

February 23, 2007

Eric Berg, Attorney at Law
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RE: James Friedman v. Department of Social and Health Services
Rule Violation Review No. RULE-06-001

Dear Mr. Berg,

On January 18, 2007, I conducted a Director's review meeting at the Department of Personnel, 2828 Capitol Boulevard, Olympia, Washington, concerning Mr. Friedman's alleged rule violation. Present at the Director's review meeting were you and Mr. Friedman; his wife, Lynn Spellman; and Merry Kogut, also representing Mr. Friedman. Laura Wulf, Assistant Attorney General, represented the Department of Social and Health Services (DSHS or department). Other individuals present included Christina Sherman, Assistant Attorney General; Doug Allen, Director of the Division of Alcohol and Substance Abuse (DASA) within the Health and Recovery Services Administration (HRSA) of DSHS; Margaret Maddox, Human Resources Administrator; DSHS employees Kathleen (Kit) Dolhar, Liz Wright, and Cindy Rivera, and Program Supervisor, BJ Wilder Moorhead; and Betsy Bosch, Kitsap County Substance Abuse Coordinator.

Procedural Issues

In a December 12, 2006 telephone conference with you and Laura Wulf, AAG, you, as Mr. Friedman's attorney, requested that the Director's review meeting be tape recorded or transcribed. You also asked that individuals present at the Director's review meeting be sworn in as witnesses. Your request was a follow-up to Ms. Kogut's email, dated December 5, 2006 (Exhibit F). Because the Director's review is an administrative

review, not a formal or evidentiary hearing, I did not swear in witnesses or record statements made by the individuals present. I did, however, allow the individuals present an opportunity to provide clarification about their knowledge of the issues surrounding Mr. Friedman's Director's review request. In emails to both parties, dated December 7, 2006, and January 3, 2007, I further explained my reasons for denying your requests (Exhibits F & H).

During the December 12, 2006 telephone conference, we also discussed timelines for exchanging documents and lists identifying exhibits and the individuals expected to attend the Director's review meeting. On December 21, 2006, I emailed the agreed timelines to both parties (Exhibit G).

Nature of Alleged Rule Violation

By letter dated May 10, 2006, Doug Allen, then Acting Director of DASA, terminated Mr. Friedman from his exempt appointment as DASA's Regional Administrator within the HRSA administration of DSHS, Region 5, effective May 15, 2006. Mr. Allen terminated Mr. Friedman for gross misconduct because he "smacked" a female DSHS employee "on the behind with a newspaper" (Exhibit R-1).

Mr. Friedman admits "he acted inappropriately in the workplace by initiating physical contact with her through the use of a folded newspaper" (Exhibit K). Mr. Friedman, however, alleges DSHS's finding of gross misconduct is inappropriate and, as a result, alleges the department violated RCW 41.06.070(3) by stripping him of his right to revert to a classified position.

RCW 41.06.070(3) states, in part, the following:

Any classified employee having civil service status in a classified position who accepts an appointment in an exempt position shall have the right of reversion to the highest class of position previously held, or to a position of similar nature and salary.

A person occupying an exempt position who is terminated from the position for gross misconduct or malfeasance does not have the right of reversion to a classified position as provided for in this section.

Background

Mr. Friedman had been employed with the state of Washington since November 1983 and had worked in an administrative role in DSHS's Region 5 for approximately eight years. In his role as Regional Administrator, Mr. Friedman supervised staff within his program and interacted with staff members of outside agencies, including those dealing with county and tribal substance abuse programs.

Overall, Mr. Friedman's technical performance had been excellent; however, a January 2005 performance evaluation noted that he occasionally used humor inappropriately (Exhibit R-12). Similarly, a March 28, 2005 letter of reprimand referenced Mr. Friedman's inappropriate use of humor while dealing with providers in the field (Exhibit R-14). Although the letter of reprimand contained some allegations that were later found to be unsubstantiated, Mr. Friedman's supervisor, Fred Garcia, Chief of Office Program Services, put him on notice that inappropriate humor and/or behavior was unacceptable. In addition, the Director of DASA at that time, Kenneth Stark, met with Mr. Friedman and his supervisor on October 7, 2005, to discuss the investigation results stemming from the March 28, 2005 letter of reprimand. Mr. Stark also discussed the seriousness of using inappropriate humor and making comments of a sexual nature, and he warned Mr. Friedman that any future inappropriate comments or behavior could result in termination (Exhibit R-9).

Prior to meeting with Mr. Stark in October 2005, Mr. Friedman had reviewed administrative policies related to ethical conduct and harassment prevention, as indicated on an employee annual review checklist he signed on September 23, 2005 (Exhibit R-8). Still, Mr. Stark directed Mr. Friedman to take additional sexual harassment training, and he attended Sexual Harassment Awareness and Prevention training on November 29, 2005 (Exhibit R-10).

DSHS has adopted Administrative Policy No. 18.64, which requires employees to:

...

D. Interact with co-workers with respect, concern, courtesy and responsiveness.

E. Create a work environment that is free from all forms of . . . sexual/workplace harassment. This includes but is not limited to:

...

3. Creating an environment free from intimidation, retaliation, hostility or unreasonable interference with an individual's work performance.

Similarly, DSHS has adopted Administrative Policy No. 18.66, which states that DSHS "strives to create and maintain a work environment in which people are treated with dignity, decency, and respect." The policy also prohibits harassment, including sexual harassment/hostile work environment, which "creates an offensive and unpleasant working environment." Further examples of prohibited harassing behavior include "verbal or physical conduct that . . . intimidates . . . and that unreasonably interferes with the employee's ability to perform his or her job." The policy also identifies "[a]ny unwelcome, unwanted physical contact" as harassing behavior. Furthermore, Policy No. 18.66 requires managers and supervisors to model appropriate behavior.

Allegations of Gross Misconduct

It is undisputed that on February 28, 2006, Mr. Friedman struck Kathleen (Kit) Dolhar on the behind with a rolled-up newspaper while she stood in the doorway of a conference room adjacent to his office. Mr. Friedman's office was located on the same floor as the Communality Services Division in Region 5, where Ms. Dolhar works as an Office Assistant 3 for the Economic Services Administration. Ms. Dolhar's supervisor, BJ Wilder Moorehead, witnessed Mr. Friedman strike Ms. Dolhar with the newspaper, noted that she was "visibly upset," and told him to apologize. Ms. Dolhar's co-worker, Liz Wright, who had been entering the conference room just ahead of her, stated she heard a "popping sound" but did not see the incident (Exhibit R-3).

In response to Mr. Friedman's actions, Ms. Dolhar submitted an email to Ms. Wilder Moorehead describing the incident, as well as other past instances of inappropriate comments made by Mr. Friedman (Exhibit R-2). Mr. Friedman denied making inappropriate comments (Exhibit R-3). Ms. Wilder Moorehead forwarded Ms. Dolhar's email to her supervisor, Dot Campbell, who then informed Mr. Allen. Effective March 6, 2006, Mr. Allen placed Mr. Friedman on home assignment, and he requested that the Human Resources Division conduct an investigation. Mr. Allen subsequently reviewed the results of the investigation (Exhibit R-3), which concluded the allegations of inappropriate behavior and comments were substantiated.

By letter dated April 11, 2006, Mr. Allen notified Mr. Friedman of his intent to terminate him for gross misconduct. At that time, Mr. Allen outlined the allegations identified by Ms. Dolhar and offered Mr. Friedman the opportunity to respond to the charges in writing or in person. On May 4, 2006, Mr. Friedman and his attorney at the time met with Mr. Allen and offered some mitigating reasons for his behavior. Mr. Allen, however, determined that Mr. Friedman had been previously warned about inappropriate behavior, had recently attended sexual harassment training, and that he was held to a higher standard as a manager. As a result, Mr. Allen did not believe Mr. Friedman's behavior was mitigated; rather, he concluded Mr. Friedman's actions were "willful or wanton" and exhibited a flagrant disregard for maintaining a work environment where employees are treated with dignity and respect (Exhibit R-1).

Summary of Mr. Friedman's Allegation

Mr. Friedman alleges that DSHS's finding of gross misconduct is not appropriate in his case; therefore, he alleges the department violated RCW 41.06.070(3) by not allowing him the opportunity to revert to a classified position. While Mr. Friedman admits he "tapped" Ms. Dolhar on the behind with a newspaper, he characterizes his behavior as a complete misunderstanding. Mr. Friedman asserts he and Ms. Dolhar had a friendly relationship and had previously joked with one another. As a result, Mr. Friedman contends he was kidding around with Ms. Dolhar and asserts his actions were not meant to be offensive and were not sexually motivated. Mr. Friedman states he was embarrassed when Mr. Dolhar's reaction was not what he anticipated and asserts he

apologized to her and continued to try and get her attention from across the room to further express his apology.

Mr. Friedman acknowledges he has a reputation for being a “wise guy” and having a sense of humor, which he admits has gotten him into trouble in the past. Mr. Friedman, however, asserts he misunderstood the level of familiarity he believed he had with Ms. Dolhar when he “tapped” her with the newspaper. Mr. Friedman denies making any inappropriate comments to Ms. Dolhar and questions her account of their interactions because he asserts she continued to stop by his work area and talk.

With regard to his previous letter of reprimand, Mr. Friedman contends the document should have been removed from his personnel file because the letter was issued prior to the investigation. Mr. Friedman further contends the investigation later proved those prior allegations were unfounded and asserts the one charge partially substantiated was based on a misunderstanding of the words “penetration rate,” which he asserts is a legitimate work phrase. Mr. Friedman asserts he was a long-term employee with an excellent work history and in light of his service to the department argues termination without the possibility of returning to classified service is too severe.

Mr. Friedman alleges other exempt employees at DSHS have been dismissed from their appointments for similar behavior but have not been charged with gross misconduct. Mr. Friedman admits his behavior was inappropriate but argues it was not so egregious that it constituted gross misconduct. Therefore, Mr. Friedman requests the finding of gross misconduct be removed so that he may revert to a previously held position in classified service.

NOTE

With respect to Mr. Friedman's argument that others at DSHS were terminated from exempt positions without the finding of gross misconduct, you requested to introduce documents related to other employees to establish a past practice by DSHS. I did not accept those documents because the facts and circumstances in Mr. Friedman's case are unique to his alleged misconduct. A presentation of documents relating to another set of circumstances beyond the scope of this review has no relevance to Mr. Friedman's case.

Summary of the Department of Social and Health Services' (DSHS's) Response

DSHS contends Mr. Friedman failed to establish his burden of proving the department's action to terminate him for gross misconduct was wrong. Consequently, DSHS asserts Mr. Friedman failed to prove the department violated RCW 41.06.070 and asserts he was not entitled to reversion rights under the law because of his termination for gross misconduct. In considering Mr. Friedman's conduct, DSHS argues the department followed the appropriate procedures for investigating Ms. Dolhar's claims. DSHS further argues the allegations were substantiated and asserts Mr. Friedman admitted he hit Ms. Dolhar on the rear-end with a newspaper. DSHS also asserts Mr. Friedman's actions

were offensive to Ms. Dolhar regardless of whether he intended them to be sexual and that she was visibly upset. DSHS contends Ms. Dolhar endured Mr. Friedman's inappropriate comments for approximately two years and argues his behavior was unwelcome and intimidating to Ms. Dolhar. Although Mr. Friedman denies making inappropriate comments, DSHS asserts the allegations were substantiated by the investigation.

Additionally, DSHS contends Mr. Friedman previously received a letter of reprimand for similar behavior, including inappropriate use of humor and invading a female employee's personal space. While the invasion of personal space allegation was later found to be unsubstantiated, DSHS asserts Mr. Friedman admitted to adjusting the female employee's collar, which his supervisor informed him was inappropriate. In fact, DSHS contends Mr. Friedman had been counseled on his inappropriate actions and use of humor on more than one occasion and directed him to respect his colleagues' personal space. DSHS also asserts he had been warned that such behavior would not be tolerated. DSHS argues that as a high-level manager, Mr. Friedman was held to a higher standard and expected to understand the department's policies, model appropriate behavior, and represent the department in a positive light to the community.

DSHS argues the department has a responsibility to provide a working environment free from harassment and intimidation and asserts Mr. Friedman's actions interfered with the department's ability to treat employees with dignity and respect. Despite receiving additional sexual harassment training, DSHS contends Mr. Friedman "does not get it" and fails to recognize the seriousness of his actions. As a result, DSHS argues the facts in Mr. Friedman's case are sufficient to establish he engaged in gross misconduct. Therefore, DSHS argues Mr. Friedman was unable to prove the department inappropriately charged him with gross misconduct and asserts no violation of RCW 41.06.070 exists.

Director's Determination

As the Director's designee, I carefully considered all of the documentation in the file, the exhibits, and the verbal comments provided by both parties. Based on my review, I conclude Mr. Allen, as the appointing authority, reasonably determined that Mr. Friedman's behavior constituted gross misconduct. Therefore, Mr. Friedman has not proven that DSHS violated RCW 41.06.070.

Rationale for Determination

Mr. Friedman had the burden of proving that DSHS erred in charging him with gross misconduct and therefore, violated RCW 41.06.070 by not reinstating him to a classified position. In light of DSHS's finding of gross misconduct, I considered the former Personnel Appeals Board's (PAB's) definition of gross misconduct as follows:

Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

In this case, Mr. Friedman's actions clearly violated DSHS's Administrative Policies 18.64 and 18.66 regarding ethical conduct and harassment prevention, which hampered the agency's ability to create a functional environment. By his admission, Mr. Friedman swatted Ms. Dolhar on the behind with a rolled-up newspaper. While Mr. Friedman offers mitigating reasons for his behavior, such as his familiarity with Ms. Dolhar and his reputation as a person who jokes around, such mitigations historically impacted only the level of discipline. The basis for the Director's review, however, is an alleged rule violation, not a disciplinary appeal. As such, the Director or designee does not have the authority to modify a disciplinary sanction. Furthermore, Mr. Friedman was an "at will" employee in his exempt position. Therefore, the issue is whether DSHS appropriately determined Mr. Friedman's conduct warranted gross misconduct.

When considering Mr. Friedman's conduct, Mr. Allen stated he reviewed the investigation, which he agreed established misconduct. He further considered Mr. Friedman's history of inappropriately using humor and sexual innuendos, as well as the previous allegation he invaded a co-worker's private space. Even though not all of the prior allegations were substantiated, Mr. Allen stated he had personal knowledge about Mr. Friedman's style of joking with others and specifically warned him that such behavior was unacceptable and would not be tolerated. Based on his own conversation with Mr. Friedman, as well as the written reprimand by Mr. Garcia (R-14), Mr. Allen concluded Mr. Friedman had been given clear expectations to exhibit appropriate behavior in the workplace. Despite those expectations, Mr. Friedman willfully decided to hit Ms. Dolhar with a newspaper.

Because Mr. Friedman was a regional administrator in a position of authority, Mr. Allen believed he was held to an even higher standard, though his conduct would have been unacceptable for any employee. As a manager, DSHS expected Mr. Friedman to coach and mentor others and model appropriate behavior. While Mr. Allen acknowledged the prior reprimand was a factor in his decision, he said he placed the most emphasis on the fact Mr. Friedman had been counseled on the use of inappropriate actions yet continued to show that pattern of behavior. As a result, Mr. Allen believed Mr. Friedman's poor judgment and inability to recognize the seriousness of his actions interfered with the department's mission and policies, as well as the ability to provide a hostile free environment.

While Mr. Friedman's conduct is not identical to examples of behavior identified as gross misconduct in prior PAB decisions, it specifically relates to the PAB's conclusions regarding gross misconduct. For example, the PAB previously determined that an

employer has a responsibility to provide its employees with a work environment free from harassment and intimidation where employees are treated with respect and dignity. When an employee's actions affect an agency's ability to provide such an environment or create an offensive work environment, that employee's actions constitute gross misconduct. Bloshenko v. Dep't of Social & Health Services, PAB No. DISM-00-0080 (2002).

In this case, Mr. Allen determined that Mr. Friedman's actions put the agency's ability to provide a safe and respectful environment at risk. Therefore, Mr. Allen's decision to terminate Mr. Friedman for gross misconduct was reasonable under the circumstances, and Mr. Friedman has failed to prove that DSHS violated RCW 41.06.070(3).

Appeal Rights

WAC 357-49-018 provides that either party may appeal the results of the Director's review to the Personnel Resources Board (board) by filing written exceptions to the Director's determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director's determination. The address for the Personnel Resources Board is 2828 Capitol Blvd., P.O. Box 40911, Olympia, Washington, 98504-0911.

If no further action is taken, the Director's determination becomes final.

Sincerely,

Teresa Parsons
Director's Review Supervisor
Legal Affairs Division

c: James Friedman
Laura Wulf, AAG

Enclosure: List of Exhibits