BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

NOLAN RADKE, Appellant, v. UNIVERSITY OF WASHINGTON, Respondent.	Case No. SUSP-01-0034 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 GERALD L. MORGEN, Vice Chair. The hearing was held at the University of Washington, South Campus Center, Seattle, Washington, on March 15 and April 23, 2002. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Nolan Radke was present and was represented by Sydney D. Vinnedge, Attorney at Law, of Emmal, Skalbania & Vinnedge. Jeffrey W. Davis, Assistant Attorney General, represented Respondent University of Washington.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a four-day (40 hour) suspension without pay. Respondent alleged that Appellant engaged in economic profiling, a form of biased policing.

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1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Nolan Radke is a Police Officer and permanent employee for Respondent University of Washington. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on September 24, 2001.

2.2 By letter dated August 24, 2001, Sandra H. Lier, Associate Vice President of Business Services, informed Appellant of his 40-hour suspension effective September 5, 2001. Ms. Lier alleged that Appellant exercised economic profiling, a form of biased police practices, in his capacity as a University Police Officer.

2.3 Appellant began his employment as a Police Officer with the University of Washington Police Department (UWPD) in 1996. He has not been the subject of any prior formal or informal discipline. In 2000, Appellant was performing duties as a Field Training Officer (FTO), working with recent graduates of the law enforcement academy. The field-training period provides student officers with an opportunity to work with experienced police officers who mentor them and help them put their academy training into practice. The field training consists of four phases.

2.4 Police Officer Lynell Josepher was hired by the UWPD in August 2000. She attended the law enforcement academy and after graduating she was assigned to work with Appellant during phase one and phase four of her training period.

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2.5 Upon completion of the field-training program in April 2001, Appellant evaluated Officer Josepher's performance and rated her below average in several areas. The below acceptable ratings meant that Officer Josepher was required to repeat a portion of the training. Officer Josepher became upset and she came forward to allege that Appellant rated her below passing because she was unwilling to make "profile stops." Officer Josepher claimed that Appellant encouraged her to focus traffic stops on vehicles that were old and dilapidated during the two phases she worked with him. In Officer Josepher's opinion, Appellant's approach to initiating traffic stops was incompatible with the training she had received in the police officer training academy. Officer Josepher was confused but did not question Appellant because she felt she had no practical experience to question the threshold necessary to initiate a traffic stop. Officer Josepher testified that a number of stops Appellant encouraged her to make lacked probable cause and were initiated of drivers in "beater cars." These stops caused Officer Josepher concern.

2.6 On January 31, 2001, Officer Josepher and Appellant were driving in the patrol car when an older vehicle failed to signal a turn from a parking lot of the University of Washington Medical Center onto Columbia Road. Appellant made the decision to stop the vehicle. Officer Josepher recognized that the driver had committed a "technical traffic infraction." However, in her judgment, the driver's failure to signal while departing the parking lot was a trivial matter and she would not have initiated a traffic stop under the circumstances. The vehicle was 14 years old at the time. Officer Josepher ran the driver's license number through radio dispatch, who communicated back that the driver had a suspended license, 3rd degree, which meant that the driver should not have been operating the vehicle. The driver was arrested and Officer Josepher issued him two citations: driving while license suspended 3rd degree and failure to signal.

2.7 On February 10, 2001, Officer Josepher and Appellant approached a vehicle that was stopped on Columbia Road, which is located in the middle of a parking lot. It was a technical

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violation of the traffic laws to be stopped in the middle of a road. The driver exited her vehicle to ask a question of Officer Josepher, who had pulled the patrol car behind the truck. Officer Josepher could not recall whether she or Appellant called in the plate to dispatch, however, she did not understand why it was necessary to call in the plate under those circumstances. After the truck's plate was called in, the dispatcher advised Officer Josepher that the driver's license of the registered owner of the truck had been suspended. The vehicle was a 1971 Ford pickup truck.

2.8 Officer Josepher completed phases two and three of her field training with other FTOs. Officer Josepher testified that while she did initiate stops of older vehicles during the timeframe she was supervised by other FTO's, she did not believe the age or condition of the vehicles was the primary reason to initiate those stops.

2.9 Officer Josepher began the final phase of her field training with Appellant on April 26, 2001. At this point, Officer Josepher was responsible for initiating all stops and actions and Appellant's role was to act as an observer. Officer Josepher testified that Appellant again directed her to make stops that she felt were questionable due to a lack of reasonable cause.

2.10 On April 26, 2001, Officer Josepher was driving the patrol car behind an older Volkswagen Bug, which she described as looking like a "beater" or "junker" car. Appellant told Officer Josepher to run the car's plate. Officer Josepher called in the plate and she continued to follow the car even though she had not observed any traffic violation. The radio dispatcher responded that the tabs for the vehicles were expired. However, Officer Josepher noted that the tabs on the car were current. Based on the dispatcher's information, Officer Josepher had sufficient information to initiate a stop of the vehicle. When Officer Josepher approached the driver, the driver asked why she had been stopped. Officer Josepher responded that her car tabs had expired. While the driver searched for her car registration, the radio dispatcher informed Officer Josepher that the car's tabs

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had been renewed. Officer Josepher felt there was no reason to detain the driver and she apologized and released her. When Appellant evaluated Officer Josepher's performance during the stop, he noted that she had failed to run the driver's name and license number while the driver was looking for her car registration.

2.11 On April 26, 2001, Officer Josepher and Appellant were driving through the South 10 (S10) parking lot, located adjacent to the hospital emergency room entrance. There were two males seated in the front of a 1983 Oldsmobile Cutlass. The men were smoking and the front windows of the car were down. After the patrol car drove by, Officer Josepher and Appellant noted that the men had exited the vehicle, left the driver's door open, and were standing at the back of the car while the driver smoked a cigarette. Appellant directed Officer Josepher to drive by the vehicle again so he could call in the car's plate. In Officer Josepher's opinion, the driver and passenger in the vehicle were not acting in a suspicious manner. The information received from the dispatcher indicated that the license of the registered owner had been revoked.

2.12 The following day, Officer Josepher and Appellant observed the same 1983 Oldsmobile Cutlass stopped in lot S10 with the engine running. The driver, who matched the description of the registered owner provided to them the previous day, was letting out several passengers. Appellant directed Officer Josepher to initiate a stop of the car. Officer Josepher subsequently approached the driver and began to process his arrest and make arrangements to have the car impounded. The driver's family subsequently approached Officer Josepher and began to ask her questions. Appellant gave Officer Josepher low marks on her daily evaluation form, indicating she had failed to take "aggressive control" of the situation.

2.13 On the way back to the police station, Officer Josepher spotted an "old, beat-up" car pull up in front of the patrol car. Appellant told Officer Josepher to follow the car. The car eventually

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pulled over in a pullout area without any prompting from Officer Josepher. At that point, Appellant reached over and turned on the patrol car's emergency lights and said, "I guess we're stopping here." Officer Josepher was upset and felt "sick' because she was at a loss as to what to tell the driver because she had not observed any traffic violations. Officer Josepher felt that she was violating the driver's civil rights by stopping him without any probable cause. However, she asked for the driver's documents because she felt that Appellant expected her to do so and because she did not want to receive any low grades. When she approached the driver, she was asked why they had been pulled over. Officer Josepher testified that she lied to the driver and stated that he looked lost. Officer Josepher subsequently released the driver without issuing a citation.

2.14 On April 28, 2001, Officer Josepher and Appellant were driving in the patrol car when she observed an older "junky" vehicle in front of them on Memorial Way and 17th Avenue NE. Officer Josepher followed the vehicle, because she felt that was what Appellant expected her to do. The car turned into a parking lot and then parked in a slot. Officer Josepher did not find the driver's behavior suspicious, and she testified it was Appellant's decision to stop the car. Either Officer Josepher or Appellant activated the patrol car lights, and Officer Josepher approached the driver. When asked by the driver why he had been stopped, Officer Josepher testified that she used the "same ruse" she used the prior day, and told him he "looked lost." After running the driver's license, Officer Josepher released the driver. She did not recall that the driver had failed to signal.

2.15 Police Officer Ginger Banyai-Riepl was hired by UWPD on May 10, 2001, and she attended the law enforcement academy from May 17 to September 2000. Appellant was Officer Banyai-Riepl's field training officer during her second week of training. Officer Banyai-Riepl credibly testified that during that time period, Appellant drew her attention to "old beater cars" while they were on patrol. She testified that Appellant expressed his reasons for focusing on those types of vehicles: the drivers were more likely to commit violations, had little money to pay their tickets,

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and were less likely to follow traffic regulations and laws. She further testified that Appellant consistently pointed out vehicles that were older and of low value. Appellant's approach to initiating traffic stops did not match the training she received at the academy or given to her by the other field training officers and she felt uncomfortable with his direction. Officer Banyai-Riepl also testified that Appellant used the reverse approach to cars that were newer and more expensive, and that he discouraged her, in one instance, from stopping a newer vehicle that had run a stop sign.

2.16 Appellant testified that there was probable cause for all stops initiated, and he denies that he engaged in any economic profiling. He further presented testimony from other UWPD Officers who went through the field-training program with him. These officers testified that Appellant never encouraged them to make traffic stops of "older, beater" cars. Former UWPD Police Officer Arturo Munoz, now a Police Officer with the Mercer Island Police Department, testified that his experience in the field-training program with Appellant was a positive one and that he never saw any indication of economic profiling. He testified that Appellant stressed making traffic stops and he described Appellant as "tough and aggressive," but fair.

2.17 Section 2.09.03 of the UWPD Policy prohibits the illegal use of race, ethnicity, or economic status as a factor in deciding to stop and question, arrest or search a person without a legal basis under the United States and Washington State Constitutions. The policy further states that, "This type of policing is illegal, reprehensible, and will not be tolerated by the University of Washington Police Department." The UWPD provided the policy to Appellant on April 14, 2001.

2.18 After considering the testimony of all the witnesses we find that it is more likely than not that Appellant encouraged Officers Josepher and Banyai-Riepl to initiate traffic stops of drivers operating old and dilapidated vehicles when there either were no traffic violations committed or when the violations were not flagrant. We recognize that Officer Josepher was dissatisfied with the

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low scores she received from Appellant. However the testimony from Officer Banyai-Riepl was compelling and supported Officer Josepher's claims that Appellant targeted vehicles that were older and visibly in poor condition. Furthermore, there is no evidence to establish that Officers Josepher and Banyai-Riepl corroborated their stories against Appellant.

2.19 In addressing Appellant's assertion that the investigator was biased, we find that the department conducted a fair and objective investigation into allegations of Appellant's misconduct.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts that UWPD officers are specifically forbidden by policy from using an individual's race, ethnicity or economic status as a factor in deciding to stop and question, arrest or search a person. Respondent argues that UWPD officers cannot, under this rule, use factors such as age or condition of a car as even part of his or her rationale for stopping it and/or questioning the driver. Respondent argues that Appellant encouraged officer Josepher to stop old "junkers" even when there was no traffic violation committed. Respondent argues that a preponderance of the evidence established that Appellant used the low economic status of individuals who drove old and/or beat up vehicles as a factor in deciding to follow and investigate them, even while directing student officers working with him to treat lightly those fortunate enough to drive expensive or newer cars. Respondent argues that Appellant violated UWPD policy and that the forty-hour suspension imposed should be upheld.

3.2 Appellant argues that he is an extremely hard working officer and there is no evidence that he was singling out drivers on the basis of economic status. Appellant asserts that there were significant problems with the department's investigation and with the charges levied against him. In addition, Appellant asserts that he was never asked if he violated the standard operating policies, and that he was never questioned directly about the charges, but was merely given a copy of the

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student officer's statements and ordered to respond. Appellant contends that all the stops referenced in the disciplinary memorandum were legal stops, but some of the department's exhibits were not included in the underlying investigation and they should not be considered because they were not the basis for the initial investigation. Appellant further agues that a review of the citations issued with other field-training officers supported that those field-training officers and the student officers were also citing older cars.

Appellant argues that the standard operating policy which references economic profiling was not given to officers until mid-April 2001, but that many of the citations presented by the department as economic profiling occurred prior to the policy being written and issued to officers. Appellant asserts that the low scores he gave Officer Josepher were for her problems ensuring officer safety and her difficulty operating the radio.

Appellant further argues that the investigation of citations issued does not demonstrate a pattern of biased policing because he wrote approximately 100 citations in 2001 and, of those, about 55 were written by the three student officers. He asserts, however, that only a few of the citations were reviewed by the department to sustain a finding of misconduct. Appellant contends that the individual responsible for the investigation was not impartial because he was in charge of the field training officer program. Appellant asserts that Respondent failed to sustain its burden of proof by a preponderance of credible evidence, and that the discipline should be reversed and his appeal granted.

IV. CONCLUSIONS OF LAW

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

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

4.4 Respondent has proven by a preponderance of the credible evidence that Appellant violated Section 2.09.03 of the UWPD Policy that prohibits the illegal use of race, ethnicity, or economic status as a factor in deciding to stop and question, arrest or search a person without a legal basis. Although the UW Police Department did not provide Appellant with the policy until April 14, 2001, the evidence established that a number of the traffic stops occurred after Officer Josepher began her final phase of training on April 26, 2001. Nonetheless, the incidents that occurred prior to the adoption of the policy support our finding that Appellant initiated several stops primarily using the poor condition of the vehicles as a basis for the stops. The traffic violations, if any, were secondary to the seeming economic status of the vehicle's driver as indicated by the poor condition of the vehicle. Although Appellant argues that Respondent failed to establish that he engaged in any pattern of misconduct, the UW Police Department's policy clearly states that the department will not tolerate biased police practices. Therefore, even one sustained allegation of the use of "an illegal factor to stop and question, arrest or search a person without a legal basis" is a violation of the policy.

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4.6 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness and circumstances of the offenses. 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 cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.7 Under the facts and circumstances of this case, we conclude that a four-day (40 hour) suspension is appropriate. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Nolan Radke is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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