BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MARGARET WYNALDA, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. SUSP-02-0012 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, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Department of Transportation in Seattle, Washington, on March 19, 2003.

1.2 **Appearances.** Appellant Margaret Wynalda was present and represented herself *pro se*. Rob Kosin, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a three-day suspension without pay for neglect of duty, insubordination, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant refused directives, shouted at co-workers, used profanity, and behaved in a disrespectful and hostile manner.

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1.4 **Citations Discussed.** WAC 358-30-170; McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Harper v. WSU, PAB No. RULE-00-0040 (2002); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); 170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant was a Bridge Tender and permanent employee of Respondent Department of Transportation. 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 28, 2002.

2.2 Appellant began her employment with the Department of Transportation on November 6, 2000. Appellant's main duty as a Bridge Tender was to open and close the bridge to allow the safe passage of water traffic at the Montlake Bridge.

2.3 On September 18, 2001, Appellant received a letter of reprimand from Patrick Moylan, Bridge Maintenance and Operations Superintendent, for refusing to open the bridge for a tug boat captain and screaming profanities at the captain over the telephone on August 29, 2001. In response to the reprimand, Appellant claimed the tugboat captain harassed her. Mr. Moylan warned Appellant of the serious nature of her inappropriate behavior. He informed Appellant that refusal to open the bridge violated the Code of Federal Regulations, and that use of profanity violated the Department of Transportation policy. Mr. Moylan warned Appellant that similar incidents could

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result in further corrective or disciplinary action. As a result of this incident, Appellant was temporarily assigned to work in the Bridge Shop for five months.

2.4 Effective January 15, 2002, Appellant was reassigned to her normal duties on the Montlake Bridge. On January 14, 2002, Appellant met with her supervisors and her union representative to discuss her return to work on the bridge. During that meeting, Appellant received a letter of expectations dated January 4, 2002 and signed by Archie Allen, Bridge Maintenance and Operations Assistant Superintendent. Appellant refused to read the letter of expectations during the meeting and insisted that she would read it later. Mr. Allen informed Appellant that another Bridge Tender would accompany her during her shift to provide her with re-orientation due to substantial changes to procedures that had occurred during her absence. Mr. Allen also informed Appellant that he expected her to refrain from using profanity and to perform her work in a cooperative, professional, and courteous manner.

2.5 By letter dated February 28, 2002, Thomas Lentz, Assistant Regional Administrator for Maintenance and Traffic, informed Appellant that she was suspended without pay for a period of three days effective March 1, 2002 through March 5, 2002. Mr. Lentz charged Appellant with neglect of duty, insubordination, gross misconduct, and willful violation of published employing agency policies.

2.6 Mr. Lentz alleged that during three days of re-orientation after a five-month absence from the Montlake Bridge, Appellant hindered the re-training attempts by being uncooperative, hostile, disrespectful, sarcastic, and unprofessional. Mr. Lentz further alleged that Appellant refused to follow directives, shouted at co-workers, and used profanity despite a previous warning and reprimand for similar behavior.

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2.7 In making a determination of the above allegations, we carefully weighed the testimony of the witnesses and reviewed the documentary evidence in this case. Appellant denies that she used profanity or shouted at co-workers. The testimony of Appellant's co-workers was concise and consistent. Based on a preponderance of the credible testimony, we find that the following events occurred:

2.8 On January 15, 2002, Tim Ditch, Maintenance Lead Technician, explained the new operation procedures to Appellant. Appellant appeared frustrated about being re-trained and communicated with Mr. Ditch in a sarcastic manner. Mr. Ditch asked Appellant to notify him as soon as she was comfortable operating the bridge alone. Appellant told Mr. Ditch that it was his responsibility to notify her when he believed that she was ready to work alone. After showing Appellant how to open the bridge, Mr. Ditch asked her to open and close the bridge. Appellant argued with Mr. Ditch and refused to cooperate with his directive to open the bridge, which he repeated four times. Appellant stated that she did not need to demonstrate her ability to open the bridge.

2.9 On January 16, 2002, Rick Rodda, Appellant's supervisor, arrived at the Montlake Bridge to ask her if she was ready to work alone. When Mr. Rodda arrived, Appellant angrily shouted, "Why the hell didn't you call first!" Even though Mr. Rodda asked Appellant six or seven times if she felt ready to work alone on the bridge, she refused to tell him. Appellant accused Mr. Rodda of lying, "dragging her through hell," and not believing her claims of harassment by the tug boat captain who was referenced in her letter of reprimand. Appellant complained to Mr. Rodda about Jim Stewart, the co-worker who was assigned to accompany her during her work shift. Appellant stated that she did not want anybody on the bridge with her.

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2.10 Sometime during the work shift on January 16, 2002, Mr. Stewart asked Appellant to do a test opening of the bridge. Appellant refused. Appellant told Mr. Stewart that he was the "big shot" and should do the test opening himself. Appellant also refused to answer the telephone. Mr. Stewart reported that Appellant continually spoke to him in a sarcastic and disrespectful manner.

2.11 On January 17, 2002, Mr. Stewart went to the Montlake Bridge to assist Appellant during her shift. When Mr. Stewart arrived, Appellant said, "What the fuck are you doing here!" Mr. Stewart informed Appellant that he was there to continue to re-train her as directed by Mr. Rodda. Appellant told Mr. Stewart she did not need anybody on the shift with her. Mr. Stewart said he would leave as soon as she called Mr. Rodda to get his approval, and Appellant said, "I'm not fucking calling Rick or anybody else!" Appellant began to shout at Mr. Stewart, and Mr. Stewart left to report Appellant's hostile and intimidating behavior to Mr. Rodda.

2.12 Mr. Rodda immediately went to the Montlake Bridge. When he arrived, Appellant began to yell at him. Appellant accused Mr. Stewart and Mr. Rodda of lying and claimed that no one believed her. Mr. Rodda instructed Appellant to go home. Appellant made several trips to and from her car to gather her things during which time she continued to angrily shout at Mr. Rodda.

2.13 The Department of Transportation's Workplace Violence Policy is available to employees on-line and a paper copy is located in the Bridge Office. Further, a copy of the policy was attached to Appellant's January 4, 2002 letter of expectations. The policy directs employees to treat others with fairness and respect. The policy clearly states that the department will not tolerate intimidating, harassing, abusive, hostile, or violent behavior. It states, in part, that some of the behaviors that will not be tolerated are:

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- verbal threats
- use of vulgar or profane language towards others
- disparaging, derogatory, or inflammatory comments or slurs
- verbal intimidation
- offensive name calling

2.14 Sometime between January 17, 2002 and February 28, 2002, a pre-disciplinary meeting was held with Appellant, Mr. Lentz, Mr. Allen, and Bill Wells of the Northwest Region Labor Relations. The purpose of the meeting was to explain the allegations and give Appellant an opportunity to respond. Appellant admitted that she was upset with Mr. Ditch and argued with him about demonstrating her ability to open the bridge. Appellant denied that she said to Mr. Stewart, "What the fuck are you doing here!" Rather, Appellant claimed she said, "What the heck are you doing here?" However, Appellant stated that she knew how to "cuss" and could "cuss very well."

2.15 As the appointing authority, Mr. Lentz was concerned about the serious nature of Appellant's hostile behavior. He reviewed the letter of expectations that Mr. Allen gave to Appellant on January 14, 2002. He concluded that Appellant failed to comply with the expected standard of conduct outlined in the letter.

2.16 After considering Appellant's responses to the allegations, Mr. Lentz decided that Appellant did not provide any convincing reasons to explain her behavior. He determined that Appellant clearly engaged in misconduct by behaving in a confrontational, disrespectful, and threatening manner. Mr. Lentz concluded that Appellant's behavior constituted neglect of duty, insubordination, gross misconduct, and willful violation of the Department of Transportation's Workplace Violence Policy.

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2.17 Mr. Lentz determined that disciplinary action was necessary. Mr. Lentz considered a five-day suspension, however, he decided that a three-day suspension would be sufficient to change Appellant's behavior and prevent a recurrence.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the department gave Appellant clear expectations of her behavior. Respondent asserts that Appellant was also given opportunities to correct her behavior. Respondent contends that Appellant frustrated the department's efforts to re-train her and was uncooperative for three consecutive days. Respondent argues that the department has a right to expect its employees to conduct themselves in an appropriate manner. Respondent asserts that the department also has a right to be assured that the Bridge Tenders understand procedures to operate the bridge in a safe manner. Respondent contends that Appellant's conduct was aggravated and directly contrary to the directives noted in the previous letter of reprimand and letter of expectations. Respondent asserts that the three-day suspension was an appropriate sanction and more than justified to deter recurrence of similar behavior.

3.2 Appellant argues that it is not reasonable for the department to label her three days back on the Montlake Bridge as "re-training" since she was never trained or orientated as a new employee. Appellant asserts that she did not yell or use profanity toward other employees. Appellant contends that she did not refuse to open the bridge. Appellant argues that she was unfairly and abruptly "ripped" off the bridge after only three days of work. Appellant contends that she stopped bringing complaints and requests for assistance to the department after her requests were continually ignored. Appellant argues that a three-day suspension was unfair and severely harsh.

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IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto 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).

4.4 Respondent has met its burden of proving that Appellant neglected her duty when she failed to cooperate and resisted the department's efforts to re-train her as a Bridge Tender.

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 Respondent has also met its burden of proving that Appellant was insubordinate when she refused directives from superiors to communicate whether she was ready to work alone, demonstrate her ability to operate the bridge, and conduct herself in a professional manner.

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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 failed to meet its burden of proof that Appellant's behavior constituted gross misconduct and adversely impacted the agency's ability to carry out its functions.

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 proven that Appellant willfully violated the Department of Transportation's Violence in the Workplace Policy when she engaged in hostile, disrespectful, and intimidating behavior, and when she shouted at co-workers and used profanity. Appellant's overall behavior was unprofessional and inappropriate and she clearly failed to treat others with respect and dignity.

4.11 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).

4.12 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

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level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.13 Appellant's behavior was unacceptable, and Respondent has established that the disciplinary sanction of a three-day suspension 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 Margaret Wynalda is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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