BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31892
	)	
LISA FOLSOM	)	**BOARD DECISION**
	)	(Precedential)
	)	
From dismissal from the position of Senior Legal Typist with the State Public Defender at Los Angeles	)	**NO. 94-28**
	)	
	)	October 4, 1994

Appearances: Michael Hersh, Attorney, California State Employees' Association on behalf of Appellant, Lisa Folsom; Loren McMaster, Attorney on behalf of Respondent, State Public Defender.

Before Carpenter, President; Ward, Vice President and Stoner, Member.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Lisa Folsom (appellant or Folsom). Appellant was dismissed from her position as Senior Legal Typist with the California Public Defender's Office for being rude to callers on the telephone and other alleged misconduct.

The ALJ who heard the appeal dismissed a number of charges on ground that the Department presented only hearsay evidence which could not be used as the sole basis for an administrative finding. Alternatively, the ALJ also held that a number of the incidents charged were the subject of previous informal

discipline and, according to Board precedent, could not be used as a basis for further disciplinary action. Based on the few remaining charges proven, the ALJ modified the dismissal to a ninety day suspension.

The Board rejected the ALJ's Proposed Decision, deciding to hear the case itself. After a review of the entire record, including the transcript and the written and oral arguments presented to the Board, the Board finds cause to discipline appellant, but agrees with the ALJ that the penalty should be reduced from dismissal to a ninety working days' suspension for the reasons that follow.

BACKGROUND

The appellant was appointed a Senior Legal Typist on March 18, 1988. She has no prior adverse actions. From June 1990 to March 1991, appellant was off work on disability. Upon her return to work, she was assigned to the reception desk. It was the appellant's understanding that she would work the reception desk until a replacement could be assigned to that position. She was on the desk for 8 months at which time she was told that she would remain at the reception desk. In a meeting with Mr. Panton, the Chief Assistant, and her union representative, appellant was informed that other employees did not want to work with her. At the same time, the Los Angeles State Public Defender's Office was preparing to close and appellant was very concerned that she had

to interview for another job at a time when her Senior Typist Legal skills were getting rusty.

Appellant's alleged rudeness and other misconduct were the subjects of a number of counseling sessions during the months of November and December of 1991 and February of 1992.

On August 17, 1992, appellant was dismissed from her position on grounds of incompetency, inefficiency, inexcusable neglect of duty, insubordination, inexcusable absence without leave and discourteous treatment of the public or other employees in violation of Government Code § 19572, subdivisions (b), (c), (a), (e), (j) and (m).[1]

ISSUES

1. Does the Board have jurisdiction?

2. Was the testimony concerning the complaint of October 31, 1991, and the allegations of discourtesy occurring on November 12, 1991, November 27, 1991, December 20, 1991 and February 4, 1992, admissible evidence which could be used to support a finding?

3. Assuming admissible evidence supports the above allegations, were the allegations resolved through informal

[1] A detailed factual summary of the incidents is set forth in the Discussion portion of this Decision, infra.

discipline or could they form the basis for the dismissal action?[2]

DISCUSSION

Jurisdiction

The Department argues that SPB does not have jurisdiction over appellant's appeal. On February 28, 1992, the appellant resigned from her position with the State Public Defender to accept a position with the Public Employment Relations Board (PERB). She was rejected from her position with PERB on August 7, 1992. At the time of her rejection, she had mandatory reinstatement rights to her previous State job with the State Public Defender's Office. When she attempted to implement her right of return, however, the State Public Defender's Office placed her on paid administrative leave effective August 8, 1992 with the intention of terminating her based on the present adverse action. Appellant was terminated on August 17, 1992.

Subsequently, appellant negotiated a settlement agreement with PERB to change her rejection from PERB to a resignation effective August 7, 1992. The agreement was concluded by the parties on December 14, 1992 and adopted by the SPB on April 6, 1993 (8 months after her rejection).

[2]The Board finds below that the allegations concerning October 31, 1991, November 12, 1991, and November 27, 1991 are not supported by a preponderance of evidence in the record and declines to reach the issue of whether these allegations should be dismissed on grounds they were the subject of prior informal discipline.

The Department's position is that by resigning from PERB, appellant forfeited her mandatory reinstatement rights. Government Code § 19140.5 provides mandatory reinstatement rights for a permanent employee who is rejected on probation. The Department correctly notes, however, that an employee who resigns from her position does not have mandatory reinstatement rights. Government Code § 19140 provides only permissive reinstatement rights to permanent employees who resign their positions. The Department argues that once the settlement agreement changed appellant's rejection to a resignation, appellant lost her right to mandatory reinstatement.

The facts do not support the Department's position. On August 8, 1992, the Department placed appellant on administrative leave. The Notice of Adverse Action affirms that appellant was reinstated. [Notice of Adverse Action, p. 7]. Thus, by its action, the Department effectively reinstated appellant to her former position.

We find that appellant properly exercised her mandatory reinstatement rights and that jurisdiction is proper.

Discourtesy

Appellant was charged with discourtesy pursuant to Government Code § 19572, subdivision (m) based on the events of 4 days.

October 31, 1991

The Notice of Adverse Action lists as the factual basis for discipline the contents of an E-mail memo sent by Chief Assistant A. Panton on October 31, 1991 to the Attorney Staff of the State Public Defender with a copy to Yolanda Oliva, the Legal Support Supervisor stating:

> Over the last two weeks I have received several complaints about the manner in which telephone calls are treated at the reception desk. Specifically, I have received complaints that 1) Callers have left messages which have not been delivered to attorneys, 2) The telephone has not been answered, 3) Callers have been put on hold for lengthy periods, and 4) the receptionist has been surly. This matter is being addressed with the support staff. Please inform either Yolanda or me of any similar deficiencies which you note. If possible, get the date and time of the occurrence. Thank you for bringing this matter to my attention.

The E-mail memorandum does not provide sufficient detail to be used as a basis for discipline. In Leah Korman (1991) SPB Dec. No. 91-04, as here, the Department stated only general complaints in the Notice of Adverse Action. In Korman, the ALJ found that "The right to be notified of the charges is a critical element in due process of law" and noted that since Korman was not told what acts were being punished, she was hampered in her ability to prepare a defense. The Board adopted the ALJ's decision in Korman as its own precedential decision.

In the present case, the E-Mail transmission provides notice to appellant that her behavior will be subject to scrutiny, but

does not provide sufficient notice of specific instances of misconduct. As stated in Steven Richins (1994) SPB Dec. No. 94-09, p. 7, a Department "cannot make a case against appellant without setting forth in the Notice of Adverse Action specific instances or details which form the basis for the adverse action." Any charges based on the October 31, 1991 complaint are dismissed.

November 12, 1991

The Notice of Adverse Action next alleges that on November 12, 1991, appellant was rude to a Mr. Livaditis, an individual identified by Mr. Panton as a death row prisoner who telephoned Mr. Panton. Mr. Livaditis is alleged to have complained to Mr. Panton that the receptionist was rude and that her tone of voice sounded like she did not like her job. The Notice of Adverse Action also related that Mr. Panton spoke to appellant about this incident and that she denied sounding unprofessional on the telephone, explaining that Mr. Livaditis was annoyed because he had called 5 or 6 times that morning and been unable to reach his attorney or someone who could help him.

At the hearing, the Department did not call Mr. Livaditis to testify. Instead, the Department attempted to prove that appellant was rude by having Mr. Panton testify as to what Mr. Livaditis said.

Appellant argues that Mr. Livaditis' statement is hearsay and cannot be used to support a finding that appellant was rude. Hearsay evidence is "evidence of a statement that was made other than by a witness testifying at the hearing and that is offered to prove the truth of the matter stated." (Evidence Code § 1200 (a).) Although all relevant evidence is admissible in an administrative law proceeding, hearsay evidence may not be used as the sole basis for a finding unless it would be admissible over objection in a civil proceeding. (Government Code § 11513.)[3]

The Department argues first that Mr. Livaditis' statement that appellant was rude is not hearsay because it is not being offered for the truth of the matter stated. This argument devours itself. The Department is charged with proving each allegation by a preponderance of evidence. The allegation the Department seeks to prove concerning the events of November 12, 1991 is that appellant was rude to Mr. Livaditis. The only evidence of appellant' rudeness is Mr. Livaditis' statement. If Mr. Livaditis' statement is not offered for the truth of the statement that appellant was rude, it cannot be used to prove that appellant was rude and, under this theory, the Department fails to meet its burden of proof.

[3]Government Code § 19578 provides, with some exceptions not relevant here, that a board hearing be conducted in accordance with Government Code § 11513.

The Department argues, in the alternative, that even if the statement is hearsay, it is admissible under the state of mind exception to the hearsay rule codified as section 1250 of the Evidence Code. The "state of mind" exception applies "whenever the intention, feeling, belief, or mental state of a person at a particular time. . . is material to an issue under trial." (1 Witkin, California Evidence (3rd ed. 1986) § 736 p. 717 quoting Estate of Carson (1920) 184 C. 437, 445.) Consequently, Mr. Livaditis' statement may be admissible to illustrate that he was offended by what he perceived to be rudeness by the appellant.

However, the Department still has not carried its burden. The Department has merely presented Mr. Panton's impression that Mr. Livaditis believed that appellant was rude when she answered the telephone, not that appellant was, in fact, rude to Mr. Livaditis.

Although the statement of Mr. Livaditis may be admissible to prove that Mr. Livaditis was offended which may, in turn, tend to support an inference that appellant may have said something to make Mr. Livaditis believe her to be rude, the Department has failed to carry its burden of proving that appellant was, in fact, rude. This charge is dismissed.

November 27, 1991

The Notice of Adverse Action next asserted that on November 27, 1991, Billie Goldstein, an attorney in appellant's office,

sent an E-Mail to Yolanda Oliva and Mr. Panton which stated:

> For your information, I got a complaint about Lisa from Andrea Heim, the attorney scheduling person at San Quentin on Monday, November 25, 1991. I left a message for Andrea and she called me back at 12:50 p.m. I was in the library, Lisa paged me then transferred the call to my office. Andrea said something like `Boy, I can't believe your receptionist. She seemed so annoyed to have to transfer the call. The tone of her voice was incredibly hostile.' I apologized. This is not the first complaint I have gotten, but I did not keep a record of prior complaints. I will report all future complaints to you.

The Notice of Adverse Action also relates that on December 2, 1991, Ms. Oliva and Mr. Panton met with the appellant to discuss this complaint. The Notice relates that appellant responded that she did not understand the basis of the complaint, stating that she only answers calls with the words "State Public Defender" and denying engaging in any conversation with the callers in which they could detect any rudeness or hostility.

Ms. Heim was not called as a witness. Instead, Billie Goldstein testified about Ms. Heim's statement. As noted in the above hearsay discussion, appellant's alleged rudeness is not proven by Billie Goldstein's testimony that a caller was offended. If Ms. Heim's statement is not offered to prove the truth of the statement that appellant was rude, it cannot serve as the sole basis for a finding that appellant was rude. If it is offered to prove Ms. Heim's state of mind, it proves only that Ms. Heim may have been offended and may support an inference that

appellant was rude, but does not prove by a preponderance of evidence that appellant was, in fact, rude.

December 20, 1991

Mr. Panton testified that on December 20, 1991, he stopped by the reception desk to tell the appellant that he was leaving the office and to inform her of the approximate time of his return. The phone rang as he was leaving the reception area. When the phone rang, he heard the appellant say "God dammit." She picked up the phone and answered "State Public Defender" in a very rude tone of voice.

Mr. Panton told the appellant that she answered as if she were very disgusted and annoyed about having to take the call. He told her that her "God dammit" expression when the phone rang reflected her annoyance at having to take the call, and that this attitude carried over into the way in which she answered the phone.

The appellant stated that the phone gets very busy at times, making her job difficult. Mr. Panton explained that whoever serves as the receptionist always has to be courteous when answering the calls no matter how hectic the reception desk phone gets. The appellant asked him what was he trying to tell her. Mr. Panton told her to avoid being rude when she answers the phone.

At the hearing before the ALJ, the ALJ determined that Mr. Panton credibly testified to rudeness he himself witnessed and found this charge to have been substantiated. We agree with the ALJ's determination.[4]

AWOL and Medical Substantiation

At approximately 8:45 a.m. on February 10, 1992, without getting prior approval from her supervisor, appellant asked another employee to take the Central Telephone Board so that appellant could attend a medical appointment. The Department documented this incident as an unauthorized absence without leave (AWOL).

Later that day, at about 12:30 p.m., the appellant called in to report that she had been in an automobile accident and would return to work the next day. On February 11, 1992, the appellant provided a medical verification from Kaiser Permanente titled "Certification of Disability and/or Return to Work or School." The document stated that she was seen on February 10, 1992, and was advised to return to work on February 10, 1992.

The document contained boxes marked "Industrial" "Non-Industrial" and "Undetermined." The box adjacent to "Undetermined" was checked. The "Remarks" section of the

[4]Although Mr. Panton engaged in counseling concerning appellant's behavior, there is no evidence that this counseling constituted discipline so as to preclude the Department from charging this instance of discourtesy in an adverse action. (See Steven Richins (1994) SPB Dec. No. 94-09.)

document contained the following entry: "PT given advice as to improving urinary status - please observe for improvement over 2-3 weeks." The document was signed by "Agate M.D.". The document did not establish that the medical appointment was so urgent that it justified appellant's departure from the office without seeking permission from either her supervisor or the Chief Assistant. Appellant's unauthorized departure constitutes cause for discipline under Government Code § 19572, subdivision (j), inexcusable absence without leave.

Wrong Court Stamp

On January 13, 1992, the appellant properly filed a document in the McDermott death penalty case entitled "Extension of Time" in the Supreme Court. However, she mistakenly had the extension stamped in the Court of Appeal instead of the Supreme Court. By her own admission, appellant sensed that the document had been improperly stamped but she returned to the office and never informed anyone of her suspected error. Mr. Panton discovered the error on January 14, 1992. The stamp concerned him because it led him to believe that the document had been filed in the wrong court.

As a Legal Secretary, the appellant filed documents in the Supreme Court. However, appellant had been working for some months as a receptionist and filing documents was not a part of her normal work routine.

This incident does not constitute cause for discipline.

Excessive Restroom Breaks

Appellant is charged with leaving the reception area unattended on February 4, 1992 and on February 10, 1992.[5] At the hearing before the ALJ, Yolanda Oliva testified to appellant's failure to see that the desk and phone were covered before going to the restroom. On February 10, 1992, appellant was counseled that her restroom breaks were excessive and that they interfered with the daily operations of the office. She was instructed that if she again left the Central Telephone Board unattended, and failed to show that it was for an emergency condition, an adverse action would be taken.

In mitigation, the appellant testified before the ALJ that during that time period she was on the Weight Watchers diet. The diet required appellant to drink large quantities of water. She further stated that on some occasions she had difficulty finding relief to go to the bathroom, and on one occasion she had extreme pain in her abdomen. Based on appellant's credible testimony, the ALJ found that appellant left the reception desk without authorization because she had physical emergencies.

[5]February 10, 1992 is the same date appellant left at 8:45 a.m. for an unauthorized medical appointment.

We find that appellant's need to take unauthorized bathroom breaks on two occasions hardly qualifies as misconduct under Government Code § 19572.

PENALTY

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board must consider are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Id. at 218].

In the present case, we find only one of four charges of discourtesy proven -- appellant was rude on the telephone on December 20, 1992. We also find that while appellant noticed that a properly filed document was improperly stamped, she did not seek to have the error corrected. In mitigation, we note that filing documents was not one of appellant's routine duties. We also find that appellant failed to provide proper documentation of the urgency of her medical appointment to justify her unauthorized absence the morning of February 10,

1994. We dismiss the charge that appellant took excessive restroom breaks.

Applying the Skelly factors, we find that discourtesy of the sort proved here constitutes serious misconduct which has great potential to harm the public service. The person answering the telephone at any state office provides the necessary link between the public and that Department's services. Under these circumstances, telephone discourtesy is actionable misconduct. The charge of absence without leave has also been substantiated. Given that only two of the charged incidents have been proven and that the other allegations were either completely unproven or de minimis, the Board agrees with the ALJ that dismissal is too severe a penalty. The penalty is reduced to 90 working days' suspension.

ORDER

Upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The above-referenced action of the State Public Defender in dismissing appellant is modified to a ninety (90) working days' suspension;

2. The State Public Defender and its representatives shall reinstate Lisa Folsom to the position of Senior Legal Typist and pay to her all back pay and benefits that would have accrued to her had she not been improperly dismissed;

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.

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

THE STATE PERSONNEL BOARD*

Richard Carpenter, President

Lorrie Ward, Vice President
Alice Stoner, Member

* Member Floss Bos was not present when this decision was adopted. Member Alfred Villalobos was not present when this case was considered and did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 4, 1994.

GLORIA HARMON
Gloria Harmon, Executive Director
State Personnel Board