BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

NERI VILLACERAN, Appellant, v. WASHINGTON STATE PATROL, Respondent.	Case No. SUSP-05-0024 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, and GERALD L. MORGEN, Member. The hearing was held at the Liquor Control Board Distribution Center, 4401 East Marginal Way, Seattle, Washington, on February 1, 2006.

1.2 **Appearances.** Appellant Neri Villaceran was present and was represented by Lawrence Schwerin, Attorney at Law, of Schwerin Campbell Barnard LLP. Elizabeth Delay Brown, Assistant Attorney General, represented Respondent Washington State Patrol.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a seven-day suspension for neglect of duty, gross misconduct, and willful violation of the published employing agency or department of personnel rules or regulations for sleeping on duty.

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II. FINDINGS OF FACT

2.1 Appellant is a permanent employee for Respondent Washington State Patrol. 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 May 24, 2005.

2.2 Appellant has worked as an Electronic Communications Systems Technician in the Electronic Services Division of the Washington State Patrol for approximately ten years. Appellant's primary responsibilities include installing, maintaining, and repairing sophisticated electronic communications systems equipment in a central maintenance facility (shop), located in Marysville.

2.3 Appellant's work hours are from 7 a.m. to 3:30 p.m., and he is entitled to two fifteen-minute breaks and a 30-minute lunch period. It is undisputed that Appellant's lunch and break times sometimes fluctuate based on the number of troopers requiring maintenance on any given day and the varying times that troopers arrive at the shop. Furthermore, Appellant has been directed to readily assist troopers coming into the shop and delay his break time, if necessary.

2.4 On November 18, 2004, Trooper Joshua McKorkle and Appellant's co-worker, Senior Telecommunications Specialist John Leyde, went to the "screen room" to find Appellant so he could install a flashlight in Trooper McKorkle's vehicle. When they arrived, they found Appellant sleeping at a work station in the screen room. Appellant does not dispute that he was taking a nap between 2:20 p.m. and 2:50 p.m. However, Appellant contends he was taking a late lunch break because he had been too busy to take an earlier break or lunch.

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2.5 Appellant had performed maintenance services for a number of troopers on that particular day and after preparing a package for shipping around 2 p.m., Appellant testified he ate lunch and then took a short nap, setting the alarm on his watch to awaken him at 2:50 p.m. Prior to his alarm going off, Appellant woke up when he heard Trooper McKorkle at the door to the screen room, and he proceeded to assist him with his request.

2.6 The 2004 WSP Regulation 8.00.180, Neglect of Duty, prohibits employees from sleeping on duty or engaging in personal activities that "cause them to neglect or be inattentive to duty . . ." The regulation is silent on the issue of sleeping at a work station during a break period.

2.7 In considering whether Appellant was on duty or break, we find the evidence supports Appellant's breaks were flexible and often dictated by the workload. As a result, we find Appellant's claim that he had been busy and unable to take normal breaks earlier in the day to be credible. While we find Appellant was on break when he slept, we also find he slept in an area where troopers frequently arrived for service on their vehicles. Additionally, there was a designated break room where Appellant could have taken his break.

2.8 On March 16, 2005, Appellant was advised of the charges related to sleeping on duty and that discipline was being considered. On March 28, 2005, Clark Palmer, Administrator for the Electronic Services Division, met with Appellant in a pre-determination meeting. During the meeting, Appellant stated that he had been sleeping because he was on break at the time. Although Mr. Palmer acknowledged there was insufficient information to determine whether Appellant was on break, he was not convinced Appellant was on a lunch break because the incident occurred late in the afternoon. In addition, Mr. Palmer did not believe departmental policies allowed Appellant to sleep at his work station.

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2.9 By letter dated May 6, 2005, Mr. Palmer notified Appellant of his seven-day suspension without pay. Mr. Palmer charged Appellant with neglect of duty, gross misconduct, and willful violation of the published employing agency or department of personnel rules or regulations for sleeping in the screen room while on duty.

2.10 In determining the level of discipline, Mr. Palmer considered Appellant's work history, including prior discipline, and the negative image that sleeping at a work station portrayed to the troopers that Appellant's division served. Consequently, Mr. Palmer felt Appellant's actions reduced the confidence placed in him as a field operations support person and were contrary to the division's mission to be attentive to customers, in this case state troopers.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues the WSP regulation prohibits employees from sleeping on duty. Respondent contends Appellant was in fact on duty because it was illogical for him to be taking a lunch break late in the afternoon. Respondent further contends there was no evidence Appellant had been taking a lunch break and asserts he was uncertain about the timeframe he was asleep. Respondent argues Appellant clearly neglected his duty and violated departmental regulations and further asserts his behavior adversely affected the division when an employee from another division viewed him sleeping on duty. Therefore, Respondent argues a seven-day suspension is appropriate.

3.2 Appellant asserts he was sleeping while on break, not while on duty. Appellant argues the evidence supports that he had the authority to adjust his breaks and lunch to meet the demands of the work flow, which was often urgent due to the needs of electronic equipment repairs on vehicles of state troopers. Appellant contends that he had never been told he was prohibited from napping on his lunch break. Appellant further contends the WSP acknowledged it was unable to determine

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whether Appellant was on duty or on break and, as a result, argues there is no basis for the discipline.

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 Respondent has proven that Appellant neglected his duty when he slept at his work station. Even though Appellant was on break, he inappropriately chose to take a nap in an area where troopers often came in to receive maintenance services. Consequently, sleeping at that location interfered with Appellant's ability to be attentive to his duties while in his work area during normal working hours.

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

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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 The credible evidence established that Appellant was permitted to adjust his break times, that he was expected to serve state troopers requiring electronic maintenance, whether on break or not, and that he had been extremely busy on the date of the alleged misconduct. As a result, Respondent has not proven that Appellant violated the policy related to sleeping on duty.

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 proven that Appellant's actions rose to the level of gross misconduct. Although Appellant had been napping, he immediately responded to Trooper McKorkle's request.

4.9 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).

4.10 In this case, we conclude a seven-day suspension is too severe. The policy does not explicitly prohibit employees from taking naps on break times. At the same time, Appellant had a duty to be attentive while at his work station and should have taken his break away from the work

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area. Therefore, a one-day suspension should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the Electronic Services Division.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Neri Villaceran is modified, and his seven-day suspension is reduced to a one-day suspension.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Member

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