BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

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| GINA THOMPSON,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF HEALTH,<br><br>Respondent. | Case No. RED-05-0007<br><br>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; 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 March 24, 2006.

1.2 **Appearances.** Appellant Gina Thompson was present and was represented by Edward E. Younglove III, of Younglove Lyman & Coker, P.L.L.C. Cathleen Carpenter, Assistant Attorney General, represented Respondent Department of Health.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of reduction in salary for neglect of duty, insubordination, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleges Appellant 1) was absent from work without authorization and failed to submit required medical verification, 2) refused to discuss



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assigned work with her supervisor, and 3) failed to comply with her work schedule, as outlined in a memo of expectations.

## II. FINDINGS OF FACT

2.1 Appellant is an Office Assistant Senior and permanent employee for Respondent Department of Health. 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 March 8, 2005.

Background

2.2 Appellant began her employment with the Department of Health on April 1, 1996. Appellant works in the Health Systems Quality Assurance section as an Office Assistant Senior processing licensing applications for health care professionals, including nursing assistants and nursing home administrators.

2.3 In early 2003, Appellant began a trial service period in a position working in the Public Disclosure section of the agency. In May 2003, while working in the Public Disclosure section, Appellant's supervisor, Shannon Walker, issued Appellant a memo of concern regarding attendance issues and her concerns about Appellant's developing pattern of sick leave. Ms. Walker also issued Appellant a letter of reprimand for demonstrations of dishonesty and insubordination. Appellant did not successfully complete her trial service period, and in July 2003, she returned to her Office Assistant Senior position in the Health Systems Quality Assurance section.

2.4 It is undisputed that Appellant has a psychological medical condition that includes depression and bipolar disorder. Throughout Appellant's employment, management has provided her with informal and formal accommodations such as authorized leave without pay, return to work



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on a gradual basis, and work adjustments with gradual increases to full-time work. On May 17, 2004, Appellant's health care provider said she could return to work full-time.

2.5 On June 7, 2004, Appellant's supervisor, Shamim Noormuhammad, issued Appellant a memo of expectations that included being available to perform the duties of her position during her normal 8:00 a.m. to 5:00 p.m. work schedule, with the exception of specific break and lunch times; notifying her supervisor in advance for known medical appointments; calling in no later than 7:30 a.m., if unable to report to work due to illness; communicating with and following her supervisor's directives in a professional and courteous manner; and participating in all scheduled meetings in a professional and courteous manner.

2.6 On June 9, 2004, Lou Owen, Reasonable Accommodations Coordinator (ADA) for the department, sent a medical questionnaire to Appellant's new health care provider, Sharon Olson, ARNP. Ms. Owen included a copy of Appellant's job duties and responsibilities and asked Ms. Olson to respond to specific questions about Appellant's condition as it related to her employment and her ability to perform the duties of her job on a full-time basis.

2.7 Initially, Ms. Olson indicated that Appellant could work on a part-time basis and that she might have difficulty working with conflict, handling stress, and maintaining concentration. Management determined that the essential functions of Appellant's position required her to work full-time and process a high volume of work that could create stress. Since previous attempts to reasonably accommodate Appellant had been unsuccessful, the department initiated a disability separation on July 20, 2004. However, on August 10, 2004, Ms. Olson, indicated Appellant could return to work full-time and perform the essential functions of her job with reasonable accommodation. Nonetheless, the evidence does not support that formal reasonable



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accommodation was in effect at the time of Appellant's alleged misconduct in early to mid-December 2004.

2.8 On August 23, 2004, Ms. Noormuhammad provided Appellant with another copy of her June 7, 2004 letter of expectations.

2.9 On October 5, 2004, Ms. Noormuhammad issued Appellant a memo requiring her to provide medical verification upon returning to work from absences due to illness. Ms. Noormuhammad suspected sick leave abuse based on Appellant's continued pattern of calling in sick on days Ms. Noormuhammad scheduled meetings to discuss Appellant's performance issues or work expectations.

2.10 On October 21, 2004, Ms. Noormuhammad issued Appellant a memo of concern discussing her failure to follow directives and notifying her that failure to do so would be considered insubordination.

2.11 On November 24, 2004, Appellant sent a memo to her section director, Paula Meyer, asking for clarification regarding the time of day she was required to provide Ms. Noormuhammad with a leave slip upon returning to work. On November 29, 2004, Ms. Noormuhammad and Ms. Meyer responded by memo, clarifying that leave slips for unplanned absences due to illness were due within one hour after Appellant's return to work.

2.12 On December 9, 2004, Ms. Noormuhammad issued Appellant a letter of reprimand for insubordination and unauthorized absences due to Appellant's failure to follow the previously issued directives. Specifically, Appellant's failure to comply with medical verification resulted in



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122 hours of unauthorized leave without pay. In addition, Appellant did not attend a mandatory staff retreat meeting scheduled for October 25, 2004.

Allegations of Misconduct

2.13 On December 10, 2004, Appellant sent Ms. Noormuhammad an email from home, stating that she was ill and going to the hospital. Appellant was absent from work but did not go to the hospital. When Appellant returned to work on December 13, 2004, she put a leave slip in Ms. Noormuhammad's inbox but did not provide the required medical verification. It is Appellant's responsibility to obtain the documentation from her health care provider.

2.14 Ms. Noormuhammad then went to Appellant's work area and acknowledged receipt of Appellant's leave slip but informed her she had not received the required sick leave verification. Appellant told Ms. Noormuhammad she did not want to communicate with her.

2.15 A short time later, around 8:45 a.m., Ms. Noormuhammad approached Appellant's cubicle to discuss work assignments. Once again, Appellant told Ms. Noormuhammad she did not want to communicate with her. Instead, she told Ms. Noormuhammad to send her an email. Later that afternoon, Ms. Noormuhammad went to Appellant's cubicle to discuss work assignments and Appellant again refused to talk with her.

2.16 Appellant testified that Ms. Noormuhammad was hostile toward her and threatened her with insubordination. However, Ms. Noormuhammad testified that Appellant's demeanor was confrontational and defensive, and she warned Appellant she could be charged with insubordination for refusing to discuss work assignments and expectations. In determining credibility, we find no compelling evidence that Ms. Noormuhammad exhibited hostility toward Appellant on December



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13. Rather, we find Ms. Noormuhammad, as Appellant's supervisor, was legitimately trying to communicate with Appellant about work related issues.

2.17 On December 14, 2004, at 8:04 a.m., Appellant left a telephone message for Ms. Noormuhammad stating that she would be late to work because she was doing charity work. Appellant was gathering books at home to contribute to a charity drive that ended that day. In a follow up memo to Ms. Noormuhammad on December 14, Appellant wrote, "[t]his morning I contacted [you] to let you know I was working on charity for one hour from 8am to 9am. At this time of year staff is allowed to use work time to do charity work." We find no evidence, however, to corroborate Appellant's claim that staff was allowed to perform charity work during working hours without supervisory approval.

2.18 Furthermore, the letter of expectations issued to Appellant on June 7, 2004, required her to obtain prior approval for leave she knew about in advance. In addition, Department of Health's Policy 07.008 states, in part, "[n]otice or approval of schedule change must be made by the immediate supervisor and appointing authority (or designees), in writing . . ." and a meal period "shall be allowed no less than two hours nor more than five hours from the beginning of the workshift."

2.19 By letter dated February 9, 2005, Laurie Jinkins, the Assistant Secretary for Health Systems Quality Assurance, notified Appellant of her two-month reduction in salary, effective March 1, 2005, through April 30, 2005. Ms. Jinkins charged Appellant with neglect of duty, insubordination, and willful violation of published employing agency or Department of Personnel rules or regulations for the above allegations of misconduct as follows:

1) On December 10, 2004, Appellant was absent from work without authorization. Appellant notified her supervisor she was ill but did not provide the required medical verification when she returned to work on December 13, 2004. Further, Appellant



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refused to communicate with her supervisor when asked to provide medical documentation.

2) On December 13, 2004, Appellant refused to discuss work assignments with her supervisor on two separate occasions.

3) On December 14, 2004, Appellant failed to comply with her work schedule, as outlined in the June 7, 2004, memo of expectations.

2.20 In determining the level of discipline, Ms. Jinkins reviewed Appellant's personnel file, including the previous letters of concern and reprimands. Ms. Jinkins believed Appellant had been given clear expectations from her supervisor and thought it was reasonable for her supervisor to meet with her to discuss work assignments. Ms. Jinkins was particularly concerned about Appellant's strong unwillingness to discuss any issues with her supervisor and felt it was not only appropriate but necessary for Appellant's supervisor to provide direct feedback about performance and talk about work assignments.

2.21 Further, when Ms. Jinkins met with Appellant to discuss the allegations, Appellant admitted she did not provide medical verification on December 13 or obtain prior approval for arriving over an hour late to work on December 14. Because there were no formal reasonable accommodations in place and Appellant had been released to work without restrictions at the time of those specific incidents, Ms. Jinkins considered Appellant's actions to be misconduct. As a result, she believed a two-month reduction in salary was appropriate to send a message to Appellant that her behavior was unacceptable.

## III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts Appellant neglected her duty when she was absent from work, failed to treat her supervisor with dignity and respect, and failed to provide the required medical verification. Respondent further asserts Appellant was insubordinate when she failed to follow reasonable



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directives, refused to interact with her supervisor regarding work assignments, and failed to follow written expectations regarding prior leave approval. Respondent contends Appellant violated the agency policy regarding work schedules when she adjusted her own hours without prior approval. Respondent argues Appellant's medical condition is not an issue here because her health care provider fully released her to perform her full-time duties in August 2004 and asserts there is no medical documentation to support that her actions in December 2004 were caused by a disability. Therefore, Respondent argues Appellant was responsible for her behavior and contends disciplinary action was warranted.

3.2 Appellant asserts she has medical issues and that she has been under the care of a health care provider for some time concerning her bipolar disorder. Appellant argues that as a result of her medical condition, she experienced problems dealing with conflicts and confrontations, which affected her ability to perform the duties of her position. Appellant argues her health care provider informed the department about ways to minimize her condition, such as allowing her additional time to process things and providing a quiet work environment; however, she asserts her supervisor did not allow such accommodations and instead became hostile. Appellant argues she was inappropriately placed on medical verification because the department was aware of her condition, and she asserts her supervisor was unreasonable in requiring her to provide medical verification within an hour after returning to work. With regard to performing charity work, Appellant argues that others had been allowed to do charity work during working hours and contends she thought it had been an acceptable practice. Appellant asserts the December 2004 incidents should be viewed in light of her disability and argues discipline was unwarranted.

## IV. CONCLUSIONS OF LAW

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



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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 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 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).

4.5 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 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).

4.6 Appellant's supervisor provided her with clear directives in June 2004 that outlined her expectations regarding work performance, communication, and attendance expectations. In October 2004, Appellant's supervisor placed her on required medical verification, not because of her disability, but rather because Appellant had exhibited a pattern of calling in sick whenever her supervisor scheduled a meeting to discuss work expectations. Appellant received additional counseling memos in October 2004, clarification regarding sick leave reporting in November 2004, and a letter of reprimand on December 9, 2004.



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4.7 Despite Appellant's previous counseling, she admittedly failed to provide medical verification upon her return to work on December 13, 2004. In addition, she refused to communicate with her supervisor about leave issues and work assignments. On December 14, 2004, Appellant continued to disregard her supervisor's directives when she failed to report her absence by 7:30 a.m. and failed to obtain prior approval for adjusting her schedule. Therefore, Respondent has proven the charges of neglect of duty and insubordination and has proven that Appellant violated Department of Health's Policy 07.008.

4.8 In her defense, Appellant raises the issue of disability and claims that Respondent failed to accommodate her disability. In Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110 (1998), appellant Maxwell, a diabetic and manic depressive, asserted that the Board should excuse his admitted misconduct because it was caused by his medical condition. The Court of Appeals upheld the Board's ruling that without evidence that appellant Maxwell's condition caused his behavior, he could not show he was disciplined because of his condition or discriminated against because of his condition. The Court also stated that an employer's duty to accommodate does not arise "unless there is a need for accommodation." The court, quoting from Goodman v. Boeing Co., 127 Wn.2d 408, P.2d 1265 (1995), states that "the employee, of course, retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications. . . . Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available position."

4.9 Here, the evidence established that Appellant's health care provider released her to work full-time, knowing the scope of Appellant's duties as provided to her by the department's ADA coordinator, Lou Owen. Whether or not Appellant continued to seek additional reasonable



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accommodation or received such accommodation subsequent to this disciplinary action does not mitigate her behavior in December 2004, as outlined in the disciplinary letter.

4.10 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).

4.11 In this case, the appointing authority imposed a two-month reduction in salary to impress upon Appellant the seriousness of her behavior and offer her an opportunity to correct that behavior. Therefore, under the fact and circumstances, the sanction was appropriate.

## V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gina Thompson is denied.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member



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