

BEFORE THE PERSONNEL RESOURCES BOARD
STATE OF WASHINGTON

MICHAEL MASTEN,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

Case No. R-DEMO-15-003

FINDINGS, CONCLUSIONS AND
ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This matter came before the Personnel Resources Board, NANCY HOLLAND YOUNG, Chair and SUSAN MILLER, Vice Chair. The hearing was held on September 9, 2015, in the Personnel Resources Board hearing room in Olympia, Washington. Appellant submitted a written closing argument on September 17, 2015. Respondent's closing arguments were submitted on October 7, 2015.

1.2 **Appearances.** Appellant Michael Masten was present and represented himself. Morgan Damerow, Assistant Attorney General, represented the Respondent, Employment Security Department (ESD).

1.3 **Nature of Appeal.** This is an appeal of a demotion. Respondent alleges that Appellant asked inappropriate questions of a female volunteer and was insubordinate and retaliatory during the course of the investigation.

II. FINDINGS

2.1 Appellant Michael Masten was a permanent employee for Respondent ESD. 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 March 5, 2015.

1 2.2 By letter dated February 28, 2015, Anne Goranson, Southwest Regional Director, notified
2 Appellant of his demotion. Ms. Goranson alleged that Appellant engaged in inappropriate
3 behavior toward a volunteer staff member and that he was insubordinate and retaliatory during
4 the investigative process. Ms. Goranson alleged that Appellant's actions violated ESD's
5 Employee Conduct Policy #1016, Harassment Policy #0014, RCW 49.44.090 regarding pre-
6 employment inquiries and WACs 357-58-005 and 357-58-390 regarding WMS managers.

7
8 2.3 Appellant began his employment with the State of Washington on March 3, 1983, and
9 held various management positions since October of 1989. Appellant has been employed with
10 ESD since July 16, 2011. At the time of his demotion, Appellant was a WMS WorkSource
11 Administrator for WorkSource Thurston County with ESD.

12 2.4 Prior to the action giving rise to appeal, Appellant received a Letter of Reprimand dated
13 October 8, 2014, as a result of two complaints from employees in his chain of command. The
14 letter noted that Appellant used inappropriate, discriminatory language in meetings and in
15 personal conversations.

16
17 2.5 Training: Appellant signed the Required Policies List, including "Employee Conduct"
18 and "Harassment;" and completed supervisory training.

19
20 ESD Policy 1016 – Employee Conduct states, in relevant part:

21 Any unreasonable or derogatory remarks concerning a customer or co-workers'
22 race, color, religion, sex, national origin, age, disability, political affiliation or
23 belief, citizenship, marital status, or sexual orientation will not be tolerated and
24 will be processed under ESD Policy.

25
26 ESD Policy 0014, Harassment Prevention states, in relevant part:

27 The Department will also not tolerate acts of reprisal or retaliation of any kind
28 against the accused harasser or against individuals who report or participate in the
29

1 investigation of matters addressed by this policy. Any such retaliation will be
2 regarded as employee misconduct and a violation of this policy.

3
4 It is the policy of ESD to respect the confidentiality and privacy of individuals
5 reporting harassment and the person accused of harassment to the extent
6 reasonably possible. Employees involved in or observing the investigation of such
7 matters are expected to maintain confidentiality and refrain from gossip or
8 speculation concerning the parties to a complaint, an investigation, and/or
9 Departmental action on such matters.

10
11 The supervisory training contents included:

12 What Not to Ask:

- 13 • Marital/family status
- 14 • Disabilities (health status, medical information)

15
16 As a manager, Appellant was aware of WAC 162-12-140, which states, in relevant part:

17 (1)...The rules also apply to inquiries made to persons other than an applicant and
18 to inquiries made by third parties...

19 ...

20 (3) The following examples of unfair preemployment inquiries define what is an
21 unfair practice under RCW 49.60.180(4) and 49.60.200...All pre-employment
22 inquiries that unnecessarily elicit the protected status of a job applicant are
23 prohibited by these statutes irrespective of whether or not the particular inquiry is
24 covered in this regulation.

25 ...

26 e. Family: Whether applicant can meet specified work schedules
27 or has activities, commitments or responsibilities that may prevent
28 him or her from meeting work attendance requirements. Unfair

1 inquiries include specific inquiries concerning spouse...children,
2 child care arrangements, or dependents.

3 ...

4 n. Pregnancy: Inquiries as to duration of stay on job or anticipated
5 absences which are made to males and females alike. Unfair
6 inquiries include all questions as to pregnancy and medical history
7 concerning pregnancy and related matters.

8
9 2.6 Prior to this demotion, ESD experienced several layoffs. One of Mr. Masten's new
10 subordinates was an Americorps volunteer, Ashley Disken (Currently Ashley Fueston). When
11 Ms. Disken's supervisor was laid off, Anita Davis, Worksource Specialist, unofficially took on
12 the role as Ms. Disken's supervisor, e.g. approving her time sheets, answering questions, etc.
13 Eventually, Mr. Masten was assigned as Ms. Disken's official supervisor.

14
15 2.7 Ms. Disken credibly testified that after she spoke with Appellant about the possibility of
16 another Americorps volunteer working with ESD, Appellant talked to her about her potential for
17 becoming a permanent ESD employee. Appellant relayed compliments about her work from
18 other employees. Appellant asked Ms. Disken questions that included her family plans, whether
19 the fathers of her children were still involved in her children's lives and whether she planned on
20 having more children. Ms. Disken said she felt obligated to answer Appellant's questions
21 because he was her supervisor.

22
23 2.8 Ms. Disken spoke to Ms. Davis after her conversation with Appellant. Ms. Disken told
24 her about the Americorps volunteer approved to work with ESD and about the conversation
25 following regarding her future employment with ESD. Ms. Disken told Ms. Davis the
26 conversation she had with Appellant made her feel uncomfortable. Ms. Davis advised Ms.
27 Disken to write down what happened and told her that Appellant should not have had this kind of
28 conversation with her.

1 2.9 On December 22, 2104, Ms. Disken wrote a paragraph explaining the conversation with
2 Appellant and sent it to her Americorps Program Supervisor. On January 5, 2015, Sandi LaPalm,
3 Deputy Assistant Commissioner for HR, notified Appellant by email of the accusations and told
4 him he was being investigated. In the email Ms. LaPalm advised Appellant that retaliation or acts
5 perceived as retaliation would not be tolerated.

6
7 2.10 The investigation was conducted by Coleen Blake, Senior Human Resource Consultant,
8 with ESD Human Resources and Operational Support Division. Ms. Blake interviewed Ms.
9 Disken, Ms. Davis and Appellant. Ms. Blake investigated the allegation that Appellant asked
10 inappropriate questions of Ms. Disken.

11
12 2.11 After the interviews were completed, Ms. Blake received a voice mail from Ms. Disken
13 stating that Appellant had discussed the investigation with her and that a WorkForce staff
14 member, Jennifer Peppin, served as a witness to the conversation.

15
16 2.12 Appellant sent Ms. LaPalm an email explaining that his recent discussion with Ms.
17 Disken (witnessed by Ms. Peppin) proved she was not offended by his original conversation
18 where he allegedly asked inappropriate questions.

19
20 2.13 After Anne Goranson, SW Regional Director, received word that Appellant discussed the
21 investigation with Ms. Disken, she sent Appellant a letter reassigning him to a different division -
22 WorkForce Career and Development Division. On January 15, 2015, Appellant posted a copy of
23 the letter on the outside of his office door.

24
25 2.14 Appellant announced the investigation at a January 9, 2015 staff meeting.

26
27 2.15 Ms. Blake conducted interviews for a second time with the same staff plus several more
28 staff members to discuss Appellant's announcement of the investigation, the posting of his
29

1 reassignment letter on his office door and his conversation with Ms. Disken that included Ms.
2 Peppin as a witness.

3
4 2.16 Ms. Blake compiled the results of her investigation into a February 10, 2015 report to
5 Sandy Miller, Assistant Commissioner of WorkForce Career and Development Division. She
6 found that the series of questions Appellant asked Ms. Disken were personal in nature and
7 included Appellant's interest in Ms. Disken's future employment with ESD. It was unclear
8 whether the questions were pre-employment inquiries. Ms. Blake found that Appellant
9 announced the investigation and his previous investigation at a staff meeting and that it made
10 staff feel uncomfortable and concerned. Ms. Blake also found that Appellant had a conversation
11 with Ms. Disken about the subject of the investigation after being told not to discuss it.

12
13 2.17 A pre-disciplinary meeting was held with Appellant on February 20, 2015. Those in
14 attendance were Appellant, Ms. Blake, Ms. Miller and Ms. Goranson. Appellant provided a pre-
15 recorded statement and a written transcription of his statement. Appellant denied asking Ms.
16 Disken inappropriate questions; denied he was retaliatory; and denied he harassed anyone.
17 Appellant said he refused to be silent. When asked if he could follow ESD policies, Appellant
18 declined to answer.

19
20 2.18 Ms. Goranson, the Appointing Authority, found Appellant violated ESD Employee
21 Conduct Policies #1016 regarding employee conduct and #0014 regarding harassment
22 prevention. Ms. Goranson found the questions Appellant asked of Ms. Disken violated WAC
23 162-12-140 concerning preemployment inquiries and questions around children, child-care
24 arrangements, dependents and marital status were inappropriate.

25
26 2.19 Ms. Goranson found Appellant did not take responsibility for his actions, rather blamed
27 his actions on others. Ms. Goranson found that WMS managers are held to a higher standard. Ms.
28 Goranson found it alarming that Appellant didn't think anything was wrong in his conversation
29 with Ms. Disken and did not see his subsequent actions as retaliatory.

1 2.20 By letter dated February 28, 2015, Appellant was notified of his demotion to an ES
2 Program Coordinator 2, a non-supervisory classification. Ms. Goranson testified that a lesser
3 disciplinary action was considered, but she believed that, given his actions, he should not be in a
4 supervisory position.

5
6 2.21 Throughout the course of hearing on this appeal, the Board heard testimony from many of
7 the Appellant's co-workers, managers and subordinates. The Board believes the witnesses were
8 forthright in their testimony and were credible. As a result, the Board finds that a preponderance
9 of the credible testimony supports that Appellant asked inappropriate questions of Ms. Disken,
10 announced the investigation at a staff meeting, posted a copy of the Letter of Investigation on his
11 door and spoke to Ms. Disken in the presence of Ms. Peppin about the investigation. Testimony
12 occurred that called this behavior retaliatory and made employees feel uncomfortable.

13
14 2.22 The Board also heard testimony that Appellant was positive, innovative, a creative
15 thinker and significantly helped his peers. Other than a Letter of Reprimand issued in October
16 2014, testimony was given that Appellant had an excellent work record.

17 18 **III. ARGUMENTS OF THE PARTIES**

19 3.1 Appellant does not deny asking alleged inappropriate questions of Ms. Disken and does
20 not deny the allegations of his actions during or following the investigation. Rather, Appellant
21 contends he is the victim of a campaign to impugn his reputation and integrity, beginning with a
22 Letter of Reprimand for racial slurs in October 2014 and ending with his demotion. Appellant
23 argues that the questions he asked Ms. Disken were not harassing, nor were they pre-employment
24 inquiries as in an interview setting. Appellant said the questions were similar to what is discussed
25 with WorkFirst clients in helping them return to work. Respondent asserts that questions about
26 family planning are typical in instances when a case manager speaks to their clients. Appellant
27 contends that as Ms. Disken's supervisor, the questions helped to understand her situation so he
28 could better support her work.

1 3.2 The Respondent argues that Appellant knows the standards around communicating with
2 subordinates, given Appellant had completed training for supervisors, signed ESD Policies about
3 employee behavior, harassment prevention and had been a manager for several years.

4 3.3 Respondent stated that any less a punishment for these infractions would not have been
5 enough and that Appellant should not be in a supervisory position.

6 **IV. CONCLUSIONS**

7 4.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.
8

9 4.2 In a hearing of an appeal for a disciplinary action, Respondent has the burden of supporting
10 the charges upon which the action was initiated by proving by a preponderance of the credible
11 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
12 sanction was appropriate under the facts and circumstances (WAC 357-52-110).

13
14 4.3 In presenting his case and in his closing argument, Appellant referenced numerous times a
15 previous letter of reprimand that is not the subject of this hearing before the Board. The Board has
16 jurisdiction in this case to rule on the demotion that was effective March 16, 2015 and whether or
17 not the sanction was appropriate.

18
19 4.4 When considering whether there was just cause for a disciplinary action, we consider
20 factors such as whether the employee was aware of the expectations, rules, or policies allegedly
21 violated, whether the employee was aware of the need to comply with the rule or policy or to
22 improve performance, whether the employee had an opportunity to demonstrate compliance or
23 improvement, whether the discipline was imposed for good reason, whether the disciplinary process
24 and procedures followed were appropriate and whether the sanction imposed was sufficient to
25 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
26 program.

1 4.5 Appellant was aware of the expectations, rules and policies he violated. He signed the
2 Required Policies List, completed supervisory training and was obliged as a manager to follow
3 applicable rules, including WAC 162-12-140 regarding pre-employment inquiries.
4

5 4.6 Appellant had opportunity to demonstrate compliance and improvement after he was
6 notified of the investigation, but failed to do so. After Appellant was told to not speak to anyone
7 about the investigation, he announced it at a staff meeting, spoke directly to the accuser and a
8 witness about the investigation and posted the reassignment letter on his office door. When
9 Appellant was asked if he was willing to follow ESD policy, he was unable to answer in the
10 affirmative.
11

12 4.7 The Board and its predecessor, the Personnel Appeals Board, have previously ruled on
13 disciplinary actions for WMS employees. For example, in Mayhew v. Dept. of Corrections, PRB
14 Case No. R-DEMO-06-002 (2006), the Board upheld the sanction of demotion and concluded that
15 the employee, who was a WMS employee with 17 years of experience and no history of corrective
16 or disciplinary actions, should have been aware of his obligation to comply with the department's
17 Code of Ethics and policies. In Ahearn v. Dept. of Corrections, PAB Case No. DEMO-02-0015
18 (2003), the Personnel Appeals Board upheld the sanction of demotion and concluded that a WMS
19 employee is held to a higher standard of conduct and professionalism and has a duty to act as a role
20 model.
21

22 4.8 Appellant was aware of the expectations of his position as a WMS manager and of the rules
23 governing pre-employment inquiries. Appellant was aware of the need to comply with expectations,
24 statutes and rules and was given an opportunity to demonstrate improvement. Instead of complying
25 with the orders to not speak about the investigation or retaliate, Appellant did just the opposite by
26 announcing the investigation at a staff meeting and speaking directly with the accuser about the
27 investigation.
28
29

1 4.9 WAC 357-58-005 states in part: “Also, it is essential that agency leaders hold their
2 managers accountable for properly leading and managing their human resources - their
3 employees.” Because of Appellant’s willful disregard for following instructions during the
4 investigative process, failure to acknowledge his error in judgement and failure to conduct himself
5 in an professional manner befitting a WMS manager, demotion to a non-supervisory position was
6 appropriate. Since ESD did not have a non-supervisory WMS position available, they appropriately
7 placed him in the highest level that was available.

8
9 4.10 Respondent has met the burden proof and established just cause for Appellant’s demotion.

10
11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Masten is denied.

13 DATED this ____ day of _____, 2015.

14 WASHINGTON PERSONNEL RESOURCES BOARD

15
16
17 _____
NANCY HOLLAND YOUNG, Chair

18
19 _____
SUSAN MILLER, Vice Chair