BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 30454
	)	
ANTHONY G. GOUGH	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position	)	
of Conservationist I, California	)	**NO. 93-26**
Conservation Corp at the Inland	)	
Empire District, California	)	
Conservation Corp at Patton.	)	September 7, 1993

Appearances: Neil Robertson, Attorney, California Union of Safety Employees for appellant Anthony G. Gough; Linda Nelson, Attorney, California Conservation Corp for respondent California Conservation Corp.

Before Carpenter, President; Stoner, Vice President; Ward and Bos, 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 Anthony G. Gough (appellant) from dismissal from the position of Conservationist I with the Inland Empire Service District, California Conservation Corp (CCC) at Patton.

In the attached Proposed Decision, the ALJ sustained the dismissal against appellant, finding that appellant committed several acts of sexual harassment against a corps member under his supervision, and also committed numerous acts of discourteous treatment against other corps members.

Prior to holding an appeal hearing on the merits of the adverse action, the ALJ determined that appellant's Skelly hearing was improper, and ordered that appellant be given a new Skelly hearing, which was done approximately three months later. After a hearing on the merits, the ALJ sustained appellant's dismissal in his Proposed Decision. In that Proposed Decision, the ALJ declined to award backpay to the appellant for the initial Skelly violation on the basis that the violation was "harmless error" and there was "no evidence of fraud, bad faith or evil intent" in connection with the initial Skelly hearing.

After a review of the entire record, including the transcript and written arguments of the parties, the Board adopts the ALJ's findings of facts and conclusions of law in the attached Proposed Decision, with the exception of the discussion of the appropriateness of backpay for the Skelly violation. For the reasons set forth below, the Board awards the appellant backpay from the period of October 4, 1991 to January 10, 1992.

FACTS PERTAINING TO THE SKELLY VIOLATION

On September 27, 1991, appellant was served with a Notice of Adverse Action dismissing him from state service effective October 4, 1991. On October 2, 1991, appellant was given a Skelly hearing before Renee Renwick, Chief of Personnel Services, who presided as the Skelly officer. Ms. Renwick affirmed the adverse action and appellant appealed to the SPB.

Appellant subsequently discovered that Ms. Renwick had been directly involved in supervising the investigation which led to appellant's adverse action. Appellant immediately requested that a new Skelly hearing be conducted before an impartial Skelly officer, but his request was denied by CCC.

At the Board's appeal hearing on December 9, 1991, the Administrative Law Judge (ALJ) determined that the October 2 Skelly hearing was not proper as the Skelly officer, Ms. Renwick, could not be considered impartial because of her earlier participation in the investigation. The ALJ ordered that appellant be given a new Skelly hearing before a different officer. In the meantime, the hearing on the appeal of the adverse action was continued.

On December 30, 1991, CCC gave the appellant a new Skelly hearing before a different hearing officer. On January 10, 1992, this new hearing officer issued a decision to go forward with the adverse action against appellant. The SPB appeal hearing followed.

DISCUSSION

The Board agrees with the ALJ's decision to order a new Skelly hearing. We find that the due process contemplated by Skelly v. State Personnel Board (1975) 15 Cal.3d 194 includes the right to a hearing before an impartial officer, one who has not been directly involved with the investigation of the matters which led to the taking of adverse action. (See Los Angeles County Employees' Assn. v. Sanitation District No. 2 (1979) 89 Cal.App.3d 294, 299; and

Williams v. County of Los Angeles (1978) 22 Cal.3d 731, 736.) The Board, however, disagrees with the ALJ's decision to deny appellant backpay.

Pursuant to Barber v. State Personnel Board (1976) 18 Cal.3d 395, the remedy for a violation of a terminated employee's due process rights is an award of backpay from the date of the employee's termination to the date of decision after a pre-termination hearing. The law does not provide that backpay is discretionary in cases where the due process violation constituted "harmless error". Neither is a backpay award for a due process violation dependent on a finding of bad faith or fraud. Rather, an award of backpay is required whenever an appellant's due process rights are violated by an employer's denial of the employee's pre-termination hearing rights. Since the ALJ concluded appellant's due process rights were violated when he ordered a new Skelly hearing, the appellant is due backpay for the period of time the discipline was improperly imposed: the date appellant was terminated, October 4, 1991 to January 10, 1992, the date the second Skelly hearing was concluded by the rendering of a decision.

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 effective date adverse action of dismissal against Anthony G. Gough is modified to January 11, 1992 to provide for an

award of backpay attributable to the Skelly violation;

2. California Conservation Corp shall pay appellant backpay for the period of time from October 4, 1991 through January 10, 1992;

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

4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member
Floss Bos, Member

*Member Alfred R. Villalobos was not a member of this Board when this case was originally heard 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 September 7, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By	)	
	)	
ANTHONY G. GOUGH	)	Case No. 30454
	)	
From dismissal from the position of Conservationist I, California Conservation Corp at the Inland Empire Service District, California Conservation Corp at Patton	)	

PROPOSED DECISION

APPEARANCES

This matter came on regularly for hearing before Jose M. Alvarez, Administrative Law Judge, State Personnel Board, on December 9, 1991 and May 26, 1992, at Rancho Cucamonga, California. Written argument was submitted by June 16, 1992.

The appellant, Anthony G. Gouch, was present and was represented by Leona Cummings, Attorney, California Union of Safety Employees.

The respondent was represented by Linda Nelson, Attorney, California Conservation Corp.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and

PROPOSED DECISION:

I

JURISDICTION

The above dismissal effective October 4, 1991, and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act.

On September 27, 1991, the appellant was served with the subject notice of adverse action. The appellant was provided a Skelly hearing. Renee Renwick was the Skelly officer. On November 26, 1991, the appellant wrote to respondent requesting a new Skelly hearing with a different Skelly officer. The respondent responded and denied the request for a new Skelly.

The State Personnel Board (SPB) set the matter for hearing on December 9, 1991. Appellant alleged a violation of Skelly rule at the hearing. A new Skelly hearing was ordered and considered appropriate because Renwick was not considered an impartial Skelly officer by virtue of her duties. Renwick had supervised the sexual harassment investigation which led to the adverse action although she did not conduct the investigation herself. Respondent moved for reconsideration of the Order on December 11, 1991, and said motion was denied on December 18, 1991.

A new Skelly hearing was held on December 30, 1991, and the Skelly Officer was Bonita MacDuffee, Chief, Fiscal Services Branch. On January 10, 1992, MacDuffee rendered her decision to let the adverse action stand with no modifications.

The matter was then set for hearing on May 26, 1992.

II

EMPLOYMENT HISTORY

Respondent appointed appellant to the classification of Conservationist I, California Conservation Corps on February 15, 1989. This was the classification held by the appellant at the time of this action.

The appellant has received a prior adverse action. The action

was a 5% reduction in salary for 6 months effective June 30, 1990. The action was for utilizing corp members to babysit at appellant's home, loaning a car to a corps member and being discourteous to corps members.

III

ALLEGATIONS

As cause for issuing the notice of dismissal the respondent alleges that the appellant sexually harassed a corps member and engaged in other improper conduct.

IV

Appeallent is a Conservationist I, California Conservation Corps with respondent. He supervises work crews composed of corps members. He is their first line supervisor. Corps members are young adults ages 18-23. The job specification for Conservationist I, California Conservation Corps notes that an incumbents in the position, "assist new corpmembers to adjust to and understand center life; teach, direct and counsel corpsmembers; are responsible for the care, maintenance and security of State property; are responsible for the discipline, safety and work habits of the corpsmember crew; safely move and direct corpsmember crews on disaster relief operations such as wildland fires and floods and assist in instructing corpsmembers in the protection and conservation of natural resources. Incumbents may supervise an entire center on evenings and weekends."

The job specification also notes incumbents knowledge should include the ability to "explain and demonstrate safe work methods and practices; demonstrate skill in teaching young adults and in

motivating and inspiring them to establish and achieve personal goals; effectively organize and direct a work crew; establish and maintain cooperative working relationships with governmental agencies and private sector organizations; participate with enthusiasm in the program with young adults in intense daily living reslationships; keep records and prepare reports; analyze situations and take effective action; conduct inspections of public service conservation work project."

V

The appellant takes work crews out to work on projects. The projects may encompass overnight stays away from the center where the corpsmembers are usually quartered. These projects are known as "Spikes."

VI

On June 16, 1992, appellant was assigned to a spike in the Mojave desert. Appellant supervised a crew of corpsmembers, one of whom was Caryn Spragg.

The spike lasted approximately ten (10) days commencing June 16, 1991. When the appellant and crew returned to the Inland Empire Center, Caryn Spragg filed a sexual harassment complaint relating to appellant's conduct.

VII

During the spike in the Mojave Desert, the appellant, on a repetitive basis, would approach Spragg and put his arms around her

and tickle her. He continued to do so even though Spragg protested and told him to stop.

On June 19, 1991, a crew member threw Spragg a set of keys. When she caught them, that crew member said, "you have good hands." In response to that appellant said, "yeah, I heard she had good hands." Spragg heard a sarcastic tone in appellant's voice and perceived the comment as sexual in nature.

On June 23, 1991, appellant was barbequing steaks for the corpsmembers. Spragg walked by. Appellant then tried to hug her, but she pushed him away and tried to leave. Appellant followed her, came up behind her and put his arm around her again.

On June 24, 1991, Spragg asked for appellant's permission to go to the kitchen for a drink. When he looked at her suspiciously, she raised her hands and said, "you can search...never mind, never mind." Appeallant reponded with, "you mean I can't do a body cavity search?"

On June 25, 1991, Spragg was drinking milk in the kitchen. Appellant came up behind her and tickled her. She told him to stop and walked away. Appellant chased her around a table with her on one side of the table and appellant on the other. Appellant took her glass of milk and proceeded to tease her with it. He then put down the milk, put his arms around another female corpsmember who was present and said, "see, she likes it." When Spragg picked up her milk and started to leave, appellant followed her, came up

close behind her, causing her to jump, and accused her of being paranoid.

VII

While on the spike in Mojave, the appellant would talk to his crew members. One of the crew members was William Henderson. He was the only black crew member. Another crew member was Aaron Fahden.

During the spike appellant would make comments about ethnic groups to the corpmembers and in Fahden's presence.

Appellant in commenting about Mexicans stated "these guys make it a daily event to go to a funeral." One of the crew members had requested time off to attend a funeral.

To Fahden and Spragg, appellant made a comment about Henderson. Henderson had committed an infraction and appellant felt he should be disciplined. His comment was that Henderson should have been fired for his misconduct.

He stated if Henderson was white, he would have been fired. Appellant also made a like comment relative to Mexican corpsmembers and the likelyhood that they would receive discipline for misconduct relative to whites committing the same offense.

VIII

In connection with his behavior towards her, Spragg found it offensive and demeaning. She was further intimidated and frightened by appellant's conduct on the spike. She was fearful of appellant's intentions towards her.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES;

Appellant admitted that he may have made some comments about blacks and hispanics.

Appellant testified that he did not recall the exact comments or discussions about the black and hispanic corpsmembers, but he did recall some discussion with other staff members about disciplining minority corpsmembers.

It is appellant's firm belief that for similar misconduct white corpsmembers are disciplined while Mexican and Black corpsmembers are not.

The evidence supports a findings that he voiced this opinion to his crew in connection with Henderson's misconduct.

Appellant has a right to his beliefs and a right to voice them. He does not have a right to utter them to his work crew about a specific crew member who engaged in misconduct. His opinion as to discipline in that instance should be referred to his supervisors or those in charge of imposing discipline. His comments to the crew members are divisive. They were not well received by Spragg or Fahden. The discredited his employer. They constitute failure of good behavior pursuant to Government Code Section 19572 (t).

Appellant admitted at the hearing that he touched and tickled both female corpsmembers assigned to his crew. He testified that he wanted to be friends with the corpsmembers and tickling them was one technique he used to be friendly. Appellant also confirmed that Spragg told him to stop touching her on more than one occasion

and that he continued to touch her after she told him to stop. He did this because he tends to be a physical person and nothing sexual was meant by his touching.

Appellant notes that he did continue to attempt to talk to Spragg alone, as for instance the incident in the freezer. He says he did this because he wanted to talk to her to determine what her problem was. He notes Spragg was his assistant and they needed to effectively communicate. He states he did not intend to upset or harass her.

Appellant also notes he has never received any training relative to sexual harassment, although he knows it is against the law to sexually harass.

Sexual harassment is illegal sex discrimination and includes unwelcome sexual advances, requests for sexual favors, and verbal, visual, or physical conduct of a sexual nature which meets any one of the following three criteria:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment;

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

3. Conduct which has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive work environment.

In determining whether a sexually harassing environment has been created, the standard to be applied is the victim's

perspective. (See Ellison v Brady (9th Cir., 1991) 924 F.2d 872).

It is no defense to a claim of sexual harassment that the alleged harasser did not intent to harass.

Government Code Section 19572 (w) makes sexual harassment an act subject to discipline. In this instance appellant's conduct consitututes sexual harassment and adverse action is warranted.

The appellant has received prior adverse action. Appellant's conduct as noted herein is repetitive and harms the public service. Dismissal in this case is appropriate.

The Skelly issue in this case relates to Renwick presiding at a Skelly hearing. At the time the allegations against appellant were investigated, Renwick supervised the personnel specialists assigned to the case. At that time she was Chief of the Personnel unit and acting Administrative Officer. She did sign the investigative report in this matter.

At the time the Skelly hearing occurred in this matter Renwick was the interim Director of the respondent by virtue of a reorganization and was, therefore, the appointing power. Appellant produced no evidence of frau, bad faith or evil intent, relative to the initial Skelly hearing. It was a harmless error and appellant was not denied a Skelly hearing and in fact got two of them. Accordingly, no back pay is awarded in this matter.

* * * * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against Anthony G. Gough effective October 4, 1991 is hereby sustained without modification.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: October 27, 1992.

JOSE M. ALVAREZ
Jose M. Alvarez, Administrative Law Judge, State Personnel Board