BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ALEXIS SANTOS, Appellant, v. OFFICE OF THE INSURANCE COMMISSIONER, Respondent.	Case No. RED-03-0005 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on March 16, 2004. BUSSE NUTLEY, Member, reviewed the file and record and participated in the decision on this matter. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Alexis Santos was present and represented himself *pro se*. Janetta Sheehan, Assistant Attorney General, represented Respondent Office of the Insurance Commissioner.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of reduction in salary for neglect of duty, gross misconduct, inefficiency, and willful violation of the published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant used state resources for personal use, and used his position to influence a constituent for personal gain.

II. FINDINGS OF FACT

2.1 Appellant had no history of prior formal disciplinary action. Appellant is an Actuary Associate and permanent employee for Respondent Office of the Insurance Commissioner (OIC). 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 February 12, 2003.

2.2 OIC has responsibility for regulating all insurance business in Washington, and ensures that all insurance companies meet and maintain rigid financial, legal, and other requirements for doing business in this state.

2.3 The Office of the Insurance Commissioner Ethics Policy prohibits employees from engaging in activities incompatible with public duties, using a state position to secure special privileges, or working on a relative's or friend's insurance complaints or issues. The policy also directs employees to avoid the appearance of a conflict of interest and to use state resources for state business only.

2.4 The Office of the Insurance Commissioner Electronic Mail Policy prohibits the use of state-owned equipment for personal reasons. The policy states that the OIC electronic mail system is for official use only, and to be used by employees in the performance of their duties.

2.5 By letter dated December 30, 2002, Michael Watson, Chief Deputy Insurance Commissioner, informed Appellant of his $500 per month reduction in salary, effective January 16, 2003 through April 16, 2003. Mr. Watson alleged that Appellant used state resources for personal use, and used his position to influence a constituent for personal gain.

2.6 During March 2002, Appellant filed a claim with his personal homeowners' insurance company, Country Mutual Insurance, for extensive damage he discovered during the replacement of siding on his home.

2.7 On May 16, 2002, Country Mutual Insurance denied Appellant's claim. By letter dated July 8, 2002, Country Mutual Insurance notified Appellant that his homeowner's policy would not be renewed due to circumstances surrounding the March 2002 claim.

2.8 On July 30, 2002, during work hours at 8:50 a.m., Appellant sent a letter from his workplace by e-mail to Mr. Barlow, Country Mutual's insurance agent. The letter was sent on OIC letterhead, contained Appellant's name, OIC job title, telephone number, fax number, and agency e-mail address. The letter stated in part:

> … the Office of the Insurance Commissioner would like to have the name of the underwriting supervisor and phone number of Country Mutual Insurance Company in connection with policy #A46K4308157. The Company Supervision Division, specifically the Market Conduct Unit, routinely examines the underwriting practices, among other things, of insurance companies doing business in the State of Washington. Your cooperation is appreciated.

2.9 At 2:21 p.m., Appellant attempted to recall the letter to Mr. Barlow. At 2:26, Appellant sent an identical letter with the added salutation of "Dear Mr. Barlow." At 5:19 p.m., Appellant attempted to recall the second letter.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.10 Mr. Barlow received both letters from Appellant, and researched the policy number referenced in the letter to discover that it was Appellant's personal policy for coverage on his home. Mr. Barlow forwarded Appellant's letter to Mr. Kevin McKenna, Agribusiness Underwriting Supervisor for Country Mutual Insurance Company.

2.11 By letter dated August 5, 2002, Mr. McKenna stated to Appellant that he was "confused as to whether your letter was intended to be direct policyholder correspondence or whether the Washington Office of the Insurance Commissioner is acting pursuant to official procedures."

2.12 By e-mail dated August 7, 2002, during work hours at 4:33 p.m., Appellant sent an e-mail from his workplace to OIC's Consumer Advocacy Section and attached a copy of his e-mail letter to Country Mutual Insurance. Appellant made a formal consumer complaint against Country Mutual Insurance and requested assistance.

2.13 On November 20 and 21, 2002, DJ Mark, Deputy Commissioner of the Operations Division, met with Appellant to discuss his July 30, 2002 letters to Mr. Barlow. Appellant verified he sent the letters from his work computer; however, he considered the incident to be *de minimus* use of state equipment.

2.14 By letter dated November 25, 2002, Mr. Watson notified Appellant that OIC was considering taking formal disciplinary action against him.

2.15 On December 17, 2002, Mr. Watson conducted a meeting with Appellant and Jim Odiorne, Deputy Commissioner, to allow Appellant an opportunity to respond to the charges. During the meeting, Appellant provided a letter of apology that stated:

> I realize that I have made a mistake for which I truly regret. The mistake was accidental and was made under extreme duress caused by the distinct possibility of having my four young children experience homelessness if a catastrophe hits us while having no insurance coverage to the biggest investment we have. It was never my intent to use my position with the OIC to influence Mr. Barlow in any way whatsoever. I will do everything in my power to prevent this from happening again.

2.16 Appellant included an attachment to his letter of apology that contained responses to the allegations. Appellant claimed he did not intend to send the letters on OIC letterhead; however, his word processor uses the agency's letterhead by default. Appellant's letter stated, in part, that:

> The direct reference to the Market Conduct Unit was my attempt to educate Mr. Barlow that there are regulatory restrictions on underwriting practices, among other things, imposed by all insurance departments, not just by Washington, nor just by the USA. I have worked in the insurance industry now for almost a quarter of a century. … In all my experiences under different regulatory environments, invariably part of my job as an actuary was educating underwriters and agents about the different regulatory restrictions on the insurance industry.

2.17 Mr. Watson reviewed Appellant's responses to the allegations and the appropriate policies and guidelines. Mr. Watson believed that Appellant did intend to use his Actuary Associate position to influence or intimidate because Appellant sent the letters to Mr. Barlow on OIC letterhead and signed with his official OIC title to imply the information was being requested by OIC. Mr. Watson believed that Appellant's letter contained an implied threat of possible examination or disciplinary action. Mr. Watson also considered that Appellant sent the letter twice.

2.18 Mr. Watson did not believe that Appellant accepted full responsibility or understood the full implications of his actions. Mr. Watson concluded that a $500 per month reduction in salary for three months was the appropriate disciplinary action to get Appellant's attention and prevent a recurrence.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant clearly used his state-owned computer during work hours for personal use, and used his position within OIC in an attempt to influence Country Mutual Insurance Company for personal gain. Respondent asserts that Appellant's letter asked for information related to his personal homeowners policy. Respondent contends Appellant attempted to intimidate Mr. Barlow and implied that information was being requested by OIC. Respondent argues that Appellant's letter contained a veiled threat of possible regulatory investigation or disciplinary action. Respondent asserts Appellant's unethical intimidation and implied threats could have benefited him by convincing Country Mutual Insurance Company to change their decision about canceling his insurance. Respondent contends that when considering the level of misconduct, the fact that Appellant works for a regulatory agency, and the fact that the insurance company had questions as to whether Appellant was acting on his own behalf or on behalf of OIC, clearly shows that a reduction in pay was the appropriate sanction in this case.

3.2 Appellant argues that sending the letters to Mr. Barlow on OIC letterhead was a mistake made under extreme duress caused by the threat of having no homeowner's insurance coverage. Appellant asserts he did not intend to use his Actuary Associate position to influence Mr. Barlow, and that Mr. Barlow already knew he was employed by OIC. Appellant argues that he used state resources to send personal e-mails on very rare occasions and only when he felt it was extremely urgent. Appellant argues that Mr. Barlow should not have forwarded the letters to Mr. McKenna because he attempted to recall the letters and asked Mr. Barlow to disregard them. Appellant asserts he was merely attempting to talk to the underwriter to discuss the specific details of the decision not to renew his policy. Appellant contends that he was also attempting to educate Mr. Barlow that there are regulatory restrictions on underwriting practices. Appellant argues that he was acting in a manner consistent with his duties as an actuary. Appellant asserts that OIC did not

.

have enough evidence to prove he was guilty of the charges and asks the Board to dismiss the charges and grant his appeal.

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 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, 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).

4.5 Respondent has met its burden of proof that Appellant was inefficient and neglected his duty to behave in an ethical manner when he engaged in personal business during work hours. By sending personal e-mails during work hours, Appellant used agency time to conduct personal business.

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. Harper v. WSU, PAB No. RULE-00-0040 (2002).

4.7 Respondent has met its burden of proof that Appellant’s actions rose to the level of gross misconduct when he used his position of power within the Office of the Insurance Commissioner, which is a regulatory agency, to intimidate and influence a constituent of the agency for personal gain.

4.8 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).

4.9 Respondent has met its burden of proof that Appellant willfully violated the Office of the Insurance Commissioner Ethics Policy and Electronic Mail Policy by attempting to use his position and company equipment for personal gain. In addition to attempting to use his position to secure special privileges and attempting to intimidate Country Mutual Insurance Company, Appellant failed to avoid the appearance of a conflict of interest with his employment.

4.10 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).

4.11 Based on Appellant's egregious misconduct, Respondent has established that the disciplinary sanction of a reduction in salary was not too severe and was appropriate under the circumstances presented here. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Alexis Santos is denied.

DATED this ______________ day of ____________________________________, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

____

Gerald L. Morgen, Vice Chair

____

Busse Nutley, Member

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504