BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICHARD GREEN, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	Case No. DISM-98-0066 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; GERALD L. MORGEN, Vice Chair; and NATHAN S. FORD JR., Member. The hearing was held in the Personnel Appeals Board hearing room in Olympia, Washington, on October 14, 1999.

1.2 **Appearances.** Appellant Richard Green was present and appeared *pro se*. Respondent Department of Labor and Industries was represented by Mickey Newberry, Assistant Attorney General.

1.3 **Nature of Appeal.** Appellant was dismissed for abandonment of position and filed this appeal. Respondent alleges that from October 27, 1998 through October 30, 1998, Appellant did not report to work and failed to notify his supervisor that he would not be at work.

1.4 **Citations Discussed.** WAC 251-11-110; 356-34-060; 356-34-080; 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Stubblefield v. Dep't of Transportation, Personnel Board No. 81S-25 (1981) (Clayton, Hearings Examiner), *recommended decision aff'd*; Cuellar v. Dep't of Social and Health Services, PAB No. D90-005 (1990); Robinson v. Dep't of Social and

Health Services, PAB No. D89-137 (1990) (White, dissenting), *majority decision rev'd on review*, Thurston County Superior Court No. 90-2-03000-5 (March 10, 1982); Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 50, 455 P.2d 359 (1969); C.f. In re Estate of Bonness, 13 Wash.App. 299, 535 P.2d 823 (1975); Mallotte v. Gorton, 75 Wn.2d 306, 450 P.2d 820 (1969), with Trotland v. New England Mutual Life Insurance Company, 1 Wash.App. 303, 462 P.2d 244 (1969), and Selover v Aetna Life Insurance Company, 180 Wash. 236, 38 P.2d 1059 (1934).

II. FINDINGS OF FACT

2.1 Appellant Richard Green was a Computer Technical Specialist 2 and a permanent employee of Respondent Department of Labor and Industries (L&I). 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 December 2, 1998.

2.2 By letter dated October 30, 1998, Respondent notified Appellant of his dismissal from his position effective November 2, 1998. The letter notified Appellant of his dismissal upon the grounds of abandonment of position. Respondent alleged that Appellant had been in unauthorized absence status since October 27, 1998.

2.3 On October 27, 1998, Appellant was arrested, charged and detained in the Thurston County jail. Subsequently, Appellant entered a plea to unspecified charges and was incarcerated. The basis for the criminal charges was not at issue in these proceedings before the Personnel Appeals Board.

2.4 Respondent was aware of Appellant's arrest on October 27, 1998. From October 27 through October 30, 1998, Appellant did not contact the agency. The agency made no attempts to contact Appellant.

2.5 Because neither Appellant nor anyone acting on his behalf had contacted the agency, the appointing authority notified Appellant, by letter dated October 30, 1998, that he was being

dismissed from his position effective November 2, 1998 because Respondent presumed that Appellant had abandoned his position.

2.6 After receiving the letter, Appellant attempted to contact the agency on November 2, 1998 by placing a collect call to the Computing and Production Services' (CP&S) operations center. Pasha Naini, a systems administration contractor for L&I, received the collect call. Mr. Naini was unsure whether to accept the call. He did not accept the call, but reported the call to Eric Vonderscheer, the Supervisor of CP&S.

2.7 Appellant made no other attempts to contact the agency. No other person contacted the agency on Appellant's behalf.

2.8 In this case, Appellant had been absent from work for three consecutive days when the appointing authority, Shelagh Taylor, presumed that Appellant had abandoned his position and informed Appellant of his dismissal by letter dated October 30, 1998. The letter was addressed to Appellant at this home address and a copy was sent to him in care of the Thurston County jail.

2.9 Ms. Taylor was unaware of the attempt by Appellant to contact Respondent on the effective date of his dismissal.

2.10 Appellant was released from custody on July 12, 1999. Prior to his release, he was eligible for work release and available to return to work on nine workdays.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant failed to contact Respondent for three consecutive days and that the appointing authority appropriately presumed he had abandoned his position. Respondent contends that Appellant had an obligation to call and that he could have made the call from the jail. Furthermore, Respondent contends that if Appellant had called the agency and his

collect call had been rejected, personnel at the jail would have assisted him in contacting the agency. Respondent asserts that Appellant had an opportunity to keep his job, but that he did not avail himself of that opportunity when he failed to contact his employer for more than three consecutive days. Respondent argues that Appellant abandoned his position and that his dismissal should be affirmed.

3.2 Appellant asserts that he was unable to contact the agency and that the agency knew where he was. Appellant contends that after nine years of employment with the agency, Respondent should have known that he would not just walk away from his job. Appellant argues that he had limited access to a telephone at the jail and that he was unable to call Respondent prior to November 2, 1998. Appellant contends that his call on November 2, 1998 demonstrates that he did not intend to abandon his position. Appellant further contends that Respondent was wrong to presume he had abandoned his position and that his dismissal should be reversed.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

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 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 WAC 356-34-060 provides, "An employee who is absent from a position for three consecutive working days without notice to the appointing authority may be presumed to have abandoned the position. Notice of dismissal upon the grounds of abandonment of position shall be

sent by certified mail to the last known address of the employee within seven calendar days after the three consecutive days of absence. The dismissal may be made effective one day after mailing of the notice." (Emphasis added). If the required facts exist, a presumption of abandonment is created which serves as a valid basis upon which to dismiss an employee under WAC 356-34-060. A presumption of abandonment may be rebutted where one or more of the underlying facts are shown by contrary evidence not to exist. Stubblefield v. Dep't of Transportation, Personnel Board No. 81S-25 (1981) (Clayton, Hearings Examiner), *recommended decision aff'd*.

4.4 Dismissal based upon presumed abandonment is not a "disciplinary" action, in that the action is not a sanction for employee misconduct but provides the appointing authority a process through which an employee who has abandoned his or her position may be dismissed. The agency may then proceed to fill the vacant position without undue delay and disruption of agency operations.

4.5 When an employee files an appeal of his or her dismissal for abandonment, as Appellant did here, the burden of proof on the Respondent agency is similar to its burden in disciplinary appeals. Under the Board's rules of procedure, the burden of supporting the "charges" upon which the action was initiated remains with Respondent. WAC 358-30-170. Respondent has the burden of proving by a preponderance of evidence, the allegations contained in the notification letter. Cuellar v. Dep't of Social and Health Services, PAB No. D90-005 (1990). Respondent must prove not only that dismissal based on presumption of abandonment was permitted by the merit system rules in the situation, but also must overcome the rebuttal of that presumption by showing that the presumption of abandonment was reasonable and that dismissal for abandonment was appropriate under the circumstances.

4.6 Appellant is entitled to reinstatement when credible evidence adduced at the hearing negates a relinquishment of the position by the Appellant. Robinson v. Dep't of Social and Health

Services, PAB No. D89-137 (1990) (White, Member, dissenting), *majority decision rev'd on review*, Thurston County Superior Court No. 90-2-03000-5 (March 10, 1982). Abandonment of property rights must be proved by clear, unequivocal and decisive evidence in civil actions. The primary element to be established regarding abandonment is an actual intent to relinquish or part with the rights claimed to be abandoned. Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 50, 455 P.2d 359 (1969); C.f. In re Estate of Bonness, 13 Wash.App. 299, 535 P.2d 823 (1975); Mallotte v. Gorton, 75 Wn.2d 306, 450 P.2d 820 (1969), with Trotland v. New England Mutual Life Insurance Company, 1 Wash.App. 303, 462 P.2d 244 (1969), and Selover v Aetna Life Insurance Company, 180 Wash. 236, 38 P.2d 1059 (1934).

4.7 Respondent met its burden of establishing that Appellant was absent from work without affirmatively notifying the appointing authority for the requisite three days and that the notice of dismissal required by WAC 356-34-060 was mailed to Appellant's last known address, including a copy mailed to the Thurston County jail where Respondent knew Appellant was then involuntarily residing. Even though the merit system rules authorized the appointing authority to presume that Appellant had abandoned his position, we find the presumption of abandonment was unreasonable because the appointing authority knew Appellant's whereabouts and knew that his detention in the county jail prevented him from reporting to work from October 27-30, 1998.

4.8 Appellant's clear intent to not abandon his position rebuts the presumption of abandonment. Appellant's attempt to contact the agency as soon as he received notice that he was being dismissed for abandonment of his position clearly establishes that he did not intend to abandon his position. Respondent did not prove that Appellant intended to abandon his position by clear, unequivocal and decisive evidence.

4.9 In the Board's review of the facts presented here to determine the context, intent and purpose of WAC 356-34-060, we looked to the Higher Education Merit System Rules for

comparison. In contrast to the General Government Merit System Rules, when notice is provided to a higher education employee acknowledging the presumption of resignation, WAC 251-11-110 allows the employee seven calendar days after the date of service of the notice in which to petition for reinstatement upon proof that the absence was involuntary of unavoidable. Providing an employee the opportunity to petition for reinstatement is reasonable when there is a question of the employee's intent in regard to his or her continued employment with an agency. The General Government Merit System Rules do not provide for such a petition, but WAC 356-34-080(1) specifically provides the right of any permanent employee who is presumed to have abandoned his/her position to appeal such action to the Personnel Appeals Board. If the Board's inquiry ended with the factual determination of whether an employee was absent without notice for three days, the merit system rules would have included abandonment as a cause for disciplinary action in WAC 356-34-010 and a separate procedure for dismissal and appeal from presumed abandonment would be unnecessary.

4.10 In this case, Respondent knew that Appellant's absence was involuntary and unavoidable. Respondent knew that Appellant was in the Thurston County jail and that he was unable to report for work. Appellant attempted to contact his employer after receiving the dismissal notice. Under the facts present here, Respondent has not overcome Appellant's rebuttal by proving that it was reasonable to presume abandonment and we conclude that dismissal for abandonment was not appropriate. The appeal should be granted without prejudice.

4.11 Having determined that the appeal should be granted, we must consider mitigation of the back pay and benefits due to Appellant. Appellant could not report to work during his incarceration with the exception of nine days during which he was eligible for work release. Appellant should receive back pay and benefits for those nine days. Appellant was released from custody on July 12, 1999 and was available to report to work at the start of his next work shift. Appellant should

receive back pay and benefits from the beginning of what would have been his next work shift after his release from custody on July 12, 1999.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Appellant Richard Green is granted, without prejudice, and Appellant is awarded nine days of back pay and benefits plus back pay and benefits commencing with what would have been his next work shift following July 12, 1999.

DATED this _____ day of _____ 1999.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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Nathan S. Ford Jr., Member