

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 36721  
 )  
D [REDACTED] ■. J [REDACTED] ) **BOARD DECISION**  
 ) (Precedential)  
 )  
From demotion from the position )  
of Supervising Motor Vehicle ) **NO. 96-01**  
Field Representative to Motor )  
Vehicle Field Representative with )  
the Department of Motor Vehicles )  
at Hayward ) February 5-6, 1996

Appearances: Loren E. McMaster, Attorney on behalf of appellant, D [REDACTED] ■. J [REDACTED]; Craig L. Stevenson, Staff Counsel, Department of Motor Vehicles on behalf of respondent, Department of Motor Vehicles at Hayward.

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

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of D [REDACTED] ■. J [REDACTED] (appellant) from his demotion from the position of Supervising Motor Vehicle Field Examiner to the position of Motor Vehicle Field Examiner. The ALJ sustained the demotion, finding that appellant made extremely inappropriate sexual remarks to a female driver's license applicant, thus establishing cause for discipline under Government Code § 19572, subdivisions (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees, (t) failure of good behavior either during or outside of duty hours which is of such a nature that it

(J [REDACTED] continued - Page 2)

causes discredit to the appointing authority or the person's employment, and (w) unlawful discrimination, including harassment, on the basis of sex against the public while acting in the capacity of a state employee. The ALJ denied appellant's request for backpay based upon the Department's alleged failure to provide appellant with copies of all materials upon which the adverse action was based. Although the ALJ found that the Department violated SPB Rule 52.3,<sup>1</sup> he concluded that the rule violation did not rise to the level of a constitutional violation for which a backpay remedy would be required.

After a review of the transcript, the evidence, and the written arguments<sup>2</sup> of the parties, the Board adopts the ALJ's Proposed Decision sustaining the discipline to the extent it is consistent herewith. However, for the reasons stated below, we conclude that appellant is entitled to backpay in an amount equal to the difference between that which he would have earned in his supervisory position and that which he earned in his demoted position for the period between the effective date of the demotion and the date of this decision.

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<sup>1</sup> SPB rules are codified at Title 2, California Code of Regulations.

<sup>2</sup>No oral argument was requested by either party.

CAUSE FOR DISCIPLINE<sup>3</sup>

Findings of Fact

The appellant has been employed by the Department of Motor Vehicles (DMV) since January 23, 1989. He began as a Licensing Registration Examiner and was promoted to Supervising Motor Vehicle Field Representative on November 30, 1990. He has no prior adverse actions.

As cause for this demotion, it is alleged that appellant made inappropriate sexual remarks to a female DMV customer during a drive test.

On September 15, 1994, while working at the Hayward DMV office, appellant gave a drive test to Teresa A., a 21 year-old female customer of Japanese ancestry. Several minutes into the drive test, appellant had the customer pull the car over to the side of the road. He asked her to put the car in reverse and back up. When she was unable to do so, appellant told the customer to turn off the engine and relax. Appellant began conversing with the customer. He told her that his wife is Japanese and likes to have sex. He asked the customer about her sex life. He asked whether she had ever had sex in Japan or in the United States. He asked whether she had ever "masturbated." When she said she did not understand, he told her that masturbation involved a man or a woman

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<sup>3</sup>The ALJ's finding of fact and conclusions of law with respect to the causes for discipline alleged are adopted by the Board and set forth herein.

(J [REDACTED] continued - Page 4)

touching themselves. He described various sex acts including how a man inserts his "penis" in a woman's "vagina" and how a woman "blows" or "sucks" a man's penis. He described how it felt to make love and how he and his wife had "orgasms." He asked whether the man who brought her to the DMV office was her boyfriend. He told her that young Japanese girls wore colored underwear. He asked what color of underwear she was wearing -- white, pink, or yellow?

The customer was uncomfortable, embarrassed, and frightened by the appellant's questions, but was afraid that appellant would fail her on the examination if she did not answer. After 15-20 minutes, appellant had the customer drive back to the DMV office and issued her a driver license. The customer did not feel that appellant had given her a complete drive test.

The customer's boyfriend was waiting for her when she returned to the DMV office. He noticed that she looked depressed. Her chin was to her chest, her shoulders were hunched, and her arms were crossed in front of her. The first thing she said was not whether she passed or failed, but that she "hates that man!" When the boyfriend asked if she had passed the test, she said "yes." This confused him since she should have been smiling and happy. She did not want to talk about what happened and kept telling him not to mention it. Finally, she told him what happened. At the boyfriend's insistence, she consulted a lawyer who filed a written complaint with DMV about appellant's conduct.

(J████ continued - Page 5)

The matter was assigned to the Department's EEO/Affirmative Action Office for investigation. During the investigation, appellant denied that any improper conduct took place during the drive test of Teresa A. Although he claimed that he did not recollect Teresa A. specifically, he vaguely recalled a drive test with a female Japanese customer. According to appellant, the customer asked him whether he had a Japanese wife. When appellant said no, she insisted that he did. She then said that he understood their culture and how important it was for her to have a driver license. She seemed to be seeking favorable treatment. She and her boyfriend seemed upset when he did not show her any favoritism. He categorically denied discussing any sexual matters with her.

During the investigation into this incident, the investigator discovered that there had been a previous complaint in 1990 involving appellant's conduct with another female customer of Japanese ancestry. Although the incident was beyond the three-year statute of limitations (Gov. Code § 19635), respondent alleged the incident as part of the background in the Notice of Adverse Action and sought to offer evidence of the incident at the hearing. Because of the striking similarity between the two incidents, the

(J [REDACTED] continued - Page 6)

Administrative Law Judge allowed the evidence under Evidence Code section 1101(b).<sup>4</sup>

On June 4, 1990, while employed as a Licensing-Registration Examiner at the Oakland Coliseum DMV office, appellant gave a drive test to Tomiko O., a 24 year-old female customer of Japanese ancestry. During the drive test, appellant had the customer pull over to the side of the road and began talking to her about sexual matters. He asked whether she had a boyfriend. He asked her about

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<sup>4</sup> Evidence Code section 1101 provides:

(a) Except as provided in this section and in sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such act.

Under Evidence Code section 1101(b), evidence of uncharged misconduct may be admitted for the purpose of demonstrating a common plan, scheme, or design if the offenses are sufficiently similar. (People v. Ewoldt (1994) 7 Cal.4th 380). Although the Evidence Code is not strictly applicable to Board proceedings (Gov. Code §§ 19578 and 11513), both the courts and the Board look to its provisions for guidance on evidence questions. (Coburn v. State Personnel Board (1978) 83 Cal.App.3d 801; Lyle Q. Guidry (1995) SPB Dec. No. 95-09).

(J████ continued - Page 7)

her sexual practices and whether she had sex in Japan. He asked whether she'd had an "orgasm." He then described what an orgasm was. Appellant spoke to the customer in this manner for 20-30 minutes. She was embarrassed, nervous, and scared, but was afraid to complain because she wanted her driver's license. Following the conversation, appellant had the customer drive back to the office where he issued her a driver's license. He wrote his name and telephone number on her copy of the score sheet. She only drove about five minutes during the entire examination.

The customer was visibly upset and crying after the drive test. Her boyfriend thought that she had failed the examination and was surprised to learn that she had passed. A week or so later, while they were watching television, the customer suddenly asked her boyfriend what an "orgasm" was. When he questioned why she was asking this, she told him what had occurred during the drive test. The boyfriend was incensed. He called the telephone number the appellant had written on the score sheet. The next day he called the DMV office and registered a complaint about appellant's conduct over the telephone. He later spoke to the office manager who told him that his girlfriend needed to file a written complaint. The boyfriend spoke to his girlfriend several times, but she refused to file a written complaint.

When confronted by the office manager about the accusation, appellant denied any inappropriate behavior. He claimed that

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during the drive test, the customer asked him if he knew of any Asian churches in the area that played "organ music." He felt that the customer might have misinterpreted the conversation because she did not speak English very well. He admitted writing his telephone number on the customer's score sheet but claimed that he did so at the customer's request. DMV apparently did not pursue the matter at the time because the victim did not file a written complaint and the appellant denied the misconduct.

At the hearing, appellant continued to deny that he discussed sexual matters with either of the customers. He again claimed that Teresa A. was the one who insisted that he had a Japanese wife and sought preferential treatment on the drive test. He again claimed that Tomiko O. asked about an Asian church with organ music and must have confused his response as referring to the male sexual organ. He suggested that nothing happened during either drive test and that the two boyfriends instigated the complaints. He called several of his supervisors who testified that he was a good employee and that they had received no other complaints that he had engaged in any sexual misconduct.

Appellant also denied that he had been given the documents upon which the action when he was served the Notice of Adverse Action. He claimed that some of the items were given to him at the Skelly hearing itself, but that others, including the EEO report which recommended adverse action and the tape recordings of the

(J [REDACTED] continued - Page 9)

witness interviews, were not given to him until his attorney requested them several weeks before the State Personnel Board hearing. He claims entitlement to back salary to the date of the Board's decision because of the Department's failure to provide these documents in a timely fashion.

#### Conclusions of Law

Respondent established by a preponderance of the evidence that appellant made inappropriate sexual remarks to Teresa A., a female DMV customer of Japanese ancestry, during a drive test on September 15, 1994. The testimony of Teresa A. was credible and convincing.

It was buttressed by the testimony of her boyfriend who described her unusual state of depression after passing the drive test. It was further buttressed by the credible testimony of Tomiko O., another female DMV customer of Japanese ancestry, who described a virtually identical encounter with appellant some four years before the incident with Teresa A. Appellant's suggestion that there was some sort of misunderstanding or that the two boyfriends encouraged the women to file false charges cannot be credited in light of the strong similarities between the two incidents.

The appellant's conduct of making inappropriate sexual remarks to a female customer during a drive test constituted inexcusable neglect of duty, discourteous treatment of the public or other employees, failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to

(J████ continued - Page 10)

the appointing authority or the person's employment, and unlawful discrimination, including harassment, on the basis of sex against the public while acting in the capacity of a state employee.<sup>5</sup> The charge of willful disobedience is not sustained since no evidence of the departmental rules or regulations allegedly violated by the appellant were introduced in evidence.

Appellant's conduct was grossly improper. He used his position of authority to humiliate and embarrass a driver license applicant by subjecting her to unwanted questions about the most intimate details of her personal life. Such misconduct clearly warranted appellant's removal from his position of trust and authority. Appellant must understand that any repetition of this conduct will justify his immediate dismissal.

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<sup>5</sup> The Board has not issued any precedential decisions on sexual harassment against members of the public. However, the Fair Employment and Housing Commission has held that the same standards which govern sexual harassment cases in the employment context apply to cases involving the provision of services to the public. (Department of Fair Employment and Housing v. University of California, Berkeley (1993) FEHC Dec. No. 93-08.) Here, appellant's conduct of having a female driver license applicant pull over to the side of the road for 10-15 minutes while he questioned her about the intimate details of her sex life was "severe" enough to create an offensive environment for the applicant; moreover, appellant was in a position of authority over the applicant and submission to such conduct was implicitly a condition of obtaining the driver license. Under these circumstances, appellant's conduct constituted sexual harassment of the public.

SKELLY VIOLATION

Factual Summary

In asserting a violation of Rule 52.3, the appellant claimed that the documents referenced in the Notice of Adverse Action as forming the basis of the action were not attached to the Notice when it was served, and that he only received them when this oversight was discovered at the Skelly hearing. In addition, the Department did not provide the appellant with a copy of an Equal Employment Opportunity (EEO) investigative report from the EEO Officer to the Division Chief and a copy of tape recorded interviews until a few weeks before the SPB hearing, after appellant's counsel demanded them, asserting that the EEO report and the tapes were not documents upon which the adverse action was based. In his Proposed Decision, the ALJ found that the Department violated Rule 52.3 by not providing appellant with the EEO report at least 5 days prior to the effective date of the adverse action.

However, the ALJ refused to award appellant back pay under Barber v. State Personnel Board (1977) 18 Cal.3d 395, concluding that the failure to provide the documents in the case of a demotion did not amount to a constitutional due process violation for which back pay must be awarded.

Issues

1. Whether the Department violated Rule 52.3 by failing to provide appellant with a copy of all materials upon which the adverse action was based.
2. If the Department violated Rule 52.3, whether appellant is entitled to back pay.

**DISCUSSION**

We agree with the ALJ's conclusion that appellant's conduct of making inappropriate sexual remarks to a female customer during a drive test constituted inexcusable neglect of duty, discourteous treatment of the public or other employees, failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment, and unlawful discrimination, including harassment, on the basis of sex, against the public while acting in the capacity of a state employee.<sup>6</sup> Accordingly, the penalty of demotion from the position of Supervising Motor Vehicle Field Representative to the position of Motor Vehicle Field Representative was properly sustained.

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<sup>6</sup>In so doing, we hold that the evidence of prior, uncharged misconduct under similar circumstances was properly admitted by the ALJ at the hearing. Evidence Code section 1101(b); People v. Ewoldt (1994) 7 Cal.4th 380; Heyne v. Caruso (9th Cir. November 9, 1995) 95 Daily Journal D.A.R. 14885. However, even if such evidence were excluded, the evidence admitted at the hearing concerning the single incident charged would have been sufficient to warrant the discipline imposed.

(J [REDACTED] continued - Page 13)

For the reasons discussed below, however, we conclude that the Department's failure to provide appellant with a copy of the EEO investigative report upon which its decision to take adverse action was unquestionably based requires an award of backpay under the principles announced by the California Supreme Court in Barber v. State Personnel Board (1977) 18 Cal.3d 395.

The Department's Failure to Provide Appellant  
With a Copy of the EEO Investigative Report

In Skelly v. State of California (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court established minimal standards of procedural due process that must be followed prior to taking punitive action against a public employee:

At a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. [Id. at 215 (Emphasis added)].

Pursuant to Skelly, the SPB enacted Rule 52.3 which provides that:

(a) Prior to any adverse action...the appointing power...shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action...The notice shall include:

- (1) the reasons for such action.
- (2) a copy of the charges for adverse action.

(J [REDACTED] continued - Page 14)

- (3) a copy of all materials upon which the action is based.
- (4) notice of the employee's right to be represented in proceedings under this section, and
- (5) notice of the employee's right to respond...  
(Emphasis added.)

The appellant claims that the Department violated his Skelly rights and Rule 52.3 by failing to provide him, in a timely manner, with copies of all materials upon which the adverse action was based. Although the Notice of Adverse Action stated that copies of any documents or other materials giving rise to the action were attached, the appellant claims that no documents were attached to the copy of the Notice he received. The parties stipulated that appellant did receive copies of the documents referred to in the Notice at the Skelly meeting.<sup>7</sup> These documents included a letter dated September 28, 1994, from EEO/Affirmative Action Officer Valora J. Harvey (hereinafter "EEO Letter") to appellant stating that the Department was investigating a discrimination complaint that had been filed against appellant. Although the identity of the complainant was not identified in this letter, the substance of the investigation related to the incident of sexual harassment by appellant against customer Teresa A. on September 15, 1994. The

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<sup>7</sup> After the close of the hearing, but before the ALJ issued his Proposed Decision, the parties submitted a "Stipulated Facts Re: Alleged Skelly Violation." The transcript indicates that the ALJ left the record open for 10 days to permit the parties to submit an offer of proof or declaration from the Skelly hearing officer. Apparently, the stipulation was submitted in lieu of such evidence.

(J [REDACTED] continued - Page 15)

parties stipulated that this letter was hand delivered to appellant on or about October 3, 1994, which was approximately two months before service of the Notice of Adverse Action in this case.

The EEO letter described the allegations made by the customer, and stated:

The EEO officer will supervise the investigation process and make the final determination as to whether or not the acts are actionable, and will make a recommendation to [sic] disposition.

On or about October 28, 1994, Valora Harvey submitted a report regarding the results of her office's investigation of Teresa A.'s sexual harassment complaint to Rebecca Jorjorian, Division Chief, Field Office Operations. The report states that the Equal Employment Office, acting as the Civil Rights Office, has completed its investigation of the complaint of sexual harassment filed by Teresa A. and summarizes the facts obtained through the Department's investigation into the allegations. The report concludes that a preponderance of the evidence, including a 1990 incident involving another customer, shows that appellant engaged in the conduct as alleged and recommends "the severest adverse action possible." Three days later, on December 1, 1994, the

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Department issued its Notice of Adverse Action in this case, signed by Personnel Officer Don Morishita.<sup>8</sup>

Although the notice states that copies of any documents or other materials giving rise to the adverse action are attached, the parties dispute whether appellant actually received all documents prior to the Skelly hearing. However, the parties stipulated that the following documents were provided to appellant at the Skelly hearing: a) a letter dated September 19, 1994 from appellant's attorney regarding the allegations of sexual harassment against Teresa A.;<sup>9</sup> b) a road test score sheet for Teresa A. prepared by appellant; c) the above-described EEO letter from Valora Harvey dated September 28, 1994, which had previously been provided to appellant; d) two memoranda concerning the prior, uncharged incident involving Tomiko O.; e) a memorandum from appellant regarding the Tomiko O. incident; and f) a road test score sheet for Tomiko O. prepared by appellant.

It is undisputed that the Department never provided appellant with a copy of the investigative report prepared by the EEO office until it was demanded in discovery and produced a few weeks prior to the SPB hearing before the ALJ. In addition, it is

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<sup>8</sup>The parties stipulated that the Notice of Adverse Action was delivered to appellant in a timely manner prior to the Skelly hearing.

<sup>9</sup>That attorney was not appellant's attorney of record in these proceedings before the Board.

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undisputed that tape recorded witness interviews used in preparing the report were provided during discovery and not previously.

The appellant has the burden of proving a Skelly violation, and must establish what materials were relied on by the person making the decision to take adverse action. Sharp-Johnson (1995) SPB Dec. No. 95-14.<sup>10</sup> Here, the record does not specifically indicate who made the decision to discipline appellant nor the materials upon which the decision was based. The Department contends that the investigative report to the Division Chief, which references the investigative interviews, makes findings, and recommends "the severest adverse action possible," was not considered by the Department in taking the adverse action. Upon consideration of all the facts and circumstances of this case, however, we find it inconceivable that the Department's decision to take adverse action against appellant was made without consideration of the EEO report.

First, assuming they were timely provided, the documents which the Department asserts it relied upon were clearly insufficient to form a basis for discipline. The only documents relevant to the charged allegations of sexual harassment against Teresa A. consisted of the letter from appellant's counsel demanding an

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<sup>10</sup> We note with interest that Sharp-Johnson involved the same department and personnel officer as this case. See Sharp-Johnson at 7, note 3.

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investigation of Teresa A.'s sexual harassment complaint, the road test score sheet for Teresa A., and the September 28, 1994 EEO letter stating that an investigation was underway. None of these documents contain any evidence of misconduct but, at most, consist of allegations of sexual harassment that the Department subsequently undertook to investigate.

Second, as stated in the EEO letter, the Department clearly contemplated making a final decision only after its investigation was completed, which it did almost immediately after receiving the complete investigative report from the same EEO officer recommending "the severest adverse action possible." Therefore, we concur with the ALJ's conclusion that the Department violated Rule 52.3 by failing to provide appellant with the investigative report prior to taking adverse action. Karen Johnson (1992) SPB Dec. No. 92-02 (failure to provide appellant with copy of investigative report that was reviewed by executive director in connection with appellant's adverse action, even though it did not corroborate the allegations, violated Rule 52.3).

As we noted in Sharp-Johnson, supra, appellant bears the burden of proving a violation of due process as set forth in Skelly. Here, the facts can support no other conclusion but that the decision to take adverse action must have been based upon materials not provided to the appellant in accordance with Rule 52.3. Accordingly, we find a violation of Rule 52.3 and of

(J [REDACTED] continued - Page 19)

appellant's Skelly rights based upon our conclusion that the Department withheld materials upon which its decision was based.<sup>11</sup>

#### Back Pay

The well-established remedy for a Skelly violation is to extend the effective date of the action until due process has been satisfied. Keely v. State Personnel Board (1975) 53 Cal.App.3d 88, 98; Kristal v. State Personnel Board (1975) 50 Cal.App.3d 230, 240-241. Thus, in Barber v. State Personnel Board (1977) 18 Cal.3d 395, the court held that the effective date of a dismissal where the employee's Skelly rights were violated would be extended to the date the Board files its decision, thus requiring back pay from the date of the dismissal to that date.

In declining to award back pay in this case, the ALJ noted that the predisciplinary safeguards outlined in Skelly are not constitutionally mandated in certain minor disciplinary actions.

Civil Service Association v. City and County of San Francisco

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<sup>11</sup>In light of our conclusion that the Department's failure to provide the final EEO report constituted a violation of Rule 52.3, we do not reach the issue of whether the Department's failure to provide the witness interview tapes upon which the report was based would also constitute an independent Skelly or Rule 52.3 violation. Moreover, we conclude that appellant has not met his burden of proving that the Department violated Rule 52.3 by failing to attach copies of the materials upon which the action was based to the Notice of Adverse Action and note that copies of such documents were provided to appellant at the Skelly meeting when he asserted that he had not received them. There was no evidence that appellant requested and was denied a rescheduling of the Skelly meeting to allow him to review the documents.

(J████ continued - Page 20)

(1978) 22 Cal.3d 552, 562 (involving suspensions of five days or less). In such cases, due process is satisfied by procedures that will apprise the employee of the proposed action, the reasons therefor, provide a copy of the charges including materials upon which the action is based, and the right to respond either orally or in writing to the authority imposing the discipline, if provided either during the suspension or within a reasonable time thereafter. Id at 564.

We agree with the ALJ's conclusion that the factors identified in Skelly as justification for requiring preremoval safeguards (e.g., loss of employment and inability to seek other work unhindered by pending disciplinary charges, duration of wrongful action, employer's interest in prompt action) do not apply with the same force in cases involving lesser forms of discipline as they do in dismissal cases. Nevertheless, a permanent demotion is a serious form of discipline with far greater impact than the lesser adverse actions involved in Civil Service Association. Accordingly, we find the full predisciplinary due process protections identified in the Skelly case apply. Therefore, the Department's failure to provide the EEO report until demanded in discovery in connection with the proceedings before the Board violated appellant's minimal due process rights under Skelly, and a back pay award is appropriate.

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The Board will decline to award back pay only where it would be futile to do so, as where the practical effect of a back pay award would be merely to delay the imposition of the discipline.

T████ W████ (1992) SPB Dec. No. 92-03 (while back pay warranted for violation of Rule 52.3, no back pay in that case, where the practical effect would be merely to delay imposition of a 1-step salary reduction for 1 year that had already been served. In the case of a permanent demotion, however, the appellant does sustain a tangible loss as a result of the improper imposition of discipline, for which an award of back pay is appropriate. Moreover, the Department's liability for back pay did not terminate when it furnished the EEO report to appellant prior to the SPB hearing. By failing to provide the report prior to the Skelly hearing, the Department deprived appellant of his constitutional right to fully respond to the charges prior to the imposition of discipline. Therefore, while we sustain the penalty of permanent demotion, we award appellant back pay to compensate appellant for the violation of his Skelly rights from the effective date of his demotion to the date of filing this decision.

#### **CONCLUSION**

We emphasize that, while we feel compelled to award backpay in this case, we in no way condone appellant's conduct in engaging in extremely offensive sexual harassment against DMV customers, which conduct certainly warranted severe adverse action and might well

(J [REDACTED] continued - Page 22)

have justified dismissal. Unfortunately, in taking adverse action, the Department breached its obligation to afford appellant the minimal due process protections articulated by the court in Skelly. In so doing, the Department put this Board in the unenviable position of having to award backpay to an employee who was otherwise justifiably disciplined.

**ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, and Barber v. State Personnel Board (1976) 18 Cal.3d 395, it is hereby ORDERED that:

1. The demotion of D [REDACTED] [REDACTED] J [REDACTED] from the position of Supervising Motor Vehicle Field Representative to the position of Motor Vehicle Field Examiner with the Department of Motor Vehicles at Hayward is sustained.

2. The Department of Motor Vehicles shall pay to D [REDACTED] [REDACTED] J [REDACTED] all back pay and benefits that would have accrued to him had his procedural due process rights not been violated, commencing December 12, 1994 through February 7, 1996.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due Appellant.

(J [REDACTED] continued - Page 23)

4. This opinion is certified for publication as a Precedential Decision pursuant to 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 February 5-6, 1996.

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