BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

BRITA HOFTO, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. DISM-04-0112 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, WALTER T. HUBBARD, Chair; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN, Member. The hearing was held at the Tukwila Regional Office of the Department of Labor and Industries in Tukwila, Washington, on September 22, 2005.

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 dismissal for neglect of duty, inefficiency, incompetence, insubordination, and gross misconduct for failure to provide medical verification as directed, unauthorized absences, and unsatisfactory performance.

Personnel Appeals Board
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Olympia, Washington 98504

II. FINDINGS OF FACT

2.1 Appellant Brita Hofto was a Support Enforcement Officer 2 and 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 November 17, 2004.

2.2 Appellant began her employment with the state of Washington in 1992. As a Support Enforcement Officer (SEO) 2 at the Seattle Division of Child Support (DCS), 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 Appellant has received the following corrective action:

- A counseling memo dated June 19, 2003, regarding Appellant's failure to return phone calls.
- A medical verification memo dated June 25, 2003, placing Appellant on medical verification for leave without pay that was not covered by the Family Medical leave Act (FMLA). Although Appellant was on approved FMLA at the time, Appellant's supervisor issued the memo due to concerns about Appellant's increasing usage of leave without pay.
- A counseling memo dated September 26, 2003, reprimanding Appellant for her failure to report for her assigned shifts or call in on September 22 and 23, 2003, and for failure to call in her absence on September 24, 2003, until mid afternoon. In that memo, Appellant's supervisor referenced Policy #1994-004 and instructed Appellant to call in absences by 9 a.m., leaving a voicemail if necessary and contacting a leadworker to report her absence.
- A letter of reprimand dated October 10, 2003, instructing Appellant to call in by 9 am., resulting from her failure to report her absences on October 6, 7 and 8 by 9 a.m. on each of those days. Further, Appellant's supervisor warned her

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

that failure to abide by her directive to call in her absences or tardy arrivals as required by policy could result in further corrective and/or disciplinary action.

- On June 15, 2004, Appellant received a reduction in salary for neglect of duty, insubordination, gross misconduct and willful violation of agency policy, for failing to report her absence on December 2, 2003, by 9 a.m. as required by policy and as directed by her supervisor.

2.4 Management further addressed Appellant's attendance issues as follows:

- On December 30, 2003, Support Enforcement Administrator Donna Hengeveld wrote Appellant a memo addressing her leave issues, including FMLA leave. Ms. Hengeveld reminded Appellant that she was placed on medical verification due to her frequent use of sick leave for non-FMLA purposes and reiterated that any leave lacking the required verification would be designated as unauthorized leave without pay.

- By letter dated February 25, 2004, Appellant's supervisor, Support Enforcement Officer 4 Brock Genereux, expressed his concerns about Appellant's continued lengthy absences from work. In addition, he directed her, in part, to provide medical verification either releasing her for work or describing any limitations; call in future absences in accordance with the leave policy; and call his direct line between 7 a.m. and 9 a.m. on the day of any absence to report that day's absence. Mr. Genereux also informed Appellant that failure to follow his directives could result in disciplinary action.

2.5 Appellant's performance evaluations from 1992 through 2001 were generally positive. However, Appellant's Employee Development and Performance Plans (EDPPs) from March 2001 through April 2004 showed a decline in her performance and indicated she had problems completing her casework on time and maintaining an acceptable accuracy rate. Appellant's supervisors outlined specific expectations and goals and provided suggestions to assist Appellant in meeting those expectations.

2.6 By letter dated November 9, 2004, Sharon Redmond, District Manager for the Seattle Division of Child Support, notified Appellant of her dismissal, effective November 24, 2004. Ms. Redmond charged Appellant with neglect of duty, inefficiency, incompetence, insubordination, and

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

gross misconduct for failing to provide medical verification, unauthorized absences, and unsatisfactory work performance.

Failure to Provide Medical Verification and Unauthorized Absences

2.7 In April 2004, Appellant was absent from work on five occasions, for a total of 12.2 hours. In each instance, Appellant claimed her absence was due either to illness or pre-scheduled therapy appointments. Appellant's supervisors assert Appellant failed to obtain prior approval for her absences and failed to provide medical verification, and as a result, she was charged with unauthorized leave without pay.

2.8 Appellant contends she informed her supervisor in advance of her pre-scheduled therapy appointments. However, Mr. Genereux testified that Appellant often refused to provide medical verification. Ms. Hengeveld testified that while Appellant indicated to her that she had ongoing therapy appointments, Appellant did not always provide the required medical documentation. Ms. Hengeveld further testified that she would have authorized Appellant's leave, if she had provided the correct documentation. Similarly, Ms. Redmond testified the department was lenient in accepting some form of documentation to excuse Appellant's absences. However, Ms. Redmond affirmed that she saw no medical documentation to support Appellant's absences on April 8, 13, 14, 16, and 22, as outlined in the disciplinary letter.

2.9 In determining whether Appellant violated the medical verification requirement and was properly charged with unauthorized leave without pay, we have considered Appellant's history of attendance related problems, including her failure to call in absences, as required. In June 2003, Appellant was given a directive to provide medical verification for non-FMLA leave. In December

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2003, Appellant was reminded of her medical verification requirement and notified that her FMLA had been exhausted. Therefore, Appellant was clearly aware of the need to provide medical documentation. Although Appellant now claims she provided doctor's slips for her absences between April 8 and April 22, 2004, we do not find her assertion credible; in fact, her testimony contradicts an April 30, 2004, written statement where Appellant indicated she could provide verification "if needed." Furthermore, we find no reason for management to be untruthful about receiving Appellant's doctor's slips, especially since they had previously been lenient about accepting some form of medical documentation.

2.10 Appellant requested reasonable accommodation due to depression and the related effects of taking medication. In April 2004, DCS management met with Appellant and her representative to discuss an Interactive Reasonable Accommodation Process, in which Appellant was to provide additional medical documentation that addressed her inability to call in to work by 9 a.m. However, Appellant did not provide any further information to support her request.

Unsatisfactory Performance

2.11 Appellant's evaluation for the period of December 11, 2003, through April 20, 2004, documented unsatisfactory performance. Appellant's EDPP identified several performance concerns including her failure to complete work on 25 – 50 cases daily; her inadequate performance on child support debt calculations; her failure to accurately maintain data within the DCS electronic system; her failure to accurately work medical support cases; her inability to comprehend basic DCS rules or procedures; and her failure to return calls to DCS customers within the required 24 hour time period.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.12 In March 2004, Appellant's caseload was redistributed, and she was assigned to work a shared caseload with another SEO. Part of Appellant's tasks included reviewing and updating child support accounts in suspense by entering the proper code in the Support Enforcement Management System (SEMS). Appellant's employee code distinguished her case work from the other SEO's. In an effort to help Appellant improve her performance, Appellant's supervisor, Mr. Genereux, explained to her how to correct errors and assigned her to work with a technical specialist. Mr. Genereux also referred Appellant to the DCS Handbook, which emphasizes the importance of debt calculation for child support and provides guidance on selecting the proper codes. However, Appellant's performance continued to decline.

2.13 Mr. Genereux met with Appellant to discuss her work backlog and directed her to complete a daily report of work accomplished, and he provided her with an audit sheet and instructions on how to track her work. Appellant's audit sheets showed she was available to work 185.7 hours over 26 work days. In that timeframe, Appellant worked an average of 12 cases per day, an amount far below the basic work standard. In addition, the tasks completed by Appellant tended to be the most routine and least complex in nature.

2.14 Ms. Redmond was Appellant's appointing authority, and she met with Appellant in a pre-termination meeting. However, Appellant did not provide Ms. Redmond with any information that convinced her to take any action other than termination. In determining the level of discipline, Ms. Redmond reviewed Appellant's personnel file, including prior discipline, and considered her twelve years of experience as an SEO. Ms. Redmond also considered the department's efforts to counsel Appellant on attendance issues, the medical verification requirement, and performance expectations.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.15 Ms. Redmond was particularly concerned about Appellant's inability to perform the basic yet critical functions of her job, and she felt Appellant's errors were substantial. For instance, Appellant's failure to accurately process cases created inaccurate debt calculation for child support; caused child support to go to the wrong individual; caused a child to be without medical coverage; created tension when callers received incorrect information; and created extra work for her supervisor and co-workers, which affected the office morale. Ms. Redmond was also concerned about the negative impact Appellant's deficient performance had on the integrity of the department and its ability to service the families who rely on DCS services. Therefore, Ms. Redmond concluded that termination was the only appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant has a history of absenteeism and has repeatedly failed to follow procedures with regard to medical verification. In addition, Respondent argues Appellant's work performance was unsatisfactory and asserts she had a high error rate and failed to meet expectations. Respondent contends Appellant was notified of her work deficiencies through the Employee Development and Performance Plan (EDPP) process but failed to make any progress. Respondent argues Appellant's misconduct and inadequate performance warrant termination.

3.2 Appellant contends she was an excellent employee who became sick and missed work due to her illness. Appellant argues that she did provide the proper medical documentation, though she disagreed with the department's reasons for placing her on medical verification, asserting the department never directly stated she was suspected of leave abuse. With regard to her work performance, Appellant contends she made minor mistakes, not unlike other employees, but asserts she did not willfully disregard her duties. Rather, Appellant argues the errors, in part, resulted from

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

a redistributed and shared caseload and asserts she was held accountable for jobs that were not her responsibility. As a result, Appellant argues termination was unwarranted and too severe.

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).

Failure to Provide Medical Verification and Unauthorized Absences

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 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 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

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

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).

4.6 Appellant was on notice that her continued failure to comply with the agency's call in procedures and her medical verification requirement would result in disciplinary action. Not only did Appellant neglect her duty to adhere to the medical verification requirement as directed, her blatant refusal to provide medical documentation constituted the charges of insubordination and gross misconduct.

Unsatisfactory Performance

4.7 Appellant had a duty to satisfactorily perform the functions of her Support Enforcement Officer 2 position. Appellant was clearly put on notice about her deficient work performance through the EDPP process, and her evaluations outlined work goals and expectations. However, Appellant's performance deteriorated to a point where she no longer functioned at the capacity expected of a support enforcement officer. Therefore, Respondent has proven by a preponderance of the credible evidence that Appellant neglected her duty.

4.8 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).

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

4.9 Respondent has shown that Appellant had the experience and resources to complete the duties and performance expectations of her position and that her supervisors made extensive attempts to help Appellant meet the demands of her position. Nevertheless, Appellant failed to meet minimum standards.

4.10 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987).

4.11 Respondent has met the burden of proving that Appellant was incompetent and no longer capable of meeting the duties and responsibilities required of her Support Enforcement Officer 2 position.

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

4.13 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. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

4.14 We have considered Appellant's previous reduction in salary, as well as the department's attempts to counsel Appellant on both attendance and performance issues. Appellant was given ample opportunities to adhere to her medical verification requirement and to improve her work. Furthermore, Appellant's significant error rate affected the department's ability to successfully process child support and related claims, which impacted the department's ability to meet state and federal timelines and adequately provide service to DCS's clients.

4.15 Under the proven facts and circumstances, Respondent has met its burden of proving the charges in the disciplinary letter, and termination is warranted. Therefore, 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

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member

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