BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

BRITA HOFTO, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. RED-04-0031 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, WALTER T. HUBBARD, Chair. The hearing was held at the Liquor Control Board Distribution Center, 4401 East Marginal Way South, Seattle, Washington, on March 10, 2005. BUSSE NUTLEY, Vice Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Brita Hofto was present and was represented by Gregory Rhodes, Attorney at Law, of Parr, Younglove, Lyman & Coker, P.L.L.C. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a five percent, one-month reduction in pay for neglect of duty, insubordination, gross misconduct and willful violation

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

of agency policy for Appellant's failure to report her absence by 9 a.m. as required by policy and as directed by her supervisor.

II. FINDINGS OF FACT

2.1 Appellant Brita Hofto is a permanent employee for Respondent Department of Social and Health Services. 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 21, 2004.

2.2 Appellant began her employment with the state of Washington in 1992. As a Support Enforcement Officer 2 at the Seattle Division of Child Support, Appellant's responsibilities included enforcing court ordered child support payments, entering administratively ordered child support when court orders do not exist, initiating paternity cases, enforcing medical insurance coverage, and taking collection action for child support.

2.3 The Seattle Office of Support Enforcement's Operations Policy #1994-004 requires employees who are ill and unable to report to work to contact their supervisors by 9 a.m. on the day of the absence.

2.4 Linda Brooks was a temporary Support Enforcement Officer 4 with supervisory responsibility over Appellant beginning in August 2003. On September 26, 2003, Ms. Brooks provided Appellant with a letter of reprimand instructing her to call in by 9 a.m. Ms. Brooks initiated the letter of reprimand after Appellant failed to report for her assigned shifts on September 22 and 23, 2003, and failed to call in her absences. In addition, Appellant did not call in until 3:15 p.m. on September 24, 2003, to report her absence for that day. Ms. Brooks reiterated the

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

requirement under Policy #1994-004 that Appellant call in her absence by 9 a.m. Ms. Brooks instructed Appellant to leave her a voicemail if she was unavailable and to also call a leadworker to report the absence.

2.5 In a letter of counseling dated September 30, 2003, Ms. Brooks addressed Appellant's failure to call in and notify her that she would be late on September 29, and 30, 2003, and again instructed Appellant to follow the call-in procedures in Policy #1994-004.

2.6 Ms. Brooks provided Appellant with a memo dated October 10, 2003, again instructing her to call in by 9 am. after Appellant failed to report her absences on October 6, 7 and 8 by 9 a.m. on each of those days. Ms. Brooks warned Appellant that failure to abide by her directive to call in her absences or tardy arrival as required by policy could result in further corrective and/or disciplinary action.

2.7 On June 15, 2004, Sharon Redmond, District Manager for the Seattle Division of Child Support, informed Appellant of her reduction in salary, from Range 47, Step K, to Range 47, Step H, effective July 1, 2004, through July 31, 2004. Ms. Redmond charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of agency policy, alleging Appellant failed to report her absence on December 2, 2003, by 9 a.m. as required by policy and as directed by her supervisor.

2.8 Appellant was on medical leave in late November 2003, and was scheduled to return to work on December 1, 2003. However, on December 1, she called Ms. Brooks prior to 9 a.m., and indicated she was not feeling well and had a medical appointment that afternoon. Appellant agreed to call Ms. Brooks back that day. There is a dispute about the exact nature of the conversation.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

However, Ms. Brooks was under the impression that Appellant would see her doctor to determine whether she could report to work that week. Ms. Brooks testified that Appellant did not inform her that she planned to be out for the rest of the week and when she did not hear back from Appellant that day, she expected Appellant to report to work on the morning of December 2.

2.9 On the other hand, Appellant testified that she informed Ms. Brooks that she had a medical appointment that afternoon, that she was not going to be in for the rest of the week, and that she agreed to call Ms. Brooks later that day to keep her "apprised." Appellant contends, however, that her appointment was late in the afternoon and she was unable to contact Ms. Brooks by the end of Ms. Brooks' work day.

2.10 In determining whether Appellant gave notice to Ms. Brooks on December 1 that she would be absent for the remainder of the week, we have considered Appellant's history of failing to call in as required. We also considered that there would have been no reason for Appellant to then call on December 2 and leave a voice mail for Ms. Brooks if she (Appellant) believed that her absence for the week was approved. Furthermore, we find no reason for Ms. Brooks to be untruthful regarding her conversation with Appellant.

2.11 Therefore, we find that on December 2, Appellant did not report to work and she failed to call and notify her supervisor of her absence by 9 a.m. as required by policy and by supervisory directives. Rather, Appellant left Ms. Brooks a message at 12:12 p.m. indicating that she would be absent from work that day[1], which did not comply with policy or prior supervisory instructions.

[1] Appellant indicated she would be absent the entire week, however, the department considered Appellant's notice for her absences on Wednesday, Thursday and Friday proper per policy and approved her leave. The only issue before the Board is Appellant's failure to call in her absence on Tuesday, December 2, 2003, per policy.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.12 Sharon Redmond, Seattle District Manager, was Appellant's appointing authority when the discipline was imposed. Ms. Redmond concluded that Appellant failed to abide by agency policy when she failed to call in her absence on December 2 by 9 a.m. Ms. Redmond further determined that Appellant was insubordinate to numerous supervisory instructions that she call in before 9 a.m. Ms. Redmond also testified that Appellant never indicated that she had informed Ms. Brooks on December 1 of her absence for the entire week at the time of the investigation or prior to the discipline being imposed.

2.13 In determining the level of discipline, Ms. Redmond reviewed Appellant's personnel file, and she reviewed policy 1994-004 to determine whether the policy was clearly written and understandable. Ms. Redmond also considered the department's efforts to counsel Appellant on the issue of calling in, but determined that Appellant failed to respond to the counseling. Based on Appellant's failure to call in per policy and instructions, her history of counseling, and because Appellant failed to present any convincing mitigating facts for her failure to call in, Ms. Redmond concluded a reduction in salary was the appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant failed to call in by 9 a.m. on December 2 as required by policy and as repeatedly directed by her supervisor. Respondent argues that Appellant violated policy and was insubordinate because she had been previously directed to call in by 9 a.m. Respondent also contends Appellant's misconduct constituted gross misconduct because her absence affected her clients and the co-workers who had to cover her work. Respondent argues, therefore, that a one-month reduction in pay was fair based on Appellant's repeated failure to comply with the department's calling in procedure.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

3.2 Appellant contends she complied with the call in policy and with prior instructions to call in by 9 a.m. Appellant contends that she told her supervisor that her recovery was slow and she was going to be out the rest of the week. Appellant claims that after meeting with her doctor on December 1, it became clear that she would be out from work for the rest of the week. Appellant also contends that she took medication prescribed by her physician that made her extremely groggy and therefore was unable to call in until noon. However, Appellant contends that she told Ms. Brooks during their conversation on December 1 that she would be absent from work for the entire week. Appellant argues that Respondent presented no proof that her absence caused a hardship to her employer and she denies her actions constituted willful violation of agency policy.

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).

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

4.4 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).

4.5 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).

4.6 Respondent has met its burden of proving by a preponderance of the evidence that Appellant neglected her duty, was insubordinate and willfully violated policy when she failed to report her absence on December 2, by 9 a.m. despite repeated written counseling and repeated warnings from her supervisor.

4.7 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).

4.8 Respondent has not met its burden of proving that Appellant's failure to call in by 9 a.m. adversely affected the agency's ability to meet its mission.

4.9 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

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.10 Appellant was on notice that her continued failure to comply with the agency's call in procedures would result in disciplinary action. Under the circumstances, Respondent has proven that the disciplinary sanction of a one-month reduction in salary is warranted, and the appeal should be denied

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Brita Hofto is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Busse Nutley, Vice Chair

Personnel Appeals Board
2828 Capitol Boulevard
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