BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JACK E. SMITH, Appellant, v. DEPARTMENT OF FISH AND WILDLIFE, Respondent.	Case No. DEMO-00-0006 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 RENÉ EWING, Member. The hearing was held on March 18 and 19, 2002, in the Personnel Appeals Board hearing room in Olympia, Washington.

1.2 **Appearances.** Kenneth S. Kagan, Attorney at Law of Carney, Badley, Smith and Spellman, represented Appellant. Stewart A. Johnston, Assistant Attorney General, represented Respondent Department of Fish and Wildlife.

1.3 **Nature of Appeal.** Appellant was demoted from his Construction and Maintenance Superintendent 1 position for neglect of duty, inefficiency, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant created a negative work environment by using foul, offensive, derogatory, crude and vulgar language in the work place and that he was an ineffective supervisor.

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); Johnson v. Dep't of Social & Health Services, PAB No. D91-128 (1992); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999); Hitzroth v. WSP, PAB No. DISM-98-0065 (2000).

II. FINDINGS OF FACT

2.1 Appellant Jack E. Smith was a Construction and Maintenance Superintendent (CMS) 1 and a permanent employee of Respondent Department of Fish and Wildlife (F&W). 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 April 28, 2000.

2.2 By letter dated April 5, 2000, Respondent notified Appellant of his demotion to an Equipment Operator B position, effective April 20, 2000. Respondent charged Appellant with neglect of duty, inefficiency, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant:

- routinely used foul and offensive language about women in the presence of female staff,
- called a subordinate female employee a crude and vulgar name behind her back in the workplace;
- routinely called construction crew staff derogatory names;
- was an ineffective and poor supervisor who used humiliating, embarrassing, harassing and bullying techniques to supervise the crew, and
- failed to use certified flaggers on the open roads.

2.3 Appellant had been employed by F&W for approximately 15 years. He had no history of prior disciplinary action. On January 25, 1993, and March 20, 2000, Appellant received Sexual Harassment training. On March 21, 2000, Appellant received eight hours of supervisory training.

2.4 Appellant was aware of the agency's policies, including Policy POL-M1201 which prohibits sexual harassment. The policy states, in part, "Managerial and supervisory staff serve as agents of the Department of Fish and Wildlife. Therefore, any managers and supervisors who observe or have knowledge of incidents or practices that constitute harassment by any employees in the agency take immediate action to stop the behavior and prevent further incidents . . . ."

2.5 Appellant worked in the Habitat Program of the Salmon and Steelhead Habitat Enhancement and Restoration (SSHEAR) Division. Appellant was responsible for supervising a construction crew and for directing the fieldwork they performed on habitat construction projects. The record before the Board establishes that Appellant was a good heavy equipment operator whose skills and abilities were respected by his peers and supervisors.

2.6 Caren Combs, Trades Helper, was an employee on Appellant's construction crew. On July 14, 1999, Ms. Combs was injured on the job. She felt that Appellant ignored her injury, although he did tell her to go to the doctor. On August 9, 1999, Ms. Combs filed a grievance against Appellant alleging, in part, that Appellant created a negative work environment, disregarded the safety of the crew, was a poor supervisor, had poor interpersonal and communication skills, and lacked respect for the crew.

2.7 Sandra Turner, Senior Personnel Officer, investigated Ms. Combs complaints. She interviewed 27 staff, including Appellant, regarding Ms. Combs' allegations. Based on the interviews, Ms. Turner found that:

- Appellant did not want women to work on the construction crew and because of his low opinion of women, he engaged in gender discrimination against Ms. Combs.
- Appellant referred to Ms. Combs as a "worthless fucking cunt" behind her back, but in the presence of other staff.
- Appellant was a poor supervisor, gave unclear instructions to the crew, called them derogatory names and created a stressful work environment.
- Appellant bullied and harassed the crew.
- Appellant allowed the use of uncertified flaggers on the roads and unsafe working habits on the job.

2.8 During his interview with Ms. Turner, Appellant admitted that he used bad language on the job, but denied referring to Ms. Comb's as a "worthless fucking cunt." Appellant said that he did not directly swear at people, call them names or belittle them, but admitted that he probably "chewed" people out unfairly. Appellant also confirmed his knowledge of the requirement that certified flaggers be used at the job sites.

2.9 Ms. Turner forwarded the results of her interviews to Penny Cusick, Personnel Manager. The matter was forwarded to Appellant's appointing authority, Greg Hueckel, Assistant Director of the Habitat Program. During a pre-disciplinary meeting with Mr. Hueckel, Ms. Cusick and Paul Sekulich, SSHEAR Division Manager, Appellant admitted that he swore and used unprofessional, vulgar, offensive language, including the term "butt fucks" toward subordinate employees; that he was a poor supervisor; and that he used uncertified flaggers on roads.

2.10 A preponderance of the credible evidence and testimony presented at the hearing before the Board establishes that in addition to using the term "butt fuck" when addressing subordinates in the work place, Appellant frequently swore and used language such as "worthless fucking cunt," and

"dumb shits" when referring to subordinates. The credible evidence and testimony also establishes that Appellant's supervisory style included demeaning, bullying, and yelling at subordinates.

2.11 Following the predisciplinary meeting, Mr. Sekulich recommended to Mr. Hueckel that Appellant be either suspended for two weeks or demoted to an Equipment Operator B position. Mr. Sekulich indicated that he preferred that Appellant be given a two-week suspension.

2.12 Mr. Hueckel reviewed the facts gathered during the investigation and considered Appellant's response to the allegations. Mr. Hueckel also discussed the level of sanction to impose with members of the F&W management team. Mr. Hueckel determined that Appellant's use of vulgar language was outside the norm for what typically is considered "construction talk." Mr. Hueckel found that in addition to violating the Sexual Harassment policy, Appellant's actions violated the policy addressing safety (POL 514), the policy addressing ethics (POL 1214) and the regulations regarding use of state-owned, leased, or rented passenger motor vehicles.

2.13 Mr. Hueckel determined that Appellant was a poor supervisor and that he had lost the trust of his subordinate crewmembers. Mr. Hueckel also determined that Appellant was a valued employee but that his disrespect for the crew, poor judgment, lack of insight and his disregard for safety of the crew warranted demotion to a non-supervisory position. Mr. Hueckel concluded that a demotion would allow Appellant an opportunity to regain the trust of other staff, to obtain supervisory and interpersonal skills training, and to later promote to a supervisory position.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent acknowledges that as a heavy equipment operator, Appellant was a capable and productive employee, that he knew the technical aspects of his work and that he had a strong work ethic. However, Respondent argues that Appellant violated the standards of common decency when he repeatedly used vulgar, derogatory and abusive language toward and in reference to his subordinates. Respondent contends that Appellant had a short fuse, was abusive towards employees, created a hostile work environment, and failed to set an appropriate example for his subordinates. Respondent asserts that neither the misconduct of others nor the alleged lack of training provided to Appellant excuse his egregious behavior. Respondent asserts that Appellant's behavior violated agency policies and warranted termination; however, in recognition of Appellant's good qualities, the agency chose to demote him to a non-supervisory position. Respondent asserts that Appellant's behavior crossed the line of what is considered "the salty language of a construction site" and that demotion was the appropriate disciplinary sanction.

3.2 Appellant asserts that many of the things for which he was disciplined were out of his control. Appellant contends that agency management failed to provide him appropriate supervisory training and that management set a tone and atmosphere that tolerated vulgarities in the work place. Appellant contends that he had to deal with the staff assigned to his crew regardless of whether they were qualified and capable of performing the work required and that he should not be held accountable for not having an adequate number of certified flaggers on his crew. Appellant argues that he was an "equal opportunity curser" and that he cursed both men and women when they were not performing on the job. Appellant contends that he made judgments and formed opinions based on job performance, not on race, gender or national origin. Appellant further contends that he did not use abusive, gender specific terms in front of Ms. Combs. Appellant asserts that he was a good supervisor, was a good motivator who got the most out of his crew, was safety conscious, worked

hard and reported to work on time. Appellant argues that the agency's decision to demote him was arbitrary and disproportionate to the discipline given to others for more egregious misconduct.

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 Inefficiency generally means wasteful of time, energy, or materials. Johnson v. Dep't of Social & Health Services, PAB No. D91-128 (1992).

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 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).

4.7 Respondent has met its burden of proof. Appellant neglected his duty, was inefficient and willfully violated published agency policies when he used vulgar, offensive, and inappropriate language in the work place, failed to set an good example for his subordinates, failed to comply with agency policies, and failed to use only certified flaggers. Appellant's behavior adversely affected the atmosphere on the job site, created a hostile and abusive work environment, and rose to the level of gross misconduct. Regardless of whether Appellant's behavior took place in a construction environment, his behavior was intolerable and the fact that Appellant was the crew supervisor, only adds to the egregiousness of his misconduct.

4.8 In Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999), we addressed misconduct of a nature similar to that presented here. In Schley we concluded that the appellant had made offensive, inappropriate comments that could reasonably be perceived to be racially motivated and that while appellant was entitled to have his own opinions, it was not appropriate for him to voice his opinions in the workplace when those opinions could offend others. We further concluded that the egregious nature of appellant's comments warranted dismissal, that appellant's admitted comments alone were offensive, inappropriate, and racial in nature, and that such conduct in the work place should not be tolerated. In Schley, we upheld dismissal of the appellant.

4.10 In Hitzroth v. WSP, PAB No. DISM-98-0065 (2000), we concluded that the appellant failed to lead by example and to be a positive, professional role model for his subordinates. We also concluded that acknowledging responsibility for some of his misconduct did not excuse or mitigate

the seriousness of the appellant's actions. In addition, we stated that misconduct by others did not excuse or mitigate the seriousness of the appellant's misconduct. Based on the appellant's admitted behavior of using derogatory comments and profanity in the workplace, the sanction of dismissal was appropriate.

4.11 Here, as in Schley and Hitzroth, Appellant's admitted misconduct warrants the disciplinary sanction of demotion. Furthermore, in light of the totality of the proven facts and circumstances, and given the serious nature of Appellant's misconduct, demotion to a non-supervisory position is more than justified. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Jack E. Smith is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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René Ewing, Member