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COURT OF APPEALS

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NO. 34531-5-II

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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*Original*

DARRELL J. HENN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

The Department of Social and Health Services (DSHS) is charged with protecting the most vulnerable of the state's residents. The safety of children is the primary mission of Child Protective Services (CPS) within the DSHS Division of Children and Family Services (DCFS) and is the reason why the DCFS exists. In carrying out this mission CPS takes referrals of alleged abuse or neglect of children and strives to conduct thorough investigations into such allegations to assess further risk and determine appropriate planning and placement options.

Appellant was a social worker with CPS who was dismissed based on his failure to conduct adequate investigations, his failure to assess risks to children, and his failure to do proper case planning for several dependent children assigned to him. The issues involved three children on the social worker's caseload, a 6-year-old child who made a disclosure of sexual abuse and two medically fragile toddlers. The record contains substantial evidence by experienced social workers, DSHS employees, a Guardian ad Litem, and an

Assistant Attorney General that the appellant's conduct fell far below accepted standards of social work. The Personnel Appeals Board (PAB or Board) weighed the evidence and gauged the credibility of the witnesses. Reviewing courts defer to the PAB's determinations regarding the facts and the credibility of the witnesses appearing before it. Under the standard of review applicable to judicial review of administrative decisions, the Court should affirm the decision of the superior court and of the PAB.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Whether the decision of the Board upholding Mr. Henn's termination from DSHS should be affirmed because the PAB's findings of fact are supported by substantial credible evidence on the record, its conclusions of law are not contrary to law, and the decision is not arbitrary and capricious.

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Substantive Facts.**

Darrell Henn was employed as a CPS Social Worker 3 in the Spokane office of the Division of Children and Family

Services (DCFS). He began his employment with the DSHS on or around April 2, 1996. Administrative Record of Proceedings (RP) 106, 245. He was dismissed effective February 6, 2003.

DSHS policies spell out, among other things, that a high standard of investigation is used for all referrals given moderate to high risk tags at intake, that the social worker gathers information for risk assessment, family evaluation and case planning, and the assigned social worker is to interview child victims face-to-face within 10 working days from the date of referral. RP 99-103, 157-162. Those policies require a social worker to complete a safety assessment immediately following the initial face-to-face contact with the child for all referrals tagged 3, 4 or 5 in which the child is not placed in out of home care. *Id.* DSHS policies also require that employees perform duties and responsibilities in a manner that maintains standards of behavior that promote public trust, faith and confidence. RP 99. Mr. Henn was an experienced social worker and, as such, was aware of and had received training on the DSHS and DCFS policies, practices, and proper case management. RP 163-164, 248-253.

**1. Emylei P.**

On April 12, 2002, CPS Intake in Spokane received a referral regarding physical abuse and neglect of 6-year-old Emylei P. The referral was given a Risk Tag 5-High, the highest risk factor, and a Response Time of Emergent, the most immediate response time. RP 166. Police officers had responded to a domestic violence call at Emylei's home and arrested Emylei's mother, Julie, for assault after Emylei was found with numerous injuries. RP 166-174.

Emylei and her two younger siblings, Hannah and Christian, resided with their mother, Julie, and Earl, the father of Hannah and Christian. Earl was not Emylei's father. As Julie was being taken to jail she informed the police officers that Earl had sexually molested Emylei approximately 1 year earlier and not to leave Earl alone with the child. RP 167.

The case of Emylei, Hannah and Christian was initially assigned to Social Worker Heather Hamasaki. Shortly thereafter, it was determined that Emylei's natural father, Michael, is Native American and, as a result, her case was

separated from that of her siblings and transferred to the Indian Child Welfare (ICW) unit. Mr. Henn, as a member of the ICW, was assigned to Emylei's case. Ms. Hamasaki retained responsibility for Hannah and Christian. RP 110-119, 128.

Due to the allegation that Julie had made regarding Earl's sexual abuse of Emylei, a counselor at Casey Family Partners was retained to conduct an interview with Emylei. RP 199. The interview occurred on April 30, 2002, during which Emylei made her own disclosure of sexual abuse by Earl and indicated that it occurred when she was 4 years old. RP 205. Mr. Henn witnessed a part of the interview and received a copy of the counselor's report during the week of May 7, 2002. RP 110, 114, 199-208.

Mr. Henn told Ms. Hamaksi he received the report and that it was interesting reading. RP 116. He did not inform Ms. Hamasaki that Emylei had made a disclosure of sex abuse against Earl. RP 110, 114. Meanwhile, Julie had recanted her earlier allegation against Earl and this information was contained in the report of the Guardian ad Litem dated May 21, 2002. RP 91, 116. Mr. Henn received a copy of that report and

acknowledged knowing that Julie had recanted her earlier allegations from its contents. RP 480.

Dependency proceedings were held on July 16, 2002, as to all three of Julie's children. RP 116, 118. Ms. Hamasaki was there providing input to the court as to Hannah and Christian, the two children assigned to her. Mr. Henn was there on behalf of Emylei as her assigned case worker. During that hearing Mr. Henn did not disclose to the court, the Assistant Attorney General representing DCFS, Dannette Allen, or anyone else that Emylei had made her own disclosure of sex abuse. The court issued its order regarding Earl's visitation with Hannah and Christian without this information. RP 96-97, 116, 118.

Mr. Henn ultimately informed Ms. Hamasaki of the sexual abuse disclosure by Emylei on July 25, 2002, as he was preparing his report for placement. RP 110, 116. Ms. Hamasaki was clearly surprised and alarmed by this as the alleged perpetrator, Earl, was having contact with two children assigned to her, Hannah and Christian. Ms. Hamaksi informed her supervisor and made a referral to intake about this disclosure. RP 117.

Mr. Henn was also exploring placement of Emylei with her natural father, Michael. RP 123. Michael had an assault conviction and Mr. Henn discussed that issue with him. Michael indicated that it was simply a barroom brawl. Mr. Henn did not obtain a copy of the police report despite the fact that an Assistant Attorney General, Cheryl Wolfe, had requested that he do so. RP 123, 126, 129, 667. The police report revealed that Michael had tracked someone down and beat them with a baseball bat while they were on the ground. RP 209-211. Emylei was placed with Michael on July 22, 2002. RP 130.

Kathy Picard, Mr. Henn's supervisor, received a call from the Olympia office on July 26, 2002, expressing concern about Michael's assault conviction and Emylei's placement with him. RP 126, 669-670. Ms. Picard then obtained a copy of the police report, convened an emergency Child Protection Team (CPT), and upon their recommendation, went back to court on July 31, 2002, to attempt to have Emylei removed from Michael's care. The court denied the request. RP 126-127, 674-676.

## **2. Gage G.**

On June 24, 2002, an Emergent, Risk Tag 5 referral was received on 14-month-old Gage G. alleging physical abuse and neglect by his mother Amanda. RP 212-218. The referral outlined various bruises and injuries to Gage, some of which had been caused by his mother. *Id.* Mr. Henn was the assigned case worker for Gage. Mr. Henn failed to document issues in the Service Episode Record (SER), failed to visit Gage while he was in foster care for 15 days and did not see the child at all until he was returned to his mother on July 9, 2002. RP 98. He failed to interview witnesses to the physical abuse and did not follow up on services for the mother and failed to document the bruises or descriptions in writing or by photographs. RP 98. A medical report and X-rays were done on Gage. Mr. Henn failed to read the report even though it was sent to him. RP 146, 219. The case was staffed with a CPT which agreed the child could be sent home if the mother agreed to the service plan. RP 146.

## **3. Fernando L.**

On July 11, 2002, DCFS received a Non-emergent, Risk Tag 5 referral on Fernando, a medically fragile, failure to thrive

infant, alleging that he had not been taken to the doctor. RP 98, 225-229. This case was assigned to Mr. Henn. On August 16, 2002, Dr. Deb Harper reported to Mr. Henn's supervisor, Ms. Picard, that Fernando was in the pediatric unit at the hospital due to medical neglect. RP 98. Mr. Henn failed to conduct an investigation within the 10-day time requirement, did not attempt to see the child or do a face-to-face contact with the child or his parent, did not attempt a home visit and did not do a safety assessment or safety plan. RP 98, 154.

#### **4. Disciplinary Proceeding**

Mr. Henn was provided with four Conduct Investigative Reports (CIRs) based on his failure to report Emylei's sexual abuse disclosure, his failure to provide accurate information regarding Emylei's father's Assault 2 conviction, his failure to conduct an adequate investigation regarding Gage, and his failure to follow up or investigate the referral of Fernando. RP 108, 121, 114, 152. Mr. Henn provided written and verbal statements and admissions during those investigations. RP 110-111, 114-115, 123-125, 128-131, 143-147, 154-155.

Mr. Henn met with his appointing authority, Mr. Ken Kraft, Regional Administrator for Region 1, on September 24, 2002, prior to his dismissal. RP 106. Mr. Henn also provided a written response to Mr. Kraft. RP 46-49. After receiving the written response, Mr. Kraft also took an additional step prior to making his decision. He asked one of his staff members, Mr. Tim Abbey, Area Administrator, to do one final review of all of the information and report back to him. At the conclusion of Mr. Abbey's review, Mr. Kraft determined that Mr. Henn had committed a number of significant policy violations and omissions that put children and the DSHS at risk. RP 851.

Mr. Kraft terminated Mr. Henn by letter on January 17, 2003, effective February 6, 2003. The termination letter outlined three charges in support of the discipline; neglect of duty, gross misconduct and willful violation of agency policy. RP 94-107.

**B. Procedural Facts.**

Mr. Henn timely appealed his dismissal to the Personnel Appeals Board pursuant to RCW 41.06.170. RP 41-43. The

PAB heard the merits of Mr. Henn's appeal on January 21 and 22, 2004, and May 4 and 5, 2004. RP 2. The PAB issued their Findings of Fact, Conclusions of Law and Order of the Board on June 29, 2004. RP 2-15. The PAB's decision concluded that Mr. Henn's termination should be upheld and determined that his actions constituted gross misconduct, neglect of duty, and/or willful violation of agency policy. RP 12-15.

On or around July 27, 2004, Mr. Henn appealed the PAB order to Thurston County Superior Court pursuant to RCW 41.64.130. Clerk's Papers CP 4-5. On April 12, 2005, the Order on Appeal from the Superior Court was entered which reversed the PAB's findings of gross misconduct and remanded the matter back to the PAB to determine if the discharge was still appropriate given that determination. CP 39-40. The Court further determined that Mr. Henn's failure to recognize the importance of a child's sexual abuse allegations and inform others, failure to fully investigate a placement parent's Assault 2 conviction causing incorrect information to

be provided to others, failure to have timely face-to-face meetings with children as required by written agency policy and otherwise fully investigate complaints constituted unacceptable negligent conduct in clear violation of his duties in employment. CP 37-38. Mr. Henn did not appeal the superior court's April 2005 order within thirty days of its issuance.

On May 5, 2005, the PAB entered its Order of the Personnel Appeals Board Following Remand From Superior Court upholding its earlier determination that dismissal was the appropriate sanction. RP (unnumbered). On or around May 17, 2005, Mr. Henn appealed the PAB's May 2005 order to Thurston County Superior Court. RP (unnumbered). On February 13, 2006, the Order on Appeal from the Superior Court was entered affirming the PAB's order. CP 52-54. On or around March 6, 2006, Mr. Henn filed an appeal to this court of the superior court's February 2006 and April 2005 orders.

#### IV. STANDARD OF REVIEW

The Court of Appeals reviews decisions of the PAB de novo on the record made at the Board level, applying the same standard of review as the superior court. *Dedman v. Personnel Appeals Board*, 98 Wn. App. 471, 989 P.2d 1214 (1999); *Adams v. Dep't of Social & Health Services*, 38 Wn. App. 13, 683 P.2d 1133 (1984); *Trucano v. Dep't of Labor and Industries*, 36 Wn. App. 758, 677 P.2d 770 (1984).

Review of PAB decisions is governed by RCW 41.64.130 and RCW 41.64.140; *Ballinger v. Department of Social & Health Services*, 104 Wn.2d 323, 328, 705 P.2d 349 (1985); *Sullivan v. Department of Transportation*, 71 Wn. App. 317, 320, 858 P.2d 283 (1993). An aggrieved employee may appeal the PAB decision on the grounds that the decision is (1) founded on or contained an error of law; (2) contrary to a preponderance of the evidence; (3) materially affected by unlawful procedure; (4) based on violations of any constitutional procedure; and (5) arbitrary and capricious. RCW 41.64.130(1).

Mr. Henn's appeal of the PAB' decision was based on three grounds: a) the Order was founded on or contained an error of law, which shall specifically include error in construction or application of the pertinent rules or regulations; b) the Order was contrary to a preponderance of the evidence as disclosed by the entire record with respect to the findings of fact; and c) the Order was arbitrary and capricious. Clerk's Papers CP 4-5.

**A. Question of Fact**

RCW 41.64.130(1)(b) nominally sets forth a preponderance of the evidence test for reviewing challenged findings of fact. However, the Washington Supreme Court has held that the Legislature intended review to be more akin to a substantial evidence test. *Ballinger*, 104 Wn.2d at 328. The Washington Supreme Court has rejected an interpretation of the statute that would confer "de novo reviewing powers" over PAB findings of fact. *Ballinger*, 104 Wn.2d at 328; *Gogerty v. Department of Institutions*, 71 Wn.2d 1, 8-9, 426 P.2d 476

(1967). Instead, the reviewing court accords the PAB decision a “presumption of correctness” and examines if there is “any competent, relevant, and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings,” and “that before the superior court could upset the board’s findings, it would have to demonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis.” *Ballinger*, 104 Wn.2d at 328 (quoting *Gogerty*, 71 Wn.2d at 8-9).

Unchallenged administrative findings are treated as verities on appeal. *Lawter v. Employment Security Department*, 73 Wn. App. 327, 332-33, 869 P.2d 102 (1994), citing *Assoc. of*

*Capitol Powerhouse Engineers v. State*, 89 Wn.2d 177, 183, 570 P.2d 1042 (1977). Additionally, administrative findings of fact are accorded great deference upon judicial review. *Id.* Therefore, the PAB's Findings of Fact should be regarded as the facts of this case and given great deference by this Court in reviewing Mr. Henn's challenge of his dismissal.

In reviewing a prior decision, a reviewing court properly considers only evidence which was admitted in the proceeding below. See *Dioxin/Organochlorine Ctr. v. Department of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992). The review "must be on the record of the administrative hearing, not what came later." *Christensen v. Terrell*, 51 Wn. App. 621, 634, 754 P.2d 1009 (1988). The court reviews the Board's decision de novo on the record made at the Board level and it is limited to those issues properly before the Board. *Trucano v. Department of Labor & Industries*, 36 Wn. App. 758, 761, 677 P.2d 770 (1984).

## **B. Error of Law Standard / Unlawful Procedure**

When reviewing a claimed error of law, the court may substitute its judgment for that of the administrative body, but must give substantial weight to the PAB's judgment. *Sullivan*, 71 Wn. App. at 321; *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994); *see also Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991). In *Sullivan*, the court held that as an adjudicative body exercising its interpretive authority, the PAB's interpretation of the merit system rules was entitled to substantial weight. *Sullivan*, 71 Wn. App. at 322.

Regarding claims of unlawful procedure, "the error of law standard of review applies and allows the reviewing court to essentially substitute its judgment for that of the administrative body, though substantial weight is accorded the agency's view of the law." *See Alexander v. Employment Security*, 38 Wn. App. 609, 613, 688 P.2d 516 (1984), citing *Schuh v. Department of Ecology*, 100 Wn.2d 180, 667 P.2d 64

(1983); *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983); and *Ciskie v. Department of Empl. Sec.*, 35 Wn. App. 72, 664 P.2d 1318 (1983).

**C. Mixed Question of Fact and Law**

If a court characterizes a case as presenting a mixed question of fact and law, that characterization does not affect the appropriate standards of review for questions of fact or questions of law. As the Washington Supreme Court held, "It is not the province of the reviewing court to try the facts de novo when presented with questions of law and fact." *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). Instead, with mixed questions of fact and law, the reviewing court must determine the correct law independently from the agency's decision and then apply the law to the facts as found by the agency. *Id.*

**D. Arbitrary and Capricious**

An administrative agency acts in an arbitrary or capricious manner if it takes “willful and unreasonable action, without consideration of facts or circumstances.” *Terhar v. Department of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180, review denied, 113 Wn.2d 1008 (1989); *Sullivan*, 71 Wn. App. at 321. An action is not arbitrary or capricious if it is exercised honestly upon due consideration, even though there may be room for two opinions or even though one may believe that conclusion to be erroneous. *Dupont-Ft. Lewis School District 7 v. Bruno*, 79 Wn.2d 736, 489 P.2d 171 (1971); *Trucano v. Department of Labor & Industries*, 36 Wn. App. 758, 677 P.2d 770 (1984).

**V. ARGUMENT**

**A. The PAB Did Not Commit An Error of Law In Rendering Its Decision.**

Mr. Henn lists, as one of the grounds for his appeal, that the Order was founded on or contained an error of law. The only specific rule cited as being violated is the WAC rule, 358-

30-170, indicating that the employer has the burden of proof in a disciplinary appeal. This rule was promulgated by the PAB pursuant to its authority arising from RCW 41.64.060.

Mr. Henn appears to argue that the PAB committed an error of law in that it exceeded its authority by substituting its judgment for the employer's and basing its decision on charges that were not advanced by the employer when determining the appropriate level of sanction. Mr. Henn further asserts that the PAB committed error by substituting the term "egregious" for "gross misconduct" in its Findings of Fact and Conclusions of Law 3.5, and by upholding the dismissal after rejecting Mr. Kraft's testimony that he considered Mr. Henn's comments about his intentional behavior and after the court rejected the gross misconduct charge. These claims are without merit.

- 1. The charges advanced by the DSHS were valid as outlined in the rules and the PAB did not substitute charges.**

Former WAC 356-34, now repealed but in effect at the time of this action, outlined the parameters for imposing discipline on general government employees.

Former WAC 356-34-010 read, in part, as follows:

Disciplinary actions-Causes for demotion-Suspension-Reduction in salary—Dismissal. (1) Appointing authorities may demote, suspend, reduce in salary, or dismiss a permanent employee under their jurisdiction for any of the following causes: (a) Neglect of Duty. (b) Inefficiency. (c) Incompetence. (d) Insubordination. (e) Indolence. (f) Conviction of a crime involving moral turpitude. (g) Malfeasance. (h) Gross misconduct. (i) Willful violation of the published employing agency or department of personnel rules or regulations.

Pursuant to the authority outlined in that WAC, Mr. Kraft dismissed Mr. Henn for three of the nine possible charges--neglect of duty, gross misconduct, and willful violation of the published employing agency or department of personnel rules

or regulations. RP 96. His reasons are outlined in detail in the disciplinary letter. RP 96-107.

There is no legal basis for the assertion that because DSHS failed to prove that Mr. Henn committed misconduct intentionally, the PAB cannot, as a matter of law, uphold his discharge. Mr. Henn appears to assert that the PAB committed two errors of law in regard to this particular issue: (1) that on remand, the PAB failed to take into account that Mr. Henn was not informed in the disciplinary letter that the appointing authority, Mr. Kraft, considered information indicating that Mr. Henn acted intentionally, in essence that this was an additional charge that he was not informed of, and, (2) that the PAB “substituted” its own judgment for that of the Appointing Authority when making its decision on remand to uphold Mr. Henn’s discharge. Neither of these assertions establishes that the PAB committed any error of law when issuing its order on remand.

Mr. Henn argues that his dismissal should be overturned because Mr. Kraft considered Mr. Henn's admission to Ms. Dawn Deshazer, Mr. Kraft's assistant, that he (Mr. Henn) had intentionally failed in his duties in order to make a point. He argues that Mr. Kraft should have informed him that this was a consideration in making his decision; that the "charge" of intentional incompetence was never asserted in the dismissal letter.

Mr. Kraft issued his dismissal letter to Mr. Henn on January 17, 2003, and outlined the reasons for the dismissal and to which Mr. Henn had previously responded. That letter included charges of neglect of duty, gross misconduct and willful violation of published policy. Intentional incompetence is not a specified charge under the WAC rules nor was it a listed charge in the letter. Incompetence is a listed charge involving an individual's inability to carry out his or her duties. There has been no assertion that Mr. Henn was not capable of carrying out his duties. The charge from Mr. Kraft was that he

neglected those duties, violated agency policy and committed gross misconduct.

The letter points out that Mr. Kraft considered certain things in determining the appropriate discipline, including Mr. Henn's history with state government, the seriousness of the offenses, a review of his personnel file and his length of service. RP 106. Further, Mr. Kraft did not, as Mr. Henn contends, base his entire discipline on this alleged charge. Rather, Mr. Kraft considered Mr. Henn's comments that he was failing to carry out his duties on purpose to draw attention to his heavy workload.

Mr. Kraft is not required to advise Mr. Henn of the specifics of his thought processes in advance of the termination. He is not required to show him a complete draft of the letter in advance and ask him for further input. Mr. Kraft is free to consider, for example, an employee's attitude, lack of remorsefulness in responding to charges, sincerity, ability to be

rehabilitated and so forth. In this case he also considered Mr. Henn's comments about his intentional behavior.

Mr. Henn claims that he was caught by surprise and was never informed that Mr. Kraft considered his comments. Mr. Henn had an opportunity to respond during the 4-day hearing regarding the issue of his intentional actions. Mr. Henn testified at the beginning of the DSHS's case and admitted, upon questioning by his attorney, that he willfully neglected his duties regarding documentation and face-to-face contacts with children. RP 473. Thereafter, Ms. Deshazer testified during the DSHS's case in chief that she personally heard these comments by Mr. Henn. RP 515-520. Mr. Henn had the opportunity to put on a case himself, and testify again to rebut Ms. Deshazer's testimony, but rested on the record at the conclusion of the DSHS's case. RP 872.

Additionally, during the PAB hearing, Mr. Henn had ample opportunity to attack the DSHS's evidence, and to cross examine Mr. Kraft on the basis of his decision to discharge.

Indeed, as evidenced by the superior court's decision to remand, Mr. Henn successfully attacked evidence that, at least in part, arguably supported the DSHS's charge of gross misconduct; i.e., that Mr. Henn made a statement to a co-worker indicating that he deliberately committed misconduct to make a point. Mr. Henn was never deprived of any procedural protections entitled to him by law.

In any event, the PAB indicated that it discounted Mr. Kraft's testimony regarding Mr. Henn's statements in this regard. The PAB considered the specified charges and concluded that dismissal was warranted. It determined that Mr. Henn's behavior constituted neglect of duty, gross misconduct, and willful violation of agency rules. The PAB did not base its decision on a phantom charge of intentional incompetence. When considering Mr. Henn's appeal following remand, it determined that the charges of neglect of duty and willful policy violation were sufficient to sustain termination even without the charge of gross misconduct.

The PAB has authority to render its own conclusions regarding a disciplinary decision made by an appointing authority. *See* RCW 41.64.120. Indeed, this is the primary reason that the legislature created an independent administrative agency to review civil service employee disciplinary actions. *See Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 831, 92 P.3d 243 (2004); *City of Yakima v. Int'l Ass'n of Firefighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 664, 818 P.2d 1076 (1991).

The PAB is free to examine the facts and circumstances, the testimony and evidence, and reach its own conclusions about the appropriateness of the discipline. The PAB freely substitutes its judgment for that of the appointing authority in disciplinary cases. Indeed, if they simply took the word of the appointing authority as to the appropriateness of any given discipline, there would be far less need to even have these hearings. In making its decision, the PAB ultimately concluded that it would give no weight to Mr. Kraft's testimony regarding

this matter. The overwhelming weight of the other evidence, including Mr. Henn's repeated admissions, was certainly more than enough for the PAB to conclude that the dismissal was appropriate. Again, as the superior court did, this Court should give substantial weight to the PAB's determination in this matter.

**2. Pursuant to PAB precedent, the disciplinary action against Mr. Henn survives even if one of the three causes was dismissed.**

This Court should disregard Mr. Henn's assertion that the PAB committed an error of law by upholding Mr. Henn's discharge even without the cause of gross misconduct. The PAB has long held that a disciplinary action "does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge." *Ross v. Community Colleges of Spokane*, PAB Case No. DISM-00-0073 (citing *Holladay v. Dep't of Veterans Affairs*, PAB Case No. D91-084 (1992)); see also *Griffin v. Dep't of Social and Health Services*, PAB Case No. DEMO-01-0012 (2003); *Frederick v. Office of Secretary of State*, PAB Case No. DISM-02-0030 (2003).

If an action continues, the PAB next considers “the seriousness and circumstances of the offense” to determine whether an employer took appropriate disciplinary action. Court decisions affirm the PAB’s approach, and courts simply examine the record to ensure that substantial evidence exists to justify the PAB’s decision. *Maxwell v. Dep’t of Corrections*, 91 Wn. App. 171, 176, 956 P.2d 1110 (1998); *Fuller v. Employment Security Dep’t of the State of Wash.*, 52 Wn. App. 603, 606, 762 P.2d 367 (1988).

The DSHS’s disciplinary action against Mr. Henn never rested solely on the cause of gross misconduct. CP at 96-107. The DSHS also alleged, and the PAB agreed, that Mr. Henn neglected his professional duties as a social worker and willfully violated agency policy regarding proper case management and risk assessments. *Id.* RP 13-15. Indeed, the superior court affirmed the PAB’s neglect of duty and willful violation conclusions after reviewing Mr. Henn’s initial appeal. CP 37-40. Since that decision was not timely appealed, it should be considered the law of the case. *Crispen v. DSHS*, 15 Wn App. 448, 549 P.2d 1158 (1976). Even if these issues are

not considered the law of the case, there is ample evidence for this Court to examine and to conclude that Mr. Henn violated agency policy and neglected his duty and that his dismissal should be affirmed.

The only question for the PAB to consider on remand was the appropriateness of Mr. Henn's sanction given the superior court's April 17, 2005, ruling that Mr. Henn did not commit deliberate acts of gross misconduct. The PAB concluded that the sanction was still appropriate.

Here, after a thorough review of the facts in the record, the PAB, pursuant to its well-established precedent stating that failure to prove one cause does not necessarily render the disciplinary action invalid, concluded that Mr. Henn's discharge was still warranted given that the DSHS proved that Mr. Henn seriously neglected his duty and willfully violated agency policy. The PAB committed no error of law by exercising its authority to consider whether Mr. Henn's neglect of duty and willful violations of DSHS's policies warranted discharge.

Further, the PAB did not, as Mr. Henn alleges, merely substitute the term “gross misconduct” with the term “egregious” in its order on remand. As noted above, the PAB looks to the seriousness and circumstances of the offense to determine whether the DSHS took appropriate disciplinary action. The term “egregious” in Findings of Fact and Conclusions of Law 3.5 that Mr. Henn refers to simply illustrates the PAB’s characterization of Mr. Henn’s behavior after considering the record. It does not represent an attempt by the PAB to passively resist the superior court’s ruling vacating the PAB’s original findings of gross misconduct.

In sum, because the PAB committed no error of law on remand by upholding Mr. Henn’s discharge based on the seriousness and circumstances of his misconduct and the remaining charges of neglect of duty and willful policy violations, charges that were originally affirmed by the superior court, this Court should reject Mr. Henn’s appeal.

### **3. Mr. Henn was provided proper due process.**

Mr. Henn was provided with four CIR’s that were investigated. He provided written and verbal statements during

those investigations. He provided input. He had a meeting with Mr. Kraft prior to his dismissal to provide input to him. He provided a written statement to Mr. Kraft as well. RP 46-49. After receiving this statement, Mr. Kraft reviewed it and took another step. He asked one of his staff members, Tim Abbey, Area Administrator, to do one final review of all of the CIRs, the records, the files, etc., and report back to him. He did this to be fair to Mr. Henn in terms of making an appropriate decision. RP 849. At the conclusion of Mr. Abbey's review, Mr. Kraft determined that Mr. Henn had committed a number of significant policy violations and omissions that put children and the DSHS at risk. RP 851.

The pre-termination due process requirements that must be afforded a public employee such as Mr. Henn who can be discharged only for cause are spelled out in the landmark case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). The Court found that because the *Loudermill* plaintiffs were public civil service employees, who

by statute were entitled to retain their positions except for cause, they have a property right in continued employment. *Id.* at 538. The Court noted that before they could be deprived of that property right, it must be preceded by notice and an opportunity for hearing appropriate to the nature of the case, *Id.* at 542, and that due process requires the opportunity to present reasons, either in person or in writing, why the action should not be taken. *Id.* at 546. The Court concluded that “all the process that is due is provided by a pretermination opportunity to respond, coupled with post termination administrative procedures as provided by the Ohio statute.” *Id.* at 547, 548.

Mr. Henn received the CIRs, provided input to each of those, responded to the possible decision to terminate him, both in person and in writing, and was provided a 4-day administrative hearing after his termination. He was afforded full and complete due process as required by the *Loudermill* decision.

**B. The PAB's Decision Was Not Arbitrary or Capricious.**

The PAB's decision in this matter clearly takes into account all of the facts and circumstances at issue. Given the extensive record in this matter and the detailed Findings of Fact rendered by the PAB, it cannot be said that its decision was anything but exercised honestly and with due consideration. This decision is not willful and unreasonable and there has been no showing to the contrary. When the trial judge reviewed the remanded decision, she determined that, even though she would not have terminated on this record, the PAB was within its rights to do so. In so ruling, the court followed the long line of cases regarding arbitrary and capricious conduct; that is, if there is room for two opinions, the decision is not arbitrary or capricious simply because the court may believe the conclusion to be erroneous.

**C. The Record Contains Substantial Evidence To Support the PAB's Findings of Fact.**

The PAB's order was not contrary to the preponderance of evidence as disclosed by the entire record. Mr. Henn challenges Findings of Fact 2.9, 2.10, 2.11, 2.13, 2.14, 2.16, 2.23, 2.25 and 2.27. The remaining unchallenged Findings of Fact are thus verities on appeal. The evidence, as shown by the testimony and exhibits entered into the record, shows strong support for the Findings set forth in the PAB's order as outlined below.

**1. Finding of Fact 2.9:**

In the course of investigating and handling Emylei's case, Appellant considered placing Emylei with her father, Michael. On April 30, Appellant interviewed Michael regarding an assault conviction, and Michael informed Appellant that the conviction resulted from a "barroom brawl" and was in self-defense. Appellant was not concerned with the nature of Michael's conviction, and he found that Michael was an appropriate placement for Emylei.

This finding is supported by Mr. Henn's testimony at RP 286, 287, 289, Mr. Henn's written and verbal statements

provided during the investigation, RP 123-125, and RP 128-131, and his testimony acknowledging these statements as his own. RP 287.

**2. Finding of Fact 2.10:**

On April 30, 2002, Emylei underwent an interview by Karen Winston, a Child Interview Specialist. Appellant and a detective observed the interview. During the interview, Emylei described an incident where Earl inappropriately touched her. When asked where, Emylei pointed to the crotch area of a body diagram. Although Appellant did not attend the entire interview, he heard Emylei's disclosure of the inappropriate touching. Appellant documented two contacts with Emylei on April 30, 2002, but never spoke with Emylei after that date. Appellant also failed to interview Emylei's mother about the allegation, and he did not contact the alleged offender, Earl, to gather further information.

This finding is supported by the report of the interview of Emylei, RP 199, which indicates who conducted the interview and who attended, and at RP 205 which describes the details of the sex abuse disclosure by Emylei. This finding is partially incorrect since Mr. Henn acknowledges that he did not actually hear the sex abuse disclosure. RP 114. Mr. Henn's contact

with Emylei on April 30 is described in his testimony at RP 282 and his other failures are supported by his testimony at RP 282, 263.

**3. Finding of Fact 2.11:**

Appellant contacted Ms. Hamasaki and shared with her his observations of Emylei during Ms. Winston's interview; however, Appellant did not discuss Emylei's sexual abuse disclosure. Appellant told Ms. Hamasaki that he would notify her when the written interview was available.

This finding is supported by Mr. Henn's testimony at RP 269, 384, and in his written and verbal statements given during the investigation at RP 110, 114, which he has acknowledged as his own at RP 264.

**4. Finding of Fact 2.13:**

On May 21, Appellant and Emylei's Guardian ad Litem, Weston Meyring, discussed Michael's assault conviction. Appellant described it as a barroom fight and expressed no concern regarding Michael's suitability as a placement for Emylei. Mr. Meyring subsequently obtained a copy of the police report and learned that Michael had not engaged in a barroom fight, but rather sought out another individual and beat him with a bat. Appellant did not obtain a copy of a police report regarding an assault charge against Michael.

This finding is supported by Mr. Weston Meyring's testimony at RP 318-320, 331, his verbal statement given to the investigator RP 135, and his acknowledgement that it was accurate at RP 317. Mr. Henn's written statements during the investigation at RP 123-125 and his testimony at RP 283-284 acknowledges his failures regarding the police report.

**5. Finding of Fact 2.14:**

In June 2002, Mr. Meyring discussed the details of Michael's conviction with Appellant in court, and he discussed the specifics of the assault with Appellant. Mr. Meyring expressed concerns regarding placing Emylei with Michael in light of his prior violent behavior. During a conversation with Assistant Attorney [sic] Danette Allen, Appellant recommended Emylei's placement with Michael. Appellant indicated to Ms. Allen that Michael's assault was over five years old and occurred when Michael was very young. Appellant did not indicate to Ms. Allen that he had not obtained or reviewed Michael's police report nor did he describe the actual events of Michael's crime.

This finding is supported by the written statement of Mr. Meyring at RP 135, and his testimony acknowledging that statement at RP 317, and the verbal statement of Ms. Allen at

RP 133, and her testimony acknowledging that statement at RP 549.

**6. Finding of Fact 2.16:**

On July 16, 2002, the fact-finding hearing was conducted to determine whether Michael would be granted custody of Emylei and whether Earl would receive unsupervised visits with Hanna and Christian. Assistant Attorney General Allen opposed Earl's unsupervised visits with his children because of Earl's alcohol problems and ability to parent. Ms. Hamasaki testified to the court regarding concerns of Earl having unsupervised visitation with his two children. Appellant, who was present, made no mention to either Ms. Hamasaki or Ms. Allan that Earl had been accused of sexual abuse by Emylei. When testimony regarding Emylei's placement occurred, Ms. Allen was caught off guard to learn during Mr. Meyring's testimony the true nature of Michael's assault conviction. Ms. Allen was upset that Appellant failed to provide her with adequate discovery regarding the conviction. Ms. Allen also felt that Appellant's failure to provide complete information thwarted her ability to provide adequate legal representation during the hearing.

This finding is supported by the testimony of Ms. Allen regarding the combined hearing at RP 536-537, her verbal statement given during the investigation at RP 118, and her testimony acknowledging that statement at RP 541. It is also

supported by her testimony regarding the discovery provided to her and her expectations and roles at RP 545-546 her verbal statement at RP 133-134, and her testimony acknowledging that statement at RP 549. It is also supported by the testimony of Ms. Hamasaki at RP 608, her verbal statement given during the investigation at RP 116, and her testimony acknowledging the accuracy of that statement at RP 607. Mr. Henn's testimony also supports this finding at RP 262-263.

**7. Finding of Fact 2.23:**

Appellant made an attempt to contact the referent, but claims that the contact number he called indicated that the "caller was unavailable." There is no indication that Appellant made further attempts to contact the referents in order to determine whether there was any validity to the allegations. Appellant spoke with Gage's mother who denied having abused the child. Appellant admits that he failed to meet with Gage in order to observe whether the child had visible signs of physical abuse.

This finding is confirmed by Mr. Henn's written statement at RP 143-144, his testimony about that statement at RP 302, his verbal statement at RP 145-147, and his testimony

about that statement at RP 306-309. It is also supported by his testimony at RP 302-304, 444.

**8. Finding of Fact 2.25:**

On July 11, 2002, the attending physician for Fernando L. contacted the department and made a referral that the caretakers for Fernando, a three-year old medically fragile child, had failed to take him to a crucial medical appointment. The case was labeled as “Emergent,” risk tagged as a 5 (high) and was assigned to Appellant. Appellant made contact with the child’s mother and instructed her to get the child to the doctor. After Appellant confirmed the mother had made the appointment, Appellant took no further action. Appellant did not conduct a home visit, he did not conduct a face-to-face meeting with the child, and he did not prepare a safety assessment or plan.

This finding is confirmed by Mr. Henn’s testimony at RP 311-312 his written statement at RP 154, and his testimony acknowledging that statement at RP 311. It is also supported by the referral at RP 225, which also shows that the case was a Risk Tag 5 but was labeled as “non-emergent,” not “emergent” as the finding suggests.

**9. Finding of Fact 2.27:**

Regarding Gage, Appellant indicated that he made an attempt to call the referent but was

unsuccessful, that the case was CPT'd and the child was authorized for return to the mother. Regarding Fernando, Appellant admitted that he did not complete his investigation within the timelines mandated by policy and failed to follow up on the referral. However, Appellant asserted that his failure to do so was the consequence of high workload demands.

This finding is supported by Mr. Henn's testimony at RP 304, 307, 310-312, and his written statements at RP 143, and 154.

Mr. Henn has provided extensive testimony and dialogue on the record in this matter. Indeed his own testimony, statements and admissions support eight of the nine challenged findings. He has repeatedly admitted to his failures, all with various excuses. In fact, he blatantly affirmed them when his attorney asked him how he felt about the work he did and he replied, “ .. yeah, I willfully neglected to follow through on documentation, and I willfully neglected to follow through on face to face contacts,....” RP 473.

Mr. Henn's dismissal, as outlined by the testimony of Mr. Kraft and the dismissal letter was based on four incidents involving three cases assigned to him. Each of the four incidents was outlined in a conduct investigation report (CIR) and Mr. Henn provided extensive statements in response to those reports during the investigations. In his testimony, as outlined above, Mr. Henn has acknowledged that those statements he provided were accurate. Each of the referrals referenced in these investigations were of the highest risk and given a Risk Tag 5, as noted above.

The first CIR, CP 108, was for his failure to disclose information to a fellow co-worker, Ms. Hamasaki, about a sex abuse disclosure by a 6-year-old child on his case load, Emylei. The alleged abuser, Earl, was the father of two other small children that were the responsibility of Ms. Hamasaki. Mr. Henn provided both written and verbal statements, CP 110-111, and 114-115, in response to that CIR wherein he admits to his failures. To wit: he told Ms. Hamasaki that the report regarding

an interview of Emylei was in and where she could find it. He did not find the need to mention to Ms. Hamasaki that Emylei made a sex abuse disclosure during that interview. He did not mention it to the court during a hearing regarding the custody of Earl's other small children. Mr. Henn reasoned that it was not a new disclosure, since the mother had made the allegation on her way to jail several weeks earlier. He asserts that no one told him that the mother had recanted her earlier allegations.

However, in his testimony, Mr. Henn admits that he received the related Guardian ad Litem report of May 21, 2002, and that it was his practice to read those reports. He acknowledges that the report was likely read to the court on a day when he was present and that he likely read the report. In that report, it indicates that the mother recanted her allegation that Earl had molested Emylei. RP 480, and the GAL report, CP 88-93, wherein the mother's recantation of her earlier allegation of the sex abuse by Earl toward Emylei is shown at the top of CP 91.

Mr. Henn acknowledges that he then knew about the recantation on May 21, 2002. RP 480. He also asserts that, in any event, the sex abuse disclosure was not significant; it was miniscule, on top of the clothing, one time only, no penetration, not repetitive, no mention of grooming, parents do this in day-to-day activities, etc. RP 384-385. Mr. Henn continues to assert that he did nothing wrong but that the fault lies with Ms. Hamasaki for not reading the report. Had Ms. Hamasaki been alerted that the report contained serious allegations of sex abuse against Earl, the father of two children on her case load, she would have notified the court about those allegations. Instead, Mr. Henn simply indicated to her that the report was interesting reading. Ms. Hamasaki was not charged with the responsibility for Emylei's case planning. Mr. Henn was. When Mr. Henn learned of a sex abuse allegation made by a child on his case load against an alleged perpetrator who was the father of two children assigned to another social worker, he should have immediately disclosed that information to that

worker. He did not. His actions placed Earl's children at potential risk of harm.

The second CIR, CP 121, was for providing inaccurate information about the criminal conviction of Emylei's natural father, Michael, to his supervisors. Again Mr. Henn provided both written and verbal statements about this issue. RP 123-125, and 128-131. In those statements Mr. Henn admits to not obtaining the police report and instead believing the version of the conviction provided to him by Michael, that it was a barroom brawl. He acknowledges that his information was inaccurate.

The third CIR, RP 140, was issued for Mr. Henn's failure to conduct a proper investigation on a referral of a small child, Gage, before returning him to his mother. Mr. Henn's admissions are outlined in his written and verbal statements at RP 143-144 and 145-147. He blames his lack of follow-through on his work load demands and states to the investigator, at RP 147, "he is under tremendous pressure and

can't keep up. He knows his credibility is in question because of the lack of SER's in his files and wanted to make sure everyone understood why.”

The fourth CIR, RP 152, was for Mr. Henn's failure to follow up on a referral for a medically fragile infant, Fernando. This investigation was very short as Mr. Henn admitted to the allegations in his written statement at RP 154, and in the management representative's report about his verbal interview at RP 155. He begins his written statement by saying, “I acknowledge that I did not complete my investigation within the timelines mandated by policy and failed to follow up on this referral. This failure was due to the urgent requirements of my other assigned cases.”

In short, his testimony and written and verbal statements shown in the record reveal that Mr. Henn, while denying that his actions were inappropriate, admitted that: 1) he failed to report the sex abuse disclosure of Emylei; 2) he failed to obtain the police report about Michael and thus had inaccurate

information; 3) he failed to interview the witnesses, to review the medical report for Gage, or to follow through with proper services for Gage's mother; and 4) he failed to conduct a proper investigation of Fernando.

The PAB concluded, given all of Mr. Henn's admissions, along with the additional testimony and evidence, that Mr. Henn neglected his duty, willfully violated agency policy and committed gross misconduct. The superior court determined that Mr. Henn neglected his duty and violated policy, but did not commit gross misconduct. The original order of the superior court was not timely appealed and that decision is the law of the case. The PAB was then left to determine if the neglect of duty and the policy violations justified the sanction of dismissal. Its conclusions are supported by the extensive Findings of Fact and the evidence clearly supports those findings. The PAB properly concluded that dismissal was the appropriate sanction.

The PAB's decision was clearly not contrary to the huge weight of the evidence, again much of which Mr. Henn acknowledged. Before the Court could overturn the PAB's findings, it would have to appear from the complete record that the evidence was so meager and lacking in probative worth and the opposing evidence so overwhelming that the findings do not rest on any sound evidentiary basis. That is clearly not the case, and the Court should give a presumption of correctness and great deference to the decision of the PAB in this matter.

## **VI. CONCLUSION**

For the foregoing reasons, DSHS respectfully requests that the Court deny Mr. Henn's appeal. Given all the evidence as presented at the administrative hearing, the PAB's decision was well founded and based on ample, competent, relevant and substantive evidence. Their decision was not arbitrary or capricious nor is there a showing that the PAB committed an error of law in rendering their decision or conducting their proceedings. Accordingly, the decision of the PAB should not

be disturbed and the DSHS respectfully requests that this Court  
affirm the PAB's decision.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of June,  
2006.

ROB MCKENNA  
Attorney General

*Donna Stambaugh*  
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Attorneys for Respondent

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RON ROSS,

Appellant,

v.

COMMUNITY COLLEGES OF SPOKANE,

Respondent.

Case No. DISM-00-0073

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, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held at Spokane Falls Community College in Spokane, Washington, on September 25 and 26, 2001.

1.2 **Appearances.** Appellant Ron Ross was present and was represented by Edward E. Younglove III, Attorney at Law, of Parr and Younglove, P.L.L.C. Donna J. Stambaugh, Assistant Attorney General, represented Respondent Community Colleges of Spokane.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for gross misconduct, neglect of duty, violation of published institution rules and regulations and mistreatment or abuse of fellow workers or members of the public. Respondent alleged that Appellant engaged in a pattern of unethical, abusive, neglectful and insubordinate conduct that included, in part, theft of a handgun, interview questions, state property, food, and aluminum cans.

1 1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084  
2 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v.  
3 School for the Deaf, PAB No. D89-004 (1989); Johnson v. Lower Columbia College, PAB No.  
4 D93-077 (1994); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994);  
5 Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

## 7 II. FINDINGS OF FACT

8 2.1 Appellant Ron Ross was a Custodian Lead and permanent employee of Respondent  
9 Community Colleges of Spokane (CCS) at Spokane Falls Community College. Appellant and  
10 Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder,  
11 Titles 251 and 358 WAC. Appellant filed a timely appeal on October 12, 2000.

12  
13 2.2 By letter dated September 25, 2000, Dr. Taylor notified Appellant of his dismissal for gross  
14 misconduct, neglect of duty, willful violation of the published employing institution/related board  
15 or higher education personnel rules or regulations, and mistreatment or abuse of fellow workers or  
16 members of the public. In summary, Dr. Taylor determined that Appellant:

- 17 • was abusive, hostile, used foul language and exerted excessive authority over his  
18 subordinates;
- 19 • was rude to a subordinate's mother;
- 20 • borrowed state equipment for his personal use;
- 21 • took food from the Spokane Falls Community College food bank without  
22 authorization;
- 23 • sent employees home before the end of their shifts and allowing them to receive  
24 pay for time not worked;
- 25 • stole the interview questions for two vacant custodial positions;
- 26 • failed to complete the monitor shift log and work his entire shift on Memorial  
Day 2000;
- stole a backpack containing a handgun from the break room table;
- brought a rifle on campus and transported the rifle in the state pickup truck;
- gave work study students the Great Grand Master keys to the college; and
- removed from campus aluminum cans belonging to the Earth Club.

1  
2 2.3 Appellant began employment with CCS in the Building and Grounds department in 1994.  
3 He was promoted to Custodian Lead in 1998. As a lead, Appellant assigned and checked the work  
4 of three permanent employees and a varying number of student work-study employees. Appellant's  
5 permanent employee subordinates were Ron Jordan, Carney Reeser and Mike Forster. Appellant  
6 and his crew worked the swing shift from 2 p.m. until 10:30 p.m. Appellant and his crew reported  
7 for work to Building 10, the campus facilities building. Building 10 has a break room that is  
8 available for staff to use during their breaks.

9  
10 2.4 Appellant's supervisor was Kevin Decker. Prior to Spring 2000, Appellant's subordinates  
11 raised concerns with Mr. Decker about Appellant's mistreatment of staff. Mr. Decker talked to  
12 Appellant about the concerns. In mid-spring 2000, Appellant's subordinates again brought their  
13 concerns to Mr. Decker. Appellant's subordinates reported that Appellant was verbally abusive with  
14 them and particularly with Carney Reeser. In May 2000, Mr. Decker again spoke with Appellant  
15 about his treatment of subordinates. However, Mr. Decker continued to hear concerns about  
16 Appellant's behavior and performance. As a result, Mr. Decker gave Appellant a letter dated June 2,  
17 2000, outlining his work responsibilities. In the letter, Mr. Decker stated that he wanted "to  
18 eliminate the impression some people have that your position is of a 'campus monitor.'"

19  
20 2.5 After receiving the letter, Appellant approached Ron Jordan and accused him of talking to  
21 Mr. Decker and reporting that he wasn't doing his job. Mr. Jordan stated that Appellant was  
22 "pissed" and "chewed him up one side and down the other." Mr. Jordan was angered by the  
23 confrontation and contacted Rebecca Crow, Facilities Operations Manager, to report the incident.

24  
25 2.6 Mr. Jordan and Ms. Crow met on June 2, 2000. During the course of the meeting, Mr.  
26 Jordan made numerous allegations against Appellant. As a result, Ms. Crow initiated an

1 investigation. She interviewed 29 individuals, including Appellant, who had knowledge of the  
2 allegations.

3  
4 2.7 When Ms. Crow completed the interview process, she developed her findings and made a  
5 recommendation. She forwarded the interview responses, her report, and her recommendation  
6 regarding whether the allegations were substantiated to Greg Plummer, District Director of  
7 Facilities.

8  
9 *Abusive, hostile behavior:*

10 2.8 A preponderance of the credible evidence and testimony establishes that Appellant engaged  
11 in an ongoing pattern of behavior consisting of talking down to subordinates, yelling at them,  
12 treating them in a hostile manner and using profanity toward them. This behavior included yelling  
13 at Mr. Carney in the presence of other people, calling Mr. Carney derogatory names, calling Dustin  
14 Sanchez, a work-study student, a derogatory name that implied Mr. Sanchez was homosexual, and  
15 yelling at Mr. Jordan, Mr. Sanchez, and others.

16  
17 2.9 The College's Dignity Statement is distributed yearly to employees with their paychecks.  
18 Appellant received a copy of the college's Dignity Statement. Appellant was aware of his  
19 responsibility to create an environment free of harassment and to treat students and staff in a fair  
20 manner and with sensitivity, dignity and respect.

21  
22 *Rudeness to a subordinate's mother:*

23 2.10 Ron Jordan complained to Ms. Crowe that Appellant had called his mother on the telephone,  
24 yelled at her and called her a liar. Respondent provided no direct testimony or evidence to  
25 corroborate this claim.

1 *Borrowing state equipment for personal use:*

2 2.11 Prior to December 1999, employees in campus facilities were allowed to borrow state  
3 equipment for their personal use provided the employee asked a supervisor first and the supervisor  
4 approved the request. In December 1999, Appellant and other facilities employees attended training  
5 on the ethics law. In addition, Arden Crawford, Facilities Manager, informed staff that they could  
6 no longer use state equipment for personal business.

7  
8 2.12 Appellant attended the ethics training on December 22, 1999. Appellant admits that on June  
9 1, 2000, he took a carpet shampooer home and used it to clean his carpets. In addition, Appellant  
10 stored and worked on two personal bicycles in a campus building and worked on his personal utility  
11 trailer in the campus carpenter's shop. The preponderance of the credible evidence established that  
12 after the training, Appellant continued to borrow state equipment for his personal use. On June 1,  
13 2000, Appellant borrowed a vacuum cleaner from one of the campus buildings and on June 14,  
14 2000, he borrowed a drill and screw box.

15  
16 2.13 RCW 42.52.150 and WAC 292-110-010 prohibit state employees from using state resources  
17 or property for private benefit or gain. Spokane Falls Community College Policy 2.10.06 prohibits  
18 employees from using their positions to secure special privileges for themselves. Appellant was  
19 aware of the law, rule and policy.

20  
21 *Taking food from the college food bank:*

22 2.14 A preponderance of the credible testimony establishes that Appellant took some food from  
23 the Food Bank. However, the Food Bank would remove out-of-date food items from the shelves  
24 and leave it for anyone to take. The area occupied by the Food Bank was small and old food would  
25 be removed to make room for new stock. The removed items were placed in a free box or were  
26 disposed of in the garbage. Food Bank staff knew that Appellant would come to the Food Bank on

1 days that they received new stock. It was not inappropriate for Appellant to take out-of-date items  
2 that the Food Bank removed from the shelves. While Appellant was seen removing food from the  
3 Food Bank, Respondent failed to establish that the food he removed was not out-of-date.

4  
5 *Sending employees home before the end of shift:*

6 2.15 A preponderance of the credible testimony and evidence establishes that it was a common  
7 practice for Custodian Leads to allow staff and work-study employees to leave on their Fridays  
8 before the end of their shifts if all their work was completed. When custodial employees were  
9 allowed to leave early, they were not required to take leave or to indicate that they did not complete  
10 their shift. Appellant admittedly engaged in this practice. Appellant's predecessors and peers also  
11 engaged in this practice. Because this had been a longstanding, common practice for custodial  
12 employees, Respondent failed to establish that it was inappropriate for Appellant to continue to  
13 engage in this practice.

14  
15 *Stealing interview questions:*

16 2.16 Appellant found the interview questions for a Custodian Lead position and for a  
17 Maintenance Custodian Supervisor position in the trashcan in Arden Crawford's office. Appellant  
18 had applied for both positions. He admits that he took the questions for the purpose of gaining an  
19 advantage in the interview process.

20  
21 *Failing to complete the shift log and complete work during the Memorial Day 2000 shift:*

22 2.17 Appellant was assigned the 6:30 a.m. to 3 p.m. "monitor" shift on Memorial Day 2000. As  
23 part of his duties, he completed a shift log. Appellant noted in the shift log that he checked in with  
24 security at the beginning of his shift. Appellant made no specific comments in the shift log  
25 regarding his activities between 1:30 p.m. and the end of his shift.

1 2.18 Appellant did not complete the shift log in detail and did not indicate when he was off shift.  
2 However, CCS had no guidelines or procedures for completing shift logs. Appellant completed the  
3 log with minimal information, which was how he had completed them in the past.

4  
5 2.19 Ron Jordan reported to work at 2:15 p.m. He talked to Appellant after he arrived and then  
6 went into Building 10 to make a phone call. After he completed his call, he went outside and  
7 observed that Appellant's personal vehicle was gone. Mr. Jordan did not see Appellant leave the  
8 campus grounds.

9  
10 2.20 A preponderance of the credible evidence fails to establish that Appellant failed to complete  
11 the shift log or that he failed to work to the end of his shift.

12  
13 *Stealing a backpack containing a handgun:*

14 2.21 Sean Reagan, Security Guard, started work at Spokane Falls Community College on  
15 February 14, 2000. He brought his personal blue and black "Jansport" backpack with him and left it  
16 on the break table in Building 10. His personal handgun was in the backpack. His shift began at 3  
17 p.m. and between 3 and 5:40 p.m., Mr. Reagan and Security Guard Dave Eder patrolled the campus.  
18 When they returned to the break room at 5:40 p.m., Mr. Reagan's backpack was missing.

19  
20 2.22 Appellant was in the room next to the break room and Mr. Reagan questioned him about the  
21 backpack. Appellant indicated that he had seen nothing out of the ordinary. Mr. Reagan did not tell  
22 Appellant or Mr. Eder that the handgun was in the backpack.

23  
24 2.23 At approximately 6 or 7 p.m. on February 14, 2000, Appellant showed Custodian Mike  
25 Forster a blue and black backpack with a gun in it. Appellant told Mr. Forster that he had found the  
26

1 backpack in the break room. Mr. Forster had not spoken with Mr. Reagan and did not know that his  
2 backpack and gun were missing.

3  
4 2.24 A preponderance of the credible evidence establishes that Appellant took Mr. Reagan's  
5 backpack containing the handgun.

6  
7 *Bringing a rifle on campus and transporting the rifle in the state pickup truck:*

8 2.25 College policy and WAC 132Q-94-150 prohibit firearms on campus. The policy states, in  
9 relevant part, "[n]o employee, student or guest shall carry, transport within a vehicle or otherwise  
10 possess any gun, pistol, or other firearm . . . on any college campus or other district property except  
11 for use in an authorized college activity with express authorization from the chief executive of  
12 campus or unit or an authorized designee."

13  
14 2.26 Appellant was aware of the prohibition against firearms, including handguns and rifles, on  
15 campus grounds. In addition, in the fall of 1999, Mr. Hayes reminded Appellant that guns were not  
16 allowed on campus. However, a preponderance of the credible evidence establishes that in the fall  
17 of 1999, Appellant gave Mike Thompson, Security Guard, a ride in a state-owned pickup truck and  
18 showed him a rifle that he had in the truck.

19  
20 *Giving work study students the great grand master key:*

21 2.27 Access to all areas and offices on campus can be gained by using a great grand master key.  
22 A limited number of great grand master keys exist and they are to be handled responsibly. Access  
23 to most areas on campus can be gained by using a grand master key. The Building and Grounds  
24 department practice was that great grand master keys were not to be given to work-study students.  
25 This practice was not memorialized in a written policy or procedure.

1 2.28 Generally work-study students worked with custodial staff. However, occasionally they  
2 were required to work on their own. When work-study students were working on their own,  
3 custodial staff would loan them keys so that they could access the areas they were to clean. Work-  
4 study students could gain access to their work areas using grand master keys. Sometimes, custodial  
5 staff would leave the keys for the work-study students on the table in the break room. Respondent  
6 provided no evidence to establish that the key loaned to or left for work-study students was a great  
7 grand master key.

8  
9 2.29 On June 2, 2000, Mr. Decker directed Appellant not to loan keys or ask other custodians to  
10 loan keys to work-study students. Appellant was placed on home assignment on June 3, 2000.  
11 There is no evidence that Appellant violated this directive.

12  
13 *Removing aluminum cans from campus:*

14 2.30 The campus Earth Club collected aluminum cans for recycling. Custodians would remove  
15 the cans from the buildings, place them outside the building, and then the Earth Club retrieved the  
16 cans and took them to recycling. When the club would not remove the cans, Appellant would  
17 remove them. Respondent provided no testimony or evidence to establish that Appellant left the  
18 campus with the cans.

19  
20 2.31 Dr. Charles A. Taylor, Chancellor and Chief Executive Officer for CCS, was Appellant's  
21 appointing authority. Dr. Taylor was advised of the allegations against Appellant and on August 17,  
22 2000, he held a pre-termination hearing with Appellant and his representative. After considering  
23 Appellant's responses to the allegations, and reviewing documentation, Dr. Taylor found that  
24 Appellant was not credible and that the allegations were supported and verified by a number of  
25 witnesses. Dr. Taylor determined that Appellant's actions breached the trust that the college places  
26 in its employees, created a disrespectful and unacceptable work environment, and undermined the

1 ability of the college to carry out its mission of creating a learning environment in which people are  
2 respected. In light of the severity of Appellant's misconduct, Dr. Taylor concluded that termination  
3 was the appropriate sanction.

### 4 5 III. ARGUMENTS OF THE PARTIES

6 3.1 Respondent argues that Appellant engaged in a pattern of complete disregard for others, for  
7 authority, for commonly acceptable work place standards, and for district property and time.  
8 Respondent contends that Appellant was aware of acceptable work place standards yet chose to  
9 violate the trust placed in him by the college, treat others in an unacceptable manner, and failed to  
10 comply with supervisory directives and college policies. Respondent contends that Appellant's theft  
11 of Mr. Reagan's backpack and handgun was so egregious that this charge alone warrants dismissal.  
12 Respondent asserts that numerous inconsistencies exist between Appellant's testimony before the  
13 Board and his answers to interview questions by Ms. Crow and therefore, Appellant lacks  
14 credibility. Respondent contends that in light of the totality of the credible testimony, the college  
15 has proven by a preponderance of the evidence, that Appellant's termination was warranted.

16  
17 3.2 Appellant argues that Respondent is "piling on charges" based on suggestions and  
18 assumptions. Appellant contends that Mr. Reeser and Mr. Jordan did not get along with him  
19 because he had addressed past performance issues with each of them, and therefore they had reason  
20 to fabricate allegations against him. Appellant admits that he borrowed equipment prior to  
21 receiving ethics training and admits taking the shampooer home to fix it, but he denies borrowing  
22 other state-owned equipment after the training. In addition, Appellant admits that he kept two  
23 bicycles in a campus building; took food he was authorized to take from the Food Bank; sent  
24 employees home before the end of their shifts; took the interview questions for two recruitments out  
25 of the trashcan in Mr. Crawford's office; and loaned grand master keys to work-study students.  
26 Appellant asserts that these actions, however, do not warrant dismissal. Appellant admits he is not

1 perfect, but he denies mistreating staff or Mr. Jordan's mother, leaving before the end of his shift on  
2 Memorial Day, removing aluminum cans from the campus, stealing Mr. Reagan's backpack and  
3 handgun, and bringing a rifle onto campus. Appellant asserts that Respondent failed to meet its  
4 burden proving that he engaged in misconduct that warrants dismissal.

#### 5 6 IV. CONCLUSIONS OF LAW

7 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
8 herein.

9  
10 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
11 the charges upon which the action was initiated by proving by a preponderance of the credible  
12 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
13 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
14 Corrections, PAB No. D82-084 (1983).

15  
16 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
17 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
18 of Social & Health Services, PAB No. D86-119 (1987).

19  
20 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
21 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

22  
23 4.5 Abuse of fellow employees is established when it is shown that the employee wrongfully or  
24 unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-  
25 077 (1994)

1 4.6 Willful violation of published employing agency or institution or Personnel Resources  
2 Board rules or regulations is established by facts showing the existence and publication of the rules  
3 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
4 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
5 Health Services, PAB No. D93-053 (1994).

6  
7 4.7 Respondent has proven by a preponderance of the credible evidence that Appellant engaged  
8 in inappropriate conduct toward employees, borrowed state equipment for personal benefit after  
9 being directed not to do so, stole interview questions for two recruitments, brought a rifle on  
10 campus and transported it in a state-owned pickup truck, and stole a backpack containing a handgun  
11 from the break room.

12  
13 4.8 Appellant's actions constituted abuse of fellow employees, neglect of duty, and willful  
14 violation of rule, regulations and policies. Appellant breached the trust placed in state employees  
15 and adversely affected the ability of the college to fulfill its mission of creating a respectful learning  
16 environment. Appellant's actions rose to the level of gross misconduct.

17  
18 4.9 In determining whether a sanction imposed is appropriate, consideration must be given to  
19 the facts and circumstances including the seriousness and circumstances of the offense. The penalty  
20 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent  
21 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.  
22 An action does not necessarily fail if one charge is not sustained unless the entire action depends on  
23 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

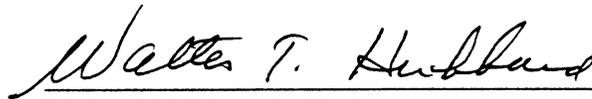
1 4.10 Under the totality of the proven facts and circumstances, and in light of the egregious nature  
2 and continuing pattern of Appellant's misconduct, dismissal is appropriate and the appeal should be  
3 denied.

4 **V. ORDER**

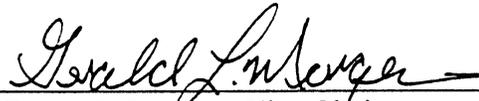
5 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Ron Ross is denied.

6  
7 DATED this 19 day of November, 2001.

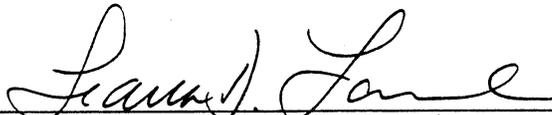
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9  
10 

11 Walter T. Hubbard, Chair

12 

13 Gerald L. Morgen, Vice Chair

14 

15 Leana D. Lamb, Member



Sexual Harassment

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

FRANK HOLLADAY,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

CASE NO. D91-084

FINDINGS, CONCLUSIONS  
AND ORDER OF BOARD

This matter came on for hearing before the Personnel Appeals Board, CHARLES ALEXANDER, Chairman, WALTER E. WHITE, Vice-Chairman, and DOUGLAS E. SAYAN, Member. The hearing was held on July 15, 16 and 21, 1992, in the Personnel Appeals Board Hearing Room, 2828 Capitol Boulevard, Olympia, Washington. The Appellant was present and represented by his attorney ROBERT A. IZZO. The Respondent was represented by MITCHEL R. SACHS, Assistant Attorney General, who was assisted by Carol Schmitt, Personnel Manager, and Gary Klein, Personnel Officer. The Board, having heard the testimony and argument, having reviewed the files and records herein and being fully advised in the premises, now enters the following:

FINDINGS

I.

The Appellant was employed as a Stationary Engineer 2 at the Washington State Soldiers' Home in Orting, Washington. By letter dated July 22, 1991, from Jesse Farias, Director of the Department of Veterans' Affairs, the Appellant was notified of his dismissal

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1 effective at 2:00 p.m., August 12, 1991, for insubordination, gross  
2 misconduct and willful violation of published agency policy.

3 II.

4 The specifics of the charges, as contained in the disciplinary  
5 letter, are as follows:

6 In February, 1989, Ms. Darla McCann presented a written  
7 complaint to the Superintendent of the Washington Soldiers  
8 Home and Colony relative to your continual unwanted  
9 attentions toward her. She states that during the three  
10 year period since June of 1986 when you were counseled due  
11 to a complaint received from Ms. McCann there have been  
12 numerous occasions when you have presented yourself in her  
13 workplace and/or approached her and tried to engage her in  
14 conversation. Ms. McCann states that she told you  
15 directly and emphatically that your presence and attempts  
16 at conversation were unwelcome and upsetting to her.  
17 These continual acts of unwanted attention towards  
18 Ms. McCann constitute gross misconduct and willful  
19 violation of agency policy (PS-2 Sexual Harassment).

20 Subsequent to Ms. McCann's complaint in February, 1989,  
21 you were counseled and provided specific expectations with  
22 respect to your future behavior towards Ms. McCann  
23 specifically and female employees in general (Supervisory  
24 Conference document signed by you on February 21, 1989).

25 On March 31, 1989, you placed yourself in a position so as  
26 to interfere with Ms. McCann's entry into her workplace  
27 and behaved in such a manner as to create an intimidating,  
28 hostile and offensive environment for her. This incident  
29 constitutes insubordination in that you violated the  
30 expectations defined in the Supervisory Conference of  
February 21, 1989.

In July, 1989, a complaint was received from Ms. Ramona  
Rudnick relative to your behavior toward her at a Home-  
sponsored barbecue the evening of July 20, 1989.  
Ms. Rudnick states that you made comments relative to her  
looks, did not make eye contact when looking at her but  
rather appeared to be looking straight through her clothes  
and refused to leave her table as requested even though  
you were informed your presence was not wanted.  
Additionally on July 21, 1989, when Ms. Rudnick entered  
the plant area you again made comments about how nice she  
looked and comments about her tan. She again advised you  
to keep your comments to yourself.

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1 Both of Ms. Rudnick's supervisors have reported instances  
 2 where they observed you simply standing around watching  
 3 Ms. Rudnick while she works, and one supervisor has  
 4 expressed concern about your interaction with Ms. Rudnick  
 5 and another female employee and noted that you always  
 6 appear to be undressing Ms. Rudnick with your eyes when  
 7 you talk to her.

8 The foregoing incidents with respect to Ms. Rudnick  
 9 constitute gross misconduct and willful violation of  
 10 agency policy PS-2.

11 Incidents cited by other female employees over the last  
 12 couple of years and particularly during 1989 included  
 13 instances of a sexual nature, such as leering, undressing  
 14 them visually or staring at their breasts and deliberately  
 15 positioning yourself to obstruct their path or require  
 16 them to reach over you to return an item. Such actions  
 17 are beyond the bounds of acceptable behavior for an  
 18 employee of this agency and constitute gross misconduct  
 19 and willful violation of agency policy PS-2 in that it  
 20 creates a hostile and intimidating work environment.

21 During the hearing, the Respondent agreed that the last paragraph  
 22 cited above was not part of the specified charges.

23 III.

24 Because of a complaint from Darla McCann a counselling session was  
 25 conducted by John Buffington with the Appellant on February 21,  
 26 1989. The Appellant was given a "Supervisory Conference" memo at  
 27 that meeting and he signed a copy to show that he had received it.  
 28 He did not agree with the limitations placed on him by that memo and  
 29 asked to see his second-line supervisor about it.

30 The memo set the following criteria to be followed by the Appellant:

1. If you desire to eat in the dining room, you will proceed through the line in a minimal time. If on duty in steam plant your food will be consumed there, if not, then in the area for staff in the dining room. When finished deliver tray to carousel and return to your assigned work area.

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2. You are not to be in any of the work areas that the dining staff works in including N. C. F., and especially in any area that Ms. McCann may be working in.
3. You will cease the practice of sitting outside the steam plant, or standing in the pump room watching the female employees taking the food carts to and from N. C. F. or cleaning them on the North dock.
4. The only exception to being in the work area is if you have assigned work to do, but still not in any area that Ms. McCann is working in.
5. You will not disturb or distract the dining room staff from their work. . . .

IV.

On March 31, 1989, the Appellant took his tray back to the kitchen after dinner. When he arrived at the kitchen, instead of returning his tray, he sat on the loading dock and talked to a cook.

Darla McCann was returning from the Nursing Care Facility with a food cart. In order to get the food cart into the building, Ms. McCann had to pass the area where the Appellant and the cook were sitting. The cook and the Appellant both had their feet out in front of them, in the way of the food cart. The cook pulled his feet back to allow the food cart to pass. The Appellant did not, forcing Ms. McCann to swing the food cart away from the Appellant's feet. When she did so, the food cart hit a post.

Dick Farnes, the Appellant's second-line supervisor, saw the incident. He heard the food cart coming and saw that the Appellant watched Ms. McCann bring the food cart up the ramp. After the incident, Mr. Farnes told the Appellant to keep his feet out of the

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1 way. He did not write up the incident. At the time, he thought  
2 what he said to the Appellant was enough to prevent recurrence.  
3

4 V.

5 July 20, 1989, was the date of the Western Days Picnic at the  
6 Soldiers' Home. The Appellant was on duty that day. He was told to  
7 get his dinner, but when he arrived at the picnic area, the food was  
8 not quite ready to be served. The Appellant looked for a table with  
9 seating available while he waited and chose the table at which  
10 Ramona Rudnick was sitting. There was no reserved seating and most  
11 other tables were full. There was no one else at Ms. Rudnick's  
12 table. She had previously been a Custodian and the Appellant had  
13 talked with her without any problems. Ms. Rudnick works on the  
14 grounds crew and typically wears shorts and a tank top when the  
15 weather is nice. She likes to get a tan because of the way it makes  
16 her feel. On the day of the Western Days Picnic, Ms. Rudnick was  
17 wearing a dress and the Appellant complimented her on her looks.  
18 Ms. Rudnick felt that when the Appellant looked at her, he appeared  
19 to be looking at her breasts. He didn't look her in the eye. She  
20 was uncomfortable with the Appellant at her table. She asked him  
21 not to compliment her and to leave. He moved to the end of the  
22 table and sat so he could see when the food was ready, which meant  
23 he had his back to her. He left when he could get dinner.

24 On July 21, 1989, Ms. Rudnick went to return a pair of pliers to  
25 Mr. Buffington in the Power House. Mr. Buffington wasn't there, so  
26 Ms. Rudnick gave the pliers to the Appellant. The Appellant

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5

1 complimented Ms. Rudnick on her tan. Ms. Rudnick told him to keep  
2 his comments to himself.  
3

4 VI.

5 There was testimony about an incident which took place near  
6 Christmas of 1985 between Dorothy Stanifer and the Appellant. The  
7 Appellant came up behind Ms. Stanifer at the carousel for food trays  
8 and gave her a hug and wished her a "Merry Christmas." When  
9 Ms. Stanifer objected, the Appellant apologized and she never had a  
10 similar problem with him again. That incident was not one of the  
11 specified charges and was dealt with to Ms. Stanifer's satisfaction  
12 at the time.

13 VII.

14 At some unspecified time in the past, Ms. McCann was on the loading  
15 dock cleaning a food cart. The carts are difficult to clean.  
16 Ms. McCann was bent over with her head between the shelves of the  
17 cart and the lower half of her body sticking out while she was  
18 cleaning. When she backed out, stood up and turned around, the  
19 Appellant was behind her. He was extremely close and in her  
20 "comfort zone." This incident was not included in Ms. McCann's  
21 complaint in February 1989, nor as a specified charge in the  
22 Loudermill letter or the disciplinary letter.

23 VIII.

24 The Appellant was the subject of ridicule because of his glasses.  
25 We observed that he wears extremely strong corrective lenses. Co-  
26 workers took his glasses, laughed about them and called them "Coke-

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1 bottle bottoms." The Appellant acknowledges that, because of his  
2 glasses, he avoids eye contact.

3 IX.

4 Department of Veterans Affairs Policy No. PS-2, "Sexual Harassment,"  
5 effective July 1, 1983, provides as follows:

6 PURPOSE: To protect all employees of the Department of  
7 Veterans Affairs from sexual harassment in the  
8 work environment.

9 POLICY: Employees of the department will be afforded a  
10 work environment free from sexual harassment,  
11 intimidation, and discrimination.

12 DEFINITIONS: The following acts are considered sexual  
13 harassment:

- 14 1. Promise of employment made implicitly or  
15 explicitly predicated on sexual activity as  
16 a condition for employment.
- 17 2. Implicit or explicit coercive sexual  
18 behavior to control, influence, or affect  
19 the career, salary, job or appointment of  
20 any employee or contractor.
- 21 3. Deliberate or unsolicited verbal comments,  
22 gestures, or physical contact of a sexual  
23 nature which is unwelcome and/or interferes  
24 with work performance and/or creates an  
25 intimidating, hostile, or defensive work  
26 environment.

27 PROCEDURE:

- 28 1. Supervisors observing or having knowledge  
29 of incidents or practices of sexual  
30 harassment (as defined in this policy)  
shall take immediate corrective action.
2. All complaints of sexual harassment should  
be referred to the individual's immediate  
supervisor for action. If a satisfactory  
resolution is not forthcoming then the  
employee should refer the matter to the  
appropriate appointing authority for  
review.

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3. Violators of this policy shall be subject to disciplinary action in accordance with Merit System Rules Chapter 356.34.

X.

The Department of Veterans Affairs Policy No. PS-2, "Sexual Harassment," effective June 1, 1989, provides, in pertinent part, as follows:

PURPOSE

To assure that employees and others are afforded a work environment free from sexual harassment. This policy defines sexual harassment, expected employee conduct, and procedures for employee and supervisor reporting and follow-up actions.

POLICY

Sexual harassment is a form of discrimination and is an unlawful employment practice under RCW 49.60 (Washington State Law Against Discrimination) and Title VII of the Civil Rights Act of 1964, therefore,

- a. Employees and clients of the Department shall not be subject to any form of sexual harassment;
- b. It is the responsibility of all employees, particularly managers and supervisors to adhere to a standard of conduct that ensures a work environment free from sexual harassment and to respond to such acts when observed;

DEFINITION

Sexual harassment, which is prohibited by this policy, includes but is not limited to:

- a. Unwelcome sexual advances;
- b. Requests, demands, or subtle pressures for sexual favors or sexual activity of another employee;
- c. Any other verbal or physical conduct of a sexual nature (e.g., lewd comments or gestures; unwanted, intentional physical

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contact of a sexual nature; and subjecting fellow employees to written or pictorial materials of a sexual nature) when:

- (4) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

CONCLUSIONS

I.

The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

II.

The Respondent has the burden of proving by a preponderance of the credible evidence that the Appellant committed the offenses set forth in the disciplinary letter.

III.

Insubordination has been defined as not submitting to authority, willfully disrespectful or disobedient, rebellious.

Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions.

Willful violation of published employing agency rules or regulations is established by facts showing the existence and publication of the rules, the Appellant's knowledge of the rule or regulation and failure to comply with the rule or regulation.

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## IV.

1  
2 In evaluating the first quoted paragraph cited in Finding II, we can  
3 find no specific acts, with even approximate dates, which are  
4 charged. We are, therefore, dismissing that paragraph as the basis  
5 for any cause for disciplinary action.  
6

## V.

7 The Appellant was required to follow the directives given to him by  
8 his supervisor on February 21, 1989, whether he agreed with them or  
9 not. The loading dock area, although a normal place to sit and  
10 chat, was also a work area for the dining room staff and  
11 specifically for Ms. McCann when she was returning or cleaning food  
12 carts. The memo specifically directed the Appellant not to be in  
13 those areas. The Appellant's presence on the loading dock on  
14 March 31, 1989, and when Ms. McCann was cleaning the food cart was  
15 not in compliance with his supervisor's directive and constitutes  
16 insubordination.  
17

## VI.

18 Although Ms. Rudnick asked the Appellant to leave her table at the  
19 Western Days Picnic, which the Appellant did not do, we cannot  
20 conclude that his conduct on that occasion constitutes gross  
21 misconduct.  
22

23 When the Appellant complimented Ms. Rudnick on her appearance at the  
24 Western Days Picnic and again on the next day, she asked him both  
25 times not to. Although the Appellant did not honor her request,  
26

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10

1 the Respondent failed to carry its burden of proof that making  
2 compliments constitutes gross misconduct.  
3

4 The Appellant is also charged with "appearing to be undressing  
5 Ms. Rudnick with your eyes when you talk with her." This charge is  
6 difficult to evaluate, however, given the general mannerisms of the  
7 Appellant with regard to other female employees with whom he worked  
8 and the conditions surrounding his use of corrective lenses, the  
9 Respondent failed to carry its burden of proving by a preponderance  
10 of the credible evidence that the Appellant committed the actions  
11 alleged in the charges.  
12

13 VII.

14 The Appellant is charged with willful violation of DVA Policy  
15 No. PS-2 as regards his conduct toward Ms. McCann on March 31, 1989,  
16 and toward Ms. Rudnick on July 20 and 21, 1989. That policy defines  
17 sexual harassment as including "verbal or physical conduct of a  
18 sexual nature" and goes on to give examples. Although the conduct  
19 of the Appellant on March 31, 1989, in which he impeded Ms. McCann's  
20 passage may well have been harassment, we can find no sexual  
21 component. Therefore, it does not meet the definition of sexual  
22 harassment in the policy. As regards Ms. Rudnick, we find nothing  
23 sexual about sitting at the same table at the Western Days Picnic or  
24 engaging her in conversation. There was no testimony that there was  
25 anything sexual in the way the Appellant complimented Ms. Rudnick on  
26 her appearance at the picnic or the next day. Both Ms. Rudnick and

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30 11

1 Ms. McCann denied that the Appellant ever at any time said anything  
2 by joke, comment or direct conversation of a sexual nature.  
3

4 The Respondent has failed to carry its burden of proving that the  
5 Appellant violated Policy PS-2.  
6

7 VIII.

8 In determining whether the sanction imposed is appropriate,  
9 consideration must be given to the proven facts and circumstances in  
10 each case, including the seriousness and the circumstances of the  
11 offenses. The penalty should not be disturbed unless it is too  
12 severe. The sanction imposed should be sufficient to prevent  
13 recurrence, to deter others from similar misconduct and to maintain  
14 the integrity of the program. An action does not necessarily fail  
15 if one cause is not sustained unless the entire action depends on  
16 the unproven charge.

17 Considering the charge proven, insubordination, the Appellant should  
18 receive some sanction, but dismissal is too severe. A 15-day  
19 suspension is sufficient to accomplish the purposes of discipline.  
20

21 ORDER

22 NOW, THEREFORE, IT IS HEREBY ORDERED that the dismissal of  
23 FRANK HOLLADAY is modified to a 15-day suspension effective  
24 August 12, 1991.  
25  
26

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IT IS FURTHER ORDERED that at the end of the 15-day suspension that the Appellant is reinstated to his position with all back pay and benefits.

DATED this 12<sup>th</sup> day of August, 1992.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Charles Alexander  
Charles Alexander, Chairman

Walter E. White  
Walter E. White, Vice-Chairman

Douglas E. Sayan  
Douglas E. Sayan, Member

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1  
2 BEFORE THE PERSONNEL APPEALS BOARD<sup>A</sup>

3 STATE OF WASHINGTON

4  
5 GERALD GRIFFIN, ) Case No. DEMO-01-0012  
6 Appellant, )  
7 v. ) FINDINGS OF FACT, CONCLUSIONS OF  
8 ) LAW AND ORDER OF THE BOARD  
9 DEPARTMENT OF SOCIAL AND HEALTH )  
10 SERVICES, )  
11 Respondent. )

---

12 I. INTRODUCTION

13 1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER  
14 T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held in the  
15 conference room at the Eastern State Hospital in Spokane, Washington, on November 4, 2003.  
16 BUSSE NUTLEY, Member, did not participate in the hearing or in the decision in this matter.

17  
18 1.2 **Appearances.** Appellant Gerald Griffin was present and was represented by Christopher  
19 Coker, Attorney at Law, of Parr & Younglove, P.L.L.C. Patricia Thompson, Assistant Attorney  
20 General, represented Respondent Department of Social and Health Services.

21  
22 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of  
23 duty, gross misconduct, and willful violation of published employing agency or Department of  
24 Personnel rules or regulations. Respondent alleges that Appellant spoke to a co-worker in an  
25 abusive, intimidating manner with a loud voice and directed profanity at the co-worker.  
26

1  
2 **II. FINDINGS OF FACT**

3 2.1 Appellant is a permanent employee for Respondent Department of Social and Health  
4 Services (DSHS). Appellant was hired as a Mental Health Licensed Practical Nurse 4 at Eastern  
5 State Hospital in 1985. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW  
6 and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal  
7 with the Personnel Appeals Board on April 23, 2001.

8  
9 2.2 By letter dated March 14, 2001, Harold Wilson, Chief Executive Officer, informed  
10 Appellant of his demotion from Mental Health Licensed Practical Nurse 4 to Mental Health  
11 Licensed Practical Nurse, 2 effective April 1, 2001. Mr. Wilson charged Appellant with neglect of  
12 duty, gross misconduct, and willful violation of published employing agency or Department of  
13 Personnel rules or regulations. Respondent alleged that Appellant spoke to co-worker Trisha  
14 Weston Low in an abusive, intimidating manner, while using a loud voice and wild gesticulations.  
15 Respondent also alleged that Appellant directed profanity at Ms. Weston by shouting, "This is  
16 bullshit."

17  
18 2.3 Appellant has been the subject of prior formal disciplinary action and has a history of prior  
19 counseling and letters of reprimand. Appellant's personnel file includes the following:

- 20
- 21 • A January 3, 2001 letter of reprimand for unauthorized absence and failure to follow Eastern  
22 State Hospital's Nursing Procedure.
  - 23 • A January 24, 2000 letter of reprimand for unauthorized absence and failure to follow  
24 Eastern State Hospital's Nursing Procedure.
  - 25 • A January 24, 2000 letter of counseling for tardiness, absenteeism, and improper reporting  
26 of absence.

- 1 • A July 19, 1998 letter notifying Appellant of his demotion from Mental Health Technician 4 to Mental Health Technician 2B for sleeping while on duty.
- 2 • A January 14, 1997 letter notifying Appellant of his reduction in salary for three months
- 3 after an unauthorized absence and failure to comply with written directives and policies.
- 4 • A May 19, 1996 letter of reprimand for unauthorized absence and failure to follow written
- 5 directives.
- 6 • A March 8, 1995 letter of counseling for Appellant's use of unscheduled sick time.

7

8 2.4 Appellant's performance evaluations from July 1986 through July 1988, and from July 1994

9 through August 2000, addressed concerns regarding Appellant's failure to follow procedures and his

10 interactions with co-workers. The July 1987 through July 1988 performance evaluation included

11 comments that Appellant "compromised his position of leadership by behaving and assigning ward

12 jobs in an almost capricious manner;" "had difficulty forming effective working relationships with

13 subordinates and supervisors"; and also mentions "unprofessional behavior involving a co-worker."

14 The July 1998 through July 1999 performance evaluation included the comment that Appellant

15 "communicated in a way that has upset co-workers."

16

17 2.5 Eastern State Hospital Policy 2.9 (Patient Abuse Policy: Procedure for Reporting) states that

18 all patients have the right to an environment free of abuse.

19

20 2.6 DSHS Administrative Policy 6.04 (Standards of Ethical Conduct for Employees) directs

21 employees to create an environment free from intimidation, retaliation, and hostility. The policy

22 further directs employees to interact with co-workers in a respectful and courteous manner.

23

24 2.7 Eastern State Hospital Policy 1.37 (Non-Patient Care Problem Solving) addresses situations

25 when a problem arises between staff members and directs employees to avoid blame and focus on

26 solving the problem.

1  
2 2.8 Eastern State Hospital Policy 1.41 (Workplace Violence) defines workplace violence as “any  
3 action on the part of one person to create a hostile work environment for another through the use of  
4 fear or intimidation.” It further defines “words, gestures, or actions that alarm” and “offensively  
5 coarse language” as intolerable.

6  
7 2.9 Shortly before December 19, 2000, Trisha Weston Low, Mental Health Technician 3,  
8 performed a routine cleaning of the employees’ refrigerator during her work shift. In doing so, she  
9 followed the established procedure of discarding items that were not labeled or dated.

10  
11 2.10 On December 19, 2000, Appellant approached the nursing station and pointed his finger at  
12 Ms. Low and said in a loud voice, “I have a bone to pick with you.” At first Ms. Low thought  
13 Appellant was joking; however, she realized by the serious look on his face that he was very upset  
14 with her. Appellant approached Ms. Low and said, “You threw out my water bottle.”

15  
16 2.11 Ms. Low asked Appellant which water bottle he was referring to. Appellant described the  
17 bottle to her and claimed she knew it was his bottle, when she threw it away. Ms. Low explained to  
18 Appellant that she did not know it was his water bottle, and she had simply followed established  
19 procedures for cleaning the refrigerator. Ms. Low stated she would not have thrown out Appellant’s  
20 bottle if it had his name on it. During Ms. Low’s explanation, Appellant repeatedly said, “That is  
21 bullshit.” Ms. Low was embarrassed and offended by Appellant’s behavior.

22  
23 2.12 Ms. Low reported the incident by memo to Debbie Lillquist, Acting Nurse Executive. In her  
24 memo, Ms. Low stated that the incident had been witnessed by Eastern State Hospital patients and  
25 Don Egan, Registered Nurse 2. That same day, Ms. Lillquist requested that Mr. Egan write a memo  
26 to document what he had observed.

1  
2 2.13 Later during the work shift, Mr. Egan stated to Ms. Low that he was shocked and  
3 intimidated by Appellant's behavior. Mr. Egan apologized to Ms. Low for not attempting to  
4 intervene on her behalf during Appellant's interaction with her at the nurse's station.

5  
6 2.14 On January 4, 2001, Ms. Lillquist conducted a fact-finding meeting with Appellant and his  
7 union representative. Appellant admitted that he had been upset with Ms. Low for throwing out his  
8 water bottle, had raised his voice while speaking to her, and said, "I have a bone to pick with you."  
9 Appellant stated he had not been aware of any patients nearby at the time of his interaction with Ms.  
10 Low. Ms. Lillquist completed a Conduct Investigation Report in which she concluded that  
11 Appellant had engaged in misconduct.

12  
13 2.15 On January 17, 2001, Judy Walker, Registered Nurse 3, conducted a meeting with Appellant  
14 and his union representative. During the meeting, Appellant admitted he had been upset with Ms.  
15 Low and used the word "bullshit." Appellant stated, however, that he did not yell at Ms. Low and  
16 therefore could not have been overheard by any of the patients. Ms. Walker completed an  
17 Investigation of Conduct Report and submitted it to Mr. Wilson.

18  
19 2.16 Mr. Wilson reviewed the written statements by Ms. Low and Mr. Egan, the Conduct  
20 Investigation Report, the Investigation of Conduct Report, and the relevant agency policies. Mr.  
21 Wilson determined that Appellant's behavior was unacceptable, and he had clearly engaged in  
22 misconduct. Mr. Wilson concluded that Appellant had neglected his duty to treat co-workers with  
23 dignity and respect, and he engaged in gross misconduct by negatively impacting the hospital's  
24 ability to carry out its mission.

1 2.17 Mr. Wilson determined that Appellant violated Eastern State Hospital Policy 2.9 (Patient  
2 Abuse Policy) by speaking in a loud voice and using profanity while patients were in the adjoining  
3 day room. Further, Mr. Wilson determined that Appellant violated Eastern State Policy 1.37 (Non-  
4 Patient Care Problem Solving) and Eastern State Hospital Policy 1.41 (Workplace Violence) by  
5 behaving in a manner that created fear and psychological distress in his co-workers.

6  
7 2.18 In determining the level of discipline, Mr. Wilson reviewed Appellant's personnel file and  
8 history of prior disciplinary action, letters of counseling, and letters of reprimand. Mr. Wilson  
9 considered that Appellant, as a shift charge "lead worker," had a duty to model appropriate behavior  
10 to other staff. Mr. Wilson determined that Appellant's misconduct damaged his ability to lead other  
11 staff and undermined his effectiveness to perform his duties in a leadership role.

12  
13 2.19 Mr. Wilson concluded that demotion from a Mental Health Licensed Practical Nurse 4 to  
14 Mental Health Licensed Practical Nurse 2 was the appropriate sanction based on the serious nature  
15 of Appellant's misconduct, and that it would prevent recurrence and deter others from similar  
16 behavior.

## 17 **II. ARGUMENTS OF THE PARTIES**

18 3.1 Respondent argues that Appellant spoke to Ms. Low in an abusive and intimidating manner  
19 and directed profanity at her. Respondent asserts that Appellant, as a lead worker, had a greater  
20 expectation to be a role model and set an example for other staff. Respondent contends that  
21 Appellant did not treat Ms. Low with respect and dignity, nor did he attempt to resolve the problem  
22 in an appropriate manner. Respondent argues that Appellant's behavior created a hostile and  
23 intimidating environment. Respondent asserts that Appellant's behavior counteracted Eastern State  
24 Hospital's goal to provide a calm, therapeutic environment for the patients. Respondent contends  
25 that there were patients in the adjoining day room who could have heard Appellant's loud tone of  
26 voice and profanity. Respondent argues that Appellant's behavior constituted neglect of duty, gross

1 misconduct, and willful violation of agency policies. Respondent asserts that demotion was the  
2 appropriate sanction in this case and asks the Board to uphold that decision.

3  
4 3.2 Appellant argues that his interaction with Ms. Low was meant to be lighthearted and began  
5 in a joking manner; however, she misinterpreted his intentions. Appellant admits he approached  
6 Ms. Low and said, "Hey, I have a bone to pick with you." Appellant asserts he was only somewhat  
7 frustrated about his water bottle being thrown away, and he denies yelling at Ms. Low. Appellant  
8 contends there is no evidence to support Respondent's claim that patients in the day room overheard  
9 the discussion at the nurses' station. Appellant argues that he has been an employee of Eastern  
10 State Hospital since 1985, and his performance evaluations reflect that he has performed his job  
11 well in most categories. Respondent asserts that the sanction of demotion from a Mental Health  
12 Licensed Practical Nurse 4 to a Mental Health Licensed Practical Nurse 2 was too severe and asks  
13 the Board to grant his appeal.

#### 14 15 IV. CONCLUSIONS OF LAW

16 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
17 herein.

18  
19 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
20 the charges upon which the action was initiated by proving by a preponderance of the credible  
21 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
22 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
23 Corrections, PAB No. D82-084 (1983).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
3 of Social & Health Services, PAB No. D86-119 (1987).

4  
5 4.4 Respondent has met its burden of proof that Appellant neglected his duty to treat his co-  
6 workers with dignity and respect, and to use established problem solving policies when  
7 disagreements arose between co-workers. Appellant clearly failed to behave in a professional  
8 manner when he spoke to Ms. Low in a loud, intimidating voice and then directed profanity at her.  
9 Appellant further neglected his duty by failing to create an environment free from intimidation and  
10 hostility and by failing to model appropriate behavior as a "lead worker."

11  
12 4.5 Gross misconduct is flagrant misbehavior that adversely affects the agency's ability to carry  
13 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant  
14 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's  
15 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

16  
17 4.6 Respondent has failed to meet its burden of proof that Appellant's actions rose to the level of  
18 gross misconduct. Respondent failed to establish that Appellant's behavior toward Ms. Low  
19 adversely impacted Eastern State Hospital's ability to carry out its functions; therefore, the charge  
20 of gross misconduct is not sustained.

21  
22 4.7 Willful violation of published employing agency or institution or Personnel Resources  
23 Board rules or regulations is established by facts showing the existence and publication of the rules  
24 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
25 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

26

1 4.8 Respondent has met its burden of proving that Appellant willfully violated Eastern State  
2 Hospital Policies 1.37 (Non-Patient Care Problem Solving) and 1.41 (Workplace Violence) by  
3 failing to use established problem solving policies, and by using intimidation and offensive  
4 language that alarmed and offended Ms. Low and Mr. Egan.

5  
6 4.9 Respondent has failed to prove that Appellant violated Eastern State Hospital Policy 2.9  
7 (Patient Abuse). During the interaction between Appellant and Ms. Low, the patients were in  
8 another room, specifically the day room, and Respondent failed to establish that the patients  
9 witnessed or heard the interaction at the nurses' station or had been affected by it.

10  
11 4.10 Although it is not appropriate to initiate discipline based on prior formal and informal  
12 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the  
13 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.  
14 D93-163 (1995).

15  
16 4.11 In determining whether a sanction imposed is appropriate, consideration must be given to  
17 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
18 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
19 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
20 program. An action does not necessarily fail if one cause is not sustained unless the entire action  
21 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

22  
23 4.12 Appellant's behavior was clearly inappropriate and unprofessional and is not condoned by  
24 the Board; however, it did not rise to the level of gross misconduct. Furthermore, Respondent failed  
25 to prove that Appellant violated Eastern State Hospital Policy 2.9 (Patient Abuse). Respondent has  
26 met its burden of supporting the remaining charges.

1  
2 4.13 After considering the totality of the proven facts and circumstances, we find that demotion to  
3 a Mental Health Licensed Practical Nurse 2 was too severe. Therefore, Appellant's disciplinary  
4 sanction should be modified to a demotion to a Mental Health Licensed Practical Nurse 3, which is  
5 a job classification that does not have lead responsibility on an on-going basis.  
6

7 **V. ORDER**

8 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gerald Griffin is granted in  
9 part. Appellant's demotion to a Mental Health Licensed Practical Nurse 2 is modified to a demotion  
10 at the Mental Health Licensed Practical Nurse 3 job classification.

11  
12 DATED this 2nd day of March, <sup>(2004)</sup> 2003.

13  
14 WASHINGTON STATE PERSONNEL APPEALS BOARD

15  
16 Walter T. Hubbard  
17 Walter T. Hubbard, Chair

18 Gerald I. Morgen  
19 Gerald I. Morgen, Vice Chair

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BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TIMOTHY FREDERICK,	) Case No. DISM-02-0030
	)
Appellant,	) FINDINGS OF FACT, CONCLUSIONS OF
	) LAW AND ORDER OF THE BOARD
	)
v.	)
	)
OFFICE OF THE SECRETARY OF STATE,	)
	)
Respondent.	)

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and BUSSE NUTLEY, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on May 7, 2003 and May 8, 2003.

1.2 **Appearances.** Appellant Timothy Frederick was present and was represented by Edward Younglove III, Attorney at Law, of Parr & Younglove, P.L.L.C. Mark Anderson, Assistant Attorney General, represented Respondent Office of the Secretary of State.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, inefficiency, and insubordination. Respondent alleges that Appellant demonstrated inadequate work performance, failed to perform the minimum requirements of his position, and refused to obey direction from his supervisor.

1  
2 1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084  
3 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v.  
4 Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston  
5 Co. Super. Ct. Jan. 10, 1997); Countryman v. Dep't of Social & Health Services, PAB No. D94-025  
6 (1995); Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of  
7 Veterans Affairs, PAB No. D91-084 (1992).

## 8 9 II. FINDINGS OF FACT

10 2.1 Appellant was a permanent employee of Respondent Office of the Secretary of State.  
11 Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated  
12 thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals  
13 Board on April 17, 2002.

14  
15 2.2 By letter dated March 15, 2002, Steve Excell, Assistant Secretary of State, informed  
16 Appellant of his dismissal effective April 1, 2002. Mr. Excell charged Appellant with neglect of  
17 duty, inefficiency, and insubordination. Respondent alleged that Appellant demonstrated  
18 inadequate work performance, failed to perform the minimum requirements of his position, and  
19 refused to obey direction from his supervisor.

20  
21 2.3 At the time of his dismissal, Appellant was a State Senior Archivist in the Division of  
22 Archives and Records Management. Appellant's responsibilities included the processing (arranging  
23 and describing) of archival records. Appellant began his employment with the Office of the  
24 Secretary of State in January 1974 as an Assistant State Archivist. In 1997, he was appointed as a  
25 State Senior Archivist for Special Projects.

1  
2 2.4 Appellant has been the subject of a prior formal disciplinary action and was charged with  
3 neglect of duty, gross misconduct, and willful violation of published employing agency policies or  
4 regulations. Appellant was dismissed effective November 15, 1998 for drafting and delivering a  
5 letter in the workplace that sexually propositioned a union representative. Appellant appealed that  
6 disciplinary sanction, and the Personnel Appeals Board modified the dismissal to a ten-month  
7 suspension (Frederick v. Secretary of State, PAB No. DISM-98-0064 (1999)).

8  
9 2.5 Since that time, Appellant has received the following:

- 10 • A January 19, 2001 e-mail directing Appellant to remove an “anti-Ralph Munro” document  
11 that was offensive to staff and inappropriately posted on a bulletin board designated for  
12 union-related material.
- 13 • A January 22, 2001 follow-up e-mail denying Appellant’s request to “poll staff” on whether  
14 they found the Ralph Munro document offensive, and second notification that he must  
15 remove the document from the bulletin board.
- 16 • A February 1, 2001 e-mail notifying Appellant that the agency was removing the bulletin  
17 board because Appellant continued to post inappropriate materials despite prior warnings.
- 18 • A February 2, 2001 e-mail to Appellant directing him to cease posting documents and to  
19 remove his notice about a “bulletin board molester who stole the bulletin board.”
- 20 • A March 16, 2001 reminder to Appellant to give advance notice when taking leave from  
21 work.
- 22 • An April 3, 2001 e-mail warning Appellant of staff complaints about a poster in his office  
23 that contained profanity.

24 2.6 During Appellant’s suspension, his office furniture and equipment were disbursed to other  
25 staff. In September 1999, when Appellant returned to work, he was assigned to the “Division of  
26 Developmental Disability – Archival Processing Project.” Appellant requested that all his furniture  
and equipment be returned to him. When the agency informed him that they could not comply with  
that request, Appellant submitted a request for oak furniture items totaling \$1,805.00 to “bring his  
office space up to archives’ office standards.” Appellant also requested that an environmental

1 computer be removed from his office to give him more workspace, a metal door installed to reduce  
2 drafts and noise, and the replacement of his computer with a newer model.

3  
4 2.7 The agency responded that their budget did not allow for oak furniture, however, suitable  
5 used furniture was provided. The agency offered to install an accordion door because Appellant's  
6 office size and location could not accommodate a metal door. Appellant declined the accordion  
7 door and considered it "unacceptable."

8  
9 2.8 Appellant was required to spend 50 percent of his time on "archival processing" (arranging  
10 and describing archival records) and 50 percent of his time on "functional analysis." Appellant's  
11 overall assignment was to "reduce and refine" the backlog of archival records. On December 1,  
12 1999, Appellant submitted a work plan and estimated that he could process at a rate of 12 cubic feet  
13 per week (12 boxes). An 11-step instruction procedure sheet was created along with a sample of  
14 how the work was to be done. Some of the tasks outlined in the instruction sheet included locating  
15 and retrieving cartons for processing, discarding duplicates, compiling inventory lists, attaching  
16 new labels, and keying information into the Gencat computer program. The agency believed that  
17 Appellant's estimate of 12 boxes per week was a low production rate, but acceptable. Therefore,  
18 Appellant's performance expectation was to complete a minimum of 12 boxes per week.

19  
20 2.9 On February 15, 2000, an ergonomic assessment was completed on Appellant's workspace.  
21 As recommended in the assessment, the agency provided Appellant with a new wrist pad, document  
22 holder, chair, and computer table.

23  
24 2.10 On August 4, 2000, Dave Hastings, Chief of Archival Services and Appellant's supervisor,  
25 wrote a memo expressing his concerns about Appellant's failure to meet work expectations. Mr.  
26 Hastings instructed Appellant to do brief rather than in-depth functional analysis reports, complete

1 reports in a timely manner, and resume his processing of archival records. Mr. Hastings was  
2 concerned because Appellant was processing approximately 12 boxes per month rather than 12  
3 boxes per week. Mr. Hastings also reminded Appellant to discard (weed) non-archival records  
4 because it was apparent that Appellant had not accomplished much weeding.

5  
6 2.11 On September 7, 2000, Mr. Hastings wrote another memo to Appellant expressing concerns  
7 about Appellant's failure to meet work expectations. Mr. Hastings instructed Appellant to keep his  
8 functional analysis reports brief and timely and directed him to resume the processing and weeding  
9 of archival records.

10  
11 2.12 On April 2, 2001, Mr. Hastings once again wrote a memo addressing Appellant's failure to  
12 prepare brief and timely functional analysis reports. Mr. Hastings also addressed Appellant's  
13 failure to construct the file folders in a useful way and his failure to process more than 7 cubic feet  
14 of archival records during the prior eighteen months, despite expectations for completion of 12  
15 cubic feet per week. Therefore, Mr. Hastings informed Appellant that he would no longer be  
16 assigned to do functional analysis and would begin processing archival records full-time. Mr.  
17 Hastings also reminded Appellant that he was expected to weed non-archival materials and  
18 provided weeding guidelines for Appellant.

19  
20 2.13 On May 3, 2001, Appellant requested a larger office because he needed more space to  
21 process archival materials on a full-time basis. Since there was no large office space available, the  
22 agency was unable to accommodate Appellant's request. In addition, the agency compared  
23 Appellant's workspace with others doing similar work. Appellant's office space was as large or  
24 larger than his colleagues.

1  
2 2.14 On June 12, 2001, the State Archivist at that time, Phil Coombs, wrote a letter of reprimand  
3 to Appellant regarding his inadequate work performance and uncooperative attitude. Mr. Coombs  
4 confirmed that Appellant would no longer be assigned to functional analysis tasks due to his failure  
5 to follow Mr. Hastings' directions and instructions, and he expressed his concern about Appellant's  
6 failure to cooperate with his supervisor's directives. Mr. Coombs instructed Appellant to perform  
7 his future processing of archival records in a timely fashion while adhering to the assigned  
8 procedures for the project. Mr. Coombs also wrote:

9  
10 As to your attitude, the list of incidents is quite long. It includes your derogatory comments  
11 about Don Whiting and Ralph Munro, which greatly upset many employees; refusal to  
12 follow leave request policies; refusal to follow purchasing procedures; refusal to perform an  
13 assigned inventory task; posting and circulating objectionable material; unauthorized use of  
14 agency copying machines; unauthorized contacts and interviews with outside government  
15 officials and the media; sleeping on the job; and a surly and uncommunicative attitude  
16 toward your supervisor which has resulted in the need to carry out all communications to  
17 you in writing.

18 Mr. Coombs ended his letter by stating that "future incidents of misconduct may result in further  
19 corrective /disciplinary action."

20 2.15 On June 21, 2001, Appellant wrote a 19-page response to Mr. Coombs' letter of reprimand.  
21 Appellant stated that it would have been "unethical" to follow his supervisor's directives.  
22 Appellant also criticized his supervisor's management style and lack of seniority. Appellant  
23 informed Mr. Coombs that he owed Appellant an apology, and he pointed out that someone else  
24 should assess his work since Mr. Coombs did not have a university degree or certification as an  
25 archivist. Appellant requested that Mr. Coombs respond to him in writing, reassign him away from  
26 the Archives Section, and periodically stop by to visit and inquire on his status. Appellant also  
requested that "the actual working space of [his] assigned office be increased, including the  
installation of a door and/or office relocation to a space possessing an office door."

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2.16 On June 25, 2001, Appellant wrote a letter to Toni Murray, Human Resources Manager, stating that he was sorry to see that Mr. Coombs “was setup [sic] as high as he was, (newboy [sic] on the block – without archival training).” Appellant requested the letter be placed in his personnel file.

2.17 On August 8, 2001, Appellant sent a memo to Mr. Hastings with his explanations of why he was not arranging the archival files, weeding them, or naming them as instructed. Since Appellant was still not following his directions, Mr. Hastings responded on August 9, 2001 and once again reiterated his previous instructions.

2.18 On August 13, 2001, Appellant sent a memo to Mr. Hastings requesting that his computer be hooked up to the Gencat Server to assist him in locating archival records. On that same day, Mr. Hastings contacted the appropriate staff to make arrangements for Appellant’s computer to be connected to Gencat.

2.19 On September 18, 2001, Mr. Hastings sent another reminder to Appellant that he was expected to process 12 boxes per week. Mr. Hastings informed Appellant that his performance would be reviewed in approximately one month and appropriate action would follow.

2.20 In October 2001, Diana Bradrick, Deputy State Archivist, prepared a report after reviewing Appellant’s work. Ms. Bradrick found that Appellant had not followed directions, failed to weed non-archival material, had not accomplished adequate quality work, and his rate of production was poor.

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2 2.21 On November 5, 2001, Mr. Hastings sent Appellant a six-week work performance plan in an  
3 attempt to assist him in improving his performance. Mr. Hastings reported that Appellant had  
4 processed 56 boxes between June 13, 2001 and September 30, 2001, which was far below the rate  
5 of 12 boxes per week. Mr. Hastings also reported that Appellant had not been weeding and labeling  
6 as instructed. The six-week performance plan included an arrangement for Appellant, Mr.  
7 Hastings, and Ms. Bradrick to meet every Monday for six weeks to discuss progress and address  
8 any problems that Appellant may be having. During those meetings, it was stressed to Appellant  
9 that he needed to increase his rate of work and follow his supervisor's instructions.

10  
11 2.22 On November 6, 2001, Mr. Hastings began to locate boxes for Appellant. This arrangement  
12 was made at Ms. Bradrick's request in an attempt to increase Appellant's production rate even  
13 though all other staff members located and retrieved their own archival boxes.

14  
15 2.23 On November 16, 2001, Ms. Bradrick spent the day with Appellant at his request. On that  
16 day, Appellant processed archival materials without spending any time locating and retrieving  
17 boxes or keying computer entries. Appellant was successful in accomplishing the quantity of work  
18 expected of him, however, he reported to Ms. Bradrick that he hated the work and could not  
19 maintain work performance at that pace.

20  
21 2.24 During December 2001, the environmental computer was removed from Appellant's office.  
22 In addition, his computer was upgraded to a newer version of Windows, however, the upgrade  
23 caused the computer to frequently lock up.

24  
25 2.25 During the first four weeks of the performance plan, Appellant processed an average of 3.25  
26 boxes per week. During the fifth week, Appellant and Mr. Hastings met with Jerry Handfield, State

1 Archivist, to resolve a disagreement with the labeling process, and Appellant processed seven boxes  
2 that week. During the sixth week, Appellant processed 13 boxes. Since his completion rate had  
3 improved, the agency decided to extend the performance plan by three additional weeks to ascertain  
4 whether he could achieve and maintain the expected 12 boxes per week. However, Appellant was  
5 not able to work at the expected level. Appellant averaged five boxes per week during the next two  
6 weeks.

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8 2.26 On January 16, 2002, Mr. Hastings completed an evaluation of Appellant's progress during  
9 the performance plan. Mr. Hastings reported that Appellant demonstrated an increase in his  
10 production and an improvement in the quality of his work, however, both increases were not  
11 sufficient to bring Appellant's work to a satisfactory level. Mr. Hastings concluded that  
12 Appellant's rate and quality of work was unacceptable and he had shown a lack of initiative. Mr.  
13 Hastings stated that at no time had Appellant met the goals expected from a professional archivist in  
14 his position.

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16 2.27 Following receipt of Mr. Hastings' evaluation of Appellant's progress, Steve Excell,  
17 Assistant Secretary of State and Appellant's appointing authority, determined that disciplinary  
18 action was necessary. On January 22, 2002, Mr. Excell informed Appellant in writing that he was  
19 contemplating disciplinary action up to and including dismissal due to his failure to perform the  
20 minimum requirements of his position. Mr. Excell offered to meet with Appellant to give him an  
21 opportunity to respond. During the week prior to Appellant's scheduled meeting with Mr. Excell,  
22 Appellant produced approximately 11 boxes, however, Mr. Hastings concluded that the quality of  
23 his work still remained unacceptable.

24  
25 2.28 On January 31, 2002, Appellant met with Mr. Excell. Appellant reported that he felt the  
26 work performance expectations of his supervisor and Mr. Handfield were unrealistic. Appellant

1 stated that his inadequate work environment contributed to his inability to meet performance  
2 expectations. Appellant claimed that he had been subjected to inequitable treatment because he was  
3 the only employee that performed processing on a full-time basis in the Archives Section.  
4

5 2.29 On February 10, 2002, Ms. Bradrick reported the following in an e-mail:  
6

7 Attached is my log of meetings with Tim [Appellant] in which he indicates he physically  
8 cannot do the work. As you can probably tell from these notes, Tim [Appellant] had two  
9 issues, his physical workspace was inadequate, and the work is "mind numbingly boring."  
10 However, when I pointed out that if his productivity was influenced by his boredom I would  
11 have expected to see a decrease in productivity over time, he had no response. I also asked  
12 if he could improve productivity if I improved his working conditions or gave him more  
13 interesting work part of the time and he repeatedly said no, it couldn't physically be done.

14 Ms. Bradrick also reported that Appellant acknowledged that he understood the work and knew  
15 what he needed to do. Ms. Bradrick reiterated to Appellant the need for greater speed in  
16 processing his work.

17 2.30 The agency arranged for Mr. Jerry Handfield, State Archivist; Rand Jimerson, Director of  
18 the School of Archives; Diana Shenk, Northwest Regional Archivist; and Susan Fahey, Senior  
19 Archivist in the Northwest Region, to review Appellant's work. All the reviewers reported that  
20 Appellant's work was inadequate both in quantity and quality. Ms. Shenk and Ms. Fahey reported  
21 that there were significant problems in how Appellant's work was processed and most of it would  
22 have to be re-done.

23 2.31 In the latter part of February 2002, a new computer was installed in Appellant's office.  
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1 2.32 After meeting with Appellant on January 31, 2002, Mr. Excell reviewed Appellant's  
2 responses. Mr. Excell was not convinced by Appellant's statement that the work performance  
3 expectations of his supervisor and the Mr. Handfield were unrealistic. Mr. Excell determined that  
4 the work performance expectations were reasonable and that Appellant's co-workers were being  
5 held to the same standards.

6  
7 2.33 Mr. Excell was not convinced by Appellant's response that his inadequate work  
8 environment contributed to his inability to meet performance expectations. Mr. Excell concluded  
9 that every effort was made by the agency to accommodate Appellant and address his work  
10 environment complaints. Further, after examining his work environment, Mr. Excell determined  
11 that the work environment issues had no bearing on Appellant's ability to perform his duties.

12  
13 2.34 Mr. Excell was not convinced by Appellant's claim that he had been subjected to inequitable  
14 treatment because he was the only employee that performed processing on a full-time basis in the  
15 Archives Section. Mr. Excell determined that past employees had performed processing full-time  
16 with satisfactory results.

17  
18 2.35 Mr. Excell decided that clear and reasonable expectations regarding quantity and quality of  
19 work were provided to Appellant, and he concluded that Appellant failed to meet the performance  
20 expectations in spite of the agency's repeated attempts to assist him. Mr. Excell determined that the  
21 agency had been responsive and patient and clearly wanted Appellant to succeed in his position.  
22 Mr. Excell determined that Appellant's unsatisfactory performance, both in terms of quantity and  
23 quality, had been an on-going problem with no improvement, and Appellant's responses when he  
24 was given direction on how to do the work assigned to him had ranged from uncooperative and  
25 resistant to outright refusal.

26

1 2.36 Appellant's performance had improved in the area of production for short periods of time,  
2 but the quality of work did not improve enough to meet minimum levels of performance. Further,  
3 Mr. Excell considered how Appellant's co-workers consistently performed processing at higher  
4 production levels with a satisfactory quality of work unlike Appellant. Mr. Excell also considered  
5 the fact that Appellant should have been able to perform the work with his education, training, and  
6 experience.

7  
8 2.37 Mr. Excell decided that Appellant did not provide any mitigating or convincing explanation  
9 for his inadequate work performance, failure to perform the minimum requirements of his position,  
10 and refusal to obey direction from his supervisor. Mr. Excell concluded that Appellant's actions  
11 constituted neglect of duty, inefficiency, and insubordination.

12  
13 2.38 In determining the level of discipline, Mr. Excell reviewed Appellant's personnel file and  
14 his performance evaluations. He considered the reviews of Appellant's work by Mr. Handfield, Mr.  
15 Jimerson, Ms. Shenk, and Ms. Fahey. Mr. Excell also considered the adverse impact that  
16 Appellant's performance had on his co-workers and the agency. Mr. Excell determined that  
17 Appellant's failure to satisfactorily perform his duties was not acceptable and he decided that  
18 substantial disciplinary action was necessary. Although it was a difficult decision considering  
19 Appellant's length of time with the agency, Mr. Excell concluded that termination was the  
20 appropriate sanction based on Appellant's history.

21  
22 **III. ARGUMENTS OF THE PARTIES**

23  
24 3.1 Respondent argues that clear and reasonable expectations regarding quantity and quality of  
25 work were provided to Appellant. Respondent asserts that Appellant failed to meet his performance  
26 expectations in spite of the agency's repeated attempts to assist him. Respondent contends that

1 everything possible was done to assist Appellant in being a successful employee. Respondent  
2 argues that Appellant's complaints about his work environment were addressed by the agency to  
3 make sure his needs were met, even though the work environment issues had no bearing on his  
4 ability to perform his duties. Respondent asserts that Appellant had a history of being  
5 uncooperative with his superiors. Respondent contends that Appellant should have been able to  
6 perform his job duties based on his education, training, and experience. Respondent argues that  
7 since Appellant's dismissal, the Archiving staff has spent 900 hours reviewing his work, fixing his  
8 work, and weeding ten boxes of non-archival material that Appellant should have eliminated.  
9 Respondent asserts that termination was the appropriate sanction in this case and asks the Board to  
10 uphold that decision by the appointing authority.

11  
12 3.2 Appellant argues that his work environment issues, including lack of adequate workspace,  
13 ill-functioning computer, and lack of connection to the Gencat server, all affected his ability to meet  
14 performance expectations. Appellant asserts that it took the agency approximately one year to  
15 address the work environment issues and his performance improved as the issues were resolved.  
16 Appellant contends that he was the only archivist not connected to the Gencat Server. Appellant  
17 argues that it took the agency two years to remove the environmental computer from his office and  
18 he needed the additional space in order to effectively accomplish his work. Appellant asserts that  
19 he was the only archivist processing archival records on a full-time basis. Appellant contends that  
20 he made an estimate of how many boxes he could process prior to understanding how complex the  
21 project actually was, and that 12 boxes per week was not reasonable. Appellant argues that his  
22 project was the largest and most complex collection in the Washington State archival records.  
23 Appellant asserts that the complexity of the project impacted his productivity. Appellant argues  
24 that the quality of his work has not been criticized before and his last performance evaluation was  
25 positive. Appellant asserts that he was not neglectful of his duties, inefficient, or insubordinate.

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#### IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter.

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 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective operations as measured by a comparison of production with use of resources, using some objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

4.5 We conclude that the agency's work expectations were clear and reasonable and samples were provided to Appellant of how the work was to be done. Appellant was clearly aware of the expectations set forth by his supervisors, yet he continued to demonstrate inadequate work performance. Appellant clearly failed to meet these work expectations and adequately perform his

1 job duties. Respondent has met its burden of proving that Appellant's poor performance constitutes  
2 neglect of duty and inefficiency.

3  
4 4.6 Insubordination is the refusal to comply with a lawful order or directive given by a superior  
5 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.  
6 Dep't of Social & Health Services, PAB No. D94-025 (1995).

7  
8 4.7 Respondent has met its burden of proving that Appellant was insubordinate by  
9 demonstrating a lack of respect and refusing to obey directions by his supervisors. Not only did  
10 Appellant's supervisor give him repeated verbal and written instructions as to how to perform the  
11 work, he also provided Appellant with samples of how the work should have been done. Appellant  
12 failed to follow his supervisor's repeated directives to do brief functional analysis reports and  
13 complete them in a timely manner, weed non-archival materials, correctly and properly process  
14 archival records, and maintain an adequate rate of production.

15  
16 4.8 Although it is not appropriate to initiate discipline based on prior formal and informal  
17 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the  
18 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.  
19 D93-163 (1995).

20  
21 4.9 In determining whether a sanction imposed is appropriate, consideration must be given to  
22 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
23 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
24 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
25 program. An action does not necessarily fail if one cause is not sustained unless the entire action  
26 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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4.10 The agency made reasonable and repeated efforts to provide Appellant with guidance and direction to improve his performance, yet Appellant continually failed to demonstrate any consistent improvement in both the quantity and quality of his work. Furthermore, Appellant had ample opportunity to improve his performance and meet the minimum requirements of his position, and the agency made every effort to address Appellant's work environment concerns. Appellant's failure to meet the performance standards required of his position warrants termination. Therefore, Respondent has established that the disciplinary action of dismissal was not too severe and was appropriate under the circumstances presented here. Therefore, the appeal should be denied.

**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Timothy Frederick is denied.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

\_\_\_\_\_  
Walter T. Hubbard, Chair

\_\_\_\_\_  
Gerald L. Morgen, Vice Chair

\_\_\_\_\_  
Busse Nutley, Member



I mailed a copy of the Brief of Respondent and Affidavit of Mailing by depositing in the U. S. Mail, with postage prepaid thereon, an envelope addressed to:

Ross P. White  
Witherspoon Kelly Davenport & Toole  
1100 U.S. Bank Building  
422 W. Riverside  
Spokane, WA 99201-0300

*Karin Skalstad*  
Karin Skalstad

SIGNED and SWORN to before me, this 15<sup>th</sup> day of June, 2006.

*Marcie W. Thompson*  
Marcie W. Thompson (Print Name)  
NOTARY PUBLIC in and for the State  
Washington, residing at Spokane  
My appointment expires: 12-30-09

