BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KENNETH HATHAWAY, Appellant, v. WASHINGTON STATE UNIVERSITY, Respondent.	Case No. DISM-00-0053 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 LEANA D. LAMB, Member. The hearing was held at the Washington State University, Compton Union Building, Pullman, Washington, on March 8 and 9, 2001.

1.2 **Appearances.** Appellant Kenneth Hathaway was present and was represented by Dolores Cooper, Attorney at Law, of Cooper Law Office. Donna Stambaugh, Assistant Attorney General, represented Respondent Washington State University (University).

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for gross misconduct, mistreatment or abuse of fellow workers, neglect of duty and willful violation of the University's sexual harassment policy. Respondent alleges that Appellant made demeaning and threatening comments to female coworkers, used profanity in the work place and touched the waist and breasts of a coworker.

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1.4 **Citations Discussed.** WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Johnson v. Lower Columbia College, PAB No. D93-077 (1994); 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).

II. MOTION

2.1 As a preliminary matter to the hearing, Appellant presented argument on his Motion in Limine to Restrict Evidence at the Hearing. Appellant argued that pursuant to WAC 358-30-150(5), it served counsel for Respondent with a subpoena duces tecum and that Respondent's counsel refused to comply. Appellant argues that service of the subpoena on Respondent's counsel was the only viable manner for him to receive discovery relevant to the core issues in this case, to obtain relevant information to prepare a defense to the charges, to obtain potential information for cross examination of potential witness, and to obtain potential impeachment information. Appellant argued that Respondent's refusal to comply deprived him of the opportunity to review this information. Appellant argued that as a result, he was reduced to conducting an evidentiary hearing blindfolded.

Appellant argued that the subpoena duces tecum was issued by the attorney of record and in compliance with civil rules (CR). Appellant asserted that counsel for Respondent had the opportunity to move that the subpoena duces tecum be quashed or modified, but that Respondent failed to do either. Appellant argued that under evidence rule (ER) 45(b), a stand alone subpoena duces tecum is appropriate. Appellant further argued that whenever both parties are represented by counsel, service shall be made upon the attorney by delivering or mailing a copy of the subpoena. Appellant argued that the information he requested was limited in nature and that interrogatories

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were not necessary because the subpoena duces tecum was specifically designed to obtain that type of information.

2.2 Respondent argued that it filed objections on January 31, 2001, to the subpoena 2duces tecum pursuant to ER 45(d), which allows the party who receives a subpoena that they believe to be faulty to file objections without requiring a motion to quash. Respondent outlined five bases for its objection to the subpoena. First, Respondent asserted that a subpoena cannot be served by fax or mail. Secondly, Respondent argued that a subpoena duces tecum does not stand alone, but is issued in conjunction with a deposition. Third, Respondent argued that the party receiving the subpoena duces tecum is to be given 30 days to produce the documents, rather than the four day turnaround given by Appellant. Four, Respondent asserted Appellant's subpoena duces tecum inappropriately required the creation of documents rather than merely requesting information. Finally, Respondent argued that Appellant's request for any and all personnel records of witnesses or individuals who would assist in anyway in the hearing was irrelevant and an invasion of privacy. Respondent asserted, however, that it delivered to Appellant a number of documents which Respondent believe to be relevant. Respondent argued that whenever objections are filed, the other party is not entitled to those documents without a court order. Respondent argued that, in this case, Appellant could have sought an order from the Board over a month ago.

2.3 The Board considered the arguments and denied Appellant's motion. We now clarify our oral ruling. Attorneys of record may use discovery procedures in a manner consistent with the civil rules for the superior courts of the state of Washington. WAC 358-30-150(1). The Board looks to the civil rules for procedural guidance in employee appeals. Accordingly, the Board encourages open communication between the parties or their representatives during discovery. Under CR26(b)(1) the parties may obtain discovery regarding any matter, not privileged, which is

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relevant to the subject matter involved in the pending action. In this case, the parties received a proposed list of cut-off dates which established that discovery was to be completed by February 6, 2001. The parties were further informed requests for discovery were to be served with sufficient time for responses to be completed by February 6, 2001. Appellant failed to make a discovery request or request an extension of time in a timely manner. We are persuaded by Respondent's argument that Appellant had ample time to participate in the discovery process, but failed to do so. Therefore, we reaffirm our earlier ruling.

III. FINDINGS OF FACT

3.1 Appellant Kenneth Hathaway was an Offset Printer Operator Supervisor and permanent employee for Respondent Washington State University (WSU) at the Cooperative Extension. 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 July 31, 2001.

3.2 By letter dated June 30, 2000, Sally E. Horton, Associate Director for the Cooperative Extension, informed Appellant of his dismissal effective July 17, 2000. Ms. Horton charged Appellant with gross misconduct, mistreatment of fellow workers, neglect of duty, and willful violation of WSU's sexual harassment policy. Ms. Horton's letter specifically alleged that Appellant 1) was abusive and used profanity during an exchange with a female coworker on February 24, 2000; 2) made demeaning and threatening comments to female subordinates and used profanity in the work place and; 3) touched the waist and breasts of a female subordinate.

3.3 Appellant had been employed by the University for over 18 years. Appellant had no history of formal disciplinary or corrective action. Appellant's work performance was not evaluated for a

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number of years, but evaluations prior to 1993 reflect that he met or exceeded normal work requirements.

3.4 Appellant worked in the Cooper Publications Building and was the direct supervisor over three female employees: Tricia Gash, Offset Printer Operator; Sue Berckefeldt, Pamphlet Binder 2; and Barbara Knudtson, Pamphlet Binder 1. Appellant and Ms. Gash worked in the press room and Ms. Berckefeldt and Ms. Knudtson worked in the bindery. The bindery and the press room are located next to each other.

3.5 On the morning of February 24, 2000, Sue Berckefeldt approached Appellant in the press room and requested a "folding bone." Ms. Gash was also in the press room at the time the exchange occurred. The folding bones, which are used to make sharp creases when folding paper, were stored in Appellant's desk. Appellant retrieved the folding bone, held it up, waved it in front of Ms. Berckefeldt and sternly told her he wanted it returned by the end of the day. Ms. Berckefeldt felt intimidated by Appellant's demeanor.

3.6 Prior to Appellant's departure from work at the end of the day, Ms. Berckefeldt returned the folding bone, and she laid it on Appellant's press. Appellant said "thank you," Ms. Berkefeldt respondent "you're welcome," and she returned to the bindery. When Appellant picked up the folding bone he noted that the folding bone was chipped. Appellant did not believe that Ms. Berckefeldt had returned the same folding bone he had given her earlier, but instead returned a damaged one. Appellant became angered and annoyed and stated out loud, "this isn't the same fucking bone that I gave her." Appellant then stated that Ms. Berkefeldt was "playing games," and he headed in the same direction as Ms. Berkefeldt. Appellant was angry and visibly shaking. Appellant was not directing his comments at anyone, but rather he appeared to be talking to himself.

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3.7 Ms. Knudtson was present when Appellant entered the bindery and confronted Ms. Berckefeldt. Appellant angrily yelled at Ms. Berckefeldt and told her that she had not returned the same bone and that he was not going to stoop to her level. Appellant then left work for the remainder of the day.

3.8 Ms. Berckefeldt was shaken by Appellant's aggression, and she immediately reported the incident to Appellant's acting supervisor. An investigation into the incident ensued, and during the course of being interviewed, Ms. Berckefeldt alleged that in the summer of 1999, Appellant "rubbed the contours of her waist and side of her breasts." Ms. Berckefeldt further alleged that for the four year period she worked for Appellant, he frequently made threatening, demeaning and intimidating remarks to her and other female staff.

3.9 Respondent has proven that Appellant regularly directed the following comments to his female subordinates:

-my pet peeve is women who think they are mechanics;
-I am a good person, but I am not a nice person;
-I know more about you than your family does;
-I've got you girls where I want you;
-paybacks are hell;
-if I go down, we all go down;
-I can't fire you, but I can make things hard for you;
-It must be that time of the month;
-Appellant also used words such as "damn" and "hell" in the work place.

3.10 Ms. Gash, Ms. Berckefelt, and Ms. Knudtson perceived Appellant's remarks as intimidating, demeaning, and threatening. Appellant's comments to Ms. Gash, Ms. Berckefeldt and Ms. Knudtson were not triggered by any one incident, but it appeared to them that he made the comments in an attempt to exert his power and authority over them.

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3.11 Although alleged by Respondent in the disciplinary letter, there was no evidence or testimony to support that Appellant bragged about how he "got in women's pants" or "I've got it and know how to use it."

3.12 In determining whether Appellant inappropriately touched Ms. Berckefeldt, we have considered the description of the alleged incident as told by Ms. Berckefeldt and Ms. Knudtson. Ms. Berckefeldt was working on a collator when a wire became stuck and she was unable to fix it. Ms. Berckefeldt asked Appellant for assistance. Appellant came to Ms. Berckefeldt's aid and was standing to her left. Ms. Berckefeldt bent down at the waist in front of the collator to show Appellant the location of the wire.

3.13 Ms. Berckefeldt testified that Appellant reached around her with his right hand and touched the side of her waist and the side of her breast. Ms. Knudtson testified that Appellant put his arm around Ms. Berckefeldt and rested his hand on her breast. However, based on the description given by both witnesses, we do not find that Appellant could have physically reached around Ms. Berckefeldt and touched her in the manner described. We find that in the course of assisting Ms. Berckefeldt, Appellant may have accidentally touched or brushed up against her, but that it was not in a sexual manner.

3.14 During the course of a number of years, Ms. Gash, Ms. Knutdson and Ms. Berckefeldt reported Appellant's comments to his supervisor, Jim Spangler. Mr. Spangler began supervising Appellant in 1983 when Appellant began working in the press room. Mr. Spangler was aware of an incident in which Appellant yelled at Ms. Knutdson and Ms. Berckefeldt, however, Mr. Spangler insisted that they write Appellant a memo to tell him that they did not want to be treated in that manner. Appellant and Mr. Spangler's work relationship had deteriorated and Mr. Spangler did not want to confront Appellant. Mr. Spangler failed to address with Appellant the feedback he had

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received regarding Appellant's intimidating demeanor and remarks. Mr. Spangler testified that use of offensive language was frequent but that it was acceptable within the department. He further testified that no one in the department complained of Appellant's use of foul language.

3.15 The University has adopted and published a policy which prohibits sexual harassment. The policy defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education, submission to or rejection of such conduct is used as a basis for employment or education decisions or such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating or hostile or offensive environment. Appellant was aware of this policy.

3.16 Sally Horton, Associate Director of the WSU Cooperative Extension, made the decision to terminate Appellant from his position. Prior to making this determination, Ms. Horton reviewed the results of the investigation and Appellant's written response to the allegations. In addition, Ms. Horton met with Appellant. Ms. Horton concluded that Appellant engaged in a pattern of behavior for a number of years that was abusive toward women. Ms. Horton believed that Appellant's behavior in the more recent years had become more controlling and abusive as he tried to exert his power over his female subordinates. Ms. Horton concluded that Appellant also engaged in sexual harassment. Ms. Horton believed that Appellant caused a great deal of disruption in the workplace which caused both Ms. Berckefeldt and Ms. Gash to feel extreme stress and anxiety. Ms. Horton believed that Appellant's behavior was egregious because of the supervisory position he held and that his conduct impacted the University's ability to provide a safe work environment for employees. Therefore, Ms. Horton concluded that terminating Appellant and removing him from the work place was the appropriate sanction.

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IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that Appellant has exhibited a pattern of abusive threats, intimidation and demeaning treatment of women and asserts that violence in the workplace should not be tolerated. Respondent argues that as a supervisor, Appellant must be held accountable for his reprehensible behavior. Respondent argues that the three women Appellant supervised testified credibly and all relayed similar stories. Respondent argues that Appellant used his supervisory position to exert power over and control the behavior of his subordinates. Respondent argues that the admissions by Appellant are consistent with testimony from subordinates. Respondent contends that Appellant received appropriate training and understood University policy. Respondent argues that Appellant created a hostile and intimidating environment for his employees. Respondent further asserts that Appellant's conduct is so intolerable and unacceptable that dismissal is the only appropriate sanction.

4.2 Appellant argues that Respondent has not met its burden of proof. Appellant admits that he used cuss words, but denies that he directed his remarks at others and denies he used the term "fuck." Appellant asserts that there was a pervasive use of cussing in the department. Appellant denies that he threatened his subordinates and denies that he touched anyone in a sexual manner. Appellant acknowledges "he lost it on the folding bone incident," but asserts that the incident was blown out of proportion and does not warrant termination. Appellant asserts that Ms. Berckefeldt was "out to get him." Appellant contends that he was terminated just one year before he was eligible for retirement, that he was denied due process and his firing came as a total shock to him. Appellant argues that in the years he worked for the University, he received no disciplinary action, was not advised that his conduct was inappropriate and needed to be corrected, and was not warned that failure to change could lead to termination. Appellant asserts that he was denied legal counsel during the pre-termination hearing with the appointing authority.

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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; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

5.3 Abuse of fellow employees is established when it is shown that the employee wrongfully or unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-077 (1994).

5.4 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).

5.5 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).

5.6 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).

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5.7 Appellant had a duty to use good judgment, conduct himself appropriately and to treat his fellow employees with dignity and respect. In his role as a supervisor, Appellant also had a responsibility to act professionally and to model appropriate and acceptable behavior. Respondent has proven by a preponderance of the credible evidence that Appellant neglected his duty during the February 24, 2000 incident with Ms. Berckefeldt. Furthermore, Appellant's reaction to the incident showed a lack of self control, was unreasonable and constitutes mistreatment of a coworker. Respondent has proven that Appellant displayed outbursts of anger and used profanity in the work place and made belittling and intimidating comments to his subordinates. Respondent has proven by a preponderance of the evidence that Appellant's misconduct interfered with the University's ability to provide a safe and secure work environment for its employees and rises to the level of gross misconduct.

5.8 Respondent has failed to meet its burden of proving that Appellant inappropriately or sexually touched Ms. Berckefeldt or that he violated the University's policy prohibiting sexual harassment.

5.9 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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5.10 Appellant was an 18 year employee of the University. During this time, Appellant received no indication that his conduct was unacceptable despite his supervisor's knowledge that Appellant's subordinates felt intimidated by Appellant's demoralizing comments, his aggressive and hostile demeanor and inappropriate displays of anger. While we do not condone this type of behavior from any employee, especially from an employee in a supervisory position, the University failed to provide Appellant with notice that his behavior was unacceptable or with the opportunity to modify his behavior. Furthermore, Respondent has failed to prove the charge that Appellant sexually harassed Ms. Berckefeldt. In light of the circumstances and mitigating factors, we find that termination is too severe. Appellant should be demoted to a position where he can be more closely monitored. Therefore, the appeal should be granted in part and Appellant should be reinstated to a position as an Offset Printer Operator 1.

VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kenneth Hathaway is granted in part, the disciplinary sanction is modified, and he is demoted to a position as an Offset Printer Operator 1.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Leana D. Lamb, Member

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