BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

LARRY ZABLE, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. DISM-98-0068 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 NATHAN S. FORD Jr., Member. The hearing was held at the Yakima-Kittitas Community Services Office in Yakima, Washington, on October 21, 1999.

1.2 **Appearances.** Appellant Larry Zable was present and was represented by Kevan T. Montoya, Attorney at Law, of Velkanje, Moore & Shore, P.S. Respondent Department of Social and Health Services was represented by Patricia A. Thompson, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency rules and regulations. Respondent alleges that Appellant had inappropriate contact of a personal nature with a coworker after being directed to keep all interactions with her on a professional level.

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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 & 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); Aquino v. University of Washington, PAB No. D93-163 (1995).

II. FINDINGS OF FACT

2.1 Appellant Larry Zable was a Computer Information Consultant 2 and permanent employee for Respondent Department of Social and Health Services in the Division of Vocational Rehabilitation in Yakima, Washington. 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 December 7, 1998.

2.2 By letter dated November 24, 1998, Sadie Lee, Regional Administrator for the Region 2 Division of Vocational Rehabilitation, notified Appellant of his dismissal effective December 16, 1998. Ms. Lee charged Appellant with neglect of duty, gross misconduct and willful violation of published employing agency rules and regulations. The letter alleged that Appellant had inappropriate contact of a personal nature with a coworker after being directed to keep all interactions with her on a professional level.

2.3 Appellant began his employment with the Division of Vocational Rehabilitation in May 1994. Appellant's duties as a Computer Information Consultant 2 included, in part, ensuring that the unit's computers were running properly, assisting employees with any computer related problems, and computer trouble shooting.

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2.4 Dawn Lopez, Counselor Aid, was Appellant's back-up whenever he was unavailable or absent to handle computer support issues. Although Ms. Lopez was Appellant's back-up, they did not work directly with each other and had very little interaction.

2.5 Appellant received a letter dated December 1, 1997, which suspended him for 10 calendar days. The letter charged Appellant with neglect of duty and willful violation of published employing agency rules and regulations. The letter outlined two incidents in which Appellant sexually harassed Ms. Lopez by making inappropriate comments of a sexual nature and for inviting and encouraging Ms. Lopez to look at pornographic internet sites. The letter informed Appellant that he had a duty to conduct himself in a professional and appropriate manner while in the workplace and during any work related travel/business trips. Ms. Lee also advised Appellant that she expected him to make every effort to ensure that such misconduct would not be repeated and warned him that any incidents of the same or similar nature would result in further disciplinary action which could include dismissal. Ms. Lee also met with Appellant to emphasize the serious nature of his misconduct and directed Appellant to refrain from discussing the issue with Ms. Lopez and keep all interaction with Ms. Lopez on a professional level.

2.6 On August 9, 1999, a number of the unit's staff were scheduled to attend a seminar in Seattle. Appellant and Ms. Lopez were scheduled to attend, as well as coworkers Sharon Smith, Vocational Rehabilitation Counselor Aid; Kathy Neely, Independent Living Counselor; and Patricia Eyerly, Vocational Rehabilitation Counselor.

2.7 At separate times prior to the seminar, Appellant spoke to Ms. Eyerly and Ms. Neely about carpooling to Seattle. Both Ms. Neely and Ms. Eyerly informed Appellant that they had made other travel arrangements. Neither Ms. Neely nor Ms. Eyerly agreed to meet Appellant in Seattle for dinner.

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2.8 On August 9, 1998, Appellant arrived in Seattle and checked into his hotel room at 3:46 p.m. Appellant immediately attempted to call Ms. Lopez' room, however, she had not yet checked into the hotel. Appellant left a message for Ms. Lopez at 3:54 p.m. which read, "Larry is in room 2938. thank you." This written message was delivered to Ms. Lopez' room at some unspecified time after she checked into the hotel.

2.9 At 4:46 p.m., Ms. Lopez checked into her room. At approximately 6 p.m. Appellant called Ms. Lopez' room and asked if she had any plans for that evening. Ms. Lopez informed Appellant that she was meeting Ms. Neely, Ms. Eyerly and Ms. Smith for dinner and she immediately ended the conversation. Appellant denies that he made this second phone call to Ms. Lopez, however, Appellant's denial is not credible in light of his earlier attempt to call Ms. Lopez and his later attempts to arrange to meet with Ms. Lopez.

2.10 At approximately 7:15 p.m. Ms. Lopez left her room to have dinner and found an envelope at her door. The envelope contained the 3:54 p.m. message from Appellant which contained his room number. When Ms. Lopez met with Ms. Neely, Ms. Eyerly and Ms. Smith at dinner, she inquired whether Appellant had also left messages for them. Because of her prior interaction with Appellant, Ms. Lopez became alarmed and concerned when she discovered that she was the only one to have received a phone call from him and a message with Appellant's room number on it.

2.11 The following morning staff gathered at the seminar site. Ms. Lopez' supervisor had just arrived and Ms. Lopez informed him of Appellant's actions the previous day, but she asked her supervisor not to address the issue with Appellant until they returned to the office.

2.12 During a morning break, Appellant approached Ms. Lopez and told her that he had not meant "anything sexual about the message," referring to the message he had left the previous day. Appellant

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also told Ms. Lopez he wanted to meet with her because he was almost finished with his therapy program and wanted to get "closure." Ms. Lopez informed Appellant that they should wait until they returned to the office. Ms. Lopez asked Appellant why he had left her a message with his room number and Appellant indicated that he was lonely, that he did not like to travel alone and he was concerned for his wife because her horse had been injured and required stitches. Appellant informed Ms. Lopez that he did not have any plans that evening and would like to meet with her to talk. Ms. Lopez again informed Appellant that it was not the appropriate time or place to meet and indicated that it would be more appropriate to wait until they returned to the office. Ms. Lopez ended the conversation.

2.13 Ms. Lopez continued to feel uncomfortable, afraid and nervous with Appellant's actions and took measures to avoid being alone or in any position where Appellant might approach her alone.

2.14 Appellant's proposal to Ms. Lopez that they meet so he could get closure on the previous incident was unwelcome and unsolicited and violated Ms. Lee's earlier directive that he maintain all interactions with Ms. Lopez on a professional level.

2.15 Respondent has adopted Administrative Policy 6.04, Standards of Ethical Conduct for Employees. The policy requires employees to "create a work environment that is free from all forms of discrimination and sexual/workplace harassment." The policy also requires employees to interact with coworkers with respect, concern, courtesy and responsiveness. Appellant was aware of this policy and of his duty to treat coworkers with dignity and respect.

2.16 Respondent has adopted Administrative Policy 6.02, Sexual Harassment, which states that sexual harassment is unacceptable in the workplace. The policy further states that sexual harassment "occurs through unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature (or conduct that occurred because of the sex/gender of the victim) when such

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conduct includes, but is not limited to, conduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Appellant was aware of this policy.

2.17 Appellant attended sexual harassment training on June 18, 1996 and October 21, 1996 and he attended ethics training on June 26, 1995.

2.18 Sadie Lee, Regional Administrator for the Region 2 Division of Vocational Rehabilitation, was Appellant's appointing authority. Prior to determining whether misconduct occurred, Ms. Lee interviewed Appellant and Ms. Lopez and reviewed the investigative report into the allegations. Ms. Lee concluded that Appellant behaved inappropriately based on Appellant's admission that he approached Ms. Lopez in an attempt to meet with her to discuss non-work issues. Ms. Lee also found Ms. Lopez' description of the events of August 9 and 10, 1998 to be credible and mostly corroborated by Appellant. Ms. Lee did not believe Appellant's denial that he did not call and speak to Ms. Lopez on the evening of August 9, 1998.

2.19 Ms. Lee was highly concerned with Appellant's action because of his previous suspension for sexually harassing Ms. Lopez. At that time, Ms. Lee personally made it a point to warn Appellant that he was not to speak to or approach Ms. Lopez for any non-work related purposes. Ms. Lee was also concerned that Appellant took the first opportunity he had away from the workplace to approach Ms. Lee even though he was aware that he was prohibited from doing so.

2.20 Ms. Lee concluded that Appellant's misconduct violated the agency's policies prohibiting discrimination and sexual harassment and that his actions interfered with the department's ability to provide Ms. Lopez with a work environment free from sexual harassment. Ms. Lee concluded that terminating Appellant was appropriate based on his repeated pattern of misconduct.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that there is no dispute that Appellant engaged in inappropriate conduct with a coworker which was unwelcome and was not solicited. Respondent argues that Appellant had been disciplined for sexually harassing the coworker previously and had been warned that any continuing behavior of a similar nature could lead to further disciplinary action. Respondent asserts that Appellant had been directed to conduct himself in a professional manner and to treat his coworker with respect and dignity and that Appellant failed to comply. Respondent argues that Appellant's misconduct violated agency policy and interfered with the agency's ability to provide a workplace for its employees which is free from sexual harassment. Respondent argues that regardless of what Appellant's intentions were, his actions created a hostile and offensive working environment for Ms. Lopez, who became concerned and afraid with Appellant's behavior and felt the need to take safety precautionary measures. Respondent contends that dismissal is not too severe a sanction and asks the Board to affirm the action.

3.2 Appellant argues that Respondent failed to prove the element of sexual harassment. Appellant asserts that his actions toward Ms. Lopez were not vulgar or even mildly offensive. Appellant argues that his previous disciplinary letter did not tell him to stay away from Ms. Lopez. And that Ms. Lopez and/or his supervisor failed to tell him that his conduct was unwelcome. Appellant asserts that he attempted to call a number of other staff before he called Ms. Lopez but was unable to reach anyone and that he left Ms. Lopez a message with his room number because she was the last person he called. Appellant argued that it was a common practice to leave room numbers with other staff when in travel status. Appellant denies that he called Ms. Lopez a second time on the evening of August 9.

Appellant asserts that he told Ms. Lopez the following day that he meant nothing sexual about his message because he realized after the fact that he should not have left a message with his room number. Appellant argues that he wanted to talk to Ms. Lopez about their previous problem so that he could get

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closure on their previous issue and he felt he could approach Ms. Lopez because she had previously informed him that she wanted to maintain a professional working relationship with him. Appellant asks that his dismissal be reversed.

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 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).

4.5 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 & Health Services, PAB No. D94-025 (1995).

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

4.7 Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. Schonauer v. DCR Entertainment, 79 Wn. App. 808 (1995), *review denied*, 129 Wn. 2d 1014 (1996). In this case, it is clear that Appellant's conduct was unwelcome, unsolicited and undesirable.

4.8 Although it is not appropriate to initiate discipline based on prior formal and informal disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.9 Respondent has proven that Appellant neglected his duty, was insubordinate and violated agency policy when he approached Ms. Lopez and asked to meet with her to discuss a previous incident in which he made comments of a sexual nature to her and which resulted in his suspension. Although the incidents occurred away from his official work site, Appellant and Ms. Lopez were still in work status and Appellant had a duty to behave professionally, abide by his superior's directives, and treat Ms. Lopez with respect and dignity. Appellant's misconduct rises to the level of gross misconduct because it interfered with the agency's ability to provide Ms. Lopez with a work environment free from harassment. Appellant was insubordinate when he made repeated attempts to contact Ms. Lopez and when he persisted in asking her to meet with him when he clearly understood that he was prohibited from doing so. It is clearly evident that this contact left Ms. Lopez feeling afraid and vulnerable.

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4.10 Appellant had received prior discipline, he had been warned verbally and in writing that any repeated conduct of the same or similar nature would not be tolerated, and he was aware that he was to avoid any contact with Ms. Lopez that was not work related. While the incidents here in isolation may seem insignificant, it is the history of Appellant's behavior with Ms. Lopez that makes the facts of this case egregious and warrants the most severe punishment that can be imposed on an employee.

4.11 Under the facts and circumstances of this case, including the seriousness of the offenses and the repeated pattern of Appellant's misconduct, we conclude that Respondent has proven that the sanction of dismissal is appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Larry Zable is denied.

DATED this _____ day of _____, 1999.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Nathan S. Ford Jr., Member

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