BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JULIA LANCE, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. SUSP-05-0032 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 office of the Personnel Appeals Board in Olympia, Washington, on January 17, 2006.

1.2 **Appearances.** Appellant appeared *pro se*. Kara Larsen, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a suspension for making in inappropriate reference in an e-mail about a co-worker to another employee.

II. FINDINGS OF FACT

2.1 Appellant Julia Lance is a permanent employee for Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the

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rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on June 28, 2005.

2.2 Appellant Julia Lance is employed in a Washington Management Service (WMS) position as a Human Resource Manager for the Department of Social and Health Services (DSHS), Human Resources Division. As a Human Resource Manager, Appellant supervises two Human Resource Consultants and is responsible for providing professional consultation and advice to division directors, agency managers, supervisors, and employees. Appellant began her employment with the state of Washington in July 1997.

2.3 Appellant has no history of previous formal discipline; however, she received a letter of expectations dated January 11, 2005, as a result of an October 19, 2004 e-mail she inadvertently sent to a customer who was seeking an informational interview with her. The customer was offended by Appellant's comments in the e-mail.

2.4 Appellant also received a letter of reprimand dated January 18, 2005, which resulted from two e-mails Appellant sent to co-workers, one dated December 15, 2004, and the other dated January 10, 2005. Arturo Haro, Personnel Operations Manager, issued Appellant letter of reprimand and informed Appellant that the content of her December 15 e-mail was inappropriate and "harsh and abrasive; insensitive and disrespectful." Mr. Haro also indicated that Appellant's January 10 e-mail was also "insensitive and disrespectful." Mr. Haro directed Appellant to interact with co-workers "with respect and courtesy" and to ensure that her e-mail communications were "respectful and courteous."

2.5 Management subsequently learned that in a continuation of the chain of e-mails dated January 10, 2005, Appellant wrote the following comment and e-mailed it to Glenda Emmett,

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Confidential Secretary for the Director of the Division of Child Support, a program for which Appellant is assigned to provide advice and consultation services: "Yes don Barbar is the union guy …and check out the below …I'm getting told off by Myla (F$$$K((((B((((H!)" (sic). The individual to whom Appellant referred is an employee in the Human Resources Division Labor Relations office.

2.6 On January 9, 2006, the Board granted partial Summary Judgment to Respondent concluding that there was no dispute that Appellant sent the January 10, 2004 e-mail to a co-worker in which she implies a derogatory comment about another co-worker and, therefore, Respondent had met its burden of supporting the "charges" upon which the action was initiated. The Board ruled, however, that the issue before the Board was whether the disciplinary sanction, a suspension, was appropriate based on Appellant's misconduct.

2.7 Sherer Holter was the Human Resources Director and Appellant's appointing authority when the discipline was imposed. Ms. Holter reviewed the e-mail, prior corrective actions, the Conduct Investigation Report, and Appellant's personnel file. Ms. Holter also considered a meeting she held with Appellant and Appellant's supervisor on July 28, 2004, during which she expressed her expectations about appropriate e-mail communication and Appellant's style of communicating with others. In addition, Appellant's supervisor previously met with Appellant to discuss appropriate e-mail etiquette.

2.8 In this case, Ms. Holter was particularly concerned about the tenor of Appellant's e-mail because she was in a management position and her inappropriate comment about another manager to a client brought disrespect to Appellant, the division and the other managers. Ms. Holter was also concerned because departmental e-mails are subject to public disclosure. Ms. Holter believed Appellant's behavior was intolerable and she considered termination.

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2.9 Ms. Holter met with Appellant to discuss the allegation of misconduct, and Appellant acknowledged she wrote the e-mail and expressed remorse about the comment she made. Because Appellant seemed to understand the inappropriateness of her conduct, Ms. Holter concluded that termination was too severe. Ms. Holter, however, did not consider issuing a letter of reprimand, because Appellant already been reprimanded for similar behavior and the misconduct in this case was more serious in nature.

2.10 After considering Appellant's work history, Ms. Holter was convinced that Appellant was an asset to the division, but that a stern disciplinary action was warranted to impress on Appellant the serious nature of her misconduct and ensure Appellant's behavior did not occur again in the future. As a result, Ms. Holter imposed a 40 hour suspension without pay. By letter dated May 27, 2005, Ms. Holter notified Appellant that she was suspended without pay "for the workweek beginning Sunday, May 29, 2005 and continuing through Saturday, June 4, 2005, which affects your scheduled workdays of May 31, 2005 through June 3, 2005."

2.11 Appellant acknowledges her e-mail was inappropriate; however, she contends she was venting frustration and sent it to a friend of hers. Appellant asserts that the sanction imposed was overly punitive and she contends she was singled out when similar behavior towards her by another employee was ignored. Appellant asserts that management's actions toward her have been unfair, inconsistent and contradictory when compared to how that other employee was treated. Appellant argues she should have been given an opportunity to change behavior, because she has taken responsibility for her action, whereas management has failed to adhere to their responsibility to set standards and apply in a manner that is equitable to all.

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2.12 Respondent argues that the level of discipline imposed is appropriate because Appellant refereed to another employee in a derogatory manner. Respondent argues there is no comparison to be made between Appellant's and the actions of any other employees, because there is no one with Appellant's exact same work history and performance and who sent an e-mail with a profane reference about an upper level manager. Respondent asserts that the meaning of Appellant's e-mail was very clear and was extremely inappropriate. Respondent argues that a one week suspension was justified based on Appellant's prior history, which included a letter of reprimand and a letter of expectations, and was the minimum level Appellant's extreme lack of judgment action warranted.

III. CONCLUSIONS OF LAW

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

3.2 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; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

3.3 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).

3.4 Appellant contends that the discipline imposed on her is disproportionate because another employee, who Appellant contends sent her an inappropriate e-mail and acted in a disrespectful manner toward her during a staff meeting, was never disciplined. The Board's evaluation of

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whether a sanction imposed is appropriate has always depended on due consideration of the facts and circumstances of the appeal, including the seriousness and circumstances of the offenses. The penalty or sanction imposed by the appointing authority 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).

3.5 During hearings before the Board, employees may raise any claim or defense including evidence of disparate discipline of employees who engaged in the same misconduct. In a 2002 decision, the Board again stated:

> This Board's practice has been to review each disciplinary appeal before it based on the facts and merits of that individual case, including the employment history of the employee, the existence of progressive discipline and the seriousness of the misconduct. The review that Appellant asks us to make requires that we examine an unrelated incident of alleged misconduct where we have limited and insufficient information before us to make a finding of misconduct and to then evaluate whether the level of discipline was appropriate on a matter over which we have no jurisdiction.

McGraw v. Dep't. of Licensing, PAB No. DISM-01-0084 (2002).

3.6 Even though the Board is often invited to consider evidence of misconduct by other employees to demonstrate disparate treatment or disproportionate disciplinary sanctions, the Board finds such evidence has limited value in evaluating whether the sanction under appeal is appropriate. The examples of disparate treatment rarely have identical facts to the appeal under consideration. Also, the facts of other actions or the lack of disciplinary action are not fully before the Board to make a meaningful comparison. The Board relies on its experience of conducting hearings and deciding appeals within its jurisdiction from across the broad spectrum of state agencies and institutions of higher education to guard against disparate treatment and

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disproportionate disciplinary sanctions. Such an approach reinforces the principle that each appeal is decided on its unique facts and circumstances, with the Board cognizant of its past decisions. To expand the scope of our review to include an examination of all similar instances of employee misconduct and discipline, we believe, would make hearings and decisions more lengthy and complex without significantly increasing the scrutiny given to disciplinary actions. (Lisi v. Dep't of Fish and Wildlife, PAB No. DISM-01-0028 (2003).

3.7 When considering the content of the e-mail, the department's repeated attempts to counsel Appellant with regard to appropriate e-mail communications, and Appellant's work history, we conclude that the appointing authority's decision to suspend Appellant was not too severe. WMS employees are held to a high standard of professionalism, accountability and judgment. Moreover, when a WMS employee holds a position as a human resource professional responsible for providing expert level personnel consultation to others, the expectation of professionalism and the use of sound judgment is even higher. Appellant did not produce any evidence to support her contention that the suspension was not appropriate. Therefore, the appeal of Julia Lance is denied.

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Julia Lance is denied.

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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