BEFORE THE PERSONNEL APPEALS BOARD
STATE OF WASHINGTON

JUSTINA LANZO, Appellant, v. OFFICE OF FINANCIAL MANAGEMENT, Respondent.	Case No. DISM-04-0066 ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

1.1 **Hearing on Motion.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this matter came before the Personnel Appeals Board, on written argument on Respondent's Motion for Summary Judgment. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on January 31, 2005. WALTER T. HUBBARD, Chair; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN Member, reviewed the file and exhibits and participated in the decision in this matter.

1.2 **Appearances.** Appellant Justina Lanzo is pro se in this appeal, and did not respond to Respondent's motion. Mickey Newberry, Assistant Attorney General, represented Respondent, Office of Financial Management.

1.3 **Documents Considered.** The Board considered the files and documents in this matter, including Respondent's Motion for Summary Judgment, with exhibits, filed December 30, 2004.

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II. BACKGROUND

2.1 On June 22, 2004, Wolfgang Opitz, Deputy Director and Appointing Authority for the Washington State Office of Financial Management, notified Appellant that she was dismissed from her position of Office Assistant Senior with the Accounting Division of the Office of Financial Management (OFM) effective July 7, 2004, for the causes of neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Mr. Opitz alleged that Appellant engaged in misconduct when she "accessed numerous web sites unrelated to state business…after having had numerous counseling sessions… about appropriate internet use," and after having received a formal letter of reprimand for "previous, inappropriate and excessive non-business Internet use." Mr. Opitz also alleged that this usage occurred despite Appellant's admitted knowledge and understanding of OFM's Ethics Policy concerning personal use of state resources. Mr. Opitz further alleged that Appellant's computer contained a non-business related poem, 45 personal pictures and approximately 473 personal files of downloaded music. Additionally, Mr. Opitz alleged in the termination letter that an investigation of Appellant's SCAN bills for the months of November 2003 through April 2004 showed that Appellant "made 28 personal calls on the SCAN system (approximately 2 hours and 15 minutes)."

2.2 Respondent alleges violations of OFM's policies 2.01, 3.01, 3.02, RCW 42.52.160-Washington State Ethics Law, and WAC 292-110-010-Use of State Resources.

2.3 On June 24, 2004, Appellant filed a timely appeal to the dismissal with the Personnel Appeals Board.

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2.4 Appellant has a record of progressive discipline, which includes at least four counseling sessions, and a formal letter of reprimand.

2.5 Appellant was aware of OFM's personnel policies, including the Ethics Policy, as demonstrated by her submitting an email on June 5, 2002, attesting to her having completed OFM's On-Line New Employee Orientation program. Appellant's awareness of agency policies has also been demonstrated by her record of progressive discipline involving misuse of state resources.

2.6 On December 30, 2004, Respondent filed a Motion for Summary Judgment.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant has admitted to the conduct underlying her termination, and that there is no question of material fact remaining in this case. Respondent argues that summary judgment is appropriate in this case. Respondent asserts that the sanction imposed is appropriate in light of the continuing abuse of state resources and the numerous efforts made by Respondent at corrective action. Respondent contends Appellant's admitted misconduct constitutes neglect of duty, insubordination, inefficiency, and willful violation of policy. Respondent also argues that Appellant's abuse of state resources meets the definition of gross misconduct. Respondent asserts that the Office of Financial Management is part of the Executive Office of the Governor which has financial, management, operational and decision-making responsibilities that impact other state agencies, their employees and the public, and that employees of OFM are held to the highest standard of ethical behavior.

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3.2 Appellant did not respond to the Motion for Summary Judgment.

IV. DISCUSSION

4.1 The Personnel Appeals Board may decide an appeal when the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be decided or dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences there from are to be determined in favor of the nonmoving party. Hall v. University of Washington, PAB No. 3863-V2 (1995).

4.2 There are no issues of material fact that must be resolved to decide Respondent's Motion for Summary Judgment. The issue is whether Appellant's misconduct warrants dismissal. The Board is able to make this determination based on the undisputed facts presented here.

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).

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4.5 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).

4.6 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).

4.7 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).

4.8 Appellant has admitted that she knew the rules related to use of state resources and that she violated them, despite repeated efforts of corrective action by Respondent. Appellant's actions constitute a neglect of her duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency rules.

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4.9 Based on Appellant's admission and her history of progressive discipline, dismissal is an appropriate level of sanction for this misconduct. Therefore, Respondent's Motion for Summary Judgment should be granted, and the appeal should be denied.

Having reviewed the files, records herein, and being fully advised in the premises, the Board enters the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion for Summary Judgment is granted, and the appeal of Justina Lanzo is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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