as well as the prior

threats appellant had made. At this meeting, appellant repeated her statement that God had given her her job back and that if she lost it, everyone was going down with her. In response to Harvey's question about the meaning of her statement, appellant said, "You remember what happened at the post office?" Harvey testified that appellant did not appear to be joking and took the comment as a further threat.

Harvey contacted the California State Police and reported the incident. Later that day, a representative from the State Police met with her and Doose. Doose was upset by the threat and left work to see his doctor. Harvey also was upset by the threat, but did not leave work.

Appellant's union steward, Carl Ross, was also present during this last meeting. Ross testified that appellant meant nothing by the statement and was harmless. He felt that there was no threat to Doose and that Doose was just being paranoid.

Appellant denied ever making any threats to anyone as alleged.

DISCUSSION

Incidents For Which Counseling Memoranda Were Issued

In the case of G[redacted] B[redacted] (1993) SPB Dec. No. 93-20, the Board concluded that formal adverse action should not be taken against an individual based on an incident when that individual has already received some form of discipline for the incident. The intent was that an employee who has already been disciplined for

misconduct or poor performance should not be subject twice to discipline based on the same incident or incidents.

In the case of S[redacted] R[redacted] (1994) SPB Dec. No. 94-09, the Board took the opportunity to clarify the B[redacted] decision, providing some guidelines as to when formal adverse action could not be based on incidents that had previously been cited in documents that were disciplinary in nature and effect.

In clarifying B[redacted], we noted that the Board never intended to preclude departments from taking formal action after merely documenting misconduct or from counselling employees as to the need for improvement. Under the specific facts before us in R[redacted], we concluded that formal adverse action could not be based on incidents cited in a previously issued Letter of Warning. The letter had warned R[redacted] that "any further problems will result in a more severe action" (emphasis added), implying that the letter was, in itself, a disciplinary action, and that only future incidents could provide the basis for a more severe disciplinary action. We concluded in the case of R[redacted] that the language used in the Letter of Warning, and the circumstances surrounding its issuance, evidenced an intent that the document was intended to be disciplinary in nature and effect and to finally resolve the specific incidents cited in it.

As we noted in R[redacted], the title of the document, the language used therein,[7] the applicable Memorandum of Understanding, written departmental policies or other circumstances will dictate a conclusion that the document was intended to be disciplinary in nature.

In many cases, however, extrinsic evidence of the department's intent is elusive and the language used in the documentation of an incident or incidents is so ambiguous that the Board cannot positively discern whether the document was to memorialize a counselling session or to constitute a progressive disciplinary measure.

Because the Board wants to encourage supervisors and managers to provide guidance and counselling to employees where appropriate, in hopes that the guidance and counselling provided will effectuate its purpose and obviate any need for adverse action, the burden of showing that documentation of counselling constituted any more than just that must lie with the employee. Thus, where there is no

[7]Ideally, if a department intends to document an incident of misconduct or poor performance short of taking formal adverse action, but wants to leave the door open for formal action based on the same incidents in the future, then it would clearly inform the employee of its intent. Thus, in such a case, a department might inform the employee in a written memorandum that:

> Your conduct on this occasion was unacceptable and will not be tolerated by this department. If you engage in similar conduct in the future, the department will take adverse action against you based on the incidents cited in this memorandum, as well as any future incidents.

clear extrinsic evidence that the documentation was disciplinary and where the language in the documentation is so ambiguous, such that a reasonable person cannot readily determine whether the documentation was intended to be disciplinary, the Board will not construe the documentation as disciplinary. Thus, where counselling fails, a department is not barred from taking formal adverse action based on incidents cited in a memorandum documenting the prior counselling, as well as upon the incidents that demonstrate that the employee did not take the counselling to heart.

In the instant case, there was no extrinsic evidence that the counselling memoranda was disciplinary. The numerous counselling memoranda issued to appellant addressing her absences and the vacuuming incident contained ambiguous language. The language used in the memoranda could be interpreted as meaning, "if you continue to engage in misconduct, formal action will be taken against you based on these incidents, as well as future incidents." Alternatively, the language could be interpreted as meaning "if you continue to engage in misconduct, formal action will be taken against you based solely on the future incidents."

Accordingly, the Department is not precluded from relying on the incidents discussed in the numerous Counselling Memoranda as the basis for the instant adverse action.

The record reveals that there is ample evidence to support the Department's allegations that appellant was inexcusably absent without leave on the dates alleged. Moreover, there is ample evidence that appellant was discourteous to her supervisor as well as the EDD employees on the date of the vacuuming incident. We therefore find cause to discipline appellant for these incidents under section 19572, subdivisions (d) and (j).

Threats Made By Appellant

In addition to the allegations previously addressed in the Department's counseling memoranda, the adverse action was premised upon several threats made by appellant in October and November of 1993 to her supervisor, Ken Doose. The Board concurs with the ALJ's findings that there is a preponderance of evidence in the record that appellant made such threats as alleged. Such threats clearly constitute cause for discipline under Government Code section 19572 (m) discourteous treatment of fellow employees, as well as under section 19572(t) other failure of good behavior.

Penalty

As noted in the California Supreme Court case of Skelly v. State Personnel Board (1973) 15 Cal.3d 194:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (Citations.) Skelly, 15 Cal.3d at 217-218.

In exercising its judicial discretion, the Board is charged with rendering a decision which, in its judgment, is "just and proper." Government Code section 19582. One aspect of rendering a "just and proper decision" is assuring that the penalty is "just and proper."

The Skelly court set forth several factors for the Board to consider in assessing the propriety of the imposed discipline. Among the factors to be considered are the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence.

We believe that serious harm inures to the public service when an employee makes credible threats of violence against another employee. In this case, Doose was upset enough by the threats to go home. Griffin was also worried about the threats, enough to contact the California State Police to come out to the building and initiate an investigation. Whether or not appellant intended to worry her fellow employees or follow through on her actions is not necessarily determinative: rather, it is enough that the threats made by appellant were such as to cause the reasonable person to worry about their personal safety.

As previously stated by the Board in F[redacted] B[redacted] (1994) SPB Dec. No. 94-01[8]:

> The State of California can not have its employees verbally and physically abusing one another whenever they are frustrated or angry. Profanity, threats, and physical confrontations have absolutely no place in the work environment. Furthermore, violent physical acts by an employee against a co-worker, student, client, patient or member of the public where genuine physical harm is produced or intended, warrant dismissal. Likewise, threats of physical harm, under circumstances where a reasonable person would conclude that the perpetrator was considering acting on the threats, could also justify termination. B[redacted] at p. 15.

Moreover, as stated in F[redacted] [redacted]. G[redacted] (1993) SPB Dec. No. 93-13 at page 4, "[a]n employee's failure to meet the employer's legitimate expectation regarding attendance results in inherent harm to the public service." Clearly, appellant's record of attendance was quite poor, and failed to improve despite the numerous warnings given to her. Appellant's deleterious record of attendance, combined with the serious threats made to her supervisor, and the discourtesy demonstrated to her supervisor and fellow state employees during the vacuuming incident, merits a one-step reduction in salary for twenty four months.

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[8] The B[redacted] decision is presently before the California Court of Appeal, Third Appellate District, after the Superior Court upheld the Board's decision.

CONCLUSION

We find that the incidents addressed in appellant's numerous counselling memos can be the basis for the instant formal disciplinary action as the language used in the memos and the surrounding circumstances do not clearly indicate that they were intended as either final or disciplinary in nature. Given the seriousness of appellant's threats, and the repeated pattern of inexcusable absences, we find that the penalty meted out by the Department in this instance is more than justified.

ORDER

Upon foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ORDERED that:

1. The one-step reduction in salary for 24 months against Carla Bazemore is sustained.

2. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 5, 1996.

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C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board