BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KENNETH ROBERSON, Appellant, v. EMPLOYMENT SECURITY DEPARTMENT, Respondent.	Case No. DISM-99-0046 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 Vancouver Fire Station #83, 213 N.E. 120th Avenue, Vancouver, Washington, on November 8, 2000.

1.2 **Appearances.** Appellant Kenneth Roberson was present and was represented by Edward Earl Younglove III, Attorney at Law, of Parr & Younglove, P.L.L.C. Colin Jackson, Assistant Attorney General, represented Respondent Employment Security Department.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, malfeasance and gross misconduct. Respondent alleges that Appellant submitted false information and received unemployment compensation that he was not entitled to receive.

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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); Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Kenneth Roberson was a Job Service Specialist 2 and permanent employee for Respondent Employment Security Department in the Vancouver Job Service Center. 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 September 8, 1999.

2.2 By letter dated September 3, 1999, Kathy Baros Friedt, Acting Deputy Commissioner, informed Appellant that he was immediately suspended followed by dismissal effective September 20, 1999. Ms. Freidt charged Appellant with neglect of duty, malfeasance and gross misconduct. Ms. Friedt specifically alleged that that Appellant submitted false information and received unemployment compensation that he was not entitled to receive.

2.3 Appellant began his employment with the Washington Employment Security Department (ESD) in Vancouver, Washington in September 1971. Appellant worked as a Job Service Specialist (JSS) 2 for 19 years. As a JSS 2, Appellant interviewed clients to determine eligibility for initial and continued unemployment insurance claims and made referral to job openings. Appellant's primary responsibilities focused on interviewing and referring clients for job placements.

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2.4 Appellant was terminated by Respondent on July 1, 1996. Appellant subsequently appealed his termination to the Personnel Appeals Board (Board), Roberson v. Employment Security Dep't., PAB Case No. DISM-96-0060 (1997).

2.5 Appellant filed a claim for and received unemployment and insurance benefits in Washington. Appellant claimed benefits for approximately eight to nine weeks.

2.6 By Board order dated November 26, 1997, Appellant's termination was modified to a suspension effective July 17, 1996, through the date of the order.

2.7 Prior to his reinstatement by the Board, Appellant worked in Oregon State and was entitled to collect unemployment insurance from the Oregon Employment Department.

2.8 After filing for unemployment insurance benefits, Appellant received an Oregon Employment Department Services Handbook. As a claimant, Appellant was responsible for filing claims in accordance with the instructions in the handbook and for knowing his rights and responsibilities. The Oregon handbook, in part, informs claimants of the following:

- The Weekly Claim Line is touch-tone operated and the system directs the claimant to answer all questions truthfully and warns the caller that earnings reported are matched with wages reported by employers and that false answers may result in overpaid benefits which must be paid back and that false or misleading information is considered fraud;
- The claimant must contact the Employment Department if he/she is underpaid;
- When filing a weekly claim, the claimant reports his/her availability and employment status during the week just ended;
- The systems indicates the dates of the week being claims;
- If trying to claim any other week, the claimant must contact the Employment Department;

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- If the claimant does not want to continue to claim benefits, he/she should just stop reporting.

2.9 On Monday, December 1, 1997, Appellant returned to work pursuant to Board order of November 27, 1997. Appellant worked a total of 32 hours and earned $504.64 during that week.

2.10 On December 8, 1997, Appellant filed a telephonic weekly claim for Oregon unemployment insurance benefits for the period of November 30, 1997, through December 6, 1997. Appellant indicated that he had not worked during the week of November 30, 1997.

2.11 Appellant does not dispute that he worked 32 hours during the week ending December 6, 1997, or that he failed to report his earnings when he filed a claim for unemployment insurance benefits.

2.12 By money order dated November 10, 1998, Appellant repaid the State of Oregon Employment Department $188.

2.13 Appellant testified that he had some difficulties in filing his claim for unemployment benefits in Washington State, and that he asked former coworkers for assistance with it. Appellant experienced further problems with his Oregon State claim, and he testified that he was not paid for a claim week to which he believed he was entitled to receive benefits. In an attempt to obtain payment for that week, Appellant called the Oregon Employment Department and reported that he had not received a check for a prior week. Appellant believed that this phone call had resolved the issue. Appellant subsequently received a benefits check, however, he had expected to receive two checks. Appellant believed that there was still a gap in payment, that Oregon had failed to make the correction, and that he was entitled to an additional check.

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2.14 Appellant testified that rather than contact the Oregon office again, he would attempt resolve the confusion on his own. Appellant did not call the Oregon Employment Department a second time to correct this subsequent error. Appellant testified, "I just knew there was week that got messed and I was trying to straighten it out." Therefore, Appellant filed a weekly claim and indicated that he had not worked for the claim benefit week of November 30, 1997. Appellant stated that his would prompt the system to issue an error notice to him, and could then make clarifications to his claim. Appellant further testified, "I knew the process, they send a statement and then I would clear with them, I would be able to talk to someone to clarify the confusion." Appellant testified that his intent was not to file fraudulent information in order to receive money to which he was not entitled, but to resolve his claim so that he would receive the benefits to which he was entitled.

2.15 Appellant admits that the decision he made to resolve his claim was not acceptable and he further testified that in his position as a JSS2, he would advise his clients against taking such actions and advise them of the repercussions for taking such steps.

2.16 Appellant was aware that there was a cross checking system in place and that his employer would receive verification that he had applied for unemployment benefits.

2.17 Based on Appellant's testimony before us, we find that Appellant knew that it was inappropriate to submit incorrect information regarding his work status, but that he nonetheless submitted false information regarding his claims. There is sufficient evidence that Appellant was

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aware of and understood the claims filing process, the steps necessary to makes adjustments to a claim, and the laws and regulations regarding unemployment insurance claims.

2.18 Kathy Baros Friedt, former Acting Deputy Commissioner, was Appellant's appointing authority when she dismissed Appellant. In determining the level of discipline, Ms. Friedt reviewed the information gathered regarding the incident, including the responses Appellant provided during the investigation. In addition, Ms. Friedt reviewed determinations made by the Oregon Employment Department regarding Appellant's claim. Ms. Friedt testified that Appellant provided explanations regarding his actions that were that were inconsistent, and she did not find Appellant's explanations credible given his experience and length of time as an employee of the Employment Security Department. Ms. Friedt ultimately concluded that Appellant filed a false claim and that his actions were intentional and willful and constituted misconduct.

2.19 Ms. Friedt concluded that Appellant neglected his duty to follow the laws, rules and procedures regarding unemployment insurance benefits, to ensure that the unemployment insurance trust fund was paid out legitimately to himself and others, and to uphold and honor the legitimacy of the unemployment insurance program. Ms. Friedt believed that Appellant made a conscious and willful decision to be dishonest and deceptive, and that she could no longer trust Appellant's integrity and credibility. Ms. Friedt also concluded that Appellant misused state resources when he received compensation for himself that he wasn't entitled to receive.

2.20 Ms. Friedt also concluded that Appellant's actions affected the agency's ability to carry out its functions to ensure that the integrity of the unemployment insurance program. Ms. Friedt also

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concluded that Appellant's misconduct was damaging to the perception of public employees and of state government.

2.21 Ms. Friedt suspended Appellant immediately, followed by his termination, because 1) the department was waiting to receive information from Oregon State, and 2) in order to convey to other employees that misuse of the unemployment insurance trust fund and the use of one's position to adjudicate his/her own claim was abuse of the authority granted to employees as public servants and was not tolerated by the department. Ms. Friedt concluded that termination was warranted even when considering Appellant's long tenure with the department, which included a history of disciplinary actions.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant's termination was justified based on his willful and deliberate misrepresentations on a claim for unemployment benefits. Respondent argues that Appellant's assertions that he did not understand how to file a claim is not credible because he had experience and training in the processing of unemployment insurance claims and had been filing his own claims for several weeks. Respondent argues that Appellant is not credible because he gave several inconsistent explanations during the course of the investigation. Respondent argues that Appellant was inappropriately attempting to adjust his own claim when he deliberately misreported his work status. Respondent argues that Appellant's actions were egregious and that termination was justified based on his willful act, especially when reviewing his history of misconduct with the department.

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3.2 Appellant asserts that based on his belief that Oregon had failed to pay him for a week to which he was entitled, he attempted to adjust his benefits. However, Appellant denies that his intent was to capture money to which he was not entitled or that it was his intent commit fraud when he inaccurately reported his work status. Appellant argues that his explanations have not been inconsistent and that he has consistently given the same explanation using different words. Appellant argues that his conduct occurred off-duty, and he further asserts that there must be some nexus between his off-duty conduct and his employment in order to conclude that the sanction was warranted. Appellant concedes that if there is a finding that his intent was to steal and defraud, that nexus exists, but otherwise asserts that the sanction is too severe, especially for a 27-year employee of the department. Appellant asserts that he made an error in judgment but denies that his intent was to steal or commit fraud. Appellant further argues that there was no evidence to justify his immediate suspension.

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).

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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 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995).

4.5 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).

4.6 The record is clear that Appellant understood that he had to accurately report his earnings, and that he deliberately did not do so because he thought he was entitled to an additional check. However, Appellant did not pursue the formal steps necessary in order to adjudicate his claim. Appellant understood the ramifications for providing false information regarding his work status, and Appellant's reason for providing the false information does not mitigate his misconduct. There is an nexus between Appellant's misconduct and his job: Appellant was responsible for determining client eligibility for unemployment insurance benefits, explaining the process for receiving benefits and assisting in job placement. It was Appellant's duty to explain the unemployment insurance claim process so that situations similar to his own did not occur. Appellant's misconduct violated the integrity of a crucial program administered by the department through its employees.

4.7 Respondent has met its burden of proving by a preponderance of the credible evidence that Appellant neglected his duty to maintain the integrity of the employment insurance program when

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he willfully and deliberately provided false information in order to adjust his claim. However, we do not find that Appellant provided false information with the intent to receive benefits to which he was not entitled. Nonetheless, Appellant had a responsibility and duty to file truthful and accurate information to the Oregon Employment Department. Appellant's actions constitute a neglect of his duty, malfeasance and rise to the level of gross misconduct.

4.8 Although it is not appropriate to initiate discipline based on prior formal and informal disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.9 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. 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).

4.10 WAC 356-34-050 sets forth the conditions under which an employee may be immediately suspended followed by dismissal:

> (1) A permanent employee who is to be dismissed for cause may be suspended without pay for the period between the notice to dismiss and the effective date of the dismissal if the appointing authority believes the good of the service requires the immediate separation of the employee.

4.11 The Board takes seriously Ms. Friedt's concerns and desire to impress upon other employees the egregious nature of Appellant's misconduct, however, we are not persuaded that

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Appellant's immediate suspension was necessary to maintain the good of the service as set forth in WAC 356-34-050. We do not believe that Appellant's presence in the work place, pending his 15-day dismissal notification period, posed a threat to Respondent's program.

4.12 In determining whether the sanction imposed here is appropriate, we have considered the facts and circumstances presented, Appellant's lengthy tenure as a state employee, and his prior disciplinary history. Appellant's long employment with the department notwithstanding, we conclude that termination is reasonable based the seriousness of Appellant's misconduct and on Appellant's prior history of misconduct. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kenneth Roberson is denied.

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IT IS FURTHER ORDERED that Appellant shall receive full back pay and benefits for the period from September 6, 1999 through the effective date of his dismissal.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Leana D. Lamb, Member

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