BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

STEVEN FAYDEN, Appellant, v. UNIVERSITY OF WASHINGTON, Respondent.	Case No. DISM-99-0039 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 LEANA D. LAMB, Member. The hearing was held in the South Campus Center on the campus of the University of Washington in Seattle, Washington, on January 28 and February 9, 2000.

1.2 **Appearances.** Appellant Steven Fayden was present and was represented by Tom Whisenant, Seattle Building and Construction Trades Council Representative. Respondent University of Washington was represented by Jeffrey W. Davis, Assistant Attorney General.

1.3 **Nature of Appeal.** Appellant was dismissed from his Sheet Metal Mechanic position for consuming beer and pizza during work time while away from his assigned work site and for using University tools, materials, supplies and time for work that was unauthorized.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social

& Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Steven Fayden was a Sheet Metal Mechanic and a permanent employee of Respondent University of Washington (UW). 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 July 29, 1999.

2.2 By letter dated June 17, 1999, Jeraldine McCray, Assistant Vice President for Facilities Services, notified Appellant of his dismissal effective at the end of his work day on July 2, 1999. Ms. McCray charged Appellant with violation of University and Departmental policy, and/or falsification of work records, and/or gross misconduct, and/or using University time and materials to construct an unauthorized project. Specifically, Appellant was dismissed for (1) using University tools, materials, supplies and time to perform unauthorized work and falsely charging his time and UW materials to other authorized projects, and (2) being in possession of and consuming beer during work time while on University property and being away from his work assignment without permission.

2.3 Appellant began his employment at the UW on November 5, 1984. At the time of the incidents giving rise to this appeal, he worked the second shift, 4:00 p.m. to 2:30 a.m., in Shop 41. The focus of Appellant's position was maintenance of University facilities and fixtures. Appellant had no history of prior corrective or disciplinary actions.

Incident 1

2.4 Craig Darko was a temporary employee at the UW from April to October 1998. He was responsible for trucking and hauling equipment to and from job sites. While he was employed at the UW, Mr. Darko talked to Appellant and Mike Cruz, Appellant's supervisor, several times about the need for something to keep tarps in place on the back of UW trucks. Appellant told Mr. Darko that he was working on his request.

2.5 Appellant determined that he could fabricate metal racks for the trucks that would satisfy Mr. Darko's request. However, before beginning construction of the racks for the trucks, Appellant spoke to Ray Uhl, his acting supervisor, about Mr. Darko's request. Mr. Uhl told Appellant that he did not believe that the purchase of racks would be approved. Furthermore, Mr. Uhl did not authorize Appellant to construct the racks.

2.6 It is undisputed that the racks Appellant proceeded to construct were unauthorized and that no work order was completed for the project. Appellant used UW materials and equipment to build the racks and he constructed them during his breaks. The credible testimony establishes that Appellant did not work on the racks in secret. In fact, when Appellant left the racks unattended, he left his welding gloves and his helmet with them. Furthermore, at least three other employees of Shop 41 knew that Appellant was working on the racks. Appellant did not charge his time or the materials he used to construct the racks to any UW budget.

2.7 On March 6, 1999, shop employees were cleaning and reorganizing the shop when Scott Neudorfer, Sheet Metal Mechnaic, discovered the racks on top of an air supply duct in a storage room. He reported finding the racks to Jerry Salisbury, Metal Trades Shop Supervisor. Mr. Salisbury asked Mr. Cruz to investigate the situation. Appellant told Mr. Cruz that he was

responsible for the construction of the racks. Appellant later discussed the situation with Jon Hooper, Manager.

2.8 Appellant admitted to Mr. Hooper that he made the racks without the approval of the shop supervisor. Appellant also explained how he envisioned the racks fitting on the truck. During his investigation, Mr. Hooper spoke with Tom Eisenbach, Matt Scillo, and Johnny Walker, three of Appellant's co-workers from Shop 41. They told Mr. Hooper that Appellant was constructing the racks to be used by a University crew to cover equipment hauled in the back of a pickup truck. They said that they had also told Appellant that there was need for this type of rack. Mr. Hooper did not believe that Mr. Uhl or Mr. Cruz knew that Appellant was constructing the racks.

2.9 Mr. Hooper concluded that Appellant violated University policies and procedures when he constructed an unauthorized project using University materials, equipment and time. In addition, Mr. Hooper concluded that Appellant worked on the racks during work time and falsely recorded and charged the time that he worked on the racks to other authorized projects. However, as stated above, a preponderance of the credible testimony established that Appellant worked on the racks during his breaks.

Incident 2

2.10 Toward the end of April 1999, the division had a backlog of incomplete work orders. The shop employees were instructed to catch up on paperwork. There were approximately 639 incomplete work orders that were distributed to various crews for completion. Appellant's crew was given approximately 50 to 60 of the incomplete work orders.

2.11 On April 22, 1999, after completing their work in Denny Hall and the Arts Building, Appellant's crew, consisting of Appellant, Gina Rushton and Johnny Walker, decided to go to the carpentry shop in Corporation Yard 1 to complete the paperwork. The yard is surrounded by fences and access to the yard is through a locked gate. University employees access the yard during all shifts to retrieve and store equipment and materials. The yard is not an area employees normally use to complete paperwork.

2.12 After Appellant's crew entered the yard, they locked the gate and proceeded to the carpentry shop. At the shop they opened a garage-type door on the shop and entered. They left the door partially open and proceeded to work on the work orders on a large work table in the middle of the room.

2.13 Shortly after Appellant's crew arrived at the yard, Eddie Roberts, a Shop 41 employee, arrived at the yard to pick up some filters. He saw the light on in the carpentry shop and walked over to see who was there. Shannon Silkman, a Shop 41 employee, also arrived at the yard. He had come to the yard to drop off scaffolding. Mr. Silkman also saw the light and walked over to see who was in the carpentry shop. Mr. Roberts and Mr. Silkman arrived at the shop at about the same time.

2.14 During his normal rounds at approximately 12:30 a.m., University police officer Ronald Trezise, observed what appeared to be suspicious activity in Corporation Yard 1. He reported the activity and waited outside the locked gate for additional officers to arrive. He also requested assistance to unlock the gate. When the gate was unlocked the officers entered the yard.

2.15 While the police were surveying the yard, Mr. Roberts, Mr. Silkman and Appellant's crew were engaged in conversation in the carpentry shop. Ms. Rushton stepped outside and as she did, the police confronted her. The police then ordered the other employees out of the building. The police detained and questioned the employees while ensuring that the yard was secure. When the police learned that the individuals were indeed employed by the University, they left the area.

2.16 Appellant and the other employees discussed the incident and then returned to the shop to go home.

2.17 Although the police reported that the employees were in possession of beer and were consuming pizza while they were in the carpentry shop, nothing in the record supports these allegations and we do not find the police officer's testimony credible. The police did not cite any of the employees, they did not confiscate any of the alleged beer as evidence, no other evidence was gathered, and no pictures of the area were taken. Furthermore, the next day Dave Fields, Northeast Zone Manager, and Mr. Cruz surveyed the area. The documents in the record establish that they found many beer cans outside of the fence to the yard, but they did not find any cans in or around the carpentry shop. The area outside of the yard is open to the public and is accessible by trails that go to nearby apartments and sports fields. The cans that Mr. Fields and Mr. Cruz found could have come from any number of sources. Furthermore, Mr. Fields and Mr. Cruz found no evidence of pizza in the carpentry shop area.

2.18 The credible evidence establishes that Appellant and his crew were at the carpentry shop doing paperwork. When Mr. Roberts and Mr. Silkman arrived, they engaged in conversation. While Appellant and his crew could have chosen to complete the paperwork in another location, the

record establishes that it was not uncommon for employees to go to the yard during second shift. Furthermore, employees were not prohibited from doing paperwork in the carpentry shop.

2.19 Mr. Hooper considered all the information available. Even though all five of the employees in the yard denied possession or consumption of beer or pizza, Mr. Hooper determined that there was no reason for him to doubt the report of the police that open beer containers were in the area.

2.20 After considering the information from both incidents, Mr. Hooper recommended to Rick Cheney that Appellant be terminated. Mr. Cheney concurred with Mr. Hooper's recommendation. By letter dated June 17, 1999, Jeraldine McCray informed Appellant of his termination effective July 2, 1999.

III. ARGUMENTS OF THE PARTIES

3.1 *Incident 1*. Respondent alleges that Appellant constructed the racks for a friend and not for University use and that he used University equipment, material and time to do so. Respondent asserts that Appellant was constructing the racks in secret, that he tried to hide them by placing them on top of the air supply duct, that when confronted about them, he was inconsistent about the type of truck for which he was constructing the racks, and that further investigation showed that the racks would not fit on the truck that Appellant identified. Respondent argues that Appellant's actions constituted using UW materials and equipment to construct an unauthorized project.

Incident 2. Respondent argues that four University police officers testified about the incident in yard 1 and asserts that their testimony was credible, that the smell of alcohol was in the area and that there were beer cans in the carpentry shop. Respondent contends that Appellant had no reason to go to the yard to do paper work especially when there were other, more suitable locations he

could have chosen. Respondent further argues that after the encounter with the police, Appellant left work before the end of his shift yet completed his time card showing that he had worked his full shift. Respondent argues that Appellant is not believable because he has been inconsistent about this incident. Respondent further argues that the issue is not whether Appellant was drinking beer, but rather that Appellant was present where there was beer and then was untruthful about it.

Respondent contends that Appellant made innuendoes and engaged in mudslinging but that he offered no evidence to counter the University's proof. Based on the totality of the proven charges and Appellant's untruthfulness, Respondent asserts that termination is warranted.

3.2 *Incident 1.* Appellant admits that he did not have authorization to construct the racks for the truck. However, he contends that he was attempting to help his co-workers to resolve a problem and that his co-workers knew he was working on the racks for the good of the University. Appellant argues that he worked on the racks in his spare time during his breaks, that he worked on them in the open and that he did not try to conceal the project. Appellant further argues that it was not unusual for employees to construct projects without a work order. Appellant admits that he made a mistake and that he should not have constructed the racks without a work order.

Incident 2. Appellant denies that he was in possession of or consumed beer or pizza in the carpentry shop on April 22, 1999. Appellant alleges that the police overreacted to the incident. Appellant contends that no evidence was taken at the scene because there was no beer or pizza present and that Respondent has failed to prove that beer and pizza were present in the yard. Appellant further contends that it is not unusual for employees to find a remote location in which to complete their paperwork.

Appellant further contends that termination is too severe a disciplinary action because the only issue remaining is his admitted violation of policy.

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 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).

4.4 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).

4.5 Respondent has met its burden of proving that Appellant violated policy when he constructed the racks without first receiving authorization and a work order. Furthermore, Appellant admits that he violated the policy. Appellant is a long-term employee, and he was aware

of his responsibility to abide by University policy. Appellant's admitted failure to abide by policy warrants disciplinary action.

4.6 However, Respondent has failed to prove that more likely than not, Appellant was in possession of or consumed beer in the carpentry shop on April 22, 1999. Therefore, Respondent has failed to prove that Appellant committed gross misconduct. Furthermore, while Respondent alleges that Appellant falsified work records when he allegedly left work early, Respondent has failed to present a preponderance of credible evidence to support this allegation.

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

4.8 Respondent has failed to prove the most egregious of the charges in the disciplinary letter. Furthermore, Appellant admits his misconduct in regard to the unauthorized construction of the racks. Under the proven facts and the totality of the circumstances, termination is too severe. The disciplinary sanction should be modified to a 45-day suspension without pay.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Steven Fayden is modified to a 45-day suspension without pay.

DATED this _____ day of _____ 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Leana D. Lamb, Member

Personnel Appeals Board
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