BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

TERRY TOWNSEND, Appellant, vs. DEPARTMENT OF TRANSPORTATION, Respondent.	CASE NO. R-RED-10-001 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This matter came before the Personnel Resources Board, LAURA ANDERSON, Chair, and JOSEPH PINZONE, Member. The hearing was held on June 9, 2010, in the Personnel Resources Board hearing room in Olympia, Washington. Closing arguments were submitted in writing on June 24, 2010.

1.2 **Appearances.** Appellant Terry Townsend was present and was represented by Andrew Green, Attorney at Law. Lawson Dumbeck, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a reduction in salary for alleged violation of the agency policy by disclosing confidential information to a former employee.

II. FINDINGS OF FACT

2.1 Appellant Terry Townsend is a permanent employee for Respondent Department of Transportation (DOT). Appellant and Respondent are subject to Chapter 41.06 RCW and the rules promulgated thereunder, Title 357 WAC. Appellant filed a timely appeal with the Personnel Resources Board on January 25, 2010.

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2.2 Appellant has been employed by the State of Washington since 1995 and with DOT since 2006. At the time of the actions giving rise to this appeal, Appellant was a Human Resource Consultant 4.

2.3 At the outset of the hearing, the following stipulations of fact were offered and entered into the record:

- Appellant did send the February 8, 2008 email that is at issue in this case.
- Appellant's employment record has no prior corrective or disciplinary action in her fifteen year career with the state. Her employment record is spotless.
- In her performance evaluations over the fifteen years she has been with the state, she has always met or exceeded expectations in every area.
- For purposes of this hearing, the Appellant is not appealing her administrative reassignment to home on November 6 pending the investigation of this matter.

2.4 Appellant was employed in DOT's Human Resource Office. As a member of the human resources staff, Appellant had access to privileged and confidential information on a daily basis. Appellant attended ethics training and on numerous occasions, she was told of the importance of maintaining the confidentiality of employee information.

2.5 In addition, Chapter 4 of the DOT Human Resources Reference Manual provides guidance on the release of information contained in employee personnel, payroll, and safety/health files. Information related to employees' ages is contained in personnel files. Chapter 4 also provides guidance on the procedures for Public Disclosure Requests. Appellant had access to the manual and also to her supervisor and other human resource staff if she needed clarification regarding releasing information.

2.6 On February 8, 2008, Appellant sent an email to a former DOT employee. The email disclosed the ages of two applicants for a position. Both of the applicants were DOT employees.

The email also informed the former employee to "keep this in mind for when you need it." Appellant was aware at the time that she sent the email, that the former employee no longer worked for DOT. Appellant admits that she had no authorization or business purpose for releasing the information. Further, the email was not in response to a Public Disclosure Request. Appellant credibly testified that by sending the email, she was passing on gossip.

2.7 Kermit Wooden is the Director of the DOT Office of Human Resources and Appellant's Appointing Authority. Mr. Wooden became aware of the email during the course of an age discrimination lawsuit filed against him and the agency. Mr. Wooden credibly testified that the email made him angry, that at first blush he believed Appellant was attempting to help the former employee with her lawsuit, and that he wanted to terminate Appellant's employment.

2.8 On November 6, 2009, Appellant was assigned to home pending an investigation into the allegation that she breached confidentiality. Thomas Howard, Human Resource Consultant for DOT, conducted the investigation which included meeting with Appellant and reviewing an audit report of her DOT email account. The only investigation document Mr. Howard produced was his handwritten notes of his interview with Appellant. As documented in Mr. Howard's notes, during the interview, Appellant indicated that she did not remember sending the email and that she did not remember where she received the employees' ages she included in the email. Based on his interview with Appellant and an audit of her DOT email and internet usage, Mr. Howard determined that this was an isolated incident and that she engaged in no other improper use of email or the internet while at work.

2.9 Appellant was provided a pre-disciplinary letter dated November 30, 2009, which alleged that she breached confidentiality and trust by using her work email account to provide protected information to an outside party. Appellant was given the opportunity respond to the charges either in person or in writing. She chose to respond in writing. Her written response was dated November 30, 2009. In her written response, Appellant admitted sending the email for non-business purposes

and stated that she "did not intend to contribute to any adverse action against the agency." She also indicated that she became aware of the ages of the employees during a conversation and that she was certain she did not use the agency's human resource management system (HRMS) or agency personnel files to obtain the information.

2.10 After considering Appellant's response, the information from the investigation, and taking into account Appellant's work history, Mr. Wooden decided that Appellant's actions were a breach of trust and confidentiality. As stated in the disciplinary letter, he felt that "breaches of confidentiality and poor ethical behavior jeopardize relationships between the Human Resource Office and its customer and detracts from its credibility." Mr. Wooden determined that based on the totality of facts and circumstances in this case, discipline was warranted. Although he initially considered termination, when taking all factors into account, including Appellant's unblemished work history, Mr. Wooden concluded that a three-month five-percent reduction in salary was appropriate. By letter dated December 4, 2009, he informed Appellant of the disciplinary sanction, effective January 1, 2010.

III. ARGUMENTS OF THE PARTIES

3.1 In summary, Respondent contends that Appellant, during working hours and using equipment provided for business purposes, released personal information about applicants and potential applicants for a position to a non-DOT employee. Respondent contends that Appellant acted in opposition to the rule of confidentially. Respondent asserts that it makes no difference where Appellant obtained the information, the fact remains that she made a knowing, willful release of employee information to a member of the public for non-business purposes. Respondent argues that DOT's Human Resources Office staff control and have access to employee records and information and that it is vital that human resources employees maintain the confidentiality of employee information. Respondent further argues that employee ages are personal information and that it is completely unacceptable for human resources employees to release personal information. Respondent asserts that by disclosing the ages of two employees, Appellant failed to maintain the

confidentiality of the employees' personnel information. Respondent contends that Appellant's actions could undermine the confidence that employees and managers have in human resources staff which would deter them from coming to human resources for expert guidance and assistance and could result in significant legal liability. Respondent argues that Appellant was aware of the directive to maintain confidentiality, yet she violated that directive as well as agency policy prohibiting the release of employee information to the public without business purposes or employee authorization. Respondent maintains that corrective action is not a mandatory prerequisite to disciplinary action and that the discipline imposed in this case is one of the lighter reductions in pay given. Respondent contends that the discipline is reasonable and appropriate given the critical importance of and the repeated emphasis placed on maintaining confidentiality in DOT's human resources environment.

3.2 In summary, Appellant argues that Respondent did not have just cause for the discipline it imposed. Appellant suggests that Respondent had more interest in punishing Appellant based on perception rather than ensuring that a thorough, fair, and objective investigation was conducted and that a just cause standard was used. Appellant further suggests that the investigatory process was tainted because Mr. Wooden expressed his desire to terminate Appellant to his subordinates who were then involved in the investigatory and disciplinary process. Appellant asserts that the confidentiality of employees' ages is not addressed in the State Ethics Law, DOT policy or Mr. Wooden's directives and opines that discussion among co-workers of their ages is no doubt a common workplace occurrence. Appellant contends that Respondent failed to apply a consistent disciplinary standard, failed to follow its own disciplinary guidelines, and imposed discipline that was much too severe given the alleged misconduct in this case. Appellant argues that she did not engage in any misconduct and that the disciplinary action should be reversed.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Resources 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 357-52-110.

4.3 This Board and its predecessor, the Personnel Appeals Board, have historically applied the commonly used expression of just cause to all disciplinary cases. When considering whether there was just cause for a disciplinary action, we consider factors such as whether the employee was aware of the expectations, rules, or policies allegedly violated, whether the employee was aware of the need to comply with the rule or policy or to improve performance, whether the employee had an opportunity to demonstrate compliance or improvement, whether the discipline was imposed for good reason, whether the disciplinary process and procedures followed were appropriate, and whether the sanction imposed was sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. Oliver v. Employment Security Department, PRB Case No. R-DEMO-08-006 (2009).

4.4 Appellant is a senior level human resource consultant with years of experience and she was told on numerous occasions of the expectation that personal information about employees be kept confidential. An employee's age is personal information maintained in an employee's confidential personnel file. Respondent has met its burden of proof that Appellant knew or should have known of the expectation that she keep personal employee information confidential and that she was aware of the importance of complying with the expectation. Respondent has established good reason for imposing discipline.

4.5 Appellant challenges Respondent's investigatory process. Investigations into employee misconduct should be thorough, timely and fair.

- In this case, Appellant argues that Respondent failed to interview the two employees' whose ages were disclosed in the email. However, we find that interviewing these two employees would not have shed light on whether Appellant's disclosure violated DOT's

expectations in regard to maintaining the confidentiality of employee information. Further, Appellant admitted to writing the email that disclosed the employees' ages. We agree with Respondent that it makes no difference where Appellant obtained the information when she admits that she sent the email using state resources for non-business purposes. Respondent brought forth a plethora of evidence that the disclosure was in violation of DOT human resource policy and expectations. Under the unique facts and circumstances of this case, the investigation was thorough.

- Although the email was nearly two years old when the investigation began, Respondent initiated the investigation as soon as it became aware of the email and Appellant's alleged violation of human resource policy and expectations. We recognize the length of time between the email and the investigation, but find that nothing requires that the evidence in this case be confined to a particular time period. Rather, when misconduct is discovered, the investigation itself must be initiated in a timely fashion. In this case, the investigation was timely.
- We have carefully considered Appellant's arguments but find that under the proven facts and circumstances of this case, the investigatory process was fair. During the investigation, Appellant was given an opportunity to provide her responses to questions about the email. And, she was provided an opportunity to respond to the charges in the pre-disciplinary letter.

4.6 During hearings before the Board, employees may raise any claim or defense including evidence of disparate discipline of employees who engaged in the same or similar misconduct. In this case, Appellant asks the Board to consider the level of discipline imposed on other DOT employees whom she alleges engaged in conduct similar to hers. This Board adopts the reasoning given by of the Personnel Appeals Board in Lisi v. Dep't of Fish and Wildlife, PAB Case No. DISM-01-0028 (2003). In Lisi, the Personnel Appeals Board stated:

> Even though the Board is often invited to consider evidence of misconduct by other employees to demonstrate disparate treatment or disproportionate disciplinary sanctions, the Board finds such evidence has limited value in

> evaluating whether the sanction under appeal is appropriate. The examples of disparate treatment rarely have identical facts to the appeal under consideration. Also, the facts of other actions or the lack of disciplinary action are not fully before the Board to make a meaningful comparison. The Board relies on its experience of conducting hearings and deciding appeals within its jurisdiction from across the broad spectrum of state agencies and institutions of higher education to guard against disparate treatment and disproportionate disciplinary sanctions. Such an approach reinforces the principle that each appeal is decided on its unique facts and circumstances, with the Board cognizant of its past decisions. To expand the scope of our review to include an examination of all similar instances of employee misconduct and discipline, we believe, would make hearings and decisions more lengthy and complex without significantly increasing the scrutiny given to disciplinary actions.

4.7 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. An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.8 In this case, considering the facts and circumstances in their entirety, including the seriousness of Appellant's misconduct, the sanction imposed is not too severe. DOT human resource staff properly advised the appointing authority against the more severe sanction of termination and the appointing authority listened to them and accepted their advice. Ultimately, the level of discipline took into account Appellant's unblemished work history and her response to the charges. Given Appellant's work history and experience, her actions rise to a level of egregiousness that warrants discipline. We agree that corrective action would not have been sufficient to impart to Appellant the seriousness of her misconduct.

4.9 Under the totality of the proven facts and circumstances, the disciplinary sanction of a reduction in salary is appropriate. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Terry Townsend is denied.

DATED this _____ day of _____, 2010.

WASHINGTON PERSONNEL RESOURCES BOARD

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LAURA ANDERSON, Chair

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JOSEPH PINZONE, Member