BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICHARD SPENCE, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DEMO-01-0027 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

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, GERALD L. MORGEN, Vice Chair. The hearing was held at the Department of Social and Health Services, Yakima, Washington, on February 18, 2003. WALTER T. HUBBARD, Chair, reviewed the file and record and participated in the decision in this matter.

1.2 **Appearances.** Appellant Richard Spence was present and was represented by Edward Younglove, Attorney at Law. Amy Cook, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant engaged in inappropriate,

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unsolicited, and unwelcome behavior of a sexual/romantic nature toward a subordinate staff member.

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); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Harper v. WSU, PAB No. RULE-00-0040 (2002); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Richard Spence is a Correctional Officer and a permanent employee of Respondent Department of Corrections at the Ahtanum View Correctional Complex. 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 October 12, 2001.

2.2 By letter dated September 18, 2001, Joop DeJonge, Superintendent of Ahtanum View Correctional Complex, informed Appellant of his demotion from Correctional Sergeant to Correctional Officer, effective October 3, 2001. Mr. DeJonge charged Appellant with neglect of duty, gross misconduct, and violation of Department of Corrections policies and state and federal laws against sexual harassment. Mr. DeJonge alleged that Appellant sexually harassed a subordinate under his supervision by making comments containing sexual or intimate overtones on numerous occasions.

2.3 Appellant began his employment with the Department of Corrections on June 28, 1990 as a Correctional Officer for the Washington Correction Center. Appellant promoted to the Ahtanum

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View Correctional Complex as a Correctional Sergeant in April or May, 2000. Appellant also served as the Ahtanum View Correctional Complex ethics instructor for new employee orientation.

2.4 Appellant received good performance evaluations and has no history of formal disciplinary actions. On September 11, 2001, Appellant went on leave without pay when he began active military duty.

2.5 As a Correctional Sergeant, Appellant worked the graveyard shift from 10:00 p.m. to 6:00 a.m. Appellant was the highest ranking officer on the night shift.

2.6 Ms. Adams, Correctional Officer, was assigned to Appellant's shift on January 6, 2001 after requesting a shift change. At that time, Appellant met with co-worker Sergeant Niles. Sergeant Niles informed Appellant that Ms. Adams requested a shift change because of difficulties with her previous supervisor. Appellant and Sergeant Niles agreed that Appellant, in addition to supervising Ms. Adams, would also mentor her in an attempt to boost her morale and self esteem because Appellant had experience in volunteer peer counseling.

2.7 Appellant and Ms. Adams had a positive working relationship during the first three or four months, but problems began to develop in May, 2001. On June 11, 2001, Ms. Adams submitted a memo of complaint to Lieutenant Westland. Ms. Adams claimed that Appellant had subjected her to unwelcome behavior of a romantic nature between May, 2001 and June, 2001.

2.8 The allegations brought forward by Ms. Adams cannot be corroborated by first hand testimony. In determining the facts of this case, we have weighed the direct testimony of Appellant and Ms. Adams.

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2.9 Appellant denied that he engaged in the misconduct stated in the disciplinary letter. We find, however, that Appellant and Ms. Adams worked together on the graveyard shift unobserved most of the time, and there was ample opportunity for Appellant to engage in the type of behavior described by Ms. Adams. Furthermore, Appellant was in a position of authority over Ms. Adams.

2.10 Based on a preponderance of the credible testimony, we find that more likely than not, the following events occurred:

2.11 Appellant routinely started the work shift by lining up six or more bottles of SoBe drinks so Ms. Adams could have her choice of flavors. Appellant also gave Ms. Adams his flight wings (a small pin) for good luck when she was scheduled for a promotional interview.

2.12 During the month of May, 2001, Appellant winked at Ms. Adams, told her that she was beautiful, and asked her to wear her hair up more often for him. Later during that same work shift, Ms. Adams was not feeling well and asked Appellant to be relieved to go home. Appellant became very angry and told Ms. Adams that he had worked feeling a lot worse, in addition to working three jobs, and told her she had no work ethic. At the end of May 2001, Appellant told Ms. Adams that he was in love with her.

2.13 During the month of June, 2001, Appellant stated to Ms. Adams that former President Clinton had beaten and raped over forty women. Appellant angrily told Ms. Adams that if former President Clinton was the kind of man she liked, then Appellant had no regard for her. Shortly thereafter, Appellant asked Ms. Adams if her husband helped her to relax by giving her multiple orgasms. On another occasion, Appellant asked Ms. Adams to meet him at the McCord Air Force Base for lunch. Ms. Adams did not meet Appellant for lunch. After Appellant's return to work following that date, he expressed anger with Ms. Adams for not meeting him for lunch.

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2.14 Appellant also asked Ms. Adams for a lock of her hair so he could clone her because he had found the perfect woman, but she was married. Appellant indicated he wanted to run off to South America with the clone.

2.15 During both months, Appellant presented Ms. Adams with typed and written memos that demonstrated inappropriate correspondence between a supervisor and a subordinate.

2.16 On June 18, 2001, Mr. DeJonge initiated an Employee Conduct Report against Appellant based on Ms. Adams' allegations.

2.17 On July 3, 2001, Appellant's supervisor, Eric Missett, Community Corrections Supervisor 2, met with Appellant and Appellant's union representative. Appellant categorically denied all Ms. Adams' allegations.

2.18 Appellant, Ahtanum View Correctional Complex Superintendent Joop DeJonge, Washington Federation of State Employees Area Representative Bob Chauvin, Shop Steward Bob Briceno, and Human Resource Consultant Colleen Williams-Scott met on August 3, 2001. Appellant again denied all the allegations. When asked about two of the memos that Appellant gave to Ms. Adams, Appellant stated that the first one was intended as a joke and a morale-builder. Appellant then indicated that he did not write the second memo.

2.19 In September, 2001, Ms. Adams filed a tort claim against the State of Washington and the Department of Corrections, however, the tort claim involves Ms. Adams' previous supervisor. Appellant is not named or involved in the lawsuit.

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2.20 The Department of Corrections adheres to a policy which allows employees to work in an environment free from unsolicited, unwelcome, and inappropriate sexual behavior. The department has adopted and published policies which require employees to maintain high ethical and professional standards at all times and which prohibit sexual harassment. The Department of Corrections Policy 850.625 defines inappropriate workplace behavior as physical contact, comments, jokes, gestures and/or materials of sexual nature regardless of intent, which are unwelcome and uninvited. The Department of Corrections Ethics Policy 800.010 requires all employees to treat fellow staff with dignity and respect. Appellant was aware of the policies and acknowledged his agreement to become familiar with and have a thorough knowledge and understanding of the contents on March 17, 1992.

2.21 In addition to considering Appellant's responses to the allegations during the meeting, Mr. DeJonge reviewed the Conduct Investigation Report and Appellant's personnel file and performance evaluations to determine whether misconduct occurred. Mr. DeJonge also reviewed Ms. Adams' personnel file.

2.22 Mr. DeJonge considered the serious nature of the allegations and the fact that Appellant was a supervisor, a shift commander, the facility's ethics instructor, and had been trusted with the responsibility of mentoring Ms. Adams.

2.23 Mr. DeJonge was not convinced by Appellant's denials because when he asked Appellant about specific alleged comments that were not witnessed by a third party, Appellant could remember those events clearly and stated they did not happen. However, when Mr. DeJonge asked Appellant about comments and conversations that took place in the presence of a third party, Appellant could not remember. Mr. DeJonge was concerned about Appellant's inability to accept

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any responsibility in his violation of department expectations and policy directives. Mr. DeJonge concluded that Appellant was not credible.

2.24 Appellant was also unable to provide Mr. DeJonge with any convincing reasons as to why Ms. Adams would fabricate her statements. Mr. DeJonge found Ms. Adams to be more credible with vivid and consistent recollection of events.

2.25 Mr. DeJonge concluded that misconduct had occurred, and he could not trust Appellant to function as a supervisor. Mr. DeJonge considered termination of Appellant. However, Mr. DeJonge decided upon demotion since Appellant had not engaged in previous incidents of this nature.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant violated the trust of the Department of Corrections by harassing the very person he was charged to protect. Respondent asserts that Ms. Adams was vulnerable when she was transferred to Appellant's supervision, and Appellant took advantage of that vulnerability. Respondent states that Appellant engaged in an almost "predatory pattern" by making inappropriate sexual and personal comments to Ms. Adams and giving her a series of personal notes and gifts. Respondent argues that Appellant clearly did not treat Ms. Adams with dignity and respect. Respondent asserts that Appellant ignored his training, the Department of Corrections policies, and his responsibilities as a supervisor by his inappropriate workplace behavior. Respondent states that the Department of Corrections has the right to expect its supervisors, and most importantly its ethics instructors, to conduct themselves in a professional manner and serve as role models for other correctional officers. Respondent states that Ms. Adams'

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version of the events is credible and consistent. Respondent asserts that Appellant's demotion was more than justified and requests that the Board affirm that decision.

3.2 Appellant denies that he engaged in any inappropriate behavior towards Ms. Adams. Appellant argues that he has had a spotless employment record with the Department of Corrections since 1990. Appellant asserts that he has a history of excellent performance evaluations. Appellant states that he tried to assist Ms. Adams by using his prior experience as a peer counselor to boost her morale and self esteem as requested by Lieutenant Niles. Appellant admits giving Ms. Adams the flight wings for good luck, however, she misunderstood and exaggerated his intentions. Appellant also admits he gave her the two hand-written notes and the typed memo dated May 12 2001, which were innocuous and did not constitute sexual harassment. Appellant asserts that Ms. Adams fabricated the rest of the allegations, and there are no witnesses or evidence to support her allegations. Appellant states that Ms. Adams has a history of making complaints against co-workers and has a tort claim lawsuit against the State of Washington, which is her motive for not telling the truth.

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

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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 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). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

4.5 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. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.6 Respondent has met its burden of proving that Appellant engaged in behavior of a sexual/romantic nature, which was unwelcome and personally offensive to Ms. Adams. Appellant's misconduct undermined the department's policy against sexual harassment and interfered with the department's ability to ensure that its employees were protected from sexual overtones and demeaning comments, actions, and innuendoes in the workplace.

4.7 Respondent has proven by a preponderance of the evidence that Appellant neglected his duty as a supervisor to treat Ms. Adams with dignity and respect, and to provide a work environment that was free of unwelcome and inappropriate sexual and demeaning behavior. Respondent has proven that Appellant's misconduct constituted gross misconduct and a willful violation of the department's sexual harassment policy.

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

4.9 The evidence supports the action taken by the department, and the disciplinary sanction of demotion to a non-supervisory position was appropriate under the circumstances presented here. We conclude that the sanction of demotion was appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Richard Spence is denied.

DATED this _____ day of _____, 2003.

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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