BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CARL KEEN, Appellant, v. WENATCHEE VALLEY COLLEGE, Respondent.	Case No. DEMO-01-0021 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held at the Holiday Inn Express, Chelan Room, Wenatchee, Washington, on April 17, 2003. WALTER T. HUBBARD, Chair, reviewed the file and record and participated in the decision in this matter.

1.2 **Appearances.** Appellant Carl Keen was present and was represented by Scott A. Volyn, Attorney at Law, of Foreman, Arch, Dodge, Volyn & Zimmerman, P.S. Donna Stambaugh, Assistant Attorney General, represented Respondent Wenatchee Valley College.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for inefficiency, gross misconduct, neglect of duty, abuse of fellow workers, and insubordination. Respondent alleges that Appellant made threatening remarks and/or intimidating statements, created

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a negative environment for other employees, made threats of damaging college equipment, and worked in a manner that caused safety concerns.

1.4 Citations Discussed. WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Johnson v. Lower Columbia College, PAB No. D93-077 (1994); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Harper v. WSU, PAB No. RULE-00-0040 (2002); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Carl Keen is a Maintenance Mechanic II and permanent employee for Respondent Wenatchee Valley College. 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 August 10, 2001.

2.2 Appellant began his employment as a Control Technician at Wenatchee Valley college in September 1995. Appellant's duties included maintaining the HVAC system and performing a variety of repairs of college equipment. Appellant has no history of prior disciplinary actions.

2.3 By letter dated July 23, 2001, Robert Parlette, former President of the Wenatchee Valley College, notified Appellant of his demotion from his Control Technician position to a position as Maintenance Mechanic 1, effective August 13, 2001. Mr. Parlette charged Appellant with inefficiency, gross misconduct, abuse of fellow workers and insubordination for "actions which occurred over the last several years." Mr. Parlette alleged that Appellant made threatening and/or

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intimidating statements or acted in an intimidating manner toward coworkers, created a negative environment, and threatened to damage college equipment and operated college equipment in an unsafe manner. The details supporting Mr. Parelette's decision to demote Appellant were described in an investigation report dated June 20, 2001 conducted by Kathy Erickson, Director of Human Resources.

Engaging in threatening and intimidating behavior

2.4 In late 1999, Bill Smith became the manager of the Facilities Department. Mr. Smith's responsibilities included supervising Appellant. However, Mr. Smith worked out of the college's Omak facility an average of three to four days a week, and therefore did not have daily contact with Appellant.

2.5 The supervisor-subordinate relationship between Appellant and Mr. Smith was strained. Soon after he became Appellant's supervisor, Mr. Smith observed that Appellant exhibited "angry and out of control" behavior. Appellant believed that Mr. Smith was an ineffective manager.

2.6 Appellant had very strong views about how the Wenatchee Valley College was being managed, and he was vocal and passionate about sharing these views with coworkers.

2.7 During the course of the hearing, we heard testimony from Appellant and 11 other college employees, many of whom worked with Appellant on a daily basis. Mechanic Ed Putman, Maintenance Custodian 2 James Pasta, and Maintenance Custodian Roger Montanez observed Appellant become frustrated and perceived Appellant's behavior and demeanor as "strong willed" and "loud and boisterous." However, they did not perceive Appellant as threatening.

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2.8 On the other hand Mr. Smith, Utility Worker Patrick Sprauer, Plant Communications Coordinator Bonny Stephens and Electrician Dan Nelson described the manner in which Appellant voiced his opinion as forceful, aggressive, and hostile. They observed Appellant engage in angry outbursts and found his gruff demeanor intimidating. Mr. Nelson observed Appellant become angry and fling or throw tools around in the shop. Mr. Nelson was not comfortable working around Appellant and described him as a "bull in a china shop."

2.9 Ms. Stephens also observed Appellant become angry on numerous occasions. Appellant would "stomp around" and "slam doors." Mr. Sprauer observed Appellant become angry and "throw stuff in disgust." Mr. Sprauer intentionally avoided working around Appellant because he found Appellant's body language, his mannerisms and his presence threatening. Ms. Stephens also did not feel comfortable working with Appellant, and she found his presence intimidating.

2.10 Kathy Brown is a Program Coordinator in the Technology Department. She has worked with Appellant for a number of years. She and Appellant are also members of the Washington Public Employee Association. Appellant often visited with Ms. Brown during work hours. Appellant spent work time complaining to her about the college and about the union. Ms. Brown told Appellant his behavior was inappropriate, however, Appellant continued to bring up the same issues. Ms. Brown also observed Appellant become loud and yell, and she found it difficult to calm him down. Because of their union ties, she was reluctant to report his behavior, but she felt that he was hurting morale with his negative talk about the college administration and how the college was managed. Ms. Brown did not fear Appellant.

2.11 Appellant denies that he engaged in any inappropriate behavior. However, he admits that he may have "slammed a hammer on a workbench" or thrown tools in the workplace, but that others "have thrown tools too."

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2.12 After evaluating the totality of the testimony, we find that a preponderance of the evidence supports that Appellant engaged in inappropriate behavior in the workplace that included loud outbursts, yelling, angrily flinging objects, and he created a generally negative work environment for others. While Appellant did not make threats to others or throw objects directly at anyone, the credible evidence supports that Mr. Smith, Mr. Sprauer, Mr. Nelson and Ms. Stephens reasonably found Appellant's behavior threatening and intimidating.

Failure to provide maintenance to college equipment and other safety concerns

2.13 **College Chiller.** The college chiller was installed in 1972. The chiller was undisputedly old and required constant maintenance. The chiller routinely surged and Appellant was responsible for attending to it, and failure to do so could have caused serious damage to the chiller.

2.14 Ms. Stephens worked in the vicinity of the chiller and could hear it surge. She was responsible for immediately notifying Appellant whenever the chiller surged. She observed, however, that Appellant did not immediately attend to the chiller and on numerous occasions he allowed the chiller to surge for up to 30 minutes before attending to it.

2.15 Appellant frequently stated to others that he wished that college equipment would blow up so it would force the college to buy new equipment.

2.16 The credible evidence supports that Appellant frequently ignored the surging chiller and failed to immediately provide maintenance to the chiller.

2.17 **Knocking down a light pole and a fire hydrant.** Appellant admits that he backed into a light pole and a fire hydrant. He credibly testified that he was operating vehicles that made it

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difficult to see behind him and as he backed up. Based on these mitigating circumstances, Appellant's accident did not constitute misconduct.

2.18 **Changes to whiteboard.** Mr. Smith utilized a whiteboard to communicate information to employees. Appellant admits that occasionally he made changes to the whiteboard, such a erasing a letter to spell out a different word. On March 12, 2001, Mr. Smith made a notation to the whiteboard that an employee had called in sick and would not report to work. Later, the information was erased and as a result, a building was left unlocked. Other employees also made changes to the whiteboard. Respondent alleges, however, that on this occasion Appellant, more likely than not, made the change. Appellant denies that he erased this particular message. We find that there is insufficient information to support this allegation.

2.19 **Chill water loop valve.** In spring 2000, Mr. Smith was notified of a flood in the campus theatre. After inspecting the chill water loop, Mr. Smith discovered that a valve had remained open in the mechanical area which caused water to pour out over the weekend. Appellant had recently emptied and refilled the water loop and Mr. Smith believed that Appellant was responsible for leaving the valve open.

2.20 Mr. Smith subsequently spoke to Appellant about the incident. Mr. Smith directed Appellant to take further precautions when he filled the loop, "such as not doing it when the campus was unoccupied or late in the workweek when problems could happen over the weekend and not be discovered until Monday." Because Mr. Smith discovered and addressed the issue with Appellant in the spring of 2001, Respondent cannot, a year later, incorporate the incident and use it to support the discipline imposed here.

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2.21 **Hiding the network adapter to his laptop computer.** On April 23, 2001, Robert Parlette, WVC President, placed Appellant on administrative leave while the college conducted an investigation into the allegations that Appellant "created a negative work environment, acted in an unsafe manner, ignored the surging of the college chiller, stated he wished it would blow up, and intimidated staff." The following day, Appellant returned to the college campus at Mr. Smith's request to return his state assigned laptop computer. Appellant was in his office alone gathering some items. When Appellant left, he returned the laptop to Mr. Smith and left.

2.22 The laptop Appellant used was loaded with a special software that allowed the user to monitor and adjust numerous temperature controls throughout campus buildings.

2.23 The following day, Mr. Smith logged onto the laptop and attempted to access the temperature controls. However, he was unable to do so but did not understand why. Mr. Smith contacted the software contractor who came to the college and discovered the network adapter (sentinel) necessary to log onto the system and operate the controls was missing. After searching Appellant's work area, the adapter was located in the back of a drawer in Appellant's desk under other items. Mr. Smith believed that Appellant intentionally hid it there.

2.24 Appellant denies he hid the internet adapter. However, Appellant was assigned a state computer and he had primary responsibility for it and all of its attachments. Therefore, we find on a more likely than not basis, that Appellant was the individual responsible for hiding the network adapter.

2.25 **Anonymous hang up calls.** Mr. Smith testified he was receiving hang up calls to his home telephone number. Mr. Smith also testified that on one occasion he heard a voice in the background that "sounded like" Appellant. The following day Mr. Smith mentioned the incident at work, and

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he noticed that the calls subsequently stopped. Mr. Smith, therefore, suspected Appellant was making the hang up calls. There is absolutely no other evidence, other than Mr. Smith's "suspicion," to support that Appellant was anyway involved in making these calls. Respondent has not met its burden in proving this allegation.

2.26 Robert Parlette was the college president and the appointing authority when he demoted Appellant. After reviewing Ms. Erickson's investigative report and discussing the allegations with her, he concluded that Appellant engaged in misconduct. Mr. Parlette considered dismissing Appellant but after discussing the sanction with Ms. Erickson, he chose to demote Appellant instead. Mr. Partlette determined that demotion was appropriate because it placed Appellant in a position where he would be under closer supervision and provide Appellant with an opportunity to correct his behavior and become a productive and positive employee.

2.27 By letter dated August 28, 2002, Jack Becherer, the new President of Wenatchee Valley College, notified Appellant that "the college is changing the status of the demotion that was effective August 13, 2001, from a permanent demotion to a temporary demotion ending on June 30, 2002."

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant's behavior had a negative impact on the workplace and that no employer should have to put up with an employee who intimidates his coworkers. Respondent argues that Appellant's coworkers preferred not to work around him because he was reckless, unsafe, displayed anger in the workplace and frequently subjected them to a barrage of negative comments about the college and its administration. Respondent argues that while Appellant did not view his behavior as negative or his actions as unsafe, it is the "victim perception" that is relevant here. Respondent argues that witnesses reluctantly came forward

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because they could no longer tolerate Appellant's behavior in the workplace. Respondent contends that Appellant engaged in a long pattern of constant disregard for authority and disrespect for coworkers. Respondent argues that the demotion was appropriate, placed Appellant under closer supervision, and should be upheld.

3.2 Appellant argues that Respondent relied on circumstantial evidence and failed to present any objective evidence to support that he was inefficient, abused fellow coworkers, or neglected his duty. Appellant argues that Respondent also failed to identify any instances of gross misconduct. Appellant asserts that it was appropriate for him to state his mind and make statements about items of public interest. Appellant asserts that he always followed supervisory directives and no evidence exists to support that he engaged in a long pattern of disregard for supervisory authority. Appellant contends that he has a good safety record and there is no evidence that he deliberately damaged college equipment or that he was acting recklessly when he hit the light pole. Respondent further argues that the victims' perception that he would retaliate against them must also be supported by objective evidence. Appellant argues that the burden has not been carried by the state and that his appeal should be granted.

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 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

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4.3 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).

4.4 Respondent has proven by a preponderance of the credible evidence that Appellant intentionally ignored the surging of the main campus chiller. Appellant was aware that the condition of the old chiller required constant and immediate attention and Appellant's failure to provide the maintenance required in a prompt and timely manner was a neglect of his duty.

4.5 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective operations as measured by a comparison of production with use of resources, using some objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

4.6 Respondent has failed to prove the charge of inefficiency. While the testimony established that Appellant spent work time airing his views with others, particularly Ms. Brown, there was insufficient evidence to clearly establish how much time Appellant spent away from his work.

4.7 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995).

4.8 Appellant clearly did not respect Mr. Smith in his role as the director for Plant Services. This is supported by his acts, such as hiding the internet interface device and making changes to the

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whiteboard. Appellant's actions demonstrate willful disregard for his supervisor and constituted insubordination.

4.9 Abuse of fellow employees is established when it is shown that the employee wrongfully or unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-077 (1994).

4.10 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).

4.11 Appellant had a responsibility to exercise good judgment, conduct himself appropriately and to treat his fellow employees in a respectful manner. Instead, Appellant behaved in a manner that created a negative work environment and a general climate of unease among staff. Bonny Stephens, Bill Smith and Dan Nelson provided compelling testimony that they feared him and/or felt intimidated and uncomfortable working around him. Respondent has met its burden of proof that Appellant neglected his duty to treat his supervisors and coworkers with respect and dignity. Appellant's behavior in the workplace was unreasonable and constitutes mistreatment of his coworkers and rises to the level of gross misconduct.

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

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4.13 Appellant has no history of prior formal disciplinary action, and there is little evidence to support that he received any formal counseling to help him recognize how his aggressive actions and behavior had the impact of intimidating others in the workplace. We recognize that the college essentially modified Appellant's permanent demotion to a 9-month demotion. However, when weighing the totality of proven charges to Appellant's inappropriate behavior in the workplace, we conclude that a six-month demotion is 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 Carl Keen is granted in part and he is demoted for a period of six months.

DATED this _____ day of _____, 2003.

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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