BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

PAUL BOSTIAN, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	)	Case No. DEMO-04-0015 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 Attorney General's Office in Spokane, Washington, on August 25 and October 4, 2005.

1.2 **Appearances.** Appellant Paul Bostian was present and was represented by Christopher J. Coker, of Parr, Younglove, Lyman & Coker, P.L.L.C. Donna Stambaugh, Assistant Attorney General, represented Respondent Department of Social and Health Services.

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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 the published employing agency or Department of Personnel rules or regulations. Respondent alleges Appellant 1) failed to follow court orders to file termination of parental rights petitions within the proper timeframe and 2) failed to follow procedures regarding the reporting of child abuse and neglect.

II. FINDINGS OF FACT

2.1 Appellant is a permanent employee for Respondent Department of Social and Health Services (DSHS). 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 May 27, 2004.

2.2 Appellant began working as a Social Worker 3 with the Division of Children and Family Services (DCFS) in October 1998. Appellant handles cases in both the Child Protective Services (CPS) unit, investigating reports of child abuse and neglect, and the Child Welfare Services (CWS) unit, working with DCFS client families to continue protecting children and working to unify families. As a CWS worker, Appellant also works with the Attorney General's (AG's) office providing information to the court regarding child dependency cases.

2.3 Appellant attended the CPS/CWS Academy and received additional training, including Risk Assessment, Child Abuse Investigation and Interviewing, Court Testimony, and Permanency Planning. Appellant acknowledged his familiarity with DSHS Policy 6.04, Standards of Ethical Conduct for Employees, which requires employees to act in a manner that strengthens public confidence and serves the public with concern and responsiveness. Appellant also acknowledged his role as a mandatory reporter of suspected child abuse and that he understood his duty to report

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under RCW 26.44.030, which requires suspected incidents of child abuse to be reported "to the proper law enforcement agency or to the department . . . at the first opportunity, but in no case longer than 48 hours after there is reasonable cause" that abuse or neglect has occurred.

2.4 Appellant's personnel file reflects a letter of reprimand in October 2000 for failing to meet response timelines on a referral and for misrepresenting his workload to his supervisor and a letter of reprimand in March 2004 for failing to follow Indian Child Welfare rules and regulations. Appellant also received a special evaluation for the period of September 1, 2000, through November 20, 2000, that addressed Appellant's need to improve his caseload management and performance. In October 2003, Appellant's supervisor counseled him after he failed to ensure a foster child's medication was properly transferred to the foster parent.

2.5 By letter dated May 20, 2004, DCFS Regional Administrator Ken Kraft notified Appellant of his demotion to a Social Worker 2 for 12 months or 2080 hours. Mr. Kraft charged Appellant with neglect of duty, gross misconduct, and willful violation of the published employing agency or Department of Personnel rules or regulations for 1) failing to follow court orders to file termination petitions within 30 days on Sandra C., Raymond S., and Joseph S., and failing to provide referrals to the Assistant Attorney General's (AAG's) office prior to the termination petitions being filed; and 2) failing to follow RCW 26.44.030 regarding reporting child abuse and neglect, as a mandatory reporter regarding bruising on Angelica D.

<u>Allegation # 1. Sandra C., Raymond S., and Joseph S. Case</u>

2.6 On November 13, 2003, Appellant attended a court review for siblings Sandra C., Raymond S., and Joseph S. A court review is normally conducted every six months to determine a child's permanency plan, whether it be reunification with the family or some other option, including a plan

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to terminate parental rights. The court entered orders regarding each of the above named children, signed and dated November 13, 2003, that scheduled non-contested review hearings for each on April 8, 2004. There was also a handwritten notation on each of the orders that stated "[t]he Department shall file for termination in 30 days." All parties, including Appellant and the Assistant Attorney General (AAG) who attended the review hearing with Appellant, signed the orders issued by the court commissioner.

2.7 On December 19, 2003, Assistant Attorney General Rebecca Prahl contacted Appellant's supervisor, Social Worker 4 Launi Burdge, to inform her that Appellant failed to follow the court's orders regarding Sandra C., Raymond S., and Joseph S. and that the AG's office had received those referrals five days past the date the petitions were due in court.

2.8 AAG Prahl, interpreted the court commissioner's notation to mean she was required to file the "termination petitions" with the court within 30 days of the orders dated November 13, 2003. Under AAG Prahl's interpretation, Appellant would have had to complete "termination referrals" and provide them to her approximately the same day he received the orders from the court because the AAG typically prepares a termination petition for filing with the court around 30 days after receiving the referral from the social worker on the case.

2.9 Based on Appellant's experience and the standard practice of the CWS unit, Appellant believed he had 30 days to complete termination referrals on the three children, which was the timeline he recommended to the court commissioner. In Appellant's CWS unit, the process for initiating a termination of parental rights typically takes longer than 30 days.

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2.10 Based on the standard practice, Appellant's interpretation was reasonable. However, Appellant admittedly failed to meet the deadline as he understood it, and he was five days late in getting the information to the AG's office. On the other hand, the AG's office also had a responsibility to monitor timelines since an AAG had signed the court orders.

2.11 Appellant and the AAG's paralegal, Kari Davis, continued to communicate through early February 2004. Ms. Burdge testified that it was not uncommon for the AG's office to request additional referral information, which Ms. Davis did by email in late January and early February 2004. In mid-February 2004, the AG's office completed the termination petitions. After the AG's review process, the termination petitions for Sandra C., Raymond S., and Joseph S. were filed in court on March 18, 2004.

2.12 The AG's office did not request an extension of time at any time between the court review hearing in November 2003 and the date of filing in March 2004, and the court did not impose any sanctions for failing to meet a deadline.

Allegation # 2. Angelica D. Case

2.13 Angelica D. was a dependent child who had been placed with her paternal grandparents in Stevens County. On December 1, 2003, Angelica D. had a supervised visit with her mother at the Spokane DCFS office where Appellant works. During the visit, Angelica D.'s mother reported seeing bruises on the child's back and buttocks to the visitation room observer, a student worker. The student worker notified Melissa Charbonneau, a public health nurse employed by Spokane County but who worked in the same building as DCFS. Ms. Charbonneau viewed the bruising on Angelica D., who told Ms. Charbonneau that her grandpa had spanked her.

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2.14 Ms. Charbonneau then went to the DCFS office to find CWS worker Ron Stewart, who she believed was Angelica D.'s case worker. At the time, Appellant was the only social worker present, and he volunteered to speak with Angelica D.'s mother, even though he was not assigned to her case. There is no dispute that Appellant spoke with Angelica D.'s mother and observed Angelica D. and her siblings but made no effort to verify whether the child had bruises or to photograph her injuries.

2.15 After speaking with Angelica D.'s mother, Appellant left a note for Mr. Stewart indicating the mother's concerns. Appellant also spoke with Mr. Stewart the following day, December 2, 2003. However, Angelica D.'s case was assigned to SW3 Paul Kosewski. Meanwhile, late in the day on December 2, Angelica D.'s mother left a message for Mr. Kosewski requesting that her children be removed from their grandparent's home due to bruises she saw on Angelica D. Because the call came in after Mr. Kosewski's shift had ended, he did not receive the message until the morning of December 3.

2.16 As a result of the mother's call, Mr. Kosewski and his supervisor staffed the issue with Appellant and Mr. Stewart, since they also had knowledge of the alleged abuse. Due to the difficulty of the case and concerns about the mother's credibility, Mr. Kosewski's supervisor advised him to contact Angelica D.'s mother and ask her to call the Spokane DCFS intake to report her allegations. When Mr. Kosewski checked with the Spokane DCFS intake and discovered the mother had not called, he asked Ms. Charbonneau to accompany him to the intake office, where they made a written CPS referral by filling out a "blue slip" and dropping it in an inbox at the intake unit. However, the only CPS referral documented was made by Angelica D.'s mother, and that resulted from a call she had made to the Colville DCFS intake in Stevens County, where the child resided.

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2.17 On January 22, 2004, the incident concerning Angelica D. was reported to Area Administrator Tim Nelson. Mr. Nelson then apprised Ms. Burdge of the incident, and she initiated a CIR on January 28, 2004. Area Administrator Tim Abbey conducted an investigation into the allegation that Appellant failed to report child abuse and neglect according to policy. Appellant requested additional time to respond to the CIR regarding Angelica D., which the department granted. However, Appellant did not provide a response to the allegation.

2.18 Regional Administrator Ken Kraft was Appellant's appointing authority when the discipline was imposed. In determining the level of discipline, Mr. Kraft reviewed Appellant's personnel file, including his prior reprimands, and considered the serious impact Appellant's actions had on the department's integrity and its mission to protect children from abuse and neglect. Although Mr. Kraft considered termination, he felt Appellant provided compelling personal circumstances that mitigated his actions. As a result, Mr. Kraft concluded that a demotion to a more supervised position for one year would allow Appellant an opportunity to better understand his role as it relates to the department's mission.

III. APPELLANT'S MOTION ON TIMELINESS

3.1 Appellant argues he was not provided with the CIR concerning Angelica D. within the required 14-days of the incident. Appellant asserts the incident occurred on December 1, 2003, and that Mr. Kosewski's supervisor was aware of the incident two days later. Appellant, however, argues he did not know this was an allegation until January 27, 2004, when he attended a meeting about the CIR concerning Sandra C., Raymond S., and Joseph S., more than 14 days after management became aware of the allegation. Appellant, therefore, asserts the CIR dated January

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28, 2004, was untimely, and he contends the passage of time hampered his ability to clearly recall the specific events and that he was unaware of all the facts.

3.2 Respondent argues the CIR concerning Angelica D. is timely because neither Mr. Nelson, nor Appellant's supervisor, Ms. Burdge, were aware of the incident until January 22, 2004, and the CIR was timely issued on January 28, 2004. Respondent asserts that misconduct cannot be assumed without concrete information and contends there is no evidence Mr. Kosewski's supervisor had information that led her to believe Appellant had committed misconduct. Respondent further argues that Appellant requested and was granted additional time to respond to the allegation.

3.3 In considering Appellant's motion, we have reviewed Robinson v. Dep't of Social & Health Services, PAB No. D94-146 (1995), *appeal affirmed*, 95-2-02813-3 (Thurston Co. Super. Ct. Oct. 31, 1996). In Robinson, the Board addressed several prior Board decisions related to issuing a report of an employee's conduct within 14 days, including the following PAB decision.

3.4 Failure to comply with time requirements may be cause to set aside a disciplinary action, but not automatically so. The Board would review each case to determine whether failure to follow the policy warrants cancellation of the discipline, considering factors listed. Rolig v. Dep't of Social & Health Services, PAB No. D92-128 (1993).

3.5 In this case, we have reviewed the facts and have determined that the approximate one-month delay in initiating the CIR does not warrant cancellation of Appellant's failure to report child abuse and neglect as a mandatory reporter. Appellant requested and was granted additional time to respond to the CIR; however, Appellant chose not to respond. Furthermore, Appellant had the

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opportunity to raise the matter at the pre-termination meeting or through the discovery process but declined to do so.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues Appellant failed to meet his obligations as a social worker when he did not meet the proper timelines regarding a termination petition of parental rights and when he did not report suspected child abuse. Respondent argues that DCFS's primary mission is to protect children and that Appellant failed to adhere to that mission in both instances of misconduct. Respondent asserts that Appellant was familiar with agency policies and legislative mandates and contends he received training to assist him in performing his duties. Respondent argues Appellant was unresponsive to Ms. Davis's requests regarding the termination cases and asserts Appellant missed a deadline.

Respondent argues Appellant was also unresponsive with regard to reporting child abuse. Respondent contends Appellant was a mandatory reporter and the only DCFS employee to actually see the child. Respondent, therefore, argues Appellant was the logical person to view her bruises and make a CPS referral. Respondent asserts Appellant failed to take responsibility in each instance and instead shifted the blame to others. Respondent asserts the appointing authority considered Appellant's personal circumstances and weighed them with DCFS's important role of ensuring children are free from harm. As a result, Respondent argues a one-year demotion is a very appropriate and lenient sanction.

4.2 Appellant argues he did take responsibility for his actions in each case. With regard to the termination petitions, Appellant argues the evidence clearly shows it was nearly impossible to file a petition for termination within 30 days and asserts the AAG agrees because she did not call attention to the court's order until after the alleged deadline had passed. Appellant further asserts

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Ms. Davis did not begin working on the referrals until a couple of weeks after he provided the information. Appellant contends he worked with Ms. Davis to provide additional information and asserts that time was not an issue for the AAG because she did not expedite the petitions, even after receiving all of Appellant's information. Therefore, Appellant argues he is not totally to blame for the lag in filing, which he asserts did not significantly impact the cases because the court did not express any concerns.

Appellant argues he reported the suspected abuse to the main social worker he thought had been handling the child's case. Appellant contends there was no reason for him to view the bruises because Ms. Charbonneau had just looked at them. Appellant contends he not only reported the child's bruises to a case worker having knowledge of her family situation but contends he also staffed the issue with two other social workers and a supervisor. Appellant asserts the supervisor then advised the primary case worker to have the mother make the report. Appellant argues the allegations leading to his demotion were overblown, that he did not have all of the information regarding the charges concerning Angelica D., and that the sanction is too severe.

V. CONCLUSIONS OF LAW

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

5.2 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).

Allegation # 1. Sandra C., Raymond S., and Joseph S. Case

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5.3 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).

5.4 Even though Appellant's interpretation of the court orders was to provide referrals to the AG's office in 30 days, he still failed to adhere to that timeline. Furthermore, Appellant's termination referrals were incomplete. Therefore, Respondent has proven Appellant neglected his duty to prepare the termination referrals in a timely and thorough manner.

5.5 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).

5.6 There is no evidence Appellant's failure to provide referrals to the AG's office within 30 days resulted in serious consequences for the department. While the AG's office was concerned about Appellant's tardiness in providing the referrals, there is no evidence the termination petitions were expedited once Appellant provided all of the information to the AG's office. Additionally, there is no evidence the court issued a sanction for failing to meet a deadline. Therefore, Respondent has not proven that Appellant's failure to adhere to timelines was flagrant misbehavior, and it did not constitute gross misconduct.

5.7 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

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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).

5.8 Although Appellant had a duty to be mindful of appropriate timelines, Respondent did not prove he willfully violated agency policy.

Allegation # 2. Angelica D. Case

5.9 Respondent has met its burden of proving Appellant neglected his duty to view the child's bruises, document the record, and make a CPS referral. Appellant had reasonable cause to suspect abuse based on the nurse's observation of bruising on the child, and he also had an opportunity to assess the child's condition himself.

5.10 While Appellant neglected his duty and violated mandatory reporting regulations, there is no evidence Appellant's actions were flagrant or that he willfully disregarded the interest of the department because he did relay the allegations of abuse to the person he believed was the primary case worker.

5.11 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).

5.12 Similar to the appointing authority's conclusion, we conclude there were mitigating circumstances that attributed to Appellant's actions during the time period these incidents occurred.

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With regard to the first charge, we agree that Appellant failed to provide the necessary paperwork to the AAG within 30 days. At the same time, the AAG assigned to the case shared some of Appellant's responsibility to monitor timelines, in light of the court's order. With regard to the second charge, Appellant did convey the suspected abuse to the social worker who he thought had been working with Angelica D.'s family. When considering all of the circumstances surrounding both incidents, we have determined a one-year demotion is too severe, and a six-month demotion should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Paul Bostian is granted, in part, and his 12-month demotion is modified to a six-month demotion.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member

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