BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

PAULA BAKER, Appellant, v. DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Respondent.	)	Case No. SUSP-00-0017 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held on April 3 and 4, 2001, in Conference Room 35 of Thurston County Family and Juvenile Court in Tumwater, Washington. LEANA D. LAMB, Member, reviewed the record and participated in the decision in this matter. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Paula Baker was present and was represented by Christopher J. Coker, Attorney at Law of Parr and Younglove, P.L.L.C. Laura L. Wulf, Assistant Attorney General, represented Respondent Department of Community, Trade and Economic Development.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of a fourteen-day suspension for neglect of duty, inefficiency, insubordination, and gross misconduct. Respondent alleged that Appellant failed to follow her supervisor's directives, failed to provide a timely and usable work product, failed to provide required medical verification for two absences, and failed to keep her voicemail current.

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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); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Droege v. Dep't of Information Services, PAB No. D88-024 (Littlemore, Hrg. Exam.), aff'd by Board (1988); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

II. FINDINGS OF FACT

2.1 Appellant Paula Baker was a Program Manager/Technical Specialist 3 and permanent employee of Respondent Department of Community, Trade and Economic Development (DCTED). 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 on March 22, 2000.

2.2 Appellant began working for Respondent in 1993. As a result of a reduction in force action in 1997, she accepted a Program Manager/Technical Specialist (PM/TS) 3 position in the Community Development Programs Unit in the DCTED Olympia office.

2.3 Appellant worked in the Community Development Block Grant (CDBG) program. PM/TS 3's in the CDBG program are assigned three major areas of responsibilities: 1) program responsibilities, 2) contract management, and 3) closure of completed contracts. PM/TS 3's work independently, have contact with local government and state officials, and are responsible for overseeing grant contracts to keep customers and the state in compliance with the law. To successfully fulfill their responsibilities, PM/TS 3's must be accessible to internal and external customers.

Work Product:

2.4 Steven Buxbaum, Managing Director of the Community Development Programs (CDP), became Appellant's supervisor in July 1998. At that time, Appellant was directly responsible for the housing enhancement program, managed 42-44 contracts, and was responsible for civil rights compliance.

2.5 When Mr. Buxbaum became the CDP supervisor, he reviewed the workload of his staff. After reviewing the contract work of Appellant and other PM/TS 3's in his unit, Mr. Buxbaum determined that Appellant's contracts were not as well organized or maintained as the majority of the contracts managed by other staff in the unit. In addition, Mr. Buxbaum was concerned that Appellant had a high number of zero balanced contracts that had not been closed out and a high number of contracts that had no activity for quite some time.

2.6 Mr. Buxbaum began working with Appellant to prioritize her work. On August 17, 1998, Mr. Buxbaum temporarily assigned Appellant to full-time contract management responsibilities to allow her an opportunity to bring her assigned contracts up to program standards.

2.7 Appellant continued to have difficulties with prioritizing her work and completing assignments. In September 1999, Appellant began an eight-week medical leave of absence. During this time, Appellant's contract responsibilities were assigned to other PM/TS 3s who had no difficulty in completing Appellant's contract work.

2.8 When Appellant returned to work on November 8, 1999. Mr. Baxbaum did not reassign Appellant's former contracts back to her. Rather, Mr. Bauxbaum assigned her to the project of updating the Housing Enhancement Program Applicant's Handbook. Appellant was to use an existing consolidated plan, review the sections that dictated how the grant money was to be distributed, and develop a new applicant handbook.

2.9 When the assignment was made, Mr. Buxbaum and Appellant agreed that a draft plan would be ready on November 19, 1999. On November 24, Appellant e-mailed Mr. Buxbaum and said that she had faxed him a copy, however, Mr. Buxbaum never received the fax. On December 10, 1999, Mr. Buxbaum asked Appellant provide a timeline for completion of the project by the end of the day. Mr. Buxbaum asked for the timeline numerous times but did not receive it. On December 14, 1999, Mr. Buxbaum directed Appellant to provide him with a complete and well thought out timeline of all the elements and steps necessary to complete the project. Appellant finally provided a timeline on December 20, 1999.

2.10 The timeline showed that the project would be ready for distribution by January 17, 2000. However, the project was not completed by this date and on January 20, 2000, Appellant provided Mr. Buxbaum with a revised timeline. The revised timeline was the same document Appellant had previously provided with the addition of a few handwritten notations and extensions to previously established due dates. The revised timeline indicated that the project would be ready for distribution on April 20, 2000.

2.11 Mr. Buxbaum credibly testified that the project was to be done in advance of calendar year 2000. Most of the programs were allocated money in early 2000 and the manual was to be used by applicants for completing their 2000 grant applications.

2.12 Appellant provided a draft of the manual on January 28, 2000. Mr. Buxbaum reviewed Appellant's draft and found that it was deficient and the content and quality of work was not representative of the amount of time Appellant spent on the project. The draft contained errors, was incomplete and contradictory to the updated information in the consolidated plan. The agency was unable utilize the draft for the 2000 grant application process.

Medical Verification:

2.13 Appellant suffered from a variety of medical problems, and as a result, attended many medical appointments that required her to be away from work. In addition, Appellant occasionally performed work in locations other than the Olympia office. On November 10, 1998, Appellant and Mr. Buxbaum entered into a written agreement that stated, in part:

> Paula will notify Stephen prior to the day, if possible, if she is going to be late to work. If Paula is going to be absent for the entire day, she will call Stephen by 7:30 a.m. for every day she is going to be absent unless a need for extended absences has been conveyed to Stephen. Paula will adjust her work hours for non-work related activities either on the same day that they occur by adjusting her lunch hour or by drawing from her exchange time balance to be approved in advance by Stephen.

2.14 On November 8, 1999, Mr. Buxbaum reminded Appellant that non-emergency doctor appointments should be planned in advance if they occurred during work hours. In addition, Mr. Buxbaum directed Appellant to provide a written doctor's excuse for all appointments that occurred during work hours. Appellant informed Mr. Buxbaum that she would not provide a written doctor's excuse for her appointments. This caused Mr. Buxbaum to be concerned that she was abusing medical leave.

2.15 In late November 1999, Appellant had a doctor's appointment and then was planning to work in the Seattle office. The Seattle office became inaccessible due to activities related to the World Trade Organization. Even though Mr. Buxbaum knew that Appellant was at a doctor's appointment, he called her home to leave her a message instructing her not to report to the Seattle office. However, Appellant answered the telephone. This caused Mr. Buxbaum to be further concerned that she was abusing medical leave.

2.16 By memorandum dated January 5, 2000, Mr. Buxbaum placed Appellant on medical verification in accordance with WAC 356-18-070. Mr. Buxbaum directed Appellant to provide medical verification the next scheduled workday following each time that she did not report to work because of illness or if she was using any type of leave as sick leave. He informed Appellant that "[f]ailure to provide the requested medical certification will result in unauthorized leave without pay for you and may lead to corrective and/or disciplinary action."

2.17 On January 6, 2000, Appellant used 1.75 hours of sick leave but did not provide a medical verification for her absence. On January 21, 2000, Appellant used 8 hours of sick leave, but did not provide a medical verification for her absence.

Voice Mail:

2.18 Appellant and Mr. Buxbaum communicated frequently by voicemail using the SIMON system when Appellant was out of the office. In addition, internal and external customers used the telephone and voicemail messaging to contact Appellant. Appellant's voicemail could store 50 messages. Appellant's voicemail was frequently full because she did not delete her old messages, and as a result, neither internal nor external customers could leave additional messages for her.

2.19 On July 28, 1998, Mr. Buxbaum directed Appellant to keep her voicemail message current and to remove old messages. On November 20, 1998, Appellant and Mr. Buxbaum entered into a written agreement that stated, in part: "Paula will remove old voice messages saved in her Simon archives by either transcribing the message(s) or tape recording them to free up more space no later than December 14, 1998."

2.20 Appellant felt it was important that she keep her phone messages. Therefore, the agency provided her with a tape recorder so that she could record the messages and then delete her messages.

2.21 On January 6, 13, 21, 24, 25 and 26, 2000, Mr. Buxbaum was unable to leave messages on Appellant's voice mail because her voicemail was full.

2.22 Appellant told Mr. Buxbaum that she was unable to successfully clear her messages because the voicemail system was malfunctioning. The agency ran a diagnostic test on Appellant's phone and voicemail system and found that the system was working correctly and that there was no reason why Appellant would not have been able to delete her old messages.

2.23 Mr. Buxbaum met with his supervisor Steve Wells, Assistant Director, about his concerns regarding Appellant's performance. They began discussing these concerns in August 1998. Mr. Wells' felt that Appellant was immensely talented and capable. However, the fundamental problem was getting her to perform the duties assigned to her. Mr. Wells and Mr. Buxbaum offered Appellant additional training, changed her assignments, reduced her workload and attempted to give her assignments in her area of interest. However, Appellant was not receptive to their suggestions and none of the different strategies were successful. After working with Appellant for over 1 1/2 years to correct her performance problems, Mr. Wells felt that they had exhausted all ideas.

2.24 Martha Choe, Director of DCTED, met with Mr. Wells, Mr. Buxbaum and Busse Nutley, the Deputy Director in charge of community development. Their general areas of concern were Appellant's failure to meet the deadlines for completing the Housing Enhancement Program Applicant's Handbook and the deficiencies in her final draft product; her failure to comply with the

request that she provide medical verification; her inaccessibility to both internal and external customers; and her failure to clear her voicemail box after having been given a number of directives to do so.

2.25 Ms. Choe notified Appellant of her alleged misconduct in letters dated February 1 and 4, 2000. Ms. Choe met with Appellant and her union shop steward on February 7, 2000.

2.26 During the meeting, Appellant was given an opportunity to respond to the charges of misconduct. Ms. Choe also allowed Appellant to respond in writing. Appellant stated that her written response would be provided by the close of business on February 10, 2000, however, her response was not received by DCTED until February 17, 2000.

2.27 Appellant responded that she felt the timeline was complete, that she was unable to provide more than handwritten revisions to the timeline because she was having problems with her computer, and that she did not have time to work on it later. Appellant said that the major reasons she did not complete the applicants handbook was that she was denied reasonable accommodations, was forced to work under hostile, offensive conditions, and because information she needed was withheld from her. Appellant responded that the medical verification requirement implied that she was untrustworthy, that it was hard for her to get a note from her doctor, and that the requirement was a form of harassment. Appellant responded that she did not clear her voicemail messages because she felt that she needed to keep them.

2.28 Prior to determining what level of discipline to impose, Ms. Choe considered the history of progressive steps taken by the agency to assist Appellant. In addition to verbal and written counseling, directives and expectations, Appellant had received two letters of reprimand. On January 12, 1999, Appellant was given a letter of reprimand for failing to complete an assignment.

On January 5, 2000, Appellant was given a letter of reprimand for failing to follow the check-in and check-out procedures for working in the Seattle office. Ms. Choe also considered Appellant's responses to the charges.

2.29 Ms. Choe found no reason to believe that Appellant's medical condition was contributing to her inability to perform her duties. Ms. Choe determined that the expectations and requests of Appellant's supervisor were reasonable and believed that Appellant did not place accomplishment of her work priorities before her desire to work on personal issues. She felt that Appellant had been given consistent directions and was capable of doing the work. She concluded that Appellant failed to complete the timeline as directed; failed to meet the deadlines and to complete a usable draft of Housing Enhancement Program Applicant's Handbook; failed to provide medical verification as directed; and was inaccessible to staff and customers because she failed to clear her voicemail messages as directed. In light of the history of unsuccessful attempts by the agency to help Appellant succeed, Ms. Choe concluded that a suspension was the next appropriate step.

2.30 By letter dated March 16, 1999, Ms. Choe notified Appellant of her fourteen-day suspension for neglect of duty, inefficiency, insubordination and gross misconduct. Ms. Choe also directed Appellant to pay attention to the details of her work, to complete the assignments, to work with her supervisor, and to follow all of his lawful directives.

Appellant's Request for Reasonable Accommodation:

2.31 In September 1998, Appellant requested reasonable accommodation. Her request was addressed at that time. However, she continued to express her desire for reasonable accommodation and as a result, an Independent Medical Exam (IME) was conducted on December 6, 1999, by Dr. Richard I. Rynes.

2.32 On December 21, 1999, Respondent received Dr. Rynes report. Respondent asked Dr. Rynes some follow-up questions in January 2000. On January 31, 2000, Respondent received his response. Dr. Rynes stated, in part:

> Based on the objective criteria, there is no reason why the patient cannot commute five days per week to Olympia. Ms. Baker can work a maximum of 8 hours per shift, day or evening shift only. In my medical opinion the adjusted hours Ms. Baker has been working are too long and certainly could aggravate her condition.
>
> Based on her subjective symptoms of pain and fatigue, she may not be able to commute. If you wish her to continue to work, an adjustment has to be made with the patient regarding her symptoms of pain and fatigue and work demand. If the patient could work one day a week in Seattle, the best day of the week for her would be Wednesday.

2.33 By letter dated March 10, 2000, Ms. Choe responded to Appellant's concerns regarding accommodation. Ms. Choe asked Appellant to submit a flextime request to DCTED Employee Services. She also stated that she would allow Appellant to telecommute from her residence on Wednesdays, that Appellant was to continue to provide medical verification, and that when Appellant was away from the Olympia office, she would maintain a check-in and check-out procedure with her supervisor. Ms Choe also agreed to provide Appellant with a telephone headset to use while at work.

Appellant's Allegations of Discrimination, Harassment and Retaliation:

2.34 During the disciplinary process, Ms. Choe took seriously Appellant's allegations of discrimination, harassment and retaliation and asked for an independent investigation of the allegations. Marcia B. Ruskin, Attorney at Law, investigated Appellant's allegations and on June 30, 2000 she completed her report. In summary, Ms. Ruskin found that Appellant exaggerated or misinterpreted information and found no grounds to support any of Appellant's allegations.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the issue of reasonable accommodation is not before the Board, but asserts that the agency provided Appellant with accommodation. Respondent argues that the agency did everything possible to facilitate Appellant doing her job. Respondent contends that Appellant failure to produce a well thought out timeline, failure to produce a useable applicant's handbook in spite of working on the project from November 8, 1999 to January 2000, and failure to delete her voice messages constituted inefficiency, insubordination, neglect of duty and gross misconduct. Respondent further contends that Appellant's actions rose to the level of gross misconduct because her failure to produce a usable product adversely affected the agency's ability to carry out its functions and her failure to delete her voice messages made it impossible for people to contact her. Respondent also contends that Appellant failure to provide medical verification constituted insubordination. Respondent asserts that misconduct occurred and that the level of discipline was appropriate in light of the agency's long history of trying to work with Appellant.

3.2 Appellant argues that her health issues and her deteriorating performance were intertwined and contends that if the reasonable accommodation issue had been allowed to run its course, this discipline would not have taken place. Appellant contends that prior to Mr. Baxbaum becoming her supervisor, she was allowed to work in Seattle two days a week and her performance was acceptable. Appellant contends that her performance began to suffer when she was no longer allowed to work in Seattle two days a week. In regard to the applicant manual, Appellant asserts that the timeline was sufficient, that she was doing what she understood she was supposed to do, and that the document was expected to have a lot of carry over from prior versions. Appellant further asserts that Respondent had no reason to suspect she was abusing medical leave and therefore, no reason to require her to provide medical verification. Appellant also asserts that she attempted to, but had difficulty with, deleting her voice mail, however, she eventually took care of the problem. Appellant contends that in determining the level of discipline, Respondent failed to

consider her need for accommodation or her poor working relationship with Mr. Baxbaum. Appellant further contends that disciplinary sanction was too severe.

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 Inefficiency is a failure to produce the desired effect with the minimum of energy and time. Droege v. Dep't of Information Services, PAB No. D88-024 (Littlemore, Hrg. Exam.), aff'd by Board (1988).

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

4.6 Respondent has met its burden of proof that Appellant neglected her duty, was inefficient and was insubordinate when she failed to produce a detailed, timely timeline for the applicant's handbook, failed to produce a complete, useable product, and failed to comply with the lawful directives of her supervisor in regard to the applicant's handbook project, deleting her old messages and providing medical verification.

4.7 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).

4.8 Respondent has failed to prove that Appellant's failure to produce a usable applicants handbook rose to the level of gross misconduct. Respondent failed to show that Appellant's behavior adversely affected the agency's ability to process grant applications or to serve its customers.

4.9 Respondent has met its burden of proof that Appellant's failure to delete her voice messages was flagrant and rose to the level of gross misconduct. Appellant behavior made it impossible for internal and external customers to contact her. This action adversely affected the agency's ability to provide service to its customers.

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 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).

4.11 Respondent has proven by a preponderance of the credible evidence that Appellant was inefficient, insubordinate, neglected her duty and committed gross misconduct. There is no credible evidence that shows Appellant was incapable of performing the duties assigned to her or that agency discriminated, harassed, or retaliated against her. Under the totality of the proven facts and circumstances, a fourteen-day suspension is appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Paula Baker is denied.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____

Gerald L. Morgen, Vice Chair

_____

Leana D. Lamb, Member

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