

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by )

**MILES LOCKER** )

From dismissal from the position of )  
Industrial Relations Counsel IV with the )  
Department of Industrial Relations at San )  
Francisco )

SPB Case No. 06-0817

**BOARD DECISION**

November 3, 2008

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**APPEARANCES:** Linda Lye, Esq., Altshuler Berzon, on behalf of appellant, Miles Locker; Anthony Mischel, Staff Counsel, California Department of Industrial Relations, on behalf of respondent, California Department of Industrial Relations.

**BEFORE:** Sean Harrigan, President; Richard Costigan, Vice President; Patricia Clarey and Anne Sheehan, Members.

**DECISION**

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision written by the Administrative Law Judge. Appellant was dismissed from his position as an Industrial Relations Counsel IV with the Department of Industrial Relations (Department) at San Francisco, effective at the close of business on February 17, 2006. The dismissal is based on allegations that, over a period of several months, appellant breached his ethical duties to his client by engaging in a pattern of conduct that was disloyal, disrespectful, and highly critical of the Department and state officials both within and outside of the Department.

In this decision, a majority of the Board finds that appellant's conduct so undermined the trust essential to the attorney-client relationship that termination is just

and proper. The Board therefore sustains appellant's dismissal. President Harrigan and Member Tom dissent.

## **BACKGROUND**

### Employment History

Appellant entered state service in 1984 as an attorney with the Agricultural Labor Relations Board. Appellant briefly left state service in late 1986, but returned in 1988 as an Industrial Relations Counsel working in the Department's San Francisco office. Appellant remained employed by the Department in various capacities, eventually promoting to Chief Counsel of the Division of Labor Standards and Enforcement (DLSE), a position he held from August 1998 to October 2001. Thereafter, appellant served as Industrial Relations Counsel IV assigned to the DLSE Legal Unit, until he was dismissed on February 17, 2006. Appellant has no record of prior discipline.

### Findings of Fact

During the period of time at issue, appellant worked in the position of Industrial Relations Counsel IV. According to the duty statement for his classification, appellant served as a lead attorney for the DLSE, handling the DLSE's most sensitive and complex legal work, including defending the DLSE and prosecuting the most difficult cases, developing strategies in cases involving the most complex issues, proposing legislation, serving as a legislative liaison, rendering legal advice to senior management on the most complicated matters, and performing other duties as assigned to him under the general direction of the DLSE Chief Counsel and Assistant Chief Counsel. When appellant was appointed as an Industrial Relations Counsel IV, he was designated as the DLSE's lead attorney on a number of issues, including public information and

education. At oral argument, counsel for both parties agreed that, as such, appellant became “the face of the DLSE.”

The DLSE is a division of the Department, one of several departments within the Labor and Workforce Development Agency (LWDA), an agency under the executive branch of California state government. In 2004, Victoria Bradshaw (Bradshaw) was appointed Secretary of Labor and Jose Millan (Millan) was Deputy Secretary of the LWDA. John Rea (Rea) served as Acting Director of the Department, and Gregory Rupp (Rupp) was Acting Chief Deputy Labor Commissioner until, on December 13, 2004, Donna Dell (Dell) was appointed as the state’s Labor Commissioner. During the period of time at issue, the DLSE legal office was under the direction of Chief Counsel, Anne Stevason (Stevason). Assistant Chief Counsel in San Francisco, Anne Hipshman (Hipshman), was appellant’s immediate supervisor. In the summer of 2005, Robert Jones (Jones) became Chief Counsel of DLSE.

**Murphy v. Kenneth Cole**

Pursuant to Labor Code sections 79, 82 and 83, the Labor Commissioner serves as Chief of the DLSE. Labor Code section 50.5 charges the Department with, among other things, fostering, promoting and developing the welfare of wage earners, improving their working conditions and advancing their opportunities for profitable employment. The Labor Commissioner is required, in accordance with state policy, to vigorously enforce minimum labor standards and laws relating to compensation. Pursuant to that enforcement authority, when an employee complains to the DLSE that he or she was not lawfully compensated, DLSE hearing officers hold administrative hearings, called *Berman* hearings. After holding a *Berman* hearing, the hearing officer

issues an order, decision, or award (ODA). ODAs may be appealed by either party. When an employer appeals an ODA to the superior court, and the employee is indigent and does not disagree with the Labor Commissioner's order, pursuant to Labor Code section 98.4, the Labor Commissioner is statutorily required to represent the employee in the de novo proceedings. Such "*Berman* appeals" have not historically been included on the DLSE's significant litigation report to the Governor.

For several years, the DLSE has referred certain indigent claimants to the Civil Justice Clinic at Hastings College of the Law where, as part of a clinical study program, law students represent the claimant with the assistance, guidance, and mentoring of their professor and the DLSE attorney assigned to the wage claimant's case. In those instances, DLSE attorneys first mail to the wage claimant a letter stating that the DLSE is representing the claimant and then file with the superior court a notice of representation. Upon determining that the case is appropriate for referral to the Hastings clinic, the DLSE attorney so notifies the wage claimant and obtains his or her consent for referral to Hastings. Hastings then files a notice of association with the superior court. It is common practice for the Hastings clinic, under the guidance of DLSE attorneys, to expand wage claims when they believe that the wage claimant's initial claims did not include all remedies to which the claimant was entitled.

One such wage claimant, whose case was ultimately decided by the California Supreme Court, was John Paul Murphy (Murphy). Murphy had succeeded in his wage claim before the DLSE hearing officer, but his employer, Kenneth Cole, appealed. Initially, another DLSE attorney, Rachel Folberg (Folberg), was assigned to the Murphy case. Folberg referred Murphy to Hastings, and Hastings students and a Hastings

professor, Donna Ryu (Ryu) associated into the case. After Folberg referred the case to Hastings, the students expanded Murphy's claim beyond the issues initially presented to the hearing officer to include a claim that, pursuant to Labor Code section 226.7,<sup>1</sup> Murphy was entitled to additional compensation because his employer had denied him rest and meal periods to which he was entitled.

Appellant's involvement in the Murphy case began when, in August of 2004, Folberg commenced a leave of absence. By that time, Folberg and the Hastings clinic had successfully represented Murphy in the superior court, obtaining a judgment in his favor that was appealed by Kenneth Cole. Ryu asked appellant who from DLSE should be listed as DLSE counsel in appellate court records. Appellant told Ryu to list appellant as co-counsel and expressly informed her that she should not indicate he was representing the Labor Commissioner in the case, as the Labor Commissioner was not a party to the action and he did not want to give a contrary appearance.

As discussed above, when Murphy initially filed his wage claim in 2002, he did not include and, therefore, the hearing officer did not consider, a claim that he was entitled to additional compensation pursuant to Labor Code section 226.7 for meal and rest period violations. In 2003, once the matter was pending in the trial court, Ryu and Folberg added a claim for meal and rest period violations and asserted that, because

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<sup>1</sup> Section 226.7 of the Labor Code reads as follows: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

the additional compensation due to Murphy pursuant to section 226.7 was premium pay, it was a wage, entitling Murphy to more than one year's worth of compensation.

At the time Folberg and Ryu expanded Murphy's claims, the argument that the compensation due to Murphy for those violations was a wage was not inconsistent with DLSE's formal position. In or about May of 2002, the DLSE had concluded that the additional compensation due to employees pursuant to Labor Code section 226.7 was premium pay constituting a wage and not, as some argued, a penalty. This position was reiterated in a June 11, 2003, Opinion Letter. The practical effect of such an interpretation was significant because, under California law, the statute of limitations for wage claims is three years, whereas the statute of limitations for penalties is only one year. Thus, if the compensation due was considered a wage, claimants claiming additional compensation under Labor Code section 226.7 may seek an additional two years' worth of section 226.7 payments, increasing employer liability for violations. If the compensation due was construed as a penalty, employer liability for violating the law was much more limited.

Although the DLSE's formal position as to the section 226.7 wage/penalty issue had, since 2002, been that the additional compensation was a wage, the matter remained hotly contested in the employment law community. Advocates for both sides, aware that DLSE Opinion Letters were not binding on the courts and were instead persuasive only in the absence of a published state court decision, eagerly anticipated a court decision resolving the matter. Appellant was aware of the divide over the wage/penalty issue within the employment law community and was informed by Bradshaw shortly after she was appointed that she believed section 226.7

compensation was a penalty. Beginning in June of 2004, the DLSE began holding in abeyance all *Berman* hearings involving the wage/penalty issue. Bradshaw told appellant and Stevason, however, that they should continue to follow the DLSE's official wage position. Nevertheless, appellant clearly understood that Governor Arnold Schwarzenegger's administration believed the DLSE's wage interpretation was incorrect.

Also, in September of 2004, Stevason told appellant that she had informed Rupp and Millan about the pending Murphy appeal. Stevason asked appellant for additional details on the Murphy case and appellant informed her that, as with all cases referred to the Hastings clinic, the DLSE was technical co-counsel for Murphy, but DLSE was not listed on the court's website. Appellant informed Stevason that the Murphy case involved the wage/penalty issue and that the DLSE, though technical co-counsel, had not participated in the trial court proceedings. On September 28, 2004, Stevason informed Rea, Rupp, Bradshaw, Millan, and LDWA General Counsel Bob Dresser about the Murphy case and advised them that she perceived an ethical conflict would arise if the Department filed an opinion letter with the Murphy court arguing that Murphy's claimed section 226.7 additional compensation was a penalty. She forwarded to appellant her email explaining the perceived ethical conflict and Rea's responsive email finding no ethical conflict. The Department did not file an opinion letter in the Murphy case.

Appellant's role as technical co-counsel in the Murphy case continued for several months. He remained minimally involved in the case, but did attend a meeting on May 11, 2005, with several employee-side attorneys and Ryu wherein amicus efforts and

other litigation strategies were discussed. He also edited the draft appellate brief and, in mid-June of 2005, sent and received emails discussing the appellate brief.

Appellant's involvement with the Murphy case ceased a few days before the Department, on June 26, 2005, designated as precedential the *Hartwig* Opinion Letter, which, for the first time, officially changed DLSE's position that the section 226.7 compensation was a penalty, not a wage.

**Westside Concrete**

In October 2004, the Second Appellate District issued an unpublished decision holding that a DLSE opinion letter, if intended as a rule of general application, constituted an unlawful underground regulation. In November 2004, counsel for Westside Concrete Company requested that the court publish its decision. Appellant, on behalf of the DLSE, had taken the position throughout the trial and in appellate arguments that, pursuant to California Supreme Court precedent, advice letters were not subject to the provisions of the Administrative Procedure Act (APA) and, therefore, could not be considered underground regulations. DLSE's involvement in the *Westside Concrete* case was included in its significant litigation report and appellant was never instructed to alter the position he was taking on behalf of the DLSE.

After Westside Concrete Company requested publication, appellant, on behalf of DLSE, filed a petition seeking depublication and Hipshman, also on behalf of DLSE, filed a petition for rehearing. The appellate court denied the petition for rehearing and published the opinion.

Appellant, believing that the *Westside Concrete* decision could significantly impact the Department and the Murphy case, consulted with Stevason about seeking

depublication with the Supreme Court. However, Stevason conveyed to appellant that her experience in another matter caused her to believe that the Department would not agree to pursue further action to depublish the case. She instructed appellant to seek the assistance of outside parties in obtaining depublication. According to appellant and Stevason, it was common practice to solicit the assistance of third parties in depublication matters.

In accordance with Stevason's instructions, appellant sent documents, emails and letters on DLSE letterhead to various individuals practicing employee-side labor law, soliciting their assistance in obtaining depublication of the *Westside Concrete* decision. On November 12, 2004, appellant also sent an email to his friend, former DLSE Chief Counsel Tom Cadell (Cadell), wherein appellant stated the *Westside Concrete* decision would "eviscerate our opinion letters if it isn't depublished. We will try to undo this mess, but this is one where I fear the Administration will tie our hands . . . I am speaking to persons who will be able to do what is necessary and who don't answer to Arnold." On November 23, 2004, appellant again emailed Cadell, informing Cadell that appellant "[would not] bother asking for permission to file a petition for review – this is exactly the sort of decision blowing up the OLs that the Administration's been praying for" and expressing concern that, if the decision remained published, the Department's opinion letters would no longer have persuasive effect in any court. As discussed below, in the spring of 2005, Cadell sued the Labor Commissioner on claims unrelated to this series of emails.

### **Wage/Penalty Regulations**

In November 2004, LWDA sought Stevason's assistance in preparing a regulation packet that would define section 226.7 additional compensation as a penalty. Stevason declined to assist and forwarded the emails on the subject to appellant and Hipshman, indicating that they would not render assistance. It was therefore very clear to appellant that the LDWA intended to promulgate regulations on the matter and that the Department's position on the wage/penalty issue would soon change.

On December 1, 2004, Ryu sent appellant an email asking him whether anyone had considered a "legislative fix" to the wage/penalty debate and whether it would be helpful to get a working group together. In his response, appellant told Ryu that the Administration's efforts to resolve the matter via regulation would result in litigation and any regulation would only be subject to deference by the courts, meaning that, without a statute, the matter "would remain alive and decided by the court" He cited in his email the Governor's veto message relating to Assembly Bill 3018, wherein the Governor encouraged the promulgation of a regulation and, if that effort failed, the introduction of legislation to resolve the issue.

About a week later, Bradshaw's statements regarding section 226.7 additional compensation being a penalty were formally ratified by the LWDA when, on December 10, 2004, the LWDA proposed emergency regulations interpreting the section 226.7 compensation as a penalty. The emergency regulations resulted in a number of news articles, including several that were critical of the regulations. On December 15, 2004, Cadell sent an email to appellant criticizing the emergency regulations and the absence of any apparent legal justification therefore. Appellant responded with equal criticism,

stating that, “knowing the persons responsible for this outrage[,] they are probably arrogant enough to believe they will get away with it. This is truly shameful . . . I am certain this has been rigged with OAL. As soon as OAL gives its approval, the State Fed will file a lawsuit for injunctive relief. I’d say they have a spectacularly good case.”

In light of the proposed regulations, Stevason circulated a memorandum, authored by Folberg, which sought guidance regarding the perceived ethical conflict presented by regulations interpreting the law in a manner clearly contrary to the best interests of many *Berman* claimants. On December 20, 2004, the proposed emergency regulations were rescinded. In news articles reporting the rescission, the administration made clear it would pursue non-emergency regulations. Appellant later sent an email to another former DLSE attorney, copied to Stevason and Hipshman, wherein he stated that he would, “love to see a good published DCA decision on this issue before the now-not emergency regulation gets adopted. Seems like it would take the wind out of that sail.”

Also on December 20, 2004, Rupp rescinded four opinion letters relating to meal and rest periods, including the June 11, 2003, Opinion Letter interpreting section 226.7 additional compensation as a wage, on the ground that the *Westside Concrete* decision mandated their rescission. In response to another email from Cadell discussing the emergency regulations and the rescission of the opinion letters, appellant wrote that “Vickie, Jose and the Evil one from Berkeley are out of control.” The reference to “the Evil one from Berkeley” related to John Rea.

Stevason, appellant, and other DLSE attorneys testified that, despite the fact that the administration was actively pursuing a penalty interpretation, they were consistently

told by Department and LWDA authorities to continue to argue the Department's official wage position. They did so in several cases, even after the Department, in January 2005, promulgated a non-emergency regulation interpreting section 226.7 additional compensation as a penalty.<sup>2</sup> In April, 2005, appellant and Stevason worked together on a memorandum to Dell setting forth their concerns about the validity of certain portions of the proposed regulation and containing a draft opinion letter setting forth the analysis and legal justifications for the penalty interpretation. Thus, despite the perceived conflict created by representing *Berman* claimants who would benefit from the wage interpretation already in effect, appellant assisted his client in developing the legal justification undergirding the Department's desired penalty interpretation.

### **Lawsuits Filed Against Labor Commissioner**

In the spring of 2005, Dell was named a defendant in two separate lawsuits. The first, filed by various labor unions and Cadell, sought relief on the ground that the LWDA, Department, DLSE, Bradshaw, Millan, Dell, and various other state departments and officials, had improperly expended public funds on videos serving no other purpose than to propagandize proposed labor regulations. In the second lawsuit, *Corrales, et al. v. Donna Dell*, the plaintiffs sought a court order compelling Dell to issue decisions in those *Berman* cases involving section 226.7 claims for compensation that were being held in abeyance.

Cadell sent appellant a copy of his lawsuit on March 22, 2005, and appellant called Hipshman to inform her that it had been filed. Hipshman told appellant that she was aware of the lawsuit, as she had just left Rea's office where a process server had

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<sup>2</sup> The regulation expired by operation of law in January of 2006; hence, it never became effective.

been waiting to serve him. Dell was also aware of the lawsuit before she was served, as other named defendants had informed her about it.

### **Legal Authority Provided to DLSE Hearing Officers**

In response to the *Corrales* lawsuit, Dell rescinded the abeyance policy for *Berman* cases involving section 226.7 claims for compensation. On April 26, 2005, Dell sent a memorandum marked "For DLSE Internal Use Only" to all DLSE hearing officers wherein she rescinded the abeyance policy and provided guidance to them regarding the factors to be considered in deciding section 226.7 issues. She included as guidance a reference to a tentative ruling in a California appellate court holding that the section 226.7 additional compensation was a penalty, a statement that other, lower courts were split on the issue, a reference to the proposed regulations interpreting the additional compensation as a penalty, and various definitions from the Labor Code. She closed by stating that hearing officers should "bear with [her] until such time as a binding appellate decision is issued, the regulations become final or a precedential decision can be issued."

Appellant was aware of a federal court decision wherein the court had found the section 226.7 additional compensation to be a wage. He therefore sent to certain hearing officers an email including the citation to that case with the caveat that federal court decisions are not binding, but are persuasive in the absence of a published state court decision. He copied Stevason on the email to the hearing officers. Stevason did not criticize appellant for sending the email, but Dell testified that she had intentionally left case citations out of her memo. Dell was unhappy that appellant had forwarded her

memo and provided a case citation that represented only one side of the wage/penalty debate.

**Memorandum relating to salary basis of exempt employees**

On May 31, 2005, Dell issued another memorandum marked "For DLSE Internal Use Only" wherein she rescinded a 2002 opinion letter relating to the salary requirements for exempt employees and offered her rationale for doing so. Stevason forwarded the memorandum to various DLSE employees, including appellant. Appellant, copying Stevason, forwarded the memorandum to Cadell, communicating his concern that it constituted an underground regulation. Stevason agreed in her reply email to appellant and Cadell that there was "an APA problem" with the memorandum. In responding to Stevason, appellant told Stevason and Cadell that, "this is worse than a mere APA problem . . . here we have a star chamber proceeding, where unidentified management side attorneys speak to Vicky, Jose, John Rea, and Donna, requesting memos setting out legal opinions (which provide a direct benefit to their clients) and which obliterate existing opinion letters – by removing them from the website without a trace. It's government by stealth, with some old fashioned book burning thrown in. The wholesale removal of the OLs from the website generated lots of protest. Instead, they will try to accomplish the same result more slowly, in secret." Stevason replied to appellant's email by stating that she would, "set Donna straight on the underground regulation aspect of her memo . . . Underground regs is something they should all understand." Stevason did not criticize appellant for his comments.

On June 8, 2005, management-side attorneys engaged in litigation on behalf of Pacific Gas & Electric (PG&E) filed with the Court of Appeal a copy of Dell's May 31,

2005, memorandum in support of PG&E's position. Upon being informed that PG&E was ultimately successful on the salary basis issue in that case, appellant sent an email to the assistant of an employee-side attorney stating that he was, "[s]orry to hear the DCA got the salary basis issue wrong. I wish it had come before them pre November 2003, so that we could have weighed in with an amicus . . . but this panel was simply not going to be budged."

### **Speaking Engagements**

Shortly after Governor Schwarzenegger was elected, the DLSE imposed a temporary ban preventing DLSE attorneys from speaking in their official capacities. The ban did not apply to appearances and speeches made by DLSE lawyers in their personal capacities. When Dell became Labor Commissioner in December of 2004, she rescinded the ban and encouraged DLSE attorneys to speak in their official capacities, provided they obtained prior approval to do so.

On March 18, 2005, appellant asked Dell for permission to speak, in his official capacity, about developments in meal and rest period issues at a lunchtime seminar sponsored by the San Francisco Barrister's Club. He informed Dell that he had been giving presentations at the event for several years, and had done so in his private capacity in 2004. Dell gave appellant permission to speak in his official capacity, provided that he focused his comments on existing statutory and case law without offering opinions or speculating. Appellant agreed to speak at the event on July 20, 2005.

On or about April 20, 2005, appellant received at his DLSE office, an invitation to speak at the Teamsters Twenty-Fifth Annual Seminar in Lake Tahoe. Appellant

obtained permission to speak in his private capacity and took a vacation day in order to do so. Although he informed the event organizers that he intended to speak in his personal capacity, when he arrived to speak, he learned that he had been listed in the program as a DLSE attorney. He informed the primarily non-lawyer audience that he was speaking in his private capacity and provided them with an overview of the current state of wage and hour law.

On June 8, 2005, Dell informed appellant that, because Rea had concerns about potential conflicts arising from the two lawsuits that were pending against Dell, Dell was rescinding permission for appellant to speak at the July 20, 2005, Barrister's Club event. Dell did not inform appellant that she was aware he had forwarded her internal memoranda and sent the case citation to DLSE hearing officers. Appellant immediately asked Hipshman and Stevason for permission to take a day of educational/professional leave and they granted it. He also sent to Dell an email stating that he was confused as to the purported conflict Dell and Rea thought would result from his participation in the event. He told Dell that he did not believe any conflict would arise if he spoke in his personal capacity, particularly since he was not involved in any way with the pending litigation against her. Appellant asked that, if Dell or Rea had any controlling authority for their position that his speaking would create a conflict, they provide it to him, because he believed he had a First Amendment right to speak on a matter of public interest. Dell did not respond.

At 3:04 p.m. on July 19, 2005, appellant sent Dell a follow-up email wherein he informed her that, since she had not responded to his email from June 8<sup>th</sup>, he believed that there was no basis for Dell's assertion that a conflict would arise from his

participation in the Barrister's Club event. He stated that he had consulted with private counsel who confirmed that his analysis was correct. Copying Hipshman and Stevason on the email, appellant told Dell that he had been granted a day of educational/professional leave and would speak in his private capacity, inviting her to attend. At 6:17 p.m., Dell responded by telling appellant he should "know better," and "respect [her] last word as [her] final word." Dell told appellant that she would be happy to speak with his attorney.

On July 20, 2005, appellant was introduced to the Barrister's Club as a 15-year attorney for the DLSE appearing in his private capacity. Speaking as the neutral on a three-person panel (including one employee-side attorney and one management-side attorney), appellant discussed the history of several wage-hour laws and answered questions from the audience. More specifically, in regards to the rescinded emergency regulations, appellant stated that, "someone [at DLSE and LWDA] must have seen a threat;"<sup>3</sup> that, after negative publicity, the emergency regulations were withdrawn, "and . . . there was no more emergency now;" that meal periods "presumably" occur somewhere in the middle of a work shift; and that "an argument could be made that whether or not you construe something as a penalty or not, penalties typically would be something that you would seek by going to an administrative agency that can award the penalty or to court to get the penalty." When audience members laughed regarding the discussion of the emergency regulations, appellant stated "no, this is all true. I'm just giving you the facts." Appellant also provided the rationale behind the DLSE's former

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<sup>3</sup> Pursuant to the APA, emergency regulations may only be promulgated when there is a threat of serious harm to the public peace, health, safety, or general welfare (see Gov. C. § 11342.545).

wage interpretation, but only briefly referenced the penalty interpretation in *Hartwig*, telling the audience that he “read the precedent decision and I guess the reason was all in there.”

The management-side attorney who was present also did not thoroughly discuss *Hartwig*, as a copy of the precedential decision had been given to the audience. Additionally, all three speakers, including appellant, offered opinions and advice on wage and hour issues for both employee-side attorneys and management-side attorneys. Nonetheless, appellant later admitted that some of his comments were made in a manner intended to entertain and induce laughter from the audience. Moreover, as discussed below, appellant clearly spoke on behalf of the DLSE on at least two occasions during his presentation.

### **Ethical Dilemma**

After *Hartwig* was made precedential, and throughout the summer and fall of 2005, DLSE attorneys continued to grapple with the perceived ethical conflict presented in instances where the *Berman* claimants they represented were pursuing a wage interpretation of their section 226.7 additional compensation claims. Folberg sent Stevason, Hipshman and Dell a letter describing one situation in which the ODA in her *Berman* client’s case found the compensation to be a wage, the employer appealed, and she would have to argue at the trial court a position conflicting with the DLSE’s position as set forth in *Hartwig*. Hipshman, Reich, Stevason and appellant sent a memorandum to Dell explaining the perceived conflict. Dell asked for a list of all *Berman* cases involving a conflict, but stated she did not wish to sign a blanket waiver of the conflict and would seek guidance from the State Bar. She encouraged DLSE

attorneys to assist *Berman* claimants in finding independent counsel. Unfortunately, even after consulting with the Bar and researching the law, neither Hipshman, Stevason nor Dell were able to obtain the necessary guidance regarding the perceived conflict.

Because of the confusion, the DLSE consulted with outside counsel for advice. Sean M. SeLegue<sup>4</sup> from the law firm of Rogers, Joseph, O'Donnell & Phillips, opined that, in cases like Murphy's,<sup>5</sup> where the *Berman* claimant had an existing claim at the time of the *Hartwig* decision and believed that they were a joint client with the Labor Commissioner in defending the ODA, any resulting conflict was merely a positional conflict and, pursuant to State Bar Formal Opinion 1989-108, positional conflicts are not true conflicts of interest. Thus, although SeLegue agreed that such *Berman* claimants were clients of both the Labor Commissioner and DLSE attorneys, he found no conflict of interest subjecting the attorneys to discipline. Instead, SeLegue recommended that the DLSE provide written disclosure of the positional conflict to both the Labor Commissioner and the *Berman* claimant. In September of 2005, after SeLegue advised the Department, DLSE attorneys were instructed that, pending further discussion of the matter in October of 2005, they were to continue to have "an avowed attorney/client relationship with the *Berman* claimants" they represented in de novo appeals.

### **Investigation and Termination**

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<sup>4</sup> SeLegue also served as the Department's expert on attorney ethics at the hearing in this matter.

<sup>5</sup> The only factual difference between the Murphy case and the others discussed by SeLegue is that Murphy's ODA did not address the wage/penalty issue, as those claims were added by Ryu after Folberg referred the case to the Hastings clinic. In all other regards, Murphy's case was similar to all other cases discussed by SeLegue, in that the DLSE legal office, on behalf of the Labor Commissioner, was representing Murphy in defending the ODA that had been appealed by Murphy's employer.

On August 29, 2005, Dell informed appellant that she was commencing an investigation into incidents relating to his work at the DLSE, including, but not limited to, his speaking engagement at the Barrister's Club event in July of 2005. Appellant was placed on paid administrative leave and, in February of 2006, was served with an amended Notice of Adverse Action (NOAA) dismissing him from state service effective February 17, 2006. The NOAA set forth nine charges of misconduct and alleged that the charges of misconduct constituted cause for discipline pursuant to Government Code section 19572 subdivisions (c) (inefficiency),<sup>6</sup> (d) (inexcusable neglect of duty),<sup>7</sup> (e) (insubordination),<sup>8</sup> (m) (discourteous treatment of the public or other employees),<sup>9</sup> (o) (willful disobedience)<sup>10</sup> 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).<sup>11</sup>

### Procedural Summary

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<sup>6</sup> Continuous failure to meet a level of productivity or failure to produce an intended result with a minimum of waste, expense or unnecessary effort (*Robert Boobar*) (1993) SPB Dec. No. 93-21; excessive absenteeism reducing employee's effectiveness (*Letitia Renee Allen* (1995) SPB Dec. No. 95-06; *Richard Vasquez Ramirez* ((1994) SPB Dec. No. 94-05).

<sup>7</sup> An intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty (*Ulysses Washington* (1993) SPB Dec. No. 93-10). Simple negligence or mere carelessness will not suffice (*Robert Herndon* (1994) SPB Dec. No. 94-07). Whether the conduct is gross negligence depends on the harm to the public service (*John C. Arnold/Miguel O. Leal* (1996) SPB Dec. No. 96-17).

<sup>8</sup> Mutinous, disrespectful, or contumacious (perverse in resisting authority, obstinate in the wrong, stubbornly disobedient, rebellious, insubordinate) conduct; employee intentionally or willfully refuses to obey an order a supervisor is entitled to give and have obeyed. Single act may be sufficient (*Richard Stanton* (1995) SPB Dec. No. 95-02).

<sup>9</sup> Includes violent, threatening, insulting, harassing, brusque, and rude, hostile or abrasive behavior, except that charges based on off-duty conduct require a showing of a nexus (*Charles Martinez* (1992) SPB Dec. No. 92-09).

<sup>10</sup> A knowing or intentional violation of a direct command or prohibition; mere negligence will not suffice, as the charge requires proof of intent (*Ruth M. Houseman* (1993) SPB Dec. No. 93-33; *Richard J. Hildreth* (1993) SPB Dec. No. 93-22; *Coomes v. State Personnel Board* (1963) 215 Cal.App.2d 770, 775).

<sup>11</sup> Misconduct that is such as to easily disrupt or impair the public service, but not simply personal or private conduct the type of which the department disapproves (*Yancey v. SPB* (1985) 167 Cal.App.3d 478). This charge requires some showing of nexus to employment, but the department need not prove that actual discredit occurred (*Warren v. State Personnel Board* (1979) 94 Cal.App.3d 95, 104).

Appellant timely filed an appeal of his dismissal with the Board and the matter was heard by an ALJ, who thereafter issued a Proposed Decision dismissing the charges of insubordination and inefficiency, but finding that the proven conduct constituted inexcusable neglect of duty, discourteous treatment of the public or other employees, willful disobedience, and other failure of good behavior. Due to appellant's long history of state service without any prior disciplinary action, and because the Department had failed to engage in progressive discipline, the ALJ reduced the penalty from dismissal to a one-year suspension. The Board rejected the Proposed Decision in order to decide the matter itself. The Board invited the parties to particularly discuss whether the Department had proven the allegations by a preponderance of the evidence and, if so, what is the just and proper penalty for the proven misconduct.

## **DISCUSSION**

The Department has charged appellant with engaging in a course of conduct that constituted a breach of his ethical duties as an attorney and was generally intended to undermine the positions taken by his employer and the authority and reputation of those responsible for directing the Department's actions. The basic allegation common to all of the Department's charges is that appellant was disloyal and actively pursued an agenda so contrary to the goals of his client that he undermined his client's confidence in him. Appellant, on the other hand, argues that he breached no duty to his clients, that he acted in most instances with the knowledge and support of his supervising attorneys, and that, although he regrets the tone and tenor of some of his comments, he never breached any client confidence and instead acted diligently to comply with his statutory duties as a DLSE attorney and consistent with his First Amendment right as a

citizen. So as to thoroughly address each of the Department's charges and the evidence for and against them, we will discuss each separate charge as set forth in the NOAA.

**Charge #1- Email Seeking “Legislative Fix”**

The Department has first charged that, on or about December 1, 2004, appellant's response to Ryu's inquiry about a legislative “fix” to the wage-penalty issue undermined his client because in it he raised with the public his belief that the effort to regulate the matter suffered from legal infirmities. The Department also charged that appellant improperly advocated, without Departmental authority, that public parties should seek to reverse the Department's position via legislation so as to abrogate the regulations the Department was about to propose. The Department did not, however, charge, nor did it prove, that appellant revealed any attorney-client confidences by sending the email.

The evidence establishes that appellant's job required him to respond to public inquiries, propose legislation and serve as the Department's legislative liaison. Moreover, both ethics experts, relying on a formal State Bar ethics opinion, testified that, in advocating a position on behalf of Murphy that was contrary to the Department's stated goal or position, appellant did not have an ethical conflict.<sup>12</sup> Further, had such a conflict existed, it was a conflict created by the Department in assigning DLSE attorneys to represent both the Labor Commissioner and *Berman* claimants. The Department had been repeatedly informed, as early as September of 2004, that DLSE attorneys

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<sup>12</sup> This testimony was consistent with the legal advice provided to the Department by SeLegue in October of 2005 – that positional conflicts like the one appellant had in the Murphy case are not grounds for discipline.

believed an ethical conflict would arise when the Department promulgated the penalty interpretation regulations, and that they received little, if any, guidance from their superiors on how to handle the perceived conflict. Most importantly, the Department did not change its official position on the wage/penalty issue until June, 2005, and, prior to that time, instructed DLSE attorneys to continue to argue in support of the wage interpretation that was the Department's official position until the *Hartwig* decision was designated precedential.

Here appellant was merely responding to a query from Ryu, his Murphy co-counsel, wherein he discussed an issue that would ultimately benefit Murphy. In doing so, appellant relied on the published California Supreme Court case cited in his email, and stated, in a courteous and professional manner, a position consistent with the course of action proposed by the Governor in his veto message relating to Assembly Bill 3018. As a result, we cannot conclude that appellant's conduct as set forth in this charge may properly serve as the basis for discipline.

**Charge #2 – Emails Criticizing the Emergency Regulations**

The Department charged that appellant violated the "duty of loyalty" owed to the Department when he: (1) sent an email to Cadell criticizing the Department's proposed emergency regulations as "an outrage that was truly shameful," accused the Department of "rigging" the regulatory process, and denigrated Bradshaw, Millan, and Rea, people to whom appellant owed a fiduciary duty; (2) never informed his client of his opinion as to the merits of the proposed regulations or likelihood of being sued if the regulations were approved; (3) sent Cadell an email stating that "Vickie, Jose, and the Evil one from Berkeley are out of control;" and (4) criticized the Department for

rescinding four opinion letters - one that had been voided by the court in *Westside Concrete* and three that the Department also felt constituted underground regulations pursuant to the *Westside Concrete* reasoning.

The evidence does not support the Department's contention that appellant, by engaging in the charged conduct, breached an ethical duty to his clients. In any ethical analysis, the first question that must be addressed is the identity of the client, as it is axiomatic that an attorney owes no duty to a non-client. Both experts testified that there is little authority defining the client of a government attorney. Nonetheless, both experts also agreed that the client is the entity and, in certain circumstances, the individuals charged with directing the entity. We agree, and we find support for our conclusion in various state documents contained in the record.

The official civil service specification for appellant's classification is instructive in determining appellant's client because it clearly delineates the parameters of appellant's job duties. Although it required appellant to provide "a wide variety of specialized legal services to the Department's various divisions, boards, and commissions" and to "render advice and legal opinions to Department management," the specification makes no reference to the LWDA or the Governor. Because appellant cannot be assigned to perform duties outside of the clearly delineated duties of his classification specification without subjecting the state to liability, the information contained therein limits the scope of his representation to "the Department."

The scope of appellant's representation is further refined by his official duty statement, which, like a retainer agreement between a private sector attorney and client, controls the scope of the work that the attorney will provide and identifies the

clients the attorney will represent. The duty statement for an Industrial Relations Counsel IV (Appellate) required appellant, under the direction of the Chief Counsel and Assistant Chief Counsel, to “[d]efend the DLSE,” prosecute the most complex and sensitive issues “involving DLSE cases” and work on legislation “affecting DLSE in any area of DLSE’s jurisdiction.” The duty statement does not reference the Department, the LWDA, or the Governor, and instead required appellant to render services solely to the DLSE.

Moreover, the Department’s organizational chart, introduced into evidence by the Department, reflects many boards, divisions and commissions within the Department, many of which have their own separate legal counsel, as does the Department itself, the LDWA, and the Governor. The fact that the Department, the LDWA and the Governor have their own legal counsel belies the argument that they have an attorney-client relationship with appellant. Under these facts, we cannot ascribe to appellant a fiduciary duty owed simultaneously to the DLSE, the Department, the LWDA, and the Governor because, in doing so, we would impose on all DLSE attorneys (and other state lawyers) an impossible ethical dilemma and legal gridlock on much of state government. Instead, we find that appellant’s ethical obligations were to the DLSE as an entity and, under certain and likely frequent circumstances,<sup>13</sup> the Labor

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<sup>13</sup> Pursuant to appellant’s job description, such circumstances would include, but not necessarily be limited to, assignment to defend the Labor Commissioner in litigation, to defend a decision of the Labor Commissioner, and upon the Labor Commissioner’s request. We decline to find that DLSE attorneys always have an attorney-client relationship with the Labor Commissioner because we can envision circumstances wherein the Labor Commissioner may be directed, or may choose, to engage in conduct that is inconsistent with the statutory mandates imposed on the DLSE in the Labor Code. Under those circumstances, the ethics experts agreed that the DLSE attorney’s duty would be to the entity and not the individual Labor Commissioner.

Commissioner. Thus, we find that, in criticizing the LWDA, Bradshaw, Millan and Rea, appellant was not referring to his client and therefore breached no ethical duty thereto.<sup>14</sup>

Moreover, we find that the allegation that appellant failed to inform his client about the problems he perceived with the emergency regulations cannot be sustained. The evidence established that the LWDA, which was not appellant's client, drafted and promulgated the regulations. Appellant repeatedly expressed his opinion to his DLSE supervisors that the emergency regulations were improper. Stevason testified that she conveyed appellant's concerns, which she shared, with her own supervisors and told appellant she had done so. She further testified that attorneys at appellant's level were not expected to communicate directly with the Labor Commissioner, and that testimony is bolstered by the duty statements for Industrial Relations Counsel IV, Assistant Chief Counsel and Chief Counsel. Even the Department's expert testified that an attorney in appellant's position should be able to rely on the instructions and counsel from his supervisor. We agree that appellant has not breached any ethical obligations.

We must still address, however, the issue of whether appellant's proven conduct constitutes legal cause for discipline pursuant to Government Code section 19572 (m) discourteous treatment of the public or other employees, (o) willful disobedience, and/or (t) other failure of good behavior. Appellant alleges that his speech and conduct are protected by the First Amendment right to free speech.

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<sup>14</sup> Additionally, we conclude that the "duty of loyalty" discussed at length by both experts stands for the proposition that an attorney must avoid actual conflicts with clients and must not reveal clients' confidences and not, as repeatedly offered by the Department's expert, for the proposition that an attorney may not criticize or disparage the client (see, e.g., *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4<sup>th</sup> 525, 552 (permitting attorneys to form labor union and holding that duty of loyalty is not breached by mere showing of antagonism between attorney/employee and client/employer, but whether attorney has permitted antagonism to actually compromise client representation; as long as attorneys continue to represent client competently or faithfully, unionization cannot serve as basis for discipline). The Department did not allege that appellant breached any confidences by sending the emails related to this charge.

Most recently, in the case of *Posey v. Lake Pend Oreille School, et al.*,<sup>15</sup> the Court of Appeals for the Ninth Circuit summarized what the public employee must show to establish a First Amendment retaliation claim. The employee must establish: "(1) the employee engaged in constitutionally protected speech, (2) the employer took adverse employment action against the employee, and (3) the employee's speech was a 'substantial or motivating factor in the adverse action.'"<sup>16</sup>

As the parties in this case do not dispute that the appellant's dismissal was based at least in part on his speech, the only issue in this case is whether appellant's speech was constitutionally protected. A series of United States Supreme Court cases have set out a balancing test for determining whether the First Amendment protects the speech in question. In the seminal case discussing the issue, *Pickering v. Board of Education*,<sup>17</sup> and in the cases that have followed,<sup>18</sup> the Supreme Court has described the balancing test as follows. First, the court must determine whether the speech in question was made on a matter of public concern. In making this determination, the court may consider the content, form and context of the statement.<sup>19</sup>

Next, the court must balance the interest in making the statement against "the interest of the State as an employer in promotion of efficiency of the public services it

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<sup>15</sup> 9<sup>th</sup> Cir. October 15, 2008, No. 07-35188) \_\_\_F.3d \_\_\_[2008 WL 4570616].

<sup>16</sup> *Posey*, 2008 WL 4570616.

<sup>17</sup> (1968) 391 U.S. 563.

<sup>18</sup> *Garcetti v. Caballos* (2006) 547 U.S. 410, 419; *Rankin v. McPherson* (1987) 483 U.S. 378, 384-389; *Connick v. Myers* (1983) 461 U.S. 138; *Pickering v. Board of Education* (1968) 391 U.S. 563, 572-575; *Vincent Ruiz* SPB Decision No. 93-24, pp. 7-11

<sup>19</sup> *Rankin*, 483 U.S. at 384-389.

performs through its employees.”<sup>20</sup> The statement is not to be considered in a vacuum, but the manner, time, place, and context of the speech are relevant.<sup>21</sup>

The Court has also considered “whether the statement impairs discipline by superiors or harmony among coworkers” and whether it has a “detrimental impact on close working relationships for which personal loyalty and confidence are necessary.”<sup>22</sup> In addition, the courts have considered the nature of the responsibilities of the employee within the agency, the extent of their authority, their public accountability, whether the employee is engaged in confidential policymaking and whether the employee serves a public contact role.<sup>23</sup>

The Court has also found that the First Amendment does not require employers to tolerate actions that they reasonably believe may disrupt the office, destroy close working relationships, and undermine the authority of a supervisor.<sup>24</sup> In *Connick*, the Court specifically recognized the necessity for attorneys to have close working relationships with their superiors, especially where those relationships are essential to fulfilling public responsibilities.<sup>25</sup> Further, the Court in *Connick* recognized that employers should not be required to wait until actual disruption of an office or relationships occurs before taking action.<sup>26</sup> In the recently decided *Posey* case, the Ninth Circuit Court of Appeals articulated the burden of the government employer, as

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<sup>20</sup> *Pickering*, 391 U.S. at 568.)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 570-573.

<sup>23</sup> *Rankin*, 483 U.S. at 390-391.

<sup>24</sup> *Connick v. Myers* (1983) 461 U.S. 138.

<sup>25</sup> *Id.* at 151.

<sup>26</sup> *Id.* at 152.

first articulated in *Garcetti v. Caballos*,<sup>27</sup> as establishing “adequate justification for treating [the employee] differently from any other member of the general public.”<sup>28</sup>

If the statements touch on matters of public concern and the government has not established justification for treating the employee differently from any other member of the public, then the final inquiry becomes whether the employee was speaking as a private citizen or public employee. If the speech is within the scope and content of the employee’s job responsibilities, it would not be protected. If the employee speaks as a private citizen, the speech would be protected.<sup>29</sup>

Clearly, the wage/penalty issue was a matter of public concern: the individuals appellant criticized in his emails were high-ranking state officials and the wage/penalty issue was being hotly debated in the labor and employment law community. Balanced against the interest of appellant in speaking out on matters of public concern are the interests of the Department.

Applying the criteria above, we find that the Department certainly had adequate justification for imposing discipline on appellant based on his comments. Given that the Department has charged appellant with pursuing his own agenda, it would be inherently inconsistent to find that appellant was acting in the course and scope of his job duties when he sent the emails in question. On the other hand, it is also clear that the time, place and manner in which appellant made disparaging comments about the LWDA, Bradshaw, Millan and Rea was disruptive to his employer and his employer’s efficient and effective operations. Appellant sent the emails from his state computer during

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<sup>27</sup> (2006) 547 U.S. 410, 418.

<sup>28</sup> *Posey*, 2008 WL 4570606.

<sup>29</sup> *Id.*

business hours, and as the lead contact for public information. Given his extensive history of speaking and acting on behalf of the DLSE, it would be difficult for any member of the public to separate appellant's DLSE-generated email from the DLSE.

Both the manner and means of the communication appellant utilized had not only the potential to damage the close working relationships between the labor community and DSLE, but also to negatively impact the personal loyalty and confidence that necessarily attend the attorney client relationship. The language used by appellant – referring to Rea as “evil,” stating that the named individuals were “arrogant” and “out of control,” that the regulatory process had been “rigged” and was “shameful” and an “outrage” – was disrespectful and accusatory. Moreover, while a verbal communication within the confines of an office may have little impact beyond those present to hear the conversation,<sup>30</sup> the fact that the statements were made in an email, meaning that they could be easily transmitted to a number of people outside the office, increased the likelihood that the statements would have a detrimental impact on the office, appellant's relationships at the office, and the confidence the state placed in appellant's legal services. On these grounds, we find that appellant's statements were discourteous and constituted other failure of good behavior during duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.<sup>31</sup>

**Charge #3 – Email Expressing Desire for a “Good Published DCA Opinion”**

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<sup>30</sup> In *Rankin*, a clerical employee was fired from making an inflammatory statement to a co-worker regarding the current U.S. President's administration. The court noted that the statements were made in a private area of the workplace and thus would be unlikely to discredit the office. In addition the court noted that the clerical employee had limited interaction with her superior who took the adverse action.

<sup>31</sup> Under *Posey*, given that the Department successfully established justification for taking the action it did, we need not address the issue of whether appellant was speaking as a private citizen or public employee.

The Department has charged appellant with breaching the duty of loyalty by opposing the goals of his employer client when, on December 23, 2004, he sent an email to a former DLSE attorney wherein appellant stated that he was hoping for a good appellate court decision finding that section 226.7 additional compensation constituted a wage, so as to “take the wind out of” the effort to promulgate “now-not emergency” regulations supporting the penalty interpretation.

As stated above, we find no authority supporting the Department’s argument that the duty of loyalty prohibits an attorney from expressing support of a position contrary to the client’s goal. Additionally, appellant copied Hipshman and Stevason on the email, and they did not criticize it. Moreover, Dell herself expressed a similar opinion when she issued her April 26, 2005, memorandum to DLSE hearing officers asking them, among other things, to “bear with [her] until such time as a binding appellate decision is issued . . . .” Given these facts, we cannot conclude that appellant was expressing an opinion contrary to that of his client. Accordingly, we find no breach of appellant’s ethical duties.

As with Charge #2, however, we find that appellant’s flippant tone in stating “[s]eems like it would take the wind out of that sail” and discussing the “now-not” emergency was inappropriate. While expressing an opinion contrary to the client may not serve as grounds for discipline by the State Bar, the words used by appellant in this instance constitute other failure of good behavior during duty hours which is of such a nature that it causes discredit to the appointing authority or the person’s employment. Had appellant merely expressed his opinion that, before the new regulations were promulgated, an appellate court decision would be helpful in providing clarification and

support for appellant's (and the DLSE's official) position that the section 226.7 additional compensation was a wage, our conclusion would be different. However, appellant's mocking words, again sent using a DLSE computer, were intended to deride his client's efforts and discredit the Department. We therefore conclude that discipline is appropriate.

**Charge #4 – Seeking Depublication of *Westside Concrete***

The Department charges that when appellant sought the assistance of outside attorneys in seeking depublication of the *Westside Concrete* decision between November 12 and December 9, 2004, he did so with the full knowledge that his client would not approve of his efforts. As a result, the Department charges that appellant breached the duty of loyalty and had a conflict of interest because he took a position in a litigation matter that was contrary to his client's position. The Department also charged that appellant denigrated the Governor when he stated in an email that he was "speaking to persons who will be able to do what is necessary and who don't answer to Arnold." The Department has not charged that appellant breached any attorney-client confidences in sending documents to outside attorneys.

The record establishes that appellant conferred with his supervisor and was instructed to seek the assistance of private attorneys in obtaining depublication of the *Westside Concrete* case. Both appellant and Stevason testified that it was common practice to undertake this approach. Moreover, appellant's efforts were consistent with the public position appellant had taken on behalf of the DLSE at the trial court and in the appellate court and, if successful, would have specifically benefitted his client, Murphy, and other *Berman* claimants who were represented by the DLSE and defending ODAs

based on DLSE opinion letters. The Department had been aware of appellant's similar actions in the lower courts, as the matter had been reported in the significant litigation report, and it was in the DLSE's best interest to have its opinion letters upheld as persuasive authority. We therefore do not find that appellant took a position contrary to that of his client. Rather, after his client informed him that it no longer wanted appellant to pursue the matter, he openly encouraged others to continue to pursue the very same position he had pursued with the client's full knowledge and consent up until that time.

Moreover, as stated above, appellant's client was the DLSE, not the Governor. Because the Governor is a high-ranking state official, appellant had a First Amendment right to criticize him. It is well-known that gubernatorial appointees represent the interests and policy goals of the Governor. While appellant's comment that he was seeking the assistance of persons who did not "answer to Arnold" was disrespectful to the Governor and impugned his integrity, based on the totality of the circumstances we conclude that the charged conduct does not constitute a basis for discipline.

**Charge #5 – Actions in *Murphy v. Kenneth Cole***

The Department generally charges that appellant's involvement in the Murphy case was surreptitious and placed him in conflict with his client, resulting in a breach of his ethical duties to his employer based on the following alleged facts: (1) appellant told Ryu to list him as the attorney for Murphy on the court's mediation statement, but not to list him as an attorney for the Labor Commissioner because the Labor Commission was not a party to the case; (2) appellant told Stevason they were "informal co-counsel" and that DLSE had not appeared in the trial court, leading Rea to opine that there was no conflict of interest with Murphy and that, if there was a conflict, a written waiver would

be necessary; (3) appellant never disclosed his role in the Murphy case to Dell, never sought a waiver from her, never disclosed a conflict to Murphy and did not seek a waiver from him; (4) appellant did not include the Murphy case on the significant litigation report; (5) appellant received a copy of a confidential attorney-client memorandum from Stevason to Dell analyzing the wage/penalty issue and describing the legal weaknesses of the proposed regulations; (6) appellant attended a meeting of private lawyers in litigation over the wage/penalty issue, some of whom were suing Dell, for the purpose of coordinating efforts to obtain an appellate ruling that section 226.7 additional compensation was a wage, but he did not inform his client that he attended the meeting; (7) appellant participated in emails regarding the Murphy appellate brief and possible amicus briefs, without notice to or permission from Dell or his supervisors, and at the time of this meeting, he knew that Dell, the Department and the LWDA believed the compensation was a penalty; and (8) on June 16, 2005, appellant emailed those same attorneys, agreeing with their analysis that the compensation was a wage and expressed support for a federal court decision interpreting the compensation as a wage (the *Tomlinson* decision), knowing that the Department believed it was a penalty and intended to release the *Hartwig* opinion letter. On these facts, the Department charges that appellant failed to represent his client's position in litigation and failed to inform his client of his activities.

The Department's allegations do not reflect the proven facts and circumstances and, therefore, cannot be sustained. First, the evidence establishes that appellant told Ryu not to list him as an attorney for the Labor Commissioner to protect the Labor Commissioner. Appellant specifically told Ryu that he did not want the Labor

Commissioner to “take on the trappings of a party.” The DLSE was clearly listed on the Murphy pleadings as counsel for Murphy and Folberg’s representation letter to Murphy clearly indicates that the DLSE was representing him. As such, every attorney employed by the DLSE was considered Murphy’s representative. The DLSE’s involvement with the Murphy case was a result of the express statutory mandate of the Labor Code, which requires the Labor Commissioner to represent indigent employees in defending ODAs appealed by employers. Moreover, appellant provided to Stevason all of the details of the Murphy case, including the fact that, although the DLSE was “technical co-counsel,” they had not appeared at trial. He clarified to Stevason that the DLSE had not taken part in the trial at all and instead, as was typical with all Hastings clinic cases, had provided only “advice and counsel as needed.” Thus, appellant’s supervisor was fully informed about appellant’s activities relating to the Murphy case and she, as part of an ongoing discussion about conflicts of interest, relayed that information up the chain of command. Furthermore, Rea testified that *Berman* cases were not historically included in the significant litigation report. Additionally, appellant’s meeting and emails with various attorneys related only to the finalization of the Murphy appellate brief and solicitation of amicus briefs in the Murphy case.

As for the charged ethical violations, every action appellant took relating to the Murphy case occurred before the Department changed its official opinion via the designation of the *Hartwig* decision as precedential. Both experts agreed that, even after *Hartwig*, the conflict presented was only positional and positional conflicts do not constitute a true conflict of interest. Appellant’s expert testified that, upon undertaking representation of Murphy, DLSE attorneys owed Murphy the same inviolate fiduciary

duties owed to the DLSE, including, where appropriate, adding at the trial court level additional claims on Murphy's behalf. He testified that, absent a clear representation agreement, the DLSE was not entitled to parcel out those positions it would or would not take on Murphy's behalf. Finally, several DLSE attorneys testified that, before the designation of the *Hartwig* decision as precedential, they were specifically instructed to continue to argue the wage interpretation that was the official DLSE position.

Under these facts, and particularly in light of the nearly year-long, unsuccessful effort of DLSE attorneys to obtain clarification and guidance on their perceived ethical conflict in *Berman* cases involving the wage/penalty issue, and given the paucity of legal authority available to assist government attorneys in these matters, we conclude that appellant's involvement in the Murphy case was not improper and did not violate the Rules of Ethics.

#### **Charge #6 – Providing Federal Court Citation to DLSE Hearing Officers**

The Department charged appellant with undermining Dell when he, without informing Dell and in response to her April 26, 2005, memorandum rescinding the abeyance policy for *Berman* hearings involving the wage/penalty issue, forwarded to certain DLSE hearing officers the citation to the *Tomlinson* case in an effort to augment Dell's factors for consideration with a case supporting the wage interpretation. Dell testified that she had intentionally omitted case citations from her memorandum.

The evidence proves that one of appellant's job duties was to provide legal advice and guidance to DLSE hearing officers and the *Hartwig* decision had not been

issued on the date that appellant sent the case citation. Moreover, Dell's memorandum specifically stated that her list of considerations was not exclusive and the memorandum included a description of a tentative court ruling but did not include a description of the *Tomlinson* holding, which was the only instructive legal authority on point at that time. Further, appellant expressly informed the hearing officers that the citation was not binding, and his email was not discourteous in any manner. We therefore find that the proven facts do not justify discipline under any of the charged bases.

**Charge #7 – May 31, 2005, Memorandum**

The Department alleges that appellant sent to individuals outside of the DLSE, including Cadell, who was suing Dell, a memorandum and accompanying email from Dell marked "Internal Use Only," wherein Dell withdrew four opinion letters relating to partial day absences. The Department charges that appellant, believing the memorandum constituted an underground regulation and public record, was under no legal obligation to disclose the document, nor did he inform Dell that he had done so, or inform her that he felt that the memorandum was an unlawful vehicle for announcing new policy. The Department further charges that appellant breached the duty of loyalty he owed to his client because, in his email accompanying Dell's memorandum, he disparaged her, Bradshaw, Millan, and Rea by accusing them of acting in secret and responding exclusively to the needs of management attorneys. Specifically, appellant wrote that the named individuals were engaged in "government by stealth, with some old fashioned book burning thrown in." Appellant is also charged with giving legal advice to Cadell. Finally, the Department charged that, after the plaintiff in the *Conley*

case lost, appellant wrote an email to Conley's lawyer's assistant, wherein appellant stated that he thought the court wrongly decided the *Conley* case.

As discussed above, we disagree that the duty of loyalty prohibits client disparagement, denigration, or criticism.<sup>32</sup> Additionally, appellant's comments regarding the *Conley* decision do not, in our view, constitute a breach of any ethical duty to his clients, as neither Dell nor the DLSE was a party to that case. Moreover, appellant's comments about the decision were made after it was decided, when it was impossible for him to affect the outcome of the case.

We further find that appellant's actions in releasing a public record, even one marked "Internal Use Only," did not constitute a breach of his duty of confidentiality.

Appellant testified without contradiction that he had been asked, weeks before the memorandum was issued, to send to certain outside attorneys all public records relating to any DLSE interpretation of the certain laws in question and that he told Stevason he had produced the memorandum. Appellant believed that Labor Code section 1198.4<sup>33</sup> required him to release the memorandum. As a matter of law, there is nothing confidential about a public record unless that record is exempt from disclosure pursuant to statute. The Department has not alleged that the memorandum in question was exempt from disclosure.

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<sup>32</sup> Assuming, *arguendo*, that the duty of loyalty prohibits disparagement, we note that appellant's disparaging comments are primarily directed at non-clients, except, arguably, the Labor Commissioner. Appellant had no duty to individuals who were not his clients.

<sup>33</sup> Labor Code section 1198.4 provides: "Upon request, the Chief of the Division of Labor Standards Enforcement shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. Copies of such policy statements shall be furnished to the Industrial Welfare Commission."

We also do not find that appellant was required to inform the Commissioner that he was releasing her memorandum, as doing so was consistent with a statutory mandate. Appellant also had a good faith belief that his supervisor had approved the release of the memo and had conveyed to Dell appellant's and Stevason's shared belief that the document was not confidential.

Finally, we cannot conclude that the evidence supports the contention that appellant provided legal advice to Cadell. Appellant testified that Cadell, given his distinguished career, "is the last person in the world who would need advice" on the APA. We do not deem as "legal advice" the statement that an action violated the APA when made to attorneys with experience in government law. Moreover, Cadell's lawsuit concerned a purported misuse of public funds related to the promulgation of videos in support of certain positions taken by the Department. The suit had nothing to do with the APA.

Based on all of the evidence, we do not believe that the charged conduct constituted an ethical violation. However, as discussed above, although appellant's First Amendment right entitles him to criticize his government employer, that right is not entirely unfettered. Again, the time, place and manner of appellant's comments were inappropriate. Using his DLSE email address, appellant accused the named individuals, including his client Dell, of engaging in star chamber proceedings for the benefit of employers, of operating in secret, and of "government by stealth, with some old fashioned book burning thrown in." The tone of appellant's comments, made in a manner that could be forwarded to unlimited citizens subject to DLSE authority, was unduly harsh, divisive, disdainful and disparaging and could only reflect poorly on the

Department. We therefore conclude that the proven conduct constitutes discourteous treatment of others and other failure of good behavior.

**Charge #8 – Failure to Inform Dell About Lawsuit**

The Department has charged appellant with failing to inform Dell about Cadell's lawsuit against her when he received it on March 22, 2005. This charge cannot be sustained.

The uncontradicted evidence proves that appellant told Hipshman about the lawsuit as soon as he received it and she told him that she already knew about it, as she had just been in Rea's office while the process server was waiting to serve him. Additionally, Dell testified that she knew about the lawsuit because her co-defendants had told her about it. Moreover, the Department's ethics expert testified that an attorney should be able to rely on his supervisor's instructions and information provided by the supervisor. It is unreasonable to expect that appellant, whose job description does not require him to report directly to the Labor Commissioner, should have personally informed Dell about the lawsuit when his supervisor, whose job description does require her to report directly to the Labor Commissioner, already knew about it.

**Charge #9 – Speech at Barrister's Club**

The Department charged appellant with insubordination, willful disobedience, discourtesy, and other failure of good behavior for speaking at the Barrister's Club on July 20, 2005, after being expressly told by Dell not to do so.<sup>34</sup> This charge raises two issues.

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<sup>34</sup> The Department also charged that it was "ethically impossible" for appellant to speak in his private capacity on a matter of DLSE enforcement. The Department has failed to prove that allegation, and we fail to see how a state attorney, speaking on a matter of public concern relating to the work of his or her public employer, is ethically

The threshold issue regarding this charge, that must be resolved to determine whether appellant was willfully disobedient, is whether Dell was entitled to issue a prior restraint on appellant's First Amendment right to speak – that is, whether Dell's order not to speak was one she was entitled to give and have obeyed.

The United States Supreme Court has held that, when the government imposes restrictions on employee speech on matters of public concern, the government has the burden of justifying the adverse employment action and ,"[B]ecause prior restraints deter an enormous quantity of speech before it is uttered, based solely on speculation that the speech might threaten the government's interests," the Supreme Court has held that "the government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government."<sup>35</sup> In addition, the Court has held that the *Pickering* balancing test discussed above applies to prior restraint cases, but that the government must make a stronger showing when it seeks to restrain speech before it is uttered.<sup>36</sup>

Given that we have concluded that appellant sought to speak on matters of public concern, the issue presented is whether Dell, in rescinding her prior assent to appellant addressing the Barrister's Club, had "adequate justification for treating

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prohibited from doing so, as long as the attorney does not reveal a confidence or otherwise violate the rules of ethics. We agree with appellant's expert that public employees, including judges, frequently speak in their private capacities and that such speeches are permissible provided it does not jeopardize a pending case or reveal attorney-client confidences. We therefore conclude that the Department proved no ethical violation as a result of appellant's speech.

<sup>35</sup> *United States v. National Treasury Employees Union* (1995) 513 U.S. 454, 466-468.

<sup>36</sup> *Id.*

[appellant] differently from any other member of the general public.”<sup>37</sup> We believe that she did.

The responsibility of the employee, the extent of their authority and their public accountability, are all valid considerations in assessing the “adequacy of the justification.” As noted in *Rankin*, “Where an employee serves no confidential policymaking or public contact role, the danger to the agency’s successful functioning from that employee’s private speech is minimal.”<sup>38</sup> Concomitantly, an employee who has, or is viewed as having, policymaking responsibilities and who has a public role in their employment, must be vigilant in insuring his communications expressing personal opinions on work-related matters that may be different than those of the employer cannot be interpreted as reflecting the views of the employer.<sup>39</sup>

In this case, Dell knew that appellant was highly regarded in the employment law community and she knew that he was, for all intents and purposes, “the face of the DLSE.” Dell was also aware that the audience would be comprised of the regulated community. The DLSE had just undertaken a formal change in policy and begun interpreting section 226.7 additional compensation as a penalty. Dell believed it was important for DSLE to present an unbiased, explicit explanation about the penalty interpretation to the practitioners working in that area of law. She knew that appellant was strongly opposed to the penalty interpretation.

Under the circumstances present here, we find that, it was reasonable for Dell to determine that, because of his opposition to the penalty interpretation, appellant was

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<sup>37</sup> *Garcetti*, 547 U.S. at 418.

<sup>38</sup> *Rankin*, 483 U.S. at 390-391.

<sup>39</sup> *Id.*

incapable of presenting the DLSE's new position in a manner that did not invite controversy. At a time when the regulated community needed information about the DLSE's new policy, Dell believed that appellant was not the appropriate person to provide the information about DLSE's new policy because, given appellant's previous policymaking and then current public contact roles, the audience would find it virtually impossible to separate appellant's statements on wage and hour issues from his official role as counsel for the DLSE.

The United States Supreme Court has "given substantial weight to government employers' reasonable prediction of disruption, even when the speech involved is on a matter of public concern."<sup>40</sup> Dell was concerned that the very lawyers appellant would address at the event were those most likely to seize on appellant's opinion as a basis to challenge the DLSE. As such, Dell legitimately feared that appellant's remarks would throw gasoline on a smoldering fire. Based on what she knew about appellant's recent pattern of conduct regarding Department's policies, Dell reasonably believed that appellant's appearance would disrupt the regulated community, thereby inviting confusion, criticism and litigation.

Instead of abiding by Dell's direction that he decline the invite to speak, appellant sought permission from his supervisors to attend in his private capacity, pitting their authority against that of the official to whom they directly reported and generally undermining Dell. Dell, knowing that appellant had engaged in conduct calling his loyalty into question, believed that appellant's appearance would have a further detrimental impact on their close working relationship, a relationship in which personal

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<sup>40</sup> *Waters v. Churchill* (1994) 511 U.S. 661, 673.

loyalty and confidence are essential. Dell reasonably concluded that appellant's conduct was causing dissension within the office and that his speech at the Barristers' Club would undermine her authority.

For the above reasons, we find that the DLSE's interests in its effective and efficient operations outweighed both appellant's interest in speaking and the audience's interest in hearing appellant speak on July 20, 2005. We find that Dell was entitled to order appellant not to speak at the Barrister's Club and that appellant's decision to defy that order constituted willful disobedience, discourtesy, and other failure of good behavior. We find no basis for discipline for insubordination, as the evidence did not establish that appellant's conduct was mutinous or contumacious.

We next turn to the second issue raised by Charge # 9: whether appellant may also be disciplined based on the contents of the speech he gave at the Barrister's Club event? As noted above, appellant's statements clearly pertained to a matter of public concern. Yet we find, for those reasons set forth above, that the Department established "adequate justification for treating [appellant] differently from any other member of the public." Appellant's statements regarding DLSE business were admittedly made with the intention of soliciting laughter from the audience at the expense of those responsible for promulgating the emergency regulations. Again, given appellant's responsibilities and position within the agency, and the nature of the audience to whom he spoke, appellant's speech had the potential to undermine the mission of DSLE, thereby undermining its credibility.

Moreover, we find that appellant, despite his claim that he was speaking as a private citizen, failed to ensure that he did so. Although appellant was introduced as

speaking in his private capacity, he did not exercise due care to avoid speaking on behalf of the DLSE. Given that appellant told Dell he would speak in his private capacity, it was incumbent upon him to do so. Nevertheless, appellant spoke on behalf of the DLSE four times, telling the audience that “we do send out” notification of investigations, that “we have interpreted” certain language in a wage order in a particular manner, that “we actually . . . we’ve encountered many cases where [employers intentionally undertake actions to avoid complying with law]” and “we had a case actually . . . against a large employer [that was not providing 30-minute meal periods].” As a high-ranking DLSE attorney speaking in his private capacity to people impacted by DLSE regulations, appellant had a duty to ensure that he was not perceived as speaking on behalf of his employer. Appellant did not fulfill that duty.

Additionally, despite his knowledge and the public perception of him as an authority on wage and hour law, appellant failed to provide good public service when he chose to ignore and not discuss the *Hartwig* decision. Given that appellant appeared at times to be speaking on behalf of the DLSE, his decision to gloss over the newly-issued precedential decision was a disservice to the regulated public.

Finally, appellant’s comments, like similar remarks giving rise to other charges against him, were intended to undermine and mock those responsible for enforcing and interpreting the law. They served no purpose but to create a divide within the DLSE and to antagonize those DLSE and Departmental employees with whom appellant disagreed over the interpretation of section 226.7. On these facts, we conclude that appellant’s statements were not protected by the First Amendment and constituted discourtesy and other failure of good behavior.

### **Charge #10 – Speech at Teamster’s Seminar**

Although the Department charged that appellant made the same speech before the Teamsters that he had made at the Barrister’s Club event, and that appellant failed to inform his client that he had been invited to speak, intended to speak or had spoken, the Department put forth little evidence<sup>41</sup> relating to this charge and did not address it at oral argument before the Board or in its brief. Appellant testified without contradiction that he told Stevason and Hipshman about the speaking invitation and received permission to take a vacation day to participate. He also testified that he spoke in his private capacity and had no control over how he was listed in the program for the event. Based on the proven evidence, we conclude that this charge was not substantiated and cannot serve as a basis for discipline.

#### Penalty

We turn next to the issue of the appropriate penalty under all the circumstances. When performing its constitutional responsibility to review disciplinary actions,<sup>42</sup> the Board is charged with rendering a decision that is “just and proper.”<sup>43</sup> The Board has broad discretion to determine a “just and proper” penalty for a particular offense, under a given set of circumstances.<sup>44</sup> The Board’s discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly),<sup>45</sup> the California Supreme Court noted:

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<sup>41</sup> Department’s Exhibits 40 and 41, the invitation to speak and the program, constituted all of the evidence submitted relating to this charge.

<sup>42</sup> Cal. Const. Art. VII, section 3(a).

<sup>43</sup> Government Code section 19582.

<sup>44</sup> See *Wylie v. State Personnel Board* (1949) 93 Cal.App.2d 838.

<sup>45</sup> (1975) 15 Cal.3d 194.

While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations)<sup>46</sup>

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of relevant factors to assess the propriety of the discipline imposed by the appointing power. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.<sup>47</sup>

The Board's statutory authority to modify or revoke an adverse action is specified in Government Code section 19583, which provides, in relevant part:

The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action....

Appellant, despite being one of the highest-ranking attorneys in the Department, engaged over several months in a course of conduct that was antagonistic towards his superiors. He not only showed disdain for their policy goals, he showed disdain for them as human beings. He was repeatedly discourteous in the manner in which he publicly criticized them and he defied at least one legitimate order intended to minimize the harm appellant was doing both inside and outside the Department.

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<sup>46</sup> 15 Cal.3d at 217-218.

<sup>47</sup> *Id.*

Moreover, because he was one of the highest-ranking attorneys in the Department, appellant's conduct calls into question his judgment. Having served under several administrations, appellant should have been aware that his ability to provide unbiased, reasoned advice relating to oftentimes highly contentious and sensitive matters is what makes a high level government attorney valuable to his or her client. Particularly in areas of law historically wrought with tension and mistrust, as in matters involving labor and management, it is critical that attorneys advocate zealously while exercising the diplomacy and judgment necessary to resolve polemical issues. While it is sometimes difficult in government work to separate politics from policy, it is incumbent on the government attorney to remain professional, regardless of the policy or the politics involved. Appellant failed to do so.

Under these circumstances, it is inconceivable that the Department could ever trust appellant to serve in its inner circle, where trust and confidence are essential not only to the attorney-client relationship, but also to providing public service. As a result of his conduct, appellant has permanently undermined the Department's confidence that it could turn to him for trusted advice. He has irreparably damaged his professional relationships with high-ranking individuals working both within and outside of the Department by his failure to display professional courtesy and civility towards them, by mocking them in emails and while speaking at public events on matters within the Department's purview. As a result of the irreparable harm appellant has done to the necessary trust that must attend the attorney-client relationship, we find that dismissal is the only appropriate penalty.

## CONCLUSION

The Department has met its burden in proving by a preponderance of the evidence that appellant's conduct constituted discourteous treatment of the public or other employees, willful disobedience and 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. Although we find that the Department has not proven the legal causes for discipline of inefficiency, inexcusable neglect of duty, or insubordination, the facts establishing the remaining legal causes justify the penalty of dismissal.

## ORDER

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

The dismissal of Miles Locker from the position of Industrial Relations Counsel IV, with the Department of Industrial Relations is sustained.

## STATE PERSONNEL BOARD

Richard Costigan, Vice President  
Patricia Clarey, Member  
Anne Sheehan, Member

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President Sean Harrigan and Member Maeley Tom, dissenting in part and concurring in part:

We respectfully disagree with the majority's decision relating to appellant's speech at the Barrister's Club and the imposition of dismissal as the penalty in this case.

We agree that the majority has relied on the appropriate legal authorities in its analysis of appellant's "free speech" defense and that the First Amendment protects appellant's right to criticize his government employers on matters of public concern, so long as he does so outside the scope of his employment duties and in a time, place and manner that is not disruptive to the employer or the employer's efficient and effective operations<sup>48</sup> Our analysis of those same legal principles as applied to the specific facts of this case, however, leads us to a different conclusion as to whether appellant should be disciplined for his conduct and speech and, if so, the appropriate level of discipline.

With regard to the charge of willful disobedience based upon appellant's attendance at and participation in the Barrister's Club meeting despite Dell's direction to the contrary, we would find appellant's conduct and speech protected by the First Amendment when he told his employer that he would take vacation time to attend the meeting and would speak in his private capacity. Unlike the majority, we do not believe that the Department established adequate justification for treating appellant differently from any other member of the general public who cared to speak out regarding the current policies of DSLE. In *Pickering*, the Supreme Court noted that it is essential that those who are most likely to have informed and definite opinions on matters of public concern are able to speak out freely on those matters without fear of retaliatory

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<sup>48</sup> See p. 28, footnote 15, *supra*

dismissal.<sup>49</sup> Clearly, appellant was informed and wanted to share his expertise with the members of the Barrister's Club. Although appellant's conduct and statements may have had an unintended detrimental impact on the close working relationship he had with the DLSE, we do not believe the statements were such as to justify discipline. The

Department has not shown that appellant's statements at the Barrister's Club in any way hampered any public function.

Undoubtedly, Dell and Rea did not want appellant to speak at the Barrister's Club because they did not want him to publicly disagree with their interpretation of section 226.7. Appellant, being a seasoned attorney, had a good faith belief that his First Amendment right entitled him to speak in his private capacity on matters of public concern. He consulted a private attorney to ensure his belief was well-grounded. Despite the brief period wherein the DLSE imposed restrictions on attorneys' ability to speak in their official capacities, the Department had never attempted to restrict lawyers from speaking in their private capacities. Indeed, appellant had spoken in his private capacity at the same event a year earlier.

Dell did not tell appellant that she was concerned he would create confusion in the regulated public and further undermine their working relationship. Although Dell testified that she no longer trusted appellant because she knew he had sent the *Tomlinson* case citation to DLSE hearing officers and disclosed to them her memo marked "Internal Use Only," she did not convey those concerns to appellant. She did not express her view to appellant that she feared appellant's speech might result in

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<sup>49</sup> *Pickering*, 391 U.S. at 572.

actual harm to the DLSE. Instead, she told him only that individuals above her thought that there might be a conflict for him to speak while *Corrales*, the lawsuit to compel Dell to hear *Berman* cases held in abeyance, was pending. Despite appellant's requests that she do so, Dell never conveyed her real reasons for imposing a prior restraint on appellant's ability to speak, nor did she respond to appellant's request that she do so.

As noted by the *Rankin* court, "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."<sup>50</sup> In this case, the Department ordered appellant, under pain of discipline, not to speak on a matter of public concern, even when he agreed to do so in his private capacity and on his own time, simply because they knew he might express disagreement with the Department's policy.

We find that the Department has failed meet the higher threshold established by courts in order to justify a prior restraint on speech. Appellant was speaking in his private capacity, on his own time, on a matter of public concern. The fact that he was well-regarded for his expertise and experience in the area of wage and hour law does not serve as justification for restricting him from speaking out in a public forum. The Department has failed to present any evidence of actual or potential disruption to the state's business as a result of appellant's speech. We do not believe that Dell was

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<sup>50</sup> *Rankin*, 483 at p. 384.

entitled to order appellant not speak even in his private capacity on his day off.<sup>51</sup> On that basis, we would dismiss the charge of willful disobedience.

The next issue is whether appellant may be disciplined for discourtesy or other failure of good behavior based on the content of his speech alone. Again, the *Garcetti*, *Pickering* and *Rankin* analyses discussed above come into play: The state may only discipline a public employee for the content of speech made about matters of public concern when the statements are made in the course of the employee's employment duties or in a time, place and manner that is disruptive to the employer or the employer's efficient and effective operations.

Clearly, the wage/penalty debate was a matter of public concern. The issue being discussed by appellant's panel had been hotly contested in the industry and in the press. As appellant's comments were made on his own time, the only issue remaining is whether they were uttered in a time, place and manner that was disruptive to the Department's efficient and effective operations. Appellant was speaking to a small group of legal practitioners interested in the topic and the comments he made were not particularly antagonistic. The tape and transcript reveal that, in many cases, appellant provided advice to both employees and employers. He spoke primarily of the history of the wage/penalty issue, specifically stating that he could not opine as to what would happen in the future, as he was not a policymaker. His comment that "someone must have seen an emergency," when read in context, is neither offensive nor discourteous. When the audience laughed, he said "no, this is all true. I'm just giving you the facts."

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<sup>51</sup> We disagree with the majority that the fact that appellant misspoke during his speech, using the word "we" when referring to the Department or DLSE rather than "the Department" or "DLSE," converted the speech into a speech made in appellant's public, as opposed to private, capacity.

Moreover, appellant, speaking in his private capacity, was not obligated to promote the Department's position.

Because we find that appellant had a First Amendment right to speak in his personal capacity and that Dell was not entitled to order him not to do so, and that the content of the speech was for the most part harmless, we conclude that the Department has not proven conduct sufficient to justify discipline, and we would dismiss Charge #9.

Despite our conclusions regarding appellant's speech at the Barrister's Club, we agree with the majority that appellant has used poor judgment in engaging in a public course of conduct displaying unbridled contempt for his superiors and their policy goals. We concur that such unprofessional conduct has undermined the Department's ability to trust appellant. The Department's concerns that appellant may not exercise fair, unbiased and reasoned judgment regarding some of the DLSE's most sensitive matters, are understandable, as is the Department's desire that appellant, at least for the present, not serve as the lead attorney for public inquiries and legislative matters.

We believe, however, that dismissal is unduly harsh under all the circumstances. Significantly, applying the factors in *Skelly* as discussed by the majority, we do not believe that the record contains any evidence that appellant's conduct resulted in actual harm to the public service. Also of note is the fact that appellant has an unblemished and lengthy record of state service. Additionally, he had a good faith belief that the First Amendment protected his right to speak in his private capacity on a matter of public concern. Moreover, given that appellant has expressed remorse for his most egregious comments, and that Dell, the only individual client involved in this case, is no longer the Labor Commissioner, we believe that the likelihood of recurrence is minimal.

We would impose a 90 days' suspension and demotion to Industrial Relations Counsel III to impress upon appellant that, given his role as the Department's counsel and need to maintain the trust of his client, he needs to be more judicious in his comments, especially those made in emails. Such a penalty would allow appellant to continue to utilize his considerable knowledge and experience for the benefit of the Department while at the same time allowing the Department to limit his independence, public contact or contact with high level policymakers within the Department.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 3, 2008.



Suzanne M. Ambrose  
Executive Officer  
State Personnel Board