BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TIMOTHY FREDERICK, Appellant, v. OFFICE OF THE SECRETARY OF STATE, Respondent.	)))))))))))	Case No. DISM-98-0064 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 NATHAN S. FORD Jr., Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on August 3, 1999.

1.2 **Appearances.** Appellant Timothy Frederick was present and was represented by Melissa Denton, Attorney at Law, of Ascher & Denton, PLLC. Respondent Office of the Secretary of State was represented by Helen Arntson, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, gross misconduct and willful violation of published agency policies or regulations. Appellant admittedly drafted and delivered a letter sexually propositioning a union representative of the Washington Federation of State Employees. Appellant used a Secretary of State envelope to deliver the letter.

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1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Schonauer v. DCR Entertainment, 79 Wn. App. 808 (1995), *review denied*, 129 Wn. 2d 1014 (1996); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); 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 Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Timothy Frederick was a State Senior Archivist and permanent employee for Respondent Office of the Secretary of State in the Division of Archives and Records 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 November 19, 1998.

2.2 By letter dated October 30, 1998, Donald F. Whiting, Assistant Secretary of State, informed Appellant of his dismissal effective November 15, 1998. The termination letter charged Appellant with neglect of duty, gross misconduct and willful violation of the published agency policies or regulations (policies preventing harassment and violence in the workplace) for preparing and delivering a letter during work hours to an area representative of the Washington Federation of State Employees which proposed that she meet Appellant for a sexual liaison. Appellant placed the letter in a Secretary of State envelope (Exh. R-3).

2.3 The facts of this case are not in dispute. Appellant admits that on October 5, 1998, he typed a letter to his Washington Federation of State Employees (WFSE) area representative, Michelle Castanedo, during his lunch hour. Appellant placed the letter in a Secretary of State envelope with Ms. Castanedo's name typed on the front of the envelope and personally delivered the letter to Ms. Castanedo's place of work, leaving it with the receptionist.

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2.4 Appellant's letter read in relevant part:

> Dear Michelle:
>
> If a archive's (sic) labor/management meeting were scheduled to be held in Bellingham; I would look forward to driving up there to meet you on the late afternoon of the day before the meeting at your accommodations were (sic) we could do each other "all night long."

2.5 After receiving and reading the letter, Ms. Castanedo became concerned. She notified her supervisor and also spoke to the Secretary of State's personnel manager, who requested that she provide the agency with a copy of Appellant's letter.

2.6 Appellant's letter to Ms. Castanedo was unwelcome and unsolicited. Ms. Castanedo was assigned to work as an area representative for WFSE members of the Division of Archives. Ms. Castanedo's duties included visits to the office of the Division of Archives. She was acquainted with Appellant only on a professional level and interacted with him during labor/management meetings. Ms. Castanedo also interacted with Appellant as his representative during an earlier grievance proceeding. Ms. Castanedo found the contents of Appellant's letter to her offensive and felt that she could no longer conduct union business with the Division of Archives if Appellant were to be present.

2.7 At Ms. Castanedo's request, Mr. Whiting made arrangements to schedule future union bargaining meetings at a location other than the Archives Building where Appellant's office was located.

2.8 Respondent has adopted a Policy Against Harassment which defines harassment as "verbal, physical, and visual conduct that creates an intimidating, offensive, or hostile working environment or that interferes with work performance." The policy further states:

> Unwelcome or unsolicited sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature constitutes sexual harassment when any of the following occur:

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. . . .

C. When such conduct unreasonably interferes with an individual's work performance or statutory rights, or creates an intimidating, hostile or offensive working environment.

(Exh. R-2)

2.9 Respondent has adopted a policy on Preventing Workplace Violence which prohibits threats (any expression, verbal or physical, of an intention to inflict harm) and disruptive behavior (behavior that creates conditions dangerous either to self or others). (Exh. R-2).

2.10 Donald Whiting, Assistant Secretary of State, was Appellant's appointing authority. After speaking with Ms. Castanedo about her concerns with the contents of Appellant's letter and reviewing a copy of the letter, Mr. Whiting, by letter dated October 13, 1998, scheduled to meet with Appellant on October 19, 1998. The October 13 letter also directed Appellant not to contact Ms. Castanedo for any purpose and informed him that if he wished to arrange for assistance from the Washington Federation of State Employees, he was to contact Diane Lutz, Ms. Castanedo's supervisor, at the Olympia headquarters office. (Exh. R-2).

2.11 At the October 19 meeting, Mr. Whiting met with Appellant and gave him an opportunity to provide an explanation of the circumstances surrounding his letter to Ms. Castanedo. Mr. Whiting credibly testified that during the meeting, Appellant acknowledged that he used a Secretary of State envelope to deliver the letter to Ms. Castanedo even though he was aware that he was not to use agency supplies for personal use. Mr. Whiting was also concerned that Appellant's use of an agency envelope inferred that the contents of the envelope concerned agency-related correspondence. Appellant further confirmed with Mr. Whiting that he intended for the letter to be a sexual proposition.

2.12 Based on Appellant's admitted conduct, Mr. Whiting concluded that Appellant's letter constituted sexual harassment by creating an offensive working environment for Ms. Castanedo which impeded her

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ability to work with the agency and its employees in her capacity as the union representative for the Division of Archives' bargaining unit. Mr. Whiting also believed that Appellant's behavior created a potential for violence in the workplace.

2.13 Mr. Whiting determined that disciplinary action was warranted. In determining the level of discipline, Mr. Whiting determined that Appellant's actions reflected negatively on the agency and impeded its ability to work with Ms. Castanedo, the designated union representative, and violated the agency's policies prohibiting discrimination, sexual harassment and violence in the workplace. Mr. Whiting noted that despite counseling and his awareness of the appropriate use of state resources, Appellant continued to use resources inappropriately. Based on Appellant's failure to modify his inappropriate behavior, Mr. Whiting concluded that any form of disciplinary action other than dismissal would have kept Appellant in the workplace and in a position to repeat his behavior. Even when considering Appellant's long work history with the Division of Archives, Mr. Whiting concluded that dismissing Appellant was the appropriate sanction.

2.14 Appellant began his employment with the state of Washington in 1974. Appellant has no history of formal disciplinary action but was previously counseled informally about using state time and resources for personal use. (Exh. R-7).

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that there is no dispute of fact that Appellant drafted a letter propositioning Ms. Castanedo to meet him for a sexual liaison and used an agency envelope to deliver the letter. Respondent contends that Appellant had been informed that personal use of agency resources was prohibited. Respondent argues that Appellant's use of the envelope implied that the letter contained official agency correspondence. Respondent further contends that the contents of Appellant's letter violated the agency's policies which prohibit sexual harassment and prevent discrimination and workplace violence. Respondent

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further argues that Appellant's actions interfered with the agency's ability and the ability of other employees to work with the Washington Federation of State Employees on union-related business. Respondent further contends that Appellant's actions hindered Ms. Castanedo's ability to perform her duties as a union representative for the division's bargaining unit.

3.2 Appellant contends that the letter to Ms. Castanedo was a personal note which he put in a Secretary of State envelope to ensure confidentiality and to ensure that she received the letter. Appellant denies that he purposefully used an agency envelope to imply that the letter concerned official business. Appellant argues that his letter to Ms. Castanedo was a "mildly phrased proposal for an assignation between consenting adults" and that he left it up to Ms. Castanedo to accept or decline his offer. Appellant contends that had Ms. Castanedo responded and rejected his offer he would have been embarrassed but would not have pursued her any further. Appellant argues that his letter was innocuous, that it did not constitute sexual harassment or establish a pattern of sexual harassment, that his use of an agency envelope was minimal and that his appeal should be granted.

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 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,

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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).

4.4 Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. Schonauer v. DCR Entertainment, 79 Wn. App. 808 (1995), *review denied*, 129 Wn. 2d 1014 (1996).

4.5 Respondent has proven that Appellant's admitted conduct violated the agency's policy against harassment. His conduct was unwelcome, unsolicited and created an offensive working environment for Ms. Castanedo. However, Respondent has failed to establish that Appellant's letter to Ms. Castanedo violated the agency's policy preventing workplace violence. Other than the appointing authority's belief that the incident created a violent environment for other employees, Respondent did not prove that Appellant's letter to Ms. Castanedo communicated an intention to inflict harm or that it created a condition dangerous to himself or others.

4.6 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).

4.7 Respondent has met its burden of proof that Appellant neglected his duty to use agency resources for work related purposes only. Appellant's use of a Secretary of State envelope to deliver a personal letter, although *de minimis*, constitutes a neglect of Appellant's duty when viewed in light of his past conduct and his awareness of the appropriate use of state resources. Although the disciplinary letter alleged that Appellant typed and delivered the letter to Ms. Castanedo during the work day, Respondent did not prove this allegation.

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4.8 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).

4.9 Respondent has an obligation to its employees to provide reasonable access to representatives of the Washington Federation of State Employees. After Ms. Castanedo informed the appointing authority that she was uncomfortable attending union bargaining meetings where Appellant would be present, Mr. Whiting made reasonable arrangements to schedule meetings at a location other than the Archives Building. Furthermore, in his October 13, 1998 letter, Mr. Whiting advised Appellant that he was to communicate with Diane Lutz, Field Services Director for the Washington Federation of State Employees, for any union business he needed to conduct. Appellant's misconduct may be characterized as flagrant misbehavior, but any adverse impact on the agency's ability to carry out its functions was effectively and reasonably mitigated by the steps Respondent and the WFSE took to prevent Appellant from having any contact with Ms. Castanedo. Respondent did not prove that Appellant's behavior unreasonably interfered with or affected the agency's ability to provide its employees with access to union representation. Therefore, the charge of gross misconduct is not sustained.

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 We recognize the difficulty an appointing authority faces whenever imposing disciplinary action against an employee. The appointing authority must impose a sanction which has the desired effect on the employee, for example, modifying or stopping the inappropriate behavior, without imposing a sanction which is too severe. The appointing authority may impose informal corrective action or impose formal

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discipline for just cause, including reducing the employee's salary, demoting, suspending or dismissing the employee.

4.12 The appointing authority here testified that he did not believe any disciplinary action other than dismissal would have the desired effect of stopping Appellant's behavior. This Board's role is not to second guess whether the appointing authority imposed the correct sanction, but to determine, based on the facts, evidence and testimony presented to us, whether the charges were proven, and if so, whether the sanction imposed was appropriate under the circumstances. The Board is not limited by the same constraints placed upon the appointing authority by the merit system rules in determining whether dismissal or a lesser form of discipline is an appropriate sanction.

4.13 The Board takes seriously incidents of harassment in the workplace. However, under the circumstances presented here, we conclude that Appellant's dismissal is too severe a level of discipline. Our decision here does not mean that Appellant or other employees have permission to sexually proposition other employees or persons conducting business with an agency. However, Respondent has failed to meet its burden of proof with respect to several of the allegations, including that Appellant prepared and delivered the letter during work time; that Appellant's conduct unreasonably interfered with the agency's ability to provide union access to its employees; and that Appellant violated the agency's policy preventing violence in the workplace. Furthermore, Ms. Castanedo was not an employee of the agency and as such was not required to interact with Appellant on a daily basis.

4.14 Appellant's behavior was clearly unprofessional and inappropriate and is not condoned by the Board. However, we must consider this as a single, isolated incident of inappropriate behavior by an employee who has no history of formal disciplinary action in 24 years of state service and our conclusion that all the allegations were not proven.

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4.15 These mitigating factors notwithstanding, the seriousness and circumstances of this incident warrants a severe disciplinary sanction. We find that a lengthy suspension is sufficient to prevent recurrence, to deter others from similar misconduct and to maintain the integrity of the program. Therefore, the disciplinary sanction should be modified to a suspension, effective November 15, 1998, to the date of this order.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Timothy Frederick is granted in part. The dismissal effective November 15, 1998 is modified to a suspension effective November 15, 1998, to the date of this order.

DATED this _____ day of _____, 1999.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Nathan S. Ford Jr., Member

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