BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JAMES LOWE, Appellant, v. THE EVERGREEN STATE COLLEGE, Respondent.	Case No. SUSP-05-0023 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, BUSSE NUTLEY, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on February 1, 2006. GERALD L. MORGEN, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant James Lowe appeared *pro se*. M.B. Newberry, Assistant Attorney General, represented Respondent The Evergreen State College.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a 15-day suspension for gross misconduct and willful violation of policy. Respondent alleges that Appellant engaged in repeated intimidation and harassment of students and employees.

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II. FINDINGS OF FACT

2.1 Appellant James (Jimee) Lowe is a permanent employee for Respondent The Evergreen State College (TESC). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on April 29, 2005.

2.2 Appellant began his employment with TESC as a Mail Rater in the mailroom in March 2000. Appellant has not been the subject of previous formal discipline; however, he was verbally counseled in 2003 when TESC learned that Appellant had "flipped off" two female students and criticized their "dreadlocks" as "inappropriate cultural appropriation." Appellant also made a comment to TESC's athletic director about his daughter's hair. At that time, Kenneth A. Holstein, Associate Vice President, met with Appellant to explain how his behavior was inappropriate, confrontational and frightening to the students and how his comment had offended TESC's athletic director. Mr. Holstein advised Appellant of his right to voice his opinions, but cautioned him to find appropriate ways to voice his opinions without offending people. Mr. Holstein told Appellant to cease behavior which was offensive to others, and he referred Appellant to employee services to get guidance on how to deal with his cultural concerns.

2.3 In 2004, TESC received two more complaints about Appellant harassing students because one wore dreadlocks and the other wore "cornrows." Mr. Holstein again counseled Appellant about his method of conveying his cultural concerns to others. Following two more interactions between Appellant and students, Mr. Holstein warned Appellant that if his behavior did not stop, disciplinary action would be taken. Appellant is also a student at TESC. When addressing the concerns, Appellant told Mr. Holstein that he had not started all the incidents involving students, and he

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claimed that some students were retaliating against him for his work on a video containing graphic depictions of Caucasians lynching African Americans. Mr. Holstein testified that in response to Appellant's claims that he was being harassed, he requested that Appellant provide him with names, dates, and other details that would allow him to investigate. However, Mr. Holstein testified Appellant never provided him with that information but that he did look into an incident where the mail van driven by Appellant was vandalized but was unable to determine who was responsible.

2.4 In March 2005, Mr. Holstein was approached by student Paul Manzanares, who complained about an incident with Appellant. Mr. Holstein determined that an investigation was warranted and he assigned Nicole S. Ack, Civil Rights Officer, to address Mr. Manzanares' complaint.

2.5 Ms. Ack did not testify before us. However, we have reviewed her written report dated March 23, 2005, which indicates that during her interview on March 17, 2005, Mr. Manzanares claimed he walked by and greeted Appellant and that Appellant responded, "You better not talk to me at all or one of these days I'm going to take out a lot of my frustration on you." Ms. Ack's report also documented Mr. Manzanares' claim that he and Appellant had interacted in September 2003 regarding "cultural appropriation." Appellant did not meet with Ms. Ack to provide his version of the incident.

2.6 Mr. Holstein reviewed Ms. Ack's investigative report. Mr. Holstein found that the series of complaints filed by students were all very similar in nature. Mr. Holstein discussed the issues presented by Mr. Manzanares' complaint with Anne Dailey, Vice President for Finance and Administration and the appointing authority. Mr. Holstein discussed with Ms. Daily his attempts to redirect Appellant's efforts toward voicing his cultural appropriate concerns in more constructive

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methods that did not include aggressively addressing the subject with students. However, he found that Appellant did not get the point about appropriate methods to voice his concerns.

2.7 As the appointing authority, Ms. Dailey determined that a two-week suspension was the appropriate sanction, and she provided Mr. Holstein with signature authority to issue the disciplinary letter to Appellant. By letter dated April 19, 2005, Mr. Holstein notified Appellant that he was suspended for 15-days, effective April 25, 2005 through May 9, 2005. Mr. Holstein charged Appellant with gross misconduct and willful violation of policy. Specifically, Mr. Holtstein alleged that Appellant engaged in repeated intimidation and harassment of students and employees.

2.8 Appellant testified that when Mr. Manzanares greeted him, he replied "leave me alone." Appellant testified that he and Mr. Manzanares had previous interactions and that he told Mr. Manzanares to leave him alone. Appellant felt that Mr. Manzanares' greeting on March 16 was in disregard of his request to be left alone and was intended to mock him. Appellant admits he did "snap at" Mr. Manzanares, but he denies he threatened to cause him any harm. Mr. Manzanares, however, was not present to testify about the incident and we do not have a written statement by Mr. Manzanares describing what occurred or what his past history of interactions was with Appellant.

2.9 Appellant clearly had a history of fervently voicing his opinions regarding cultural appropriation with TESC students, and we recognize Respondent's concerns that Appellant was voicing his concerns in ways that were perceived as threatening by some of the students. However, under the circumstances, Respondent has not provided a preponderance of evidence to support that Appellant made a threatening remark to Mr. Manzanares. In reaching this finding, we do not take lightly Respondent's concerns. Moreover, Appellant must recognize that his right as a student to

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advocate for his beliefs about cultural appropriation is different from his duty as an employee to behave professionally at all times and treat others with dignity and respect. Any concerns Appellant has with retaliatory or discriminatory behavior should be addressed by filing formal complaints with the college.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts that the culture at The Evergreen State College culture honors and respects diversity. Respondent asserts that Appellant had a right to express his opinion, and that even though he had appropriate methods to do so, he instead chose to express his opinion inappropriately by flipping off and mocking people. Respondent asserts that Appellant admitted to being involved in a number of situations with students, but fails to recognize his aggressive behavior. Under the circumstances, including previous counseling provided to Appellant regarding his behavior, Respondent asserts that a two-week suspension is appropriate.

3.2 Appellant denies that he threatened Mr. Manzanares, and he asserts he became the target of taunting and harassment because of a video project he worked on concerning cultural appropriation. Appellant asserts that his video contains images of African enslavement that has made others throughout TESC uncomfortable and created controversy. Appellant contends that his passion about cultural appropriation is perceived by others as aggressive, but he argues that he has a right to speak out regarding his beliefs.

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; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Respondent has not met its burden of proving by a preponderance of the credible evidence that Appellant made an inappropriate and threatening remark to a student. However, again, we caution the Appellant to maintain professional communications when he is on work status, ensuring that he not behave in an aggressive and threatening manner toward others. While on official duty, Appellant should refrain from any behavior that may be perceived from others as belittling or threatening. Moreover, we encourage Appellant to follow TESC policies and file formal complaints whenever he is the victim of discriminatory harassment or is himself subjected to threats.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of James Lowe is granted.

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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