BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

HOWARD BERRY, Appellant, v. UNIVERSITY OF WASHINGTON, Respondent.	)	Case No. DISM-01-0061 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, WALTER T. HUBBARD, Chair. The hearing was held on April 18, 2002, at the University of Washington in Seattle, Washington. GERALD L. MORGEN, Vice Chair, reviewed the record and participated in the decision in this matter. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant was present and represented himself *pro se*. Jeffrey W. Davis, Assistant Attorney General, represented Respondent University of Washington.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, insubordination, violation of University policies, and gross misconduct. Respondent alleged that Appellant threatened violence against management and coworkers, failed to work during work hours, failed to follow instructions and was excessively absent from work.

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); Thomas v. Dep't

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481

of Corrections, PAB No. D86-118 (1987), aff'd, Thurston Co. Super. Ct. No. 87-2-01522-7 (1990); Dahn v. Dep't of Social & Health Services, PAB No. D91-007 (1991); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Burgess v. University of Washington, PAB No. D93-151 (1994); Chung v. University of Washington, PAB No. D94-079 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

II. FINDINGS OF FACT

2.1 Appellant Howard Berry was a Custodian and a permanent employee for 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 August 6, 2001.

2.2 By memorandum dated June 11, 2001, Henry DePosit, Manager of Program Operations, recommended to Gene Woodard, Director of Facilities Services Custodial Division, that Appellant be dismissed for:

> [g]ross misconduct, violation of University and Department policies on workplace violence, threatening violence against management and another UW employee, continued failure to work during work hours, failure to follow instructions, insubordination, neglect of duty, failure to follow absentee reporting procedures, and excessive absenteeism.

2.3 On October 29, 1998, Appellant began employment with Custodian Services in the Facilities Services Department at the University of Washington. When he began employment, Appellant was provided a copy of the Department's rules and procedures manual. Appellant's work history contains a November 28, 2000, letter of counseling for arguing with a co-worker.

2.4 Tyrone Pinckney was Appellant's supervisor and Hyong Kang was Appellant's lead. As a Custodian, Appellant was assigned to collect trash and recyclables, dust mop and wet mop floors

and stairs, clean restrooms, and perform required floor maintenance in his assigned areas. Appellant worked Monday thru Friday from 5 a.m. to 1:30 p.m.

2.5 On December 29, 2000, Mr. Pinckney received an e-mail complaint about trash not being emptied and cleaning not being done in Appellant's assigned area, Kane Hall. At 9 a.m., Mr. Pinckney and Mr. Kang went to Kane Hall and found Appellant sitting in a chair in custodial closet when he should have been working. Mr. Pinckney instructed Appellant to complete his cleaning tasks. When Mr. Pinckney and Mr. Kang inspected Appellant's work area at 12:30 p.m., they found that Appellant had not completed the cleaning. Mr. Pinckney found Appellant in a copy room visiting with a female staff person. Appellant did not have his cleaning equipment with him and when Mr. Pinckney asked him why he had not finished the cleaning, Appellant said that he did not have time.

2.6 On January 2, 2001, Appellant called in sick. He was on approved leave of absence from January 2, 2001 to March 19, 2001. However, Appellant failed to return to work on March 19, 2001, as scheduled and failed to call in his absence. When he returned to work on March 20, 2001, Appellant indicated that he was accustomed to being off work and that he overslept on March 19.

2.7 When Appellant reported to work on March 20, 2001, he was assigned to clean the Brooklyn Building. Mr. Kang gave Appellant an orientation to the building. When Mr. Kang inspected Appellant's work area at 10:20 a.m., he found that only the wastebaskets had been emptied. When Mr. Kang brought the lack of cleaning to Appellant's attention, Appellant handed Mr. Kang the building keys and left the work area without permission.

2.8 Appellant was not happy with the assignment to the Brooklyn Building and wanted to be reassigned to his former area. At 11:45 a.m. on March 20, 2001, Appellant meet with Mr. Pinckney and Mr. DePosit to discuss his work assignment. During their discussion, Appellant indicated that

he was upset and that he was "close to doing something." Mr. DePosit told Appellant he could leave and suggested that Appellant contact Employee Advisory ServiceS.

2.9 On March 27, 2001, Appellant called in sick for a prescheduled appointment. The department's leave policy requires employees to provide advance notice of absences for prescheduled appointments.

2.10 On March 29, 2001, at 8:45 a.m., Mr. Pinckney and Mr. Kang found Appellant in the Odegaard Undergraduate Library (OUGL) sitting in a chair with his eyes closed. Appellant indicated that his stomach hurt and complained that Mr. Pinckney and Mr. Kang were "watching" him too much.

2.11 On April 3, 2001, Appellant was assigned to clean a stairwell in OUGL. At 8:45 a.m. Mr. Kang found that Appellant had cleaned only 15 steps. Mr. Kang could not locate Appellant. Mr. Kang informed the acting supervisor, Carlos Conde, about the situation. Mr. Kang and Mr. Conde attempted to locate Appellant. At 10:20 a.m., they found Appellant sitting a chair with his eyes closed and with a newspaper in his lap. They woke Appellant and told him that they had been unable to locate him for over an hour. Mr. Conde said that he was going to recommend that Appellant be charged with leave without pay. Appellant indicated that they could charge him for the whole day and then left the building and clocked out.

2.12 On April 5, 2001, Mr. Pinckney informed Appellant that he was going to recommend disciplinary action.

2.13 On April 25, 2001, Nancy Hautala, the Meany Theater Coordinator, reported to Mr. Pinckney that on April 24, 2001, she observed Appellant sleeping in the performer's lounge from 9:25 a.m. to past 10:25 a.m.

2.14 Also on April 25, 2001, Custodian Desidero DeCastro reported to Mr. Conde that while he and Appellant were in Mr. DeCastro's custodial closet, Appellant said that he was very stressed and depressed and that he was thinking of going home, getting a gun, and bringing the gun to work the next day to kill himself. Subsequent to this statement, Appellant told Mr. Conde that he was sick and going home.

2.15 On April 26, 2001, Appellant did not report for work at 5 a.m. He telephoned in at 5:45 a.m. and stated that he was having car trouble and might be in later in the day. However, Appellant did not appear for work and was subsequently charged with leave without pay.

2.16 On April 27, 2001, Appellant was expected to report to work at 8 a.m. He arrived at 9:35 a.m. and was placed on home assignment. Appellant was directed to attend his previously scheduled sessions with the Employee Advisory Service (EAS) office. Appellant met with EAS on April 27 and 30. He was subsequently released to return to work. Appellant was expected to return to work on May 7, 2001.

2.17 On May 7, Appellant telephoned Mr. DePosit and requested emergency vacation leave. Mr. DePosit granted Appellant's request and directed him to report to work the following day at 8 a.m.

2.18 On May 8, 2001, Appellant did not report to work until 8:35 a.m. Appellant was charged with leave without pay. After reporting for work, Appellant met with Mr. DePosit and Amy Hawkins, Human Resource Representative. Mr. DePosit provided Appellant with a letter of return to work expectations. The letter directed Appellant to resume his regular shift from 5 a.m. to 1:30

p.m. and to assume his full range of duties and responsibilities. In addition, the letter instructed Appellant to follow through with his referral appointment from EAS and to provide confirmation by May 18, 2001, that he had done so.

2.19 On May 9, 2001, Appellant did not report to work. When Mr. DePosit contacted him at 7:35 a.m., Appellant indicated that he would be to work by 9 a.m. Appellant did not arrive until 9:40 a.m. Appellant was charged with leave without pay.

2.20 On May 15, 2001, Appellant left work three hours prior to the end of his shift because he was sick. On May 16, 2001, Appellant did not report to work and did not call in. Appellant was charged with leave without pay for May 16.

2.21 On May 21, 2001, Appellant called in sick and said that he would report to work between 9 a.m. and 10 a.m. Appellant did not call again and did not report to work.

2.22 On May 22, 2001, Appellant was assigned to assist with cleaning in OUGL. Custodian Aniceta Gabuat complained to Mr. Pinckney and Mr. Conde that Appellant had not completed emptying the trash and that he was sleeping somewhere. Mr. Conde found Appellant sitting on the corner of a table in the custodial closet. Mr. Conde and Appellant went to find Mr. Pinckney. Mr. Pinckney asked Appellant what part of his assignment he completed. Appellant said that he had emptied the trash, but Mrs. Gabuat pointed out areas where Appellant had missed the trash. Appellant said that Mrs. Gabuat had told him not worry about those areas, but Mrs. Gabuat denied making the statement. Appellant then began to walk away. Mr. Pinckney asked him twice where he was going, but Appellant did not reply. Appellant then returned, gave his work keys to Mrs. Gabuat and said he was going home. Appellant then went to Mr. DePosit's office and complained that he had too many bosses. Mr. Pinckney suggested that Appellant return to work, but Appellant

clocked out ten minutes later. Mr. DePosit talked with Mrs. Gabuat at the end of the shift and she confirmed that she had seen Appellant sitting down in the custodial closet before Mr. Conde found him. She also said the Appellant had accused her of being one of his many "bosses."

2.23 On May 23, 2001, Appellant was working with Mr. Kang in Kane Hall. At 11:30 a.m., as they were on their way to the basement to get more "bagits," Appellant grabbed a wooden meter-stick from a table, waived it in the air and said he was going to beat people with it. Mr. Kang asked Appellant if he was going to beat him and Appellant replied that he didn't know. Earlier in the shift, Appellant left his custodial cart outside the main entrance of the library blocking the entrance for two hours. When the OUGL coordinator asked Appellant to move his cart, he moved to the front entrance of Kane Hall.

2.24 At 1:25 on May 23, 2001, Appellant went to Mr. DePosit's office and said that he had "had enough," and that he had almost gotten in a fight in the parking lot. Appellant told Mr. DePosit that he had a confrontation with Mrs. Gabuat's husband, who was also a UW employee. Mr. DePosit followed Appellant to the parking lot and continued to talk to him. During the conversation, Appellant accused Mr. Kang of "telling things" to Mrs. Gabuat. Mr. DePosit told Appellant that Mr. Kang was not involved and speculated that Mrs. Gabuat told her husband about the previous day's incident. Appellant then said, "I'm not taking this any more. This is going to get settled tonight. Either me or one of my boys will take care of them. I know where they live." Appellant then went to his car, looked around and then returned to Mr. DePosit and said, "I won't take this. I know where they live and I'm going to settle this tonight." Appellant then left in his car.

2.25 Mr. DePosit reported the incident to the UW police, who sent Officer Rocco to talk with Mr. DePosit. While they were talking, Mr. Gabaut came into Mr. DePosit's office. Mr. Gabuat

indicated that he initiated the conversation with Appellant, but that Appellant became angry and wanted to fight.

2.26 Subsequently, Mr. Deposit contacted Appellant and placed him on Administrative Leave. Appellant then called Caroline Currin, Human Resources Consultant, and repeated to her the threats he had made against Mr. And Mrs. Gabuat.

2.27 On June 5, 2001, Appellant and his representative met with Mr. Woodard, Mr. DePosit and Ms. Hawkins. During the meeting, Appellant admitted that he became "overheated" and made threatening statements about Mr. and Mrs. Gabuat and admitted that he had been caught sleeping during work hours. Mr. DePosit recommended to Mr. Woodard that Appellant be dismissed.

2.28 Mr. Woodard concurred with the recommendation. Mr. Woodard determined that Appellant was aware of the UW and department policies prohibiting workplace violence and that he had been previously counseled against such behavior. Mr. Woodard also determined that Appellant was not reporting for work or reporting his absences in accordance with policies, that his work was unsatisfactory, and that he failed to provide follow-up documentation from EAS. Mr. Woodard concluded that Appellant neglected his custodial duties, and that his actions created a hardship for clients and staff and created an unsafe work environment. Mr. Woodard forwarded the recommendation to Jeraldine McCray, Associate Vice President for Facilities Services.

2.29 By letter dated July 3, 2001, Ms. McCray notified Appellant of his dismissal, effective at the end of the workday on July 5, 2001. Ms. McCray stated, "dismissal is immediate because of the threats you made towards another UW employee. Your continued employment may result in damage to state property or may be injurious to others."

2.30 The UW's Policy and Procedure on Workplace Violence indicates, in part, that reports of threatening incidents are taken seriously and that individuals who engage in such behavior may be removed from the workplace and subject to dismissal. The policy also indicates that the UW does not tolerate behavior that threatens violence, including physical acts or oral statements.

2.31 The Custodial Services Department Attendance/Leave Policy addresses notification of absences. The policy requires, in part, that any absences, which have not received prior approval, must be reported daily before the start of the shift. The policy asks employees to provide as much advance notice of unscheduled absences as possible and to provide a minimum of one hour notice if the employee will not be able to report to work.

2.32 The Custodial Services Department Policy concerning disciplinary actions states, in part:

> [T]he following are examples of some of the kinds of behavior which may be grounds for disciplinary action, which may include . . . termination. . . .
>
> 1. Refusing to carry out instructions or perform the work assigned by supervision (insubordination).
> . . . .
>
> 4. Fighting, or using abusive or threatening language or conduct.
> . . . .
>
> 6. Displaying unacceptable tardiness and/or absenteeism and/or patterns of absenteeism.
> 7. Failing to notify Division of absences from work as specified in the notification of absence procedure.
> 8. Leaving assigned work area without permission during working hours.
> 9. Lying down or sleeping on the job during working hours.
> . . . .
>
> 13. Failing to perform duties to the cleaning standards of the Division, or neglecting one's duty.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant had an obligation to perform the work assigned to him or to tell someone if he was not able to complete his work. Respondent contends that Appellant repeatedly failed to complete the cleaning tasks assigned to him. Respondent asserts that Appellant had multiple incidents of sleeping or sitting down on the job and multiple episodes of calling in late or not at all for his unexpected absences. However, Respondent asserts that the most substantial basis for Appellant's dismissal was his threat against the Gabauts. Respondent argues that no matter how angry an employee becomes, it is never acceptable for an employee to make a threat against another. Respondent argues that the University is obligated to provide a safe place for employees to work. Respondent contends that Appellant's blatant neglect of duty, repeated violation of department and UW policies and unrefuted threats to the Gabauts warrant dismissal.

3.2 Appellant argues that for two years his performance and workplace behavior were fine, but that after he received an on-the-job injury, he became depressed, stressed and was experiencing personal problems. Appellant contends that after his injury, management's attitude toward him changed and asserts that his injury was the basis for his termination. Appellant admits that all of the allegations against him are true, but contends that management did not consider his medical problems, kept assigning him to different buildings, and watched everything he did, including monitoring his use of the bathroom. Appellant further contends that he did not personally threaten Mr. Gabaut, that he did not have the time to hurt anyone, and that the University failed to provide him the help he needed following his injury.

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). Sleeping on duty constitutes neglect of duty. Thomas v. Dep't of Corrections, PAB No. D86-118 (1987), aff'd, Thurston Co. Super. Ct. No. 87-2-01522-7 (1990). An employee has a duty to be present to perform work and failure to report to work or leaving the work site without authorization constitutes neglect. Dahn v. Dep't of Social & Health Services, PAB No. D91-007 (1991).

4.4 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).

4.5 Excessive tardiness or excessive absenteeism that causes a burden or undue hardship of fellow employees or a reduction in productivity is just cause for discipline in compliance with WAC 251-11-030. Burgess v. University of Washington, PAB No. D93-151 (1994).

4.6 Violation of policy is established by facts showing the existence and publication of the policy, Appellant's knowledge of the policy, his/her failure to comply with the policy and presumes a deliberate act. Chung v. University of Washington, PAB No. D94-079 (1995)

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 met its burden of proof that Appellant neglected his duty, was insubordinate and violated UW and Department policies. Appellant was clearly aware of the performance and behavior expectations set forth by his supervisors. Yet, Appellant failed to complete his custodial work, failed to comply with supervisory directives to complete his work, slept and failed to work during work hours, left work without permission, failed to call in his absences, failed to report to work when he was scheduled to work, and threatened the Gabauts. Such workplace behavior is intolerable.

4.9 Under the totality of the proven facts and circumstances of this case, dismissal is not too severe. The appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Howard Berry is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481