BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JERRY MICHAEL, Appellant, v. WASHINGTON STATE PATROL, Respondent.	Case No. DISM-05-0021 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 Department of Transportation, Regional North Conference Room, 1551 North Wenatchee Avenue, Wenatchee, Washington, on December 6 and 7, 2005 and January 4, 2006. The parties submitted written closing briefs on January 30, 2006.

1.2 **Appearances.** Appellant Jerry Michael 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 dismissal for neglect of duty, gross misconduct, and willful violation of agency rules and regulations. Respondent alleges that Appellant engaged in inappropriate and unprofessional behavior at work and was untruthful when questioned during the investigation.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

II. FINDINGS OF FACT

2.1 Appellant Jerry Michael was a permanent employee for Respondent Washington State Patrol (WSP). 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 March 31, 2005.

2.2 Appellant began his employment with the Washington State Patrol in 1981 and promoted to a position as a Communications Officer (CO) 3 in 1992. As a CO 3, Appellant was a shift supervisor and provided direction and guidance to CO 1's and 2's answering 911 emergency calls. Appellant's duties included training and monitoring employee work performance.

2.3 In response to internal complaints from staff in the Wenatchee Communications Center, Marty Knorr, Director, held a meeting in December 2002 to solicit information and feedback for the source of the complaints. Mr. Knorr, who described the meeting as a "sensing session," met with non-supervisory employees who shared with him a general feeling of dissatisfaction with the supervisors in their chain of command and what they perceived as lack of leadership, a failure to abide by their supervisory/managerial responsibilities, failure to provide adequate training, and a generally negative working environment. Mr. Knorr informed the employees at the December 5, 2002 sensing session that the feedback gathered would not be used to generate investigations but that any specific complaints could be addressed directly with him after the meeting. None of the employees, however, filed immediate complaints.

2.4 After the sensing session was completed, Mr. Knorr met with the communications supervisors, which included Appellant, CO 3 Joy Keller, Appellant's counterpart, and CO 4 Pam

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

Chowning, who supervised both Appellant and Ms. Keller. Mr. Knorr shared employees' perceptions and directed all three supervisors to develop an action plan with performance measures to address and resolve the employees' concerns. The plan was presented to employees and implemented in approximately mid-March 2003.

2.5 In March 2003, Appellant accepted a temporary position in the WSP Information Technology Division (ITD) assisting in a state-wide computer upgrade. Appellant's last day at the Wenatchee Communications Center was March 17, 2003. Although Appellant's temporary assignment was set to expire in June 2003, it was extended into November 2003. Appellant's CO 3 position remained vacant during his temporary absence. However, during his temporary assignment, Appellant visited the Wenatchee Communications Center on a few occasions and interacted with staff.

2.6 As a result of the action plan, morale at the Wenatchee Communications Center improved. Appellant was due to return to work in his CO 3 position in mid-November. When staff learned of Appellant's return, they began to express concerns related to Appellant's behavior and their belief that his presence in the workplace would bring down morale again. Mr. Knorr received six Interoffice Communications (IOCs) from various staff at the Wenatchee Communications Center documenting concerns with Appellant's return to the workplace.

2.7 On November 25, 2003, Mr. Knorr met with Appellant to discuss his expectations regarding his transition back to the Wenatchee Communications Center. Mr. Knorr advised Appellant that he would not allow the environment at the communications center to regress to the level prior to the March 2003 implementation of the action plan. In addition, Mr. Knorr advised Appellant he would be required to attend training on new software that impacted his job. Mr. Knorr reiterated that the

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

communications center had made significant progress and that he needed Appellant's commitment to being a part of the solutions, not problems. Appellant signed a written agreement affirming his commitment to Mr. Knorr's expectations.

2.8 The date of Appellant's return to the Wenatchee Communications Center was November 17, 2003. However, upon Appellant's official return to his position as a CO 3, he immediately attended training on the new computer program for approximately two weeks in Yakima.

2.9 On November 18, 2003, Ms. Chowning filed a formal complaint against Appellant alleging that Appellant had made rude and inappropriate remarks about her to a subordinate and had made rude gestures behind her back. The alleged behaviors occurred from November 2002 to November 18, 2003. The behaviors described in her complaint were different than the issues raised by staff during the December 2002 sensing session with Mr. Knorr.

2.10 WSP Internal Affairs initiated an investigation into Ms. Chowning's complaint. When questioned, Appellant denied he made any offensive comments about Ms. Chowning or that he made any inappropriate gestures behind her back. The investigation also uncovered allegations that Appellant abused his position as a supervisor by pitting employees against each other, questioning Ms. Chowning's ability to manage the communications center, and creating an overall negative work atmosphere. When questioned, Appellant denied engaging in any inappropriate behavior or misconduct. Based on Appellant's denials, the WSP initiated a second investigation into the allegation that Appellant violated agency policy by providing untruthful answers to the original allegations.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.11 Captain Steve Davis was Appellant's appointing authority when the discipline was imposed. He reviewed an investigation packet and read the witness interview notes, including Appellant's responses to the allegations. Captain Davis found that the preponderance of the statements from staff supported that Appellant created a work environment that was divisive by manipulating his subordinates. He further concluded that Appellant disrespected his superior, Ms. Chowning, by making inappropriate comments and gestures behind her back. Captain Davis also found that Appellant had been untruthful during the investigation, and that his untruthfulness violated WSP Regulation 8.00.300, which requires employees to truthfully answer questions related to their employment. In determining the level of discipline, Captain Davis considered Appellant's length of service and his employment record, and he concluded that Appellant's misconduct warranted disciplinary action and that his violation of the truthfulness policy warranted no other sanction but termination because he could no longer rely on Appellant to be honest.

2.12 By memorandum dated March 22, 2005, Captain Davis notified Appellant of his termination effective April 8, 2005. Captain Davis informed Appellant that the causes of his termination were neglect of duty, gross misconduct, and willful violation of agency rules and regulations.

2.13 During his testimony before this Board, Appellant again denied that he engaged in the type of behavior described in the termination memorandum. However, several witnesses presented consistent testimony describing Appellant's style of supervision as "manipulative." They also described Appellant as engaging in unprofessional behavior, which included making disrespectful remarks and demeaning gestures towards Ms. Chowning and staff perceiving Appellant as having little respect for Ms. Chowning as a manager. After reviewing all of the testimony and exhibits, we find the weight of the evidence supports that Appellant, more likely than not, engaged in

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

misconduct which included making demeaning comments about his supervisor, Ms. Chowning, to co-workers, and abusing his position as a supervisor. For example:

- CO's Anthony Amorati and Kevin Baird both heard Appellant question Ms. Chowning's competence and ability to manage. Mr. Amorati observed Appellant rolling his eyes in a mocking manner after completing a conversation with Ms. Chowning.

- On one occasion, in response to Mr. Baird's inquiry into Ms. Chowning's whereabouts, Appellant responded, "if she were here, you certainly would not miss her" which Mr. Baird perceived to be a comment related to Ms. Chowning's weight. At times, Appellant also led Mr. Baird to believe that (Mr. Baird) was in trouble with Ms. Chowning for no apparent reason.

- In early November 2003, when Appellant was visiting the Wenatchee Communications Center, CO Dave Kastel observed Appellant use an inappropriate hand gesture directed at Ms. Chowning's buttocks as she walked by him in the Wenatchee Communication Center.

- CO 3 Joyce Keller also observed Appellant make inappropriate hand gestures toward Ms. Chowning's buttocks on several occasions, and she heard Appellant make comments regarding Ms. Chowning's use of prescription sleeping aids, implying that the pills had no effect on her due to her weight.

- Appellant asked Mr. Amorati to "watch" co-workers and report back to him any improper behavior.

- After Appellant told Mr. Amorati that other staff found him intimidating, he offered apologies to his co-workers for offending them. However, his co-workers denied ever having told Appellant they were intimidated by Mr. Amorati.

- Appellant told Mr. Amorati that Ms. Chowning wanted him written up for minor incidents, giving Mr. Amorati the impression that Ms. Chowning did not like him. Appellant told Mr. Amorati that he would "take care of it," and no action was taken against him. However, after Appellant's departure to the ITD position, he learned from Ms. Chowning that she was not scrutinizing him as represented by Appellant.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts that because Appellant was a supervisor, there were high expectations regarding his supervisory role and he failed to act in that manner. Respondent asserts that the preponderance of the evidence support Appellant engaged in misconduct when he made inappropriate gestures and comments about his supervisor and by then being untruthful to

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

investigators about his misconduct. Respondent also contends the evidence supports that Appellant neglected his duty as a supervisor by encouraging a work environment filled with mistrust.

3.2 Appellant asserts that his co-workers fabricated reports that he made gestures and made disrespectful comments toward Ms. Chowning. Appellant asserts that his subordinates were motivated to file false statements because they were bitter over disciplinary actions he had initiated against them, and he contends that Ms. Keller was motivated to lie by her desire to obtain Ms. Chowning's job upon her impending retirement. Appellant argues that the agency failed to conduct a thorough investigation by failing to conduct in-person interviews, thereby failing to assess witness credibility. Appellant asserts that Respondent also failed to evaluate work records to verify the accusations. Appellant finally argues that the state is unable to meet its burden of proving that he was untruthful and that his termination was justified.

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 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).

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 proof that Appellant created a negative working environment in the Wenatchee Communications office among his subordinates as well as between his subordinates and Ms. Chowning. Appellant's mocking gestures toward Ms. Chowning were inappropriate, disrespectful and demoralizing. Appellant fails to even acknowledge, despite credible and corroborating testimony from other employees to the contrary, that he may have uttered a comment or made a gesture in passing that, although not intended to be offensive, did indeed impact the listener or observer as being offensive, distasteful, and inappropriate in the workplace. To the contrary, Appellant categorically denied that he engaged in any of the offensive behavior described; therefore, he failed to take responsibility for his actions.

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

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

4.8 The appointing authority testified that Appellant's denials of misconduct constituted untruthfulness, which violated policy and that the only appropriate sanction for such violation is termination. We disagree with that strict interpretation of the policy. Although we do not disagree that an agency can take a "zero tolerance" position on untruthfulness from its employees, we disagree that every instance of dishonesty must result in termination. The Board heard a previous appeal from another WSP employee who violated the truthfulness policy but who was not terminated. In Dormaier v. Washington State Patrol, PAB No. SUSP-99-0033 (2001), the WSP imposed a 15-day suspension where it found that the employee engaged in misconduct and had been untruthful during an investigation into that misconduct, which included uncooperative and disruptive behavior and disregard of a supervisory directive.

4.9 In December 2002, WSP management learned of staff's concerns about Appellant, Ms. Keller and Ms. Chowning. The department was not aware of staff's specific concerns about Appellant until he was due to return from his temporary assignments, and the record supports that Appellant engaged in several instances of inappropriate and unprofessional behavior between the time period of November 2002 through November 2003. However, Appellant did not have the same opportunity that Ms. Keller and Ms. Chowning had to implement the action plan and to make meaningful changes to improve the environment within the communications department.

4.10 In this case, the record does not support that Appellant's misconduct was so egregious in nature as to warrant termination of a 23-year employee. Nonetheless, it is clear that Appellant's behavior substantially compromised his reputation, and that he was not trusted or respected by staff. As a result, we conclude that demotion to a non-supervisory position is appropriate because Appellant failed to provide the leadership necessary to create trust and harmony in the communications center and encourage a positive work environment. A demotion to a position as a

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

Communications Officer 1 will allow Appellant to utilize his skills and provide him the opportunity to demonstrate improvement in his workplace behavior.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Jerry Michael is modified to a demotion to a position as a Communications Officer 1.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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