BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

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| CASSANDRA GIBSON,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF LABOR AND INDUSTRIES,<br><br>Respondent. | Case No. RED-02-0031<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, and GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on March 28, 2003.

1.2 **Appearances.** Appellant Cassandra Gibson was present and was represented by Dale Pettit. MB Newberry, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a reduction in pay for neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency rule or regulations for Appellant's admitted use of the agency email for personal reasons.

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); Anane v. Human



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Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

## II. FINDINGS OF FACT

2.1 Appellant Cassandra Gibson is an Offices Assistant Senior and permanent employee for Respondent Department of Labor and Industries. 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 14, 2002.

2.2 By letter dated May 15, 2002, Steven Young, Assistant Director for Administrative Services, notified Appellant of her 10 percent reduction in pay (range 31, step H to range 31, step D) for a period of three months, effective June 3, 2002 through September 3, 2002. Mr. Young charged Appellant with neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency rules or regulations. Mr. Young imposed the reduction in pay based on Appellant's admitted use of the agency email for personal reasons.

2.3 Appellant began her employment with the department October 1, 1999. Appellant works in a unit that resolves dispute of vocational determinations. Appellant reviews incoming mail and performs other clerical and editing duties.

2.4 Carol Kromer, Appellant's supervisor, addressed Appellant's misuse of state resources on June 4, 2001 after she discovered, on a printer she shared with Appellant, a personal document belonging to Appellant. Ms. Kromer also received a complaint from a coworker who claimed that Appellant was



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using email and Internet for personal use. Ms. Kromer discussed with Appellant the appropriate use of the agency's email and Internet. Ms. Kromer provided Appellant with copies of Administrative Policies 3.30 (Private Use of State Resources) and 7.30 (Proper Use of Computer Resources, Email and Internet).

2.5 Ms. Kromer reviewed the policies with Appellant, and she stressed that personal use of state resources and email was prohibited. Ms. Kromer instructed Appellant not to use the email system at work for personal reasons at any time. Ms. Kromer, in response to a question from Appellant, clarified that it was not appropriate to engage in personal use of the email system even during break times. Appellant also raised the issue that other employees were engaging in personal use of the agency's email system. In response, Ms. Kromer re-sent the policies on appropriate use of state resources to all employees in her unit, and she reminded them that non-business use of state resources was not appropriate.

2.6 On December 20, 2001, Internal Investigator Stephen Smith accessed Appellant's agency email account. Mr. Smith specifically reviewed Appellant's use of the agency's email system from October 18, 2001 through December 18, 2001. Appellant's email activity reflected that she sent a total of 31 personal emails.

2.7 The content of the emails Appellant authored varied, but included explicit and crude discussions of a sexual nature with another coworker. The content of Appellant's other email was inappropriate and non-work related, such as inappropriate jokes she forwarded to other department employees.

2.8 Appellant does not dispute that she engaged in use of the agency's email system for non-business purposes.



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2.9 Respondent has adopted Policy 3.00, Ethical Standards for State Employees, which requires employees to "adhere to high ethical standards" and prohibits employees from using state resources for personal benefit.

2.10 Respondent has adopted Policy 3.30, Private Use of State Resources, which defines an employee's responsibility in the use of state resources. The policy provides that misuse of work time or other state resources "is an abuse of public trust and is subject to corrective or disciplinary action as appropriate."

2.11 Respondent has adopted Policy 7.30, which outlines the department's position on the proper business and personal use of computer technology, electronic email, and the Internet by employees or any other persons using state technology resources. The policy permits use of its technology resources for "business or <u>limited</u> personal use <u>appropriate</u> for the workplace" (emphasis added). The policy further states that limited personal use of technology resources by L&I employees is permissible if all the following are met:

> A. The use is approved by a supervisor or manager to promote organization effectiveness or enhance job related skills.
> B. These resources are not being used just to avoid personal expense.
> C. There is no cost to the state, or the cost is deemed "*de minimis*" (so small as to being insignificant or negligible).
> D. The use of these resources does not interfere with the performance of the employee's official duties.
> E. The use is brief in duration, infrequent, and does not disrupt or distract from the conduct of state business due to volume or frequency.
> F. The use does not compromise the security or integrity of state information, computer systems, or networks.

2.12 L&I's Policy 7.30 was adopted in accordance with WAC 292-110-010 - Use of State Resources, which provides:



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> (1) No state officer or state employee may use state resources including any person, money, or property under the officer's or employee's official control or direction or in his or her custody for private benefit or gain of the officer or employee or any other person . . .

2.13 L&I posts all its policies on its homepage. In addition, the department sends periodic emails to all employees regarding the use of computer technology, including email, for personal purposes. In addition to posting notices on the L&I Intranet, which is accessible to all employees upon logging onto their computers, the department also sent direct emails to each employee's email address with reminders and information regarding appropriate and prohibited uses of the agency's email system. Specifically, on April 20, 2000, an L&I Intranet notice was posted which read: Special attention to be given to the new agency policy (7.30) regarding the proper and legal use of technology here at L&I, including email and the Internet. ... All employees are urged to read and understand these new policies, and to ask questions where further clarification is needed."

2.14 Steve Young, Assistant Director for Administrative Services, was Appellant's appointing authority when he imposed the reduction in pay. Prior to taking the disciplinary action, Mr. Young reviewed the investigative results. On May 2, 2002, Appellant had an opportunity to meet with Mr. Young and respond to the charges. During the meeting, Appellant communicated that her actions were the result of a lapse in judgment due to personal issues she was dealing with at the time. Appellant also claimed that the time she spent creating the emails was *de minimis* and that she had taken steps to correct her actions. Appellant did not defend the inappropriateness of her emails and she acknowledged that she had been previously counseled regarding her use of agency resources.

2.15 Mr. Young considered Appellant's explanations, the previous counseling she received from Ms. Kromer, and the sexual content of the chain emails between Appellant and her coworker. Mr. Young, however, did not believe that Appellant's personal issues mitigated her willful violation of agency policies. Mr. Young concluded that Appellant engaged in misconduct and that the disciplinary action



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was warranted. Mr. Young imposed a reduction in salary because Appellant had full knowledge of the policies regarding use of state resources.

## III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues the evidence supports that the sanction imposed was appropriate and necessary to prevent recurrence. Respondent asserts that Appellant did not learn from previous attempts to correct her inappropriate conduct. Respondent argues that it was in the agency's best interest to send a message to all employees that inappropriate use of state resources will not be tolerated and will not be overlooked. Respondent argues that the issue here is not the volume of Appellant's email use, but the explicit content of the email. Respondent asserts that the reduction in pay was appropriate and should be affirmed.

3.2 Appellant admits that her personal use of the agency's email was not appropriate, but she argues that the punishment was too severe. Appellant asserts that most of her emails were simply quick, one line responses and were not lengthy or time consuming. Appellant argues that her use of the email system occurred during a brief two-month period, was *de minimis* and resulted in no personal gain to her. Appellant contends that she was suffering from depression and was vulnerable at the time she was engaging in the email exchange with another employee. Appellant asserts that the department failed to implement a plan of progressive discipline and that informal training from her supervisor was not corrective action. Appellant asserts that a letter of reprimand would have been more appropriate based on her actions.

## IV. CONCLUSIONS OF LAW

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



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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 emails sent by Appellant, we agree that Appellant's personal use of the L&I email system, while not extensive, was inappropriate for the workplace. Appellant was aware of her duty and responsibility to use the department's computers and its email system for work related purposes only, and she neglected that duty as reflected by her inappropriate personal use of the email system.

4.5 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).

4.6 Respondent has met its burden of proof that Appellant was inefficient when she used her state owned computers and the email system to exchanging non-work related emails during work time rather than perform the duties of her position.



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4.7 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).

4.8 Ms. Kromer clearly informed Appellant that use of state resources was intended for official business only. She also informed Appellant that personal use was appropriate only if approved by a supervisor, resulted in no cost to the state, did not interfere with official duties, and use was brief and infrequent and did not interfere with work due to volume and frequency. Appellant's continued personal use of the email for personal reasons was in direct violation of Ms. Kromer's instructions and constitutes insubordination.

4.9 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).

4.10 Respondent has failed to prove, under the facts and circumstances presented here, that Appellant's email use for non-business purposes constitutes gross misconduct.

4.11 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).

4.12 Respondent has met its burden of proof that Appellant neglected her duty and willfully violated L&I Policies 3.00, 3.30 and 7.30 when she utilized the department's computers and email system for non-work related purposes.



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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 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).

4.15 In assessing the level of discipline imposed here, we conclude that the reduction in salary imposed is not too severe and is appropriate under the circumstances. Therefore, the appeal of Cassandra Gibson should be denied.

## V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Cassandra Gibson is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair



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