BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHELLE ZACHARIAS, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	Case No. DEMO-03-0016 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, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on June 29, 2005.

1.2 **Appearances.** Appellant Michelle Zacharias was present and was represented by Michael Hanbey, Attorney at Law. M. B. Newbery, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, inefficiency, insubordination, and willful violation of the published employing agency or department of personnel rules or regulations for an ongoing pattern of unexcused absences, resulting in poor work performance.

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II. FINDINGS OF FACT

2.1 Appellant was a Workers Compensation Adjudicator 3 and permanent employee for Respondent Department of Labor and Industries (L&I). 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 July 10, 2003.

2.2 Appellant began her employment with L&I in approximately 1992 as a customer service representative. In 1994 Appellant began training as a Workers Compensation Adjudicator 2 and subsequently promoted to a Workers Compensation Adjudicator 3. Appellant's duties included the timely processing of injured workers' claims.

2.3 Appellant reported to Claims Unit Supervisor Joan Scofield from 1994 to 1997. In 1996, Ms. Scofield issued Appellant two letters of reprimand regarding attendance problems and the negative impact her absences had on the performance of her assigned job duties. Appellant's performance evaluation for the time period of September 1995 to November 1996 also reflected problems with attendance and punctuality, resulting in her co-workers and supervisor having to cover her work.

2.4 On March 18, 1997, Ms. Scofield issued Appellant a counseling memo in which she clearly stated that Appellant was not adhering to attendance or job performance expectations. Appellant's attendance records from December 1, 1996, through March 14, 1997, indicate she missed 172.4 hours of the 568 hours available for her to work. Ms. Scofield further noted that Appellant's co-workers had to take calls from Appellant's irate customers and handle Appellant's work to ensure the unit was not in violation of legislative mandates related to injured workers.

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2.5 In 1997, Claims Unit Supervisor Richard Kelm became Appellant's supervisor. In Appellant's performance evaluation for the time period of August 1997 to April 1998, Mr. Kelm documented Appellant's attendance problems and attached Ms. Scofield's previous counseling memo. Mr. Kelm also noted that Appellant had two "deemed reopened" claims that went past the statutory time to make a decision.

2.6 Between May 2000 and January 2001, Mr. Kelm addressed Appellant's attendance and performance problems as follows:

- On May 16, 2000, Mr. Kelm issued Appellant a memo regarding her performance and attendance expectations, her inability to perform her assigned duties, the significant burden on co-workers, and untimely services to customers.

- On July 5, 2000, Mr. Kelm issued Appellant a memo reiterating performance and attendance expectations. Appellant had missed 100 hours of work that had not been pre-approved since her May 16, 2000, counseling memo. Mr. Kelm also stated that sick leave would only be granted if supported by medical certification and vacation leave requests must have prior approval. Further, Appellant was required to call her supervisor within one-half hour of the beginning of her work shift, if unable to arrive to work on time, and submit leave slips by the end of the business day upon her return from any absences.

- On July 21, 2000, Mr. Kelm issued Appellant a counseling memo for not following his instructions concerning her absences as stated in the July 5, 2000, memo, and he subsequently disapproved several of her leave requests. Once again, Mr. Kelm stressed Appellant's unacceptable attendance and the negative impact on her performance.

- On August 11, 2000, Mr. Kelm issued Appellant a letter of reprimand for inappropriate conduct in the work place when Appellant loudly used profanity toward him, including "fuck you"; "this is a bunch of fucking shit"; "fucking bastard"; and "son of a bitch," after he asked if she had submitted leave for her absence and reminded her he would not approve her absence without a medical certificate.

- On August 16, 2000, Mr. Kelm received a letter from an injured worker regarding Appellant's poor customer service and lack of responsiveness. He then pointed out the customer's letter to Appellant as an example of how her absences impacted her ability to perform her duties.

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- On September 28, 2000, Mr. Kelm issued Appellant a counseling memo regarding attendance, job performance, and expectations. He also informed her that he would consider taking corrective action if there was not measurable improvement in her reliability and performance.

- On January 11, 2001, Mr. Kelm issued Appellant a letter of reprimand regarding her failure to improve attendance and job performance expectations since her last counseling memo in September 2000. Since that time, Appellant had been assessed with almost 100 hours in unpaid leave. In addition, a unit report on January 4, 2001 indicated Appellant had 87 phone messages to return, 83 of which had not been completed within the 48 hour guideline.

2.7 During February 2001 and the time period of March 16, 2001, through May 31, 2001, Appellant was on approved Family Medical Leave, and her absences were not the subject of any corrective action.

2.8 After returning to work, Appellant's attendance and job performance continued to decline. Between July and October 2001, Mr. Kelm issued Appellant one letter of reprimand for her late arrival to work and failure to call in within 30 minutes of the beginning of her work shift or provide medical certification; an email regarding 17 late phone calls; and an email directing her to take actions on claims and uncompleted work. In addition, Mr. Kelm met with Appellant on September 11, 2001, following up with a written memo on September 12, 2001, regarding her late arrival to work and her absence due to illness. At that time, Appellant explained that she had an appointment with a new doctor, and Mr. Kelm temporarily lifted the requirement to provide medical certification for medical leave until October 1, 2001.

2.9 From August 26, 2002, to approximately November 1, 2002, Appellant was placed on approved Family Medical Leave, and her absences were not the subject of any corrective action.

2.10 On December 5, 2002, Mr. Kelm sent a letter to Appellant notifying her that she had exhausted her Family Medical Leave. Mr. Kelm indicated he was willing to work with her on a

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return to work plan or any reasonable accommodation that she needed. However, Mr. Kelm stated he needed information from Appellant's doctor regarding her ability to work as a claims manager by no later than December 13, 2002.

2.11 On December 31, 2002, Appellant met with Sandra Riggle, Human Resource Consultant, and Maura Quiggle, Family Medical Leave Act (FMLA) administrator, to request a six-month leave of absence. Appellant's request for a continued leave of absence was forwarded to management for consideration. Because the medical documentation presented by Appellant did not provide a sufficient basis for a continued leave of absence, the department arranged for Appellant to attend an Independent Medical Examination (IME).

2.12 On February 18, 2003, Appellant attended the IME and a report was forwarded to the department. The IME indicated that a leave of absence was unnecessary and nothing prevented Appellant from returning to work.

2.13 On April 3, 2003, Georgia Moran, Program Manager for Claims Administration, sent Appellant a letter informing her that the results of the IME indicated that a leave of absence would not facilitate her ultimate return to work. Ms. Moran denied Appellant's six-month leave of absence, and directed her to return to work on April 9, 2003.

2.14 Appellant failed to report to work on April 9, 2003, as directed, and failed to notify her supervisor that she would be absent. Instead, Appellant delivered a letter to the Human Resources Department on April 9, 2003, requesting reasonable accommodation and outlining specific requests, including working from home.

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2.15 By letter dated April 25, 2003, Ms. Quiggle responded to Appellant's request for reasonable accommodation by stating that the IME indicated she was in fact able to return to work and that any further arrangements or accommodations would need to be supported by the appropriate medical documentation. Appellant did not provide the agency with any further medical documentation to support her request.

2.16 The department held Appellant's position open until May 19, 2003. Appellant, however, failed to report to work or notify her supervisor of her absences from April 9, 2003, through May 19, 2003. Appellant was charged with eight hours of unauthorized leave without pay for each of those days, totaling 232 hours of unauthorized leave without pay.

2.17 Robert Malooly, Assistant Director for Insurance Services and Appellant's appointing authority, notified Appellant of the charges related to her absences. On June 3, 2003, Mr. Malooly met with Appellant and her attorney for a predetermination meeting to allow Appellant the opportunity to respond to the charges. Appellant responded to the charges by referring to her April 9, 2003, letter, but she failed to provide any supporting medical documentation.

2.18 Mr. Malooly first became aware of Appellant's request for reasonable accommodation at her predetermination meeting. Mr. Malooly reviewed Appellant's specific requests and consulted with the Human Resources Department to determine if anything could be done to support her requests. Mr. Malooly also reviewed Ms. Quiggle's April 25, 2003, response to Appellant, in which Ms. Quiggle stated that there were technology and business related reasons that prohibited Workers Compensation Adjudicators from working from a remote site. Mr. Malooly concluded that Appellant's requests were not feasible for the department. Furthermore, he found Ms. Quiggle's response clearly put Appellant on notice that additional medical documentation was necessary to support her requests.

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2.19 In determining the level of discipline, Mr. Malooly considered Appellant's personnel file, including the positive aspects of her past performance, as well as her extensive history of failing to report to work, resulting in deficient performance. Mr. Malooly determined that previous counseling attempts had been unsuccessful and that Appellant continued to be absent from work, violating L&I's Administrative Policy 3.50, which states that "[e]mployees are responsible for requesting and reporting leave" in accordance with WAC 356-18-070, requiring employees to report sick leave at the beginning of an absence and in compliance with agency procedures. In addition, Mr. Malooly considered the negative impact Appellant's actions had on her ability to assist her customers and the unnecessary burden her absences placed on her work unit. Mr. Malooly concluded Appellant could not remain in a position that required prompt action affecting the critical well being of injured workers. Therefore, Mr. Malooly determined demotion was the appropriate disciplinary sanction.

2.20 By letter dated June 30, 2003, Mr. Malooly notified Appellant that she was being demoted from a Workers Compensation Adjudicator 3 to an Industrial Insurance Underwriter 1, effective July 16, 2003. Mr. Malooly charged Appellant with neglect of duty, inefficiency, insubordination, and willful violation of L&I Administrative Policy 3.50, Leave, WAC 356-18-070, Sick leave-Reporting-Payment, and the Collective Bargaining Agreement, Article 24.8.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant neglected her duty when she failed to report to work and perform her assigned job duties. Respondent asserts Appellant's excessive absenteeism affected her ability to satisfactorily perform her duties and resulted in performance deficiencies, causing additional work for her co-workers and a lack of responsiveness to the injured workers who were her customers. As a result, Respondent contends Appellant was inefficient in processing the claims

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on her caseload and failed to complete tasks in a timely manner. Respondent argues Appellant was insubordinate when she failed to follow her supervisors' expectations and directions regarding absences, as well as the Program Manager's directive to return to work on April 9, 2003. Further, Respondent argues Appellant violated agency policy when she failed to properly request and report leave in accordance with the rules. Respondent asserts Appellant exhibited a pattern of poor attendance and contends her supervisors' attempts to corrective her behavior were unsuccessful. Therefore, Respondent argues demotion is appropriate.

3.2 Appellant does not dispute that she has missed a lot of work. However, Appellant argues she suffers from various medical conditions, including previous job injuries, that affect her ability to perform the duties of her position. Appellant asserts the agency failed to recognize that she has chronic medical conditions that require reasonable accommodation. Appellant asserts the agency failed to consider her requests for accommodation as outlined in her April 9, 2003 letter, including a transfer to another work unit and working from home. Appellant contends the agency is aware of her ongoing medical conditions because she was granted Family Medical Leave on previous occasions. Appellant argues the agency is relying on the results of an IME and not the recommendation of her own medical doctor, who she asserts does not agree that she is able to return to work. Appellant argues the agency has not made a reasonable attempt to accommodate her and asserts there is no basis for her demotion.

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

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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 Respondent has proven by a preponderance of the credible evidence that Appellant neglected her duty to report to work and contact her supervisor at the beginning of her work shift to report her absences from April 9, 2003, to May 19, 2003. The department clearly informed Appellant that her Family Medical Leave had been exhausted, her request for a six-month extension in leave was denied, and that an IME did not support Appellant's request for additional leave. Furthermore, the Claims Administration's program manger clearly directed Appellant to report to work on April 9, 2003. Despite the department's numerous attempts to counsel Appellant on poor attendance and leave reporting, she failed to report to work and failed to complete the assigned duties of her claims adjudicator position, creating a significant burden on her work unit and resulting in unsatisfactory customer service.

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 proven that Appellant was inefficient and unproductive as a result of her continual attendance problems.

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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 Respondent has proven that Appellant was insubordinate when she failed to follow the directives of her superiors to report to work and follow proper procedures regarding leave requests.

4.9 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).

4.10 Respondent has proven that Appellant violated the agency's leave policy when she failed to report her absences at the beginning of her work shift, resulting in unauthorized leave without pay for the time period of April 9, 2003, through May 19, 2003.

4.11 Appellant raises the issue of reasonable accommodation and claims that Respondent failed to accommodate her medical conditions. In this case, Appellant attended an IME, and the results of the IME indicated Appellant was able to return to work and perform the duties of her position. Although Appellant claims that reporting to work was against her doctor's orders, Appellant provided no medical documentation to support she had a disability that prevented her from performing the essential duties of her position with or without accommodation. Appellant's refusal to return to work was unreasonable under the circumstances, and her actions were not mitigated.

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4.12 Under the facts and circumstances of this case, we conclude that Respondent has proven Appellant's demotion was warranted, and the appeal of Michelle Zacharias should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michelle Zacharias is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member

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