

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 32122  
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 T ██████ █. W ██████ ) **BOARD DECISION**  
 ) **(Precedential)**  
From 1-step reduction in salary )  
for 10 months from the position )  
of State Traffic Sergeant with the ) **NO. 94-20**  
Department of Highway Patrol in )  
Oakland ) June 7, 1994

Appearances: No appearance for the California Department of Highway Patrol<sup>1</sup>; John Markey, Labor Representative, California Association of Highway Patrolmen, representing appellant, T ██████ █. W ██████.

Before Carpenter, President; Ward, Vice President; Stoner, Bos, and Villalobos, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of an Administrative Law Judge (ALJ) in the appeal of T ██████ █. W ██████ (appellant). Appellant, a State Traffic Sergeant with the California Department of Highway Patrol (Department), received a 1-step reduction in salary for 10 months based upon charges that he had engaged in inappropriate physical contact with a female clerical supervisor in the office and failed to take appropriate

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<sup>1</sup> The Department of Highway Patrol was represented at the administrative hearing by the Attorney General's office. The Department did not submit written argument to the Board and failed to make an appearance before the Board at oral argument.

(W [REDACTED] continued - Page 2)

action when ethnic and racial jokes were told by Department employees under his supervision.

In his Proposed Decision, the ALJ concluded that there was insufficient evidence to support the charge of failure to take appropriate action when jokes were told, but that there was evidence of inappropriate physical contact between appellant and a fellow employee. The ALJ, however, modified the penalty from a 1-step reduction in salary for 10 months to a 1-step reduction in salary for 5 months. The Board rejected the Proposed Decision, opting to hear the case itself.

After a review of the transcript and evidence as well as the written and oral arguments of the appellant, the Board revokes the salary reduction in its entirety, finding that appellant's conduct did not merit formal adverse action given the limited evidence presented at the administrative hearing.

#### **FACTUAL SUMMARY**

Appellant has been employed with the Department since 1968 when he was appointed to the position of State Traffic Officer. He was promoted to State Traffic Sergeant in 1982. He has no prior adverse actions.

Appellant has received informal counseling on two occasions for failing to take appropriate action in dealing with his subordinates when female officers in his charge were harassed by their fellow male officers. In 1991, appellant received a

(W [REDACTED] continued - Page 3)

Memorandum of Direction for failing to take stronger measures against officers who had placed a picture of a female lieutenant on his desk with the female lieutenant's lips painted red. The appellant had told the officers who were suspected of doing the act to "knock it off", but the Department felt he should have done more. In 1992, the appellant received a Censurable Incident report for failing to take strong and timely measures when, during a briefing, some officers made comments which implied a romantic link between a female officer and her male partner.

In the instant case, the Department alleged that appellant failed to take appropriate action when ethnic and sexual jokes were being told by Department employees while at work. The Department also alleged that appellant maintained inappropriate physical contact with a female clerical supervisor, Yvonne Williams, while both were on duty. Specifically, the Department charged that appellant sat on Williams' lap on numerous occasions and allowed Williams to sit on his lap, and also that appellant patted Williams' rear end as they walked down the hall together. As causes for discipline for this behavior, the Department cited Government Code section 19572 subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees and (w) unlawful discrimination, including harassment, on the basis of race, religious creed, color, national origin, ancestry, physical handicap, marital status, sex,

(W [REDACTED] continued - Page 4)

or age, against the public or other employees while acting in the capacity of a state employee.

At the administrative hearing, the Department presented seven witnesses in support of its case. None of the seven witnesses recalled specific instances where appellant was present when jokes were told. Of these seven witnesses, three believed that W [REDACTED] was probably present when ethnic or sexual jokes were told, but could not recall anything specific other than that when such jokes were told in W [REDACTED]'s presence, W [REDACTED] would tell the other officers in some fashion to "knock it off" and then would leave the room in an apparent effort to get the person to stop telling the jokes. The Department presented no testimony concerning what action supervisors should take when ethnic and sexual jokes are told in the office.

As to the allegations of inappropriate physical conduct, of the seven witnesses who testified for the Department, only two recalled witnessing a "lap sitting" incident. One of those two witnesses testified that on one occasion she remembered seeing appellant and Williams joking around and saw Williams sit on appellant's lap for a few seconds. The other witness recalled seeing a few instances where Williams briefly sat on appellant's lap in the presence of other employees but did not specifically remember when, under what circumstances, or how many times this occurred. When asked if it was "as many as six times over a two

(W [REDACTED] continued - Page 5)

year period", the witness agreed it "probably was."

As to the allegation of "rear-end patting", only one witness could recall any such incident. This witness testified that from a distance down the hall, he saw appellant swing his arm down towards Williams who was walking with him. He also testified that it appeared as if the two of them were joking and that he was aware that appellant and Williams had a friendly relationship.

Williams did not testify at the hearing and there was no evidence offered by the Department to rebut the testimony of its own witnesses that the two individuals had a friendly relationship and that the behavior between them appeared to be consensual. Appellant admitted that he and Williams were good friends and often joked around together, but denied patting her rear-end, allowing her to sit on his lap, or otherwise acting unprofessionally with her.<sup>2</sup> The Department employees who testified confirmed that appellant and Williams were required to work together on a regular basis due to their respective positions within the Department. When asked if appellant and Williams spent an inordinate amount of time together or appeared to have anything more than a friendly business relationship, the Department's witnesses each testified "no."

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<sup>2</sup> Appellant admitted that on one occasion Williams sat on his knees for a second in a joking manner and that another time Williams pinched him in response to a joke.

**ISSUE**

Does a preponderance of the evidence support formal disciplinary action against appellant based on the causes alleged?

**DISCUSSION**

Joke Telling Incidents

Inexcusable neglect of duty under 19572(d) has been defined as "...an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty."

U [REDACTED] W [REDACTED] (1993) SPB Dec. No. 93-10, page 6, citing Gubser v. Department of Employment (1969) 271 Cal.App.2d 240, 242.

The charge of inexcusable neglect of duty in this case appears to stem from the allegation that appellant had a duty as a supervisor to take strong action against subordinates who told ethnic or sexual jokes at work and that appellant failed to fulfill that duty. The Department, however, failed to present sufficient evidence to prove this charge.

First, there was no testimony presented at the hearing concerning specific incidents when ethnic or sexual jokes were told.<sup>3</sup> The only facts evident from the record of the hearing are that three witnesses recall appellant being in attendance on a few

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<sup>3</sup> We note that the Notice of Adverse Action is devoid of specific factual information concerning the dates and circumstances upon which the allegations are based. Some of the charges are, therefore, vulnerable to dismissal under the Board's Precedential Decision in Leah Korman (1991) SPB Dec. No. 91-04. We need not reach this conclusion, however, as we find insufficient evidence in the record to support formal disciplinary action.

(W [REDACTED] continued - Page 7)

occasions when jokes were told and that, at the time, appellant made a statement to the effect that the officers "knock it off" and then left the room. The Department presented no evidence as to the nature and content of the jokes, the circumstances under which they were told, or what action the appellant should have taken under the circumstances.<sup>4</sup> Such facts are necessary to determine whether appellant's actions were an adequate response or whether appellant is deserving of formal adverse action. Given the limited evidence in the record, however, we cannot conclude that appellant was inexcusably neglectful of his duties as a supervisor.

#### Inappropriate Physical Contact With Williams

The three other causes for discipline, inefficiency, discourteous treatment of the public and other employees, and unlawful discrimination on the basis of sexual harassment, appear to be premised upon the allegations of inappropriate physical contact with Williams.

Inefficiency as used in Government Code section 19572 (c) has been defined as a continuous failure to meet a level of productivity set by other employees in the same or similar position and, in some instances, the failure to produce an intended result with a minimum of waste, expense or unnecessary effort. R [REDACTED]

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<sup>4</sup> In fact, one Department witness testified that appellant's actions (telling the joke tellers to knock it off and leaving the room) were in line with the practices of other Department supervisors.

(W [REDACTED] continued - Page 8)

B [REDACTED] (1993) SPB Dec. No. 93-21, pages 10-11. We assume that the charge of inefficiency stems from the assumption that appellant was busy "socializing" with Williams when he should have been attending to his duties.

The Department presented no evidence at the hearing, however, that appellant spent an inordinate amount of time with Williams. On the contrary, the Department's own witnesses testified that appellant had proper business that he had to conduct with Williams on a daily basis, and that he did not appear to spend an inordinate amount of time at Williams' desk. Moreover, there was no evidence presented at the hearing that appellant failed to meet any expected level of production or that he failed to produce any intended results. Given this lack of evidence, we fail to find that appellant was inefficient in his duties.

We also find insufficient evidence to sustain the allegation of unlawful discrimination due to sexual harassment [Government Code section 19572, subdivision (w)]. As set forth in the Board's Precedential Decision R [REDACTED] J [REDACTED] SPB Dec. No. 93-18, sexual harassment, as defined by federal and state laws, is prohibited under section 19572(w) and consists of unwelcome verbal or physical conduct of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. For purposes of determining whether sexual



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harassment has taken place, conduct is unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." EEOC guidelines dated March 19, 1990 citing Henson v. City of Dundee, (11th Cir. 1982) 682 F.2d 897, 903.

In this case, Williams did not testify at the hearing herself and the only evidence as to the "welcomeness" of the conduct was: 1) the un rebutted testimony that the lap-sitting incidents and one alleged rear-patting incident appeared to be consensual acts of "joking around" between friends, and 2) appellant's testimony that Williams sat on his knees on one occasion and pinched him once. Thus, the record contains insufficient evidence that appellant's actions were unwelcome so as to constitute sexual harassment.

Our inquiry does not end here, however, as sexual harassment may still occur when a person or persons are forced to observe physical or verbal conduct of a sexual nature, even if the conduct is not perpetuated directly upon them. (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 610, fn. 8.) The conduct, though, must be of such nature as to interfere with the work performance of other employees who viewed the conduct or otherwise create an intimidating, hostile or offensive working environment. Id. at 613.

Whether the conduct complained of in this case is sufficiently pervasive to create a hostile or offensive work environment must be

(W [REDACTED] continued - Page 10)

determined from the totality of the circumstances. The factors to be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or words (generally, physical touching is considered more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurred; and (4) the context in which the sexually harassing conduct occurred. (Fisher v. San Pedro Peninsula Hospital at 609-610.) In determining what constitutes "sufficiently pervasive" harassment, the courts have held that to constitute harassment, the acts cannot be occasional, isolated, sporadic or trivial. Id. at 610.

Based on the facts presented at the administrative hearing, we do not find sufficient evidence that appellant perpetrated unlawful discrimination on his fellow officers. The few acts of consensual lap-sitting testified to at the hearing were spread out over a number of years, were relatively trivial in nature and did not appear to offend those who viewed the incidents. If anything, the Department employees spoke very highly of the appellant. While such acts are certainly juvenile and unprofessional, we do not feel there is evidence that they were severe or pervasive enough to create a hostile environment for the other employees of the Department.

Although we fail to find appellant's actions constituted

(W [REDACTED] continued - Page 11)

unlawful discrimination, we do find that such actions, is sufficiently pervasive or severe, could constitute discourteous treatment of other employees under Government Code section 19572 (m).<sup>5</sup> We decline, however, to impose formal adverse action against appellant for his behavior under the circumstances of this case.

The Board does not approve of immature behavior in the workplace such as lap-sitting or rear-end patting. Such behavior is not appropriate for the work environment and, even if consensual between participants, can cause embarrassment, anger, or discomfort in others forced to view such conduct. It appears though that the Department could have dealt with such apparently sporadic and minor incidents through informal counselling. If appellant's behavior did not immediately cease, then formal adverse action might have been appropriate. In this case, we feel particularly obliged to reach the conclusion that formal adverse action is inappropriate after noting that the Department's evidence on these allegations was extremely weak, and the Department apparently did not feel strongly enough about the adverse action to submit oral or written argument to the Board. Given the record before us, we decline to find appellant's actions serious enough to merit formal adverse action and hereby revoke the adverse action.

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<sup>5</sup> Such actions might also have constituted a failure of good behavior under Government Code section 19572 subdivision (t), had subdivision (t) been charged in the Notice of Adverse Action.

**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, it is hereby ORDERED that:

1. The adverse action of a 1-step reduction in salary for 10 months is hereby revoked;

2. The Department of Highway Patrol shall pay to T [REDACTED] [REDACTED]. W [REDACTED] all backpay and benefits that would have accrued to him had he not had his salary reduced 1-step for 10 months;

3. This matter is referred to the Administrative Law Judge and shall be set for hearing in the event that the parties are unable to agree as to the salary and benefits due T [REDACTED] [REDACTED]. W [REDACTED].

STATE PERSONNEL BOARD

Richard Carpenter, President  
Lorrie Ward, Vice President  
Alice Stoner, Member  
Floss Bos, Member  
Alfred R. Villalobos, 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 June 7, 1994.

GLORIA HARMON  
Gloria Harmon, Executive Officer  
State Personnel Board