BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

| | |
|---|---|
| MARNEL GROEBNER,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF INFORMATION SERVICES,<br><br>Respondent. | Case No. SUSP-05-0002<br><br>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; 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 August 5, 2005.

1.2 **Appearances.** Gregory Rhodes, Attorney at Law, of Parr, Younglove, Lyman & Coker, P.L.L.C. represented Appellant Marnel Groebner. Kara Larsen, Assistant Attorney General, represented Respondent Department of Information Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a two-week suspension for neglect of duty, gross misconduct and willful violation of agency policy for Appellant's misuse of state resources.



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

## II. FINDINGS OF FACT

2.1 Appellant Marnel Groebner is a permanent employee for Respondent Department of Information Services (DIS). 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 January 10, 2005.

2.2 Appellant is an Information Technology Systems Specialist 5 in the Computer Services Division, and she has been employed with the DIS for approximately 15 years. Appellant has a good performance record and has had no previous disciplines of any type.

2.3 By letter dated December 22, 2004, Rebecca R. Riley, Assistant Director, notified Appellant of her two-week suspension. Ms. Riley charged Appellant with neglect of duty, gross misconduct and willful violation of agency policy for misuse of state resources.

2.4 Appellant's disciplinary sanction resulted after Shalice Ando, Human Resource Manager, was contacted by the Department of Health (DOH) and informed that DOH was conducting investigation of inappropriate e-mail usage by an employee of their department. During that investigation, evidence was uncovered that a DOH employee and an employee of DIS were exchanging e-mails that were non-work related. Ms. Ando subsequently received copies of e-mails from DOH that showed Appellant was the DIS employee who was using her state e-mail account to exchange e-mails of a personal nature with DOH employee. As a result, DIS initiated an investigation into Appellant's use of the DIS's computer, e-mail and internet service.



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.5 Nancy Widders, Human Resource Consultant, reviewed Appellant's use of the agency's e-mail and internet for the period of January 1, 2003 to November 5, 2003. Ms. Widders reviewed a box of printouts and sorted through and separated e-mail that was work related from e-mail that was personal in nature. The documents supported that Appellant used her state computer and e-mail account to e-mail friends and other employees. Appellant forwarded chain letters and jokes, she emailed her husband, a DIS contractor, and she made travel arrangements. Ms. Widders also found that some of Appellant's e-mails contained questionable content, such as negative remarks about other DIS employees. Appellant also used her work e-mail address to solicit funds for her daughter's soccer team, to request a Microsoft employee (who happened to be her nephew) to buy software on her behalf and on the behalf of another state employee as well. Appellant also visited numerous internet sites that were non-work related, such as e-Bay and AOL to make personal purchases.

2.6 DIS Policy 1.1.4 addresses use of state resources and provides guidance to employee regarding their responsibilities for proper use of state resources, information technology, including telephones, computers, email and the internet.

2.7 DIS Policy 1.1.7 provides employees with guidance regarding use of agency email. The policy advises employees that *occasional but limited use* of the DIS e-mail systems for purposes other than official work is permissible "provided that the use conforms to the limited personal use standards." The policy adopted the Executive Ethics Board definition of "limited personal use standards requirement." Under this requirement, personal use must result in little or no cost to the state, be infrequent and brief in duration, be the most effective use of time and resources, must not interfere with performance of job duties, must not disrupt other employees nor obligate other employees to make personal use of state resources, and must not compromise the security or



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

integrity of state resources. Policy 1.1.7 also provides, in relevant part, that use of the DIS email system for soliciting for an outside organizations and forwarding chain emails and jokes is prohibited.

2.8 DIS Policy 1.1.1 addresses conflict of interest and provides guidance on how to manage relationships with outside vendors to prevent any action that would result in a conflict of interest or appear to be a conflict of interest.

2.9 Rebecca Riley, Assistant Director for Computer Services Division, was Appellant's appointing authority when the discipline was imposed. Prior to making a decision on the level of discipline, Ms. Riley reviewed the emails and internet activity printouts. Ms. Riley found that the activity in the documents was voluminous and egregious.

2.10 Appellant did not dispute that she engaged in use of the agency's computer resources systems for non-business purposes or that she was provided and had read the agency's policies related to use of state resources. In a written response to the appointing authority, Appellant wrote that she routinely checked her personal e-mail account from work but that she considered that "part of the day-to-day use allowed under DIS policy." Appellant also admitted that she used the agency's internet service for personal reasons but believed that it was not as extensive as the agency contended. Appellant also asserted that the agency's definition of what it considered "abuse of state resources" was vague.

2.11 Ms. Riley considered Appellant's response; however, she determined that Appellant's extensive use of the e-mail system for personal purposes, her forwarding of chain letters, and her use of the department's computer to make personal purchases was completely inappropriate and



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

went beyond *de minimus* activity. Ms. Riely was also very disturbed by Appellant's e-mail to solicit a contractor of DIS to ask for funds to support her daughter's soccer team. Ms. Riley found that asking for such a contribution could negatively impact the professional relationship between DIS and the vendor, because Appellant gave the appearance of using her position with the agency to solicit the donation. Ms. Riley further found that the e-mail Appellant sent asking to make a personal purchase of software from a Microsoft employee, another DIS vendor, was unacceptable and also could have had a negative impact on the professional relationship between DIS and its vendor.

2.12 Ms. Riley concluded that Appellant's actions called into question her trustworthiness and integrity and she determined that Appellant's actions were willful because some of her emails indicated that she was not allowed to use her resource in this way; however, Appellant continued to do so despite that knowledge.

2.13 Ms. Riley considered terminating Appellant's employment on the basis that Appellant knew she was misusing state resources, and because Ms. Riley was not convinced that Appellant was unaware of the impact of her actions. However, Ms. Riley concluded that a two-week suspension was sufficient to impress upon Appellant the seriousness of her actions and return to the workplace and be a productive employee.

2.14 During her testimony before us Appellant estimated that she spent approximately 10-percent of her work time on personal e-mail. Appellant also considered whether she was using too much work time for personal activities, and therefore, she advised her friends to use her personal e-mail account. Appellant, nonetheless, continued to check her personal e-mail account at work.



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

## III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant's computer use for personal business was more than *de minimus*. Respondent argues that Appellant violated DIS Policy that strictly prohibits sending chain emails and jokes that could distract employees from their duties. Respondent argues that Appellant engaged in an ethical violation when she solicited funds for her daughter's soccer team and contends there is no *de minimus* standard for making solicitations. Respondent contends that Appellant was responsible for knowing the agency's policy on the use of state resources and that her argument that the policy was vague is not credible. Respondent contends that Appellant exhibited poor judgment in the workplace and that her comments in her e-mails supported that she had knowledge that she was inappropriately using state resources; therefore, her actions were willful. Respondent argues that Appellant's failure to use state resources in a responsible manner warrants a two-week suspension.

3.2 Appellant asserts that the department's "use of state resources" policy and its definition of the term "*de minimis*" use is ambiguous and ill defined. Appellant admits that she exchanged occasional emails with others, that she occasionally sent emails to her husband, and that she bought a few items on e-Bay over the course of several years. She contends, however, that her actions were well within the agency's policy. Appellant denies that she willfully violated policy, she asserts she always performed her work duties, and she contends that her performance evaluations were always positive. Therefore, she asserts Respondent failed to prove that she neglected her duty. Appellant further argues that her misconduct does not rise to level of gross misconduct because nothing in the evidence demonstrates the agency suffered in any manner. Appellant asserts the suspension is too harsh when informal counseling would have been sufficient to put her on notice regarding minimal and acceptable use of the agency's email and internet systems.



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

## 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 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 After reviewing the e-mails sent by Appellant and her use of the internet, we conclude that Appellant's personal use of DIS's computer, e-mail and internet systems was not limited in nature. The volume of the e-mails sent by Appellant and the numerous internet websites visited during the time period of January 1, 2003 to November 5, 2003, was excessive and exceeded any acceptable use of a state resource by a state employee. Respondent has met its burden of proof that Appellant neglected her duty when she used state owned computers and programs for non-work related purposes during work time.

4.5 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).



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

4.6 Respondent has also met its burden of proving that Appellant willfully violated the department's policies when she repeatedly accessed the internet for personal purposes and used her state e-mail account to compose and send e-mails of personal nature during work hours.

4.7 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).

4.8 Appellant's conduct in using her state e-mail address to solicit of funds for her daughter's soccer team was inappropriate, showed lack of professional standards and poor judgment. However, Respondent presented no evidence that Appellant's conduct was flagrant or that it adversely affected the agency's ability to carry out its functions. Respondent has failed to meet its burden of proof that Appellant's conduct constituted gross misconduct.

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. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.10 In assessing the level of discipline imposed here, we are not convinced that Appellant, an Information Technology System Specialist 5, was unaware that her personal use of state resources was excessive or that the agency's policy on use of resources was vague. Both Policy 1..1.4 and



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

Policy 1.1.7 clearly state that employees may make occasional but limited use of the DIS computer resources. By Appellant's own admission, she engaged in personal use of her DIS computer, internet and e-mail on a daily basis and her use went beyond merely checking her e-mail and sending brief messages to others, but included sending extensive personal e-mails, making online purchases, and researching other items of a personal nature. Even without a finding of gross misconduct, we conclude that the two-week suspension imposed is not too severe and is appropriate under the proven facts and circumstances. Therefore, the appeal of Marnel Groebner should be denied.

## V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Marnel Groebner is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member



Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504