BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KIM SUN LEE, Appellant, v. UNIVERSITY OF WASHINGTON, Respondent.	Case No. DISM-05-0016 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, WALTER T. HUBBARD, Chair; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN, Member. The hearing was held at the University of Washington, South Campus Center, Conference Room 254, Seattle, Washington, on December 1 and 2, 2005.

1.2 **Appearances.** Appellant Kim Sun Lee was present and was represented by Gregory Rhodes of Younglove Lyman & Coker, P.L.L.C. Jeffrey W. Davis, Assistant Attorney General, represented Respondent University of Washington.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for just cause, including but not limited to willful violation of policy, neglect of duty, and inefficiency for taking longer breaks than allowed, sleeping on the job, and/or taking breaks in an unauthorized location.

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II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent University of Washington. 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 March 8, 2005.

2.2 Appellant began her employment as a full-time custodian with the University of Washington on November 4, 1996. Appellant worked in the Health Sciences building and her duties included collecting trash and recycling, dusting and mopping floors and stairwells, maintaining restrooms, and performing floor maintenance, as required. Appellant's assigned shift was from 4:30 p.m. to 1:00 a.m., which included two fifteen minute breaks and one half hour meal period.

2.3 Appellant is Korean, and although she has the ability to converse about simple topics as they relate to her custodial duties, she has difficulty comprehending more complex issues and does not read or write English very well. In addition, Appellant has had diabetes since 1988, and her blood sugar fluctuates between high and low levels, causing her to become dizzy and lethargic at times.

2.4 In December 2004, Appellant met with Gene Woodard, Director of Facilities Services Custodial Division, to discuss an earlier allegation of sleeping on the job, which resulted in a 15-day suspension. During that meeting, Appellant referenced the effects of her diabetes. Although Appellant had not made any formal reasonable accommodation requests, she had previously submitted physician's slips to Facilities Services, dating back to at least May 2004, which stated that she had missed work due to "diabetes mellitus" and also because she suffered from fatigue.

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2.5 Appellant received a letter of reprimand in April 1998 for unsatisfactory attendance and three letters of reprimand in February and March 2000 for not working during work hours. On August 1, 2000, Appellant received a five-day suspension for not working during working hours and sleeping on the job. On January 19, 2001, Appellant received a fifteen-day suspension for exchanging inappropriate words with a co-worker. On December 16, 2004, Appellant received a fifteen-day suspension for neglect of duty, not working during work hours, and sleeping on the job.

2.6 On January 13, 2005, at approximately 7:12 p.m., another custodian telephoned Supervisor 1 Custodian Allegra Reynolds, Appellant's supervisor, to inform her that Appellant was sleeping in room J575 of the Health Sciences building. Approximately three minutes later, Ms. Reynolds and her supervisor, Debra Mitchell, entered the room where Appellant was sitting in a chair with her head tipped back and her eyes closed, and it appeared that she was asleep. Ms. Mitchell then called out Appellant's name three times. Appellant testified that she heard Ms. Mitchell calling her name but was unable to immediately respond. When Appellant did respond, she stated that she had not been sleeping. Ms. Mitchell then asked Appellant if she needed to go home, but Appellant indicated she would continue to work.

2.7 Appellant testified that she had been feeling ill prior to sitting in the chair, and she recognized the dizziness and fatigue as symptoms of her diabetes. Appellant further testified that she regularly took insulin shots and that during the timeframe of the incident she had experienced similar episodes and had been attempting to regulate her diabetes through medication, diet, and rest.

2.8 The fact that Ms. Mitchell called Appellant's name three times and could not elicit a response supports Appellant's contention that she could not regain her composure well enough to immediately respond. Appellant's extreme lethargy is consistent with the description of her diabetic symptoms, and we find a preponderance of the evidence suggests she was in fact resting

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because she did not feel well. Nonetheless, Appellant was not performing her duties when she was discovered sitting down with her eyes closed, and she gave the appearance of being asleep.

2.9 On February 10, 2005, Ms. Mitchell wrote a memo to Mr. Woodard describing the January 13 incident and outlining Appellant's work history. Ms. Mitchell concluded that Appellant's behavior negatively impacted her co-workers and portrayed a negative image to the public, and she recommended disciplinary action.

2.10 By letter dated February 11, 2005, Mr. Woodard notified Appellant that he was considering disciplinary action based on Ms. Mitchell's memo. On February 16, 2005, Appellant met with Mr. Woodard to discuss the allegations. During that meeting, the issue of Appellant transferring to day shift was informally raised, as a means for her to better manage the effects of her diabetes. Mr. Woodard, however, was not convinced that Appellant's actions resulted from being diabetic, and he concluded she had slept while on duty. In addition, Mr. Woodard felt disciplinary action was warranted because of Appellant's history of sleeping on duty and because he believed she had been informed about the forms she needed to fill out to request either a shift transfer or reasonable accommodation, which she had not done.

2.11 Mr. Woodard ultimately recommended termination, and by letter dated March 1, 2005, Jeraldine McCray, Assistant Vice President for Facilities, notified Appellant that she was dismissed, effective March 16, 2005, for just cause, including but not limited to willful violation of policy and rules, neglect of duty, and inefficiency by taking longer rest or meal breaks than allowed, sleeping on the job, and taking breaks in an unauthorized location.

2.12 After meeting with Mr. Woodard on February 16, 2005, but prior to receiving the March 1, 2005, termination letter, Appellant submitted another physician's slip to Facilities Services,

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received on February 22, 2005. The physician's slip described Appellant's diabetes symptoms, including dizziness, and noted that she suffered from frequent attacks of hypoglycemia and should sit or lie down in the event of an attack. An additional physician's statement dated March 11, 2005, reiterated that Appellant's medical condition likely caused her to become sleepy and dizzy. Although the February and March 2005 physician's statements were subsequent to the University's decision to terminate Appellant, they lend credibility to Appellant's description of her diabetic symptoms and her occasional need to sit and rest.

2.13 It is undisputed that Appellant periodically attended meetings along with other custodial staff in which the topics of Family Medical Leave Act (FMLA) and Reasonable Accommodation were discussed. It is also undisputed that it is the University's practice to have employees request accommodation by filing out a request form. However, the University's Administrative Policy 46.5, Reasonable Accommodation of Employees with Disabilities, emphasizes that the disability accommodation process is "interactive" and requires cooperation and communication between the employee and the University.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts Appellant was sleeping while on duty. Respondent further asserts that Appellant has received a number of prior disciplinary actions related to sleeping on the job and argues the most recent incident occurred one week after being suspended for the same conduct. Respondent contends the University has given Appellant multiple opportunities to correct her behavior but argues that she continues to sleep while on duty. Respondent acknowledges that Appellant suffers from diabetes but argues that she has not presented the University with any requests for reasonable accommodation. Therefore, Respondent argues termination is appropriate.

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3.2 Appellant asserts that on the day of the alleged misconduct she was not sleeping on the job. Rather, Appellant contends she became dizzy and lethargic due to her diabetes and needed to sit down and rest a few minutes before resuming her cleaning duties. Appellant asserts her diabetes is severe enough to require regular insulin injections and contends she was having problems regulating her condition on the date of the alleged incident and suffered from a diabetic episode. Appellant argues the University was aware of her medical condition and asserts she was in the process of trying to regulate her diabetes and determine the best method for controlling her illness at the time of the incident. Appellant argues that work performance was not an issue and asserts she was a long term employee who performed her duties well. Therefore, Appellant argues termination is too severe.

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

4.3 Respondent has met its burden of proving just cause for discipline because Appellant was not performing her duties, and she appeared to be asleep on duty. However, the credible evidence has shown that Appellant was momentarily resting because she was feeling ill as a result of her diabetes. While Appellant did have a responsibility to notify her supervisors when she needed an additional break to cope with the symptoms of her diabetes, the evidence clearly supports that both Ms. Mitchell and Mr. Woodard were aware of Appellant's medical condition. Generally, the

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employee has the responsibility to request reasonable accommodation and participate in the reasonable accommodation process. In this case, however, the evidence suggests Appellant had a difficult time comprehending the scope of reasonable accommodation, which is a complex subject matter. In light of Appellant's language barrier, the University had even more of a responsibility to guide her through the process and ensure she fully understood her responsibilities in the reasonable accommodation process.

4.4 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).

4.5 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness 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).

4.6 We conclude that termination is too severe. At the same time, we recognize Appellant had been put on notice that it was unacceptable to sleep at work. Therefore, she had a responsibility to further explain to her supervisors that she was resting due to her medical condition. Reasonable accommodation is an interactive process, and Appellant also shared some of the responsibility to communicate with her supervisors about her illness and request additional clarification regarding reasonable accommodation. As a result, we conclude that a lengthy suspension is sufficient to impress upon Appellant the seriousness of the University's position on the appearance of sleeping on the job and the negative impact it has on the integrity of the custodial services division.

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Therefore, Appellant's dismissal is modified to a six-month suspension, effective March 16, 2005, through September 16, 2005.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kim Sun Lee is modified, and she is suspended from her Custodian position, effective March 16, 2005, through September 16, 2005.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Member

DISSENT

I respectfully dissent. The Board majority finds that Appellant was in fact resting because she did not feel well. I would additionally find that Appellant's "sleeping on duty" on January 13, 2005, was the result of a medical condition that was known to her employer for a number of years prior to this incident. Therefore, I conclude just cause does not exist to support any disciplinary action and would reverse the sanction of dismissal entirely.

The Board majority concludes that Appellant had a responsibility "to further explain to her supervisors that she was resting due to her medical condition." Because of this duty, and the fact that Appellant had already received a 15-day suspension for sleeping on the job, the majority has determined that Appellant should receive a six-month suspension, rather than dismissal, as an appropriate disciplinary sanction. Assuming that cause for discipline exists for the sole purpose of reviewing the level of discipline, a six-month suspension is too severe.

The evidence established that Appellant has difficulty communicating in the English language, and this was made clear by the presence of a Korean language interpreter during the hearing. Respondent asserts that the "interactive" process of reasonable accommodation means the burden

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for initiating that process lies with the employee. I disagree, especially in this case where the employee has problems with conversational English, let alone the medical/legal language of reasonable accommodation. "Interactive" means that the process allows for and also may require cooperation between the employer and the employee in determining facts and in finding solutions to assure work is accomplished while "accommodating" medical conditions.

The University should have stopped its disciplinary process at the time of the February 16, 2005 meeting when Appellant told Gene Woodard she had been resting due to her diabetic condition. Although Appellant was given the paperwork to initiate the reasonable accommodation process and she supplied information from her doctor after the deadline Respondent imposed, Respondent should have required an Independent Medical Evaluation when Appellant failed to timely provide the voluntary information instead of proceeding with this disciplinary action. If Appellant had failed to follow a directive to get an IME, Respondent could have then initiated discipline for insubordination.

Where the majority of this Board has placed a heavy burden of action on an Appellant who has difficulty with the English language, I place this burden on the Respondent University, which should have exercised compassion for its employee's illness and different language and culture, without sacrificing its ability to discipline as a last resort.

The Appellant's discipline should have been reversed for the reasons stated above. However, the Board majority has modified the dismissal to a six-month suspension, and Appellant will be reinstated as a result. In addition, I strongly recommend that Respondent initiate a more vigorous reasonable accommodation process, including referral for an IME, so that the extent of Appellant's medical condition and limitations, if any, are known and can be addressed through that process.

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Busse Nutley, Vice Chair

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