BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

WILLIAM BIDSTRUP, Appellant, v. DEPARTMENT OF NATURAL RESOURCES, Respondent.	Case No. DISM-03-0123 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, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held in the Evergreen Conference Room at the Office of the Attorney General, West 1116 Riverside Avenue, Spokane, Washington, on July 27 and September 30, 2004.

1.2 **Appearances.** Appellant William Bidstrup appeared *pro se*. Kari Hanson, Assistant Attorney General, represented Respondent Department of Natural Resources.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty and insubordination. Respondent alleges Appellant refused to comply with a lawful directive to remove posted signs and, as a result, willfully defied his supervisor's authority.

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II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Department of Natural Resources. 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 9, 2003.

2.2 Appellant was a Resource Program Specialist in the Rivers District of the Aquatics Region of the Department of Natural Resources (DNR). The Aquatics Region was formed in September 2001, and operates as one region even though it encompasses all state-owned aquatic lands. Appellant was a long-term DNR employee and had no prior history of formal disciplinary action.

2.3 As a Resource Program Specialist, Appellant worked out of his home in Colville, Washington. Appellant's first and second line supervisors, Robert Brenner and Gary Cooper, were located in Chehalis, and he communicated with them primarily via email or telephone.

2.4 By letter dated December 5, 2003, Francea L. McNair, Aquatic Lands Steward and Appellant's appointing authority, notified Appellant of his dismissal effective December 19, 2003. Ms. McNair charged Appellant with neglect of duty and insubordination for his repeated refusal to comply with his supervisor's directive to remove signs posted along the Similkameen River. Ms. McNair alleged Appellant failed to follow his supervisor's directive as stated in three separate emails on September 2 and 3, 2003, and was ultimately given a deadline to remove the signs by noon on September 5, 2003. Ms. McNair further alleged Appellant willfully defied his supervisor's authority by refusing to remove the signs until it was too late to meet the deadline.

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2.5 In July and August 2003, DNR was in the process of reviewing the proper regulatory procedures for recreational gold prospecting on rivers in Washington State. Recreational prospecting includes panning and small scale dredging for gold. The Similkameen River, a popular river for recreational prospecting, is located in north central Washington. Appellant worked directly in an area that included the Similkameen River. On August 13, 2003, Appellant and his supervisor, Robert Brenner, posted temporary signs along the Similkameen River advising prospectors and miners that prospecting activity was prohibited until further notice. By the end of August, DNR made a determination to re-open rivers to recreational prospecting. A fact sheet was created to inform potential prospectors about rules related to prospecting and mining.

2.6 On September 2, 2003, Robert Brenner emailed Appellant and directed him to remove the signs posted near the Similkameen River. In Mr. Brenner's email, he wrote:

> . . . I need to have you go back out to the Simikameen this week (the sooner the better) and pull down the signs we posted as a result of the fact sheet. . .

2.7 Appellant questioned the legality of Mr. Brenner's directive. Mr. Brenner reiterated to Appellant, "I want you to pull [the signs] down by noon Friday." Mr. Brenner established the September 5 deadline so the public would be aware the river was re-opened to recreational prospecting prior to the upcoming weekend. Mr. Brenner also assured Appellant the Commissioner of Public Lands and the Aquatics Steward had consulted with the Office of the Attorney General, and the agency was acting in a legal and ethical manner. In the same email, Mr. Brenner further addressed Appellant's legal concerns as follows:

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> With that in mind, you need to act based on the direction you are given. I understand your concern, but knowing that the aforementioned folks came to the decision that they did is all the assurance you need as a state employee that the actions you are being tasked with are legal.

2.8 On the morning of September 3, Appellant emailed Mr. Brenner, once again questioning the legality of removing the signs. Appellant wrote:

> . . . I believe allowing dredging on the Similkameen River without authorization or compensation is clearly illegal; as a state employee I can not be required to participate in illegal activities. . . . I would be happy to remove the signs and hand out the 'fact sheet' when either: 1) DNR provides me with a written argument that convinces me that it is not illegal; or 2) the State Auditor concludes such dredging is not illegal.

2.9 Mr. Brenner responded to Appellant by email on September 3 and stated, in part, "I consider removal of the signs to be legal and my direction to you to remove them by noon Friday is also legal. Failure to remove the signs by the time stated will be cause for disciplinary action."

2.10 On the afternoon of September 3, Appellant sent another email to Mr. Brenner again asserting his belief that dredging on the Similkameen River was illegal and requesting written proof that such activity was not illegal.

2.11 On the morning of September 5, Appellant emailed Mr. Brenner, Mr. Cooper, and Ms. McNair, once again questioning dredging activity on the Similkameen River and requesting proof before he would comply with his supervisor's directive to remove the signs. Appellant wrote:

> . . . I have been directed by Robert [Brenner] to remove the signs and hand out the 'fact sheet' to dredgers. I have informed Robert several times that I would be happy to do so

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> when I am convinced that dredging and removal of gold from the Similkameen River for commercial purposes without authorization and compensation to the state is legal.

2.12 Based on Appellant's refusal to remove the signs by the deadline, Mr. Brenner made arrangements for another DNR employee to remove the signs on the morning of September 5.

2.13 Approximately 20 minutes prior to the noon deadline on September 5, Appellant emailed his superiors to let them know, under protest, he would comply with the directive to move the signs, but he would not be able to remove the signs until the following day on Saturday, September 6. Mr. Brenner notified Appellant that he made other arrangements for the removal of the signs.

2.14 By letter dated October 16, 2003, Ms. McNair notified Appellant of the allegations of neglect of duty and insubordination. Ms. McNair offered Appellant an opportunity to provide additional information or explain any circumstances that might mitigate his conduct.

2.15 By letter dated November 14, 2003, Appellant responded to the allegations. Appellant claimed he never refused to remove the signs; rather, he claimed he was simply asking for an explanation as to the legality of dredging gold on state-owned land. Appellant further asserted he ultimately agreed to remove the signs.

2.16 In determining the level of discipline, Ms. McNair considered Appellant's employment record, his refusal to follow his supervisor's directive, and his reasons for not complying. Ms. McNair also considered the impact Appellant's actions had on DNR's ability to maintain credibility with the public. In this instance, Ms. McNair had responded to several inquiries on behalf of the Commissioner of Public Lands and had advised interested parties the Similkameen River would be

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re-opened to recreational prospecting. As a result, Ms. McNair determined Appellant's bold refusal to remove signs stating the contrary threatened to harm the public's trust in the department because the conflicting information would have misguided and frustrated the public. Consequently, Ms. McNair concluded Appellant's misconduct seriously undermined public trust and respect, which is contrary to its mission.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant's repeated refusal to follow his supervisor's directive was clear insubordination. Respondent further argues Appellant's blatant refusal to remove the signs constitutes a neglect of his duty. Respondent argues the Commissioner of Public Lands and the Aquatic Lands Steward made a clear determination regarding the legality of recreational prospecting and argues Appellant's supervisor reassured him the removal of the signs was legally correct. Respondent contends Appellant's supervisor established the September 5 deadline because interested parties, including legislative representatives, had been continually inquiring about the river closure. In addition, Respondent argues the recreational prospecting and mining season was nearing an end, so it was important for the public to know the river was re-opened to recreational prospecting prior to the upcoming weekend. Respondent argues Appellant's outright refusal to accept DNR's interpretations made it very difficult to supervise him.

3.2 Appellant argues he was never insubordinate, but that he simply questioned the legality of the task the department asked him to perform. Appellant argues the department cannot ask him to perform a duty that is unlawful. Appellant asserts he wanted to be clear about the law, and his legal concern was the reason for his delay in removing the signs. Appellant argues his supervisor never

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informed him of the urgency related to removing the signs. Appellant contends he never neglected his duty because he ultimately agreed to remove the signs even though he did not believe it was ethically correct to do so. Appellant argues he was making steps to improving working relationships and argues termination of a long-term employee with only 19 months to retire is too severe.

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 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).

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4.5 Respondent has met its burden of proof that Appellant engaged in insubordination when he disregarded management's directives to remove the signs. Appellant asked for legal clarification, and Respondent provided clear written responses that assured him removal of the signs was lawful. Furthermore, Appellant's legal concerns were more directly related to the actual gold prospecting activity and not his supervisor's directive to remove the signs. Although Appellant might have disagreed with the agency's position on prospecting and mining, the department made a determination that recreational prospecting was legal. Therefore, Appellant had an obligation to perform his duty and remove the signs that prohibited recreational prospecting as directed by his supervisor. Respondent has proven by a preponderance of the evidence that Appellant's failure to remove the signs was a neglect of his duty.

4.6 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. An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.7 In determining whether dismissal was appropriate, we considered Appellant's refusal to accept the department's decision to re-open the Similkameen River and, consequently, his refusal to follow his supervisor's directive. Appellant's lack of cooperation adversely impacted the agency and its ability to consistently and effectively communicate with the public regarding recreational prospecting on state owned aquatic land. Appellant was repeatedly given a clear directive with an established deadline and warned that failure to comply would result in disciplinary action. Based

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on Appellant's refusal to work cooperatively with his superiors, we conclude Respondent has established that the disciplinary sanction of dismissal was not too severe and was appropriate under the circumstances presented here. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of William Bidstrup is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Gerald L. Morgen, Vice Chair

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Busse Nutley, Member

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