BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TERENCE MALONEY, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. RED-03-0022 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 Department of Transportation, Safety Conference Room, 15700 Dayton Avenue North, Seattle, Washington, on December 14, 2004.

1.2 **Appearances.** Appellant is not represented and did not appear at the hearing. Mitchel Sachs, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a six-month, 10 percent reduction in salary for neglect of duty, inefficiency, insubordination and willful violation of agency policy. Respondent alleges Appellant misused state resources.

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II. FINDINGS OF FACT

2.1 Appellant Terence Maloney was a permanent employee for Respondent Department of Transportation. 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 June 13, 2003.

2.2 Appellant was a Right of Way Agent 4. He became employed with the Department of Transportation in December 1987. John Jenson, Manager for Real Estate Services, was Appellant's supervisor.

2.3 On February 24, 2003, Mr. Jenson discovered that Appellant sent a 17-page fax to a long distance number. Mr. Jenson asked Appellant about the purpose of the fax and directed Appellant to provide him with a copy of it. Appellant refused to comply with Mr. Jenson's directive. Consequently, the agency initiated a review of Appellant's work activities, including his use of the agency's computer and Internet services. The agency discovered that Appellant's 17-page fax was sent for personal business and that Appellant's computer contained 116 pages documenting Internet sites Appellant accessed since November 2002. Appellant visited numerous non-work related sites that included Alaska Airlines, 570 KVI Talk Radio, Find an Attorney, Health World Online Marketplace, Altonweb the River Bend, Thyroid Disease Information Source, the World's Online Marketplace and E-bay. In addition, the agency discovered 125 pages documenting Appellant's use of his work email, which reflected that between December 2002 and February 2003, Appellant sent to his personal email address documents regarding his supervisor and manager's daily activities and conversations. These emails were not work related and were sent during working hours.

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2.4 The department has adopted a policy regarding Ethics in Public Service that prohibits state employees from using any state resource for personal benefit. Appellant was aware of this policy and he attended a course on Ethical Standards in March 1995.

2.5 Amir A. Rasaie, Assistant Regional Administrator for Programs and Services, was Appellant's appointing authority when the discipline was imposed. Mr. Rasaie held a pre-disciplinary meeting with Appellant to give him an opportunity to respond to the allegation he misused state resources. Appellant admitted he sent a 17-page job application to a non-state employer using the state fax machine for a long distance fax. Appellant admitted he used his work e-mail account during work time and used the Internet to send his personal email account documents related to the whereabouts of his supervisor, and he admitted he used work time to create the documents. Appellant also admitted he used his state computer and the Internet to purchase an airline ticket and to a search for another trip. Appellant further admitted he accessed a health website to do personal research, to find an attorney, and to conduct job searches in the state of California.

2.6 Appellant provided Mr. Rasaie with his reasons to justify his actions; however, after conducting some follow-up interviews, Mr. Rasaie concluded Appellant's reasons did not mitigate his misuse of state resources. In determining the level of discipline, Mr. Rasaie reviewed Appellant's personnel file, which contained a counseling memo regarding poor performance and inefficient use of work time and reflected a history of poor work performance. Mr. Rasaie determined Appellant's misconduct warranted a reduction in pay.

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2.7 By letter dated April 18, 2003, Mr. Rasaie notified Appellant that his salary was reduced by 10 percent for six months, effective May 16, 2003, through November 15, 2003. Mr. Rasaie alleged Appellant misused state resourced, namely his state computer and fax machine, for non-business related activities and he charged Appellant with neglect of duty, inefficiency and willful violation of agency policy. Mr. Rasaie also charged Appellant with insubordination for refusing to comply with his supervisor's directive to provide him with a copy of the 17-page fax.

III. CONCLUSIONS OF LAW

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

3.2 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).

3.3 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).

3.4 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective operations as measured by a comparison of production with use of resources, using some objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

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3.5 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).

3.6 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).

3.7 Respondent has met its burden of proof that Appellant neglected his duty and willfully violated the department's Ethics in Public Service policy when he utilized the department's fax machine, computer, Internet and e-mail system for non-work related purposes. Respondent has met its burden of proof that Appellant was inefficient when he spent work time researching the Internet for personal reasons and writing and emailing to his own personal email account documents related to his superiors rather than performing the duties of his position. Furthermore, Appellant was insubordinate when he refused to comply with a directive from his supervisor to provide him with a copy of the documents he faxed.

3.8 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).

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3.9 In assessing the level of discipline imposed here, we conclude that Appellant's repeated use of the Internet for personal business and his use of the agency's e-mail system to send personal e-mails during work hours are unacceptable and warrant disciplinary action. Therefore, we conclude the 10 percent, six-month reduction in salary imposed is not too severe and is appropriate under the circumstances. The appeal of Terrence Maloney should be denied.

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Terence Maloney is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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