BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KAREN FERGUSON, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. RED-01-0029 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for a hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. For purposes of hearing, this matter was consolidated with Burnham v. Dep't. of Corrections, PAB Case No. RED-01-0029. The hearing was held in the Superintendent's Conference Room at the Monroe Correctional Complex in Monroe, Washington, on July 23, 2002. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Karen Ferguson was present and was represented by Spencer N. Thal, General Counsel for Teamsters Local 117. Amy F. Cook, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** Appellant was given a reduction in salary for neglect of duty and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleged that Appellant inappropriately accessed an inmate's medical file and used information from the file for personal reasons rather than for health care issues related to the inmate.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Karen Ferguson is a Licensed Practical Nurse (LPN) and a permanent employee of Respondent Department of Corrections (DOC) at the Monroe Correctional Complex (MCC) hospital. 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 August 29, 2001.

2.2 Appellant has been a nurse for 30 years. She has been employed at MCC for 4 years. Appellant was aware of her responsibility to be familiar with agency policies and to protect the confidentiality of patients' medical information.

2.3 Appellant has history of prior corrective actions at MCC. In December 2000, she was given a letter of reprimand for refusing to provide prescribed medications to an inmate. In September 2000, she was given a letter of reprimand for inappropriate behavior toward two co-workers. In February 1999, she was given a letter of counseling for sick leave usage.

2.4 By letter dated July 5, 2001, Respondent notified Appellant of her two-step reduction in salary, effective August 1, 2001 through October 31, 2001. Respondent charged Appellant with neglect of duty and willful violation of published employing agency or department of personnel rules or regulations. In summary, Respondent alleged that Appellant:

- accessed an inmate's medical file on March 4, 2001, for purposes other than health care issues;
- accessed the inmate's medical file again on March 5, 2001, made an unauthorized copy of a Mental Health Progress Note Primary Encounter Report Form (PERF), took the copy out of MCC, and failed to log that she had accessed and copied the progress note; and
- provided the Superintendent with a copy of the unauthorized PERF note and failed to protect the confidentiality of the inmate's name during a meeting with her shop steward, the Superintendent and Correctional Officer Dan Grey.

2.5 On March 2, 2001, Inmate N complained to Psychologist Douglas Campbell that Appellant was "stealing" his medications. Dr. Campbell documented the inmate's concerns, including Appellant's name, in the inmate's medical file in a PERF note.

2.6 Subsequently, Appellant received a telephone call at home from a correctional officer (CO) assigned to the inmate's unit. The CO told her about the inmate's allegation.

2.7 On March 4, 2001, Appellant accessed Inmate N's medical file and read the PERF note written by Dr. Campbell. Because the PERF note is a legal document, Appellant felt that her name should not have been included in the note.

2.8 Appellant was not able to read the signature of the author of the note, but she thought that Psychologist 4 Ron Dahlbeck had written it. Mr. Dahlbeck was the husband of Appellant's first-line supervisor, Registered Nurse 3 Karen Dahlbeck. Appellant thought that Mr. Dahlbeck inappropriately used her name in the PERF note because of past issues she had with his wife.

2.9 On March 5, 2001, Appellant again accessed Inmate N's medical file, however, this time she made a copy of the PERF note. Appellant then took the copy of the note out of the institution. In

addition, she scheduled a meeting with Superintendent Robert Moore to discuss the use of her name in the note.

2.10 On either March 5 or 6, 2001, Appellant telephoned her shop steward, Dinnie Burnham. On March 6, 2001, Appellant and Ms. Burnham met at a restaurant outside of the institution and Appellant showed Ms. Burnham a redacted copy of the PERF note. Both Appellant and Ms. Burnham had difficulty reading the signature of the person who wrote the note. Ms. Burnham thought that Superintendent Moore would also have difficulty reading the note. Therefore, Ms. Burnham transcribed the note as being authored by R. Dahlbeck because Appellant told her that Mr. Dahlbeck had written the note.

2.11 On March 6, 2001, Appellant, Ms. Burnham, and shop steward Dan Grey met with Superintendent Moore. After clarifying that Superintendent Moore was authorized to view inmate medical records, Ms. Burnham showed him the copy of the PERF note. The inmate's name was redacted from the note. Superintendent Moore told Appellant that he would look into her concerns.

2.12 Appellant, Ms. Burnham and Mr. Grey each testified that the inmate's name was not used during the meeting. Superintendent Moore testified that he could not recall whether the inmate's name was mentioned during the meeting. We find that more likely than not, the inmate's name was not used during the meeting.

2.13 Following the meeting, Superintendent Moore discussed the situation with Associate Superintendent Carol Grandmontagne. Ms. Grandmontagne talked with Health Care Manager William Doran. Mr. Doran felt that Appellant had violated the medical information disclosure

policies and nursing standards by failing to observe the privacy and confidentiality of patient information.

2.14 On March 20, 2001, Mr. Doran initiated an Employee Conduct Report (ECR) alleging, in part, that Appellant inappropriately and without written authorization from Inmate N, accessed the inmate's medical records for her personal use and made a copy of the PERF note written by Dr. Campbell.

2.15 Following completion of the ECR process, the report and investigation information was forwarded to Superintendent Moore.

2.16 Superintendent Moore considered the ECR information and Appellant's response to the allegations. He agreed with the administrative findings of the ECR. He determined that rather than making an unauthorized copy of the inmate's medical information, Appellant could have used other methods to address the issue.

2.17 Superintendent Moore concluded that without the inmate's permission or consent, Appellant inappropriately accessed the inmate's medical file for personal reasons, made a copy of the PERF note, took the copy outside of the institution, failed to chart accessing the file and removing the information, and shared the copy with her shop steward. Superintendent Moore determined that Appellant neglect her duty to conduct herself in a professional manner and maintain the confidentiality of inmate medical and mental health information; neglected her duty to use the inmate's medical information for legitimate health care issues; and failed to treat and serve the inmate fairly, equitably, and with concern for his welfare. Superintendent Moore found that Appellant's actions violated the Department's Employee Handbook and DOC Policy 640.020.

2.18 After considering Appellant's misconduct in this instance and her past disciplinary history, Superintendent Moore concluded that a course of progressive discipline warranted a reduction in salary. By letter dated July 5, 2001, Superintendent Moore gave Appellant a three-month, two-step reduction in salary.

2.19 The Department of Corrections Employee Handbook, states, in relevant part:

> The department's main objectives are to:
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> . . . .
>
> - Treat all offenders . . . fairly and equitably;
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> . . . .
>
> The Department of Corrections subscribes to a . . . commitment to professional . . . service.
>
> . . . .
>
> As a representative of the Department of Corrections, **<u>you will be expected to</u>**:
>
> . . . .
>
> - Serve each offender with appropriate concern for their welfare and with no purpose of personal gain;
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> . . . .

2.20 The Department of Corrections Policy Directive DOC 640.020 addresses, in part, disclosure of health records. Under disclosure by *Health Care Provider*, the directive states, in part:

> A. Information contained in an offender's health record, including information the offender shares with *health care* professionals, is confidential unless disclosure is otherwise authorized by law.
>
> B. All *health care information* disclosures will be documented as directed by the Department's Health Records Guidelines.

2.21 Under *Disclosure Without Offender's Authorization*, Policy Directive DOC 640.020 states, in part:

> D. Information may be disclosed and/or exchanged with health services providers in the community to ensure continuity of an offender's health care in accordance with RCW 70.02.050 (1)(a).
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> . . . .
>
> F. Health information may be disclosed in other circumstances, as permitted by RCW 70.02.050 or RCW 70.02.900.

2.22 Under *Security Safeguards*, Policy Directive DOC 640.020, states in part:

> A. All Department . . . employees . . . within the Department having access to health information will:
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> . . . .
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> (3) Be advised of the consequences for misuse or abuse of health information, including disciplinary action.

2.23 RCW 70.02.010 defines the terms used in Chapter 70.20. RCW and provides, in part:

> "Health care information" means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care. The term includes any record disclosures of health care information.

2.24 RCW 70.02.020 discusses disclosure of health care information by health care providers. The RCW states, in relevant part:

> Except as authorized in RCW 70.02.050, a health care provider . . . may not disclose health care information about a patient to any other person without the patient's written authorization. . . .
>
> Health care providers . . . shall chart all disclosures . . . of health care information, such chartings to become part of the health care information.

2.25 RCW 70.02.050 discusses disclosure of health care information without the consent of the patient. The RCW states, in relevant part:

> (1) A health care provider may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:
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> . . . .
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> (b) To any other person who requires health care information for health care education, or to provide planning, quality assurance, peer review, or administrative, legal, financial, or actuarial services to the health care provider; or for assisting the health care provider in the delivery of health care . . . .
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> . . . .
>
> (d) To any person if the health care provider reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual, however there is no obligation under this chapter on the part of the provider to so disclose;
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> . . . .
>
> (g) For use in a research project that an institutional review board has determined:
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> . . . .
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> (iv) Contains reasonable safeguards to protect against identifying, directly or indirectly, any patient in any report of the research project; and
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> . . . .
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> (i) To an official of a penal or other custodial institution in which the patient is detained;
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> . . . .

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant committed misconduct when she accessed and used information from the inmate's medical file for personal reasons without the inmate's permission, failed to chart accessing the information, removed the information from the institution, and discussed the information with Ms. Burnham. Respondent contends that by copying and disclosing

a confidential medical record, Appellant neglected her duty and violated the trust place in her as a health care provider. Respondent argues that Appellant's actions were not intended to assist the inmate, did not protect the confidentiality of the inmate's medical information, created a liability for the institution, and constituted a willful violation of common sense nursing standards and agency policy. Respondent contends that Appellant's actions did not further the mission of the institution, that she had received prior corrective actions for failing to follow policies, and that in this case, a reduction in salary was warranted.

3.2 Appellant argues that the core issue before the Board is whether she improperly disclosed information as defined in the statute. Appellant contends that the statute contains exceptions that allow for disclosure of information. Appellant further contends that she redacted the inmate's name and number from the document before sharing the document with Ms. Burnham, thereby maintaining the inmate's confidentiality. Appellant asserts that she did not violate the statute or policy and did not neglect her duty. Appellant argues that her actions were not taken out of malice or recklessness toward the inmate, but rather with concern for maintaining his confidentiality. Appellant asserts that she has no history of prior discipline for confidentiality issues and that under the facts and circumstances here, the discipline is too severe and should be overturned.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

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 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. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.5 Respondent failed to prove that Appellant disclosed the identity of the inmate during the March 6, 2001, meeting with Ms. Burnham, Mr. Grey and Superintendent Moore.

4.6 Respondent has met its burden of proof that Appellant neglected her duty and willfully violated agency policies when she accessed the inmate's medical file for personal reasons without the inmate's permission, when she made an unauthorized copy of the PERF note, when she failed to log accessing the file and copying the note, and when she removed the information from the institution. Appellant was not acting to provide medical care to the inmate and therefore, was not acting with concern for the welfare of the inmate. Appellant's actions were strictly for personal reasons. Whether or not the document was redacted, does not mitigate Appellant's misconduct. The fact remains that she inappropriately accessed the inmate's medical information and disclosed the medical information to persons who did not need to know the information.

4.7 Under the totality of the proven facts and circumstances, including Appellant's 30 years of experience and knowledge of nursing practices and the importance of protecting the confidentiality of patients' medical records, the minimal disciplinary sanction of a two-step, three-month reduction is salary is appropriate. The appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Karen Ferguson is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair