BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

PAUL DOWNING, Appellant, v. DEPARTMENT OF FISH AND WILDLIFE, Respondent.	)	Case No. DISM-99-0002 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, and LEANA D. LAMB, Member. The hearing was held on July 26, 2000, in the Personnel Appeals Board hearing room in Olympia, Washington. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Paul Downing was present and was represented by Anita L. Hunter, Attorney at Law of Parr and Younglove, P.L.L.C. Respondent Department of Fish and Wildlife was represented by Mitchel R. Sachs, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, inefficiency, incompetence, gross misconduct and willful violation of published agency policies because Appellant consumed alcohol, drove a state owned vehicle and struck another vehicle which resulted in him being charged with Driving Under the Influence (DUI).

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Plaisance v. Dep't of Social and

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Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987); Girod v. Dep't of Social & Health Services, PAB No. D91-003 (1991), appeal dismissed, Thurston Co. Super. Ct. No. 91-2-02922-6 (1993); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Painter v Dept. of Labor and Industries, PAB No. D94-034 (1995) aff'd, Thurston Co. Super. Ct. No. 95-2-01406-0 (1998).

II. FINDINGS OF FACT

2.1 Appellant Paul Downing was a Fish Hatchery Specialist (FHS) 4 and permanent employee of Respondent Department of Fish and Wildlife (F&W) at the Hoodsport Complex of the Hatcheries Division. 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 on January 11, 1999.

2.2 Appellant had been employed by F&W since 1987. He had been an FHS 4 since April 1998. As an FHS 4, Appellant was a supervisor and was responsible for managing the day-to-day operations of the Hoodsport Complex which included the Eells Springs and the Hoodsport hatcheries.

2.3 Appellant was aware of the state regulations and rules and the agency policies and procedures regarding drinking and work related activities. In 1997, the agency was concerned about the use of alcohol by employees at the hatcheries. As a result, Rich Eltrich, Appellant's supervisor, instructed the Hoodsport Hatchery staff, including Appellant, that drinking alcohol during working hours was not allowed. He did not instruct them to stop drinking in the hatchery residences during their off-work hours.

2.4 The record before the Board indicates that Appellant had no prior history of informal or formal disciplinary actions. Furthermore, Appellant's past performance evaluations indicate that he had been a good employee.

2.5 By letter dated December 30, 1998, Bruce Crawford, Assistant Director for the F&W Fish Program, informed Appellant that he was dismissed from his position effective at the end of his work shift on January 14, 1999. Mr. Crawford charged Appellant with neglect of duty, inefficiency, incompetence, gross misconduct and willful violation of published agency policies.

2.6 At the outset of the hearing, the parties indicated that the underlying facts of this case were not in dispute and stipulated to the basis for the charges as stated in the disciplinary letter which states:

> On October 3, 1998, you heard from your wife that alarms went off at the Hoodsport Hatchery. You were at Eells Springs Hatchery where you reside. You were not on standby, but determined on your own as a Fish Hatchery Specialist 4, that you would go to Hoodsport Hatchery and check on the alarms. You took the state-owned truck from Eells Springs Hatchery. When you arrived at the hatchery, you saw Drew Burkhard picking loss in the adult pond. Drew was on standby for Robert Prante who had a personal issue he had to attend to for a few hours. After reviewing the situation you determined everything was under control.
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> At that time, you and Drew went to Robert Prante's on-site apartment to play cards. You and Drew engaged in consuming alcohol. When you left the Hoodsport Hatchery, you drove the state-owned Eells Springs truck. On your way home you struck another vehicle. You were charged with Driving Under the Influence (DUI). It is my understanding that you were twice over the legal limit.

2.7 Following his DUI charge, Appellant entered into and has complied with the conditions of a deferred prosecution plan with Mason County. The plan includes two years of probation, participation in an out-patient alcohol treatment program, and attendance at Alcoholics Anonymous meetings twice a week.

2.8 While the incident was being investigated, Appellant continued to perform the duties of his position, including driving state-owned vehicles. Appellant was not placed on administrative leave.

2.9 When the investigation was completed, a Loudermill meeting was scheduled. Appellant was given an opportunity to respond to the charges during the meeting or in writing. Appellant attended the Loudermill meeting on October 27, 1998. During the meeting, Appellant acknowledged that the charges were accurate and true.

2.10 Based on the results of the investigation and Loudermill meeting, Mr. Crawford determined that misconduct had occurred. Mr. Crawford concluded that Appellant failed to conduct himself in an appropriate manner and that his conduct demonstrated a disregard for the best interests of the agency, its staff and facilities. Mr. Crawford also concluded that Appellant was grossly negligent of his duties and responsibilities as the manager of the Hoodsport complex and that he knowingly violated policy. After considering the available disciplinary sanctions, Mr. Crawford decided that termination was appropriate.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that dismissal is not unreasonable because Appellant knowingly drove a state vehicle while intoxicated and then crashed into another vehicle causing damages to both vehicles and creating a liability for the agency. Respondent contends that as a long-term employee, Appellant should have known better and should have been aware of his responsibility to act as a role model for subordinate employees such as Drew Burkhard. Respondent asserts that Appellant was given his full due process rights and that the appointing authority gave full consideration to Appellant's employment history before making an informed decision to terminate Appellant's employment. Respondent argues that Appellant committed an egregious major offense, that he exhibited extremely poor judgment, and that his actions warrant termination.

3.2 Appellant admits that he used poor judgment, however, he maintains that under the totality of the circumstances, including his prior exemplary employment history, termination is too severe. Appellant further argues that Respondent's claim that he created a liability for the agency rings hollow because the agency allowed him to continue to perform the duties of his position and to operate state vehicles until his termination. Appellant contends that Respondent should have chosen a lesser disciplinary option, asserts that he committed a once in a lifetime mistake and has complied with his deferred prosecution plan, and requests that he be allowed to return to state service.

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 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987).

4.5 Inefficiency is the utilization of time and resources in an unproductive manner. Girod v. Dep't of Social & Health Services, PAB No. D91-003 (1991), appeal dismissed, Thurston Co. Super. Ct. No. 91-2-02922-6 (1993).

4.6 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).

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

4.8 In Painter v Dept. of Labor and Industries, PAB No. D94-034 (1995), aff'd, Thurston Co. Super. Ct. No. 95-2-01406-0 (1998), the Board upheld the termination of an employee who drove a state owned vehicle under the influence of alcohol, left the scene of an accident which he caused while driving a state owned vehicle and initially misled law enforcement. Even though the appellant was off duty at the time of incidents, the Board stated that improper conduct involving use of a state car brought the case directly into the realm of job performance. In relevant part, the Board concluded that the appellant neglected his duty to abide by a standard of conduct befitting his position as a supervisor and as an employee of the state of Washington, failed to use a state vehicle appropriately, committed gross misconduct and willfully violated agency policies. The Board also concluded that while it was commendable that the appellant had recognized his alcoholism, that did not diminish the fact that he should be accountable for his actions taken while under the influence of alcohol.

4.9 Here, as in Painter, Appellant failed to use a state vehicle appropriately and failed to abide by a standard of conduct befitting his position as a supervisor and as an employee of the state of Washington. In addition, Appellant admittedly used extremely poor judgment. Furthermore, Appellant willfully violated agency policies and state regulations, neglected his duty to follow agency policy and the directions of his superior, and demonstrated incompetence by failing to act as an appropriate role model for his subordinate. When viewed in totality, Appellant's actions rose to the level of gross misconduct.

4.10 Also, here, as in Painter, it is commendable that Appellant is complying with the conditions of his deferred prosecution plan and is undergoing alcohol treatment. However, that does not diminish the fact that he should be accountable for his action of driving a state vehicle while under the influence of alcohol.

4.11 In spite of Appellant's exemplary employment history, the egregious and intentional nature of his misconduct warrants a severe disciplinary sanction. Under the totality of the undisputed facts and circumstances presented here, Respondent has met its burden of proving the charges in the disciplinary letter and has proven that the disciplinary sanction of termination is appropriate. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Paul Downing is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

_____

Leana D. Lamb, Member

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