BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by P[redacted] K[redacted] From dismissal from the position of Youth Correctional Officer at the Ventura Youth Correctional Facility, Department of the Youth Authority at Camarillo	SPB Case No. 98-1586 **BOARD DECISION** (Precedential) **NO. 99-11** December 7-8, 1999

APPEARANCES: Thomas W. Vallance, Legal Counsel, Department of Personnel Administration, on behalf of the Respondent, Department of the Youth Authority; Ina A. Arnold, Senior Hearing Representative, California Correctional Peace Officers' Association, on behalf of appellant, P[redacted] K[redacted].

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ronald Alvarado and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) revoking appellant's dismissal. The Department of the Youth Authority (Department) dismissed appellant for making false representations on her pre-employment health questionnaire.

In this decision, the Board finds that the evidence introduced by the Department to support the charges against appellant should have been excluded as having been obtained and/or used in violation of the Confidentiality of Medical Information Act and the right to privacy encompassed in Article I, section 1 of the California Constitution. Even assuming the Department was legally entitled to use such evidence to support the adverse action, the Board finds the Department failed to prove that appellant intended to make false representations.

BACKGROUND

Employment History

Appellant began her state service career as a Group Supervisor with the Department on October 4, 1991 at the Ventura Youth Correctional Facility.[1] As a Youth Correctional Officer (YCO), appellant is classified as a "peace officer". At the time of her dismissal, appellant was still serving as a YCO at the Ventura school.

Appellant has one prior adverse action that she received in January 1998. The adverse action was a five-percent reduction in salary for 12 pay periods for tardiness, insubordination and alteration of the date of an automotive repair bill. Appellant did not appeal this adverse action and, thus, the action is deemed final.[2]

Factual Summary[3]

In June of 1997, appellant filed a workers' compensation claim with the Department's insurer, State Compensation Insurance Fund (SCIF). The claim covered a two-day period in May of 1997 when appellant was not at work because of stress that allegedly resulted from having been sexually harassed while at work. Appellant filed the claim after the Department denied her use of sick leave credits to cover the two-day absence.

Pursuant to the claim for workers' compensation, SCIF required that appellant be evaluated by a psychiatrist of the Department's choosing, John L. Carlton, M.D. Appellant saw Dr. Carlton on July 17, 1997 for an evaluation. Dr. Carlton

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[1] In 1998, the Group Supervisor classification was renamed the Youth Correctional Officer.
[2] Government Code section 19575.
[3] This factual summary is taken, in pertinent part, from the ALJ's Proposed Decision dated May 3, 1999.

subsequently prepared a 26-page report, detailing his interview with appellant and his review of appellant's medical history and information. The report provided a diagnosis of appellant's medical and psychological condition and was filled with highly personal and confidential information concerning the physical and mental health of appellant.

At or around the time of the July 17 interview, Dr. Carlton informed appellant that the usual doctor-patient confidentiality would not apply, as he would need to send his report to the workers' compensation claim adjuster at SCIF, Rick Wiehl. Dr. Carlton did not inform appellant that a copy of the report would also be sent to the Department, nor did he obtain a written authorization from appellant allowing him to release information concerning the status of her health.

Dr. Carlton sent his report to Weihl, along with a copy to the Department's Return to Work Coordinator, Audree Robinson, and to the Department's Safety Officer, Nancy Ozaki. Ozaki reviewed Dr. Carlton's report and noticed that appellant had been hospitalized for psychological problems twice in the past, once in 1981 and the second time in 1982.

The report reflected that appellant told Dr. Carlton that she put herself in the hospital for a few weeks in 1981, because she was suffering from depression caused by extreme stress from her job as a surgical nurse. The report further revealed that appellant was again hospitalized for several weeks in 1982, this time by her parents, again for depression-related symptoms. Appellant told Dr. Carlton that she had not had any similar problems since that time. Dr. Carlton's report also revealed that appellant had been hospitalized twice for the birth of her two children

by cesarean section in the mid-1980's and that she had undergone two minor medical procedures in the early 1980's.

The report of psychiatric hospitalizations in 1981 and 1982 struck a chord in Ozaki's mind, as California law requires that all peace officers be free from any mental condition that might adversely affect the exercise of the powers of a peace officer.[4] Ozaki contacted Ventura School Superintendent Mary Herrera to find out whether appellant had reported these hospitalizations on the health questionnaire she would have completed when starting her employment in 1991. Herrera did not know off-hand, but promised Ozaki that she would look into it.

Based solely on Dr. Carlton's report to SCIF, Herrera launched an investigation into whether or not appellant had disclosed her two prior psychiatric hospitalizations on her pre-employment health questionnaire. Lieutenant Ruben Magdaleno was assigned to the investigation. He immediately asked the Department's Pre-employment Medical Program Coordinator, Denise Sims, for a copy of appellant's pre-employment health questionnaire. Sims declined to supply the questionnaire to Magdaleno, citing her interest in maintaining confidentiality when it comes to the medical information provided by employees. Sims did, however, prepare a letter to Magdaleno, specifically answering Magdaleno's questions. In that letter, Sims advised Magdaleno that appellant had answered "no" to each of the following three questions that had appeared on appellant's pre-employment health questionnaire in 1991: (Question 12) Have you ever had or do you have mental illness or nervous breakdown (sic)? (Question 41) Have you ever

[4] Government Code section 1031.

been hospitalized? If yes, list the reason and date of hospitalization; and (Question 43) Have you ever had any other illness, injury, or physical condition not named above which required treatment as an outpatient or where surgery was recommended (exclude common minor illnesses, e.g., colds, flu, etc.)?

Magdaleno conducted an investigative interview of appellant on February 24, 1998. At the outset of this interview, Magdaleno informed appellant that if she refused to answer any questions posed completely and accurately, she could be disciplined for insubordination.[5] The appellant was also informed of her right to have a representative present with her during the interview, but appellant waived her right to do so.

Appellant cooperated fully with Magdaleno, answering all of his questions about her two prior hospitalizations for depression. Magdaleno did not have a copy of appellant's health questionnaire before him during the interview, as Sims refused to release it to him. Instead, he referenced a currently-used blank health questionnaire that was basically the same as the one appellant had completed in 1991.

During the course of this interview, Magdaleno asked appellant about the two hospitalizations almost ten years before, including the reasons for her hospitalization. Appellant told Magdaleno that she may have answered "no" to questions 12, 41, and 43, but claims she never did so with an intent to lie about her medical history. When asked by Magdaleno if she considered herself to have

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[5] In Lybarger v. City of Los Angeles (1985) 40 Cal.3d 822, the California Supreme Court held that a peace officer had no constitutional or statutory right to refuse to cooperate in an investigatory interview and that he could be disciplined for his refusal to cooperate.

suffered from mental illness or a nervous breakdown during either hospitalization, appellant responded "no". Appellant told Magdaleno that she did not believe she had suffered from either mental illness or a nervous breakdown, but was simply hospitalized for "stress" created as a result of work conditions and her family life at the time.

Magdaleno also asked appellant why she had not responded "yes" to Question 41 when asked if she had ever been hospitalized in the past. Appellant responded, "I guess, you know, I didn't think of it ...I thought they was (sic) probably asking for a hospital - I mean something as far as surgery or something." When asked later again by Magdaleno why she had not answered "yes" to the question of whether she had been hospitalized, appellant responded "Like I said, I thought it was a surgery-related question. I thought it was asking if I had, you know - if I had any kind of surgery or something, which I hadn't had any surgeries." While she conceded to Magadaleno in the interview that she would now, upon further reflection, answer "yes" to Question 41, she contended that her answer that day was never intended to deceive the department.

Finally, when Magdaleno asked appellant why she had not answered "yes" in response to Question 43's inquiry regarding past illnesses, injuries or physical conditions not otherwise listed, appellant responded that she did not view her two brief stress-related hospitalizations as being "illnesses or injuries" not otherwise listed, and, again, did not answer "no" to intentionally cover-up her hospitalizations for stress.

During the interview, Magdaleno did not ask appellant about her two cesarean sections or the other two medical problems noted in Dr. Carlton's report, items she had also failed to disclose to the Department on the pre-employment health questionnaire.

Appellant's Defenses

(Timing of the Pre-Employment Health Questionnaire)

Appellant contends that the Department cannot discipline her based upon her answers to the 1991 pre-employment health questionnaire because she was required to complete the questionnaire prior to being offered employment. On the questionnaire, at the top, in capital letters, is the following admonition quoted verbatim from the form:

APPLICANTS ARE REQUIRED TO FILL IN
QUESTIONS ON BOTH SIDES OF FORM
ONLY AFTER A JOB OFFER
HAS BEEN MADE

Although the language on the questionnaire expressly provided that appellant was not to be required to complete it until she received a job offer, the evidence at the hearing was that appellant was required to complete the questionnaire before she was offered the job. Appellant provided a letter from the Department to her dated August 23, 1991, that stated that she would have to undergo pre-employment medical testing (including responding to the questionnaire), prior to receiving an offer of employment. Indeed, appellant only received her offer of employment from the Department after she had completed and returned the health questionnaire.

(Appellant's Problems with Reading Comprehension)

Appellant introduced evidence at the hearing that she had problems with basic reading comprehension. One of appellant's teachers at the training academy, John Karber, testified that appellant often demonstrated difficulty with reading comprehension during her training period, as noted by the fact that she had to retake several of her written examinations before ultimately passing. Magdaleno also testified that he was one of appellant's instructors at the training academy and verified that appellant had a great difficulty passing written examinations. Additionally, one of appellant's supervisors at work, Theodore Smith, testified that appellant was consistently marked down as needing improvement in her reading and writing skills.

In addition to the testimony of these witnesses, appellant introduced data from tests she took at a local junior college that showed she scored in a very low percentile on reading comprehension skills. Appellant further testified that she has been working at raising her reading comprehension skills by taking courses at college since being dismissed from the Department.

PROCEDURAL SUMMARY

Appellant was dismissed effective May 1, 1998, based upon causes of discipline set forth at Government Code section 19572, subdivisions (a) fraud in securing appointment, (f) dishonesty, (m) discourteous treatment of the public or other employees, and (t) other 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. A hearing was held before an ALJ on August

24 and October 15, 1998. At the hearing, the ALJ granted appellant's request that Dr. Carlton's report, introduced by the Department, be placed "under seal" to protect her interests in privacy.

At the conclusion of the hearing, the ALJ issued a Proposed Decision, finding that the evidence was equivocal on the issue of whether appellant intended to misrepresent facts on the pre-employment health questionnaire. The ALJ further determined that, in any event, the Department was barred from pursuing adverse action against appellant because the Department's investigation went far beyond the permissible scope of a lawful medical inquiry. The Board rejected the Proposed Decision, determining to decide the case itself.

ISSUES

1. Was the Department legally entitled to rely upon medical information derived from a doctor's report that was generated as a result of appellant's workers' compensation claim to discipline appellant for false representations made on a health questionnaire completed prior to an offer of employment?
2. If so, did the appellant act dishonestly when completing the questionnaire?

DISCUSSION

Admissibility of the Department's Evidence

(Rehabilitation Act of 1973)

The appellant contends that since both the Federal Rehabilitation Act of 1973 and the Americans with Disabilities Act prohibit requiring an applicant to complete a

pre-employment health questionnaire prior to an offer of employment, the Department is prohibited from relying on such a questionnaire as a basis for bringing adverse action against appellant.

At the time appellant completed her pre-employment questionnaire in September of 1991, the Americans with Disabilities Act[6], which prohibits requiring a job applicant from having to answer questions about their health status prior to receiving an offer of employment,[7] had not yet taken effect.[8] The Federal Rehabilitation of 1973, however, was in effect at the time, and prohibited state employers who receive a certain amount of federal funding from conducting pre-employment medical inquiries prior to an offer of a job.[9] The admonition on the top of the health questionnaire completed by appellant, that the questionnaire is to be completed only after an offer of employment has been made, appears to be the Department's attempt to comply with this law.

As previously noted, the record revealed that appellant was given the questionnaire and asked to complete it prior to the time she was made an actual offer of employment by the Department. While the Department may have violated the Federal Rehabilitation Act approximately 10 years ago by requiring appellant to complete the questionnaire prior to the offer of employment, there is no precedent for revoking an otherwise valid adverse action on this basis alone. We, therefore, turn to appellant's other defenses.

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[6] 42 U.S.C. section 12101 et seq
[7] 42 U.S.C. section 12112(d); 29 C.F.R. sections 1630.13(a) and 1630.14(a).
[8] Title I of the Americans with Disabilities Act took effect on July 26, 1992.
[9] 28 C.F.R. section 41.55. The ALJ took judicial notice after the hearing that the Department received the requisite federal funding during 1991, rendering it subject to the requirements of the Federal Rehabilitation Act. The Board finds nothing in the record to the contrary and adopts this finding in this case.

(The Confidentiality of Medical Information Act)

The appellant contends that the Confidentiality of Medical Information Act (CMIA) precludes the Department from using Dr. Carlton's report as evidence to support the adverse action.[10] The CMIA strictly regulates both the disclosure of medical information by health care providers, as well as the use and disclosure of medical information by employers who receive such information. Civil Code section 56.20 specifically provides that employers who receive medical information concerning their employees must establish procedures to ensure the confidentiality of that information and protect their employees from unauthorized use and disclosure of the information. Subdivision (c) of section 56.20 further provides that an employer who receives medical information shall not use or disclose the medical information it possesses unless the patient to whom the information pertains signs a specific written authorization. Absent such a written authorization, section 56.20 provides that the information may only be used by the employer under the following four circumstances:

(1) The information may be disclosed if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.

(2) That part of the information which is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment may be used or disclosed in connection with that proceeding.

(3) The information may be used only for the purpose of administering and maintaining employee benefit plans, including ... workers' compensation and for determining eligibility for paid and unpaid leave from work for medical reasons.

[10] California Civil Code section 56 et seq.

(4) The information may be disclosed to a provider of health care or other health care professional or facility to aid the diagnosis or treatment of the patient, where the patient or other person specified in subdivision (c) of Section 56. 21 is unable to authorize the disclosure.

Neither subdivision (c) (1) or (4) applies to the instant situation as the Department was not compelled by any process of law to use or disclose the medical information received from Dr. Carlton, nor did the Department use or disclose the information to a health care provider or health care facility.

Subdivision (c)(2) does allow an employer to use medical information it receives from health care providers in a proceeding in which both the employer and the employees are parties and in which the employee has placed his or her medical history, condition or treatment in issue, such as in a workers' compensation proceeding. Pursuant to this subdivision, however, the information may only be used or disclosed, "in connection with that proceeding."

While the medical information contained in Dr. Carlton's report was initially obtained in a proceeding in which appellant placed her medical condition in issue, the Department's subsequent use of that information for purposes of taking adverse action was not a use or disclosure "in connection with **that** proceeding" as is required by the statute's exception.[11] Thus, the use of the unauthorized information, in this instance, would not fall under the exception listed in subdivision (c)(2).

Similarly, subdivision (c)(3) allows an employer to use or disclose medical information it obtains from a health care provider for the purpose of managing employee benefit plans, such as workers' compensation. Although the medical

[11] Emphasis added.

information concerning appellant's medical history may have been properly obtained from SCIF pursuant to the Department's right to administer appellant's workers' compensation claim, subdivision (c)(3) clearly states that the information may be used "only" for that purpose. The statute does not provide that an employer may otherwise use or disclose the information it legitimately receives for any purpose other than managing or administering workers' compensation. By using the confidential medical information received from Dr. Carlton as the basis for launching a disciplinary action, the Department used the information in a manner separate and apart from the administration or management of appellant's workers' compensation claim – a use clearly not intended by the language of subdivision (c)(3) or the intent of the CMIA.

Since the Department did not obtain appellant's written authorization to use and disclose the information in Dr. Carlton's report and the Department's use and disclosure of the information did not fit under any of the exceptions provided in Civil Code section 56.20, the Department's use of the report to support an adverse action violated the CMIA.[12]

The Department argues that the CMIA does not bar use of Dr. Carlton's report in this instance, as section 56.30 specifically exempts information acquired through the workers' compensation process. Civil Code section 56.30(f) states:

[12] This conclusion comports with the Board's non-precedential decision in Dennis Storasli, SPB Case No. 96-2241, as well as the Court of Appeals' decision in Pettus v. Cole (1996) 49 Cal. App. 4th 402. In both cases, it was determined that an employer violates the CMIA when it uses confidential medical information obtained from a health care provider in connection with an employee's claim for benefits as the basis for disciplinary action.

> The disclosure and use of the following medical information shall not be subject to the limitations of this part:
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> (f) (Industrial Accidents) Information and records acquired, maintained or disclosed, pursuant to Division 1 (commencing with section 50), Division 4 (commencing with section 3201), Division 4.5 (commencing with section 6100), and 4.7 (commencing with section 6200) of the Labor Code.

The code sections cited in subdivision (f) involve the administration of the workers' compensation system. Since the information provided by Dr. Carlton was derived as a result of a workers' compensation claim, the Department contends that the information is exempt from the CMIA, no matter how the information is used or distributed.

The Board previously rejected this argument in its non-precedential decision, Dennis Storasli.[13] In Storasli, an employee suffered injuries while on the job and was sent to the hospital for a medical examination. During that examination, the physician noted that the employee, Storasli, was intoxicated, and noted that fact in his medical records - records that were transmitted to SCIF, for purposes of workers' compensation, and later released to the department. The department attempted to discipline Storasli for being drunk on duty based upon the information contained in the doctor's report. The Board held that the department could not use the medical information it obtained during the workers' compensation proceeding as the basis for the adverse action and that the exemption to the CMIA set forth in section 56.30(f) did not apply.

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[13] SPB Case No. 96-2241. A non-precedential decision of the Board may be cited as "persuasive", not binding authority. Gordon J. Owens (1992) SPB Dec. No. 92-11, p. 5.

As the Board held in that decision, principles of statutory construction hold that statutes must be interpreted to ascertain the intent of the Legislature so as to effectuate the purpose of the law.[14] As we indicated in Storasli, the intent of the Legislature in adopting the CMIA was to provide for the confidentiality of a person's medical information, while permitting certain reasonable and limited uses of that information. It would make no sense to place strict requirements on the use and dissemination of an employee's medical information by an employer and then allow that same information to be used and disclosed for any purpose simply because it originated from a workers' compensation claim. To conclude otherwise would be to allow an employer the opportunity to publicly disseminate all types of confidential medical information it may have on its employees merely because the information was received as the result of a workers' compensation dispute. The Board does not believe that the Legislature could have intended such a result when it enacted this exemption.

Since the CMIA prohibits an employer, without authorization of the patient, from using or disseminating the medical information it receives, and because the use and disclosure of the information in this instance did not fall under one of the specific exceptions to this rule, nor was it exempted from the CMIA under section 56.30, the Department was not permitted to use Dr. Carlton's report as evidence to support appellant's adverse action.[15]

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[14] Dyna-Med, Inc. v. Fair Employment and Housing Comm. (1987) 43 Cal.3d 1379, 1386.
[15] This decision does not address whether Dr. Carlton acted appropriately by furnishing the information directly to the Department in the first place without a written authorization.

(Appellant's Constitutional Right to Privacy)

Appellant also contends that the use of Dr. Carlton's report to launch an investigation and disciplinary action violated the law pursuant to the Court of Appeals' holding in Pettus v. Cole. In Pettus, an employee saw several psychologists designated by his employer, DuPont, in connection with Pettus' request for disability benefits. One of the psychologist's reports indicated that appellant had a problem with alcohol. Dupont used this information to order that appellant undergo treatment for alcoholism or be fired from work. The Court of Appeals held that DuPont violated Pettus' constitutional right to privacy under Article I, section 1 of the California Constitution when it used the medical information it obtained from Pettus' doctors in that manner.

Article 1, section 1 of the California Constitution provides:

> "All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**."[16]

To determine whether Pettus' constitutional right to privacy was violated, the court in Pettus looked to the California Supreme Court's directive in Hill v. National Collegiate Athletic Association.[17] In Hill, the Supreme Court held that a claim for invasion of the state constitutional right of privacy existed where there was: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by another constituting a serious invasion of privacy.

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[16] Emphasis added.
[17] (1994) 7 Cal.4th 1.

In Pettus, the court concluded that Pettus had a legitimate privacy interest in preserving the details of his medical information from his employer. The medical information relayed from Pettus' doctors to his employer contained thorough details about Pettus' private life and his emotional state. The court determined that this was the type of "sensitive personal information" that was in voters' minds when Article I, section1 was adopted guaranteeing every person's right to privacy.

Likewise, the court found that Pettus had a reasonable expectation of privacy in the medical information that he disclosed to his doctors. The court acknowledged that Pettus placed his mental condition in issue by requesting benefits under DuPont's disability policy, but noted that the detailed medical information released by the doctors was ultimately used by DuPont to make adverse personnel decisions about Pettus – a use that was far beyond what was necessary for the employer to accomplish its legitimate objectives of deciding Pettus' disability claim.

Finally, the Pettus court examined whether the employer's conduct constituted a serious invasion of privacy and whether there existed equally available, less intrusive alternatives to Dupont's conduct. The court held that while employers do need information about their employees as to whether or not they can perform some or all of the essential functions of their jobs and any information necessary to make a decision about an employee's claim for paid leave or benefits, employers do not have a cognizable interest in going beyond that boundary, as they did in that case when they attempted to dictate the course of a medical treatment for employees who suffer nonindustrial injuries.

Based upon the discussion in Pettus, the Board concludes that the Department violated appellant's constitutional right to privacy when it used the medical information it received from Dr. Carlton to launch an investigation and a subsequent adverse action. Appellant had a legally cognizable interest in preserving the privacy of her medical information as relayed to Dr. Carlton, as well as a reasonable expectation that the information relayed to him would be used only for the purpose of making a decision as to her eligibility for workers' compensation benefits. The Department's use of the medical information as the starting point for an investigation into appellant's 10-year old health questionnaire was certainly not within the realm of appellant's reasonable expectations when she agreed to participate in Dr. Carlton's medical examination. Indeed, it is this reasonable expectation that medical information provided by an employee to an employer will be used for only specific, narrow purposes (absent written authorization) that is also embodied in the CMIA.

Appellant gave Dr. Carlson a great deal of personal information under the impression that it would be used solely for the purpose of determining whether or not she would be eligible for workers' compensation benefits. We find that the Department's use of this confidential information, under these circumstances and without authorization, conflicted with her appellant's right to privacy under the California Constitution.

Application of the Exclusionary Rule

Traditionally, evidence obtained in violation of a person's constitutional rights could only be excluded from evidence in criminal proceedings, not disciplinary

proceedings held before an administrative agency.[18] In Dyson v. State Personnel Board,[19] the Court of Appeals rejected the traditional rule, finding that evidence procured in violation of one's constitutional rights could be excluded from evidence in an administrative hearing before the State Personnel Board under certain conditions. The court determined that those conditions existed only when (1) exclusion of the evidence would serve to deter government officials from lawless conduct by denying them a reward for such conduct and (2) when excluding the evidence would preserve the integrity of the judicial process by keeping it free of the taint of improperly obtained evidence.[20]

In this case, excluding Dr. Carlton's report from evidence would have expressly furthered the intent of the exclusionary rule, since it was the Department that stood to benefit from its own conduct in violating the appellant's constitutional rights. Moreover, application of the exclusionary rule to Dr. Carlton's report would serve to deter such unconstitutional uses of medical reports by state employers in the future.

Even assuming Dr. Carlton's report had been excluded from evidence, there remain appellant's admissions to Lieutenant Magdaleno during her investigatory interview that she had been hospitalized for "stress" in 1981 and 1982 and yet answered "no" to questions 12, 41 and 43. While, normally, admissions made by an appellant in an investigatory interview are evidence that may be admitted into the record at an SPB administrative hearing, the Board believes that appellant's

[18] Emslie v. State Bar (1974) 11 Cal. 3d 210.
[19] (1989) 213 Cal. App. 3d 711.
[20] Id. at 718.

admissions should have been excluded from evidence as they were made as the result or "fruit" of an unconstitutional use of confidential medical information.

Unlike in the case of Pettus v. Cole, where the Pettus court remanded the case back to the superior court to determine whether the employee waived his right to privacy when he voluntarily disclosed medical information to his employer, the appellant, in this instance, did not voluntarily disclose the information concerning her medical history. On the contrary, the Department launched an investigation into her answers on her pre-employment health questionnaire and then required her to answer questions concerning the questionnaire and her health history. Given that appellant's "admissions" were not voluntarily procured, but were the result of a mandatory investigatory interview that arose from the release of information that violated appellant's right to privacy, they should have likewise been excluded from evidence.

Appellant's Dishonesty

Even assuming that the Department's use of the medical information obtained in appellant's workers compensation proceedings were legally permissible, the Board would nevertheless revoke the adverse action as we find insufficient evidence in the record to prove that appellant acted dishonestly in filling out the health questionnaire.

Dishonesty entails an intentional misrepresentation of known facts.[21] The Department bears the burden of proving this issue by a preponderance of evidence. If the evidence is so evenly balanced the Board is unable to say that the evidence on

[21] Marc Shelton (1994) SPB Dec. No. 94-19, p. 20.

either side of an issue preponderates, the finding on that issue must be against the party with the burden of proving it.[22]

The Department has failed to prove by a preponderance of evidence that the appellant intended to misrepresent facts when she answered "no" to the three questions at issue. While there is evidence in the record to indicate that appellant may have had some difficulty with reading comprehension in the past, the Board does not rely solely upon this evidence as the basis for our conclusion. Rather, the Board finds that while appellant's subjective interpretation of the questions was perhaps overly narrow, it was not so unreasonable as to be disregarded.

The health questionnaire asked appellant numerous questions regarding her health history, including whether she had ever had "mental illness or nervous breakdown." Appellant responded "no" to this question. Appellant contends that she did not intend to deceive the Department with her "no" answer: she had never thought of nor heard anyone characterize these brief hospitalizations as either "mental illness" or a "nervous breakdown". Rather, she viewed these hospitalizations as care for work-induced stress. The Board does not find appellant's subjective interpretation of this question incredible and thus concludes that there is insufficient evidence to prove that appellant acted dishonestly.

Question 41 asked whether appellant had ever been hospitalized and Question 43 asked if she had ever had any other illness, injury or physical condition, other than one mentioned above, which required treatment as an outpatient or where surgery was recommended. In response to both of these questions, appellant

[22] Lyle Q. Guidry (1995) SPB Dec. No. 95-09, p. 8, citing Glage v. Hawes Firearms Co. (1990) 226 Cal.App.3d 314, 325.

answered "no." The Department contends that such answers are patently false given appellant's admissions as to her psychiatric hospitalizations in 1981 and 1982. Notwithstanding appellant's admissions of her hospitalizations, the Board declines to find a preponderance of evidence that appellant answered these questions with intent to misrepresent the facts.

As to question 41, appellant testified that she never thought of the hospitalizations in 1981 and 1982 as responsive to the question. She claims she interpreted question 41 as asking whether she had been hospitalized for "surgery" or something similar. Appellant contends that her innocent intention is evidenced by the fact that she also failed to respond to this question with information regarding the cesarean births of her two children, despite the fact that the Department was well aware of the existence of her children and had no reason to hold these births against her in her employment application.

Similarly, appellant claims that she did not think of her 10-year old hospitalizations for stress when responding to Question 43. While other persons in appellant's shoes may have answered "yes" to that question, appellant's denial is plausible since technically appellant's hospitalizations neither required outpatient treatment nor a recommendation for surgery.

While the Board expects applicants for employment to be thorough and complete in their answers to questions posed to them, we find appellant's explanations of why she answered as she did credible and her interpretation of the questions not implausible. Since the ALJ did not make a final determination of appellant's credibility in her Proposed Decision, the Board must make its own

credibility determinations based upon the record.[23] Accordingly, even assuming the adverse action was legitimately pursued in the first place, the Board would nevertheless revoke the allegations against appellant.

CONCLUSION

The board recognizes that there may be instances when a department gleans medical information concerning one of its employees, which information causes the department legitimate concern for the health and welfare of that employee or his or her coworkers, or gives the department reason to believe that the employee may be currently unable to perform the essential functions or his or her position. In such a case, a department has the option pursuant to Government Code section 19253.5 to send that employee for a fitness for duty examination to ensure that the employee is able to perform his or her job duties in a safe and effective manner.

In this case, though, the Department did not seem concerned about whether appellant could adequately perform her job, but only about whether or not she had intentionally failed to disclose two prior psychiatric-related hospitalizations on her pre-employment health questionnaire; hospitalizations that only came to light as a result of the appellant's mandatory workers' compensation examination. The Board will not sustain an adverse action supported solely by evidence obtained in violation of laws protecting confidentiality of medical information. Even assuming the department had legitimately obtained the information it relied upon to support the action, the Board still finds insufficient evidence to support the action. Accordingly, the adverse action is revoked.

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[23] See Linda Mayberry (1994) SPB Dec. No. 94-25, p. 7.

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 dismissal action of P[redacted] K[redacted] from the position as Youth Correctional Officer at Ventura Youth Correctional Facility is revoked.
2. P[redacted] K[redacted] is ordered to be reinstated to her position as a Youth Correctional Officer and the Department of the Youth Authority shall pay P[redacted] K[redacted] all back pay and benefits it may owe her under Government Code section 19584 as a result of the Board's decision to revoke the adverse action.
3. This case shall be assigned to the Chief Administrative Law Judge for hearing should the parties not be able to agree upon the amount of backpay and benefits owed to P[redacted] K[redacted].
4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD[24]

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
Sean Harrigan, Member

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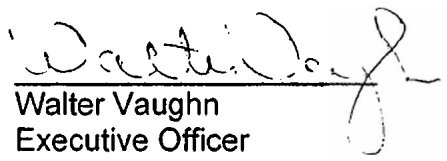
[24] Board member Elkins did not participate in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 7-8, 1999.



Walter Vaughn
Executive Officer
State Personnel Board

[H[redacted].dec]