

BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

ROBERT GUTIERREZ,

Appellant,

vs.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

CASE NO. R-DISM-07-001

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This matter came before the Personnel Resources Board, MARSHA TADANO LONG, Chair, and LAURA ANDERSON, Member. The hearing was held on May 30 and 31, 2007, at Yakima Valley School in Selah, Washington. Subsequent to this hearing but prior to issuing this decision, the Board's titles changed. The signatures on this document reflect the Board's current titles.

1.2 **Appearances.** Appellant Robert Gutierrez was present and was represented by James Elliott, Attorney at Law. Pat Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services (DSHS).

1.3 **Nature of Appeal.** This is an appeal from a dismissal for unprofessional and unethical business practices, failure to follow policies and procedures, and improper use of state equipment, resources and time.

II. FINDINGS OF FACT

2.1 Appellant Robert Gutierrez was a permanent employee for Respondent Department of Social and Health Services (DSHS). Appellant and Respondent are subject to Chapter 41.06 RCW and the rules promulgated thereunder, Title 357 WAC. Appellant filed a timely appeal with the Personnel Resources Board on January 8, 2007.

1 2.2 By letter dated November 29, 2006, David Rendon, Regional Administrator for Region 2
2 Community Services Division, notified Appellant of his dismissal, effective December 14, 2006.
3 Mr. Rendon alleged that Appellant had engaged in unprofessional and unethical business
4 practices, failed to follow policies/procedures that were known to him, improperly used state
5 equipment and resources and electronic imaging systems by sending sexually explicit emails,
6 and improperly used official duty time.

7
8 2.3 Appellant began employment with DSHS in 1977 as an affirmative action officer. He
9 held various position within DSHS during his tenure with the agency include Regional Personnel
10 Manager, Community Services Office Administrator, Deputy Regional Administrator for Region
11 2, and finally, Community Outreach Administrator for Region 2. Appellant testified that all of
12 his positions were management positions.

13
14 2.4 David Rendon became the Regional Administrator for Region 2 in 2003. Appellant
15 reported directly to Mr. Rendon. Prior to this time, Appellant's performance evaluations had
16 been positive. Mr. Rendon testified that Appellant's performance continued to be acceptable
17 until sometime after his June 2003 – June 2004 annual performance appraisal period. However,
18 at the time of the action giving rise to this appeal, Appellant had no negative performance
19 appraisals in his personnel file.

20
21 2.5 Mr. Rendon testified that one of Appellant's areas of interest was working with
22 community organizations. Mr. Rendon felt that Region 2 needed to strengthen its relationships
23 with community organizations. On December 16, 2005, Mr. Rendon reconfigured the duties and
24 responsibilities of Appellant's position, number NL16, and changed his working title from
25 Deputy Regional Administrator to Community Outreach Administrator. This change in duties,
26 responsibilities and working title did not result in a change in Appellant's position number,
27 status, salary or benefits as a Washington Management Service (WMS) Band 3 employee.

1 Appellant's revised duties and responsibilities were documented in a Position Description Form
2 which Appellant received on December 16, 2005.

3
4 2.6 Appellant's new duties included serving as an assistant to Mr. Rendon and "ensuring
5 region wide participation in diversity, homelessness and food assistance outreach activities,
6 including program implementation, monitoring, evaluating and assessing the region's
7 performance in these activities." (Exhibit R-21).

8
9 2.7 In carrying out the responsibilities of his new role, Appellant repeatedly raised his
10 concerns about DSHS's lack of diversity in its regional personnel; particularly, its lack of
11 Hispanic staff, and what he believed was the region's inadequate service to Hispanic clients.
12 Appellant raised his concerns internally and externally. When raising these issues, Appellant did
13 not follow the DSHS chain of command. By email dated September 5, 2006, Mr. Rendon
14 confirmed his directive to Appellant to adhere to the chain of command and address any concern
15 Appellant had about the region to Mr. Rendon. Subsequent to this email, Appellant complied
16 with Mr. Rendon's directive when raising concerns internally. However, Appellant continued to
17 raise numerous concerns externally, specifically with the Commission on Hispanic Affairs
18 (CHA). For example, in an email dated September 13, 2006, Appellant coached CHA on how to
19 address Appellant's concerns with DSHS management and in an email dated September 11,
20 2006, Appellant shared his personal feelings about DSHS with CHA and refers to DSHS as
21 providing "nothing but a dog and pony show." Appellant's emails to CHA address issues
22 internal to Region 2 and decisions made by DSHS management.

23
24 2.8 Before the September 5, 2006, directive to Appellant, Mr. Rendon discussed his concerns
25 with John Clayton and Sam Senn. They shared his concern about Appellant sending emails
26 outside of the chain of command and they were particularly concerned that he might be sending
27 inappropriate emails to people or organizations outside of the agency. To investigate the matter,
28 Mr. Rendon contacted Information Technology services for the agency and asked that he be
29

1 given access to documents and emails in Appellant's computer as well as a report on Appellant's
2 internet usage.

3
4 2.9 Mr. Rendon's investigation revealed a number of emails that Appellant sent to CHA after
5 September 5, 2006, in which Appellant expressed his concerns and mistrust of DSHS
6 administration. Mr. Rendon found two emails containing sexually explicit information that
7 Appellant forwarded to a DSHS staff person. Mr. Rendon also found several emails containing
8 derogatory and disrespectful comments about other staff. For example, in one email, Appellant
9 referred to a staff person as "the ABC Peacock" and in another, he referred to a different staff
10 person as "Hitler." In addition, Mr. Rendon found a number of personal documents concerning
11 Appellant's previous formal complaints and court actions against the agency.

12
13 2.10 DSHS Administrative Policy 15.15, Use of Electronic Messaging Systems and the
14 Internet, was revised on April 26, 2006. The revision confirmed DSHS's position of "zero
15 tolerance" for any employee usage of the state electronic messaging system or internet for
16 pornographic and sexually explicit materials. Appellant was in attendance at the June 13, 2006,
17 Region 2 management team meeting during which the policy was distributed and discussed.

18
19 2.11 DSHS Administrative Policy 15.15 states, in relevant part:

20 B. Employee Use of Electronic Messaging Systems and the Internet

21 . . .

22 3. Prohibited uses – Employees are prohibited from using state-provided electronic
messaging systems and the Internet in any of the follow ways:

23 a. Personal use of state-provided electronic messaging systems or Internet access
that does not meet the conditions found in B.2.a.-e is prohibited.

24 . . .

25 d. Employees must not use state provided electronic messaging systems or Internet
26 access to create, access, post, send, or print any sexually explicit or pornographic
material unless the material is necessary for the performance of the employee's job-
27 related duties (e.g., when necessary for conducting an investigation). . .

28 . . .
29

1 k. Employees must not create, forward or store electronic messages that do not
2 pertain to the state's business except as allowed in B.2. This includes, but is not
limited to, hoaxes, hypes, chain letters, and spamming messages.

3 D. Disciplinary Action for Noncompliance

4 1. Violations of this policy may result in disciplinary action, up to and including
dismissal from employment. . .

5 2. "Zero Tolerance" for pornographic and Sexually Explicit Materials – If after a
6 just cause investigation it is found that an employee used state provided electronic
7 messaging and/or the Internet to create, access, post, send, or print any sexually
8 explicit or pornographic material in violation of this policy, it will result in
9 termination of an individual's employment or contract with the Department. In
addition, the individual may be subject to other legal consequences for violating the
state's ethics laws.

10 2.12 Appellant was also aware of Administrative Policy 18.64, Standards of Ethical Conduct for
11 Employees. Section 2 of this policy states, in relevant part:
12

13 Employees are required to:

14 . . .

15 B. Promote an environment of public trust free from fraud, abuse of authority and
misuse of public property.

16 C. Strengthen public confidence in the integrity of state government by
demonstrating the highest standards of personal integrity, fairness, honesty and
17 compliance with law, rules, regulations and DSHS policies

18 D. Interact with co-workers with respect, concern, courtesy and responsiveness.

19 2.13 By letter dated November 13, 2006, Mr. Rendon notified Appellant of his intent to dismiss
20 Appellant from employment. Mr. Rendon alleged that Appellant violated Administrative Policies
21 18.64 and 15.15. He asserted that Appellant's actions undermined management authority, were
22 insubordinate and damaged DSHS's reputation in the community; that he was unprofessional and
23 disrespectful toward his coworkers; that he misused state property, and that he sent sexually explicit
24 emails to a coworker.

25
26 2.14 Mr. Rendon met with Appellant on November 16, 2006, for a pre-disciplinary meeting. The
27 purposes of the meeting was to discuss the allegations and allow Appellant an opportunity to present
28 information to Mr. Rendon prior to Mr. Rendon making a final decision regarding the level of
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1 discipline to impose. Mr. Rendon determined that Appellant provided no information to persuade
2 him that dismissal was not warranted.

3
4 2.15 By letter dated November 29, 2006, Mr. Rendon notified Appellant of his dismissal effective
5 December 14, 2006.

6 **III. ARGUMENTS OF THE PARTIES**

7 3.1 Respondent argues that Appellant provided derogatory information to community
8 organizations which damaged DSHS's reputation; sent disrespectful emails about coworkers to other
9 coworkers; used the state computer for personal business, and sent inappropriate, sexually explicit
10 emails to a coworker. Respondent contends that rather than supporting management's decisions,
11 Appellant's actions undermined DSHS management and damaged DSHS's reputation in the
12 community. Respondent asserts that Appellant was aware of DSHS policies and that as a 30-year
13 management employee he knew of the higher standard of behavior required of management
14 employees. Respondent further asserts that the investigation was thorough and fair and that the
15 results showed that Appellant engaged in misconduct that was damaging to DSHS, disrespectful to
16 other employees and sexually explicit. Respondent argues that Mr. Rendon worked with Appellant
17 since December 2003 to build trust and work as a team with shared values and responsibilities but
18 his efforts were unsuccessful. Respondent contends that Appellant's behavior was not what is
19 expected of a 30-year employee at Appellant's level within the organization. Respondent argues that
20 Appellant's actions were egregious and that dismissal was the only sanction available that would
21 assure Appellant ceased undermining management and damaging DSHS's reputation in the
22 community.

23
24 3.2 Appellant argues that he does not recall being at the June 13, 2006, Region 2 management
25 team meeting and does not recall receiving a copy of Administrative Policy 15.15. He contends
26 that he was unaware of the limitations of the policy or the punishment for violating the policy;
27 therefore he should not be punished for violating the policy. Appellant argues that his job
28 required him to engage in community outreach and that it was his responsibility to provide
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1 information to the community. He contends that the information he provided to CHA was part of
2 his role as the Community Outreach Administrator. Appellant argues that he complied with the
3 chain of command when he raised concerns. When his concerns were not dealt with, he took
4 them to a higher level in the chain which was appropriate. Appellant argues that because his
5 concerns involved Mr. Rendon, Mr. Rendon should not have conducted the investigation into his
6 alleged misconduct. Appellant contends the investigation conducted by Mr. Rendon was not
7 thorough or fair. Appellant argues that his dismissal was inconsistent with the discipline imposed
8 on other employees who used state owned equipment and systems for personal business and
9 distributed sexually explicit information. Appellant contends that his dismissal should be
10 overturned and that he should be reinstated with full back pay and benefits, including the
11 medical and dental expenses he incurred since his wrongful termination.

12 13 **IV. CONCLUSIONS OF LAW**

14 4.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.

15
16 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
17 the charges upon which the action was initiated by proving by a preponderance of the credible
18 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
19 sanction was appropriate under the facts and circumstances. WAC 357-52-110.

20
21 4.3 Respondent has met its burden of proof that Appellant:

- 22 • Engaged in unprofessional and unethical business practices by sending derogatory emails
 - 23 to staff and to the CHA about other DSHS staff and DSHS practices.
 - 24 • Failed to comply with policies that were known to him.
 - 25 • Improperly used state equipment, resources and official duty time for personal business.
 - 26 • Improperly used the state electronic messaging system and official duty time when he
 - 27 sent two sexually explicit emails to another staff person.
- 28
29

1 4.4 Respondent has proven that a severe disciplinary sanction is appropriate; however, this
2 Board finds that the sanction of dismissal is too severe. In spite of the agency's "zero tolerance"
3 policy and based on the specific, unique facts and circumstances of this case, Respondent has
4 failed to prove that dismissal is the appropriate disciplinary sanction for an employee who has
5 more than a 30-year work history with the agency with no prior disciplinary actions and who has
6 only positive performance evaluations in his personnel file.

7
8
9 4.5 This Board and its predecessor, the Personnel Appeals Board, have previously ruled on
10 disciplinary actions for WMS employees. For example, in Mayhew v. Dept. of Corrections, PRB
11 Case No. R-DEMO-06-002 (2006), the Board upheld the sanction of demotion and concluded
12 that the employee, who was a WMS employee with 17 years of experience and no history of
13 corrective or disciplinary actions, should have been aware of his obligation to comply with the
14 department's Code of Ethics and policies. In Ahearn v. Dept. of Corrections, PAB Case No. DEMO-
15 02-0015 (2003), the Personnel Appeals Board upheld the sanction of demotion and concluded that a
16 WMS employee is held to a higher standard of conduct and professionalism and has a duty to act
17 as a role model.

18
19 4.6 Here, as in Mayhew and Ahearn, Appellant was aware of the agency's Administrative Policy
20 15.15 prohibiting the use of the agency's electronic messaging systems and the internet for sending
21 sexually explicit messages and he was aware of his duty to abide by Administrative Policy 18.64
22 which addresses standards of ethical conduct. Yet, by forwarding two sexually explicit emails to a
23 co-worker, continuing to raise problems he perceived within DSHS Region 2 to CHA after he had
24 been directed to take all issues of concern to his immediate supervisor, sending derogatory and
25 disrespectful emails to DSHS staff about other staff, and using his state owned computer for
26 personal business, Appellant violated the policies. As a DSHS WMS employee with decades of
27 experience, Appellant should be held to a higher standard of conduct and professionalism and should
28 be expected to fulfill his duty to act as a positive role model for other staff and to positively support
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1 the decisions of DSHS management with clients and outside organizations. Appellant failed to fulfill
2 these expectations.

3
4 4.7 In Halcomb v Dept. of Corrections, PAB Case No. DEMO-04-0017 (2005), the Personnel
5 Appeals Board upheld the demotion of a lead employee who had a positive work history but who
6 utilized the department's computer and e-mail system for non-work related purposes, accessed,
7 stored, and forwarded clearly inappropriate and offensive messages and posted discriminatory and
8 offensive material in the work place. As in Holcomb, Appellant has a positive work history.

9
10 4.8 In Zimmerman v Dept. of Labor and Industries, PAB Case No. DISM-99-0032 (2000), the
11 Personnel Appeals Board upheld the sanction of dismissal of a general service employee with a long
12 history of corrective and disciplinary actions and who viewed inappropriate and sexually oriented
13 pictures at his work station computer. Unlike Zimmerman, Appellant in this case has no history
14 of previous disciplinary actions and additionally, he has a record of good performance
15 evaluations.

16
17 4.9 In determining whether a sanction imposed is appropriate, consideration must be given to
18 the facts and circumstances, including the seriousness and circumstances of the offenses. The
19 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient
20 to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of
21 the program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

22
23 4.10 The Board does not intend to negate the importance or applicability of Respondent's "zero
24 tolerance" policy. However, the rigidity of the policy must be weighed against unique mitigating
25 factors particular to this individual situation. In consideration of Appellant's length of service, his
26 unblemished work history, and good performance evaluations, and in keeping with the disciplinary
27 sanctions imposed in similar cases, Appellant's dismissal should be modified to a suspension,
28 effective December 14, 2006 to the date of this order, followed by a 15-percent reduction in salary.

Appellant should be returned to a WMS position that represents a 15-percent reduction in salary and that does not have supervisory responsibilities or community contact. This sanction should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. After Appellant's return, if his position no longer meets the criteria to be included in WMS or other factors exist that would impact the agency's need for the position, the agency may take appropriate actions within the merit systems rules to properly align the position with the mission and goals of the agency.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Robert Gutierrez is granted in part and the dismissal is modified to a suspension, effective December 14, 2006, to the date of this order, followed by a 15-percent reduction in salary. Appellant is returned, effective the date of this order, to a WMS position that represents a 15-percent reduction in salary and that does not have supervisory responsibilities or community contact.

DATED this ____ day of _____, 2007.

WASHINGTON PERSONNEL RESOURCES BOARD

LAURA ANDERSON, Vice Chair

MARSHA TADANO LONG, Member