BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

BERNARDO OZUNA, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	Case No. SUSP-00-0015 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 September 27, 2000, in the Board Room at Skagit Valley College in Mount Vernon, Washington. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant did not appear and no representative appeared on his behalf. Respondent Department of Labor and Industries was represented by Mickey B. Newberry, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a fifteen-day suspension for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant drove a state vehicle when he was off duty, lied to his supervisor, failed to comply with his supervisor's directive, was untruthful and unprofessional in his interactions with customers and his supervisor, falsified documents, and failed to treat his supervisor with dignity and respect.

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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); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Bernardo Ozuna was a Safety and Health Specialist 2 and a permanent employee for Respondent Department of Labor and Industries (L&I). 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 March 15, 2000.

2.2 By letter dated February 14, 2000, Respondent notified Appellant of his fifteen-day suspension, effective February 14, 2000 through the end of his work shift on February 28, 2000, for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that:

- On September 14, 1999, Appellant was observed driving his state motor pool vehicle when he was on sick leave and not on state business.
- On October 25, 1999, after being paged because he did not report to work, Appellant told his supervisor that he had gone to meet a customer to close an inspection report but that the customer did not show up. The customer subsequently told Appellant's supervisor that they did not have a meeting scheduled and that after Appellant opened the inspection, Appellant never returned to the customer's business to complete it.

- On October 26, 1999, after being told not to go to a customer's private residence, Appellant went to the residence to close an inspection report. Appellant then falsified the report by indicating that he had closed the inspection by telephone.

2.3 Appellant was first employed by Respondent in 1993. He was aware of the agency's policies and procedures. He was dismissed in 1996 but was reinstated in 1997 following his appeal of his dismissal. Following his reinstatement, Respondent again reviewed with Appellant the agency policies, procedures and mission, the work processes of the unit, and Appellant's work schedule, duties and responsibilities.

2.4 On September 14, 1999, Appellant called in sick and reported that he had a sore ankle. At about 6:30 p.m., Appellant's co-worker, Matt Stroud, observed Appellant driving a state motor pool vehicle. The next day, Mr. Stoud went to Appellant's acting supervisor and reported seeing Appellant. Even though Appellant drove the state vehicle on September 14, 1999, a subsequent review of his mileage report found that Appellant did not report mileage for that day.

2.5 On October 25, 1999, Appellant did not report to work in the morning. Appellant's supervisor, Mark McHarg, paged him. When Appellant responded to the page, he told Mr. McHarg that he had gone to meet the owner of Twin Sisters Mushroom Farm for the purpose of closing his inspection report. Appellant said that they were to meet at a Burger King restaurant but that the owner never arrived. Mr. McHarg later spoke with the owner of the farm. The owner reported that he and Appellant never agreed to meet at the Burger King. He also reported that Appellant never returned to the farm after opening the inspection report in July 1999. The owner then requested a closing conference which Mr. McHarg scheduled. Appellant and Mr. McHarg conducted the closing conference on November 2, 1999. After speaking with the owner, Mr. McHarg determined that Appellant lied about the alleged October 25, 1999 meeting.

2.6 On October 26, 1999, Patrick Barton, Revenue Officer 3, and Appellant had business with the owner of Brandt Rock Corporation. Mr. Barton needed to serve collection papers on the owner and Appellant needed to close an inspection report. Mr. Barton and Appellant went to Mr. McHarg and asked if they could go to the owner's residence. Mr. McHarg told Appellant not to go to the owner's residence and instructed him to close the report by telephone. Appellant disregarded his supervisor's direction and drove Mr. Barton to the owner's residence. While at the residence, Appellant obtained the owner's signature on a compliance verification form which closed the inspection. However, when he completed the inspection report, Appellant indicated that he had closed the inspection by telephone.

2.7 In-person closing conferences are generally held at the place of business or in the L&I office. Closing conferences are also held by telephone.

2.8 Mr. McHarg spoke to his supervisor, John Ecker, about Appellant's actions. Mr. Ecker reported the information to Kerry Ivey, the Regional Administrator and Appellant's appointing authority. When Ms. Ivey heard about the incidents, she determined that Appellant had committed the same type of misconduct for which he had been previously disciplined.

2.9 In regard to the incidents giving rise to this appeal, Ms. Ivey met with Appellant but nothing in his response to the charges gave her a reason to believe that the misconduct did not occur. Ms. Ivey determined that Appellant misused a state vehicle, lied to his supervisor, failed to treat his supervisor with dignity and respect, refused to follow his supervisor's directive, and falsified documents. In determining the appropriate level of discipline, Ms. Ivey considered all the available information including Appellant's work history, his response to the charges and the unique skills that he brought to the agency and the community. She concluded that a fifteen-day suspension was

sufficient to bring these performance issues to Appellant's attention and to deter him from future wrongdoing. By letter dated February 14, 2000, she imposed the discipline that is the subject of this appeal.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the undisputed facts prove that the misconduct occurred and support that the disciplinary sanction imposed was appropriate. Therefore, Respondent contends that the appeal should be denied.

3.2 Appellant did not provide a defense to the charges nor did he dispute the appropriateness of the disciplinary sanction before the Board.

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 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 shown that Appellant blatantly defied his supervisor's directive and also engaged in a pattern of untruthfulness, unprofessional behavior, and inappropriate use of state resources and work time. Respondent has met its burden of proving that Appellant neglected his duty, was insubordinate, and willfully violated agency policies. Furthermore, Respondent has proved that Appellant's actions rose to the level of gross misconduct.

4.8 Respondent has proven the charges in the disciplinary letter. Under the undisputed facts and circumstances, a fifteen-day suspension is appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Bernardo Ozuna is denied.

DATED this _____ day of _____, 2000.

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WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Leana D. Lamb, Member

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