BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KEVIN SKELLY, Appellant, v. CRIMINAL JUSTICE TRAINING COMMISSION, Respondent.	Case No. DISM-03-0039 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held at Thurston County Family and Juvenile Court, Olympia, Washington, on January 15, 2004.

1.2 **Appearances.** Appellant Kevin Skelly was present and was represented by Alexander Gambrel, Attorney at Law, of Luce, Lombino & Riggio, P.S. Elizabeth Brown, Assistant Attorney General, represented Respondent Criminal Justice Training Commission.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal of a Washington Management Service employee.

II. FINDINGS OF FACT

2.1 Appellant Kevin Skelly was a Human Resource Manager (Washington Management Service) and permanent employee for Respondent Criminal Justice Training Commission.

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Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on April 30, 2003.

2.2 Appellant began his employment with the Criminal Justice Training Commission on September 13, 2001. Appellant was hired by Michael Parsons, Director of the CJTC, the appointing authority. Mr. Parsons advised Appellant that as the Human Resource Manager, Appellant had complete responsibility for the department's human resource activities, including personnel and administrative polices and providing training to employees. Mr. Parsons was aware that Appellant had no prior experience working as an employee for the state of Washington. However, they agreed that Appellant was responsible for attaining a good working knowledge of the state's personnel practices, including the Merit System Rules as well as CJTC's own policies and procedures.

2.3 Michael Parsons set out additional expectations regarding Appellant's performance. Because the former human resource manager provided little guidance or direction to the staff, Mr. Parsons instructed Appellant to build positive working relationships with all staff in the agency. Mr. Parsons instructed Appellant to personally meet with each employee in order to build staff confidence in the Human Resource Department. Further, Mr. Parsons informed Appellant of concerns related to Appellant's assistant, Shauna Wells, and specifically directed him to monitor and address her performance and attendance problems.

2.4 Appellant's performance evaluation for his first year of work was positive, and Mr. Parsons received no negative feedback regarding Appellant's performance as a Human Resource Manager. On September 23, 2002, however, Mr. Parsons issued a letter of reprimand to Appellant for his inappropriate comments on an employee's Labor and Industries claim form. Mr. Parsons cautioned

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Appellant against exercising poor judgment and warned him that similar behavior would result in future disciplinary action.

2.5 On October 1, 2002, Ms. Wells did not report to work or call in her absence. After listening to a message on Ms. Wells' phone, Appellant became concerned for her safety. Appellant contacted Mr. Parsons and explained the circumstances. Mr. Parsons agreed that Appellant should call the police and have an officer conduct a welfare check on Ms. Wells at her residence.

2.6 The following day, Mr. Parsons and Sharon Tolton, Deputy Director, requested to meet with Ms. Wells to discuss her absence the previous day. During the course of their meeting, Ms. Wells indicated that although Appellant was working with her to improve her attendance and performance, she found his approach intimidating. Ms. Wells stated other employees observed and could corroborate her negative interactions with Appellant. She further indicated that Appellant directed her to process paperwork that did not meet personnel policies. Mr. Parsons and Ms. Tolton concluded that Ms. Wells' claims against Appellant warranted investigation.

2.7 On October 3, 2002, Mr. Parsons reassigned Appellant to his home on administrative leave, informing him that an investigation would be initiated "regarding certain allegations that have come to my attention." On October 4, 2002, to ensure an impartial investigation, the department contracted with the Washington State Patrol (WSP) to conduct an administrative investigation and prepare a report of Appellant's alleged misconduct. The WSP investigation commenced on October 8, 2002.

2.8 On October 24, 2002, Mr. Parsons sent Appellant a letter informing him the Washington State Patrol was going to conduct an investigation into allegations that he engaged in misconduct. Mr. Parsons instructed Appellant to "in no way interfere with the investigative process by having

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communications regarding this matter, either on-duty or off-duty, with any person who is a potential witness or who may be materially involved with the administrative investigation."

2.9 On January 22, 2003, the Washington State Patrol submitted their completed investigation to Mr. Parsons. The report included the statements of various CJTC employees, including Appellant's December 11, 2002 statement. After reviewing the information, Mr. Parsons decided that disciplinary action was warranted. On February 20, 2003, Mr. Parsons and Ms. Tolton met with Appellant to discuss the allegations of misconduct. Mr. Parsons was not persuaded by Appellant's responses to the charges, and he believed that Appellant was unwilling to take responsibility for his action by blaming others.

2.10 Mr. Parsons ultimately concluded Appellant made disrespectful comments and was intimidating toward staff, illegally appointed Ms. Cervantes to the Secretary Senior position and misused the agency cell phone to make personal phone calls. Mr. Parsons concluded Appellant's actions constituted misconduct, and he was not convinced by Appellant's explanations when they met to discuss the allegations. Rather, Mr. Parsons believed that Appellant failed to take any responsibility for his actions, blamed others and provided inconsistent information. Mr. Parsons concluded Appellant failed to create a positive and professional working climate, which compromised his ability to successfully manage the Human Resource Department. Mr. Parsons concluded that termination was appropriate.

2.11 By letter dated March 20, 2003, Mr. Parsons notified Appellant of his dismissal effective April 5, 2003. Mr. Parsons alleged that Appellant 1) impeded the effective performance of staff in the workplace, thereby, creating a negative, hostile and adversarial work environment; 2) failed to follow established rules governing the proper appointment of Cheryl Cervantes to a Secretary Senior position; 3) misused his agency cellular phone by making and receiving personal telephone

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calls; and 4) contacted Janice Alger, contrary to an earlier directive prohibiting communicating with potential witnesses to his alleged misconduct.

Motion to Exclude

2.12 On December 30, 2003, Appellant filed a Motion to Exclude Evidence. On January 9, 2004, Respondent submitted a Respondent to Appellant's motion. The Board heard oral arguments from the parties on January 12, 2004.

2.13 Appellant asserts that the Fair Credit Report Act (FCRA) provides that when an employer hires a third party to investigate alleged misconduct in the workplace, it must 1) notify the employee within three days of requesting the investigation; 2) obtain the employee's consent to pursue the investigation; 3) provide a copy of the investigative report to the employee if it intends to take any adverse action; and 4) provide the employee with a statement of his rights under the FCRA. The Appellant argues that the department violated the FCRA when it failed to notify him of the investigation requested, failed to obtain his written consent, and failed to disclose his right under the FCRA. Appellant argues that under the Washington State Constitution, the remedy for the violation of an individual's privacy rights is to exclude the evidence obtained unlawfully. Therefore, he asserts the investigation and all related information should be excluded from his appeal.

2.14 Respondent argues that Appellant's motion should be denied because the PAB does not have jurisdiction to hear claims regarding violation of the FCRA, because the FCRA states that the proper jurisdiction for FCRA claims is "any appropriate United States district court", and because the Washington State Patrol is not a "consumer report agency" as intended by the FCRA.

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2.15 The Board denied Appellant's Motion to Exclude Evidence. The Board now affirms its earlier ruling. We find Appellant provided no basis to support his argument. WAC 358-01-030 charges the Personnel Appeals Board with responsibility for hearing employee appeals pursuant to RCW 41.06.170 and issuing findings of fact, conclusions of law and orders regarding such appeals. There is no provision, either in statute or the WAC governing this Board's powers and duties that gives us the jurisdiction to hear matters involving violations of the Fair Credit Report Act. The Board now enters the following findings:

2.16 The first allegation to be resolved is whether Appellant created a negative, hostile and adversarial work environment for his subordinates and coworkers. Appellant testified that he treated others in a friendly and respectful manner and engaged in good-natured joking, and that if anyone had informed him his jokes were inappropriate, he would have immediately stopped.

2.17 However, CJTC employee David Price credibly testified that he felt cornered when Appellant entered an office where he was working and asked about a conversation Mr. Price had overheard. When Mr. Price refused to relay the contents of the conversation, Appellant insisted he answer the question, and he blocked Mr. Price's only way to exit the office. Mr. Price described Appellant's demeanor as aggressive, insistent and intimidating. On another occasion, Appellant belittled Mr. Price by questioning why Mr. Price wanted to take management courses, because Mr. Price would "never be a manager." Mr. Price felt intimidated because of Appellant's position as the agency's Human Resource Manager and was reluctant to confront Appellant for fear he would be "written up." Because of Appellant's behavior, Mr. Price considered leaving his employment with CJTC. Respondent has proven by a preponderance of the credible evidence that Appellant created a negative, hostile and adversarial work environment for Mr. Price.

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2.18 Other staff complained of Appellant's deficient performance as a Human Resource Manager. Appellant contends that there was an "extensive learning curve" in his job as Human Resource Manager, and he acknowledges there were areas he needed to improve. After reviewing the testimony and exhibits, we find a preponderance of the evidence supports that employees were frustrated at Appellant's lack of responsiveness to their human resource questions, and that he failed to demonstrate the level of knowledge expected of the Human Resource Manager. For example, Robert Posey, Division Manager of Professional Development Division, and Rachel Daves, Office Assistant Senior, requested human resource information from Appellant. However, Appellant was generally unable to answer their requests, directed them elsewhere for answers or to Ms. Wells. Furthermore, Appellant occasionally provided inaccurate information. In addition, Appellant failed to ensure the integrity of an employee's personnel file when neither he nor his assistant could locate the personnel file of Cheryl Cervantes after she requested to view its contents.

2.19 Respondent's second allegation concerns Appellant's approval of Cheryl Cervantes to a permanent position as a Secretary Senior. When an agency has a vacancy, the appointing authority may appoint a person referred from a certified register maintained by the Department of Personnel. In June 2002, Appellant approved the appointment of Ms. Cervantes to a Secretary Senior position within in the agency; however, Ms. Cervantes was not on a certified employment register for that classification as required by the Department of Personnel. Appellant does not dispute that he failed to follow Merit System Rules and regulations regarding the appointment of Cheryl Cervantes to a Secretary Senior position within the agency.

2.20 After Appellant was placed on administrative leave, a review of his agency assigned cell phone for the time period of October 3, 2002 through December 31, 2002 showed Appellant made 70 unauthorized calls. In addition, Appellant received 73 calls that were non-business related. The

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cell phone records support that Appellant received non-business related calls during the weekends and during non-business hours. Appellant does not dispute the calls were of a personal nature.

2.21 The review of Appellant's cell phone use also revealed that Appellant contacted a former employee of the agency, Janice Alger, after having received the October 24, 2002 directive that he not contact any "potential witnesses" to the misconduct. Mr. Parsons considered Ms. Alger a potential witness; however, the record does not support that Ms. Algers was ever a part of the investigation. Appellant does not dispute that he contacted Ms. Alger, but he denies that he discussed the investigation with her and asserts he was assisting Ms. Algers find a job. Respondent has not met its burden of proving that Appellant acted inappropriately when he contacted Ms. Algers to discuss her job search.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant was not competent in his job, did not meet the human resource needs of staff, acted inappropriately, and created a hostile and intimidating work environment for others. Respondent argues that as a Washington Management Service employee, Appellant was expected to perform at a higher level and meet certain responsibilities, and that Appellant failed to meet those expectations. Respondent argues that termination was the only appropriate sanction.

3.2 Appellant asserts that Ms. Wells initiated the complaints against him after he contacted the police and requested a welfare check of her residence. Appellant admits that some of the allegations are true and admits that, in hindsight, he made inappropriate remarks. Appellant contends that he has a military background, and that many of the issues are related to his style. He asserts, however, that if others had informed him they were offended, he would have corrected his style. Appellant asserts he was never provided with written notification of his deficiencies.

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Appellant contends that because he attained permanent status in his position, he should have been given the opportunity to improve or to cure the problems. Appellant asserts that termination is not the appropriate sanction.

IV. CONCLUSIONS OF LAW

4.1 Washington Management Service employees may appeal disciplinary actions to the Personnel Appeals Board under WAC 356-56-600.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 As a Washington Management Service employee and in his role as a Human Resource Manager, Appellant was held to a very high standard of performance and had a duty to strengthen the Human Resource Department by providing professional services. Inherent in his position was a responsibility to conduct himself in a professional manner, treat others with respect and ensure that all personnel practices within the Criminal Justice Training Commission complied with the Merit System Rules and the agency's policies and regulations. Respondent has met its burden of proving that Appellant failed to demonstrate the level of expertise and competency expected of a manager at his level.

4.4 Respondent has proven by a preponderance of the credible evidence that Appellant subjected Mr. Price to belittling comments and acted in an intimidating manner toward him and

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created a negative working environment within the department. Appellant's actions were inappropriate and unprofessional.

4.5 Respondent has met its burden of proof that Appellant abused his authority as a Human Resource Manager when he disregarded the Merit System Rules and appointed Ms. Cervantes to a position when she did not meet the necessary criteria. Respondent has also proven by a preponderance of evidence that Appellant misused the agency cellular phone assigned to him by making and receiving an excessive number of personal phone calls.

4.6 In assessing the level of discipline, we have considered the totality of the credible evidence and given weight to the absence of any former disciplinary action in Appellant's employment record, as well as his position of responsibility and authority within the department. When viewing the totality of the proven charges, especially Appellant's ineffective and substandard performance as the agency's top Human Resource professional, termination was not too severe. Therefore, the appeal of Kevin Skelly should be denied.

VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kevin Skelly is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Gerald L. Morgen, Vice Chair

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Busse Nutley, Member

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