BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

COURTNEY MORTIMER, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case Nos. SUSP-01-0030 & DISM-02-0010 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, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Department of Social and Health Services West Seattle Training Center in Seattle, Washington, on August 27 and 28, 2002.

1.2 **Appearances.** Appellant Courtney Mortimer was present and represented himself *pro se*. Wendy Lux Lienesch, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeals.** These are appeals from the disciplinary sanctions of suspension and dismissal. Appellant was suspended for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. In summary, Respondent alleged that Appellant failed to follow supervisory directives, was disrespectful to a client, and engaged in inappropriate and unprofessional behavior. Appellant was dismissed for neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. In summary,

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Respondent alleged that Appellant was on unauthorized leave on two occasions, misused the Internet, and conducted himself in an unprofessional and hostile manner in the workplace.

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); Girod v. Dep't of Social & Health Services, PAB No. D91-003 (1991), appeal dismissed, Thurston Co. Super. Ct. No. 91-2-02922-6 (1993); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Cantrell v. Dep't of Social and Health Services, PAB No. DISM-01-0055 (2001); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992); Aquino v. University of Washington, PAB No. D93-163 (1995).

II. FINDINGS OF FACT

2.1 Appellant Courtney Mortimer was a Financial Services Specialist 4 (FSS4) and permanent employee of Respondent Department of Social and Health Services (DSHS), Community Services Division, at the West Seattle Community Services Office (CSO). 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 of his suspension on July 12, 2001, and a timely appeal of his dismissal on February 4, 2002.

2.2 Appellant began employment with DSHS in May 1992. Appellant held various positions and received several promotions during his employment with DSHS. At the time of the first incident subject to this appeal, Appellant was assigned to the Applications Unit. Appellant was aware of DSHS's policies and procedures and had a clear understanding of the duties and responsibilities of his various positions, including his position as an FSS4. During his employment at DSHS, Appellant received several letters of commendation. However, he also received prior

disciplinary action. By letter dated November 3, 2000, Appellant received a one-day suspension for misusing the DSHS computer system to locate a personal acquaintance. Appellant was warned that his behavior was unacceptable and would not be tolerated.

FIFTEEN-DAY SUSPENSION:

2.3 By letter dated June 18, 2001, Thomas Haines, Acting Regional Administrator, notified Appellant of his 15-day suspension for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Mr. Haines alleged that:

1. On March 1, 2001, Appellant failed to provide service to a client in a respectful and responsive manner;
2. On March 2, 2001, Appellant reported to work 45 minutes late following his lunch break and did not request time off or submit a leave slip for his absence;
3. At approximately 1:45 p.m. on March 2, 2001, after reading a confidential letter from CSO Administrator Hoang Tran reassigning Appellant to the Medical Unit, Appellant uttered the word "assholes;"
4. At approximately 3 p.m. on March 2, 2001, after informing his supervisor that he would not report to the Medical Unit, Appellant stated that Mr. Tran could "kiss my ass;"
5. After failing to report to the Medical Unit on March 5, 2001, on March 6, Appellant received a second directive from Mr. Tran that he report to the Medical Unit. Appellant did not report to the unit and on March 6, 2001, dared Mr. Tran to "take your best shot;" and
6. At approximately 2:14 p.m. on March 2, 2001, Appellant sent an offensive, disrespectful e-mail about Mr. Tran to Mr. Tran, several supervisors and co-workers.

Incident 1:

2.4 On March 1, 2001, Mr. Son L. came to the West Seattle CSO to apply for benefits. Mr. L. did not speak English so his daughter and an interpreter accompanied him to provide him assistance. Appellant conducted a Foodstamp eligibility interview with Mr. L. and his daughter in the presence of Interpreter Khanh Le. Mr. L. had the documents he thought DSHS needed to process his application. However, Mr. L.'s documents did not contain all of the information needed.

Mr. L. was not happy when Appellant questioned the documentation he provided. At the conclusion of the interview, Mr. L. told Appellant that he wished to file a complaint. Appellant provided him with a business card for Hoang Tran, Administrator of the West Seattle CSO, and told him where Mr. Tran's office was located. By the time the interview ended, Mr. L. was angry and he told Appellant that he was "no good."

2.5 During Appellant's interview of Mr. L., Stacey Nguyen was conducting a client interview in the adjoining interview booth. Ms. Nguyen could not see the interaction between Appellant and Mr. L. and she could not hear what was said during the interview. However, she did hear Mr. L. raise his voice during the interview. She did not hear Appellant raise his voice.

2.6 Following the interview, Mr. Son L., his daughter and Mr. Le went to Mr. Tran's office. Candace James, Administrative Secretary, spoke with them while they waited to speak to Mr. Tran. Ms. James observed that they were upset. The interpreter informed her that Appellant had called Mr. L. a liar and grabbed papers out of Mr. L.'s hand.

2.7 When Mr. L., his daughter, and the interpreter met with Mr. Tran, Mr. L. complained that Appellant pounded on the counter, pointed at him and called him a liar in front of his daughter and the interpreter. Mr. L.'s daughter and the interpreter confirmed that Appellant shook his finger at Mr. L., grabbed an envelope out of his hand, and called him a liar.

2.8 Mr. Tran contacted Appellant's supervisor, Shawn Hartline, and informed him of the allegations. Mr. Hartline asked Tam Ngo, Financial Services Lead, to talk to Mr. L. and his daughter and to conduct another eligibility interview for Mr. L. Mr. L and his daughter told Ms. Ngo that during the interview with Appellant, he pounded on the counter, called Mr. L. a liar and that he did not respect them. Ms. Ngo reviewed Mr. L.'s application for benefits and his supporting

documentation and found that Mr. L. did not have all the information needed for processing his application.

2.9 Mr. Tran also met with Appellant and Mr. Hartline to hear Appellant's version of the incident. Appellant denied the allegations and suggested that "Black" clients had complaints about Mr. Tran's Asian staff. Appellant is African-American and Mr. L., his daughter, the interpreter, Ms. Ngo and Mr. Tran are Asian.

2.10 Mr. Tran told Mr. Hartline to take appropriate action to address the issue. On March 12, 2001, Mr. Hartline, initiated a Conduct Investigation Report (CIR). Appellant responded to the CIR and stated, "Once again your lack of supervisory skills is evident . . . ." and referred to the CIR as "another example of a 'hostile work environment.'" Appellant did not address his interactions with Mr. L.

2.11 Michael Wagner, Social Services Supervisor, conducted the CIR investigation and interviewed the known witnesses to the incident. Mr. Wagner was not aware that Ms. Nguyen witnessed the incident. Based on the statements he received from Mr. Hartline, Ms. James, the interpreter and Mr. L., Mr. Wagner concluded that the allegations were truthful and accurate.

2.12 We have considered the totality of the testimony about this incident and find that Appellant's behavior toward Mr. L. was appropriate. We heard testimony and saw various demonstrations of the manner in which Appellant allegedly pounded the table. We find that more likely than not, Appellant did not "pound" the table, but rather put his hand down on the table. We also find that while Appellant questioned Mr. L. about his lack of documentation, more likely than not, Appellant did not call Mr. L. a liar. Because it is undisputed that Appellant has a loud speaking voice, we find that Mr. L. and his daughter misinterpreted Appellant's manner of speaking as being disrespectful.

Incident 2:

2.13 It is undisputed that on March 2, 2001, Appellant was 45 minutes late returning from lunch. Appellant did not request time off and did not turn in a leave slip for his time. Subsequently, Appellant was charged with 45 minutes of leave without pay.

Incident 3:

2.14 After receiving the allegations from Mr. L., Mr. Tran decided to reassign Appellant. By letter dated March 1, 2001, Mr. Tran notified Appellant of his reassignment to the Medical Unit, effective March 5, 2001. The letter was not delivered to Appellant until March 2, 2001. On March 2, 2001, Mr. Tran asked Candace James to deliver a sealed confidential envelope to Appellant. The envelope contained the letter from Mr. Tran informing Appellant of his reassignment.

2.15 After lunch on March 2, 2001, Ms. James went to Appellant's desk to give him the envelope, but Appellant was late returning from lunch and was unavailable. Therefore, she asked staff in Appellant's work area to tell him to come to her desk when he returned.

2.16 After Appellant returned to work he went to the administration area where Ms. James worked and Ms. James handed him the envelope. Appellant thanked her and walked away. As he was walking away, he opened the envelope, he read the contents and said, "assholes."

2.17 Karl Allison is a Financial Services Specialist 5 in the West Seattle CSO. Prior to Mr. Allison's appointment as the FSS5, Appellant temporarily filled the position. Mr. Allison was in Mr. Tran's office near where Appellant was reading the reassignment letter. Mr. Allison heard Appellant say "assholes." On March 14, 2001, Mr. Allison initiated a CIR. Even though Appellant

was not speaking directly to anyone, Mr. Allison perceived Appellant's comment to be directed at management.

2.18 Appellant responded to the CIR, however, rather than addressing the allegation, Appellant accused Mr. Allison of being an inexperienced worker who took over his position. Appellant accused Mr. Allison of creating a hostile work environment and asserted that Mr. Allison's inexperience, lack of proper training, and pressure from others in the management team was the reason Mr. Allison initiated the CIR. Appellant stated that the CIR showed Mr. Allison's "unprofessionalism" and inexperience.

2.19 The credible testimony provided about this incident establishes that the word "assholes" is not commonly used in the West Seattle CSO. However, the testimony also establishes that Appellant's comment was not directed specifically at anyone, but rather, his comment was made out of frustration. We find the Appellant's use of the term "assholes" was badly chosen but was not threatening or out-of-place under the circumstances.

Incident 4:

2.20 After Appellant read the reassignment letter, Appellant met with Mr. Hartline. Mr. Hartline instructed Appellant to comply with Mr. Tran's letter and to report to the Medical Unit. Appellant refused to comply and told Mr. Hartline that Mr. Tran could "kiss my ass if he thinks I'm going to move."

2.21 On March 13, 2001, Mr. Hartline initiated a CIR. Appellant responded to the CIR and denied meeting with Mr. Hartline. Appellant accused Mr. Hartline of being Mr. Tran's "boy" and accused Mr. Hartline of being a liar.

2.22 Based on the totality of the credible testimony, including Appellant's earlier comment in the hallway and his apparent escalating frustration over his reassignment, we find more likely than not, that Appellant met with Mr. Hartline and commented Mr. Tran could "kiss my ass."

Incident 5:

2.23 Appellant did not report to the Medical Unit on March 5, 2001. On March 6, 2001, Mr. Tran gave Appellant a written directive to report to the Medical Unit. Appellant responded to Mr. Tran by e-mail. Appellant said:

> Per you momo dated march 6th directing me to report to the medical unit immediately or face discinplanry action: (sic)
>
> TAKE YOUR BEST SHOT. . . . . .

2.24 Appellant sent copies of his memo to Sharon Thompson, Supervisor of the Medical Unit, and Mr. Hartline. On March 12, 2001, Ms. Thompson initiated a CIR. Appellant responded to the CIR by stating, in part: "I dared Hoang Tran to take his best shot and he initiated his staff to drum up 6 CIR's . . . ."

Incident 6:

2.25 After receiving the initial reassignment letter, Appellant responded by e-mail to Mr. Tran and to Ms. Thompson. In addition, Appellant copied Mr. Hartline and Mr. Antoine Tran, Financial Services Supervisor 3 at the West Seattle CSO with the e-mail, and sent "blind copies" to a number of other DSHS staff. In the e-mail, Appellant accused Hoang Tran of using his position as administrator to punish staff who had different opinions from his or who did not process benefits for family and friends in a timely manner.

2.26 Appellant said, in part, that his reassignment was:

> [A] continuation of the assault perpetuated by those in power who are frightened of people who do not have the same moral, legal and political belief of those in power. h. tran is one of those people. He guides this office as if he was a collaborator in colonial vietnam. Any one who exposes beliefs different then his or shows any independent thought h. tran considers a threat and does every thing in his power to remove his perceived threat. I will not stand ideally by while this assault continues. (sic)
>
> I will continue to speak mind mind as I see fit. Whether it is in the Applications Unit, Medical unit, TANF unit or Multi Service unit. I will continue to process cases bases on WAC rather than the nepotism/favortism exercised by this megalomanic. (sic)

2.27 On March 13, 2001, Mr. Hartline initiated a CIR. Appellant admitted that he sent the e-mail and responded to the CIR, stating, in part:

> I was going to respond to this CIR with a scathing attack on the Supervisor who initiatiated the CIR and the Administrator who told him to do so. The Receipt of this "CIR" for the aforementioned suspected misconduct shows the ineptitude of both and lack of Supervisory skill and training. although appointments of supervisors are done out of favors and other unprofessional reasons appointments without proper training inevitability leads to CIR like the 3 I received to be issued. The EMAIL was sent as a way to show that there are some underlying issues affecting the Administrator and myself. I have no problem showing respect to someone who EARNS it I have no problem with that. The problem surfaces when a person feel a title bestows respect and then starts believing "THE HYPE" surrounding their appointment. . . . (sic)

2.28 Following the CIR investigations, the CIRs and supporting documentation were forwarded to Mr. Tran. Mr. Tran reviewed the information and talked to the people involved in the incidents. By letter dated April 27, 2001, he forwarded the information, along with his recommendation that Appellant be terminated, to Tom Haines. Mr. Tran concluded that Appellant demonstrated a pattern of disrespect for management and clients, misused state resources, and failed comply with agency policies and procedures.

2.29 Mr. Haines was Appellant's appointing authority and was responsible for determining the level of discipline to impose. He reviewed the six CIRs and considered Appellant's work history. He determined that Appellant used inappropriate, unprofessional language, made derogatory, inflammatory remarks in reference to the CSO administrator and management and behaved in a confrontational manner. Mr. Haines felt that such behavior could not be condoned in the workplace. Mr. Haines recalled a grievance meeting with Appellant in May 2001 during which Appellant admitted that he was "fanning the flames" and was purposely making inflammatory responses to get a reaction from management. Mr. Haines felt that Appellant was very angry and that he was "drawing a line in the sand." Although Mr. Tran recommended that Appellant be dismissed, Mr. Haines felt that a 15-day suspension was sufficient to impress upon Appellant the serious nature of his misconduct. In his June 18, 2001 letter notifying Appellant of the suspension, Mr. Haines stated, in part:

> Your failure to follow supervisory directives, your disrespectful and inexcusable customer service to Mr. L., your disrespect for authority, and your inappropriate and unprofessional behavior are unacceptable and will not be tolerated. I am directing you to comply with all State policies and procedures, to follow your supervisor's directives, and to refrain from the type of inappropriate and unprofessional behavior you have been displaying. Any further incidents of misconduct and/or unsatisfactory work performance may result in further disciplinary action which could include dismissal.

IMMEDIATE SUSPENSION FOLLOWED BY DISMISSAL:

2.30 By letter dated January 3, 2002, Thomas Haines, Acting Regional Administrator, informed Appellant of his immediate suspension followed by dismissal for neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. In summary, Mr. Haines alleged that Appellant:

1. Was absent without authorization on June 8, 2001 and June 11, 2001; failed to notify his supervisor or designee of his absences; and failed to comply with supervisory directives regarding notification of absences;
2. Inappropriately used the Internet on June 12, 2001; and

3. On August 2, 2001, behaved in a disruptive and hostile manner toward three supervisors.

Incident 1:

2.31 On March 8, 2001, Appellant reported to the Medical Unit. Appellant's normal work hours were 8 a.m. to 5 p.m. with a lunch break from noon to 1 p.m. Sharon Thompson was Appellant's supervisor in the Medical Unit.

2.32 When Appellant reported to the Medical Unit, Ms. Thompson felt that he displayed an arrogant attitude and she began dealing with daily issues and difficulties involving Appellant. One issue was attendance. Appellant was frequently late to work or he would not call in his absences. By e-mail dated March 12, 2001, Ms. Thompson confirmed Appellant's work schedule and directed him to get approval for any deviations from his work schedule. In addition, Ms. Thompson provided Appellant with the names and phone numbers of the persons to call when he needed to report an absence due to illness. Appellant was aware of the expectation that when he was sick he was to call in to report his absence and he was aware that leave for other purposes was to be pre-authorized.

2.33 At approximately 11:15 a.m. on June 8, 2001, Mike Wagner, Social Services Supervisor, observed Appellant shutting down his computer. Subsequently, Appellant left the office for the day without notifying anyone that he was leaving. Another employee of the Medical Unit left with Appellant. Appellant had not sought prior approval to leave early and he did not sign out on the sign out board when he left. After Appellant and the other employee left, only one staff person remained on duty in the Medical Unit.

2.34 Ms. Thompson was not in the office on June 8. She returned to work on June 11, 2001, and was told that Appellant had left early on the 8th.

2.35 On June 11, 2001, Appellant was absent from work. He did not call in to report his absence and he was not on pre-authorized leave.

2.36 When Appellant returned to work, Ms. Thompson asked him about his absences and Appellant replied that he had no excuse, reason or explanation. Appellant was subsequently charged with unauthorized leave without pay for his absences on June 8 and 11, 2001.

2.37 On June 14, 2001, Ms. Thompson initiated CIRs for each incident. Appellant responded to the CIRs and stated that office rules were not applied equally. In his response to the June 8th incident, Appellant said that racism might be the overriding reason for the continued harassment. In his response to the June 11th incident, Appellant said that he believed that if he was "not a proud black man but humble and shuffle along like this office used to there would be no problem."

Incident 2:

2.38 Mike Wagner's office was approximately ten feet from Appellant's cubicle. On an almost daily basis, he observed Appellant viewing non-work-related Internet sites. On June 12, 2001, Mr. Wagner walked by Appellant's work area several times during the morning. Between 8 a.m. and noon, he observed Appellant viewing non-work-related Internet sites, including the New York Times and other news sites.

2.39 Mr. Wagner e-mailed Ms. Thompson and told her that Appellant was viewing unauthorized sites on the Internet for extended periods of time. Ms. Thompson talked to Mr. Wagner and then she met with Appellant. Appellant did not deny his actions and when Ms. Thompson said that she intended to initiate a CIR, Appellant responded, "you gotta do what you gotta do."

2.40 On June 14, 2001, Ms. Thompson initiated a CIR. Appellant responded to the CIR and indicated that everyone in the office from staff to management engaged in unauthorized use of the Internet. Appellant suggested that the CIR was "retaliation for not remaining a quiet and humble black man."

2.41 Following the CIR investigations into incident 1 and 2 above, the CIRs and supporting documentation were forwarded to Mr. Tran. Mr. Tran reviewed the information and concluded that Appellant continued to defy policies and procedures, that he showed no intent to change and that his behavior exhibited a flagrant disregard for agency guidelines. By letter dated August 20, 2001, he forwarded the CIR information, along with his recommendation that Appellant be terminated, to Tom Haines.

Incident 3:

2.42 It is undisputed that Appellant has a loud speaking voice. When he received personal phone calls at work other staff could easily overhear his conversations, especially when he raised his voice. Appellant received frequent personal phone calls at work, which often resulted in him raising his voice and disturbing staff working in the area.

2.43 On August 2, 2001, Appellant received a personal phone call shortly after he started work. At 9:45 a.m. Maribeth Bookter sent an e-mail to Ms. Thompson and to Mr. Tran stating that she had been listening to Appellant arguing on the telephone during a personal phone call since he arrived at work. Ms. Bookter said, "we are all sick of hearing it!"

2.44 Mr. Tran sent Ms. Thompson an e-mail and told her to take care of the problem. Ms. Thompson went to Appellant's cubicle to talk to him, but Appellant continued to talk on the phone. She went to his cubicle a second time and Appellant was still talking on the phone. Therefore, at

10:02 a.m., she sent Appellant an e-mail asking him to limit his personal phone calls to breaks and lunch and to keep his voice down during his personal phone calls. Ms. Thompson copied Mr. Tran on the e-mail.

2.45 Appellant went to Ms. Thompson's office at approximately 10:30 a.m. and closed the door. Appellant appeared to be upset and in loud voice asked Ms. Thompson why she had sent Mr. Tran a copy of the e-mail. Appellant continued to yell at Ms. Thompson about a number of other issues.

2.46 Other staff heard Appellant yelling and became concerned for Ms. Thompson's safety. Mr. Wagner was one of the staff that heard Appellant yelling. Mr. Wagner contacted Willie Peoples, the office manager, and told her to come the office immediately. Mr. Wagner then went to Ms. Thompson's office and tried to open the door. Appellant blocked the door and refused to allow Mr. Wagner to enter.

2.47 As soon as Ms. Peoples stepped out of the elevator, she heard Appellant yelling. She went to Ms. Thompson's office and Mr. Wagner told her to get Mr. Hartline.

2.48 Ms. Peoples found Mr. Hartline and told him to go to Ms. Thompson's office. After arriving at the office, Mr. Hartline tried to open Ms. Thompson's office door, but Appellant continued to block the door. Mr. Hartline was able to force the door open far enough that he could brace his shoulder in the doorway.

2.49 Mr. Hartline told Appellant to stop his behavior and Appellant replied that the situation was not Mr. Hartline's business. Mr. Hartline said that he was not leaving until Appellant calmed down. Ms. Thompson indicated that she would talk with Appellant if he would calm down. Appellant became quiet and after standing quietly and thinking for a few moments, he agreed to calm down.

Appellant continued to talk with Ms. Thompson for a few minutes and then he returned to his cubicle. Mr. Hartline, Mr. Wagner and Ms. Peoples remained in the area until Appellant left Ms. Thompson's office.

2.50 After Appellant left her office, Ms. Thompson went to the nurse's station with Ms. Peoples. Ms. Thompson was visibly shaken by her encounter with Appellant and she began to cry. Ms. Thompson indicated to Ms. Peoples that she was fearful when Appellant first came into her office and confronted her but then she became angry but she tried to remain calm so that her anger would not further agitate Appellant's anger.

2.51 Ms. Peoples, Mr. Hartline and Mr. Wagner credibly testified that Ms. Thompson was visibly shaken by her encounter with Appellant. The situation was tense and staff was fearful because they did not know what Appellant might do. At the conclusion of his discussion with Ms. Thompson, Appellant informed her that he would not hurt her but then told her to warn Mr. Hartline and Mr. Wagner that if they approached him, there would be trouble. Mr. Hartline and Mr. Wagner felt threatened by Appellant's warning.

2.52 Mr. Hartline reported Appellant's behavior and his verbal threat to Tom Haines. Mr. Haines asked Mr. Hartline to instruct Appellant to leave the premises. Mr. Hartline was not comfortable approaching Appellant and giving him the message. Therefore, Mr. Haines telephoned Appellant, placed him on home assignment and directed him to leave the premises.

2.53 By letter dated August 3, 2001, Mr. Tran reported the incident to Mr. Haines.

2.54 On August 8, 2001, Mr. Hartline initiated a CIR. Appellant responded to the CIR on August 21, 2001. Appellant stated, in part:

> If I was a white boy we would not even be going through this. But since I am a PROUD BLACK MAN! Who is hated by the white/Asian management staff you use this procedure to harass and discredit me. Never mind that the offenses to which I have been CIR'd happen every day by white boys & girls throughout the West Seattle office and other offices in Region 4 without repercussions, so lets cut to the chase and say to this black man "misconduct has occurred."

2.56 Following the CIR investigation, the CIR and supporting documentation were forwarded to Mr. Tran. Mr. Tran reviewed the information and concluded that Appellant had been on a constant decline in his willingness to adhere to policies and procedures and agency expectations and that he showed no intent to change his behavior. By letter dated September 11, 2001, he forwarded the information to Tom Haines and once again recommended that Appellant be terminated.

2.57 Mr. Haines considered the CIRs and Appellant's personnel history, including his two prior disciplines. Mr. Haines concluded that Appellant's prior disciplines had not caused him to change his behavior, that there was no reason to believe that Appellant would change his behavior in the future, and that, in fact, Appellant's misconduct appeared to be escalating and creating safety concerns within the office. Mr. Haines determined that Appellant had been disciplined and warned about using agency resources appropriately yet he continued to inappropriately use the Internet. Mr. Haines concluded that Appellant did not care about maintaining an appropriate work environment, that he acted intentionally and willfully when he sent inflammatory emails, and that he willfully violated agency policies and procedures concerning computer use, requesting and reporting leave, and treating others with respect and courtesy. Mr. Haines also concluded that Appellant's behavior on August 2, 2001 was close to workplace violence, that staff was frightened by Appellant's behavior, and that his behavior was contrary to the department's expectations that employees conduct themselves in a professional and non-hostile manner. Mr. Haines could not allow such behavior to be tolerated in the workplace and determined that in the best interest of the CSO and division, Appellant's termination was necessary. Mr. Haines felt that allowing Appellant

to return to the workplace would be devastating to staff and to the morale of the office. Therefore, Mr. Haines terminated Appellant, effective January 18, 2002.

2.58 Appellant was aware of agency policies including the policies on leave, ethics and Internet usage.

2.59 DSHS Personnel Policy 524 addresses leave and states, in relevant part:

> The employee requesting leave must submit a . . . Leave Request, before an anticipated absence. When the reason for absence precludes prior approval, the employee must submit a eave request to his/her supervisor at the beginning of the work shift on the first day the employee returns to work.
> . . . .
>
> The employee's supervisor must treat any unauthorized absence as leave without pay. Unauthorized leave may be grounds for corrective/disciplinary action. Immediately on returning to work, the employee must give a written statement to his/her supervisor explaining the reason for the unauthorized absence.

2.60 DSHS Administrative Policy 6.04 addresses standards of ethical employee conduct. The policy states, in part:

> DSHS requires employees to perform duties and responsibilities in a manner that maintains standards of behavior that promote public trust, faith, and confidence. Specifically, employees shall:
>
> 1. Strengthen public confidence in the integrity of state government by demonstrating the highest standards of personal integrity, fairness, honesty, and compliance with laws, rules, regulations and departmental policies.
>
> . . . .
>
> 2. Serve the public with respect concern, courtesy and responsiveness, recognizing that service to the public is the primary mission of state government.
>
> 4. Interact with co-workers with respect, concern, courtesy, and responsiveness.

2.61 On January 12, 1999, Appellant signed an Internet Access Request and Agreement form. By signing the form, Appellant acknowledged that he had read and would comply with the DSHS Internet policy. DSHS Administrative Policy 15.15 addresses the use of electronic messaging systems and the Internet. The policy specifies that the electronic message systems and Internet access are to be used to conduct state business and for business activities. The policy states, in part:

> 2. . . . [D]epartment employees may make occasional but limited personal use of state resources if:
> . . . .
>
> b. The use of state resources does not interfere with the performance of the employee's official duties;
> . . . .
>
> d. The use does not compromise the security or integrity of state information or software.
> . . . .
>
> e. Employees are expected to exercise good judgment in both duration and frequency on such occasions.
> f. Employees represent DSHS when using electronic mail and accessing the Internet. They shall use these tools in accordance with Administrative Policy 6.04, Standards for Ethical Rules of Conduct.
>
> 3. Prohibited Uses are as Follows:
>
> a. Department employees shall not create, transmit or store messages that contain or promote:
> (1) Discrimination on the basis of age, race, color, gender, creed, marital status, national origin, disability, religion, sexual orientation or Disabled and Vietnam Era Veterans status.
> . . . .

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant showed disgust and distain for management and his coworkers and that his behavior was utterly appalling. Respondent contends that Appellant made a choice of how to behave and that he chose to behave unprofessionally, challenge management, bait managers, and run rough shod over people. Respondent asserts that Appellant yelled and screamed

in a manner that scared people and that his behavior was out of control and disruptive to the entire work area. Respondent further asserts that Appellant chose to disregard directives given to him by management and rather than comply with directives, he chose to respond in a rude, disrespectful manner. In addition, Respondent argues that Appellant misused the Internet, directly threatened management staff, was late coming to work or did not call in his absences, left work without permission and deliberately "fanned the flames" to bait management to take action against him. Respondent concedes that in the past, Appellant had been a valued employee. However, his behavior leading to the dismissal was so egregious that termination was the appropriate disciplinary sanction.

3.2 Appellant argues that Respondent did not challenge his claim for unemployment compensation, which supports his position that he did not engage in misconduct. Appellant contends that management directed the CIRs to be initiated, that the CIR investigations were not thorough or designed to find the truth of the matter, and that critical witnesses were not interviewed. Appellant argues that he was a valuable employee, but his attributes and achievements carried no weight with management. Appellant contends an injustice has been done and asserts he was a leader in the unit who went above and beyond the standard for service for all his clients. Appellant feels that his reputation was destroyed by gossip and innuendo and that management's goal was to get rid of him. Appellant also feels that agency rules and regulations were not applied evenly or equitably. However, Appellant acknowledges that there are things that he is sorry for and wishes he had not done, but asserts that he was not explosive or violent and did not pose a threat to coworkers or management. Appellant believes that some form of discipline may be warranted, but asserts that dismissal is too severe given his overall history of service and leadership with the agency.

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).

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 Inefficiency is the utilization of time and resources in an unproductive manner. Girod v. Dep't of Social & Health Services, PAB No. D91-003 (1991), appeal dismissed, Thurston Co. Super. Ct. No. 91-2-02922-6 (1993).

4.5 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 and Health Services, PAB No. D94-025 (1995).

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. Cantrell v. Dep't of Social and Health Services, PAB No. DISM-01-0055 (2001).

4.7 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).

4.8 In his responses to the CIRs, Appellant appears to suggest that he was subject to discrimination. Pursuant to WAC 356-46-020, allegations of discrimination are within the jurisdiction of the Washington State Human Rights Commission, not the Personnel Appeals Board. The issue before the Board is whether Appellant's behavior, as described in the Findings of Fact, warranted discipline and, if so, whether the level of sanction imposed by Respondent was appropriate.

FIFTEEN-DAY SUSPENSION:

4.9 Based on the totality of the proven facts and circumstances, Respondent failed to establish that Appellant provided service to Mr. L. in a disrespectful and unresponsive manner or that Appellant's uttering of the word "assholes" rose to the level of misconduct.

4.10 Respondent has met its burden of proof that on March 2, 2001, Appellant:

- Was 45 minutes late to work following his lunch break and that his tardiness was unauthorized;
- Set an offensive, disrespectful e-mail about Mr. Tran to Mr. Tran and numerous other DSHS employees; and

- Told Mr. Hartline that Mr. Tran could "kiss [his] ass."

Respondent has also met its burden of proof that Appellant failed to report to the Medical Unit on March 5, 2001 as first directed, and that he responded to the second directive given on March 6, 2001, by challenging Mr. Tran to "take [his] best shot."

4.11 Appellant's behavior was unprofessional, inappropriate and confrontational, constituted neglect of duty, willful violation of agency policies and insubordination, and rose to the level of gross misconduct. Appellant neglected his duty to be at work, obtain authorization for tardiness or to notify his supervisor or designee of his tardiness, he neglected his duty to treat coworkers and supervisors with respect and courtesy, and he neglected his duty to use the agency electronic messaging system appropriately. Appellant's actions constituted a willful violation of agency policies. Furthermore, Appellant was insubordinate when he refused to comply with Mt. Tran's directive to report to the Medical Unit. In addition, Appellant's decision to compose and send an offensive, degrading and disrespectful e-mail about Mr. Tran to numerous DSHS employees constitutes neglect of duty, willful violation of policy, willful or wanton disregard of the agency's standards of expected behavior, and rises to the level of gross misconduct.

4.12 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances including the seriousness and circumstances of the offense. 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 charge is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

4.13 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).

4.14 Given the pattern of Appellant's proven misconduct and considering his history of prior discipline for misuse of the agency computer system, Respondent has established that the disciplinary sanction of a 15-day suspension was justified. Appellant's suspension appeal should be denied.

IMMEDIATE SUSPENSION FOLLOWED BY DISMISSAL:

4.15 Respondent has met its burden of proof that Appellant:

- Had been directed by his supervisor to call in and report his absences, yet he was absent without authorization on June 8 and 11, 2001, and failed to notify his supervisor or designee as previously directed;
- Visited non-work-related Internet sites for an extended period of time on June 12, 2001; and
- Behaved in an inappropriate, hostile, disruptive, unprofessional, and threatening manner toward three supervisors on August 2, 2001.

4.16 Appellant's behavior constituted neglect of duty, inefficiency, insubordination, willful violation of agency policies, and rose to the level of gross misconduct. Appellant neglected his duty to report his absences as directed, to treat coworkers and supervisors with respect and courtesy, and to use the agency's internet system for work related purposes. Appellant's actions constituted a willful violation of agency policies. Furthermore, Appellant was insubordinate when he failed to comply with his supervisor's directive to report his absences, and failed to comply with Mr. Hartline and Mr. Wagner's directives to leave Ms. Thompson's office. Appellant was inefficient when he used the Internet to visit non-work-related sites for an extended period of time. In addition, Appellant's appalling behavior in Ms. Thompson's office on August 2, 2001, constituted

neglect of duty, willful violation of policy, willful or wanton disregard of the agency's standards of expected behavior, and rose to the level of gross misconduct.

4.17 Appellant may have been a valued and productive employee in the past. However, from March 1, 2001 through August 2, 2001, he engaged in a repetitive and escalating pattern of egregious misconduct and, as exhibited by his CIR responses, refused to accept responsibility for his actions. Such behavior should not be tolerated in the work place. Under the totality of the proven facts and circumstances and considering Appellant's history of prior discipline, Respondent has established that the disciplinary sanction of immediate suspension followed by dismissal was justified. Appellant's appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeals of Courtney Mortimer are denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____

Walter T. Hubbard, Chair

_____

Gerald L. Morgen, Vice Chair

Personnel Appeals Board
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