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NO. 34531-5-II
IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DARRELL J. HENN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

ORIGINAL

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR AND ISSUES

The Personnel Appeals Board (PAB) and the trial court erred by finding or concluding:

1. That the termination could still be affirmed, even though the employer's claim that Mr. Henn had committed intentional misconduct was rejected. Issues related to this assignment of error are whether the employer was required to prove the charges relied upon in support of the termination (Argument 1) and whether the PAB and the trial court can substitute their judgments for the employers and uphold the termination on grounds other than what was relied on by the employer (Argument 1).

2. That the termination could still be affirmed, even though the employer's claim that Mr. Henn was guilty of gross misconduct was rejected. Issues related to this assignment of error are whether the employer was required to prove the charges relied upon in support of the termination (Argument 1) and whether the PAB and the trial court can substitute their judgments for the employer's and uphold the termination on grounds other than what was relied on by the employer (Argument 1).

3. That the termination could still be affirmed following remand based on the PAB's finding/conclusion that Mr. Henn's conduct was "egregious" misconduct, a phrase which is synonymous with "gross misconduct" which had been rejected by the trial court. Issues pertaining

to this assignment of error are whether the employer was required to prove the charges relied upon in support of the termination (Argument 1); whether the PAB and the trial court can substitute their judgments for the employer's and uphold the termination on grounds other than what was relied on by the employer (Argument 1); whether the PAB could justify the termination on remand by finding/concluding that Mr. Henn's conduct was egregious; and whether affirming the termination based on the PAB's finding/conclusion that Mr. Henn's conduct was egregious was contrary to the law of the case and/or was arbitrary and/or capricious (Argument 1).

4. That the employee's conduct constituted willful violation of public personnel rules. The issue pertaining to this assignment of error is whether there was sufficient proof of such violations (Argument 2).

5. That the employee's actions constituted neglect of duty. The issues pertaining to this assignment of error is whether there was sufficient proof to support each such finding (Argument 2).

6. That termination was appropriate under the facts actually proved in this case. The issue pertaining to this assignment of error is whether termination is in fact, an appropriate sanction given the proven matters in this case (Argument 4).

B. STATEMENT OF THE CASE

I. Statement of Relevant Facts.

Mr. Henn was hired by DSHS on April 2, 1996. (RP 245) Up until the disciplinary action involved in this case, his record was exemplary and he was a highly respected member of the organization. No previous disciplinary action of any kind had ever been taken against Mr. Henn. (RP 741, 742, 868) (The transcript and exhibits from the PAB hearing will be referenced to in this brief as the report of proceedings (RP).)

On April 16, 2002, a referral was made to the Spokane office regarding the alleged abuse of three children, Emylei, Hannah and Christian. (RP 166) Emylei, in particular, had been seriously abused and Emylei's mother, Julie, had been taken away to jail. (RP 167) Before Julie was taken to jail, she advised the police officers that Earl, Hannah and Christian's father, had sexually molested Emylei approximately one year earlier and that she did not want Emylei left alone with Earl. This information was reported to the DSHS intake worker. (RP 167, 171) Social worker Heather Hamasaki was assigned the case. (RP 166)

On April 17, 2002, Ms. Hamasaki advised Earl that Julie had reported that he had sexually abused Emylei. (RP 175) On April 22, 2002, Ms. Hamasaki met with Julie in jail, but did not interview her with respect to the sexual abuse allegation. (RP 177)

On or about April 24, 2002, it was determined that Emylei had Native American ancestry. As a result, a decision was made to transfer Emylei's case to the Indian Child Unit. By that time, the Shelter Care hearing was completed. Kathy Picard was the supervisor of the Indian Child Unit. She was also Mr. Henn's supervisor. She assigned Emylei's case to Mr. Henn. Ms. Picard believed that the investigation had been completed by Ms. Hamasaki. (RP 113) No case transfer staffing was done whatsoever. This split child situation was highly unusual. Neither Mr. Henn nor Ms. Hamasaki had ever been faced with a similar situation. (RP 633, 723) There were no policies which dealt with such a situation. (RP 398) Mr. Henn's directive was to work on placement of Emylei with her father. Mr. Henn was not given any directive to further investigate the sexual abuse allegation. (RP 113) Ms. Hamasaki, while she was still involved in the case, was advised that Emylei was to be interviewed by Karen Winston, a Child Interview Specialist. Ms. Hamasaki had retained jurisdiction over Hannah and Christian, Earl's children. And she knew that Earl had been accused by Julie of having sexually molested Emylei.

Mr. Henn attended part of the Karen Winston interview. He then had to appear in court. Sometime later, he went by Ms. Hamasaki's desk and advised her of his observations of Emylei. (RP 114) The report then came in on May 7, 2002. In that report, Emylei reported that Earl had

touched her in her crotch area over her clothes. (RP 205) All witnesses with knowledge expressed that Ms. Winston is a very highly respected interviewer and investigator. Ms. Winston made no recommendation regarding the alleged touching. (RP 207)

Following receipt of the report, Mr. Henn made the point of going by Ms. Hamasaki's desk to advise her the report had come in. She was on the phone at the time. It was very unusual for Mr. Henn to come by her desk. (RP 643-645) He advised her that the report came in and she believes he said something to the effect that the report was "interesting reading". (RP 116)

Ms. Hamasaki did not review the report. She admitted that she had an ongoing concern regarding the sexual abuse allegation, but she did not review the report. Her explanation for this was as follows:

I think there was ongoing concern, but I also knew at that time that all of Earl's contact with his children was supervised, so I didn't have any real pressing concern. I was going to leave the investigation to the police.

(RP 607)

By July 16, 2002, Ms. Hamasaki had still not reviewed the report, even though she believed the sole issue being addressed by Karen Winston was the alleged sexual abuse of Emylei by Earl. (RP 631)

On July 16, 2002, a fact finding hearing occurred to determine if Earl would receive unsupervised visitation. Ms. Hamasaki argued against that result based on other factors, but because she had not reviewed the Winston report, she did not address the sexual abuse allegation. As a result, Earl was granted unsupervised visitation with his very young children. (RP 608) There was never any claim or evidence that Earl had sexually abused either of his children.

Thereafter, Mr. Henn was reviewing Ms. Hamasaki's Individual Service and Safety Plan (ISSP) because the mother was the same in the two cases and he observed that Ms. Hamasaki had not made note of Ms. Winston's report. He called her and asked her about that. She thereafter claimed to Ms. Picard that Mr. Henn had withheld information. Ms. Picard had not reviewed the referral and did not know that the information was contained in the referral. And Ms. Picard was not told that Mr. Henn had gone by Ms. Hamasaki's desk to advise Ms. Hamasaki that the report was in and that it was "interesting reading". As a result, Ms. Picard issued the first Conduct Investigation Report (CIR) claiming that Mr. Henn had withheld information from Ms. Hamasaki. (RP 108)

At the same time, Ms. Picard served a second CIR related to a 1997 assault 2 conviction of Emylei's father, Michael.

Initially the fact of the felony assault was discovered by Heather Hamasaki. The assault occurred in 1997 and there was never any indication it involved children. Ms. Hamasaki interviewed him about the assault on April 22, 2002. (RP 177)

When the case was transferred to Mr. Henn, he also asked Michael about the assault. He got the impression it was like a “barroom brawl”. He reported this information to his supervisor. (RP 713)

Thereafter, Mr. Henn was told to obtain a copy of the police report. He was in the process of doing so when he went on vacation on or about July 26, 2002. When he returned from vacation on August 6, 2002, he was provided with a CIR and told not to do anything further with respect to his cases. (RP 732)

On June 24, 2002, a referral was made to DSHS regarding Gage, a 14 month old child. (RP 212) Gage’s mother, Amanda, was staying with her two children at a motel. The referent was the child care provider for Nolan and Gage. The referent advised that Amanda had been seen kneeling Gage and knocking him to the ground. (RP 213)

Mr. Henn proceeded to conduct his investigation. He made sure the child was evaluated by appropriate medical personnel. He interviewed the police officer. He attempted to interview the witness who allegedly

observed the mother knee the child. (RP 133-134) He was unable to do so.

Because of the allegations, a Child Protective Team (CPT) evaluation occurred and the CPT team was fully advised as to the issues in the case, including the claim that Gage had been kneed in the head. (RP 221)

The CPT recommended the child be returned to the mother, if a previously ordered long bone scan was negative. The scan was in fact negative and the child was returned to the mother with agreed upon conditions. (RP 222)

While Mr. Henn was on vacation, further problems developed. Upon his return, he received a third CIR, this time alleging he had not performed a proper investigation. (RP 140) No details were provided and up through the CPT, and the return of the child to the mother, no one claimed that anything further was necessary.

The final incident involved a child by the name of Fernando. This was a non-emergent referral by a healthcare provider who wanted to see Fernando. Mr. Henn made sure that Fernando was seen by his doctor. (RP 225-229; 154)

Mr. Henn was then on vacation and upon his return, he was advised that he was to no longer work on his cases. He advised his

supervisor of the need to work on his critical cases, including Fernando's case. The supervisor did not follow-up. And then on August 16, 2002 or so, the mother took Fernando to the hospital and another referral was made. Mr. Henn received his fourth and final CIR. (RP 152)

II. Relevant Procedural History

Following the issuance of the CIR's and further investigation, Mr. Henn was terminated. He appealed the termination to the Personnel Appeals Board (PAB). The hearing in front of two members of the board took place on January 21 and 22, 2004 and May 4 and 5, 2004.

The employer (DSHS) took the position from the outset of the case (RP 233) that Mr. Henn was somehow guilty of what the employer claimed was "intentional incompetence". This was the employer's theme throughout the case. (RP 852-859; 872)

Following the hearing, the PAB issued its findings of fact, conclusions of law and order of the Board.

As one of the conclusions of law (Conclusions of Law 4.11) the PAB stated as follows:

. . . In coming to our conclusion, we give no weight to the appointing authority's testimony that Appellant's acts were deliberate since that was not a charge in the termination letter . . .

Mr. Henn thereafter timely appealed this matter to Thurston County Superior Court. Mr. Henn took issue with the adverse findings and conclusions. All such allegations of misconduct, except those related to the claim of gross misconduct, continue to be at issue on appeal.

The matter was heard by Judge Paula Casey on March 11, 2005. Following the hearing, Judge Casey issued a letter opinion wherein she specifically rejected the PAB's findings/conclusions that Mr. Henn's conduct constituted gross misconduct. Judge Casey remanded the matter to the PAB for further proceeding to address whether termination was still appropriate.

On remand, the PAB gave the parties the opportunity to submit further evidence. No further evidence was produced.

On or about May 4, 2005, the PAB issued its order of the Personnel Appeals Board following remand from Superior Court. In that order, the PAB once again affirmed the employer's decision to terminate Mr. Henn and justified its decision in its finding of fact and conclusions of law 3.5 as follows:

. . . Appellant's failure to perform his duties with the primary objective of protecting vulnerable children was egregious and termination will deter other social workers from disregarding the department's requirements regarding child abuse and neglect investigations.

Mr. Henn thereafter timely appealed this matter to Judge Casey. On January 11, 2006, Judge Casey issued the supplemental letter opinion upholding the termination although indicating at the same time that she would not have terminated Mr. Henn.

Mr. Henn thereafter duly filed his notice of appeal with this court. Mr. Henn continues to take issue with the remaining adverse findings and conclusions. The orders by the PAB literally contain in excess of 100 individual findings or conclusions. Those adverse findings and conclusions are contested. (See App. 1)

C. ARGUMENT

1. The PAB and the Court erred by deciding the case on grounds different from those charged and proven by the employer.

WAC 358-30-170 sets forth the burden of proof requirements applicable to this case. Specifically the WAC provides in pertinent part as follows:

At any hearing on appeal from a . . . dismissal . . . the appointing authority shall have the burden of supporting the charges upon which the action was initiated . . .

See also *In re Smith*, 30 Wn. App 943, 639 P.2d 779 (1982) (Civil Service Commission is not authorized to uphold a discharge on grounds other than those advanced by the employer).

For reasons unknown to the employee, the employer did not disclose the true reason behind the employer's decision to terminate Mr. Henn until the hearing began before the PAB on January 21, 2004.

At that time, the employer, through its counsel, revealed that Mr. Henn was alleged to be guilty of intentional incompetence. (RP 233)

The appointing authority, Mr. Ken Kraft, thereafter testified at length regarding the charge of intentional incompetence and the role that played in his decision to terminate Mr. Henn. Mr. Kraft first testified that he learned of the claim very early on in the investigation. (RP 851). He further testified that he informed Ms. Fenske (the person assigned the responsibility to investigate three of the CIR's) and Mr. Nelson and Mr. Abbey (two of his subordinates) of the allegation. (RP 855, 858) And yet this claim cannot be found in any of the employer's supporting documents. It is not found, and admittedly so, in the CIR's. (RP 857) It is not contained in the termination letter. It is not contained in Ms. Fenske's investigating notes. It is completely absent.

And yet it was the primary basis for the termination. It was the lynchpin of the employer's case as is evident from the employer's opening statement, through the testimony of Mr. Kraft, and right up to the closing argument.

Mr. Kraft testified at length regarding the importance of that claim to his decision to terminate Mr. Henn. Specifically, at RP 857 Mr. Kraft testified as follows:

MR. WHITE: . . . let's get to the bottom line here. Was he terminated in part because of your understanding that he did one of these things that's contained in the CIR's intentionally?

MR. KRAFT: Yes.

MR. WHITE: How would he know that?

MR. KRAFT: I don't know that.

Despite this testimony, the employer continued to rely on this claim throughout the case. The employer never backed down from its position that Mr. Henn was fired because of intentional incompetence.

The PAB thereafter rejected the employer's claim. One of the pivotal issues in this appeal is whether the PAB has the authority to affirm the termination once it has rejected the fundamental claim in support of the termination.

Mr. Henn submits that WAC 358-30-170 does not provide the PAB with that authority. Mr. Henn further submits that what the PAB has done here is to impermissibly substitute its judgment for that of the employer. The PAB is not granted such authority.

In the case of *In re Smith*, 30 Wn. App 943, 639 P.2d 779 (1982), an analogous situation occurred. In that case, a deputy sheriff was fired by the Sheriff for allegedly pointing a gun at the occupants of a car. The Civil Service Commission thereafter heard the matter and affirmed the dismissal, but on grounds different from those offered by the Sheriff. In fact, the Commission did not make any finding that the deputy had pointed a gun at the occupants of the vehicle. The trial court reversed the Commission and concluded that the Commission acted ultra vires. The Commission appealed. The Court of Appeals, Division II, affirmed the trial court. The Court of Appeals relied heavily on an early case, *Easson v. Seattle*, 32 Wn. 405, 73 P. 496 (1903). The court stated at pp. 927-949:

. . . In *Easson v. Seattle*, 32 Wn. 405, 73 P. 496 (1903), an employee of the Seattle Police Department was charged with misconduct. These charges were investigated by the civil service commission after the chief of police found there existed insufficient grounds for dismissal. The civil service commission ordered the employee discharged. The *Easson* court held the commission's action to be without effect because the power of removal resides exclusively in the appointing power unless statutory language clearly provides otherwise. The court reasoned that the role of the civil service commission was merely to investigate the reasons given by the appointing power for dismissal. In this regard the court stated:

The function of the commission seems to be to make the test of fitness, and to that extent it may be said to recommend the appointment of any persons whose names are included in the lists it prepares; but the actual appointment made is made by another. A

further function of the commission under the charter of the city of Seattle seems also to be that it shall act as a sort of check upon the appointing officer if he shall seek to make removals based upon mere personal, political, or other insufficient motives. When, therefore, he has filed with the commission his reasons in writing for the removal of any officer, the commission shall proceed to investigate the reasons, and if they are found insufficient the removal shall not be made. Thus the functions of the commission are such that the members thereof are evidently intended to be free from any considerations in connection with either appointments or removals, except those which are purely meritorious. That they may the more fully discharge their duty in that spirit, they are not given the power of either actual appointment or removal.

Id. at 413. We believe that the reasoning in *Easson* is in accord with the spirit of the present statute. Therefore, we hold that a civil service commission operating pursuant to RCW 41.14.120 must confine its inquiry to those reasons set forth by the appointing power. It may investigate those reasons but it may not substitute reasons of its own, as it did here. The trial court correctly held this action to be ultra vires.

The same conclusion should apply to this case. The employer's reliance on the rejected claim is undisputable. Once that claim was rejected, the employer could not meet its burden of proof. And the PAB, and thereafter the trial court, are not granted the authority to substitute their judgments for that of the employer. The remedy is reversal of this matter and reinstatement of Mr. Henn pursuant to WAC 358-30-180.

It should be noted also that no one has challenged the PAB's conclusion that it could not consider the claim that Mr. Henn's acts were deliberate.

In addition, there has been no challenge to Judge Casey's rejection of the claim that Mr. Henn was guilty of gross misconduct. The employer alleged gross misconduct and the PAB concluded that gross misconduct existed with respect to each of the four incidents. (Conclusion 4.7, Conclusion 4.8 and Conclusion 4.9) Judge Casey, however, after a full and complete review and hearing, rejected that argument. Judge Casey's conclusion that gross misconduct was not established is now also a verity on appeal.

The two most significant claims being made by the employer in support of termination were rejected either by the PAB or the trial court. The appointing authority, Mr. Kraft, made it absolutely clear that it was these two claims that in his mind justified the termination. Mr. Kraft testified at RP 853 as follows:

MS. STAMBAUGH: Can you tell us . . . just in summary, why you concluded that dismissal was the appropriate action in this case?

MR. KRAFT: Because that I believed . . . well, two things. One is that I believed that the omissions involved in all of these cases were very egregious in nature in terms of practice. And then also his statements . . . statements about . . . that it was intentional.

There was no testimony that, absent the intentional misconduct claim and absent the gross misconduct claim, Mr. Henn would have still been subject to termination.

Under these circumstances, the termination should not be upheld. Following Judge Casey's ruling, the matter was remanded back to the PAB for a "determination of whether the discipline of discharge is appropriate punishment under these circumstances." (Letter opinion of Judge Casey dated March 17, 2005)

The parties were afforded the opportunity to present additional materials. Despite the fact that the employer had the burden of proof, despite the fact that the intentional misconduct claim had been rejected, and now following the ruling of Judge Casey, rejecting the "gross misconduct" and "flagrant behavior" claims, the employer did not submit any further evidence to support any claim that termination was still justified.

On remand, the PAB again substituted its judgment for that of the employer. The PAB this time justified the termination by simply substituting the word "egregious" for the previously used words "gross" or "flagrant". The PAB stated a new finding of fact and conclusions of law 3.5 as follows:

. . . Appellant's failure to perform his duties with the primary objective of protecting vulnerable children was egregious and termination will deter other social workers from disregarding the department's requirements regarding child abuse and neglect investigations.

Nowhere does the PAB define egregious conduct. The PAB defines gross misconduct as "flagrant misbehavior which adversely affects the agency's ability to carry out its functions". The PAB defines flagrant misbehavior as occurring "When an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. (See Conclusion of Law 4.4) But nowhere does the PAB define egregious misconduct. Egregious is defined in the dictionary, The New Shuster Oxford, English Dictionary Thumb Index Edition as follows:

Remarkable in a bad sense; gross; flagrant; shocking.

All the PAB did is substitute a synonym for gross and/or flagrant in its new finding/conclusion. The meaning is the same. The trial court rejected the same finding at the time of the initial hearing. The PAB substituted one word and, based on that substitution, submitted that the termination was still appropriate. And the trial court now accepted this.

Such a decision is contrary to the law of this case and arbitrary and capricious. Judge Casey determined the law of this case when she rejected the claim that Mr. Henn was guilty of gross misconduct. It does not make any sense for the PAB to turn around following remand and to then say

that the termination is still justified because Mr. Henn is guilty of gross misconduct. That is what has occurred here. It appears that what the PAB did here was simply reject Judge Casey's decision that reversed the findings of gross misconduct and did so by simply using a synonymous word.

A decision is arbitrary and capricious when it is willful and unreasonable, and made without consideration and in disregard of facts or circumstances. See *Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 29, 978 P.2d 481 (1999).

Here there is error because the termination was affirmed by Judge Casey based on the same claim that was previously rejected by Judge Casey. Those positions cannot be reconciled. And such a decision is arbitrary and capricious.

2. The PAB and the trial court erred by determining that Mr. Henn's conduct constituted neglect of duty and willful violation of published employing agency rules.

With respect to all the claims brought by the employer, the PAB concluded that Mr. Henn's conduct constituted neglect of duty and the willful violation of agency policy regarding case management and investigation. (See Conclusions of Law 4.7, 4.8 and 4.9) As the PAB

recognized in Conclusion of Law 4.5, in order for there to be a willful violation, there first must exist a published rule or regulation.

a. Emylei's sexual abuse.

With respect to the sexual abuse allegation, there was no such rule or regulation. The PAB recognized this in Conclusion of Law 4.6 where the PAB states as follows:

We recognize that the department did not have a process in place for managing the cases of children who are split between two units. The circumstances of splitting of children here may have contributed to the lack of information sharing between Appellant and Ms. Hamasaki.

It was uncontroverted in this case that Mr. Henn was not assigned any responsibility with respect to investigating the sexual abuse allegation. (RP 113) In fact Ms. Picard, Mr. Henn's supervisor, specifically denied at the hearing that Mr. Henn had any responsibility regarding that investigation. At RP 722, Ms. Picard testified as follows:

MR WHITE: All right. And you would agree that what you were telling Ms. Fenske was that you understood the investigation had been completed and the issue of sexual abuse was not thereafter part of DJ's responsibility, am I correct?

MS. PICARD: Right.

In fact, Ms. Picard admitted that Mr. Henn had met his responsibility to keep Emylei safe. (RP 723)

The problem occurred in this case primarily because there was no joint case planning. There was no policy for such within the Spokane DSHS office. Ms. Hamasaki, in her interview with Ms. Debra Fenske, the DSHS investigator, stated that she wished there was case transfer staffing. (RP 116) She stated that she wished that were a practice in Spokane. (RP 116) Ms. Fenske, as part of her investigation, attempted to find out why case transfer staffing wasn't done. (RP 397-398) It was the policy where Ms. Fenske worked to have such a staffing. But she could not find any evidence that Spokane had such a policy. When she inquired regarding the matter, she was simply told: "We don't do that". (RP 398)

As a result, both Ms. Hamasaki and Mr. Henn were left to fend for themselves in a situation neither had been faced with before. (RP 633, 723)

After Emylei's case was assigned to him, Mr. Henn thereafter was provided with the Winston report. He went to see Ms. Hamasaki and advised her that the report had come in. She recollects that he had told her the report was interesting reading. Absent a policy that required more, it is respectfully submitted that Mr. Henn acted pretty reasonably.

Ms. Picard did, however, end up preparing the CIR based upon Ms. Hamasaki's claim that Mr. Henn had withheld information. But Ms.

Picard was not provided all the relevant information. Ms. Picard testified as follows:

MR. WHITE: Okay. Do you know what he did with the report in terms of Heather Hamasaki?

MS. PICARD: No.

MR. WHITE: Did you know he went by her desk?

MS. PICARD: No.

MR. WHITE: Did you know that he told her that the report had come in?

MS. PICARD: No.

MR. WHITE: Did Heather ever tell you that he had in fact done that?

MS. PICARD: No.

MR. WHITE: Would that be an appropriate thing for him to have done?

MS. PICARD: Yes.

(RP 721-722)

In fact Ms. Picard even went further and testified as follows:

MS. STAMBAUGH: If you're told that a report is in and it's interesting reading, do you rush to read it?

MS. PICARD: Yes.

(RP 787)

MR. WHITE: You didn't know any of that . . . and Ms. Hamasaki, when she expressed the surprise about that

report, did she tell you that, several months earlier, D.J. had in fact gone to her desk and told her about the report and that it was interesting reading, did she tell you that?

MS. PICARD: No.

(RP 790)

The conclusion that seems absolutely inescapable in this case is that Ms. Hamasaki simply forgot the report was in and so she did not read the report. She admitted that the investigation into the sexual abuse allegation started under her watch. She admitted that she did not have any pressing concern because Earl was not receiving unsupervised visitation of his children at that time. (RP 607) She admitted that Mr. Henn told her about the report and that it was interesting reading. Despite all of the above, she had not reviewed the report by the time the matter went to hearing as to whether Earl should have unsupervised visitation. She had not even checked with anyone as to the status of the police investigation, if any. Again, the only rational conclusion is that she forgot. By the time the matter went to hearing, she had forgotten about the investigation. Mr. Henn, when he reviewed her ISSP, he saw that she had not referred to it. He called that to her attention. She then reviewed the report and rather than admit that she had blown it, she blamed Mr. Henn. The obvious question Ms. Hamasaki cannot answer is: from April 18, 2002 when you learned of the alleged molestation, or from May 7, 2002, when you were

told by Mr. Henn that the report was in and it was interesting reading until July 16, 2002 when the fact finding hearing occurred to determine if Earl would have unsupervised visitation, what did you do to determine the status and/or outcome of the sexual abuse investigation? The answer is that she did absolutely nothing. Under these circumstances, it simply is not appropriate to lay this at Mr. Henn's door.

Substantial evidence does not exist to support any adverse findings or conclusions against Mr. Henn regarding this issue. He did not neglect his duty and he did not willfully violate any policy.

b. Emylei – assault issue.

Michael's assault conviction was certainly no secret. Ms. Hamasaki was assigned the responsibility for investigating the conviction. It is undisputed that she obtained the criminal background check. She also interviewed Michael regarding his record. (RP 147) Ms. Hamasaki claims that she would have passed the information on to Ms. Picard. (RP 637)

Mr. Henn also interviewed Michael regarding the assault. Michael described the incident as having been similar to a bar-room brawl. Mr. Henn immediately advised Ms. Picard of the assault. In fact, he called her at home. (RP 713)

The conviction was over five years old and did not involve minors. The assault did, however, prevent immediate placement of Emylei with Michael. (RP 703) Mr. Henn thereafter proceeded to develop a case plan which would have resulted in placement of Emylei with Michael.

The information Michael gave Mr. Henn about the assault was not entirely accurate. But that was the information Mr. Henn passed on as he is allowed to do. (RP 714) But the reality was the assault was simply not considered to be significant.

The Guardian Ad Litem, working on his first case, did not agree with the department's decision to place Emylei with Michael. He felt the assault was more significant. Irrespective, Mr. Henn had not obtained the actual police report. He never claimed he had. He gave Ms. Picard the information he had. Ms. Picard knew he had gotten the information from Michael. Ms. Picard attempted to claim that she assumed Mr. Henn had the police report because he said it was a bar-room brawl. This was not true, however, because Mr. Henn had already told her that Michael had told him that. Her testimony ultimately was nonsensical. (RP 779-782)

Ultimately, the court did not believe the assault conviction was significant. And even the assistant attorney general responsible for the case was not all that concerned regarding the assault. She was more

concerned about the types of things that Mr. Henn was concerned about.
(RP 582-583)

Mr. Henn provided the information he had. He always attributed that information as having come from Michael. And he never claimed he had obtained the police report.

Mr. Henn did not violate any policy. In fact, there was no applicable policy. The evidence in this case does not support any adverse findings.

c. Gage.

The claim in this CIR was that Mr. Henn had not conducted an appropriate investigation. (RP 140) It was very difficult to comprehend the basis for these claims made by Ms. Picard. When first questioned by Ms. Stambaugh, Ms. Picard testified as follows:

MS. STAMBAUGH: Can you tell us what made you conclude that there was no appropriate investigation? What did you discover?

MS. PICARD: You know, I don't remember. Um . . .

(RP 682)

She then testified that she gave a statement to Ms. Fenske, the investigator, but no such statement was ever located. (RP 682-683; 420)

Ms. Fenske believed that she should have interviewed Ms. Picard regarding what Ms. Picard claimed with respect to the improper

investigation. But Ms. Fenske was unable to explain why she did not conduct such an interview. (RP 420)

Ms. Picard ultimately said that something alerted her upon her review of the file that resulted in her filing the CIR. (RP 683) The PAB hearing then became a process of attempting to figure out what exactly it was that the employer felt justified some disciplinary action. Ms. Picard testified that this case was reviewed by a CPT panel. The CPT panel is a group of citizens and specialists who get involved in serious cases. The CPT panel is responsible to review the facts as presented to help CPS make decisions such as whether or not a child should be returned to a parent. At all times Ms. Picard was aware that there was an allegation that the mother had physically abused the 14 month old child. Significant efforts were made to evaluate the claim. Medical specialists were involved. A long bone scan was required by the CPT panel. That was all accomplished. All involved in this case were looking at the issue of whether the mother should be reunited with the child. (RP 724-728; 221)

After hours of testimony Ms. Picard was finally able to articulate what it was that caused her to believe that Mr. Henn had not performed a proper investigation. The testimony was as follows:

MS. NUTLEY: Okay, and finally, if you could . . . on R-2, page 33 . . . this is a CIR on Gage. And you said you did not conduct an appropriate investigation . . . could you just

summarize for me we've been through the details of it, but could you just generally summarize to me how it was when you read the file you came to that conclusion?

MS. PICARD: Part of the . . . when I read the file, part of the information that I'd forgotten earlier when I was asked the question was that there was a witness of the abuse that was in . . . that was documented in the SER within the referral that a person had seen the mom knee Gage in the head, but that person wasn't investigated by Mr. Henn. Nobody talked to that person. So that was the piece that I had forgotten earlier, and so when I read the file.

MS. NUTLEY: So based on that one thing, you decided it was an inappropriate investigation . . . ?

MS. PICARD: Yes.

MS. NUTLEY: . . . because of one witness had not been interviewed?

MS. PICARD: Yes, because not too long after . . . after that, the child was removed from the mother's care.

(RP 782)

Mr. Henn was terminated in part because he did not interview one witness. Any competent supervisor involved in this case would recognize how ridiculous this claim is. This matter was taken in front of a CPT panel. If Ms. Picard or any of the members of the CPT panel felt that the witness needed to be interviewed that was the time to require that more effort be made to accomplish that. Everyone involved in this case knew that there was an allegation of physical abuse. Efforts were made to determine how serious the abuse was. Medical professionals were

involved to the extent that a long bone scan was ordered. And the decision was made to return the child to the mother if the long bone scan was negative. In the event the long bone scan was negative then other steps were to be taken to protect the child and dependency was going to be sought in the event the mother didn't follow through with services or disengaged services within 90 days. (RP 222)

There is no policy that requires all witnesses to be interviewed. Mr. Henn attempted to interview the witness but was unable to do so because the witness was no longer at the motel and was not answering the cell phone. (RP 143) There was no evidence presented that contradicted Mr. Henn.

Even the appointing authority, Mr. Kraft, had a difficult time testifying with respect to this claim. Mr. Kraft testified as follows:

MR. WHITE: And so you would have, I guess, found that . . . what . . . what was the misconduct? That he . . . returned Gage to his mother?

MR. KRAFT: He . . . I believe that the, uh, the allegation in here is that . . . he was intent on referring, he was intent on placing the child back with the mother despite . . . concerns, you know, I believe in terms of her . . . of abuse, because she abused another child in the home, and that the mother had not been following through with her drug . . . her drug treatment program.

(RP 865)

Much of the claim against Mr. Henn was pure fiction. It was as if the employer was attempting to come up with the justification for the discipline at the time of the PAB hearing.

Ms. Picard was candid when she testified that what really triggered this matter is that at some later date the child was removed from the mother again. Despite everything that had been previously done and despite the involvement of the CPT panel and despite the fact that Ms. Picard had signed off on the decision to return Gage to the mother, the mother did not comply with the requirements. And then ultimately it was claimed that Mr. Henn should have interviewed one witness. The flip side to this coin is that if the mother had complied no one would have ever claimed that he should have interviewed that one witness. Discipline of an employee should not turn on this kind of irrational analysis.

The PAB, at Conclusion number 4.8, states as follows:

Respondent has proven by a preponderance of the credible evidence that Appellant's failure to conduct a thorough investigation Gage G. referral constitutes neglect of duty, willful violation of agency policy and gross misconduct. Appellant has failed to present any convincing reasons to mitigate his failure to conduct the requisite face-to-face visit with the child and personally observe and document the child's injuries.

This is another example of the PAB making a decision based on its own analysis and not on whether or not the hiring authority actually was

making these claims. This matter was like trying to catch a shadow. The claim was so fluid it was truly impossible to defend. Eventually the PAB decided to rely on matters that the PAB must have believed were significant even though that wasn't the position taken by the hiring authority and/or Mr. Henn's direct supervisor. The decision that Mr. Henn neglected his duty or willfully violated any policy should be reversed.

d. Fernando.

Mr. Henn was charged on August 20, 2002 with the fourth and final CIR. This CIR provided in part:

On July 11, 2002, a referral was made on Fernando L. alleging that the grandparents and biological mom had not taken this medically fragile child to the doctor during the past two weeks. You failed to investigate and follow up on this referral. . . .

(RP 152)

In fact, Mr. Henn had followed up on this referral. It was uncontroverted that he had contacted the doctor and contacted the mother and had the mother take the child in to see the doctor. There was never any evidence to suggest that Mr. Henn had not taken care of the immediate problem. If any such evidence had ever existed it would have been produced. Mr. Henn was then gone on vacation and he returned on August 6, 2002. At that time, again a fact not in dispute, he was removed from being able to work on his cases. At the time that occurred he advised

his direct supervisor that he had cases that needed immediate attention. Ms. Picard testified that one of the cases that needed immediate attention was the Fernando case. (RP 734, 735) But Ms. Picard, even given Mr. Henn's statement to her that some of his cases needed immediate attention, completely ignored the Fernando case for the next 10 days. Ms. Picard testified as follows:

MR. WHITE: August 6th when you took over the file and August 16th when the doctor called. Mr. Henn has already told you that there are cases that need (sic) immediate attention. You review it and see that this is one of them. Why didn't you do anything between August 6th and August 16th?

MS. PICARD: I don't know.

...
...
...

MR. WHITE: And then, am I correct, that between August 6th when you took over the file and August 16th when the doctor called and you were standing right there when the doctor called that you had done absolutely nothing yourself to ensure that that child was seen?

MS. PICARD: Correct.

(RP 737-738)

Ms. Picard thereafter took the position that she had not reviewed the file for some unknown reason between August 6 and August 16 and hadn't even asked Mr. Henn which of his cases needed immediate attention. (RP 738-739)

Mr. Henn had been completely removed from his ability to work on the files on August 6, 2002. Mr. Henn's position was stated in his written response to the CIR. He stated:

7) Two weeks passed prior to Dr. Harper contacting the department. I believe that an appropriate intervention may have been achieved to prevent the hospitalization if the investigation had been continued through either a temporary worker or myself during these two weeks.

8) I urge the Department to either allow me to continue with my assignments or to directly reassign my cases to another worker in order to prevent any further unnecessary abuse or neglect of children directly assigned to me.

Furthermore, I feel as if I am being set up for continued failure and additional CIR's by the Department's failure to commit appropriate resources to assist the ICW unit during this time of investigation.

(RP 154)

Mr. Henn is exactly right with respect to who should bare responsibility on this issue. It was not him. Ms. Picard's testimony demonstrates how ridiculous it is to charge him with respect to Fernando.

She testified as follows:

MR. WHITE: All right. Now with respect to the issue regarding Fernando, my understanding in summary of your testimony is that DJ was clearly removed from his ability to handle the cases as of August 6th, at least you have no basis to challenge that date as you sit here today, correct?

MS. PICARD: Correct.

MR. WHITE: And that D.J. from August 6th until August 16th had no responsibility for that case, correct?

MS. PICARD: Correct.

MR. WHITE: And that you were the one who had that responsibility for that case, correct?

MS. PICARD: Yes.

MR. WHITE: And apparently, you were too busy to be able to get to a review of that case until after August 16th when you received the report from the doctor, correct?

MS. PICARD: Correct.

MR. WHITE: And that at no point in time or in a period of time you took over DJ's case did you ever assign any of his cases out, including that one, to somebody else who could review it and make a decision as to whether or not something had to be done, am I correct?

MS. PICARD: Correct.

...
...
...

MR. WHITE: Why didn't you, then, ask DJ anything with respect to where those cases stood?

MS. PICARD: I don't know.

MR. WHITE: But you didn't do it, correct?

MS. PICARD: Correct.

MR. WHITE: And if you had done it, you would have been advised that a face to face had not been done with that child, and that it needed to be done, correct?

MS. PICARD: Yes.

(RP 774-775)

Mr. Henn should not have been disciplined for this matter. Any problem with the handling of this case was a management problem. If Ms. Picard, and or other management personnel had been doing their jobs, this issue would never have come up.

3. Termination under these facts and circumstances is not appropriate.

It is not disputed that the employer had the burden of proof with respect to all issues in the case, including the level of discipline. The employer withheld from the employee the true reason for the termination until the hearing. As a result, the fundamental underlying reason for the termination was thrown out.

In addition, the claims of gross misconduct were rejected by Judge Casey. Pursuant to WAC 358-30-170, the appointing authority had the burden to support its charges and it did not do so. The employer did not meet its burden of proving that termination was appropriate once the reasons given for the termination were rejected.

Up until this period of time, Mr. Henn had not been the subject of any disciplinary action. He had not even had a verbal counseling, yet alone anything more serious such as a written reprimand, a period of

probation, or a suspension. There was never any claim or proof that Mr. Henn had ever had any similar issue to the ones related to the CIR.

His direct supervisor testified as follows:

MR. WHITE: Would it be fair to say that you gave him good reviews over the year that you supervised him?

MS. PICARD: That would be fair to say.

MR. WHITE: He was a respected employee of yours . . . would that be fair to say?

MS. PICARD: Yes.

(RP 692; see also RP 742)

There was no evidence that he was not amenable to correction or training. An employee does not get to the point where he is so highly respected if that is the case.

Here each and every claim made against Mr. Henn could have easily been addressed by training or new policies or things of that nature. Ms. Hamasaki did not receive any discipline for her failures. (RP 649) It is not reasonable for Mr. Henn to have been terminated.

Mr. Henn was terminated improperly. He should be reinstated with full back pay and benefits as required by law.

D. CONCLUSION

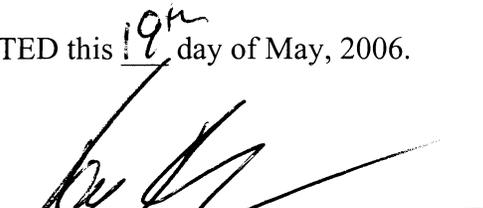
The employer did not meet its burden of proof in this case. The true reason for the termination was wrongfully withheld until the time of

the hearing. That conduct alone should have resulted in the reinstatement of Mr. Henn. Once that charge was rejected, Mr. Henn should have been reinstated. Once the findings/conclusions of gross misconduct were rejected, Mr. Henn should have been reinstated. Once the employer failed to justify the termination on remand, Mr. Henn should have been reinstated.

Furthermore, there are numerous other findings that are not supported by substantial evidence and those findings do not support the conclusions of law.

Given all of the above, Mr. Henn deserves to be reinstated to his prior job with full back pay and full benefits.

RESPECTFULLY SUBMITTED this 19th day of May, 2006.



Ross P. White, WSBA No. 12136
Attorney for Appellant

Appendix 1

Assign. of Error	Finding or Conclusion	Portion Protested	Reason for Protest
4.	F 2.9	That Michael claimed self defense.	This was not the testimony.
4.	F 2.10	That Mr. Henn heard Emylei's disclosure at the April 30, 2002 interview.	This was not the testimony.
4.	F 2.11	That Mr. Henn did not discuss Emylei's disclosure when he went by Ms. Hamasaki's desk prior to receiving the report.	He was not present when the disclosure was made.
4.	F 2.13	That Mr. Henn did not obtain a copy of the police report.	There was no policy requiring such. He was not charged with failing to obtain a report.
4.	F 2.14	That the sequence of events was as is stated.	Mr. Henn never indicated that he obtained the report. He was not required to say that he had not.
4.	F 2.16	That Mr. Henn failed to mention that Earl had been accused of sexual abuse by Emylei.	No evidence Mr. Henn was involved in Ms. Hamasaki's case.
4.	F 2.23	Appellant attempted to contact referent.	The referent had previously been contacted. The issue had to do with a witness, not the referent.
4.	F 2.23	That appellant filed to meet with Gage.	Gage had been met with, as required by policy, the night of the referral. Mr. Henn then made sure Gage was properly evaluated by medical personnel. The signs of physical abuse were well documented in the file.
4.	F 2.25	The case was labeled as emergent.	The case was non-emergent.

Appendix 1

Assign. of Error	Finding or Conclusion	Portion Protested	Reason for Protest
4.	F 2.27	Appellant admitted he did not complete the investigation or follow-up	This was not the evidence.
4.	C 4.6	That Appellant had a duty to inform Ms. Hamasaki and the AAG's of the disclosure. And that he had a duty to investigate the allegations.	This was not the evidence. No such duty existed.
4.	C 4.6	That Mr. Henn's failure to obtain other information regarding assault negatively impacted the department's presentation.	This was not the evidence in the case.
4.	C 4.7	That Mr. Henn dialed to take seriously certain allegations.	Not true. He was not assigned any responsibilities regarding the sex abuse allegation. He addressed the criminal charge.
4.	C 4.7	That the respondent met its burden regarding neglect of duty and willful violation.	The respondent failed to meet its burden.
4.	C 4.8	That respondent met its burden regarding neglect of duty and willful violation.	The respondent failed to meet its burden.
4.	C 4.9	That respondent has proven neglect of duty and willful violation.	The respondent did not meet its burden.
4, 5.	C 4.11	That he should be held to a high standard. That he displayed a pattern of disregard of policies, practices and procedures. That he violated the agencies standard and warranted termination.	Contrary to evidence and law. Relies on facts not supported by evidence.

Appendix 1

<u>Assign. of Error</u>	<u>Finding or Conclusion</u>	<u>Portion Protested</u>	<u>Reason for Protest</u>
1, 2, 3, 4, 5.	Order	That the appeal should be denied. Order of the PAB following remand from Superior Court	Contrary to law and evidence.
3, 4.	F/C 3.5	That appellant's conduct was egregious and termination will deter other workers.	Contrary to law of the case and not supported by the evidence.
1, 2, 3, 4, 5.	F/C 3.6	That his appeal should be denied.	See above.
1, 2, 3, 4, 5.	Order	That his appeal should be denied.	See above.

FILED
COURT OF APPEALS

06 MAY 22 AM 10:56

STATE OF WASHINGTON

NO. 34531-5-II
IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DARRELL J. HENN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

AFFIDAVIT OF SERVICE

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