BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RALPH JAVINS, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. DEMO-03-0006 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 Department of Transportation, 3700 9th Avenue South, Seattle, Washington, on December 3, 2003. GERALD L. MORGEN, Vice Chair, reviewed the record, exhibits and recorded proceedings and participated in the decision in this matter.

1.2 **Appearances.** Appellant Ralph Javins was present and was represented by Christopher Coker, Attorney at Law, of Parr, Younglove, Lyman and Coker, P.L.L.C. Kari Hanson, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, inefficiency and insubordination.

II. FINDINGS OF FACT

2.1 Appellant is a Transportation System Technician B and permanent employee for Respondent Department of Transportation. Appellant and Respondent are subject to Chapters 41.06

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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 March 13, 2003.

2.2 Appellant began his employment with the Department of Transportation (DOT) on December 3, 1990. Prior to his demotion, Appellant worked as a Transportation System Technician C.

2.3 Appellant has been the subject of prior formal and informal disciplinary action. On October 9, 2000 and June 5, 2002, Appellant received letters of reprimand. Effective April 1, 2002, through May 1, 2002, Appellant's salary was reduced for neglect of duty and inefficiency after the appointing authority concluded that Appellant's work performance was unsatisfactory. Following the reduction in salary, Appellant was formally reassigned to perform locate functions for the North Signal crew, effective May 14, 2002. The goal of the reassignment was to assist Appellant to correct and improve his job performance.

2.4 A "locate" is a referral to the department from individuals and contractors who intend to dig underground in an area where DOT may have underground utilities. The locate requests are made to a call center, where the intake worker gathers information from the caller and fills out a referral form. Appellant's responsibilities included reviewing the requests to determine if any of the planned construction could result in damage to DOT underground electrical facilities. Appellant was required to disregard requests that did not impact DOT facilities, to log valid referrals and conduct field visits and mark with orange paint the site where the electrical facility was buried. Appellant had been instructed to call the contact person on a referral, if he believed a locate request was ambiguous or unclear.

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2.5 Appellant received a letter of counseling dated August 30, 2002 after he conducted a locate of a non-DOT electrical facility. Appellant's supervisor, Rick Hardin, advised Appellant to carefully review the information provided in the referral to determine whether a locate was necessary. Mr. Hardin was concerned that Appellant was making unnecessary field visits to non-DOT right of way areas, and he also instructed Appellant to gather additional information prior to visiting the site.

2.6 Following the letter of reprimand, Mr. Hardin monitored Appellant's work performance. Mr. Hardin discovered numerous instances where Appellant logged referrals and made site visits which, based solely on the information contained on the referral, were clearly not located on or near DOT underground facilities. Mr. Hardin subsequently provided the information to his manager and recommended that disciplinary action be taken against Appellant.

2.7 The issue here is whether, between September 2002 and November 2002, Appellant conducted 15 unnecessary locates to sites where, based on the information provided on the referral, it was clear the planned digging/construction did not impact a DOT underground facility. Appellant claims each of the field visits he made was necessary because the information contained on the locate referrals was unclear and insufficient for him to determine whether construction would impact DOT utilities. We have reviewed the information contained on the 15 locate referrals as well as the testimony of the witnesses, including Appellant's testimony, and we find the evidence supports that Appellant failed to properly evaluate the information on the referral form and conducted site visits where DOT electrical facilities were not impacted. The evidence supports Appellant conducted unnecessary visits on the following occasions:

- September 9, 2002
- September 13, 2002
- September 24, 2002 (Appellant conducted two unnecessary locates on this date)
- October 4, 2002 (Appellant conducted two unnecessary locates on this date)

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- October 8, 2002 (Appellant conducted two unnecessary locates on this date)
- October 18, 2002
- November 20, 2002
- November 30. 2002
- November 14, 2002
- November 18, 2002
- November 19, 2002
- November 22, 2002

2.8 David McCormick, Assistant Regional Administrator for DOT Maintenance and Traffic, was Appellant's appointing authority when the discipline was imposed. Mr. McCormick held a pre-disciplinary meeting on January 8, 2003 to provide Appellant an opportunity to respond to the allegation that he continued to conduct unnecessary locates in violation of Mr. Hardin's August 30, 2002 directive. During the meeting, Appellant expressed his belief that each site visit was justified, and he presented an explanation for how he approached each locate to justify each field visit. After considering Appellant's explanations, Mr. McCormick concluded Appellant neglected his duty, was inefficient and failed to follow supervisory directives when he made field visits on locate referrals which, based on the initial information provided, clearly did not impact DOT electrical facilities.

2.9 In determining the level of discipline, Mr. McCormick reviewed Appellant's performance evaluations, which he found contained feedback that mirrored similar concerns with Appellant's job performance, including inefficient and insubordinate behavior. Mr. McCormick also considered the efforts Appellant's supervisor made to coach and help Appellant perform his duties more efficiently. Additionally, Mr. McCormick considered prior formal discipline imposed against Appellant for inefficient use of his time. Mr. McCormick acknowledged that the prior discipline seemed to have a positive effect on Appellant's performance for a short period of time, but that Appellant later reverted to his past behavior. Mr. McCormick concluded a more severe discipline

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was necessary to convince Appellant to perform his job adequately and efficiently. Mr. McCormick concluded that demotion was the appropriate sanction.

2.10 By letter dated January 30, 2003, Mr. McCormick notified Appellant of his demotion from his position as a Transportation System Technician C to a Transportation System Technician B, effective February 16, 2003. Mr. McCormick charged Appellant with neglect of duty, inefficiency and insubordination for performing inappropriate locates contrary to his supervisor's directives.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant has the ability to do his job but chooses not to screen locates effectively in spite of direction he has received. Respondent argues Appellant failed to follow instructions to seek additional information on referrals, when he had any uncertainty regarding a location, rather than consume time on visits to unnecessary locates. Respondent argues Appellant neglected his duty, refused to follow supervisory directives and that previous counseling and discipline failed to impress on Appellant the importance of performing his job duties more efficiently. Respondent argues the demotion is appropriate and should be affirmed.

3.2 Appellant asserts he had valid reasons for conducting field sites of the referrals in question and that he is being disciplined for overdoing his job. Appellant asserts the department has treated him unfairly, because other employees also conducted unnecessary locates but were not disciplined. Appellant denies he neglected his duty or disobeyed supervisory directives, and he asks that his appeal be granted or that the discipline be modified.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

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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 The Department of Transportation provided Appellant with clear and reasonable work expectations, and Appellant acknowledges he understood the criteria for reviewing referrals to determine whether the work would have an impact on DOT facilities. Furthermore, he understood under what circumstances to seek additional information prior to conducting a field visit. Finally, the 15 referrals had sufficient information on their face for Appellant to conclude they did not impact DOT underground facilities. Nonetheless, Appellant repeatedly made unnecessary field inspections. Respondent has met its burden of proving that Appellant's poor performance constitutes neglect of duty and inefficiency.

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4.6 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).

4.7 Mr. Hardin provided Appellant with specific instructions regarding work expectations and how to review locate referrals. Nonetheless, Appellant disregarded supervisory direction, and he continued to conduct unnecessary field site visits where the information provided did not support construction would impact DOT underground electrical facilities. Appellant failed to follow his supervisor's repeated directives on a minimum of 15 referrals between September and December 2002.

4.8 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).

4.9 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. An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.10 The agency made reasonable and repeated efforts to provide Appellant with guidance and direction to improve his performance. Appellant had ample opportunity to improve and meet the minimum requirements of his position. Furthermore, Appellant provided no convincing

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explanations to mitigate his deficient work performance. Therefore, under the facts and circumstances of this case, we conclude that the demotion was warranted, and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Ralph Javins is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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