BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

STEVEN MEYER, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	)	Case No. SUSP-01-0023 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held on June 18, 2002, at the Attorney General's Office in Spokane, Washington. RENÉ EWING, Member, reviewed the record and participated in the decision in this matter. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant was present and was represented by Christopher Coker, Attorney at Law of Parr and Younglove, P.L.L.C. Patricia A. Thompson, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a five-day suspension for neglect of duty, insubordination, gross misconduct and willful violation of a published agency guideline. Respondent alleged that Appellant engaged in hostile and intimidating behavior in the workplace.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Chung v. University of Washington, PAB No. D94-079 (1995); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Steve Meyer is an Equipment Mechanic 1 - Transportation and a permanent employee for Respondent Department of Transportation (DOT) in the Eastern Region Equipment Shop. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on June 28, 2001.

2.2 Appellant has been employed by Respondent since January 1977. Appellant has attended training in conflict management and interpersonal communications. In addition, he is aware of the agency policy prohibiting workplace violence.

2.3 Appellant has an extensive history of informal and formal disciplinary actions for engaging in hostile and intimidating behavior in the work place. On August 22, 2000, merely two months prior to the incidents giving rise to this appeal, Appellant received a two-day suspension without pay for displaying hostile or intimidating behavior in the workplace.

2.4 By letter dated June 15, 2001, Regional Administrator, J.C. Lenzi notified Appellant of his five-day suspension without pay, effective June 25, 2001 through June 29, 2001, for neglect of duty, insubordination, gross misconduct and willful violation of a published agency guideline. Mr. Lenzi

alleged that on October 24, 2000, Appellant (1) had an angry exchange with a co-worker and (2) approached his supervisor in an angry and hostile menner.

Incident 1:

2.5 The morning of October 24, 2000, Appellant and coworker Laverne Sullivan were doing maintenance work on a Low Boy Trailer that Appellant was intending to use the following day. The trailer needed a new filter so Appellant asked Mr. Sullivan to get one from the parts room.

2.6 Barry Beck is the parts specialist and was working at the counter in the parts room when this incident occurred. In addition, David Smith, Mechanic 2 and acting supervisor, was working at the computer in the parts area. When Mr. Sullivan asked for a filter for the trailer, Mr. Beck asked for the number of the trailer and a work order. Mr. Sullivan had neither, so he returned to Appellant and said that he needed the trailer number and a work order.

2.7 Appellant and Mr. Sullivan returned to the parts counter. Appellant knew the trailer number, but Mr. Beck told Appellant that he also needed a work order. However, Mr. Smith was the only person available at the time who was authorized to write a work order. Mr. Smith did not intervene or offer to write an order.

2.8 It was not uncommon for parts to be purchased before a work order was completed. Appellant was frustrated by his inability in this instance to obtain the filter without first completing a work order. As he was leaving the counter, Appellant raised his voice and angrily said, "Fuck it. I'll go ahead and run it without a filter." Appellant was upset and walked away.

2.9 It was common for staff to be frustrated by their inability to obtain parts when needed. Furthermore, it was common for DOT shop staff to use profanities in the work place. However, it

was not common for shop staff to use profanity in a hostile or intimidating manner in the work place.

2.10 Mr. Beck felt that Appellant was hostile and intimidating and that Appellant's anger was directed at him. However, Mr. Sullivan perceived that Appellant's frustration was directed at the situation, not at Mr. Beck personally. We find that more likely than not, Appellant's angry comment was a reflection of his frustration with the situation and was not directed at Mr. Beck.

Incident 2:

2.11 Also on October 24, 2000, Appellant's supervisor, Michael Steinmetz, instructed Mr. Smith to assign Appellant to work on a boat trailer belonging to the Department of Ecology (DOE). Appellant informed Mr. Smith and several people that it was ironic that he, a grass farmer, should be assigned to work on a DOE vehicle considering the disagreements that the local grass farmers were having with the DOE. While Appellant expressed his displeasure about the assignment to Mr. Smith, he did not refuse to work on the trailer.

2.12 After being given the assignment, Appellant approached Mr. Steinmetz in the parking lot. Mr. Steinmetz was preparing to leave the DOT shop to perform compliance inspections with Brett Bolyard, a Mechanic 2 from the Davenport shop.

2.13 Mr. Steinmetz was getting into the passenger's side of a DOT vehicle and Mr. Bolyard was in the driver's seat when Appellant approached Mr. Steinmetz. Appellant appeared to be agitated and as he approached Mr. Steinmetz, he expressed his displeasure at being assigned to work on the DOE trailer. Appellant used a raised voice and said that he did not understand why he had to work on DOE "shit" after the way they had been "fucking" with him. Mr. Steinmetz told Appellant that

he had assigned him to work on the trailer because he was not working on a priority project at the time.

2.14 Based on Appellant's tone of voice and demeanor, Mr. Steinmetz knew that Appellant was upset and was not joking about his displeasure with working on the DOE trailer. Before Appellant walked away from Mr. Steinmetz, Appellant said, in a threatening tone, "I'm serious."

2.15 After he returned from the compliance inspection, Mr. Smith told Mr. Steinmetz about two incidents earlier that day during which Appellant behaved inappropriately. One of those incidents was the interaction Appellant had with Mr. Beck at the parts counter. The other incident involved Appellant expressing his displeasure with working on the DOE trailer. Mr. Steinmetz felt that Appellant's behavior in each of the reported incidents was yet another example of Appellant becoming angry, engaging in the use of profanity, and behaving in an intimidating manner in the workplace.

2.16 Mr. Steinmetz reported the incidents to Ed McCallister, Eastern Region Administrative Officer. Mr. McCallister investigated the incidents by interviewing witnesses and gathering information. During the interviews, additional allegations were made but Mr. McCallister was unable to substantiate them and those charges were dropped.

2.17 In regard to the two incidents discussed above, Appellant's appointing authority, Mr. Lenzi, determined that misconduct occurred. Prior to determining the level of discipline to impose, Mr. Lenzi met with Appellant on more than one occasion. Appellant provided Mr. Lenzi with information about the incidents and suggested that additional witnesses be interviewed. Mr. Lenzi considered the additional information provided by Appellant and the additional witnesses. In addition, he reviewed Appellant's long history of corrective actions and formal discipline and found

that Appellant had a long history of being insubordinate, loud and intimidating, and generally acting like a "schoolyard bully." Mr. Lenzi considered the many unsuccessful attempts the agency made to assist Appellant with changing his behavior, including counseling, training and documentation in his performance evaluations. Mr. Lenzi concluded that in spite of the efforts of the agency, Appellant continued to engage in inappropriate behavior by expressing himself in a loud, hostile, intimidating manner that constituted a neglect of duty, insubordination, gross misconduct and willful violation of the department's guideline prohibiting violence in the workplace. Mr. Lenzi determined that Appellant needed a strong message that his behavior was not acceptable. Therefore, by letter dated June 15, 2002, he gave Appellant a five-day suspension without pay.

2.18 DOT's guideline on managing violence in the work place states, in part:

> . . . [w]e honor the right of every individual to be treated fairly and with respect . . . Therefore, the department will not tolerate employees or other individuals within the WSDOT work environment who engage in behaviors that are intimidating, harassing, hostile, or violent. Such behavior by any person is strictly prohibited and may be cause for appropriate management intervention. . . .

2.19 In addition, the guideline sets forth the standard of conduct for employees and states, in relevant part:

> Employees are expected to conduct themselves in accordance with WSDOT's value of respect for others. Intimidating and/or harassing behavior will not tolerated, which may include, but are not limited to, the following:
>
> . . . .
>
> - the use of vulgar or profane language toward others
>
> . . . .
>
> - verbal intimidation
>
> . . . .

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant's behavior, interactions and attitude in dealing with his coworkers and supervisor were inappropriate. Respondent contends that Appellant was upset and

reacted inappropriately by raising his voice and using profanities in an intimidating and hostile manner when the parts department did not have a filter for the Low Boy trailer and when he was assigned to work on the DOE trailer. Respondent contends that despite extensive training, negative performance evaluations, numerous counseling sessions, reprimands, and finally, formal discipline, all for inappropriate interpersonal interactions, Appellant continued to act in an inappropriate manner. Respondent asserts that Appellant's demeanor, attitude, yelling, and intimidating presence created an unpleasant working environment. Respondent argues that in light of Appellant's long history of similar misconduct, his continued misconduct warranted a five-day suspension without pay.

3.2 Appellant argues that the question is one of perception. Appellant contends that he was joking and that Mr. Beck, Mr. Smith, Mr. Bolyard and Mr. Steinmetz overreacted and misperceived his intent. Appellant asserts that he never refused to do his work and did not direct profanity at Mr. Smith or at Mr. Steinmetz. Rather, Appellant admits that he used expletives in a general sense out of frustration. Appellant contends that his actions, tone and demeanor were not hostile or threatening and that the evidence does not support the erroneous perceptions of Respondent. Appellant asserts that the five-day suspension without pay was not justified and that his appeal should be granted.

IV. CONCLUSIONS OF LAW

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

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

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

4.6 Violation of policy is established by facts showing the existence and publication of the policy, Appellant's knowledge of the policy, his/her failure to comply with the policy and presumes a deliberate act. Chung v. University of Washington, PAB No. D94-079 (1995).

4.7 Respondent has failed to meet its burden of proof that Appellant engaged in intimidating, hostile behavior toward Mr. Beck. While it is never acceptable to use profanities the work place, in this case, it was Appellant's demeanor and tone during the exchange in the parts room that allegedly created the hostile work environment. Appellant's venting of his frustration over the situation by using loud a voice and profanities was inappropriate. However, it was not directed at either Mr. Beck or Mr. Smith and under the totality of the facts and circumstances presented here, should not have been perceived as hostile or intimidating.

4.8 Respondent has met its burden of proof that Appellant's interaction with Mr. Steinmetz constituted neglect of duty, insubordination, and willful violation of a department guideline. Appellant neglected his duty when he failed to treat his supervisor with respect, raised his voice, used profanities and challenged his assignment to work on the DOE trailer. Appellant was insubordinate when he continued to engage in inappropriate behavior after being instructed repeatedly to cease such actions. Furthermore, Appellant willfully violated the agency guideline requiring employees to treat others with respect.

4.9 Respondent has failed to meet its burden of proof that Appellant's actions rose to the level of gross misconduct. Respondent failed to establish that Appellant's behavior adversely impacted the agency's or the equipment shop's ability to carry out their functions.

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

4.11 Under the totality of the proven facts and circumstances, including Appellant's extensive history of informal and formal discipline for engaging in hostile and intimidating behavior in the work place, the disciplinary sanction of a five-day suspension without pay is warranted for Appellant's inappropriate behavior toward his supervisor. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Steve Meyer is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____

Gerald L. Morgen, Vice Chair

_____

René Ewing, Member

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481