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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SUKHDEV RYE,

Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD,

Defendant and Respondent;

STATE BOARD OF EQUALIZATION,

Real Party in Interest and
Respondent.

C064445

(Super. Ct. No.
34-2008-00008321-CU-
WM-GDS)

About to be rejected from probation in his new position, an attorney working for the State Board of Equalization (BOE), petitioner Sukhdev Rye, took a notebook from the desk of another attorney in the office and used notes found in that notebook concerning confidential attorney-client communications to try to prove that the BOE was not giving him a fair chance in his new position. Dismissed for his conduct, Rye sought a writ of

administrative mandate in the trial court. The court upheld the dismissal, and Rye appeals.

On appeal, Rye raises a multitude of issues concerning his hearing before the State Personnel Board (SPB), including, most extensively, a contention that the SPB violated a privilege attaching to Rye's communications with his union representative. We conclude that Rye fails to establish prejudicial error. Accordingly, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Rye began working for the state in 1997 in the position of Tax Counsel on the staff of BOE member Johan Klehs. He was promoted to Tax Counsel III in July 2004, on a probationary basis, and was assigned as one of the two employees in the Sacramento office of then-BOE member John Chiang, whose primary office was in Los Angeles. The other employee in the Sacramento office was Sylvia Tang, who oversaw the office.

In late September 2004, Rye received from Tang and Audrey Noda, Chiang's chief deputy, an unfavorable probation report.

On October 7, 2004, Tang met with BOE Senior Tax Counsel Brian Branine and discussed the process for rejecting Rye on probation. In her notebook, Tang devoted one page to this discussion and, on a second page, noted the name of the attorney who would temporarily replace Rye.

The next day, October 8, 2004, Tang, Noda and Rye met. Tang explained to Rye that his work had not shown enough improvement, but she proposed that if he voluntarily returned to his former position as Tax Counsel, Range D, in the BOE's legal

division, she would remove his unfavorable probation report from his personnel file. Rye declined.

Rye met with Roberta Battle, a nonattorney labor representative employed by Rye's union, CASE,¹ and discussed his unfavorable probation report and the October 8 meeting.

In early January 2005, Rye was served with a probation rejection notice. He received a *Skelly*² hearing on this rejection on January 10. Attempting to prove that Tang denied him a fair opportunity to succeed on probation, Rye showed *Skelly* hearing officer Randie Henry copies of the two pages of Tang's notes described above, and provided Henry with a copy of the first page. Henry upheld Rye's probation rejection, and notified the BOE's personnel department about the notes.

On January 13, 2005, the BOE placed Rye on paid leave while it investigated how he obtained Tang's notes. BOE personnel formally interviewed Rye on three occasions. During the first interview, on January 18, 2005, Rye was represented by Battle, his nonattorney union representative (apparently, Battle left her employment with CASE prior to Rye's second BOE interview). During this first interview with the BOE on January 18, 2005,

¹ CASE is the acronym for "California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment."

² *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*); the record does not reflect why Rye was afforded such a hearing for a probation rejection.

Battle advocated Rye's position that the copies of Tang's notes had been left on Rye's desk and were therefore not confidential.

In March 2005, after completing its investigation, the BOE dismissed Rye from his position as Tax Counsel, Range D. The BOE maintained that Rye took his supervisor's confidential notes (i.e., Tang's notes) concerning her discussion with BOE counsel about Rye's job performance, and failed to return those notes when ordered to do so.

In a dismissal hearing, an administrative law judge (the ALJ) upheld Rye's dismissal. The BOE subpoenaed Battle to testify at this hearing regarding what Rye had told her concerning Tang's notes (this testimony did not support Rye's position that copies of Tang's notes had been left on his desk). The ALJ, however, ultimately found that these Rye-Battle communications were privileged, and the ALJ did not use Battle's testimony in upholding Rye's dismissal.

The SPB initially adopted the ALJ's decision, but then granted Rye's petition for rehearing to decide the case itself (on the administrative record) and to consider the privilege issue. With one member dissenting on the issue of privilege, the SPB found that no evidentiary privilege applied to Rye's conversations with Battle. On January 8, 2008, the SPB concluded unanimously: "[A]fter reading [Battle's] testimony, the [SPB] concludes that [Rye] not only took the [Tang] notes as alleged by the [BOE], but also breached his ethical and confidentiality duties as an attorney and employee. The [SPB] therefore sustains [Rye's] dismissal."

Rye unsuccessfully petitioned the trial court for a writ of administrative mandate to overturn the SPB decision. The trial court, too, found no evidentiary privilege covering Rye's conversations with Battle.

DISCUSSION

I

Allegedly Binding Admission

Rye contends that a statement made by a BOE investigator during the investigation now binds the BOE. The contention is frivolous.³

Rye contends that a BOE investigator stated "at the conclusion of eight hours of interviewing Rye over three days that 'we don't know who . . . has gone through [Tang's notebook] and taken a photocopy of it and provided it to [Rye].'" Rye has taken this passage out of context. This was not an admission by the BOE, but simply a technique the investigator used in questioning Rye. No authority supports the contention that a statement made by a government employee during an investigation is binding on the government.

As support for his contention, Rye cites two cases involving summary judgment. (See *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1060, fn. 12; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367,

³ The BOE's request for judicial notice (Apr. 21, 2011) of the legislative history of Government Code section 19579 and Rye's request for judicial notice (Sept. 20, 2011) of the BOE investigation report are granted.

396 ["The admissions of a party receive an unusual deference in summary judgment proceedings."].) However, Rye offers no reasoning for applying summary judgment principles to this case, which does not involve a summary judgment. That leaves his contention with no authoritative support and renders the contention unpersuasive. (See *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228 [contention without authoritative support is meritless].)

Despite the fragility of Rye's contention, he claims that the BOE forfeited its opposition to the contention because the BOE responded to it in a footnote in its respondent's brief. This claim is not only frivolous but requires a discussion, at the outset, to dispel Rye's mistaken notions and assertions about appellate procedure.

On appeal, the appellant bears the burden of establishing prejudicial error. The California Constitution provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

Under this standard, the appellant bears the burden to show error and to establish that it is reasonably probable that the appellant would have received a more favorable result had the

error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "Injury is not presumed from error, but injury must appear affirmatively upon the court's examination of the entire record. 'But our duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a "miscarriage of justice."' [Citation.]" (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 (*McLaughlin*).)

Even if a respondent fails to file a brief, "we do not treat the failure to file a respondent's brief as a 'default' (i.e., an admission of error) but independently examine the record and reverse only if prejudicial error is found. [Citations.]" (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203.)

In this perspective, Rye's arguments concerning the BOE's supposed forfeiture of its opposition to his binding-admission contention are nonsensical. He claims that the BOE's placement of its argument on this issue in a footnote constitutes forfeiture. For this proposition, he cites a criminal case in which the *appellant* made a contention in a footnote and did not clearly indicate that it was intended to be a separate contention. (*People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.) Rye also faults the BOE for not making the argument under "a separate heading or subheading summarizing the point." (Cal.

Rules of Court, rule 8.204(a)(1)(B).) These arguments fail to relieve Rye of the burden of establishing prejudicial error.

II

Asserted Union Representative Privilege

Rye contends the SPB denied him a fair hearing by erroneously determining that no evidentiary privilege exists for communications between a state civil service employee and his nonattorney union representative. We conclude the contention is without merit because Rye has failed to establish prejudice. We need not, therefore, consider the merits of his contention.

In his opening brief, Rye argued that the testimony of Battle, his nonattorney union representative, should have been excluded based on an implied privilege. He claimed that the SPB "erroneously and prejudicially" considered Battle's testimony concerning what Rye told her -- that is, that he took Tang's notebook from her desk. While Rye, in his opening brief, discussed at length his argument that considering Battle's testimony was erroneous, which argument we need not recount at length here, he did not "spell[] out in his brief exactly how the error caused a "miscarriage of justice.'" [Citation.]" (*McLaughlin, supra*, 82 Cal.App.4th at p. 337.)

As we noted, establishing error is not enough to prevail on appeal. Because he failed to also establish prejudice, his argument does not require reversal, even assuming for the purpose of argument that error occurred. Based on Rye's opening brief, we could have concluded, without more, that the purported error did not require reversal because of an absence of argued

prejudice; however, we exercised our discretion to give Rye a chance to establish prejudice through supplemental briefing after oral argument. In the letter soliciting supplemental briefing, we cited article VI, section 13 of the California Constitution and *Leal v. Gourley* (2002) 100 Cal.App.4th 963, which held that a party filing a petition for writ of administrative mandate must show not only error in the agency proceedings but also prejudice resulting from that error, using the state constitutional standard. (*Id.* at p. 968.)

Once again, in Rye's supplemental opening brief, he failed to assert prejudice. Instead, he argued that the purported error was reversible per se -- that is, reversible without a finding of prejudice. That argument, however, is without merit.

The standard of review for prejudice resulting from admission of privileged information is whether it is reasonably probable that the appellant would have obtained a more favorable result absent the error. (*People v. Canfield* (1974) 12 Cal.3d 699, 707; *Leal v. Gourley*, *supra*, 100 Cal.App.4th 963.) Yet Rye ignores this standard and argues instead that the admission of the privileged information was some kind of structural or similar error requiring reversal without determining prejudice. He is wrong, and the cases he cites for this proposition are distinguishable. (See *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291-293 (*Carlsson*); *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 993 (*American Motors*).)

In *Carlsson*, the trial judge abruptly ended the trial, preventing a party from putting on its case. We held that this was a violation of the party's fundamental right to a fair trial. Because the party was not allowed to present its evidence, prejudice could not be assessed and reversal was required without a finding of prejudice. We relied on precedent stating that "[d]enying a party the right to testify or to offer evidence is reversible per se." [Citations.]" (*Carlsson, supra*, 163 Cal.App.4th at p. 291.)

Rye's case does not feature the fundamental denial of the right to a fair trial found in *Carlsson*. He was afforded a full hearing. The proceedings were not ended prematurely. Unlike the circumstances of *Carlsson*, there is nothing here stopping us from determining whether actual prejudice occurred. Indeed, it is not uncommon for us, and constitutionally required, to determine from the entire record whether an error in the admission of evidence caused prejudice. (Cal. Const., art. VI, § 13.)

In *American Motors*, we affirmed the trial court's nullification of a New Motor Vehicle Board adjudication without regard to actual prejudice because the composition of the board was fundamentally flawed, necessarily biased in favor of one of the parties by its structure. (*American Motors, supra*, 69 Cal.App.3d at p. 993.) Here, there was no such flaw in the structure of the SPB as an adjudicatory body.

Rye cannot elevate the error to one that is reversible per se simply by claiming it violated his fair trial and due process

rights. To the contrary, the constitutionally-mandated prejudice analysis applies unless, as in *Carlsson* or *American Motors*, there was a fundamental or structural problem with the hearing. Therefore, Rye's argument that the purported error was reversible per se is unpersuasive.

Because (1) Rye's argument that the purported error is reversible per se is without merit and (2) Rye makes no attempt to establish actual prejudice in his supplemental opening brief, he has forfeited any assertion of prejudice. This court is neither obligated nor inclined to comb the record for support for a finding of prejudice. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) Therefore, Rye forfeited consideration of whether the purported error was a miscarriage of justice.⁴

Even if we were to reach the issue of prejudice, a review of the entire record supports a finding that it is not reasonably probable Rye would have obtained a more favorable result absent the purported error.

⁴ In his supplemental reply brief, which is more than twice as long as his supplemental opening brief, Rye attempted to argue that the purported error was prejudicial because it is reasonably probable that he would have obtained a more favorable result absent the purported error. The attempt is too late. By waiting until his supplemental reply brief to argue the issue, Rye has precluded the BOE from responding to his arguments. Fairness precludes consideration of Rye's untimely briefing of the issue. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10.) Nonetheless, as we explain, even if there was error and Rye had not forfeited consideration of prejudice associated with the error, the error was harmless.

The ALJ decided in favor of Rye on the issue of privilege (and thus excluded Battle's testimony) but found, based on the rest of the evidence, that Rye was properly dismissed. The ALJ found, specifically, that Rye was not credible, as he gave conflicting accounts, contradicted himself, and was evasive and guarded in answering even simple questions. The ALJ stated that Rye "has shown by his conduct that he will disregard confidentiality and the attorney-client privilege when it suits his own ends, and has no qualms about lying to cover his behavior. [He] still denies his actions, which makes the likelihood of recurrence high."

The SPB initially accepted the ALJ's opinion. However, on Rye's insistence, the SPB decided to rehear the case and consider the issue of privilege. The SPB's second decision, which unlike the ALJ's decision considered Battle's testimony, was that Rye was properly dismissed. On the matter of whether he was properly dismissed, Rye has lost at every level, with and without Battle's testimony.

Rye admittedly possessed and used Tang's confidential notes -- a serious ethical lapse, even without considering how he got them. Those notes contained obvious attorney-client communications.

All the evidence, except Rye's own self-serving and contextually incredible denials, leads to the conclusion that he took the notes from Tang's office and then lied about having done so. Rye had access to Tang's office and, according to the card-key records, was in the office over the weekend when he

obtained the notes. Rye told his friend Steven Kamp, who was also a BOE attorney and active union member, that he found the notes in Tang's office and looked through them. And Kamp recounted Rye's admission to another BOE attorney, Mary Ann Alonzo. Rye then brazenly used the notes in his *Skelly* hearing as evidence of the attorney-client communication between Tang and Branine. He told Randie Henry, the *Skelly* hearing officer, that he got the notes from Tang's notebook and that Tang did not know he had them.

When ordered to return the notes, Rye refused, claiming that he had no documents to return. And he continues, even in this court, to lie concerning how he got the notes.

Rye was unethical (as shown by his possession and use of the notes containing information protected by the attorney-client privilege) and dishonest (as shown by his persistent lies concerning how he got the notes). It is not reasonably probable that he will obtain a result more favorable than dismissal if we send this case back to the SPB for reconsideration without Battle's testimony.

We agree with the SPB's reasoning for dismissing Rye, which reasoning does not depend for its persuasiveness on Battle's testimony. The SPB said: "Here, [Rye] has concocted a story designed to conceal his improper behaviors, breached his duty as an attorney, violated departmental policy, and, for his own benefit, generally engaged in a course of conduct undermining the sacred trust so necessary to the attorney-client relationship. It is inconceivable that the [BOE] could regain

enough confidence in [Rye] to render him useful as a staff attorney and, as a result, [Rye's] actions have harmed the public service. Moreover, [Rye] has shown no remorse for his actions and continues to find fault or conspiracy with everyone but himself. Under these circumstances, the [SPB] finds that the likelihood of recurrence is probable and that dismissal is the just and proper penalty."

To summarize our conclusions with respect to Rye's argument that it was error for the SPB to consider Battle's testimony, we need not consider the argument because (1) he forfeited it by failing to assert prejudice in his opening brief, (2) he again forfeited it by failing to assert prejudice in his supplemental opening brief, and (3) in any event, it is not reasonably probable that he would have obtained a more favorable result absent the purported error.

III

Tang's Attorney-Client Privilege

Rye contends that there was no remaining attorney-client privilege attached to Tang's notes when he obtained them because Tang had revealed to Rye the substance of the notes. The contention is without merit because, although Tang used BOE counsel Branine's advice, she did not reveal to Rye what Branine told her.

The attorney-client privilege may be waived if the holder of the privilege "disclosed a significant part of the communication." (Evid. Code, § 912, subd. (a).) However, "a client does not waive the privilege by testifying about facts

which might have been discussed in confidential conversations with his or her lawyer, as such testimony is not equivalent to disclosure of the actual content of those attorney-client conversations. [Citation.]” (*Maas v. Municipal Court* (1985) 175 Cal.App.3d 601, 606.) Similarly, here, Tang talked to Rye about matters that she may have discussed with Branine, but she did not disclose the actual content of her conversation with Branine. Therefore, she did not waive any attorney-client privilege regarding her notes by discussing points in them with Rye.

IV

Trial Court Standard of Review

Rye contends that the trial court erred because it applied the independent judgment test to a factual finding of the SPB rather than applying the substantial evidence test. The record does not support this contention.

Rye quotes the following statement by the trial court as evidence that the court applied the independent judgment test rather than the substantial evidence test:

“Once a person, no matter how true his or her motives may be or how frustrated he or she may be at the time, goes into a supervisor’s desk and photocopies sections of notes -- even if the person believes the notes are helpful or somehow or other prevent an injustice -- then denies that that activity ever occurred, and then refuses to surrender the notes, you have behavior which rises to the level of seriousness that supports the SPB’s decision with regard to penalty.”

Here, the court was not applying the independent judgment test; instead, it was summarizing the facts and the SPB's findings. Because Rye does not establish that the trial court applied the independent judgment standard of review, his contention is without merit.

In any event, Rye makes no effort to establish that any error in applying an improper standard of review resulted in prejudice. He therefore forfeited a prejudice analysis. (*McLaughlin, supra*, 82 Cal.App.4th at p. 337.)

V

Compelled Disclosure

The ALJ compelled Battle to testify concerning the substance of her communication with Rye before the ALJ made its ruling that the communication was privileged. Rye contends that compelling disclosure before ruling on the privilege was error. We need not consider this contention because, even if it was error, it is not reasonably probable that Rye would have obtained a more favorable result absent the error. The timing of the disclosure adds nothing to our discussion in part II establishing the lack of prejudice to Rye in admission of the evidence of the communication.

VI

Insubordination and Willful Disobedience

Rye contends the SPB committed a prejudicial abuse of discretion in deciding that he was insubordinate and willfully disobedient. He claims that the factual findings the SPB relied on to reach the decision were not supported by substantial

evidence. We conclude that there was no prejudicial abuse of discretion because the record supports a finding that Rye was insubordinate and willfully disobedient.

The focus of Rye's argument that the evidence was insufficient with respect to insubordination and willful disobedience is that there was no evidence he refused to return the Tang notes (or copies he made) when ordered to do so. To the contrary, the evidence was sufficient.

The SPB's decision concerning Rye's failure to return the notes included the following findings:

"[Skelly hearing officer] Henry testified that she expressly asked [Rye] to return Tang's notes to her and he did not do so. [BOE] investigator, Dolores Giorgi, also testified that, on several occasions, she expressly requested that [Rye] return Tang's notes to the [BOE]. Further evidence establishes that the [BOE] made several written requests that [Rye] return 'all copies of documents not directly related to his assignments that were copied, faxed, or removed by [Rye] during his assignment in Chiang's office,' and that [Rye] claimed that he did not have any of the documents sought by [the BOE]."

Rye argues that, to establish insubordination and willful disobedience, the evidence must show that he disobeyed a direct order from a supervisor to return the notes. The record includes such evidence. Jefferson Vest was Rye's supervisor. Vest sent memos to Rye, entitled "Retained Confidential Documents," directing him to "return all copies of documents not directly related to your assignments copied, faxed or removed by

you while employed in Mr. Chiang's office." Rye claimed at the time not to have any such documents, even though he still had a copy of Tang's notes, and he claims now that the order was too vague to support a finding of insubordination and willful disobedience.

In addition to Vest's direction to Rye to return the documents, there were other requests from the hearing officer (Henry) and a BOE investigator (Giorgi) specifically for the return of the copies of Tang's notes. Rye's remonstrance that Vest's direction was too vague and that Rye did not understand it to include the copies of Tang's notes is utterly unpersuasive, in context.

There was additional evidence of Rye's refusal to return copies of Tang's notes, but the evidence we have cited is sufficient to reject Rye's contention. In any event, Rye does not explain how a different finding as to insubordination and willful disobedience would have changed the result in his favor. He was still unethical and dishonest.

VII

Failure to Specify Evidence

Rye contends: "The SPB committed prejudicial abuse of discretion by failing to proceed in the manner required by law, by failing to specify evidence of the demeanor, manner, or attitude of witnesses Henry, Alonzo, Battle, and Giorgi, that supports its credibility determinations, as required by Government Code section 11425.50, subdivision (b)." We conclude that the SPB did not commit a prejudicial abuse of discretion.

An administrative board such as the SPB is required to make findings to support its adjudicatory decisions. (Gov. Code, § 11425.50, subd. (a); *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 590.) Government Code section 11425.50, subdivision (b) states, in pertinent part: "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it."

Rye claims that the SPB did not include in its decision an identification of sufficiently specific evidence relevant to its credibility determinations. He argues that this was a prejudicial abuse of discretion in that the SPB did not proceed in the manner required by law. However, he fails to cite any authority that failing to provide specific evidence concerning credibility determinations is, by itself, a prejudicial abuse of discretion requiring reversal.

Here, it appears the SPB adopted the credibility determinations of the ALJ, which determinations were supported by specific evidence, and added its own reasoning concerning the evidence. Therefore, the SPB both agreed with the ALJ's credibility determinations with respect to Rye and noted the corroborations among the witnesses on the version of events

adopted by both the ALJ and the SPB. The SPB therefore identified specific evidence upon which it based its credibility determinations.

In any event, even if the SPB should have identified more specific evidence to support its credibility determinations, that failure was not a reversible abuse of discretion. Instead, as stated in the statute, whether the SPB provided specific evidence to support credibility determinations affects only the weight to which those credibility determinations are entitled on judicial review. (See *California Youth Authority v. State Personnel Bd.*, *supra*, 104 Cal.App.4th at p. 588.) In other words, failure to provide specific evidence to support credibility determinations is not a failure to proceed in a manner provided by law that, by itself, requires reversal.

In this case, the trial court reviewed the SPB record for substantial evidence supporting the findings. The court, at least impliedly, did not accord great weight to the SPB's credibility determinations. Therefore, the court acted properly, even if the SPB failed to provide specific evidence to support its credibility determinations.

VIII

Hearsay

Rye contends that Mary Ann Alonzo's testimony about what Steve Kamp told her about what Rye told him about how he got Tang's notes was inadmissible hearsay. We disagree. In the administrative forum, the evidence was admissible.

Government Code section 11513, subdivision (c) states that an administrative hearing "need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." Subdivision (d) of the same section adds: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d).)

Here, Alonzo's testimony was credible and corroborated. Rye, himself, admitted to having the notes. And Henry testified that Rye said he found Tang's notebook on her desk. Alonzo's testimony, therefore, was not used by itself to support a material finding. (See Gov. Code, § 11513, subs. (c), (d); see also Gov. Code, § 19578.) Therefore, Alonzo's testimony was admissible in the SPB hearing.

IX

Miscellaneous Substantial Evidence Contentions

Rye points out several of what he argues are incorrect factual findings by the SPB, and he claims that making those findings was a prejudicial abuse of discretion. He asserts the evidence was insufficient to conclude that (1) he did not have

an attorney-client privilege as to his communications with Battle, (2) Chiang's office suite was accessible only with a card-key, (3) his own statements about how he obtained Tang's notes were inconsistent, (4) he reported to Tang, (5) Tang managed the office, (6) he and Tang did not have common assignments, (7) he was not a good fit for the job, and (8) he was "assigned" to work for Chiang. Rye, however, makes no attempt to explain how these asserted problems in the SPB's decision were prejudicial to him. Because he does not make an identifiable prejudice argument, we conclude there was no prejudice and decline to consider the factual contentions. (*McLaughlin, supra*, 82 Cal.App.4th at p. 337.)

X

Penalty

Rye contends that we should remand to the SPB for a new penalty determination because the SPB improperly relied on Battle's testimony in concluding that Rye should be dismissed.⁵ (See *Shepard v. State Personnel Bd.* (1957) 48 Cal.2d 41, 51 [remand to SPB if reasons for dismissal partially fail].) We disagree for two reasons: (1) even assuming without deciding

⁵ In the heading to his argument, Rye states: "The penalty of dismissal is grossly disproportionate and excessive." However, he does not make that argument in the text. Instead, he continues to deny that he did anything wrong. He also does not cite authority concerning gross disproportionality and excessiveness. Therefore, to the extent he meant to make such an argument, he fails to carry his burden of establishing prejudicial error. (*McLaughlin, supra*, 82 Cal.App.4th at p. 337.)

that the SPB should not have admitted Battle's testimony, the improper admission was harmless (as we discuss at length above) and (2) even disregarding Battle's testimony, the SPB's conclusions that Rye took the notebook from Tang's desk, kept the copies of notes, and failed to return them when directed to do so are supported by convincing evidence.

Rye also contends the record is "devoid of any evidence showing that [his] alleged actions caused any harm to the public service, much less risk of repeated harm." There are three problems with this argument. First, Rye's actions are no longer simply alleged but instead have been proved. Second, the argument completely ignores the fact that the unethical and dishonest actions of an attorney in public service are harmful to public service because they engender distrust in government generally and the BOE specifically and, as the SPB found, the public service is harmed because Rye cannot be trusted as an employee. And third, Rye's continued insistence that he did nothing wrong increases the risk that he will engage in wrongful conduct in the future.

Therefore, a remand would serve no valid purpose.

DISPOSITION

The judgment is affirmed. Rye's request for attorney fees is denied because the SPB did not act arbitrarily or

capriciously. (Gov. Code, § 800.) The BOE is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, Acting P. J.

I concur:

MAURO, J.

I respectfully dissent. Unlike the majority, I do not believe we can avoid the merits of the union/legal representative privilege issue simply by claiming forfeiture of the issue on prejudice grounds, or assuming error and finding no prejudice. I base this belief on two grounds.

First, I note that in the majority's accurate summary of the facts, we learn that the State Personnel Board (the SPB), in deciding the case for itself, concluded: "[A]fter reading [Battle's] testimony [i.e., the testimony from Rye's nonattorney union representative who counseled him here, Roberta Battle; the Board of Equalization (BOE) subpoenaed Battle to testify against Rye at his employment dismissal hearing], [the SPB] concludes that [Rye] not only took the [Tang] notes as alleged by the [BOE], but also breached his ethical and confidentiality duties as an attorney and employee. [The SPB] therefore sustains [Rye's] dismissal." (Italics and third bracketed material added.) (Maj. opn., ante, at p. 4.) It is difficult to read this conclusion without finding Battle's testimony pivotal to the SPB's dismissal decision.

Second, the majority concludes that it can apply the traditional state law standard of harmless error, distinguishing this court's decision in *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 (*Carlsson*). (Maj. opn., ante, at pp. 9-11.) In *Carlsson*, the trial judge ended the trial before one party had finished putting on its case-in-chief. (*Carlsson*, at p. 284.) We concluded that this error, which deprived the party

of its full day in court, was not subject to the harmless error doctrine. (*Id.* at p. 293.)

I am familiar with *Carlsson*. I authored it. What occurred there approximates what occurred here, in terms of unfairness. Here, one party subpoenaed its adversary's legal representative to testify against that adversary, and the representative was compelled to do so; just to be clear, the legal representative was forced to testify against her client. The majority distinguishes *Carlsson*, reasoning that "Rye's case does not feature the fundamental denial of the right to a fair trial found in *Carlsson*. [Rye] was afforded a full hearing. The proceedings were not ended prematurely. Unlike the circumstances of *Carlsson*, there is nothing here stopping us from determining whether actual prejudice occurred." (Maj. opn., ante, at p. 10.) The full hearing described in *Carlsson*, though, was the right to a *fair* hearing. (See *Carlsson, supra*, 163 Cal.App.4th at pp. 292-293.) Indeed, Rye had a full hearing here—in fact, too full, with his legal representative testifying against him; what was lacking was a fair hearing. I acknowledge that Rye is not the most sympathetic of litigants. But many of the legal rights we have come to cherish trace their genesis to litigants much more unsavory than this one.

With that said, I now turn to the merits of the privilege issue. For the reasons that follow, I conclude that the communications between a permanent state civil service employee (like Rye) and his or her nonattorney designated representative

(like Battle), in the context of an employment adverse action investigation, are privileged. I would reverse and remand this matter for the SPB to reconsider its dismissal decision without using Battle's testimony.

Any discussion concerning the existence of an evidentiary privilege must begin with Evidence Code section 911, which states:

"Except as otherwise provided by statute:

"(a) No person has a privilege to refuse to be a witness.

"(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

"(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing."

As succinctly explained in the seminal high court decision on this subject, *Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766 (*Crisan*), "In section 911 of the Evidence Code, the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy. [Citations.] Thus, unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal." (33 Cal.3d at p. 769.)

The issue of whether a new evidentiary privilege should be recognized presents a question of law; therefore, this issue is determined independently of the trial court. (*American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 887-888 (*American Airlines*).)

Crisan provides the analytical roadmap for my decision here. In *Crisan*, the state Supreme Court concluded that communications between welfare claimants and lay representatives—authorized to represent claimants in administrative fair hearings under the Aid to Families with Dependent Children (AFDC) program—are subject to a privilege comparable to the attorney-client privilege, because such a privilege is impliedly based on a statute, Welfare and Institutions Code section 10950. (*Crisan, supra*, 33 Cal.3d at pp. 768-771.)

Crisan's analytical roadmap unfolded along the following points of interest. The first point was the United States Supreme Court's decision in *Goldberg v. Kelly* (1970) 397 U.S. 254 [25 L.Ed.2d 287], which held that AFDC recipients have a federal due process right to an evidentiary hearing before their benefits are terminated. (*Crisan, supra*, 33 Cal.3d at p. 769.)

Next, *Crisan* quoted the state statute on which the evidentiary privilege was implied there, former Welfare and Institutions Code section 10950. (Stats. 1981, ch. 1, 1st par., p. 3.) That statute, consistent with *Goldberg* and federal regulations, stated as pertinent, "If any applicant for or

recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of public social services . . . he shall, in person or through an authorized representative[,] . . . be accorded an opportunity for a fair hearing.'" (*Crisan, supra*, 33 Cal.3d at p. 770.)

Crisan then reasoned, "By using the term 'authorized representative' rather than 'counsel' or 'attorney,' the Legislature made it clear that claimants have a right to be represented by lay representatives as well as by members of the bar" (and *Crisan* further noted in footnote 1 that state regulations made this explicit). (*Crisan, supra*, 33 Cal.3d at p. 770 & fn. 1.)

Crisan continued, "The term 'authorized representative' signifies an expansion of the right of representation that previously had been accorded welfare claimants. Before the enactment of [Welfare and Institutions Code] section 10950, the [former] applicable statute . . . had provided: 'At the hearing the applicant or recipient may appear in person with counsel of his own choosing, or in person and without such counsel.' The substitution of 'authorized representative' for 'counsel' suggests that the Legislature recognized that attorneys alone could not satisfy the representational needs of the state's welfare claimants and that assistance through [nonattorney] representation was necessary to insure the meaningfulness of the 'fair hearing' right provided by statute [and mandated by due

process]. [¶] . . . [Fn. omitted.] [Citations.] [T]he considerations which support the [attorney-client] privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons. Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature." (*Crisan, supra*, 33 Cal.3d at pp. 770-771.) Nor, as I shall explain, do I.

My analytical route follows that of *Crisan*.

First, as the state Supreme Court recognized in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, the California statutory scheme regulating civil service employment confers upon a "permanent" state civil service employee, like Rye, a property interest in the continuation of his employment which is protected by due process. (*Id.* at p. 206.) Before such an employee may be subjected to an "adverse action" (i.e., dismissal, demotion, suspension or other disciplinary action), he must be afforded notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, orally or in writing, to the authority initially imposing discipline. (*Skelly*, at p. 215; see Gov. Code, § 19570 [defining "adverse action"].)

Next come the two Government Code statutes from which any evidentiary privilege here is to be implied: sections 19574.1 and 19579.

Government Code section 19574.1 states, as pertinent, "An employee who has been served with notice of adverse action, or a *representative designated* by the employee, shall have the right to inspect any documents in the possession of, or under the control of, the appointing power which are relevant to the adverse action taken or which would constitute 'relevant evidence' as defined in . . . the Evidence Code. The employee, or the *designated representative*, shall also have the right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based." (Gov. Code, § 19574.1, subd. (a), italics added.)

And Government Code section 19579 adds, "Failure of either party (the employee, the employer, or *their representatives*) to proceed at the [adverse action] hearing shall be deemed a withdrawal of the action or appeal, unless the hearing is continued by mutual agreement of the parties, or upon showing of good cause." (Italics added.)

As for Government Code section 19574.1, an amendment to it came right on the heels of *Crisan* in 1983. (Stats. 1983, ch. 154, § 1, p. 528.) That amendment substituted "a representative" for "an attorney." (Legis. Counsel's Dig., Sen. Bill No. 231, 4 Stats. 1983, ch. 154, § 1, p. 45; see Sen. Bill No. 231, approved by Governor, June 29, 1983, Sen. Final Hist. (1983-1984 Reg. Sess.) p. 186.) As shown by *Crisan*, then, by using the term "representative" rather than "attorney" in Government Code section 19574.1, the Legislature made it clear

that permanent state civil service employees subjected to the adverse action process have a right to be represented by lay representatives as well as by members of the bar (and, as in *Crisan*, state regulations make this explicit).¹

Of course, Government Code section 19574.1 specifies only that the employee's designated representative has the right to inspect any relevant documents in the appointing power's possession or control, and the right to interview other knowledgeable employees. This is not as broad-based a representative right as provided by the statute at issue in *Crisan*—Welfare and Institutions Code section 10950—which specified that a welfare claimant, "in person or *through an authorized representative . . .* be accorded an opportunity for a fair hearing." (*Crisan, supra*, 33 Cal.3d at p. 770.)

This is where Government Code section 19579 comes in. Section 19579 specifies that "[f]ailure of either party (the employee, the employer, or *their representatives*) to proceed at the [adverse action] *hearing* shall be deemed a withdrawal of the action or appeal," unless certain conditions are met. (Italics added.) Government Code section 19574.1, then, contemplates a representative (designated by the employee) conducting

¹ California Code of Regulations, title 2, section 52.9 (formerly section 51.5) specifies as relevant, "Any party may be represented by counsel or any other person or organization of the party's choice in any hearing or investigation conducted pursuant to this article [the referenced article pertains to the SPB]." (Cal. Code Regs., tit. 2, § 52.9, subd. (a).)

discovery, and Government Code section 19579 contemplates a representative designated by the employee carrying out the hearing based on that discovery. This one-two punch contemplates a designated representative fully representing a permanent state civil service employee in the adverse action context. This is confirmed by (1) the fact that Government Code section 19579 was rewritten in 1985 (following the 1983 amendment to Government Code section 19574.1) to add the term "representatives" (Stats. 1985, ch. 1195, § 4.5, pp. 4047-4048; see Stats. 1949, ch. 1416, § 9, p. 2469), and (2) companion Government Code sections 19578 and 19582, which provide for adversarial hearings before the SPB in the adverse action context.

With that clarified, I return to the *Crisan* roadmap. Analogizing to *Crisan*, the 1983 substitution of "representative" for "attorney" in Government Code section 19574.1, and the 1985 addition of the term "representatives" in Government Code section 19579, signify an expansion of the right of representation that previously had been accorded state civil service employees. These legislative expansions suggest that the Legislature recognized that attorneys alone could not satisfy the representational needs of the state's civil service employees, who recently had secured full collective bargaining rights, and that assistance through nonattorney representation was necessary to ensure the meaningfulness of the discovery and hearing rights afforded by Government Code sections 19574.1 and

19579 (and confirmed by companion Government Code sections 19578 and 19582).

Given all these parallels between *Crisan* and the present matter, *Crisan's* conclusion applies with analogous force here: "[T]he considerations which support the [attorney-client] privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons [in Government Code sections 19574.1 and 19579]." (*Crisan, supra*, 33 Cal.3d at p. 771.) Otherwise, as the administrative law judge aptly put it here, and again, mirroring *Crisan*, "It would be a cruel hoax were the SPB to allow a layperson to represent [a permanent state civil service employee], and then permit [the employing agency] to call the lay representative to testify about admissions made by the [employee] during the course of [that lay] representation, or the legal strategies they discussed." (See *Crisan*, at p. 771 [not willing to attribute "such a sadistic intent to the Legislature" in laying such a "trap"].)

I conclude that communications between a permanent state civil service employee and his or her nonattorney designated representative in the context of an adverse action investigation are privileged.²

² In my view, *American Airlines, supra*, 114 Cal.App.4th 881 does not help the BOE here. *American Airlines* did emphasize that evidentiary privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." (*Id.* at p. 887, citing *United States v. Nixon* (1974) 418 U.S. 683, 710 [41 L.Ed.2d 1039, 1065].) But the

The BOE argues against such a conclusion by asserting that an adverse action was not the context here. The BOE claims that Rye informed Battle of the origin of the Tang notes while Battle was representing Rye in the context of his probation rejection, a nonadverse action. (See Gov. Code, § 19570 [defining "adverse action"].)

However, Battle represented Rye, not just during Rye's probation rejection, but through the BOE's first investigative interview of Rye on January 18, 2005, which concerned how he had obtained Tang's notes. This investigation comprised the heart of the adverse action against Rye. And Battle vigorously advocated on Rye's behalf during this investigative interview, using information Rye had provided her. To compel Battle to testify what Rye disclosed to her in this context is to make a mockery of the concepts of meaningful representation and fair hearing, as envisioned by Government Code sections 19574.1 and 19579 (and confirmed by Government Code sections 19578 and 19582). As I have explained, the *Crisan* roadmap would not permit the court to travel there.

facts in *American Airlines* stand completely apart from those here. There, an employee, in his wrongful termination lawsuit based on racial discrimination, indicated that his union representative had supportive information in the form of disparaging racial remarks that other employees had made to the union representative. The *American Airlines* court rejected the union representative's claim of a union representative-union member privilege in this context, noting that such a privilege would severely hamper an employer's ability to investigate harassment claims. (*American Airlines, supra*, 114 Cal.App.4th at pp. 884-885, 890.)

Finally, the dearth of decisional law on this subject only bolsters my conclusion. If not much has been said over the years concerning the existence of an evidentiary privilege in the context presented here, that is probably because it goes without saying. (See *Crisan, supra*, 33 Cal.3d at p. 772 [The "absence of a single earlier case on this issue provides substantial support for our conclusion: during the 17 years in which the right of lay representation in welfare hearings has existed in California, the implicit guarantee of confidentiality has apparently gone unquestioned."].)

Accordingly, the BOE and the SPB could not compel Battle to testify against Rye regarding their communications. The question then becomes, what now?

The SPB granted Rye's petition for rehearing, heard this matter on its own (using the administrative record), and concluded, as noted: "[A]fter reading [Battle's] testimony, [the SPB] concludes that [Rye] not only took [Tang's] notes as alleged by the [BOE], but also breached his ethical and confidentiality duties as an attorney and employee. [The SPB] therefore sustains [Rye's] dismissal." Battle's testimony, then, was pivotal in the SPB's decision and penalty.

The SPB should not have considered Battle's testimony. Consequently, I would reverse and remand this matter to the trial court to issue a writ of administrative mandate directing the SPB to set aside its dismissal decision and to reconsider this matter without using Battle's testimony. (See *Shepherd v.*

State Personnel Board (1957) 48 Cal.2d 41, 51 [where the basis of a state personnel board dismissal decision "partially fails," the matter should be remanded for reconsideration].)

BUTZ, J.