BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DAVID HUBBARD, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. SUSP-03-0031 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 HUBBARD, Chair, and GERALD L. MORGEN, Member. The hearing was held in the Liquor Control Board Distribution Center Conference Room, 4401 East Marginal Way South, Seattle, Washington, on January 13, 2005.

1.2 **Appearances.** Appellant David Hubbard appeared *pro se*. Paige Dietrich, 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 two-week suspension without pay for neglect of duty, insubordination, gross misconduct, and willful violation of published employing agency or department of personnel rules regulations. Respondent alleges

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Appellant exhibited unprofessional and disrespectful behavior, including aggressive gestures, toward his supervisor.

II. FINDINGS OF FACT

2.1 Appellant David Hubbard was a Support Enforcement Officer 2 for Respondent Department of Social and Health Services. 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 29, 2003.

2.2 Appellant had been a state employee since 1993 and began working in the Region 4 Division of Child Support (DCS), Seattle Office in 1997. As a Support Enforcement Officer 2, Appellant was considered a non-scheduled employee. Instead, Appellant's work unit adhered to a shift schedule to ensure proper coverage within the unit. Appellant worked a flex schedule, typically consisting of 10-hour shifts from 6 a.m. to 4:30 p.m. On occasion, Appellant worked through his lunch hour. If Appellant's workday exceeded 10 hours, he was allowed to adjust his schedule throughout the week, as long as he informed his supervisor of schedule adjustments.

2.3 Appellant's personnel file does not reflect any previous discipline; however, his performance evaluations indicate instances of inappropriate communications with his peers and lead workers.

2.4 DSHS has adopted Policy 6.04, Standards of Ethical Conduct for Employees. In subsection A, Policy 6.04 states, "DSHS requires employees to perform duties and responsibilities in a manner that maintains standards of behavior that promote public trust, faith, and confidence." Subsection 2 specifically states that employees shall create a working environment free from harassment, to

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include "[c]reating an environment free from intimidation, retaliation, hostility, or unreasonable interference with an individual's work performance."

2.5 On April 21, 2003, Appellant began his work day at 6 a.m., worked through his lunch, and around 4 p.m. had one fax to send prior to leaving for the day. At that time, Appellant's supervisor, Quang Tran, walked by Appellant's cubicle and asked him how he was doing. Appellant responded by stating that things were not going well and voiced some complaints regarding DCS management and his belief that Mr. Tran did not support him. As the conversation ensued, Appellant's demeanor became increasingly agitated, his voice became elevated, and he said, "fuck you" to Mr. Tran, at least three times and within earshot of other employees. Additionally, Appellant made a derogatory remark to Mr. Tran about his perceived lack of support, stating that Mr. Tran was "Larry's little boy" in reference to District Manager Larry Walker.

2.6 In response to Appellant's inappropriate conduct, Mr. Tran asked Appellant to step into his office to discuss the matter in private. Once again Appellant used profanity and loudly commented to Mr. Tran, "it's too bad you didn't lose your eye Quang," referring to an eye injury Mr. Tran had recently suffered. Appellant's co-worker, Michael Canonica overheard the verbal exchange, including Appellant's use of profane language, his disrespectful tone toward his supervisor, and the comment regarding Mr. Tran's eye.

2.7 At approximately 4:25 p.m. on the same afternoon, Appellant met with Mr. Tran in his office. Terry McLafferty, union shop steward, observed the impromptu meeting in Mr. Tran's office but did not act in his capacity as union shop steward. While in Mr. Tran's office, Appellant continued to vent his frustration with management in a loud voice and agitated manner. Appellant apologized to Mr. Tran; however, Mr. Tran informed Appellant that he would report the incident to management.

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2.8 During the hearing before this Board, Appellant testified that he believed the conversations he had with Mr. Tran occurred after he completed his work shift and therefore, he considered them personal conversations between two friends. However, the conversations happened during DCS's normal hours of operation and in the building where Appellant worked. Therefore, we find Appellant's interaction with his supervisor occurred in a working environment.

2.9 By letter dated August 27, 2003, Sharon Redmond, District Manager and Appellant's appointing authority, notified Appellant of his suspension without pay from his Support Enforcement Officer 2 position, effective August 28, 2003, through September 11, 2003. Ms. Redmond charged Appellant with neglect of duty, insubordination, gross misconduct, and willful violation of published employing agency or department of personnel rules or regulations due to unprofessional, disrespectful, loud, obscene, and aggressive conduct toward his supervisor, Mr. Tran.

2.10 In determining the level of discipline, Ms. Redmond reviewed Appellant's personnel file, including past performance evaluations, and reviewed the conduct investigation report along with former District Manager Larry Walker's attached administrative comments. Ms. Redmond was concerned with Appellant's unacceptable behavior in the workplace and the effect it potentially had on creating and unsafe and hostile working environment for his supervisor and co-workers. Therefore, Ms. Redmond determined that a suspension from his position would send a clear message that Appellant's unprofessional behavior would not be tolerated.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues there is no dispute the conversation between Appellant and his supervisor occurred in Appellant's cubicle and in his supervisor's office. Consequently,

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Respondent argues the incident was clearly a workplace incident. Respondent further argues there is no dispute about the type of language Appellant used while speaking to his supervisor, and that the profane language was highly inappropriate, especially since others in the work unit were also present. Respondent argues the department has the right to set standards and argues Appellant neglected his duty, was insubordinate, and violated agency policy when he exhibited disrespectful and inappropriate behavior in the workplace. Therefore, Respondent contends suspension is the appropriate sanction to convey that such behavior is not acceptable.

3.2 Appellant asserts that he was off duty and simply waiting to fax one last item for the day when his supervisor approached his cubicle. Appellant further asserts that he and his supervisor, Mr. Tran, were friends and that the use of profane language was commonplace in his work unit. Appellant contends that his supervisor initiated the conversation regarding an eye injury, and that he responded profanely because he did not want to view Mr. Tran's injured eye. Appellant asserts he asked his supervisor to leave him alone so that he could complete his task and go home for the day, but that his supervisor asked him to remain while he went to look for a union shop steward, so they could discuss the incident in his office. Appellant argues the conversation in his supervisor's office was an "off work conversation" and he believed the matter had been resolved. Therefore, Appellant argues the department should not have taken disciplinary action.

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

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sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-240(1); 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 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).

4.5 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 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. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.7 Appellant had a duty to treat his supervisor and co-workers with dignity and respect. Respondent has proven by a preponderance of the credible evidence that Appellant neglected that duty, was insubordinate, and violated agency policy when he engaged his supervisor in argumentative conversations and repeatedly used profanity. Respondent has further proven that Appellant's unacceptable behavior constitutes gross misconduct because his disrespectful comments and unprofessional actions toward his supervisor occurred in the presence of at least one

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other employee. As a result, Appellant's misconduct affected the department's ability to provide a safe and respectful working environment.

4.8 Therefore, under the proven facts and circumstances, suspension is appropriate, and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of David Hubbard is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

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Gerald L. Morgen, Member

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