BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICHARD HEITZENRADER, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. DEMO-04-0027 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 Lower Columbia College, Administration Building, Longview, Washington, on July 7, 2005.

1.2 **Appearances.** Appellant Richard Heitzenrader was present and was represented by Bill Kalibak, Union Representative, IFPTE Local 17. Mitchel Sachs, 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, gross misconduct, and willful violation of agency policy. Respondent alleges that Appellant failed to perform a required quality control test and submitted a false report indicating he had performed the test.

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II. FINDINGS OF FACT

2.1 Appellant is a permanent employee for Respondent Department of Transportation. 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 August 19, 2004.

2.2 By letter dated August 12, 2004, Douglas Ficco, Regional Construction Engineer, notified Appellant of his demotion from his position as a Transportation Engineer 2 to a position as a Transportation Technician 2, effective August 27, 2004. Mr. Ficco charged Appellant with neglect of duty, gross misconduct and willful violation of agency policy. Specifically, Mr. Ficco alleged that Appellant failed to perform a required quality control test and submitted a false report indicating he had performed the test.

2.3 Appellant has been employed with the Department of Transportation for approximately 27 years. Prior to this demotion, Appellant had no other formal disciplinary action taken against him; however, Appellant received a letter of reprimand dated January 17, 2003, for misuse of state resources.

2.4 In August 2003, Appellant was assigned as the Grading Inspector for the I-5 Salmon Creek to I-205 Highway Project #6610. As the Grading Inspector, Appellant was required to conduct quality control tests to ensure that contractors met or exceeded the specifications outlined on project contract documents. One of the tests Appellant was required to conduct was a compaction density test using a nuclear gauge. Specifications for project #6610 required a compaction test for every foot of subgrade laid to ensure the roadway being constructed met density compaction

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requirements. Failure to conduct compaction tests could result in use of public roadways with inadequate compaction density, creating a safety hazards for travelers of the roadway.

2.5 In March 2004, Appellant became certified to operate the Nuclear Test Device (commonly referred to as a "test gauge") used to conduct the density test for compaction.

2.6 On May 6, 2004, Appellant's Supervisor, Frank Green, directed Appellant to check out and carry a test gauge every day because he was concerned that Appellant was having other inspectors conduct the compaction tests for him.

2.7 On May 12, 2004, Appellant completed a field density test and a daily compaction test report indicating he had performed compaction tests at station 334+50, station 332+90, and station 333+10. However, Assistant Area Engineer Kris Strickler noted that Appellant had not checked out a test gauge for that day. Mr. Strickland confirmed that other inspectors had not conducted the test on Appellant's behalf. After a subsequent investigation, the department concluded that Appellant failed to perform the compaction test, but submitted test documentation falsely indicating the tests had been performed.

2.8 Appellant claims he was at the project site and performed compaction testing from approximately 9:30 a.m. to 11 a.m. on May 12, 2004. He testified that he borrowed the test gauge from co-worker Phil Freeman, who was working in an office trailer nearby, because there were no available test gauges when he went to check one out. Appellant further testified that Mr. Freeman was unavailable when he arrived at the office trailer to borrow the gauge, so Appellant removed the gauge from the back of Mr. Freeman's van and left a note explaining what he had done. Appellant claims he later returned the test gauge, but again did not see Mr. Freeman. Appellant stated he put back the gauge in Mr. Freeman's van.

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2.9 Mr. Freeman testified he was only away from the office trailer on two occasions for a total of approximately 15 minutes. Per the agency's requirement, the test gauge Mr. Freeman checked out was secured in a locked box, which was chained to the floor of his van. Mr. Freeman never saw Appellant pick up or drop off the gauge, he never noticed the gauge was missing during any of the times he was in and out of his van, and he never found a note from Appellant.

2.10 Appellant also testified he saw and greeted Tracy Fleming at the testing site. Ms. Fleming, however, who was walking the same site at the same time that Appellant would have been conducting his testing, never saw Appellant in the area.

2.11 To support the claim he completed a compaction test, Appellant presented testimony from Craig Stuck, Richard Davis and Scott Neil, employees of the private contractor working on the project. Mr. Davis and Mr. Neil both testified regarding their recollection that Appellant conducted testing on the date on May 12. Specifically, Mr. Neil recalled that Appellant conducted a compaction test every day he was at the work site; however, the evidence established that other inspectors conducted tests, including tests Mr. Freeman conducted on May 11. This calls into question whether Mr. Neil could accurately recall the specific dates on which Appellant conducted testing. Furthermore, Mr. Stuck indicated that he believed Appellant conducted a compaction test on May 12 because it was the first day that a compaction test was necessary. However, the evidence established that the first time Appellant took a compaction test was May 10, not May 12. Although we find no reason to believe that these witnesses would be untruthful, none of these witnesses could identify with any certainty that the testing they recalled happened on May 12.

2.12 Appellant's compaction test report for May 12 indicates that the subgrade height of the first test he conducted was 15 feet, the second at 20 feet and the third at 22 feet. Based on these

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numbers, the contractors would have constructed seven feet of lift on May 12; however, the credible evidence established that it would take approximately two days to construct 7 feet of fill. Therefore, it was not possible during the one and one half hours Appellant allegedly spent on conducting the density test for the contractors to lay and compact gravel in the areas indicated on Appellant's density report. Moreover, there was insufficient material at the site to fill seven feet.

2.13 After reviewing the testimony and evidence, we find a preponderance of the evidence establishes Appellant completed a density test report falsely indicating he performed a compaction test when he did not perform any compaction tests on May 12, 2004.

2.14 Doug Ficco, Regional Construction Engineer, was Appellant's appointing authority when the discipline was imposed. Mr. Ficco concluded that Appellant failed to fulfill one of the primary responsibilities of his position when he failed to conduct the compaction tests. Mr. Ficco further concluded that Appellant violated the agency's ethics policy to maintain a high standard of honesty and integrity by submitting false documentation to cover his failure to take an important quality assurance test. Mr. Ficco found that Appellant's misconduct was particularly egregious because it posed a danger to safety of the traveling public. Further, he found that Appellant placed the agency at risk of losing federal funding by failing to adhere to requisite testing procedures. Therefore, Mr. Ficco found that Appellant's misconduct rose to the level of gross misconduct. In determining the level of discipline, he considered Appellant's length of service, his employment record, including a letter of reprimand for misuse of state resources. Mr. Ficco concluded that the seriousness of misconduct deserved a strong message and he considered termination. However, based on Appellant's longevity with the department, he concluded that demotion was appropriate.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the evidence supports that Appellant created a fraudulent report to support he performed three compaction tests he could not have performed. Respondent asserts that Appellant's explanation of the events is not believable because he did not have a test gauge on May 12 and his story of how he obtained a gauge is not corroborated. Respondent contends the level of discipline is appropriate because Appellant's role as inspector required him to keep contractors in compliance. Respondent argues that by permitting contractors to continue laying road surface without properly performing density tests, Appellant compromised the safety of the public. Therefore, Respondent argues that the disciplinary sanction was fair and the demotion should be affirmed.

3.2 Appellant asserts that he used Mr. Freeman's gauge to conduct the compaction test and nothing in the record refutes his claim of getting the gauge from Mr. Freeman. Appellant asserts that three contractors placed him at the job site where he performed the test. Appellant asserts that because Ms. Fleming was walking several areas of the project site, it was not odd that she did not see him while he was performing the compaction tests. Appellant claims on May 12, he did not know what the fill height was, so he asked one of the contractors who indicated it was 15 feet. Appellant asserts that he later obtained the correct heights of 20 and 22 feet, but erred by not correcting his report.

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

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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 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).

4.5 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 Conducting compaction testing was a critical responsibility of Appellant's position. Respondent has met its burden of proving that Appellant not only neglected his duty to take a compaction test on May 12, but that he engaged in gross misconduct when then falsified documents indicating that he had performed tests at three sites and that all tests were within minimum specifications. Furthermore, by completing reports containing false information, Appellant violated Respondent's ethics policy.

4.7 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

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level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.8 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).

4.9 Appellant's action of submitting compaction test reports containing fraudulent information demonstrates a lack of personal integrity and honesty. Appellant's actions harmed his credibility and undermined the trust Respondent placed in him. Therefore, under the facts and circumstances of this case, Respondent has proven that demotion was the appropriate sanction, and the appeal of Richard Heitzenrader should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Richard Heitzenrader is denied.

DATED this _____ day of _____, 2005.

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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