BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

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| MANUEL ASCENCIO,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF SOCIAL AND HEALTH SERVICES,<br><br>Respondent. | Case No. DISM-00-0089<br><br>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 Community Services Office in Kennewick, Washington, on May 16, 2002. RENÉ EWING, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Manuel Ascencio was present and was represented by Kenneth Raber, Attorney at Law. Patricia Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, incompetence, conviction of a crime involving moral turpitude and gross misconduct. Respondent alleges that Appellant falsified a state application for employment when he failed to disclose his conviction of a crime that unfavorably affected his fitness to work as a financial



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services specialist and when he failed to disclose an accompanying condition of the sentencing restriction that he was to have no contact with females under the age of 18 years.

1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983). WAC 356-26-120(5); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989)

## II. FINDINGS OF FACT

2.1 Appellant Manuel Ascencio was a Financial Services Specialist 3 and permanent employee for Respondent Department of Social and Health Services. 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 December 1, 2000.

2.2 By letter dated October 19, 2000, Stella Vasquez, Regional Administrator for the Division of Community Services, informed Appellant of his immediate suspension effective October 20, 2000, followed by his dismissal effective November 4, 2000. Ms. Vasquez charged Appellant with neglect of duty, incompetence, conviction of a crime involving moral turpitude and gross misconduct. Ms. Vasquez specifically alleged that Appellant falsified a state application for employment when he failed to disclose a conviction of a crime that unfavorably affected his fitness to work as a Financial Services Specialist. She further alleged that Appellant failed to disclose a court order that restricted him from having contact with females under 18 years of age.

2.3 On February 10, 1999, Appellant completed a state job application for the position of Financial Services Specialist. In responding to the question, "Have you been convicted of a misdemeanor or felony within the past seven (7) years that might unfavorably affect your fitness for



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this job?" Appellant answered "no." However, on February 19, 1998, Appellant pled guilty to the charge of "Communication with a Minor for Immoral Purposes," and he was sentenced and placed on probation for two years. As a condition of his sentence, Appellant was not to have contact, associate with, or go upon the property of females under 18 years of age.

2.4 Appellant's name was certified by the Department of Personnel as a qualified candidate on the Financial Services Specialist (FSS) register. Appellant interviewed for and was appointed to a position as a FSS, and he began his employment with DSHS Region 2 Division of Community Services in March 1999.

2.5 Appellant attended a training academy after he was hired to work with the Pasco Community Services Office. He was later assigned to work at La Clinica, an outstation office where he provided financial services to a wide variety to clients. Appellant worked with minimal supervision. As a Financial Services Specialist 3, Appellant was responsible for managing a financial services caseload. Appellant's duties required that he conduct face-to-face meetings with clients. DSHS clients are predominately female, and include teen mothers under the age of 18 and families with young children.

2.6 Once Appellant began working at La Clinica, he should have reasonably known that he would have contact with female clients under 18 years of age. However, Appellant did not disclose to his supervisor that he had a conviction and was under probation and restricted from having contact with females under 18 years of age.

2.7 On October 9, 2000, Appellant was arrested at his work site at La Clinica for not complying with the requirements of his sentencing. Appellant's probation was terminated on November 8, 2000.



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2.8 Stella Vasquez, Regional Administrator for Region 2, was Appellant's appointing authority. After learning the facts surrounding Appellant's arrest, she scheduled a pre-termination meeting to give Appellant an opportunity to respond to the charge that his criminal conviction affected his ability to perform the duties of a Financial Services Specialist. After meeting with Appellant on October 17, 2000, Ms. Vasquez did not believe that Appellant's explanations mitigated his failure to inform the department that he was restricted from having contact with females under 18 years of age. Ms. Vasquez did not find credible Appellant's assertion that he did not know his duties required that he have contact with females under the age of 18. Furthermore, she felt that he had a responsibility to inform his supervisor of his probation restriction once he became aware of the need to have contact with teenage females.

2.9 In determining the level of discipline, Ms. Vasquez took into consideration that Appellant falsified an application for state employment when he failed to disclose that he had been convicted of a crime that unfavorably affected his fitness for duty. Ms. Vasquez also concluded that Appellant failed to indicate at the time of employment that he had a conviction on his record, which would have allowed the department to determine whether the condition of his probation restriction interfered with his ability to do his job. Ms. Vasquez testified that as a Financial Services Specialist, Appellant had a duty to be honest and that his failure to be forthcoming with pertinent information that affected his ability to perform his duties greatly undermined the department's trust in him.

2.10 In Ms. Vasquez' judgment, the probation restriction did affect Appellant's ability to do his job because of the contact he was required to have with young female clients on his caseload. Ms. Vasquez was also concerned that employing a convicted sex offender called the agency's integrity into question with the public. Ms. Vasquez testified that she was concerned with the potential



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liability if Appellant engaged in any inappropriate actions while dealing with clients. Ms. Vasquez stated that Appellant's failure to disclose his restriction compromised the agency's ability to meet its mission, and she ultimately determined that dismissing Appellant was the appropriate sanction.

## III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant violated WAC 356-26-120(5) when he falsified his state employment application. Respondent argues that Appellant's failure to inform DSHS of his conviction and his probation conditions affected his fitness to perform his job as a Financial Services Specialist 3. Respondent argues that Appellant's responsibility included contact with female clients under the age of 18 and access to personal client information. Respondent argues that Appellant is not credible when he states that he did not believe his position would have contact with females under the age of 18. Respondent argues that as an agent of the department, Appellant had an obligation and a high level of responsibility to conduct himself with integrity because of the department's role in providing services to the public. Respondent contends that DSHS is subject to harsh scrutiny and employing an individual convicted of a sex offense creates serious liability issues, calls into question the integrity of the agency, and places clients at risk.

3.2 Appellant asserts that when he completed the employment application, he was required to answer a subjective question on whether his conviction would affect his ability to do his job. Appellant argues that he checked the "no" box because nothing about the job he was applying for led him to believe that he would have contact with females under the age of 18. Appellant argues that his sentence did not affect his ability to perform the duties of a FSS because his counselor told him the restriction was limited to social contacts only and did not apply to the workplace. Appellant also asserts that he called DSHS and asked for a list of crimes that required disclosure to his employer, but that such a list did not exist. Appellant contends that the job description for the FSS did not specify that he would have contact with females under the age of 18. Appellant denies



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that he intended to mislead his employer and he asserts that when he accepted employment, he believed he had completed his counseling and had fulfilled the requirements of his probation.

## 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 WAC 356-26-120(5) states in pertinent part, "Falsification or misrepresentation of information on an application for employment will be cause to remove an applicant's name from the register. . . . After the probationary period the appointing authority may dismiss the employee for cause pursuant to WAC 356-34-010."

4.4 Appellant should have had a reasonable belief that his conviction and the restrictions of his sentencing might affect his ability to perform his work for the Department of Social and Health Services. Respondent has proven by a preponderance of the credible evidence that Appellant falsified his employment application when he failed to reveal his conviction on the application.

4.5 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).



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4.6 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987).

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).

4.7 In order for conviction of a crime involving moral turpitude to be sufficient to sustain a dismissal, the conviction must impair the employee's ability to perform the duties of the class. Forslund v. Dep't of Social and Health Services, PAB No. D87-65 (1987).

4.8 There is no dispute that Appellant's duties as an FSS brought him into contact with females under 18 years of age. Appellant was convicted of a crime involving moral turpitude and the conditions of the sentencing prohibited him from having contact with females under 18 years of age. There was no credible evidence that the condition of his probations was limited to social situations. Respondent has proven that the conviction impaired Appellant's ability to perform the duties of a Financial Services Specialist. As an employee of DSHS, Appellant had a duty to demonstrate a high level of integrity. Moreover, DSHS has a duty and obligation to protect its clients. Appellant's dishonesty and failure to be forthcoming with information related to his conviction and sentencing was unethical and clearly violated the trust placed in him by the agency and had a detrimental effect on the agency's ability to carry out its functions. Respondent has met its burden of proving that Appellant was convicted of a crime involving moral turpitude, that he failed to provide truthful information on his employment application and that he failed to disclose his conviction to his employer. Appellant was incompetent to perform his job, and his actions rose to the level of gross misconduct.



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4.9 Respondent has proven that under the undisputed facts and circumstances of this case that Appellant's immediate suspension followed by dismissal is warranted and the appeal should be denied.

## V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Manuel Ascencio 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



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