BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 29416
	)	
VINCENT RUIZ	)	**BOARD DECISION**
	)	(Precedential)
From 1-step reduction in salary	)	
for 1 month as a Staff Counsel,	)	**NO. 93-24**
Range C with the State	)	
Compensation Insurance Fund at	)	
Ventura	)	August 3, 1993

Appearances: Dennis Moss, Attorney, Association of California State Attorneys and Administrative Law Judges, representing Vincent Ruiz, appellant; Richard D. Owen, Attorney, representing State Compensation Insurance Fund, respondent.

Before Carpenter, President; Stoner, Vice President; and Ward, 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 Vincent Ruiz (appellant), from a one-step reduction in salary for one month from the position of Staff Counsel with the State Compensation Insurance Fund (SCIF or respondent).

The appellant was served with the reduction in salary for willful disobedience and insubordination after refusing to obey an order to remove a sign which expressed his personal opposition to the Persian Gulf war. Appellant had posted the sign on his office window facing outside in view of passersby. At the hearing, appellant argued that he was not required to obey the order from his superior to remove the sign as the order itself violated his

constitutional right to free speech. The ALJ rejected this argument, sustaining the discipline on the grounds that the request that appellant remove the sign from his window did not violate his first amendment right of free speech.

The Board rejected the Proposed Decision in order to examine the issue of appellant's first amendment rights in the government workplace and to determine whether appellant was being disciplined solely for the failure to remove the sign from the window and not the sign he subsequently placed on his desk.

The Board determined to hear the case itself based upon the record of the hearing. After reviewing the transcript and evidence in this matter, and the oral and written arguments of the parties, the Board sustains the 1-step reduction in salary for one month imposed upon appellant.

FACTUAL BACKGROUND

The appellant worked as both a Graduate Legal Assistant and Staff Counsel for SCIF since 1982. He has no prior adverse actions.

On January 16, 1991, during the height of the Persian Gulf war, the appellant placed a printed bumpersticker, approximately 4 by 8 inches, on his office window so that it faced outside. The sticker said, "Troops Out Now--No Blood For Oil." At that time, appellant's office was located on the first floor of the SCIF building and his window was near a back entrance to the building

designated for SCIF employees. His window faced east and looked out over an area in which employees took their breaks. About 50 yards east of appellant's window was the building's employee parking lot, and about another 50 yards east of the parking lot was the Chevron Oil building.

The parties agree that the sticker was visible from the employee parking lot and the "break" area. Appellant contends, however, that it was not easy to read from the parking lot, and that it was not visible from the Chevron Oil building. He further argues that members of the public who were visiting SCIF's office would not generally see the sign unless they parked in the employee parking area, walked around the building, or came in through the employee entrance.

At approximately 4:00 p.m. on January 16, 1993, appellant's direct supervisor, Mr. Warren Lobdell, referring to appellant's window sign, told the appellant that placing signs on the building in such a manner was improper because such placement gave the impression to people that the message on the sign was a SCIF-sanctioned statement. He asked appellant to remove the sign. The appellant wanted to know if there was anything in writing that prohibited him from displaying the sign from his office window. Mr. Lobdell then ordered appellant to take the sign down. Appellant refused. Mr. Lobdell attempted to remove the sign himself but the appellant blocked Mr. Lobdell's path to the window.

Mr. Lobdell again ordered appellant to remove the sign, and informed him that if the sign were not removed from the window before the morning of January 17, 1991, appellant's refusal to remove the sign would constitute willful disobedience and result in disciplinary action.

Later the same day, Mr. Lobdell and a Mr. Mark Tanchuck, a Senior Staff Counsel Specialist, met with the appellant and instructed him to remove the sign before the start of work the following day. Despite this order, appellant did not remove the sign the following day, January 17.

On the morning of January 18, a fellow attorney approached appellant in appellant's office and angrily complained about the sign in appellant's window. Appellant refused to remove the sign. Sometime later that day, Mr. Lobdell came into appellant's office when appellant was not there and removed the sign himself. Appellant did not know who took the sign, and his window remained vacant of any signs the rest of that day. Appellant did, however, speak to Mr. Lobdell later that day and told him that he was upset concerning what he perceived to be harsh threats received from the fellow attorney who had complained about the sign. Mr. Lobdell promised he would speak to that attorney. Mr. Lobdell did speak with the attorney, and that attorney ended up apologizing to the appellant for his behavior.

The sign was absent from appellant's window over the three day holiday weekend. On January 22, 1991, however, when appellant arrived to work, he replaced the missing sticker in his window with a hand-written sign which similarly stated "NO BLOOD FOR OIL." Again, Mr. Lobdell discussed the issue with appellant and again directed appellant to remove the sign from the window. Appellant still refused and the hand-written sign remained on his window for the rest of the week.

On the following Monday, January 28, appellant removed the sign from the window and replaced it with a sign on his desk which said "Get That Warmonger Out of the White House." That sign remained on appellant's desk for almost a year.[1]

Respondent served appellant with the instant adverse action for failing to obey the orders of his supervisor to remove the window sign. The adverse action charged appellant with violation of Government Code section 19572, subdivisions (e) insubordination and (o) willful disobedience.

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[1] While Mr. Lobdell recalled at the hearing that he may have asked appellant to remove this sign as well, appellant admits that he was never told to remove this sign. Moreover, it appears that failure to remove the desk sign was not listed as a cause of action in the adverse action. Therefore, we will not consider the presence of the desk sign as an issue in this case.

ISSUE

Whether Mr. Lobdell's order to appellant to remove the sign from his window was constitutionally valid in light of the First Amendment's guarantee of freedom of speech.

DISCUSSION

The First Amendment to the United States Constitution provides that "Congress shall make no law abridging the freedom of speech..." The Fourteenth Amendment makes this provision binding upon the states.

The rights of persons to speak freely on any subject is highly treasured, yet, it is not without exceptions. For example, obscenity is not protected by the First Amendment [Roth v. United States (1957) 354 U.S. 476], nor are "fighting words" or words which incite others to perform violent acts. Chaplinsky v. New Hampshire (1942) 315 U.S. 568.

With respect to the issue of a public employee's right to speak freely in the workplace without retribution by the government, there is a litany of cases which set forth the applicable law, beginning with the landmark case of Pickering v. Board of Education (1968) 391 U.S. 563. In the case of Pickering v. Board of Education, the Supreme Court held that a government entity may not discharge one of its employees for speaking her mind about topics of public concern in a letter to the editor of a newspaper because it violated her right of free speech. In

determining whether a public employee has been properly discharged for engaging in "speech", Pickering established a balancing test, which is still used today. That test requires that courts balance:

> ...the interests of the [employee] as a citizen in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. at 568.

The balancing test was deemed necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. Rankin v. McPherson (1987) 483 U.S. 378, 384. This balancing test is to be applied, even where an employee is not being dismissed. Chico Police Officers' Assn. v. City of Chico (1991) 232 Cal.App.3d 635.

The threshold question in applying the balancing test is whether the speech touches upon a matter of "public concern." Rankin v. McPherson, 483 U.S. at 384. The High Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is "entitled to special protection." Connick v. Meyers (1983) 461 U.S. 138, 145. Whether a particular statement or form of speech is a "public concern" or not is a question of fact and is determined by the content, form and context of a given statement, as revealed by the whole record. Id. at 147.

The statements made in appellant's signs were clearly a matter of public concern. The statements dealt with appellant's viewpoint on a very sensitive political topic -- the United States' involvement in the Persian Gulf war. Accordingly, appellant's speech was entitled to the highest level of First Amendment protection. The government could only discipline appellant for his speech if, under all of the circumstances, it found that the government's interest in promoting the efficiency of the public service as an employer outweighed appellant's right of free speech. In performing the balancing test, however, the statement will not be considered in a vacuum; the manner, time and place of the employee's expression are all relevant, as is the context in which the dispute arose. Rankin v. McPherson 483 U.S. at 388. The interests of the state must focus upon whether the government entity can effectively function in light of appellant's "speech." Other factors which may be considered are whether the speech took place in public or private, and whether there was any danger of the speech discrediting the public employer. Id. at 389.

In this particular case, we find that SCIF's interest in maintaining control over its property and the possible perception of other employees and the public that the sign espoused the views of the state outweighs an employee's interest in having his message relayed in this manner. The appellant's speech was entirely different in nature from that traditionally analyzed in employee

free speech cases. Since appellant's "speech" was not verbal or in the form of a signed letter or memorandum, it was not clearly attributable to him and him alone. Rather, appellant's speech was attached to the window of a government building, facing the outside. Passersby, whether employees of SCIF or members of the public walking the grounds of the SCIF offices, would not know whose speech they were viewing and could potentially attribute the speech to all SCIF employees, SCIF management, or the state of California. While appellant demands his right to speak out freely, the method of speech which he chose (placing the sign facing the outside of the building) tended to give the appearance that it was a SCIF-sanctioned viewpoint and not merely his own. Under these circumstances, we believe that the interest of the state in prohibiting the placement of personal signs on the building windows, even where the sign deals with a matter of public concern, outweighs any interest enuring to the appellant.

We find justification for our conclusion under the Supreme Court case of United States v. Grace (1983) 461 U.S. 171. In Grace, individuals threatened with arrest for distributing information in front of the Supreme Court building attempted to enjoin enforcement of a federal law which prohibited the display of any flag, banner or device designed or adopted to bring into public

notice any party, organization or movement in the Supreme Court buildings or on its surrounding grounds, including the adjoining sidewalks.

The Supreme Court found that the law as it applied to the public sidewalks was unconstitutional, since sidewalks are traditionally considered to be public forums. The Court found, however, that the Supreme Court building itself and surrounding grounds were not a public forum, and that therefore speech could be reasonably restricted in those areas. The court noted in concluding that the building and grounds were non-public forum property:

> Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will... The government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. United States v. Grace, 461 U.S. at 177-178.

The court went on to state that it was only necessary to determine whether the rules restricting the building's use were reasonable in light of the purpose for which the building was dedicated and whether there was any discrimination on the basis of content of the speech. In addition, the Supreme Court noted, "We have regularly rejected the assertion that people who wish to propogandize protests or views have a constitutional right to do so whenever and however they please." Grace, 461 U.S. at 177-178.

We similarly believe that appellant did not have a right to place his views "wherever he pleased" on the SCIF building and that Mr. Lobdell's order to remove the window sign was constitutionally valid. We find that the request was reasonable in light of the fact that the physical building itself was a place of official SCIF business, not a public bulletin board for employees to externally air their political philosophies. Moreover, ample alternative methods of communication remained available to the appellant.

Appellant, however, argues that the order was applied in a discriminatory or disparate manner, and was moreover, a violation of his rights to equal protection. Appellant bases this assertion on the fact that American flags, yellow ribbons[2] and pro-war memorabilia were simultaneously being displayed in and about other offices in the SCIF building, such as on desks and on office partitions.[3] The Board finds that the employees' actions of displaying those items of speech in or about their offices to be appreciably different than appellant's actions of placing a sign on

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[2] Yellow ribbons were often worn or used as a decoration during the Persian Gulf war as a symbol of support for the American troops participating in the war.

[3] SCIF did not attempt to dispute this assertion, but instead argued that appellant's supervisor in the Legal Department did not have control over what went on in the other departments within SCIF. The Board rejects this argument. In serving an adverse action based upon appellant's refusal to follow an order, it was incumbent upon SCIF to ensure that appellant was not the subject of disparate treatment compared to other SCIF employees, not just persons within the Legal Division. As noted below, we find no such disparate treatment.

his window facing outside of the building to the public. Because there was no evidence that other persons employed by SCIF were allowed to affix signs to their windows, we find that appellant was not the subject of unequal protection and that the order to remove the sign was applied in a content-neutral manner.

Appellant argues that American flags owned by other employees could be seen through the windows of the SCIF building at night, and therefore constituted speech in the window by those employees. We disagree. Assuming that the flags displayed in the offices could be seen through the windows at night, we believe this to be very different than appellant's placement of a political message in his window. While the flag may be used as "speech" in certain instances, it remains an inanimate object which represents our country and which typically appears in most government office buildings. Moreover, while the flags displayed by individual employees may have been incidentally visible to outsiders, it is clear from the record that none were purposefully affixed to the windows of the building. We find appellant's argument that he was subject to unequal treatment because of the visibility of the flags to be unpersuasive.

Finally, appellant makes the argument that he can not be punished for his speech as the law requires that the speech be shown to cause "actual disruption" before one can be disciplined. Appellant is correct in that many of the cases dealing with the

government's right to discipline an employee for his speech require that the government demonstrate actual disruption of the workplace. Roth v. Veteran's Administration of the U.S. (9th Cir. 1988) 856 F.2d 1401. However, we find that SCIF did suffer actual disruption as a result of the appellant's speech.

First, there is evidence in the record that the sign was disruptive to the efficiency of SCIF. The record reveals that during the period of time that the sign was posted on the window, there was a great deal of controversy and hostility brewing among SCIF employees as a result of its appearance. One angry co-worker even took the time to confront appellant in his office about the propriety of the sign. Others complained to Mr. Lobdell, appellant's supervisor, about the sign.

Second, contrary to the finding of the Supreme Court in Rankin v. McPherson, supra, where the Court observed that the speech took place in private, and therefore was unlikely to bring discredit to the employer, the speech here took place in public and was physically and figuratively "attached" to SCIF, not to appellant. We believe the disruption to SCIF from appellant's manner of speech is intrinsic in such a case and sufficient to sustain appellant's discipline.

Having rejected appellant's claim that Mr. Lobdell's order to remove the sign was a violation of appellant's First Amendment rights, we find that appellant's repeated failure to obey his

supervisor's order constituted willful disobedience and insubordination. As to the appropriateness of the penalty imposed, we find a 1-step reduction in salary for one month to be a "just and proper" penalty under the circumstances.

We acknowledge the fact that the period of time during which these events transpired was emotionally-charged. We also understand appellant's desire to communicate his political viewpoint to others, particularly in light of the "pro-war" sentiments displayed in and about the various offices of SCIF. We believe, however, that appellant could have handled the situation in a different manner. While appellant certainly had the right to speak his mind to his co-workers concerning his political opinions, he could not use the SCIF windows as a forum in which to publicly display his opposition to the war. His supervisor had the right to request that he remove such a sign, particularly in light of the fact that no other persons were shown to be displaying signs from their windows.

While we believe that appellant did not intend to create any problems or ill will through his actions, we also believe that appellant was wrong to repeatedly disobey the order of his supervisor. Accordingly, we find the relatively light penalty of a 1-step reduction in salary for one month to be an appropriate penalty under the circumstances.

ORDER

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

1. The above-referenced adverse action of a one-step reduction in salary for one month is sustained.

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

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member

*Member Floss Bos was not present and therefore did not participate in this decision. Member Alfred R. Villalobos was not on the Board when this case was originally considered and did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board