BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ALAN L. ZIMMERMAN, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)))))))))))	Case No. DISM-99-0032 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF 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 at the office of the Personnel Appeals Board in Olympia, Washington, on June 2, 2000.

1.2 **Appearances.** Appellant Alan L. Zimmerman was present and was represented by Rick Cordes of Cordes Brandt, P.L.L.C. 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 the disciplinary sanction of dismissal for neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published agency policies for Appellant's admitted viewing of inappropriate and sexually oriented pictures at his work station computer.

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); Anane v.

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Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Aquino v. University of Washington, PAB No. D93-163 (1995).

II. FINDINGS OF FACT

2.1 Appellant Alan L. Zimmerman was a Workers' Compensation Adjudicator 3 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 June 21, 1999.

2.2 By letter dated June 16, 1999, Douglas Connell, Assistant Director for Insurance Services, informed Appellant of his dismissal effective July 2, 1999. Mr. Connell charged Appellant with neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published agency policies after two female coworkers witnessed Appellant viewing inappropriate and sexually oriented pictures at his work station computer.

2.3 Appellant became employed with Respondent in August 1986. Appellant's most recent performance evaluations indicate that he met, exceeded or far exceeded normal requirements in all job dimensions. There is no dispute that Appellant was viewed as a competent and knowledgeable Workers' Compensation Adjudicator.

2.4 Appellant has a long history of corrective and disciplinary action, including the following:

- Letter of reprimand dated December 2, 1997 for his inappropriate and unprofessional behavior toward his supervisor.

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- Letter of reprimand dated March 27, 1997, for calling his supervisor a "stupid jerk" in a loud and disruptive voice.
- A 15-day suspension without pay, effective October 7, 1996, for behaving in a hostile and aggressive manner toward his supervisor and calling her an "egomaniac" and a "maniacal jerk."
- A three-day suspension without pay, effective August 21, 1996, for behaving in an inappropriate manner and shouting profanities at his supervisor.
- Letter of reprimand dated March 22, 1996, for raising his voice and using profanity in the workplace.
- A counseling memo dated September 3, 1992 for using profanity toward a coworker.

2.5 In addition, Appellant was verbally counseled on numerous occasions regarding his inappropriate behavior and outbursts in the workplace. On October 22, 1996, Appellant was given a "Work Conduct and Behavior Expectations" memo which addressed his behavior in the workplace and directed him, in part, to conduct himself in a professional manner at all times. On March 18, 1997, the memo of expectations was reviewed again with Appellant and he was reminded of his duty to behave in an appropriate manner in the workplace.

2.6 In February 1999, coworker Leisa Claflin, Unit C Claims Manager, walked past Appellant's work area and observed Appellant at his desk viewing sexually oriented pictures of women on his computer terminal. On February 10, 1999, Ms. Claflin reported the incident to her supervisor. Shortly prior to February 10, Claim Manger Claudia Johnson also observed Appellant viewing a sexually oriented Internet site on his computer.

2.7 An investigation into Appellant's computer use revealed that Appellant accessed the Internet on numerous occasions between January 13, 1999 and March 23, 1999 and that he accessed approximately 880 Internet sites during work hours. Appellant accessed and used the Internet on a number of occasions for large blocks of work times including four hours on January 15, 1999; four hours on February 4, 1999; over two hours on February 5, 1999; over three hours on February 16, 1999; over two hours on February 18, 1999; and over two hours on February 23, 1999. The investigation also revealed that Appellant accessed the Internet to view over 20 sexually explicit

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sites and that he spent approximately 20.5 hours of work time using the Internet for non-work reasons.

2.8 Appellant does not dispute that he accessed and viewed a number of Internet sites during work hours, including Internet sites which contained sexually explicit material.

2.9 Respondent has adopted Policy 3.00 which requires employees to adhere to high ethical standards and prohibits employees from using state resources for personal benefit.

2.10 Respondent has adopted Policy 3.13 which defines an intimidating, hostile or offensive work environment as a workplace in which "repeated . . . pictures or any action with sexual connotation" have the effect of making another employee feel uncomfortable in the workplace.

2.11 Respondent has adopted Policies 3.30, 7.05, 7.12 and 7.15. These policies require employees to use state resources for state business only, warn employees that misuse of work time or other state resources is "abuse of public trust and is subject to corrective or disciplinary action," warn employees that state computers are to be used for official state business only, and inform employees that computer use for personal purposes is limited.

2.12 Douglas Connell was Appellant's appointing authority. In determining the level of discipline, Mr. Connell reviewed Appellant's personnel file and his history of corrective and disciplinary actions. Mr. Connell took into consideration Appellant's history of good performance and his ability to perform the duties of his job. Mr. Connell concluded that Appellant's admitted misconduct of viewing of sexually explicit material at his computer during work hours was flagrant misbehavior which required a severe penalty. Mr. Connell was concerned with Appellant's excessive misuse of state resources and time and his lack of performing his work related activities. Mr. Connell concluded that termination was the appropriate sanction.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that it has shown that Appellant neglected his duty, was inefficient and willfully violated agency policy by using state computers and time to view sexually oriented material on the Internet. Respondent argues that although Appellant had a history of good work performance, his viewing of offensive Internet sites resulted in his unprofessional and disrespectful behavior in the workplace. Respondent further argues that Appellant was directed to behave professionally in the workplace and that Appellant's failure to do so constitutes insubordination. Respondent contends that although Appellant's previous disciplinary and corrective actions were not related to misuse of state resources and time, it was Appellant's pattern of unprofessional behavior in the work place which warranted a severe penalty. Respondent argues that Appellant's behavior rises to the level of gross misconduct and that termination is not too severe.

3.2 Appellant asserts that it was not his intent to offend his coworkers and that he did not intend for anyone to see his computer. Appellant argues that he had an exemplary work performance history and that he completed all of his daily work prior to using the Internet for personal purposes. Appellant asserts that he was not aware of the agency's Policy 7.16. Appellant admits that he messed up but that his prior disciplinary actions were unrelated and contends that termination is not warranted for a 13-year employee.

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

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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 is the utilization of time and resources in an unproductive manner, the ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective operations as measured by a comparison of production with use of resources, using some objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

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).

4.6 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).

4.7 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).

4.8 Appellant's conduct in accessing the Internet for personal purposes and to view sexually oriented material was inappropriate and showed lack of professional standards and poor judgment. As a 13-year employee, Appellant more likely than not was aware of the agency's policies against

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personal use of state resources and should have known of his duty and responsibility to use the department's computers and the Internet for work related purposes only. We are not persuaded by Appellant's contention that he was unaware of the policies regarding the appropriate use of state computers. Appellant had a duty to perform work duties during work time which he failed to do while he was occupied viewing non-work related material on the Internet. Respondent has met its burden of proof that Appellant's flagrant misuse of state resources and time constitutes neglect of duty, inefficiency and willful violation of agency policies and rises to the level of gross misconduct. Furthermore, Appellant had been directed to behave in a professional manner and his continued failure to do so constitutes insubordination.

4.9 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).

4.10 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. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.11 Although Appellant was a 13-year employee, he had a long history of failing to behave in an appropriate manner in the workplace. While we recognize that the incidents for which Appellant was previously disciplined and counseled are unrelated to this action, it is appropriate to consider his egregious and repeated failure to modify his workplace conduct when weighing the severity of the sanction to impose here. Under the facts and circumstances of this case, we conclude that Respondent has proven that termination was warranted. Therefore, the appeal should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Alan L. Zimmerman is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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Leana D. Lamb, Member

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