BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CAROL DAMRON, Appellant, v. DPEARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. DISM-99-0025 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 office of the Personnel Appeals Board in Olympia, Washington, on April 6, 7, 25, May 15, 22 and June 7, 2000. LEANA D. LAMB, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Carol Damron was present and was represented by Christopher Bawn, Attorney at Law. Respondent Department of Social and Health Services was represented by Valerie Petrie, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal. Respondent alleges that Appellant designed, developed and implemented a loss of earning power compensation process without the necessary approval from the Department of Labor & Industries; allowed false and misleading information to be submitted in order to acquire loss of earning power compensation

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from the Department of Labor and Industries which resulted in the unlawful and unauthorized use of L&I funds; and after being informed that the process was illegal, failed to advise her superiors and directed the process to be implemented.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. MOTION

2.1 At the conclusion of Respondent's case, Appellant moved to Set Aside the Discipline for Respondent's 1) failure to implement the disciplinary action in a timely manner and 2) failure to prove that she participated in any unlawful activity as alleged in the disciplinary letter. Appellant first argued that Respondent's rules required her supervisor to initiate a Personnel Conduct Report within 14 days from the time when she first suspected misconduct. Appellant asserted that Respondent failed to initiate a Personnel Conduct Report within 14 days of discovering the suspected misconduct. Appellant argued that Respondent knew of the suspected misconduct well before placing her on administrative leave and that three investigations were conducted prior to a PCR being initiated against her. Appellant argued that the time which subsequently elapsed far exceeded Respondent's requirements to initiate the PCR process within 14 days.

2.2 Secondly, Appellant argued that the discipline should be dismissed as a matter of law because of a ruling issued by the Board of Industrial Insurance Appeals (BIIA) that a school district had not erred in prepaying sick leave to employees. In that case, the employees were required to repay the advances upon their return to work. Appellant argued that the BIIA decided as a matter of law that it was not an unlawful or illegal procedure to advance employees money because they were not considered wages. Therefore, Appellant argued that Respondent failed to show that she committed any unlawful activity.

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2.3 Respondent argued that when the appointing authority learned of Appellant's activities, Appellant was placed on home assignment while an internal audit was conducted. Respondent argued that on December 2, 1997, the audit resulted in a finding of potential criminal misconduct or misconduct of a very significant nature. Respondent contended that DSHS had the authority to request that the Washington State Patrol (WSP) conduct an investigation into Appellant's alleged misconduct. Respondent contends that the WSP subsequently referred the case to the Thurston County Prosecutor's office for review. After the Prosecutor's office declined to file criminal charges against Appellant, the issue was referred to the internal affairs office. Respondent argued that once the appointing authority received the internal affairs report, the department felt that misconduct had occurred, and a PCR was issued against Appellant on December 23, 1998. Respondent argued the PCR was initiated 14 days after a showing of misconduct on Appellant's part. Regarding Appellant's second motion, Respondent argued that this appeal is not a matter before the BIIA and that the facts of this appeal are distinct and not related to facts dealing with a school district. Respondent argued that they provided ample evidence that the process Appellant designed and implemented was not lawful. Respondent argued that Appellant's motion should be denied.

2.4 The Board denied Appellant's motion to set aside the discipline ruling that 1) Appellant failed to provide any documentation or exhibit which outlined the requirements of Respondent's PCR policy and 2) that this Board's jurisdiction is separate from the BIIA, and therefore the Board is not bound by BIIA rulings.

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III. FINDINGS OF FACT

3.1 Appellant Carol Damron was a Claims Program Manager and permanent employee for Respondent Department of Social and Health Services in the Employee Services Division of the Office of Risk Management. 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 May 14, 1999.

3.2 By letter dated April 29, 1999, Robert J. Conner, Director of the Employee Services Division of DSHS, informed Appellant of her dismissal from her Washington Management Service position as a Claims Program Manager effective May 18, 1999. The letter of dismissal made the following allegations:

> 1. You designed, developed, and directed implementation of a process within the Transitional Return to Work (TRTW) program without prior approval from the Department of Labor [and] Industries (L&I). You allowed false and misleading employee salary information to be provided to L&I. The false information was used to acquire Loss of Earning Power (LEP) compensation when the employee had not lost earnings;
>
> 2. You developed the LEP process that involved the unlawful and unauthorized use of the L&I funds (approximately $24,000) for purposes other than what it was intended for; and
>
> 3. After you were clearly advised by L&I that the process was illegal, you misrepresented it to your supervisors; told them that you had obtained proper authorization; and directed implementation of the process.

3.3 Appellant began her employment as a Claims Program Manager (CPM) with DSHS in May 1989. In 1996, Appellant's position was converted to a Washington Management Service position. As a CPM, Appellant had statewide responsibility for managing the department's industrial insurance assault benefit claims program, the return to work program and claims program.

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Appellant's duties included developing, implementing, and writing policies and procedures, supervising several professional staff, and managing a budget for her work unit.

3.4 In the early 1990s, Rainier School entered into an agreement with its labor union which required the institution to fully compensate injured workers participating in the Transitional Return to Work Programs. The basic goal of the Transitional Return to Work Program was to assist injured state employees to return to their employment as soon as reasonable.

3.5 Appellant participated in developing a policy for the department's Transitional Return to Work (TRTW) Program. Respondent's TRTW Personnel Policy 554 allowed qualified injured employees to be compensated for working in a transitional return to work assignment in a lower paying position as if the employee were working in his/her regular position. Employees who were unable to return to work full time or at their prior earning capacity were included under this policy. The goal of the policy was to prevent reducing an injured worker's wages. As a part of the agreement, DSHS agreed to make up any reduction in the employee's wage. The policy also stated that the employee's compensated wage could include approved industrial insurance Loss of Earning Power compensation if the TRTW assignment was in a position with a lower salary range.

3.6 Loss of Earning Power (LEP) benefits were paid by the Department of Labor and Industries (L&I) to qualified injured employees working in positions at a lower wage than the wage received at the time of injury. L&I paid employees the difference in salary between their regular assignment and the lower paying assignment. RCW 51.32.090 governs the partial restoration of earning power. Subsection 6 provides that employees receiving full salaries from their employers are not entitled to receive Loss of Earning Power benefits from L&I.

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3.7 Beginning 1994, Appellant drafted and developed procedures to assist DSHS employees in obtaining L&I LEP benefits. Appellant's goal was to comply with the union/management agreement while at the same time recouping the portion of the money paid by the institution to its employees. Appellant's procedures called for employees to submit requests for LEP compensation even though they were receiving their full salary from DSHS. In addition to her part in drafting Policy 554, Appellant developed a form which would provide L&I with all the information needed by L&I claims mangers to determine whether to pay LEP benefits. In the method designed by Appellant, the employee signed the DSHS LEP form while it was primarily blank. A personnel employee at the institution would complete the form indicating that the employee received a lower level salary even though the employee had actually received their full salary. Appellant's procedure also required that the employee, after receiving the LEP compensation from L&I, either authorize the institution to deduct the amount from subsequent paycheck or repay the institution directly.

3.8 On November 28, 1995, Appellant provided Kathy Willis, Program Manager at L&I, a memo entitled, "Loss of Earning Power for DSHS Transitional Return to Work Assignments." Attached to the memo was the LEP form which Appellant designed and a three-page document entitled Loss of Earning Power Procedures. The memo, in summary, advised Ms. Willis of DSHS's desire to obtain L&I's acceptance of the form. Appellant informed Ms. Willis that DSHS wished to implement the procedures as soon as possible and she asked Ms. Willis for feedback. Appellant's draft of the Loss of Earning Power Procedures stated that DSHS staff would inform employees in TRTW assignments and that DSHS would continue to pay their regular wage even though they were working in positions paid at lower wages. This would prevent employees from waiting for L&I to pay LEP benefits. The procedure also outlined the two methods for DSHS to recover the LEP benefit.

3.9 Appellant never received a response from Ms. Willis.

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3.10 By memo dated June 27, 1996, Appellant provided a number of DSHS area personnel managers with the Loss of Earning Power Procedures and the LEP form. Appellant informed the managers that the procedures for recouping some of the department's costs of Transitional Return to Work assignments were available for implementation.

3.11 The Loss of Earning Power Procedures drafted by Appellant stated, in part:

> Use the following procedures for all transitional return to work (TRTW) assignment in which the wage value of the work performed is less than the wage value of the regular job . . .
>
> A. Field Claim Specialist
>
> . . . .
>
> 5. Discuss all steps in the process with the employee. If the reason for LEP is TRTW assignment, explain to the employee the department will continue the regular wage up front so the employee will not have to be burdened with waiting for the Department of Labor and Industries (L&I) compensation. There are two methods for the institution to recover the LEP. . . .

3.12 On August 22, 1996, Appellant met with Carol Edinger, Operations Manager for L&I, and another representative of L&I, Jolene Bellows. During the meeting, they discussed the latest version of the DSHS LEP form and potential problems with Appellant's program because the employees would not be eligible to receive L&I LEP if they were paid full wages by their employer. Appellant subsequently approached her staff, advised them of the problems with the program and directed them to contact claims management specialists at the institutions and advise them that the program was to be put on hold pursuant to L&I's request.

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3.13 Nancy Carlson, Claims Management Specialist (CMS), was supervised by Appellant from July 1993 though May 1997. Ms. Carlson was the CMS responsible for working directly with Rainier School. Sometime in 1996, Ms. Carlson advised Appellant that Rainier School would be interested in being a project pilot for Appellant's DSHS LEP program. With Appellant's consent, Ms. Carlson drafted a memo dated August 5, 1996, to Rainier School staff. Attached to the memo were the Loss of Earning Power instructions and the DSHS LEP form.

3.14 In late September 1996, Rainier School implemented the LEP program designed by Appellant. A number of difficulties in implementing the program ensued, including problems with employees not repaying the agency and difficulties in calculating the wages.

3.15 On October 29, 1996, Ms. Willis, Ms. Edinger and Appellant met to discuss the TRTW process and the issue of which wage to report on the LEP form. During the meeting, Ms. Willis and Ms. Edinger clearly informed Appellant that it was illegal for employees tom request L&I LEP by reporting anything other than the actual wages paid by their employer.

3.16 Appellant testified that in November 1996, she and Ms. Carlson met to discuss Rainier School's desire to become a pilot for the project. Appellant testified that she informed Ms. Carlson that based on the problems with the procedure, they should not implement the process at Rainier School. Appellant testified that Ms. Carlson became angry and stated that Rainier School would implement the process regardless. Appellant further testified that Ms. Carlson failed to inform her that Rainier School had already started the program. Appellant testified that she told Ms. Carlson that she had to devise a system in which the employees were paid out of some fund other than a wage, that Ms. Carlson was the lead on the project, that she did not want to be actively involved in the program any longer, and that she did not think that they could come up with a method to make the program function.

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3.17 Ms. Carlson denies that Appellant told her that she was the lead on the project or that Rainier could not continue to utilize the process.

3.18 Appellant's testimony that she divested herself of any responsibility of the project is not credible. Appellant was the Claims Program Manager with a high level of responsibility and authority within the Industrial Insurance Claims Section and, more importantly, she was Ms. Carlson's supervisor and had the authority to direct Ms. Carlson to stop working on the project. It is not believable that a higher level manager would divest themselves of a project which she knew to be illegal and then allow a subordinate to continue working on the project. We find that Appellant was aware that Rainier School had implemented the program and she failed to tell others in her unit, including her superiors and Ms. Carlson, that the program was unauthorized and unlawful.

3.19 Rainier School employees and personnel staff continued to request L&I LEP compensation using the method developed by Appellant.

3.20 On June 10, 1997, Appellant, Ms. Carlson, and several claims management specialists from Rainier School met to clarify issues that Rainier School staff had with the LEP program. There were also concerns with the LEP form that employees signed because the form misrepresented the actual amount of salary that employees received.

3.21 Cherie Greenwood, Chief of the Office of Risk Management, supervised Appellant from May 1997 through October 1997. She first became aware of the LEP procedure at the June 10, 1997 meeting which she attended at Rainier School. During the meeting, Appellant did not inform attendees that she had been previously informed by L&I that the procedure was not legal.

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3.22 Because a representative from L&I was not present, Ms. Greenwood and Ms. Carlson discussed the possibility of an L&I representative coming to meet with them. Ms. Carlson initiated a call to L&I and left a message for Si Sarton, Claims Trainer, with a detailed message about the department's desire to have an L&I representative meet with them to discuss the procedure and L&I's method for calculating LEP benefits. Ms. Sarton returned Ms. Carlson's call and left her a message saying the method was illegal, that Appellant had been previously informed of this, and that the process could not be authorized.

3.23 After receiving the information provided by Ms. Sarton, Ms. Greenwood consulted with her supervisor. By letter dated October 21, 1997, Betsy Sawyers, Director of Employee Services, placed Appellant on administrative leave so that an investigation of suspected misconduct could be initiated.

3.24 By memo dated October 24, 1997, Ms. Sawyers requested an administrative review of Appellant's alleged misconduct. A subsequent audit was conducted which concluded that Personnel Policy 554 was flawed because there was no entitlement to LEP benefits if the employee earned their regular wages.

3.25 On December 9, 1997, Respondent requested that the Washington State Patrol conduct an investigation into Appellant's suspected fraudulent activities.

3.26 In September 1998, the Washington State Patrol issued its investigative report and the case was referred to the Thurston County Prosecutor's Office for review. On October 8, 1998, Steve E. Straume, Deputy Prosecuting Attorney, issued a determination that the Prosecutor's Office was declining to file charges against Appellant and the Department of Social and Health Services.

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3.27 On October 15, 1998, Respondent's Internal Affairs office initiated an administrative investigation. Detective Jerry Schlesser conducted the investigation and on December 9, 1998, issued a summary of the evidence gathered.

3.28 After reviewing all of the investigative reports, Ms. Greenwood initiated a Personnel Conduct Report dated December 23, 1998, alleging that Appellant had designed, developed and directed implementation of a process within the Transitional Return to Work Program which required injured employees to apply for L&I LEP benefits even though they had received their full wages. The PCR further alleged that Appellant continued to allow the program to be implemented even after she was told that the process was unlawful and unauthorized.

3.29 The Department of Labor and Industries paid $23,958.04 in benefits to DSHS employees submitting requests for LEP compensation using Appellant's procedures. On May 7, 1999, DSHS repaid the $23,958.04 overpayment to L&I.

3.30 Edith Rice was the Risk Management Chief from October 1995 through June 1997. Ms. Rice supervised Appellant during this time period. Ms. Rice relied on Appellant to manage the agency's TRTW Program. She and Appellant also met on a weekly basis to discuss work issues. Ms. Rice credibly testified that Appellant represented to her that she was in constant contact with L&I staff regarding the DSHS LEP Program, that the feedback she received from L&I was positive, and that Appellant gave her verbal assurance that the program was progressing. Ms. Rice credibly testified that Appellant gave her no indication that L&I staff had determined that Appellant's procedure was unlawful or that Appellant had delegated the program to Ms. Carlson.

3.31 Robert J. Conner, Director of the Employee Services Division, was Appellant's appointing authority. Prior to imposing the disciplinary action against Appellant, Mr. Conner reviewed the

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investigative reports from the Washington State Patrol, the internal audits, Appellant's employment record, which indicated that Appellant had no former disciplinary actions, as well as a written statement from Appellant. Mr. Conner concluded that Appellant intentionally implemented a program that she knew was not lawful and wantonly disregarded information that the process was unlawful. She further aggravated the situation when she withheld information from her superiors and coworkers regarding L&I's position on the process, continued to allow the process to be implemented after she was informed that it was unlawful, and then attempted to blame her subordinate for her actions. Mr. Conner did not believe Appellant's assertions that she informed her staff that the program was illegal.

3.32 Mr. Conner concluded that Appellant's misconduct warranted termination because Appellant was in a high level position of responsibility and authority and was relied upon by the agency as an expert on industrial insurance matters. Mr. Conner also believed that the money repaid to L&I was a direct result of Appellant's instruction that the program be implemented. Mr. Conner felt that Appellant had destroyed the level of trust necessary to be in the position of authority and that her behavior and lack of ethical conduct was contrary to the code of conduct expected of any employee and violated the Governor's Executive Order on Ethical Behavior.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that Appellant was dismissed for cause after she designed and implemented an unlawful procedure without obtaining proper authorization from the Department of Labor and Industries. Respondent argues that Appellant was charged with implementing a procedure that was not legal under L&I law, which is not a criminal law. Respondent argues that Appellant designed a procedure and form whereby employees misrepresented their earnings to L&I in order to qualify to receive L&I LEP benefits which they otherwise would not have been entitled to receive. Respondent asserts that there was no issue with the form designed by Appellant, but

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rather with the directive that employees report lower wages than what they received. Respondent argues that as a result, numerous employees received L&I benefits to which they were not entitled. Respondent further argues that Appellant failed to advise management and staff that L&I had denied use of her process and that once Appellant was advised by L&I that the process was unlawful, she continued to allow it to be carried out. Respondent further argues that the end result of the process designed by Appellant was that the department received LEP benefits to which they were not entitled. Respondent argues that termination is warranted based on Appellant's neglect of her duty as a manager with department-wide control, her failure to provide accurate information to management and those she worked with, and her failure to accept any responsibility for her actions and instead shifting the blame to her subordinate.

4.2 Appellant denies that her actions were willful and wanton. Appellant contends that the program was designed to benefit the employee. Appellant argues that she was attempting to reduce the amount of industrial insurance benefits being paid to injured workers by the department and that in doing so, she developed a procedure to advance monies to employees. Appellant argues that she designed a process where employees were paid their full wages up front and later reimbursed the agency when they received L&I benefits. Appellant argues that it was not until October 1996 that L&I informed her that it was their position that her procedure was not legal. Appellant contends that the department did not challenge L&I's position and therefore did not have a final determination as to whether the procedure was illegal or not. Appellant argues that she openly worked on the project and made no attempts to misrepresent the status of the project to her superiors. Appellant argues that the Respondent failed to prove that the system was illegal. Appellant argues that the Prosecutor's Office did not believe that she was committing fraud because everyone in the agency knew what she was doing. Appellant argues that Respondent failed to prove that what she did was illegal, that she developed the process without L&I's approval, or that she misrepresented the fact. Appellant argues that termination is too severe.

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V. CONCLUSIONS OF LAW

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

5.2 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).

5.3 Respondent has proven that Appellant directed her staff to implement the DSHS LEP Program she developed despite clear information from L&I staff that the process did not conform with L&I requirements. Additionally, Appellant was dishonest and failed to be forthright with her employer when, after becoming aware in October 1996 of L&I's position on the LEP process, she failed to notify anyone within DSHS that the process was unlawful, failed to instruct her subordinate that DSHS did not have L&I's approval to utilize the process, and failed to ensure that Rainier School stopped implementation of the process. Respondent has met its burden of proving the charges in the termination letter of April 29, 1999.

5.4 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).

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5.5 In assessing the level of discipline, we have considered the totality of the credible evidence and given weight to Appellant's long history with the department, the absence of any former disciplinary actions in her employment record, and her position of responsibility and authority within the department. We find no reason to overturn Appellant's termination. Based on a preponderance of the credible evidence and testimony, and the totality of the proven facts and circumstances, we conclude that the sanction imposed was appropriate. Therefore, the disciplinary sanction of dismissal should be upheld.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Carol Damron is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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