COMMONWEALTH OF MASSSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033057-08**

Joseph A. Upton	Employee
Suffolk County House of Correction	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Levine.

APPEARANCES
Michael C. Akashian, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision denying his claim for benefits[1] stemming from an emotional injury resulting from a November 25, 2008 meeting, conducted on work premises during work hours, with representatives of the employer.[2] Following a four-day hearing,[3] the administrative judge concluded that the November 25, 2008 meeting was a bona fide personnel action and,

[1] The employee sought § 34 total incapacity or, in the alternative, § 35 partial incapacity benefits, from November 26, 2008 and continuing, medical benefits under §§ 13 and 30, § 50 interest, and attorney's fees and costs under § 13A. (Tr. I, 3.) At oral argument before the reviewing board, the parties represented that the employee had returned to work. Consequently, employee's counsel represented that the employee was seeking a closed period of weekly incapacity benefits. Following oral argument, the parties reported that the employee returned to work on October 20, 2010. (See November 4, 2011 correspondence to the board on behalf of the employee.)

[2] Although the employee also testified about other events that occurred at work between August 2008 and the November 25, 2008 meeting, the impartial medical examiner opined that the November meeting "was the predominant contributing cause of the employee's emotional disability," and the parties agreed "that the employee prevails on his claim depending on the legal effect of a November 25, 2008 interview (or meeting) the employee had with self-insurer's [sic] investigators." (Dec. 7, 8.)

[3] Herein, we reference the transcripts for these dates as follows: January 6, 2010 as Tr. I; February 5, 2010 as Tr. II; February 26, 2010 as Tr. III; and March 16, 2010 as Tr. IV.

accordingly, any emotional injury resulting from it was not compensable under the applicable provisions of § 1(7A).[4] For the reasons that follow, we reverse the decision and recommit the matter for a hearing de novo on the issues of disability and the extent thereof.

In order to place the November 25, 2008 meeting in context, we briefly summarize the lengthy legal proceedings between the employer and the employee's union, which led to the meeting. In 1999, the employer terminated the employee, a jail officer, based on alleged misconduct occurring at work. The employee filed a grievance through his union. An arbitrator's award ordered the employee's reinstatement following a six month suspension without pay, and ordered the employer to pay the employee back wages offset by any outside earnings during the period of his termination.[5] (Dec. 6-7.) The employer sought to vacate the award. Ultimately, in June of 2008, the Supreme Judicial Court affirmed the Superior Court's judgment confirming the arbitrator's award. Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 451 Mass.

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[4] General Laws c. 152, § 1(7A), provides, in pertinent part:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. . . . No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

[5] The arbitrator's decision contained the following award:

> Upton's discharge is revoked and he is suspended for six months with no pay or benefits and without accumulation of seniority during that period of time effective from the original date of discharge.
>
> Thereafter he will be reinstated with full back pay and benefits, less any outside earnings and/or unemployment compensation.

(Self-ins. Ex. 1.)

698, 703 (2008).[6] In June of 2008, as part of his reinstatement process, the employer began a background check and investigation of the employee. (Tr. I, 127-130, 143, 149.) On July 25, 2008, the employee was reinstated and, after completing a refresher training course at the academy, he commenced work at the jail. The back pay issue remained unresolved, and the employer sought to discover the amount the employee earned during the back pay period.[7] The administrative judge made the following findings:

> To determine how much the employee had earned during the years that he was awaiting resolution of the grievance procedure, and based on information it received, the self-insurer prepared Self-Insurer Exhibit 5, which listed "offset earnings" for the aforesaid period of time. Although the employee may have been hesitant to sign the aforesaid statement, he did sign it "under the pains and penalties of perjury."
>
> Thereafter, self-insurer's investigators came to suspect that the employee did not disclose all his relevant earnings on Self-Insurer Exhibit 5.
>
> In a meeting, which included members of the self-insurer's legal staff, it was decided that two investigators would interview the employee with regard to apparent discrepancies.
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> On behalf of the self-insurer, Brian Dacey and Leonora DiStefano conducted the interview. Pursuant to a collective bargaining agreement, the employee was accompanied by a union representative. The employee was neither offered an attorney nor did he request an attorney at the November 2008 interview. If he requested an attorney, he would have been allowed one. (1/6/10 Tr. p. 137.) In addition to investigating the discrepancies, the

[6] Regarding those legal proceedings, the Sheriff's office was represented by Attorney Ellen Caulo and the union was represented by Attorney Stephen Pfaff. Id.

[7] On July 17, 2008, Attorney Caulo wrote to Attorney Pfaff, requesting the employee's W-2 forms and federal and state tax returns for the years 1999 through 2007. (Employee Ex. 2.) Subsequently, the employer compiled a document allegedly consisting of an Excel spreadsheet purporting to show both the back wages the employee would have received during the time he was terminated, and the income the employee received during his termination. (Tr. III, 14-16, 22.) Only the last page of that document, listing the total figures and requiring the employee's signature "under the pains and penalties of perjury," was placed in evidence at the hearing. (Id.; Self-ins. Ex. 5.) The employer had the employee sign that document on September 5, 2008. (Self-ins. Ex. 5.) On September 19, 2008, Attorney Pfaff provided Attorney Caulo with documentation concerning the employee's outside earnings for the time period prior to his reinstatement. (Joint Ex. 1.)

> purpose of the interview was to determine if the employee was being truthful when he signed Self-Insurer Exhibit 5.

(Dec. 7-8.)

Soon after the meeting, the employee was sent to a hospital emergency room with shortness of breath, tingling in the arm, and chest pain.[8] The judge adopted the impartial physician's opinion that the meeting was the predominant contributing cause of the employee's emotional disability. (Dec. 7, 8.) However, the judge concluded that the meeting was a personnel action, it was bona fide, and the employer did not intentionally inflict the employee's emotional distress. (Dec. 8-10.) Accordingly, the judge denied and dismissed the employee's claim.

The question on appeal is whether the judge erred in finding the November 25, 2008, meeting was a bona fide personnel action within the meaning of § 1(7A). For the following reasons, we conclude that as a matter of law, the event at issue was not a "personnel action" within the meaning of the exclusion set forth in § 1(7A).

The judge made the following findings of fact regarding the November 25, 2008 meeting:

> The purpose of the meeting was to investigate discrepancies between information the self-insurer had obtained in its independent investigation compared to the information the employee disclosed in his signed statement in Self-Insurer Exhibit 5. The investigation also was to determine whether the employee had been truthful. The investigation could lead to termination

[8] The employee testified that when he was told "to report to SID," which meant he had to report to the interrogation room,

> I thought I did something wrong again, and I thought I might have been getting fired or - - I didn't know what was going on. There was a lot of things racing through my mind. You know: what did I do now? I've been through this before, now what? What's next? I just got back.

(Tr. I, 22, 24.) When he got to the interrogation room, he found out the questioning was not about being terminated or transferred but about "the back pay." (Tr. I, 26.) While he was at the meeting the employee felt "pretty angry, sneak-attacked, not true, the questions being asked, not fair." (Tr. I, 28.)

> or suspension of the employee. The November 2008 meeting is part of a process to determine what action, including suspension or termination, might be taken based on the employee's conduct.[4] . . . A personnel action can be a process; not just one particular act. For example, notice of suspension would be a personnel action; but the investigation leading to the suspension may also be considered part of the personnel action.
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> [4] The fact that the meeting was not narrowly about the employee's conduct regarding case, [sic] custody and control of inmates does not mean that the meeting was not a personnel action. The meeting was about an employment related matter.

(Dec. 8-9; footnote in original.)

We begin by noting that not every interaction between an employer and an employee regarding employment-related matters constitutes a "personnel action" within the meaning of the exclusion set forth in § 1(7A). We conclude the judge's finding that the meeting in this case was an excluded "personnel action" under § 1(7A), rests on an overbroad interpretation of that statutory provision. Our analysis is based upon the legislative responses to court opinions interpreting the range of compensability for purely emotional disabilities resulting from specific events occurring within the employment considered in conjunction with the humanitarian purpose of the act. See, Young v. Duncan, 218 Mass. 346, 349 (1914)("The act is to be interpreted in the light of its purpose and so far as reasonably may be to promote the accomplishment of its beneficent design").

In Albanese's Case, 378 Mass. 14 (1979), the court addressed an emotional disability indirectly arising from changes in the employer's overtime and bonus policies, which took place over a short period of time. Id. at 16. The court held: "[I]f an employee is incapacitated by a mental or emotional disorder causally related to a series of specific stressful work-related incidents, the employee is entitled to compensation." Id. at 14-15. The legislature responded by enacting the first version of the third sentence of § 1(7A): "Personal injuries shall include mental or emotional disabilities only where a contributing cause of such disability is an event or series of events occurring within the employment." St. 1985, c. 572,

§ 11. Accordingly, it confirmed that a series of identifiable events, such as those in Albanese, could be a proper foundation for a compensable emotional disability.

Subsequently, in Kelly's Case, 394 Mass. 684 (1985), the court ruled that the employee's emotional disability related to a lay-off and transfer was a compensable injury under Chapter 152. Although these were good faith actions on the part of the employer, the court concluded the workers' compensation act provided no exemption from its coverage for emotional injuries based on the legitimate business decisions made by the employer. Id. at 684-685. The court stated:

> We recognize that layoffs and job transfers are frequent events and that emotional injuries are more prone to fabrication and less susceptible to substantiation than are physical injuries. Nevertheless, it is within the Legislature's prerogative to determine, as a matter of public policy, whether one of the costs of doing business in this Commonwealth shall be the compensation of those few employees who do suffer emotional disability as a result of being laid off or transferred, and it is also the Legislature's prerogative to say whether determination of the existence of such a disability is appropriately left to the expertise of the industrial Accident Board.

Id. at 689. The Legislature accepted the court's invitation and enacted in response, the "bona fide, personnel action" exception to compensability. See Cornetta's Case, 68 Mass. App. Ct. 107, 115-117 (2007)(recounting the legislative history). See also Agosto v. M.B.T.A., 20 Mass. Workers' Comp. Rep. 281, 286-288 (2007)(Horan, J., concurring).

In its original draft, the exclusion was very narrow, pertaining only to "an economically motivated, bona fide, personnel transfer, promotion, demotion, or termination."[9] House Bill 6766, § 54. In its final version, which ultimately

[9] House Bill 6766 § 54 read:

> No mental or emotional disability whose principal cause is an economically motivated, bona fide, personnel transfer, promotion, demotion, or termination shall be deemed to be a personal injury within the meaning of this Chapter.

became the fifth sentence of § 1(7A), the requirement that the employer's decision be "economically motivated" was removed and the category of excluded actions was expanded from the four actions appearing in the original draft, to "personnel actions *including* a transfer, promotion, demotion, or termination." General Laws, c. 152, § 1(7A), as amended by St. 1986, c. 662, § 35, and by § 55 effective January 1, 1986(emphasis added). While this language signals the legislature's intent to make the exclusion apply to more than just the four examples listed, the four examples of excluded "personnel actions," share a common characteristic: they are actions that impact or alter the terms of the employment relationship or employment status. Agosto, supra. "When elements are listed in a series, the rules of statutory construction require the general phrase to be construed as restricted to elements similar to the specific elements listed." Commonwealth v. Zubiel, 456 Mass. 27, 31 (2010).

In addition, although we are mindful that "[t]he various sentences of § 1(7A) were adopted piecemeal over time and are best understood not as an all-encompassing definition of compensable 'personal injury,' but, rather, as a series of legislative responses to specific court decisions and perceived needs for targeted reform," Cornetta, supra at 114, it is noteworthy that this legislative change came on the heels of another amendment to § 1(7A), providing another exception to compensability; specifically, the insertion of the second sentence, providing the exclusion for injuries resulting from an employee's "purely voluntary participation in any recreational activity, *including but not limited to* athletic events, parties, and picnics." General Laws c. 152, § 1(7A), as amended by St. 1985, c. 572, § 11, effective January 1, 1986(emphasis added). By providing the four examples of excluded "personnel actions" and failing to further broaden the statutory language by using the terms, "including but not limited to,"

The phrase, "economically motivated," appears to have been borrowed from the Kelly dissent. See Kelly, supra at 689 (Hennessey, C.J., dissenting).

we conclude that the legislature did not intend to broaden the scope of the "bona fide, personnel action" exclusion so far as to include events that do not share the characteristic of changing or impacting the employment relationship, or the employment status. Agosto, supra. at 288; see McCarty's Case, 445 Mass. 361, 364-365 (2005)(in light of its beneficent design, statutory language removing subject matter from scope of c. 152's coverage to be narrowly construed). Accordingly, we read the statutory language, "including a transfer, promotion, demotion, or termination," as limiting the scope of the term "bona fide, personnel action" to the actions enumerated in the list, along with synonymous actions (e.g., a suspension, probation, disciplinary actions, lay-off), in other words, as pertaining to only those actions that impact or alter the terms of the employment relationship or the employment status. Agosto, supra.

Here, the meeting did not impact or change the employee's employment status or his employment relationship in any manner. The meeting was not akin to "a transfer, promotion, demotion, or termination." Instead, it was a fact-finding mission concerning what has become the second phase of the separate, lengthy, legal action: the calculation of damages.[10] We also do not agree with the judge's

[10] The judge acknowledged as much in his decision.

> The self-insurer had legitimate reasons to investigate the employee's truthfulness with respect to his earnings while he was not working for the self-insurer. During the seven or eight years when the employee did not work for the self-insurer, there were outstanding earnings that the self-insurer could owe the employee totaling more than $400,000.00. It certainly was appropriate that the self-insurer determine how much the employee earned during that out of work period of time to reduce what the self-insurer would owe the employee. Convening the November 2008 meeting was consistent with that determination.

(Dec. 9.) That the "investigation" was akin to informal discovery on the issue of damages was evident by Deputy Superintendent Leonora DiStefano's statements upon commencing the meeting:

> And Joe, let me reiterate the reason we are looking to talk to you today is that as you well know, there is a back pay issue that there's an amount outstanding that the department is going to be making to you - uh - in the course of the

reasoning that because the employer was legitimately investigating the employee's reported earnings, which was an employment-related matter that "could lead to termination or suspension," it was a personnel action within the exclusion appearing in § 1(7A). [11] (Dec. 8) The fact the employer used its investigatory unit to conduct informal discovery on the issue of damages, does not make the meeting a "personnel action" as those words are commonly understood or typically used. Throughout the course of the meeting, there was no mention of any aspect of the employee's then current job or job duties. (Self-ins. Ex. 6.) Indeed, as the parties stipulated at the hearing,[12] and as they represented at oral argument, to this date,

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> proceedings - uh - there were certain documents in the form of tax returns and W-2s and related documents that were requested of you through the legal department. Uh- I was provided copies of the documents and in my review and subsequent research I've come up with some questions. And that's the purpose for the meeting with you.

(Self-ins. Ex. 6.) The employee was asked about his living situation, child support payments, a 2007 census report that listed his occupation as carpenter, a 2006 police report that listed his place of employment at 6 Concord Street in Charlestown, and the fact he had not filed tax returns for those years. The employee was also asked about whether he ran in a road race in 2004 and 2007. (Self-ins. Ex. 6.)

[11] The judge's reliance on Presto v. Bishop Connolly High School, 21 Mass. Workers' Comp. Rep. 157 (2006), is misplaced. In that case, the investigation and the employer's action of placing the employee on administrative leave with pay, occurred simultaneously in a meeting between the high school principal and the employee. In addition, the actual event that caused the employee's disability was his subsequent termination from employment. More importantly, on appeal the employee did not challenge the judge's finding that the series of events spawning his claimed incapacity were personnel actions. Rather, the employee's argument was that the judge incorrectly applied a subjective test to determine whether his ultimate termination from the employment was bona fide. Id. at 159-161.

[12] The parties stipulated in pertinent part:

> On July 24, 2009, the Union filed a complaint of contempt against the Suffolk County Sheriff seeking to have the Sheriff compensate Joseph Upton pursuant to the Arbitrator's Award.
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> The Suffolk County Sheriff answered that complaint and filed a counterclaim for declaratory judgment, alleging that the Employee's assertion that his Offset

the underlying dispute over the employee's back pay remains unresolved. Moreover, there is no indication any discipline resulted from the meeting. On these facts, we conclude the meeting was not a "personnel action," within the meaning of § 1(7A). Accordingly, we reverse the decision and transfer the case to the senior judge for assignment to a different judge for a hearing de novo on the issues of disability and the extent thereof.[13]

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***December 21, 2011***

Earnings did not exceed $14,940.00 is false, and requesting that the Court issue a declaration pursuant to ch. 231A as to the true amount of the employee's earnings during the relevant time period.

(Joint Ex. 1.)

[13] The matter must be reassigned because the judge no longer serves the Department in the capacity of administrative judge.