BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DARRELL MINOR, Appellant, v. NORTH SEATTLE COMMUNITY COLLEGE, Respondent.	Case No. DISM-04-0099 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, Member. The hearing was held in the Board Room at North Seattle Community College in Seattle, Washington, on October 11, 2005.

1.2 **Appearances.** Appellant Darrell Minor was present and was represented by Edward E. Younglove III, of Parr, Younglove, Lyman & Coker, P.L.L.C. David LaRaus, Assistant Attorney General, represented Respondent North Seattle Community College (NSCC).

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for gross misconduct, neglect of duty, and insubordination for severing a natural gas line while operating a piece of equipment used to dig an irrigation line.

II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent North Seattle Community College. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on September 28, 2004.

2.2 Appellant began his employment with North Seattle Community College in April 1997. Appellant worked in the Facilities Department as a Gardner II. Part of Appellant's duties included the operation of light power equipment, such as a Bobcat, to maintain the college's irrigation system. On occasion, Appellant operated a piece of heavy equipment, a John Deer backhoe.

2.3 On June 23, 2004, Appellant was assigned the task of replacing a signal wire that enables a portion of the irrigation system. In order to reach the wire, Appellant had to excavate the area near the irrigation line using a Bobcat with a backhoe attachment. A site map was available for Appellant to review the general location of underground utilities. Appellant was already aware of a natural gas line in the vicinity due to a visible scar that remained on the grass from a previous excavation. In addition, Appellant's supervisor provided a spotter to work with him; however, Appellant did not work with the spotter because he did not believe the person was trained well enough to assist him.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.4 Around 9:30 a.m. on June 23, while digging with the backhoe attachment on the Bobcat, Appellant struck a water line that was part of the irrigation system. Safety and Security Manager Jeff Caldwell assisted Appellant in shutting off the water, reviewed the site map with him, and suggested Appellant locate the underground utilities. Appellant, however, told Mr. Caldwell he knew where the underground utilities were located.

2.5 Approximately two hours later, Wally Fosmore, Manager of Facility Operations, noticed the flooding caused by the broken water line and asked Appellant if he had used the college's underground locating equipment. Appellant told Mr. Fosmore he had not used the equipment because it was not accurate. A short time later, Appellant struck an electrical conduit.

2.6 Mr. Fosmore then told Appellant that a locator service should be contacted if the college's equipment was not accurate, and he reminded Appellant that the gas line in the vicinity was a high pressure line. Appellant's supervisor, Michael Brokaw, called the locating service and directed Appellant to dig just beyond a specified path familiar to Appellant, which was still about 30 feet and a safe distance from the visible scar denoting the approximate location of the gas line. Appellant, however, continued to dig the trench, and at approximately 1:30 p.m., he ruptured the high pressure gas line, causing the administration building to immediately fill up with noxious gas. As a result, the administration building had to be evacuated for health and safety reasons.

2.7 On July 13, 2004, President Ronald LaFayette notified Appellant that he was considering disciplinary action against him for digging up the natural gas line. On August 2, 2004, President LaFayette met with Appellant to provide him an opportunity to respond. Appellant provided several defenses to mitigate his actions, including poor supervision and inadequate training, not

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

being provided with a qualified spotter, and working out of class. President LaFayette asked Human Resources Administrator David Bittenbender to investigate Appellant's responses.

2.8 After reviewing the Gardener II job description and class specification, Mr. Bittenbender reported that operating a Bobcat and reviewing site maps were within the scope of Appellant's job. He further reported that Appellant had prior experience operating the Bobcat and was present when the Bobcat vendor reviewed and demonstrated the proper procedures for operating the machine. As a result, President LaFayette was not persuaded by Appellant's attempt to mitigate his actions, and he did not find Appellant's responses credible.

2.9 By letter dated September 10, 2004, President LaFayette notified Appellant of his dismissal, effective September 24, 2004. President LaFayette charged Appellant with gross misconduct, neglect of duty, and insubordination for severing a high pressure natural gas service line after being instructed to stop digging with power equipment until the gas utility was located.

2.10 In determining the level of discipline, President LaFayette considered Appellant's work history, which contained an October 20, 2003, documented verbal warning for participating in a verbal altercation with a co-worker and leaving work without authorization and a March 31, 2004, letter of reprimand for failing to seek prior authorization for leave. President LaFayette also considered Appellant's poor safety record, the seriousness of the offense, and the hazard Appellant created for the college, students, and staff. President LaFayette concluded Appellant's negligent behavior warranted termination.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant neglected his duty to perform skilled work, failed to follow instructions, and failed to exercise caution when operating machinery near a high pressure gas line. Respondent asserts that Appellant's supervisor instructed him to review the site map and use a spotter when excavating with the Bobcat. Respondent further asserts that after digging up two underground utilities, Appellant was specifically told by management to use locator equipment or contact a locator service before resuming any significant digging. Respondent contends Appellant's disregard for management's directives and lack of attention to safety issues created a dangerous situation for the college and argues termination is the appropriate sanction.

3.2 Appellant argues that he was employed by the college as a gardener, not a heavy equipment operator. Appellant, therefore, asserts he was not qualified to be excavating a trench near a high pressure gas line. Appellant contends he was never specifically told to stop digging and asserts management simply suggested he stop digging until the utilities were located. While Appellant asserts he might have used poor judgment in determining exactly where the gas line was located, he contends he was not deliberately insubordinate, and he argues that his supervisor should have provided better guidance. Appellant argues he that he has no prior formal discipline and asserts termination is 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

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

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 Respondent has met its burden of proving Appellant neglected his duty to exercise caution and act responsibly when operating the Bobcat for the purpose of digging up and repairing an irrigation system. Appellant's supervisor advised him to review the site map prior to excavating the trench and assigned an individual to work as a spotter while Appellant dug the trench. Appellant, however, refused to have the spotter assist him. Even after digging up two underground utility lines, Appellant continued to excavate too close to a visibly marked area where he knew a natural gas line was in close proximity.

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

4.6 After digging up the water line and electrical conduit, a manager for the facilities department told Appellant that it was necessary to locate the underground utilities prior to advancing any further toward the natural gas line, which was in a general area familiar to Appellant. Nevertheless, Appellant continued to operate the Bobcat. When Appellant's direct supervisor became aware of the breaches made to the utility lines and it became evident that a locator service was needed, he specifically told Appellant where to stop digging, which was a landmark Appellant

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

would clearly have understood and one approximately 30 feet from the vicinity of the natural gas line. Appellant, however, repeatedly disregarded management's instructions. Therefore, Respondent has proven the charge of insubordination.

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 actions clearly jeopardized the safety and security of the college and, as a result, constituted gross misconduct.

4.9 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).

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

4.11 Appellant's prior reprimand and verbal counseling considered by the appointing authority put Appellant on notice that he needed to follow supervisory directions. In this case, Appellant

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

continued to exhibit a pattern of disregarding management's instructions. Here, Appellant's failure to follow directions resulted in an extremely dangerous situation that could have been catastrophic. Therefore, under the facts and circumstances, termination is appropriate.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Darrell Minor is denied

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Member

Personnel Appeals Board
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