BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

VIRÁG HEGYI, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. RULE-05-0010 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, and GERALD L. MORGEN, Member. The hearing was held at the Department of Social and Health Services, 840 North Broadway, Everett, Washington, on January 6, March 6, 7, 8, 9, and April 7, 2006.

1.2 **Appearances.** Appellant Virág Hegyi was present and was represented by Attila Hegyi. Mitchel Sachs, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is a rule violation appeal in which Appellant contends the department violated the following laws and rules:

- RCW 41.06.169 (Performance Evaluations) and WAC 356-30-300 (Performance Evaluation);

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- RCW 41.06.450 (Destruction or retention of information relating to employee misconduct) and WAC 356-46-060 (Personnel and payroll records);
- RCW 41.06.530 (Personnel resource and management policy);
- WAC 356-06-120 (Americans with Disabilities Act of 1990 (ADA));
- WAC 356-18-070 (Sick leave – Reporting – Payment);
- WAC 356-34-020 (Reduction in salary – Demotion – Procedure);
- WAC 356-35-010 (Disability – Reasonable Accommodation – Separation – Appeals) and WAC 356-46-020 (Discrimination – Prohibitions);
- WAC 356-56-400 (Training and development).

1.4 **Preliminary Matter.** At the outset of the hearing, the parties stipulated that any alleged violation of WAC 356-34-020 (Reduction in salary – Demotion – Procedure) would be addressed at Appellant's reduction in salary appeal hearing. During the course of the hearing, the parties further stipulated that any issues related to discrimination due to disability or requests for reasonable accommodation could be raised by Appellant as defenses at her reduction in salary appeal hearing. Appellant's separate appeal of a salary reduction was pending before the Board at the time this rule violation appeal was heard (Hegyi v. DOT; RED-05-0021).

II. FINDINGS OF FACT

2.1 Appellant was a Secretary Senior and permanent employee for Respondent Department of Transportation (DOT). 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 an appeal with the Personnel Appeals Board (PAB) on May 26, 2005.

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2.2 Appellant worked for DOT beginning in the mid-1990s, had a break in service, then returned to work at DOT in 2000. Appellant worked as a Secretary Senior for the Seattle Project Development/Design Office in DOT's Northwest Region.

Performance Evaluations

2.3 Appellant alleges that DOT violated RCW 41.06.169 and WAC 356-30-300 when the department failed to follow its own procedures for conducting evaluations and failed to use standardized forms.

2.4 RCW 41.06.169 states, in part, that "[a]fter consultation with state agency heads . . . the state personnel director shall develop standardized employee performance evaluation procedures and forms which shall be used by state agencies for the appraisal of employee job performance at least annually."

2.5 WAC 356-30-300 further emphasizes that agencies shall evaluate employee performance "at least once a year" as follows:

> . . .
>
> (2) The annual evaluation will be conducted during the sixty-day period following the employee's anniversary date, except an agency can establish, on a consistent basis, a due date which better accommodates the agency's particular needs. The evaluation will cover the period ending with the established due date.
>
> . . .

2.6 In DOT's Northwest Region, the due date for employee evaluations is approximately 60 days after an employee's birth month, plus a short extension of time for reviewing purposes. Kittie

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Tyler from the Northwest Region's Human Resources Office was responsible for processing annual performance evaluations, and she credibly testified that she emailed Appellant's supervisor and sent a copy to Appellant notifying them the target date for Appellant's annual evaluation was April 22, 2005.

2.7 It is undisputed that no performance evaluations had been completed for Appellant since her return to DOT in 2000. However, Respondent asserts Appellant's alleged rule violation regarding her performance evaluations after 2000 would need to have been filed 30 days after her annual evaluation due date each April. Appellant's most recent performance evaluation was due on April 22, 2005. Since Appellant did not file her rule violation appeal until May 26, 2005, Respondent argues the alleged rule violation was untimely.

2.8 Appellant further alleges that DOT violated laws and regulations regarding performance evaluations because she contends none of her performance evaluations from the 1990s were in her personnel file when she asked to review it in early January 2005.

2.9 Respondent asserts Appellant's performance evaluations from the 1990s do exist but acknowledges those evaluations may not have been in Appellant's active personnel file when she reviewed it in January 2005, because performance evaluations are typically archived once an employee leaves state service. Nevertheless, Respondent asserts Appellant had knowledge that those evaluations were missing from her file and argues that any rule violation allegation should have been filed no later than February 2005.

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2.10 In considering whether the department violated RCW 41.06.169 and WAC 356-30-300, we find that while the department admittedly failed to complete Appellant's performance evaluations from 2000 through 2005, the latest date Appellant could have appealed a rule violation regarding the department's failure to conduct her most recent evaluation would have been May 23, 2005. Any alleged rule violations regarding the department's failure to conduct previous performance evaluations needed to be filed 30 days after the department failed to meet the deadline.

2.11 In further considering whether the department violated RCW 41.06.169 and WAC 356-30-300, a preponderance of the evidence suggests evaluations prior to 2000 did exist, though they were likely in an archived file at the time Appellant reviewed her personnel file in January 2005. Nevertheless, Appellant became aware of the fact that her evaluations from the 1990s were not in her current personnel file in January 2005; therefore, a timely appeal would have been no later than 30 days after she reviewed her file, which would have been no later than March 2, 2005.

Destruction/Retention of Employee Misconduct

2.12 Appellant alleges the department violated RCW 41.06.450 and WAC 356-46-060 when it failed to destroy a witness statement containing information "where the accused employee had been fully exonerated of wrongdoing."

2.13 RCW 41.06.450(1)(a) requires state agencies to destroy information relating to employee misconduct when the employee has been fully exonerated. However, subsection (2) allows agencies to retain information relating to employee misconduct "if it is related to pending legal action or legal action may be reasonably expected to result."

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2.14 Similarly, WAC 356-46-060(2)(e) requires that personnel records regarding employee misconduct be destroyed when the employee is exonerated or when the information is false. However, subsections (g) and (h) address the need to retain such information as follows:

> (g) Information relating to employee misconduct that is committed in the performance of state business shall be maintained by the agency for a minimum of six years or in accordance with policies established in chapter 40.14 RCW. Employees may request that such information be removed from their personnel record at the conclusion of the retention period. The information may be retained by the agency if it has a reasonable bearing on the efficient and effective management of the agency.
>
> (h) . . . agencies may retain information relating to employee misconduct or alleged misconduct if . . . agency management reasonably expects that the information will be needed in a pending or prospective legal action.

2.15 On April 27, 2005, Appellant was notified that she was being disciplined for misconduct that occurred on January 3, 2005. Appellant's co-worker, Hien Nguyen, was also charged with alleged misconduct relating to a portion of the same incident. As part of the investigative process, the department interviewed four witnesses, who were identified as witnesses A, B, C, and D. While all four witness statements specifically related to the allegation that Appellant used profanity, only witness statement A contained information specifically related to the allegation that Mr. Nguyen made a threatening remark.

2.16 Assistant Regional Administrator William Vlcek, the appointing authority, conducted Loudermill hearings for both Appellant and Mr. Nguyen. Mr. Vlcek reviewed the four witness statements and determined that all four statements supported the allegation that Appellant used

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profanity directed toward her supervisor, Project Engineer Methqal Abu-Najem. Mr. Vlcek, however, ultimately determined there was insufficient information to pursue disciplinary action against Mr. Nguyen for allegedly making a threatening remark directed toward Mr. Abu-Najem.

2.17 Appellant alleges that DOT violated laws and rules when it retained information learned from "Witness A" after Mr. Nguyen was exonerated of wrongdoing.

2.18 Respondent asserts that Appellant cannot allege a rule violation on behalf of Mr. Nguyen and further asserts the allegation regarding Mr. Nguyen's remark was not included in the charge for which Appellant was formally disciplined. Respondent asserts that Mr. Vlcek relied on the four witness statements to support the charges outlined in the April 27, 2005, disciplinary letter that resulted in Appellant's reduction in salary. Therefore, Respondent contends the department rightfully retained documentation to support the charges and level of discipline related to Appellant's misconduct.

2.19 In considering whether the department violated RCW 41.06.450 and WAC 356-46-060, we find the department had issued Appellant a reduction in salary for one specific allegation of using profanity, which Appellant had also appealed to this Board at the time she filed her rule violation appeal. Consequently, DOT carried the burden of proving the charges outlined in the disciplinary letter and the level of discipline imposed. As a result, we find it appropriate for the agency to maintain documentation from the investigation into Appellant's alleged misconduct. Furthermore, we find that Mr. Vlcek's decision not to pursue disciplinary action against Mr. Nguyen had no

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impact on his decision to discipline Appellant because he disciplined Appellant for allegedly using profanity, not making a threatening remark.

Personnel Resource and Management Policy

2.20 Appellant alleges that DOT violated RCW 41.06.530 by being unresponsive to the diverse nature of the work force composition, specifically with respect to Appellant's disability.

2.21 RCW 41.06.530 requires state government to recognize diversity, including the presence of disabilities. Subsection(1)(c) states, in part, "[i]t is therefore the policy of the state to create an organizational culture in state government that respects and values individual differences and encourages the productive potential of every employee."

2.22 It is undisputed that Appellant was in a car accident several years ago and sustained some serious and permanent injuries. It is also undisputed that Appellant had surgery on her leg and used a wheelchair and crutches for a period of time around June 2003. Further, Appellant intermittently received Family and Medial Leave (FMLA) when she qualified for it in 2003 and 2004.

2.23 Kittie Tyler serves as the ADA coordinator for DOT's Northwest Region, and she credibly testified that the department has policies and procedures related to reasonable accommodation, which is an interactive process. In this case, the Board heard a substantial amount of testimony regarding Appellant's medical issues and her request for reasonable accommodation. The Board also learned that Appellant was disability separated from her position at DOT subsequent to the

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time she filed her appeals with the Personnel Appeals Board. While specific issues related to Appellant's disability separation are more appropriate for any appeal or grievance related to that action, we have considered the evidence as it relates to Appellant's claim that DOT violated WAC 356-06-120 and WAC 356-35-010, which both address disability and reasonable accommodation. Because Appellant alleged those rules had been violated in her May 26, 2005 appeal to the Board, we did not consider any information leading up to Appellant's disability separation that occurred after that May 26 date.

2.24 WAC 356-06-120 states, "[a]gencies shall comply with the rules of the director (Title 356 WAC) unless doing so would cause them to violate state laws, chapter 49.60 RCW, or the federal Americans with Disabilities Act of 1990."

2.25 WAC 356-35-010(1) states, "[a]n appointing authority may initiate a disability separation of a permanent employee only when reasonable accommodations cannot be provided." The rule does not require the appointing authority to consider reasonable accommodations "[i]f the disability prevents performance of an essential function of the current job, and there is no appropriate work available while trying to reasonably accommodate the employee . . ."

In addition, subsection (4) states:

> The appointing authority may require an employee to obtain a medical examination at agency expense from a physician or a licensed mental health professional of the agency's choice. In such cases, the agency shall provide the physician or licensed mental health professional with the specification for the employee's class and a description of the employee's position. Evidence may be requested from the physician or licensed mental health professional regarding the employee's ability to perform the specified duties.

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2.26 Appellant made a verbal request for reasonable accommodation at her pre-disciplinary hearing with Mr. Vlcek on January 28, 2005. Mr. Vlcek notified Ms. Tyler, who then met with Appellant on February 4, 2005. At that time, Ms. Tyler provided Appellant with paperwork to give to her doctor so she could begin the reasonable accommodation process. Although Appellant provided her own written responses, Ms. Tyler did not receive any specific instructions or necessary accommodations from Appellant's doctor to be able to assess whether the department could reasonably accommodate her so that she could perform the essential functions of her job. Furthermore, Ms. Tyler was unable to communicate with Appellant's doctor because she had a very limited medical authorization signed by Appellant, which Appellant later revoked.

2.27 Ms. Tyler then scheduled an Independent Medical Evaluation (IME) for Appellant in mid-March 2005; however, Appellant did not attend the IME.

2.28 In considering whether DOT violated RCW 41.06.530 or the rules regarding ADA or reasonable accommodation, we find the department recognized Appellant's medical issues and attempted to initiate the reasonable accommodation process but was unable to obtain the specific, necessary requirements from a medical provider due to Appellant's lack of cooperation. Therefore, we find DOT was in compliance with RCW 41.06.530. Furthermore, we find no evidence to support that DOT violated WAC 356-06-120 or WAC 356-35-010 in the 30-day time period prior to the time Appellant filed her rule violation appeal on May 26, 2005.

<u>Sick Leave Reporting</u>

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2.29 Appellant alleges that DOT violated WAC 356-18-070 and that her supervisor unlawfully imposed sick leave verification on her without cause to suspect sick leave abuse.

2.30 WAC 356-18-070(1)states, "[s]ick leave shall be reported at the beginning of the absence and in accordance with agency procedure." The rule also indicates, in part, "[a] medical certificate may be required when there is cause to suspect sick leave abuse."

2.31 By letter dated December 16, 2004, Appellant's supervisor, Mr. Abu-Najem, officially notified her that he was placing her on medical verification because he had cause to suspect sick leave abuse. Appellant's supervisor advised her that she was required to provide medical verification for absences due to personal illness or injury or the illness or injury of any relatives or household members.

2.32 Respondent argues that Appellant's alleged rule violation regarding sick leave reporting was untimely because she was aware of the sick leave verification requirement in December 2004, but she did not file a rule violation appeal until May 26, 2005.

2.33 In considering whether the department violated WAC 356-18-070, we find Appellant had knowledge that she was required to provide medical verification for absences due to illness or injury on December 16, 2004; therefore, Appellant's alleged rule violation with regard to sick leave reporting was untimely.

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Training and Development

2.34 Appellant asserts that DOT violated WAC 356-56-400 because Appellant claims Mr. Vlcek failed to obtain sufficient training as a manager and, as a result, committed the above alleged violations.

2.35 WAC 356-56-400(1)states, "[t]he responsibility for training and development is a collaborative effort among state agencies, managers, and the department of personnel. In addition, subsection (b) indicates, "[m]anagers shall be responsible for seeking out and fully participating in opportunities to enhance their knowledge, skills, and abilities.

2.36 Since Mr. Vlcek began his employment with DOT in 2003, his training has included an Ethical Standards course in September 2003 and Enhanced Leadership for WSDOT, in October 2004, among other courses. Although Mr. Vlcek has received limited training as a DOT manager, he credibly testified that he received numerous supervisory and personnel related trainings over his 30-year career, during his tenures with the United States Coast Guard, King County, the Port of Seattle, and the City of Lynnwood. Additionally, as a regional administrator, he relies on the expert knowledge of his human resources staff for specific personnel issues.

2.37 In considering whether the department violated WAC 356-56-400, we find that the training Mr. Vlcek has received while employed with DOT has been limited. At the same time, he has only been employed with DOT for a short period of time, and he credibly testified that he received extensive management training prior to his employment with DOT. Furthermore, we find it was appropriate for Mr. Vlcek to delegate specific personnel matters to the human resources professionals he managed. Therefore, we find that DOT did not violate WAC 356-56-400.

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III. CONCLUSIONS OF LAW

3.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

3.2 In an appeal of an alleged rule violation, Appellant has the burden of proof. (WAC 358-30-170).

Performance Evaluations

3.3 The issue here is whether Appellant's appeal was filed within 30 days of the date when she could reasonably have been expected to have knowledge of the action giving rise to her appeal.

3.4 RCW 41.06.170 provides, in relevant part:

> (2) Any employee who is . . . aversely affected by a violation of the state civil service law . . . shall have the right to appeal to the personnel appeals board . . . not later than thirty days after the effective date of such action . . .

WAC 358-20-040(1) provides, in relevant part:

> An appeal must be received in writing at the principal office of the personnel appeals board within 30 days after: . . . the stated effective date of the action . . .

3.5 This situation is similar to that discussed in Washington Federation of State Employees (WFSE) v. Washington State University, PAB No. RULE-03-0001 (2003), where the Board determined an appeal was untimely because the Appellant had knowledge of the alleged violation of the rules "months and years" prior to filing an appeal. In WFSE, Appellant also argued that a "continuing violation" existed. The Board, however, concluded that Appellant could not point to a new viable action each time an alleged violation occurred.

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3.6 In this case, DOT admittedly failed to complete performance evaluations for Appellant from 2000 through 2005. However, Appellant was aware that her most recent performance evaluation was due on April 22, 2005, but she did not file an alleged violation of the rules until May 26, 2005. In addition, Appellant's concerns regarding her performance evaluations first came to light in January 2005. The credible evidence suggests Appellant's performance evaluations prior to 2000 were likely kept in an archived file at the time she reviewed her personnel file in January 2005. Therefore, any violations related to RCW 4106.169 and WAC 356-30-300 were untimely, and the Board lacks jurisdiction to decide those issues.

Destruction/Retention of Employee Misconduct

3.7 While the rules relating to employee misconduct provide for the destruction of documentation relating to that misconduct when an employee has been exonerated, that is not the case here. In this case, the appointing authority decided not to pursue disciplinary action against Appellant's co-worker for allegedly making a threatening remark toward their supervisor. Appellant was not charged with and did not receive any discipline for making a threatening remark. Rather, Appellant's misconduct was limited to one specific allegation of using profanity directed at her supervisor, and the department had the right to retain documentation supporting that allegation at that point in time because the possibility existed that DOT would be required to prove that disciplinary action at a subsequent appeal hearing. Therefore, Appellant has failed to prove that DOT violated either RCW 41.06.450 or WAC 356-46-060.

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3.8 Ms. Tyler provided credible testimony regarding DOT's policies and procedures relating to workplace diversity and the interactive reasonable accommodation process for employees with disabilities. Appellant has not proven that the department was insensitive to her needs. Rather, the evidence has shown the department made efforts to work with Appellant regarding any reasonable accommodation. Therefore, Appellant has failed to prove that DOT violated RCW 41.06.530, WAC 356-06-120, or WAC 356-35-010.

Sick Leave Reporting

3.9 As referenced in RCW 41.06.170 and WAC 358-20-040(1) above, the appeal must be filed 30 days after the effective date of the action. In this case, Appellant became aware of her medical verification requirement on December 16, 2004. Therefore, any alleged rule violations needed to be filed by January 15, 2005. Because Appellant did not file her rule violation appeal until May 26, 2005, the rule violation relating to WAC 356-18-070 was untimely, and the Board lacks jurisdiction to decide that issue.

Training and Development

3.10 It is undisputed that Mr. Vlcek has received minimal training since he joined DOT in 2003. However, he credibly conveyed he had knowledge, experience, and training in personnel matters as a manager in the industry for approximately 30 years. Additionally, the evidence has shown Mr. Vlcek relied on the human resources professionals in the Northwest Region to advise him when dealing with specific areas, such as employee discipline and reasonable accommodation. While we encourage DOT management to pursue additional training opportunities regarding sensitive personnel issues, we conclude that DOT was in compliance with WAC 356-56-400.

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3.11 Appellant has not substantiated the alleged rule violations, or the allegations are untimely, as discussed above; therefore, her appeal should be denied.

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Virág Hegyi is denied.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Member

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