BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TOM SPARKS, Appellant, v. STATE PARKS AND RECREATION COMMISSION, Respondent.	Case No. SUSP-05-0019 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, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on February 24 and March 1, 2006.

1.2 **Appearances.** Appellant was present and represented himself *pro se*. Mickey Newberry, Assistant Attorney General, represented Respondent State Parks and Recreation Commission.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a two-week suspension for insubordination, gross misconduct, and willful violation of published employing agency or Department of Personnel rules and regulations. Respondent alleges Appellant sent several inappropriate emails to agency staff and outside organizations.

1.4 **Preliminary Matters.** At the outset of the hearing Christopher J. Coker of Younglove, Lyman & Coker, P.L.L.C. appeared on behalf of the Washington Federation of State Employees (WFSE) and moved to quash Appellant's subpoenas of several WFSE staff associates. The Board

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ruled that two of the WFSE associates subpoenaed by Appellant were required to appear. Appellant, however, chose not to call those witnesses during his case in chief. In addition, Appellant moved to have the disciplinary charges dismissed during the course of the hearing. However, the Board ruled that genuine issues of material fact existed and denied Appellant's motion.

II. FINDINGS OF FACT

2.1 Appellant is a permanent employee for Respondent Washington State Parks and Recreation Commission. 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 May 2, 2005.

2.2 Appellant is an Environmental Engineer 2 and has been employed with the State Parks and Recreation Commission for approximately 20 years. Appellant is assigned to work in the Puget Sound Regional Office. Appellant previously received a seven-day suspension for misuse of his agency computer.

2.3 By letter dated April 14, 2005, Acting Deputy Director Judy Johnson notified Appellant of his two-week suspension without pay for insubordination, gross misconduct, and willful violation of published employing agency or Department of Personnel rules and regulations. Specifically, Ms. Johnson suspended Appellant for sending inappropriate emails to agency staff and others, including employees at the Washington Federation of State Employees (WFSE) and the Washington State Park Rangers Association, between February 1 and March 14, 2005.

2.4 On February 1, 2005, Mike Allen, Manager of Capitol Development Program issued a written professionalism standard to ensure employees professionally represented the department by

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wearing the proper office attire. Mr. Allen expected each of his regional managers to comply with his professionalism standard as a minimum requirement but allowed each regional manager the latitude to interpret and apply the standard as it related to their specific regions.

2.5 On February 8, 2005, Troy Fitzsimmons, Puget Sound Regional Office Manager, emailed his staff to clarify any questions employees might have regarding acceptable office attire. As part of Mr. Fitzsimmons email he wrote, "[t]his is very straightforward and I don't believe needs further clarification except to say that obviously dresses or skirts would be appropriate and cut off shorts would not be . . ."

2.6 It is undisputed that Appellant disagreed with the professionalism standard, chose to wear a skirt to the office on February 22, 2005, and photographed himself wearing the skirt at work. It is further undisputed that on February 25 and 28, 2005, Appellant attached the photograph of himself wearing the skirt to an email he sent his co-workers and others that included the caption, "poster child? can we talk? LOL pass it on . . ." and "WHO REPRESENTS YOU? WFSE/AFSCME 'Dress' Code – Frivolous? To Whom?"

2.7 Mr. Fitzsimmons advised Appellant that he could file a grievance regarding his concerns about the professionalism standard. Appellant filed a grievance; however, the grievance was untimely, and the agency did not continue with the grievance process.

2.8 In addition, Mr. Fitzsimmons met with Appellant and Appellant's supervisor, Arnie Larsen on March 2, 2005, to discuss Appellant's concerns regarding the professionalism standard. Appellant's supervisors told him he could seek clarification from the union but also discussed with

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him the policies regarding the use of state resources for union communications and the *de minimis* requirement according to the Ethics law.

2.9 On March 8, 2005, Appellant sent inappropriate emails to several agency employees, WFSE staff, and the Washington State Park Rangers Association, which employs approximately 200 employees. The emails included sarcastic and disparaging remarks about Saint Edward State Park Manager Mohammad Mostafavinassab, who also served as the WFSE Chapter President.

2.10 On March 9, 2005, Mr. Larsen sent Appellant an email reminding him to use the computer according to agency policies and to maintain ethical standards. The following day, however, Appellant responded to an email from Melanie Watness, Ethics Manager, to all agency employees by voicing his concerns with the union and sending his reply email to each of the approximately 400 agency employees. In addition, Appellant forwarded copies of the email to WFSE staff members.

2.11 The Washington State Parks and Recreation Commission has adopted Policy/ Procedure 70-15, Maintaining Ethical Standards, which states, "employees are personally responsible to exhibit ethical behavior in all their work activities." The policy also requires agency employees "to be familiar with the requirements and restrictions of the state ethics law." The section of the policy addressing *de minimis* use of state resources states that employees are obligated to protect state resources for public interest, "rather than their private interests." The policy allows *de minimis* use of state resources only if " . . . use is brief in duration and does not disrupt or distract from the conduct of state business due to volume or frequency. . ."

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2.12 Ms. Johnson, Appellant's appointing authority, ultimately determined that Appellant's conduct violated state and agency ethics regulations, was insubordinate, and rose to the level of gross misconduct. In determining the appropriate level of discipline, Ms. Johnson considered Appellant's previous disciplinary action regarding misuse of his state computer, as well as the disruption Appellant's actions caused to agency employees and outside associations. Furthermore, Ms. Johnson considered the inappropriateness of the content of Appellant's emails, as well as the mockery of wearing a skirt in response to his issues with the professionalism standard. While Ms. Johnson testified she would not have disciplined Appellant for simply wearing the skirt, she felt it was inappropriate to email the picture with the caption to agency employees and outside individuals. Ms. Johnson was particularly concerned about the number of emails sent to agency employees and outside associations, the disruption caused by the emails, and the inappropriate content.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts Appellant was insubordinate and violated agency policy when he chose to respond to personal issues he had with a professional standards expectation and union concerns by sending inappropriate emails. Respondent contends Appellant acted unprofessionally when he aired his concerns in mass emailings containing inappropriate and unprofessional comments, as well as disparaging remarks about a union leader, who was also an agency manager, to agency staff and outside parties. Respondent further contends Appellant specifically mocked the professional standards when he wore a skirt to work and asserts some of the inappropriate emails contained a picture of Appellant wearing the skirt and included distasteful comments. Respondent asserts Appellant's actions clearly exhibited disrespect for authority and, as a result, argues Appellant's actions rose to the level of gross misconduct. Therefore, Respondent argues a 15-day suspension was the appropriate disciplinary action to impress upon Appellant the seriousness of his misconduct.

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3.2 Appellant admits he was upset about the professional dress standard but asserts it was unfair to impose a different standard to one work unit within the agency. Appellant asserts he has a right to voice his opinion regarding work issues that affect him and others in his work unit. Appellant contends the "dress code" imposed by management was unfair and inappropriate for the type of field work performed by his work unit. Appellant further contends that his clothing became ruined due to the work he performed and asserts the dress standard impacted him financially since he could no longer wear clothing ruined on the job to the workplace according to the mandate. Appellant argues he tried to file a grievance regarding the professional standards issues relating to dress but asserts his regional manager initially accepted the grievance but his supervisor later dismissed the grievance. Appellant asserts he only sent the picture of himself wearing the skirt to employees who requested it and asserts his actions did not have any impact on his work. Appellant contends that his performance evaluations were positive and argues disciplinary action was unwarranted.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

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 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).

4.5 Although Appellant may have had legitimate complaints regarding the professionalism standard, his method for challenging those issues was clearly inappropriate. The emails containing the photograph were inappropriate due to the disrespectful nature of the text included. Additionally, the emails themselves were unrelated to official state business and not appropriate for the workplace. After those emails were sent, Appellant received clarification on at least two occasions about the appropriate use of email for union communications and *de minimis* use of state resources according to ethics policies. Nevertheless, after specifically being reminded to maintain ethical standards, Appellant continued to use state time and resources to send additional inappropriate emails to agency staff and outside organizations. Therefore, Respondent has proven the charges of insubordination and willful violation of the ethics policy.

4.6 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). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

4.7 Respondent has failed to prove Appellant's misconduct undermined the agency's ability to carry out its functions.

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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 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 Appellant had previously been disciplined for misuse of his state computer, and he had been put on notice to maintain ethical standards and use email appropriately. Therefore, a two-week suspension is an appropriate sanction to prevent recurrence, deter others from similar misconduct, and impress upon Appellant the seriousness of his actions.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Tom Sparks is denied.

DATED this _____ day of _____, 2006.

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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