BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DUANE DORMAIER, Appellant, v. WASHINGTON STATE PATROL, Respondent.	Case No. SUSP-99-0033 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 Washington State Patrol, 2715 Rudkin Road, Union Gap, Washington, on November 3, 2000 and November 29, 2000.

1.2 **Appearances.** Appellant Duane Dormaier was present and was represented by Mark Lyon, General Counsel for the Washington Public Employees Association. Mitchel R. Sachs, Assistant Attorney General, represented Respondent Washington State Patrol.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a 15-day suspension for gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent specifically alleged that Appellant was uncooperative, disruptive, insubordinate, disobeyed the directive of a superior and made untruthful statements during the investigation into the incident.

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1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); 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. FINDINGS OF FACT

2.1 Appellant Duane Dormaier is a Deputy State Fire Marshal and a permanent employee for Respondent Washington State Patrol (WSP). 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 October 6, 1999.

2.1 By memorandum dated September 8, 1999, Mary Corso, State Fire Marshal for the Fire Protection Bureau, informed Appellant of his 15-calendar day suspension, effective October 1, 1999 through October 15, 1999. Ms. Corso cited gross misconduct and willful violation of the published employing agency or department of personnel rules or regulations as the causes for Appellant's suspension. Ms. Corso specifically alleged that Appellant's behavior during an office move was uncooperative and disruptive, that he was insubordinate and disobeyed the directive of a superior, and that he was untruthful during the investigation into the incident.

2.3 Appellant works as a Deputy State Fire Marshal at the Washington State Patrol office in Union Gap, Washington. As a Deputy State Fire Marshal, Appellant is responsible for developing and implementing statewide fire programs, addressing fire training, life safety inspections and fire investigation. Appellant works in cooperation with state, federal and local officials in public

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education, standards and accreditation and emergency mobilization of statewide structural fire resources. Appellant has no prior disciplinary action.

2.4 In September 1998, the Washington State Patrol District 3 office was moving into newly constructed facilities. The move into the new building occurred from September 14 through September 17. Prior to the move, plans were provided to management and staff throughout the construction phase. As floor plans changed, they were posted for staff to review their new work spaces.

2.5 Captain David Karnitz was in charge of the physical move into the new facilities. After Captain Karnitz received the final floor plan, he posted a copy on the wall of the old facility. In addition, Captain Karnitz provided staff with tours of the new building prior to the move. Captain Karnitz was not responsible for design of the office layout or for assigning work spaces to staff.

2.6 Dennis Craig, Senior Architect in Property Management, was the project manager for the relocation to the new building. Mr. Craig credibly testified that prior to moving into the new facility, he and Appellant met to discuss Appellant's location in the building and to determine whether Appellant's furniture and cabinets fit into his office space. Mr. Craig ordered additional furniture for Appellant's office based on these discussions.

2.7 On an undetermined date, Appellant approached Captain Karnitz and expressed his interest in moving from the office he was assigned in the new building, room #204, to a larger office designated as room #203. Room #203 was designated to be a conference room.

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2.8 Captain Karnitz checked with Mr. Craig to determined whether it was possible for Appellant to move into room #203. Mr. Craig informed Mr. Karnitz that it would not be possible because furniture had already been ordered for Appellant's office and for the conference room. Mr. Craig informed Captain Karnitz that the larger room was better suited to accommodate the conference room furniture and he advised against the switch. Based on Mr. Craig's testimony, we find that the conversation between Appellant and Captain Karnitz occurred prior to September 14.

2.9 The following day Captain Karnitz informed Appellant that he could not move into room #203 because it was going to be used as a conference room.

2.10 Cary Everson, hired by Respondent to assist in the moving process, credibly testified that he was approached by Appellant on at least two occasions to ask if he could switch into the larger office. Mr. Everson informed Appellant that he could not because the larger office was designated to be a conference room. He also advised Appellant that he had to remain in the office he was assigned. Mr. Everson credibly testified that he spoke to Appellant about the switching of rooms approximately two days before Appellant's office, which was one of the last offices to be moved into the new facility, was physically relocated. Mr. Everson described Appellant as not being cooperative and having a poor attitude during the move. Appellant subsequently moved into his assigned office, room #203.

2.11 In January 1999, Appellant reported several fire code violations in the new facility to Captain Karnitz.

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2.12 On January 22, 1999, Captain Karnitz e-mailed Mary Corso, Appellant's supervisor, with his concern that Appellant's reporting of the code deficiencies was connected to the denial of Appellant's request to switch offices. In his memo, Captain Karnitz expressed his concern over Appellant's demeanor and asserted that Appellant's reason for bringing forth the code deficiencies occurred after Captain Karnitz had denied Appellant's request to change offices. Captain Karnitz wrote that Appellant

> started the open code violation issue the moment I explained to him the office switch could not be made. . . . What was further offensive is that after I explained the denial and the reasons for it, he went behind my back to Property Management personnel. He was given two more denials. . . .

2.13 As a result of Captain Karnitz' email, an Administrative Investigation and a Washington State Patrol investigation were conducted to investigate the issues surrounding Appellant's conduct during the move. The evidence establishes that the Respondent conducted a fair and objective investigation into allegations of Appellant's misconduct.

2.14 As a part of the investigation, Appellant was interviewed on April 20, 1999. During the course of the interview Appellant stated that he did not know which office he was assigned to until the day of the move, he denied that he spoke to Captain Karnitz about switching offices prior to the actual move, and he asserted that Captain Karnitz informed him that he could move into the conference room after the open house.

2.15 Appellant testified before us that he spoke to Captain Karnitz about switching offices on the day of the move or one day prior to the move and that he was told he could switch offices after the open house. Captain Karnitz denies making that statement to Appellant.

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2.16 Based on the testimony of Captain Karnitz, which is corroborated by the testimony by Mr. Craig and Mr. Everson, Respondent has shown by a preponderance of the evidence that Appellant approached Captain Karnitz about switching offices prior to the day of the move and that he provided false statements throughout Respondent's investigation, specifically that he did not speak to Captain Karnitz about switching offices prior to the move, that he did not know where his office was located until the day of the move, and that Captain Karnitz advised him that he could switch offices after the move was finished. Appellant's assertion that he did not know where his office was located until the day of the move is not believable and further discredits his assertion that Captain Karnitz told him he could switch offices after the open house.

2.17 Respondent has adopted WSP Regulation 8.00.300 which requires that all employees "truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the department which may be asked of them."

2.18 Ms. Corso was Appellant's appointing authority. Prior to making a determination of misconduct, Ms. Corso reviewed the investigative reports and met with Appellant to allow him an opportunity to present mitigating circumstances. Ms. Corso concluded that Appellant intentionally lied during the investigation and noted that his recollection of the events was different from other staff's recollections. Ms. Corso found Captain Karnitz credible and she concluded that his statements about the events were corroborated by other staff. Ms. Corso testified that As a Deputy State Fire Marshal and a representative of the Washington State Patrol, Appellant is expected adhere to a strict code of honesty and integrity. Based on her finding that Appellant lied during the investigation, and based on Appellant's long employment history with the Fire Protection Bureau,

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Ms. Corso concluded that a suspension without pay for 15 calendar days was the appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant was disciplined because he was disruptive during the relocation to the new facility and because he was untruthful during the subsequent investigation. Respondent argues that Appellant was untruthful during the investigation when he 1) stated that he did not have a conversation with Captain Karnitz approximately one week before the move, 2) that he did not know which office he was supposed to occupy until the day of the move, and 3) that Captain Karnitz told him that he could switch offices after the move was completed. Respondent argues that Captain Karnitz, Mr. Craig and Mr. Everson are credible witnesses who provided corroborating evidence that contradicted Appellant's assertions that he was unaware of the location of his office. Respondent further argues that Appellant was disruptive when he insisted and continued to ask others whether he could switch offices after he was told by both Captain Karnitz and Mr. Everson that he had to remain in his assigned office. Respondent contends that Appellant held a position of authority, which included enforcement responsibilities, and must maintain impeccable integrity. Respondent asserts that in determining the sanction, the appointing authority considered Appellant's longevity with the department and that Appellant had no prior disciplinary actions. Respondent asserts that a 15 calendar day suspension is more than reasonable under the circumstances and asks the Board to uphold the discipline.

3.2 Appellant denies that he was untruthful during the investigation and asserts that his statements during the investigation honestly reflected his recollections of the events. Appellant

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argues that his actions in reporting fire code deficiencies are protected activities and that he is required to report violations "of any of the rules, regulations, directives, orders or policies of the state of Washington." Appellant argues that the charges against him are stale and the failure of the Washington State Patrol to initiate a timely investigation has substantially prejudiced him. Appellant asserts that the department's investigation was hampered by the passage of time and that the participants interviewed were unsure of the sequence of events, dates or the substances of conversations. Appellant argues that it is unfair to charge him with discipline where the lapse of time prevents him from being able to prepare an adequate defense. Appellant further asserts that his actions did not constitute gross misconduct, that he was not insubordinate, and that his actions did not constitute willful violation of the department's policy regarding truthfulness.

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

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4.4 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).

4.5 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).

4.6 Respondent has failed to prove by a preponderance of the evidence that Appellant refused to comply with a lawful directive from a superior or that he was uncooperative and disruptive during the move. Respondent has carried the burden of proving by a preponderance of the evidence that Appellant failed to provide truthful answers during the investigation and that his actions constitute a willful violation of WSP Regulation 8.00.300 which required Appellant to truthfully answer questions directed of him. Appellant's dishonesty impaired his integrity as a Deputy State Fire Marshal and rises to the level of gross misconduct. However, we conclude that the sanction imposed, a 15 calendar day suspension, is too severe. Appellant is a long-time employee, this was

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his first offense and there is no history of prior progressive discipline. We conclude that the disciplinary sanction should be modified to a five-day suspension without pay which is sufficient to prevent recurrence, deter others from similar misconduct and to maintain the integrity of Respondent's program

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Duane Dormaier is modified to a five-day suspension without pay.

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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