CITY OF SEATTLE
CIVIL SERVICE COMMISSION

In Re the Appeal of: CITY OF SEATTLE SEATTLE DEPARTMENT OF TRANSPORTATION Appellant, v. KELLY GEIGER Respondent	ORDER ON REVIEW CSC Case No. 01-01-007

This matter coming on review before the Commission on this date, the Commission, after reviewing the record herein and the submissions of the parties enters the following

Order

1) This matter is re-opened for additional fact-finding.
2) The Commission does not remand this matter to Hearing Examiner. Instead, as provided for in Rules 8.09 and 8.21 the Commission will conduct this additional fact-finding.
3) The parties will submit additional evidence and may submit additional briefing on the following issue: Whether Kelly Geiger was, at the time of his discharge, a probationary employee. The evidence shall include, at a minimum:
   a) Written documentation of all classifications held by Mr. Geiger during his employment with the City;
   b) Written documentation of the history of these classifications.
4) The record shall remain open until 4:30 p.m. October 4, 2002.
5) If submitted, briefs must be filed and served on opposing parties by 4:30 p.m., October 8, 2002.
6) If submitted, reply briefs must be filed and served on opposing parties by 4:30 p.m., October 12, 2002.

Dated this 24th day of September, 2002.

CITY OF SEATTLE CIVIL SERVICE COMMISSION

Ken Morgan

Ken Morgan, Chair

BEFORE THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

KELLY GEIGER, Appellant, vs. SEATTLE TRANSPORTATION DEPARTMENT, Respondent.	CSC No. 01-01-007 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

Kelly Geiger, a Structural Painter for the Seattle Transportation Department, appeals his discharge from employment. Although the letter notifying Appellant of his discharge was dated July 27, 2001, it was apparently mailed to Appellant on July 30, 2001. Allowing the additional three days for mailing required by CSCR 10.05(3), means that Appellant's appeal, filed with the Commission on August 22, 2001, was timely.

This matter came on for hearing on June 18, 19 and 20, 2002. Appellant was represented by Kevin Peck, from the Law Offices of Mann & Peck, and the Seattle Transportation Department (hereinafter "SEATRAN" or the Department) was represented by Assistant City Attorney Erin Overbey. The Hearing Examiner requested post-hearing briefs from the parties.

SEATRAN Position:

SEATRAN contends that Appellant was terminated for a variety of reasons, most important of which was his angry outburst at a co-worker, lead painter Michelle Herron, on June 13, 2001, when Appellant called Ms. Herron a bitch at least twice to her face, and repeated the epithet several times to supervisors

investigating the incident. Also taken into account was that Appellant had been back on the job for only six weeks after being out of the workplace for discipline resulting from a fighting incident. During that six weeks, SEATRAN contends that Appellant failed to wear safety equipment, requested written instructions concerning his reporting relationship to Ms. Herron, and urinated off the West Seattle Bridge. SEATRAN believes that these incidents, taken together with the short period of time in which Appellant had been back in the workplace and Appellant's prior disciplinary record, justify discharge.

Appellant's Position:

Appellant admits the facts stated by SEATRAN, with the exception of his failure to wear safety equipment. Appellant contends that his behavior was in part justified by the abuse and mistreatment he suffered from his crew chief, Houston Bradley, and Michelle Herron's condescending attitude towards him. Appellant believes that termination was an overly harsh response to his misbehavior, arguing that appropriate discipline would have been a 2 or 3 day suspension.

Appellant also contends that he was denied due process, and that the City did not follow its own procedures under the City of Seattle Employee Handbook. Exhibit 20. Appellant received notice before his Loudermill hearing that the recommended discipline was a 30-day suspension. It was only after the Loudermill hearing that SEATRAN Director Daryl Grigsby decided to discharge Appellant.

The Hearing Examiner, having heard the testimony and the arguments of counsel, having considered the post-hearing briefs submitted by counsel, and having reviewed the evidence in this case now makes the following:

FINDINGS OF FACT

1. Appellant Kelly Geiger had been a Structural Painter for SEATRAN for 15 years, from 1986 through October 10, 2000. Testimony of Appellant, Houston Bradley. From the time Appellant returned to work in April 2001 until his termination in July 2001, he was a Painter. Exhibit 8; Testimony of Appellant.

During most of Appellant's employment with the City of Seattle he was supervised by Houston Bradley, Appellant's crew chief at the time of his termination. Testimony of Houston Bradley, Appellant.

2. Although most of Appellant's prior work performance and conduct had been satisfactory, and he generally received good performance evaluations, he had received previous discipline from SEATRAN for misconduct on the job. Exhibits 1-6; Testimony of Appellant, Houston Bradley. These incidents include sleeping in a department truck during his lunch hour, for which he received a written reprimand (reduced from a recommended 2-day suspension), and a fighting incident with a temporary co-worker, for which he was recommended to be suspended. Exhibits 24, 25 and 27.

3. At the Loudermill hearing on Appellant's recommended termination, the SEATRAN department head Daryl Grigsby considered Appellant's explanation for the fight and other mitigating circumstances, including the fact that Appellant had attempted to go to his supervisor in order to defuse the situation. Exhibit 48. Mr. Grigsby decided not to terminate Appellant, but rather to demote him to Maintenance Laborer, if he signed a Last Chance Agreement agreeing to the demotion and a number of other conditions. Exhibit 27.

4. Appellant refused to sign the Last Chance Agreement and was terminated. Exhibit 28. Appellant grieved his termination and reached a settlement agreement with the City allowing him to return to work. Exhibit 8. The terms of Appellant's settlement agreement allowed him to come back to work as a Painter, and if he had no major disciplinary incidents for one year, he would be promoted back to Structural Painter. *Id.*, ¶2.1. Other terms of the settlement agreement included attending counseling after referral from the City's Employee Assistance Program. *Id.*, ¶2.3.

5. Appellant came back to work on April 30, 2001, and had a meeting with his crew chief Houston Bradley, and supervisors, Ed Mortensen, Bridge Maintenance Supervisor, and Dave Chew, Manager Roadway Structures. Exhibit 70. During this meeting, Appellant was welcomed back to the workplace, told

that he would be working with Michelle Herron, and that she would be the lead on the crew. Testimony of Dave Chew, Ed Mortensen. At that point, Ms. Herron was apparently a Temporary Structural Painter, although she later became a permanent City employee. Testimony of Houston Bradley, Michelle Herron. Appellant did not complain about the reporting relationship at that time. Testimony of Houston Bradley, Ed Mortensen.

6. Appellant's working relationship with Ms. Herron varied. Usually they got along well; sometimes there was tension between them, particularly if they disagreed about job procedures or equipment needed for a particular assignment. Testimony of Appellant, Michelle Herron. Appellant testified that he did not like the way Ms. Herron treated him, that she had a rough attitude, was kind of moody, and sometimes acted as if she did not want to be bothered if he asked her a question. Testimony of Appellant. There was no testimony that Appellant was insubordinate or failed to follow directions from Ms. Herron. Ms. Herron testified that she and Appellant mostly got along fine, he treated her with respect, he was a good experienced worker, she enjoyed working with him and she felt comfortable working with him. Testimony of Michelle Herron.

7. There were apparently some problems with Appellant not wearing all the safety equipment required by the City, including a hard hat and safety vest. Exhibits 32, 33. However, Ms. Herron testified that once she told Appellant the City policy had changed, and they now had to wear their safety equipment all the time, whether or not they were working in traffic, Appellant complied, and there was no further problem with Appellant failing to wear safety equipment. Testimony of Michelle Herron.

8. At some point, Appellant apparently became concerned about his reporting relationship with Ms. Herron, who he believed was a temporary employee. Appellant complained to Ed Mortensen and requested written instructions regarding the reporting relationship, so that Appellant could show the document to his union representative, to determine if it was in keeping with his settlement agreement and his contract

with the City. Exhibits 9, 33; Testimony of Appellant, Ed Mortensen. He never received the requested written instructions. Testimony of Appellant.

9. On June 10, 2001, Michelle Herron caught Appellant urinating off the West Seattle Bridge. Exhibit 38. She objected to this behavior and complained to Houston Bradley. *Id.* Appellant's statement, which the Hearing Examiner credits, was that upon his return to work, he had not been given necessary City keys that would allow him to use the bathrooms in the bridge tower. Testimony of Appellant. Appellant testified that he apologized to Ms. Herron for his behavior and stated that it would not happen again. Exhibit 38; Testimony of Appellant. Each of the incidents described in Paragraphs 7-9 was documented by Appellant's crew chief Houston Bradley and passed on to higher level supervisors, but the documentation was not shown to Appellant and no discipline was recommended or imposed before June 13, 2001. Exhibits 32, 33, 37, 38; Testimony of Houston Bradley.

10. On the morning of June 13, 2001, an altercation developed between Appellant and Michelle Herron. Exhibits 31, 36, 37. There was some disagreement in the shop about the amount of supplies (rollers, skins and paint) that they needed to take with them on the job that day. Testimony of Appellant; Michelle Herron. Appellant felt that they needed more supplies, while Ms. Herron thought that they had enough and wanted to get moving. In the truck, as they were exiting the building with Ms. Herron driving, Appellant told Ms. Herron that he did not like her attitude in the shop and that she could really be a bitch sometimes. When Ms. Herron stopped the truck to ask him what he had said, Appellant repeated the slur, saying "I called you a bitch." Ms. Herron immediately drove back to the shop and went in to talk to their supervisor, Houston Bradley. Appellant also went into the shop yelling and screaming, and told Mr. Bradley that he didn't "have to take this shit from this bitch," and that he wanted to go home. Exhibits 31, 36, 37, 47; Testimony of Appellant, Michelle Herron.

11. Mr. Bradley was on the phone to the next in command, Ed Mortensen, and asked Appellant to speak to Mr. Mortensen on the telephone. Exhibits 31, 36. Mr. Mortensen told Appellant that he could not go home, and instructed him to come see him. Exhibit 36. Appellant went to see Mr. Mortensen, still very angry and upset, and repeated the slurs about Ms. Herron to Mr. Mortensen, saying "I called her a bitch because she is a bitch." Exhibit 36; Testimony of Ed Mortensen. Mr. Mortensen continued to tell Appellant that he could not go home, and took him to see the next in the chain of command, Dave Chew, Roadway Structures Manager. Appellant was still upset and angry and repeated essentially the same slurs about Ms. Herron to Mr. Chew. Testimony of Dave Chew.

12. At the hearing, Appellant's explanation about his inappropriate language was that Ms. Herron had used the term "bitch" about herself, telling him sometime earlier when they worked together that she was moody when she had her period, and that she could be a bitch sometimes. Testimony of Appellant. Appellant admitted that he overreacted and that the slur was inappropriate and unjustified, and said that he was sorry and that he would not use the same language again. Testimony of Appellant.

13. After meeting with Mr. Chew on June 13, 2001, Appellant was sent home for the rest of the day, and then came back to work the next day, where he spent several weeks working alone performing clean-up and maintenance work, first at the shop for Mr. Mortensen, and then at another location. Exhibit 11; Testimony of Dave Chew, Ed Mortensen, Appellant. At some point in July, Appellant began working again with Michelle Herron. Exhibits 30, 35. Both testified, as did Mr. Bradley, about an incident on July 10, 2001 when Mr. Bradley came out to watch them on the jobsite and made them nervous. *Id.*, Testimony of Appellant, Michelle Herron, Houston Bradley.

14. On June 27, 2001, Appellant was given notice that he was being recommended for a 30-day suspension, and informed of his Loudermill rights. Exhibit 13.

15. At Appellant's July 18, 2001 Loudermill hearing before SEATRAN Director Daryl Grigsby, Appellant did not take responsibility for his behavior, but rather blamed Ms. Herron and Mr. Bradley, complaining about Ms. Herron's attitude, and the abuse and mistreatment he suffered from his supervisor, Houston Bradley. Exhibit 69; Testimony of Daryl Grigsby, Ruth Scollan. Appellant told Mr. Grigsby that a 30-day suspension would not work and yelled at Mr. Grigsby "you make me sick," apparently after Mr. Grigsby had told Appellant that he was giving him a headache. *Id.* The result of the Loudermill hearing was that Mr. Grigsby determined that the 30-day suspension was not sufficient discipline, and instead decided to discharge Appellant from employment. Testimony of Daryl Grigsby; Exhibit 18. At the hearing, Mr. Grigsby testified that they had gone out of their way to craft the Last Chance Agreement ("LCA") he had offered Appellant after his previous Loudermill for the fighting incident, that the LCA was more than fair, and that Mr. Grigsby was not happy that Appellant had refused to accept the LCA. Testimony of Daryl Grigsby.

16. Appellant was informed of the decision to terminate him by letter dated July 27, 2001, mailed to Appellant on July 30, 2001. Exhibit 18.

17. Prior disciplinary action that SEATRAN has taken against other employees for yelling, confrontations and inappropriate behavior including insults and swearing, generally fall in the range of 1 to 5 days suspension, depending on the seriousness of the conduct. Exhibits 52-62, 72. One day suspensions have been imposed for disrespectful conduct and cursing/derogatory remarks. Exhibit 72. Discipline imposed for inappropriate behavior includes written reprimands, 3 or 5 day suspensions, and demotions. Exhibit 72. Five day suspensions have been imposed for inappropriate behavior and confrontation, and a 10 day suspension has been imposed for another situation involving an angry outburst and cursing, including profanity and a threatening manner. Exhibits 61, 72. Termination has generally been reserved for cases when the misconduct was quite serious, including escalating verbal outbursts and abuse, and threats of physical violence. Exhibits 59, 72.

Based upon the above Findings of Fact, the Hearing Examiner now makes the following:

CONCLUSIONS OF LAW

1. The incident that occurred on June 13, 2001, in which Appellant became angry and called the Lead Painter Michelle Herron a bitch, was inappropriate and violated SEATRAN policies and workplace expectations. However, the verbal outburst was not an assault or threat, or sexual or racial harassment, and it did not constitute a major disciplinary offense under City Personnel Rules, the Seattle Municipal Code, or the collective bargaining agreement governing Appellant's employment.

2. SEATRAN had justifiable cause to impose some discipline on Appellant, but Appellant's behavior, even with aggravating factors, did not justify discharge or a 30-day suspension.

3. In view of discipline imposed previously for similar offenses, and all the facts and circumstances of the incident and Appellant's employment with SEATRAN, the maximum justifiable level of discipline in this case would be a 10-day suspension.

4. Appellant's due process rights were not violated by the City's actions in this case. Appellant received notice of proposed disciplinary action and had a pretermination hearing to respond to the facts leading to the proposed discipline. Appellant then received a full post-termination administrative hearing, which has resulted in a modification of the discipline imposed. A second Loudermill hearing before Appellant was discharged was not required, and would not have given the Appellant any more relief than he has received at the post-termination hearing.

DATED this 7th day of August, 2002.

Jennifer S. Divine, Hearing Examiner
City of Seattle Civil Service Commission

DECISION

The Hearing Examiner does not condone Appellant's behavior. There is no question that his conduct on June 13th was extremely inappropriate and violated SEATRAN policies and workplace expectations. Angry outbursts at fellow employees cannot be tolerated; employees must learn more appropriate ways of handling conflict in the workplace. Calling a female coworker a "bitch" is unacceptable. Every employee should know that gender slurs and profanity have no place on the job.

The Hearing Examiner does not give weight to Appellant's claims that he was subjected to a hostile work environment. While Mr. Bradley appears to have significant problems as a supervisor, Appellant has not shown evidence sufficient to support a claim of a hostile workplace, nor any behavior by Mr. Bradley or anyone else at the City that could justifiably have provoked Appellant into his outburst at Ms. Herron, or excuse that outburst or Appellant's behavior afterwards. There is no question that the Department was justified in imposing discipline on Appellant.

Nevertheless, the Hearing Examiner can find no legitimate reason why the Department chose to impose the severe discipline given out in this case – either the recommended 30-day suspension or the ultimate discharge. Ed Mortensen, the frontline supervisor closest to the events, who actually overheard some of Appellant's outburst towards Ms. Herron, testified that he did not immediately think he was dealing with an incident that would result in discipline, and later that a two or three day suspension would have been his recommended discipline in the case. The perceived seriousness of the incident itself and Appellant's other behavior seemed to escalate as the investigation went up the chain of command, picking up steam as it went along, finally culminating in a discharge for an offense that probably could have been handled effectively and with far less disruption to the workplace by a written reprimand or a brief suspension.

Appellant's behavior, although serious, in no way justified discharge. Appellant's outburst was not a major disciplinary offense as described in City personnel rules, the collective bargaining agreement covering

Appellant, or the Seattle Municipal Code. Exhibits 19, 21, 22. It was not an assault or threat toward another person; Appellant did not touch or harm Ms. Herron in any way, nor did he threaten her with any harm or negative action – he used a verbal insult. Being called a bitch, even twice in a short period of time, while unpleasant, is not an assault or a threat. Nor is it racial or sexual harassment. It was not appropriate behavior, but it appears to be a one-time incident. One angry outburst, even with a very bad word, simply does not rise to the level of racial or sexual harassment appropriately addressed by City policy. Nor can Appellant's conduct be considered an "offense of parallel gravity" to racial or sexual harassment, or assault or threat.

Ms. Herron herself testified that she was shocked and surprised at Appellant's conduct, and that she did not appreciate being called a bitch, but showed no fear or even lingering bad feelings toward Appellant. Although she apparently told Ruth Scollan, the Human Resources Director who questioned her after the incident, that she was scared when Appellant yelled at her and called her a bitch, she did not testify to being frightened or scared during the hearing, and was able to work alone with Appellant less than a month after the incident without any fear or concern for her well-being. Exhibits 30, 35, 47. Testimony of Michelle Herron, Appellant.

While SEATRAN was entitled to take aggravating factors into account to impose a higher level of discipline on Appellant, the aggravating factors in Appellant's case did not justify increasing the discipline to the highest level or terminating Appellant. Although Appellant did have some disciplinary history, only one prior incident, the fighting incident that led to his discharge in 2000 involved an angry outburst at another employee. Moreover, the fighting incident, while not excusable, did appear to result from provocation of Appellant by another employee. Nor is Appellant's verbal outburst toward Ms. Herron of the same seriousness as the fighting incident. There is no indication from any testimony or evidence that Appellant's anger toward Ms. Herron would have resulted in any physical confrontation or fight.

Further, while Appellant's disciplinary record cannot be ignored, neither does it negate Appellant's 15 years of hard work, dedication, and mainly satisfactory work for the City. Although the incident did cause some disruption in the workplace, since Appellant at least lost a day of work and various department supervisors spent time dealing with the issue, this disruption was not significant enough to justify increasing Appellant's discipline to termination.

Nor did the other factors cited by the City as part of the reason for discipline justify discharge. The reported failure to wear safety equipment appears to have been corrected once Ms. Herron raised the matter with Appellant. Appellant's request for written instructions regarding his reporting relationship to Ms. Herron is not a valid reason for discipline at all. Whether or not Appellant was correct that Ms. Herron was a temporary employee, and whether or not there would be any grievable issue in his being required to report to a temporary employee, Appellant had the right to raise that issue with his union representative and should not be disciplined for requesting the documentation he apparently thought was necessary to do so.

The incident involving urinating off the West Seattle Bridge was inappropriate, and does support an increase in discipline. However, this incident, while exhibiting poor judgment on Appellant's part, does not indicate any major anger management problem. While it might support increasing discipline from a written reprimand to suspension, or increasing the length of a suspension, it does not justify raising Appellant's discipline to discharge, or even a 30 day suspension.

The Department cannot rely on Appellant's failure to sign a Last Chance Agreement after the Loudermill on the fight incident in 2000 as a reason for increasing discipline. Appellant had a right to refuse that agreement and grieve his discharge through his union. He did so, and the City voluntarily signed a settlement agreement bringing Appellant back to work. The Department is bound by the terms of that settlement agreement, and cannot now try to convert it into the Last Chance Agreement that Appellant refused to sign. Department managers all testified that they believed Appellant would return to work as a "model

employee," but the signed settlement agreement contains no such guarantee. Testimony of Daryl Grigsby, Richard Miller, David Chew; Exhibit 8. The portion of the settlement agreement addressing future disciplinary offenses does not speak to Appellant's continued employment, but rather the circumstances under which he would be able to regain his position as Structural Painter after his demotion to Painter. Exhibit 8, ¶2.1. Nothing in the settlement agreement states that any future disciplinary offense, even a major offense, would subject Appellant to immediate discharge.

In sum, the incidents cited by the City as reasons for Appellant's termination indicate a need for discipline, but they do not justify a lengthy suspension or discharge. Given the levels of discipline imposed in prior situations involving verbal outbursts, including situations involving prior discipline, a reasonable level of discipline would have been in the 2 to 5 day range. Even factoring in Appellant's egregious behavior at his Loudermill hearing[1], and assuming that the Department wanted to send a wake-up call to Appellant to get him to take his anger management problems seriously, the highest level of discipline justifiable under the circumstances was a 10-day suspension. Accordingly, Appellant's discharge should be reversed, his discipline modified to a 10-day suspension and his pay and benefits restored accordingly.

DATED this 7th day of August, 2002.

Jennifer S. Divine, Hearing Examiner
City of Seattle Civil Service Commission

[1] With respect to Appellant's claims of lack of due process, it is very troublesome that the Department chose to increase Appellant's recommended discipline from 30 days to discharge without any notice to Appellant, either written or oral during the Loudermill hearing itself, that discharge was being considered. However, Appellant has not established any due process violation or violation of City policy. Appellant did receive notice of proposed discipline and an opportunity to respond to the events leading to the discipline before discipline was imposed. He has now received a full post-termination hearing, which has resulted in a modification of the discharge to a 10-day suspension. This is all the process Appellant is due under *Loudermill* and its progeny. A second Loudermill would result in no more relief than Appellant has gained by the post-termination hearing.