BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ALVIN LOFTON, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. SUSP-05-0029 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, BUSSE NUTLEY, Vice Chair. The hearing was held at the Liquor Control Board Distribution Center, 4401 East Marginal Way South, Seattle, Washington, on April 7, 2006. GERALD L. MORGEN, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Alvin Lofton was present and was represented by Gregory Rhodes, Attorney at Law, of Younglove, Lyman & Coker, P.L.L.C. Franklin Plaistowe, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a three-day suspension for neglect of duty, insubordination, gross misconduct and willful violation of agency policy.

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Respondent asserts that Appellant behaved inappropriately and unprofessionally toward co-workers in violation of a supervisory directive to treat others with respect and professionalism.

II. FINDINGS OF FACT

2.1 Appellant Alvin Lofton is a permanent employee for Respondent Department of Social and Health Services. 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 June 6, 2005.

2.2 Appellant has been employed by the state of Washington since September 1989. At the time the discipline here was imposed, Appellant worked as a WorkFirst Program Specialist managing a client caseload and processing eligibility applications for public assistance. Appellant has an overall positive employment record; however, on March 5, 2004, he received a letter of reprimand for unauthorized absences and failure to comply with reporting his absence as required.

2.3 On August 27, 2004, Appellant received a second letter of reprimand addressing his inappropriate and unprofessional behavior toward co-workers that included yelling and disrespectful behavior. In that letter of reprimand, the Regional Administrator Greta Kaas-Lent directed Appellant to "refrain from such inappropriate behavior in the future." She further warned Appellant that continuing to engage in that type of behavior could result in further corrective and/or disciplinary action.

2.4 In addition to the August 27 letter of reprimand, Appellant's performance evaluations dated October 2003 and October 2004, directed him to "refrain from emotional outbursts and being argumentative with workers."

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Incident #1

2.5 Karen McEwen was Appellant's supervisor and Connie Reynolds was a lead worker. On March 8, 2005, Ms. McEwen returned from vacation and learned of two messages from a client assigned to Appellant's caseload. The client was complaining that she had submitted an application for benefits but had not heard back from the department and that her calls to Appellant were not returned. Ms. McEwen spoke to the client who expressed her distress and need for the benefits.

2.6 Ms. McEwen called Appellant to her office and told him a client on his caseload was upset and that she wanted him to work on the client's case and give the client a call back. Ms. McEwen credibly testified that in response to her concerns, Appellant raised his voice and demanded to know who made the complaint against him. Ms. McEwen did not feel it was appropriate to tell Appellant that she received the complaint from the client and she told him that it was unnecessary for him to know that information.

2.7 Appellant then stood in her doorway and insisted on knowing who complained. Appellant was visibly tense and used his arms to gesture excitedly, repeatedly demanding to know, "who came to you?" "Who complained?" "Who's doing this?" Ms. McEwen described Appellant's voice as angry and agitated and loud enough to be heard by others throughout the office. Ms. McEwen credibly testified that she felt intimidated when Appellant stood up and blocked the doorway and she was uncertain as to what could happen.

2.8 Ms. Reynolds, who was down the hall, heard Appellant's loud voice. She stood from her desk to check what was happening. Ms. Reynolds observed Appellant standing at Ms. McEwen's office door, leaning slightly forward, and emphatically shaking the paperwork in his hand. Ms. Reynolds did not perceive a physical threat, and she returned to her cubicle.

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2.9 To calm Appellant and deescalate the situation, Ms. McEwen spoke to him in a quiet voice. After quietly directing Appellant three times to return to his desk, Appellant complied; however, rather than return to his workstation, he approached Ms. Reynolds, who was sitting at her desk. Ms. McEwen was able to hear Appellant loudly demanding to know from Ms. Reynolds if she was the one who complained about him. Ms. Reynolds responded no, but Appellant insisted on knowing if she had complained to Ms. McEwen. At that point, Ms. McEwen approached Appellant and asked him twice to return to his desk and tend to the case. Appellant finally left, muttering under his breath that he just wanted to know who complained.

2.10 There is no dispute that Appellant has a deep, booming voice that easily carries and that at times he has become excitable when discussing workplace policies or case management issues. However, both Ms. McEwen and Ms. Reynolds, who have worked with Appellant for a number of years, credibly testified that Appellant's voice and demeanor during the March 8 incident were significantly different than his normal and characteristic workplace behavior.

Incident #2

2.11 On March 14, 2005, Customer Service Specialist Lori Fulmer returned a number of documents to Appellant and advised him they lacked completion dates, and she requested he stamp the dates on them. Ms. Fulmer was responsible for preparing documents for imaging, and it was important the documents contained the correct dates and client identification numbers. Appellant vented to Ms. Fulmer in a very loud voice that the process kept changing and he questioned why. Ms. Fulmer responded that the process had not changed and the documents needed the date on which they were completed to be stamped on them. Ms. Fulmer credibly testified that Appellant grabbed the papers from her in a rough manner, and began date stamping the current date on each

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page. Ms. Fulmer tried to stop Appellant, explaining the documents needed the accurate dates. Ms. Fulmer had previously interacted with Appellant and was familiar with his communication style; however, on this occasion she found his demeanor to be rude and belittling towards her.

2.12 Acting Regional Administrator Patti Omdal was Appellant's appointing authority when the discipline was imposed. Ms. Omdal reviewed the investigative reports, supporting documents, and a written response provided by Appellant. Ms. Omdal also met with Appellant to discuss his version of the events. Appellant, who is African American, contended that the complaints against him were by Caucasian females who felt he was confrontational rather than considering that he was merely attempting to resolve legitimate workplace issues. Ms. Omdal took Appellant's concern seriously, and she informed him that she would look into his claim. Subsequently, Ms. Omdal sent Appellant's file to Myron Toyama, the manager of the department's Division of Equal Opportunity. Ms. Omdal credibly testified that Investigator Eddie Rodriguez was assigned Appellant's file and issued a response that nothing in his review indicated further investigation was warranted.

2.13 After reviewing all of the information before her, Ms. Omdal concluded that Appellant engaged in misconduct and that disciplinary action was warranted. In determining the level of discipline, she considered Appellant's length of service and his overall employment record. She considered the previous letter of reprimand for similar behavior as well as the evaluations that addressed his workplace behavior and directed him to stop engaging in outbursts at work. Therefore, Ms. Omdal found that Appellant had been put on notice that any future outbursts would not be tolerated.

2.14 Ms. Omdal also determined that Appellant's conduct toward Ms. McEwen, Ms. Reynolds and Ms. Fulmer was a neglect of his duty and a violation DSHS's Policy 6.04, which requires

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employees to create a working environment "free from intimidation, retaliation, hostility, or unreasonable interference with an individual's work performance" and to "[i]nteract with co-workers with respect, concern, courtesy, and responsiveness." Ms. Omdal also concluded that he was insubordinate when he failed to comply with the August 27, 2004 supervisory directive to treat others with respect. Ms. Omdla found that a three-day suspension without pay was appropriate, because Appellant failed to respond to the previous attempts to correct his behavior.

2.15 By letter dated May 20, 2005, Ms. Omdal notified Appellant that he was suspended for a period of three days, beginning May 24, 2005 and continuing through May 26, 2005. Ms. Omdal charged Appellant with neglect of duty, insubordination, gross misconduct, and willful violation of agency policy.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent asserts the credible testimony supports Appellant yelled and behaved in a demeaning fashion toward his co-workers. Respondent argues that Appellant was directed in previous evaluations to refrain from emotional outbursts and from being argumentative. Respondent also asserts that Appellant was put on notice through a letter of reprimand that his unprofessional conduct, including yelling and being disrespectful, was unacceptable in the workplace. Respondent argues that Appellant, nonetheless, failed to comply with the directives to conduct himself in a professional manner at work and treat co-workers with respect and dignity. Respondent argues that Appellant's behavior had a negative impact on co-workers, who felt belittled and demeaned. Respondent further asserts that Appellant's passion for his clients had nothing to do with the incidents here and that the evidence does not support the department acted in any discriminatory or retaliatory manner. Respondent asserts that a three-day suspension was the appropriate sanction to achieve the goal of changing Appellant's workplace behavior.

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3.2 Appellant asserts his passion for his job and the clients on his caseload is often misinterpreted by others as belittling and aggressive. Appellant acknowledges that a general code of civility should be the rule at work, but asserts that there are times when issues have to be addressed and "hashed out," and that others are easily offended, because he is not afraid to speak his mind. Appellant contends his behavior on March 8 and 14 was not abnormal or out of character, and he denies he was aggressive or intimidating or that he said anything that was unprofessional, incited violence, or created a danger in the office. Appellant further asserts that his normal demeanor, voice, and presence causes others to feel uncomfortable and results in his receiving disciplinary actions when others in the office who may exhibit similar behavior are not penalized. Appellant also asserts that race is at the heart of the issue here, and he asserts the three-day suspension was not justified.

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; 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).

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4.4 Respondent met its burden of proving that Appellant neglected his duty when he failed to treat co-workers in an appropriate, respectful and professional manner. We have considered Appellant's argument that his voice is naturally loud and that it is not uncharacteristic for him to become passionate and animated about work issues. However, Appellant's co-workers provided credible testimony that his conduct on March 8 and March 14, 2005, was not like his normal workplace demeanor. We have also considered Appellant's argument that he was discriminated against based on his race and treated differently than other employees who engaged in similar misconduct. However, these assertions are not support by the evidence in the record here.

4.5 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).

4.6 Appellant was previously directed to treat co-workers in a professional and respectful manner. His failure to do so constituted insubordination.

4.7 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).

4.8 Respondent has met its burden of proof that Appellant's conduct on May 8 constituted gross misconduct. Appellant's behavior was clearly unprofessional and inappropriate. Although Ms. Reynolds did not perceive an imminent threat of violence towards Ms. McEwen, Ms. McEwen

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presented credible testimony that she found Appellant's behavior intimidating because she was uncertain as to what could happen and it caused her to employ de-escalation techniques to redirect his anger and calm him down. Therefore, Appellant's actions interfered with Respondent's ability to provide a workplace in which employees felt safe and secure and it rises to the level of gross misconduct.

4.9 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).

4.10 Respondent has met its burden of proof that Appellant's belittling and intimidating demeanor toward his co-workers violates DSHS policy 6.04.

4.11 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).

4.12 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 was previously disciplined for similar misconduct, he was provided with expectations regarding his interpersonal communications with others, and he was directed to behave in a professional manner. Under the circumstances, a three-day suspension should be adequate to impress upon Appellant the seriousness of his unprofessional and intimidating conduct.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Alvin Lofton is denied.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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