BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JAMES MARK, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. SUSP-99-0021 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 Airport Ramada Inn, Conference Room 100, Spokane, Washington, on January 26, 2001.

1.2 **Appearances.** Appellant James Mark appeared *pro se*. Patricia A. Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a seven calendar day suspension for neglect of duty, insubordination and gross misconduct, for Appellant's failure to follow a supervisory directive to return a phone call to a client.

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); Countryman v.

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Dep't of Social & Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

II. FINDINGS OF FACT

2.1 Appellant Mark James is a Financial Services Specialist 3 and permanent employee for Respondent Department of Social and Health Services at the Region 1 Spokane North Community Services Office. 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 August 26, 1999.

2.2 By letter dated August 19, 1999, Ben Green, Regional Administrator for the Region 1 Community Services Office, informed Appellant of his seven calendar day suspension without pay effective August 23, 1999. Mr. Green charged Appellant with neglect of duty, insubordination and gross misconduct and alleged that Appellant failed to follow a supervisory directive on May 27, 1999.

2.3 Appellant began his employment with Respondent in October 1991. As a Financial Services Specialist 3, Appellant's duties include determining eligibility for financial, medical and food stamps programs and screening for on-going client eligibility of public assistance programs.

2.4 Appellant received a letter of reprimand dated June 8, 1998 for his refusal to make contact with a client. Appellant's performance evaluations reflect that he is an above average employee who understands the duties and responsibilities of his position.

2.5 The facts of this case are not in dispute. On May 20, 1999, a client on Appellant's caseload filed a complaint that she had been unable to get an appointment with him and that he had not

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returned her phone calls. Earlier in the month, the client's food stamp eligibility had been terminated. On May 25, 1999, Deborah Sicilia, Appellant's lead worker, sent an e-mail to Appellant asking that he contact the client by phone.

2.6 On May 26, 1999, Appellant e-mailed Ms. Sicilia that he would not phone the client. Later that day, Ms. Sicilia phoned the client and explained the loss in her food assistance. The client expressed her frustration that her caseworker had not returned her calls. On the morning of May 27, 1999, Sandy Nelson, Appellant's supervisor, e-mailed Appellant that the client wanted a return phone call from him. Ms. Nelson directed Appellant to call the client that day.

2.7 Appellant responded to Ms. Nelson by e-mail approximately one hour later, stating, "It appears I have not made myself clear regarding this matter. I acknowledge receipt of your email directing me to contact [the client]. I will not do so." Appellant wrote that he would determine the priorities for his own time when she reduced his increasing caseload. Appellant also wrote:

> I should not have to make this choice. You (Department management) should have seen that the work force to meet the increased workloads was in place before those workload increases were implemented. But since you force me to choose, I choose not to cater to the whiny client and instead to see that one more non-whiny client gets the correct benefit in a timely matter instead.

2.8 Appellant did not comply with the directive from his supervisor to contact the client.

2.9 Beginning January 1997, a number of new social programs were implemented which created an increase in the workload for the financial services specialists in the office. The additional workload created difficulties for employees to return calls. In March 1998, Respondent issued a memorandum to employees entitled " service to clients." The memorandum stated that employees were to make every effort to return telephone calls within 24 hours. Employees were advised to

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contact their supervisors with any problems related to processing their workloads and calls. Appellant was aware of and understood this requirement.

2.10 Ben Green, Regional Administrator, was Appellant's appointing authority. In determining the sanction, Mr. Green reviewed the personnel conduct report, which contained Appellant's response to the allegation that he failed to follow a supervisory directive, and Appellant's personnel history, which included prior evaluations and the letter of reprimand. After reviewing the documents, Mr. Green concluded that Appellant's refusal to follow a supervisory directive was blatant misconduct. Mr. Green testified that as a public agency, the department's mission is to gain the full confidence of the public by providing reliable service and responding to legitimate requests. Because Appellant had been previously counseled for an incident in which he failed to call a client, Mr. Green felt that a more severe penalty was appropriate. Mr. Green concluded that a seven-day suspension without pay was the appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant was given a supervisory directive to call a client and that he refused to do so. Respondent argues that Appellant was aware of his responsibility to respond to client calls and should have understood that, in this case, the call became a priority when his supervisor gave him a clear directive. Respondent argues that Appellant had a duty to respond to the client's request that he call her, and that his failure to carry out a requirement of his position constitutes neglect of duty. Respondent argues that Appellant was insubordinate when he did not comply with a supervisory directive. Respondent further argues that Appellant has not shown that the directive was unlawful. Respondent asserts that the effects of Appellant's failure to call the client created additional work for other employees who became involved in the complaint process and ultimately had to make the call for Appellant. Respondent argues that the misconduct affected the agency's ability to carry out its function and rises to the level of gross misconduct. Respondent

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argues that based on Appellant's prior letter of reprimand for similar behavior, a seven-day suspension is appropriate.

3.2 Appellant does not dispute that he failed to call the client as directed to by his supervisor. Appellant, however, argues that his actions are mitigated for a number of reasons. Appellant argues that the May 27, 1999, directive was unlawful because Respondent was assigning him work far in excess of what he could reasonably complete in a 40-hour workweek. Appellant argues that on May 27, he was performing other critical duties of his position and when he asked which of his duties took priority, he received no feedback from his supervisor. Appellant contends that additional duties and responsibilities have been progressively added to his position without any elimination of other tasks, and he has been required to do more work with the same amount of hours. Appellant contends that Respondent assigned him work far in excess of what he could reasonably complete in a 40-hour workweek, and therefore, created an obligation to provide him with overtime compensation. Appellant argues that Respondent violated the Fair Labor Standards Act and WACs 356-15-030 and 356-14-010. Appellant contends that the notice he provided to the client already contained an explanation for the case determination and that it was not his responsibility to respond to a customer complaint when the complaint was about him. Appellant asserts that the duty to respond to the complaint rested elsewhere. Finally, Appellant argues that the department has been engaging in a pattern of discriminatory and harassing actions toward him.

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

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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).

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 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).

4.6 Respondent has proven that Appellant was given a lawful order by his supervisor, and that Appellant refused to comply with that directive. Appellant's response, "I will not do so," was clearly insubordinate and not justified under the circumstances. Although we understand Appellant's concerns regarding the increase in his workload over the past several years, that does not mitigate his refusal to follow a supervisory directive. There is no evidence that Appellant worked overtime hours or that he was not compensated for additional work performed. Respondent has proven by a preponderance of the credible evidence that Appellant neglected his duty and was insubordinate to his supervisor when he failed to call the client. However, Respondent has failed to prove that Appellant's misconduct rose to the level of gross misconduct.

4.7 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

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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. An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.8 In determining whether the sanction imposed here is appropriate, we have considered the facts and circumstances presented, Appellant's tenure as a state employee, his excellent performance evaluations, and the prior corrective action. However, we find that the penalty imposed here is too severe and should be modified to a three-day suspension without pay.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of James Mark is granted in part and the disciplinary sanction is modified to a three-day suspension without pay.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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Leana D. Lamb, Member

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