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BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DONALD OLMSTED,	)	Case No. RED-05-0019
	)	
Appellant,	)	FINDINGS OF FACT, CONCLUSIONS OF
	)	LAW AND ORDER OF THE BOARD
	)	
v.	)	
	)	
DEPARTMENT OF NATURAL RESOURCES,	)	
	)	
Respondent.	)	

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**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 office of the Personnel Appeals Board in Olympia, Washington, on March 9, 2006. GERALD L. MORGEN, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant 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 a reduction in pay for sending an inappropriate e-mail joke to an employee under his supervision.

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2 **II. FINDINGS OF FACT**

3 2.1 Appellant Donald Olmsted is a permanent employee for Respondent Department of Natural  
4 Resources. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules  
5 promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the  
6 Personnel Appeals Board on May 25, 2005.

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8 2.2 Appellant is a Natural Resource Project/Section Administrator responsible for managing the  
9 Port Program for the Aquatic Resources Division. Sarah Dzimble, Assistant Division Manager, is  
10 responsible for supervising Appellant.

11  
12 2.3 As a part of his duties, Appellant had responsibility for supervising Marilyn Mead. Ms.  
13 Mead and Appellant initially had a good working relationship; however, the nature of the work  
14 relationship changed due, in part, to the following incidents:

- 15
- 16 • On November 10, 2004, Appellant was discussing a work situation with Ms. Mead during  
17 which he used a stern tone of voice with her. Appellant later returned and apologized to Ms.  
18 Mead, who approached Ms. Dzimble to express her stress, and she left for the day.  
19 Subsequently, Appellant met Ms. Dzimble to discuss the incident, and she provided  
20 guidance to him about respectful workplace relationships. On November 15, Ms. Dzimble  
21 sent Appellant an e-mail memorializing their discussion and encouraging Appellant to  
22 attend training in communication skills for supervisors.
  - 23 • On November 29, 2004, Appellant asked Ms. Mead if she was looking for a “more sultry  
24 appearance” in reference to her hair. Ms. Mead found Appellant’s comment inappropriate  
25 and complained to Ms. Dzimble. Ms. Dzimble counseled Appellant about how he  
26 communicated with Ms Mead, and she directed him to refrain from making personal  
comments to Ms. Mead and to communicate with her on a professional level only. In an e-  
mail dated December 12, Ms. Dzimble memorialized her conversation with Appellant and  
provided him with specific directives on how to delegate work tasks to Ms. Mead.

1 2.4 To help facilitate the communication process between Appellant and Ms. Mead, Ms.  
2 Dzimble arranged to have Lou Ann Dunlop meet with them on a regular basis to mediate the work  
3 discussions between the two of them.  
4

5 2.5 On February 7, 2005, Appellant sent Ms. Mead a joke to her work e-mail. The joke was a  
6 fake advertisement for a pill called “Fukitol,” which in part stated, “*When life just blows ...*  
7 *Fukitol!*” The subject line of the e-mail read, “I think I already overdosed.” At the time, Ms. Mead  
8 was undergoing therapy to alleviate stress she was experiencing at work, and she perceived the joke  
9 as an attempt by Appellant to make fun of her stress and communicate to her that that he could get  
10 away with whatever he wanted. The Ms. Mead also found the joke “menacing,” and she forwarded  
11 a copy of the e-mail to Ms. Dzimble.  
12

13 2.6 Loren Stern, Manger of the Aquatic Resources Division, was Appellant’s appointing  
14 authority when the discipline was imposed. Mr. Stern met with Appellant prior to deciding the  
15 level of discipline. During the meeting, Appellant indicated he and Ms. Mead previously shared a  
16 friendly working relationship and that his e-mail was an attempt to restore that positive relationship.  
17 Appellant indicated he did not intend the e-mail to have a negative effect on Ms. Mead or further  
18 exacerbate their workplace issues.  
19

20 2.7 The department has adopted a policy regarding appropriate use of the state electronic  
21 communication systems. The policy, in part, allows use of state electronic systems when there is  
22 little or no cost to the state, is brief in duration, and “does not interfere with the performance of an  
23 officer’s or employee’s official duties.”  
24

25 2.8 The department has also adopted a harassment prevention policy, which describes other  
26 form of harassing behavior. The policy, in part, states:

1  
2 While some inappropriate conduct may not constitute harassment in the legal  
3 sense, it is nevertheless the policy of the DNR that all employees have the right to  
4 conduct their work activities in an environment that is professional, comfortable,  
5 and free from other forms of inappropriate behavior. This includes, but is not  
6 limited to, behaviors that others may find intimidating or offensive, such as  
7 making derogatory remarks and engaging in unprofessional conduct ...

8  
9 2.9 Mr. Stern believed that Appellant's intent was to foster a more positive working  
10 environment. However, the nature of the e-mail joke ultimately had a negative impact on Ms.  
11 Mead, and made her feel harassed and that she was working in hostile environment. He also  
12 considered Ms. Dzimble's ongoing attempts to counsel Appellant regarding appropriate work-place  
13 communications and the fact Appellant's training record indicated he previously attended  
14 harassment training and had received the department's policies on preventing harassment in the  
15 workplace and appropriate use of electronic communication systems. Mr. Stern concluded that  
16 Appellant failed to heed Ms. Dzimble's direction that he interact with Ms. Mead in a professional  
17 and respectful manner at all times. Mr. Stern concluded that Appellant neglected his duty to treat  
18 her in a respectful manner and violated the agency's policies regarding harassment in the workplace  
19 and proper use of state resources.

20  
21 2.10 Mr. Stern considered taking a four-month reduction in salary; however, after considering  
22 Appellant's response to the charges, Mr. Stern made the decision to reduce Appellant's pay for two  
23 months. By letter dated April 7, 2005, Mr. Stern notified Appellant of his reduction in salary, from  
24 Range 56, Step K to Step I, effective May 1, 2005, through June 30, 2005. Mr. Stern cited the  
25 causes of neglect of duty and willful violation of the department's harassment and internet policies.  
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**III. ARGUMENTS OF THE PARTIES**

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3.1 Respondent argues that Appellant’s joke was not professional or appropriate in the workplace. Respondent asserts that Appellant, as a supervisor, had a duty to exercise good judgment and that the e-mail was a misguided and inappropriate attempt to promote a better work relationship between him and Ms Mead. Respondent asserts that Ms. Dzimble counseled Appellant to maintain appropriate interactions with Ms. Mead, but that Appellant neglected his duty and willfully violated policy when he chose to send the e-mail to Ms. Mead, who found it menacing. Respondent asserts that Appellant should be held accountable for his actions and that the two-month reduction in salary is appropriate.

3.2 Appellant admits he made a mistake by sending the e-mail joke, but he denies he neglected his duty or willfully violated agency policies. Appellant contends that he did not believe the joke would offend Ms. Mead, and that he immediately apologized when he realized it had “backfired.” Appellant asserts the department imposed the punitive sanction not in response to the incident, but in response to union pressure related to disciplining supervisors. Appellant asserts that Ms. Dzimble did not indicate he was being counseled when they met to discuss the prior incidents involving Ms Mead, and that the department failed to impose any progressive discipline here. Appellant argues that under the circumstances, the discipline was harsh and unfair.

**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

1 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
2 Corrections, PAB No. D82-084 (1983).

3  
4 4.3 There is no dispute that Appellant sent Ms. Mead an e-mail joke that implied a profane  
5 word. Appellant continues to assert that his joke was not inappropriate and that his intent in  
6 sending it was to re-establish a positive working relationship with Ms. Mead. However, the issue  
7 here is not Appellant's intent was when he sent Ms. Mead the e-mail, but what impact the e-mail  
8 had on Ms. Mead when she received it, especially in light of their past history of problems.

9  
10 4.4 Appellant and Ms. Mead were meeting with a facilitator toward a shared goal of improving  
11 their working relationship and communications. Although Appellant does not recognize Ms.  
12 Dzimble's discussions with him about maintaining a respectful and professional relationship with  
13 Ms. Mead as "counseling sessions," he did recognize the need to improve how he communicated  
14 with Ms. Mead. As a supervisor in a professional-level position, Appellant should have known that  
15 sending the joke was not a constructive form of improving the relationship.

16  
17 4.5 Neglect of duty is established when it is shown that an employee has a duty to his or her  
18 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
19 of Social & Health Services, PAB No. D86-119 (1987).

20  
21 4.6 Willful violation of published employing agency or institution or Personnel Resources  
22 Board rules or regulations is established by facts showing the existence and publication of the rules  
23 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
24 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

1 4.7 Under the facts and circumstances, Respondent has met its burden of proving that Appellant  
2 neglected his duty to maintain all his communications with Ms. Mead in a professional and  
3 respectful manner. Furthermore, Appellant's conduct violated Respondent's Harassment  
4 Prevention policy by creating an offensive and intimidating work environment for Ms. Mead.  
5 Although Appellant's use of the state e-mail system to send the joke was *de minimis*, the nature of  
6 the joke upset Ms. Mead and caused her to go home early. Therefore, the nature of Appellant's e-  
7 mail violated the agency's policy on use of state electronic communications system when it  
8 interfered with Ms. Mead's performance.

9  
10 4.8 Although it is not appropriate to initiate discipline based on prior formal and informal  
11 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the  
12 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.  
13 D93-163 (1995).

14  
15 4.9 In determining whether a sanction imposed is appropriate, consideration must be given to  
16 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
17 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
18 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
19 program. An action does not necessarily fail if one cause is not sustained unless the entire action  
20 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

21  
22 4.10 After considering the content of the joke e-mail, Ms. Dzimble's attempts to counsel  
23 Appellant with regard to appropriate and professional communications with Ms. Mead, and  
24 Appellant's work history, we conclude that the appointing authority's decision to reduce Appellant  
25 pay for a period of two months was not too severe. As a supervisor, Appellant is held to a higher  
26 standard of professionalism, accountability and judgment. Appellant did not produce any evidence

1 to support his contention that the reduction in pay was not appropriate. Therefore, the appeal of  
2 Donald Olmsted is denied.

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**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Donald Olmsted is denied.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

\_\_\_\_\_  
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member