BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

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| JOHN F. LINIGER,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF CORRECTIONS,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. DISM-98-0012<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, HOWARD N. JORGENSON, Chair, and WALTER T. HUBBARD, Member. The hearing was held in the conference room at the Department of Social and Health Services Community Services Office in Pasco, Washington, on December 29 and 30, 1998.

1.2 **Appearances.** Appellant John F. Liniger was present and was represented by Mark A. Anderson, Attorney at Law, Teamsters Local No. 313. Respondent Department of Corrections was represented by Elizabeth Van Moppes, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for Appellant allegedly making unwelcome and personally offensive sexual advances toward three female co-workers.

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); Skaalheim v. Dep't of Social & Health Services,

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PAB No. D93-053 (1994); Jackson v. Dept. of Social and Health Services, PAB No. D94-172 (1996); Schonauer v. DCR Entertainment, 79 Wn. App. 808 (1995); Chung v. University of Washington, PAB No. D94-079 (1995)(citing Ellison v. Brady, 924 F.2d 872,880 (9th Cir., 1991).

## II. MOTIONS

2.1 At the outset of the hearing, the Board heard arguments on Respondent's Motion in Limine. Respondent moved to exclude exhibits, testimony and evidentiary matters regarding instances of alleged conduct that attacked the credibility of witnesses.

2.2 In summary, Respondent alleged that Appellant should not be allowed to present reputation evidence attacking witnesses credibility. Respondent asserted that the rules of evidence and state case law supported the motion.

2.3 In summary, Appellant argued that the appeal was all about credibility and that because credibility was at issue, he should be allowed to present all relevant evidence.

2.4 The Board considered the arguments of the parties and denied Respondent's motion stating that the Board would rule on objections when and if the information was offered.

## III. FINDINGS OF FACT

3.1 Appellant John F. Liniger was a Correctional Officer (CO) 2 and a permanent employee of Respondent Department of Corrections (DOC) at Coyote Ridge Corrections Center in Connell, Washington. 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 March 16, 1998.

3.2 By letter dated March 5, 1998, Appellant was given official notification of his suspension from March 6, 1998 to March 20, 1998, followed by his immediate dismissal, effective March 21, 1998, for neglect of duty, gross misconduct, and willful violation of the published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant made unwelcome and personally offensive sexual advances toward three female co-workers including forcefully kissing a co-worker, touching another co-worker's breasts and buttocks and making inappropriate statements to yet another co-worker. Respondent alleged that Appellant's actions created an inappropriate and hostile working environment. (Exh. R-1).

3.3 Coyote Ridge Correctional Center is considered a small facility and a close knit community. Gossip among employees is common. In addition, many of the employees at Coyote Ridge are related to each other and/or are friends outside of the facility. At Coyote Ridge, as well as other correctional facilities, following the chain of command is important.

3.4 Respondent has policies which prohibit sexual harassment and discrimination. In addition, Respondent's Employee Handbook sets out the department's expectations that employees will treat fellow staff with dignity and respect. Appellant was aware of the department's policies and expectations. On April 27, 1992, he acknowledged that he understood his responsibility to follow DOC policy directives, and on September 27, 1993, he acknowledged receipt of the employee handbook. (Exhs. R-1, Atts. 6 and 7).

3.5 Appellant began his employment at Coyote Ridge in April 1992. It is unrefuted that Appellant was a good correctional officer who knew and followed appropriate correctional procedures. While Appellant was considered a good officer, some of his co-workers perceived him as intimidating and they feared retaliation from him. Among his co-workers, Appellant was known

for "clowning around," being vindictive toward people who disagreed with him, and making bets, including making bets for kisses from female co-workers. Appellant's employment history at Coyote Ridge includes informal and formal disciplinary actions for not adhering to instructions to stay home, for cutting the hair of a fellow staff person without permission, for spraying "fart spray" around staff, for inappropriate interactions with staff, and for making inappropriate comments over a unit intercom system.

3.6 As a Correctional Officer 2, Appellant's duties included working with and training intermittent correctional officers. Appellant was assigned to the second shift. Sheila Riches and Jessica Ayers worked with Appellant when they were intermittent correctional officers. When they were intermittent employees, both Ms. Riches and Ms. Ayers hoped to become permanent correctional officers at Coyote Ridge.

**Allegations of Sheila Riches:**

3.7 Beginning in August 1996, Appellant worked with Ms. Riches. Ms. Riches engaged in verbal horseplay with Appellant. He would comment to her about being her "buddy" and would ask her for kisses. In addition, he would make bets with her that included payoffs of espressos, lunch, pop, and kisses. As time went on, Appellant became more insistent that it was acceptable for "buddies" to kiss and he continually asked Ms. Riches for kisses. On one occasion when Ms. Riches' payoff on a lost bet was a kiss, she gave Appellant a peck on the cheek. However, Appellant was not happy with the peck and he grabbed Ms. Riches and forcefully kissed her. Ms. Riches was reluctant to report Appellant's inappropriate behavior because she did not want to upset Appellant. She was an intermittent employee and feared she would lose her job if she reported Appellant's actions.

3.8 Ms. Riches discussed Appellant's actions with CO Joseph Ostrem. CO Ostrem advised Ms. Riches to report Appellant's actions, but she felt that she could deal with Appellant on her own.

3.9 It is unrefuted that Ms. Riches and Appellant had disagreements. They disagreed about overtime assignments. Although Appellant was not responsible for assigning overtime, Ms. Riches felt that Appellant "played games" with the overtime assignments. In addition. they had a disagreement over whether Ms. Riches had ordered an area secured for the arrival of a "chain bus." Ms. Riches believed that this disagreement was another example of Appellant's game playing.

**Allegations of Jessica Ayers:**

3.10 When Jessica Ayers and Appellant first began working together, Appellant was helpful and friendly. As time passed, Appellant began asking Ms. Ayers for kisses because they were "buddies." Ms. Ayers treated Appellant's requests like jokes. On one occasion when she was accompanying Appellant during a drive of the perimeter of the facility, he stopped the vehicle and told her he was not leaving until she gave him a kiss. She kissed his cheek. On another occasion when Ms. Ayers accompanied Appellant during a drive of the perimeter, he again stopped the vehicle and asked her for a kiss. Ms. Ayers said no, got out of the vehicle, and walked back to the institution. In addition, when Ms. Ayers was in the "mud room," Appellant would walk up behind her and grab her breasts and buttocks. Ms. Ayers was reluctant to report Appellant's actions because she was an intermittent employee and she feared that reporting Appellant would have a negative impact on her chance of getting hired as a permanent employee.

3.11 After working with Appellant on second shift, Ms. Ayers was assigned to work the third shift in the Camas unit. One time, Ms. Riches worked overtime on the third shift with Ms. Ayers. Ms. Ayers told Ms. Riches that she was upset with Appellant and described Appellant's conduct

towards her. Ms. Riches felt that Appellant was engaging in the same type of conduct with Ms. Ayers as he had been engaging in with her. Ms. Ayers told Ms. Riches not to tell anyone about their conversation. Since Appellant worked second shift and Ms. Ayers now worked third shift, she felt that she had distanced herself from Appellant and that he would no longer be "in her face."

3.12 Ms. Riches told CO Ostrem about her conversation with Ms. Ayers. CO Ostrem again told Ms. Riches that she should report Appellant's actions. Ms. Riches wanted to think about whether to report Appellant. In the meantime, CO Ostrem reported what Ms. Riches had told him to Correctional Lieutenant Mike Obenland.

3.13 Lt. Obenland contacted Correctional Captain Rick Karten. When the allegations were brought to Superintendent Anne Fiala's attention, she asked Capt. Karten and Correctional Program Manager Pat Gorman to talk to staff and find out what was going on. When they reported back to her that it appeared sexual harassment may have occurred, Superintendent Fiala directed Capt. Karten to initiate an Employee Conduct Report (ECR) (Exh. R-1, Att. 1) and assigned Ms. Gorman to conduct the ECR investigation. Capt. Karten assisted Ms. Gorman with the investigation.

**Allegations of Tracy Christ:**

3.14 CO Harvey Christ and Appellant were friends and co-workers. Appellant was CO Christ's best man at his wedding to Tracy. When Tracy Christ and Appellant began working together, they were friends but then Appellant began asking her for hugs and kisses. Appellant's comments to Ms. Christ became more personal and he began making comments such as "do you taste as good as you smell," and "you have gorgeous lips, can I taste them." Ms. Christ distanced herself from Appellant but she did not report his conduct. The investigation into the allegations made by Ms. Riches and Ms. Ayers was a topic of conversations among employees at Coyote Ridge. Because Appellant had

engaged in similar inappropriate behavior with her, Ms. Christ felt that she had to come forward and report Appellant's conduct. Ms. Christ testified that she could not have lived with herself if she had not.

3.15 Based on Ms. Christ's allegations, a second ECR was initiated by Lt. Obenland. (Exh. R-1, Att. 2).

3.16 Investigations were conducted on both ECRs and as a result, Superintendent Fiala determined that misconduct had occurred. Throughout the process, Appellant raised concerns about the investigation and provided Superintendent Fiala with numerous written documents containing his concerns and responses to the allegations. Superintendent Fiala was new to Coyote Ridge and she took Appellant's concerns seriously. As a result, in addition to her meetings with Appellant, she personally interviewed Ms. Riches, Ms. Ayers, Ms. Christ and CO Ostrem. After considering all the information available, including Appellant's responses, the results of the ECR investigations, her personal interviews with staff, and Appellant's employment history, Superintendent Fiala determined that Appellant's behavior could not be tolerated and dismissal was appropriate.

3.17 Appellant denied the allegations made by Ms. Riches, Ms. Ayers and Ms. Christ and advanced various theories for why he thought they made the allegations. However, testimony and exhibits presented during the hearing established that while Ms. Riches and Ms. Ayers did not have unblemished reputations among their co-workers, their testimony regarding Appellant's conduct was consistent and we find them credible. Ms. Christ was willing to risk her and her husband's friendship with Appellant by coming forward and reporting Appellant's conduct toward her. Ms. Christ had nothing to gain by coming forward. We find Ms. Christ's testimony credible, and in light of the similarities of the allegations, her testimony further supports the credibility of Ms.

Riches and Ms. Ayers. On the other hand, the Board does not find Appellant credible. For instance, one of the letters of support that Appellant provided during the investigation is clearly fraudulent. The document was allegedly composed by a former employee who is now deceased. The signature on the document was transposed from another document that the former employee had signed. Appellant did not challenge or provided an explanation for the fraudulent signature.

## IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that even though there were no witnesses to Appellant's conduct, the credible testimony provided by three separate women proves that Appellant engaged in inappropriate conduct that created a hostile work environment. Respondent argues that the investigation was thorough and the process was fair and that Appellant was given every opportunity to provide information to counter the allegations. However, rather than address the allegations, Respondent contends that Appellant continually attempted to deflect the blame and instead attempted to slander the victims of his harassment. Respondent further contends that Appellant was aware of the DOC policy and guidelines prohibiting sexual harassment and he was aware of the type of actions that constitute sexual harassment. Respondent asserts that the DOC sexual harassment policy provides guidance for reporting allegations of sexual harassment but does not require that allegations be reported to the victim's supervisor. Respondent asserts that the victims properly reported Appellant's misconduct and the investigation confirmed that Appellant had engaged in a continued pattern of intimidation and inappropriate, unprofessional behavior. Respondent argues that based on the egregious nature of Appellant's behavior toward Ms. Riches, Ms. Ayers and Ms. Christ and on his past history of disciplinary and corrective actions, dismissal was appropriate.

4.2 Appellant denies the allegations made by Ms. Riches, Ms. Ayers and Ms. Christ and argues that it is difficult to prove that something did not happen. Appellant asserts that Ms. Riches and Ms. Ayers both have reputations for untruthfulness and that they came forward to gain the favor of management and secure permanent employment with Respondent. Appellant further asserts that Ms. Christ came forward in an effort to protect her husband's employment at Coyote Ridge. Appellant contends that someone would have observed the conduct if it had occurred with the frequency reported by the alleged victims. Because no one observed Appellant interacting inappropriately with the alleged victims, Appellant asserts that the allegations are unsubstantiated and that the women are not credible. Appellant further asserts he was a leader at Coyote Ridge who had a reputation for standing up for what he believed was right and for following procedures, but that the alleged victims failed to comply with the procedures in the DOC policy for reporting incidents of alleged sexual harassment. Furthermore, Appellant asserts that the investigation process was suspect because those who worked most closely with him were not interviewed. In addition, Appellant asserts that management perceived him to be a troublemaker because he raised issues and filed grievances regarding overtime assignments. Therefore, Appellant asserts that management was "out to get him." Appellant contends that in this instance, as previously, management engaged in a "witch hunt." Appellant contends that no misconduct occurred, his dismissal should be overturned and he should be reinstated as a CO 2. Appellant further contends that even if the misconduct had occurred, dismissal would be too severe.

## V. CONCLUSIONS OF LAW

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

5.2 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).

5.3 The Board must carefully weigh the credibility of witnesses in reaching its conclusions. Ms. Riches, Ms. Ayers and Ms. Christ provided consistent, credible testimony about the incidents. Appellant has provided no compelling reason for them to fabricate these incidents. Furthermore, Ms. Christ had much to lose by bringing forward her allegations of Appellant's misconduct. In addition, the three women independently raised concerns about Appellant's behavior. Ms. Riches told CO Ostrem about Appellant's behavior toward her, Ms. Ayers independently told Ms. Riches about Appellant's behavior toward her, and after hearing about the investigation, Ms. Christ independently wrote a memo to Lt. Obenland about Appellant's behavior toward her. Appellant has provided no credible, persuasive evidence that would lead the Board to doubt the victims' testimony, and furthermore, he has submitted a fraudulent document in an attempt to support his innocence.

5.4 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).

5.5 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).

5.6 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).

5.7 Respondent has met its burden of proof that Appellant neglected his duty by engaging in a pattern of behavior that included making unwelcome and offensive sexual advances toward three female co-workers. Appellant's behavior created a hostile work environment. Appellant's actions were flagrant and adversely affected Ms. Riches', Ms. Ayers' and Ms. Christ's ability to work with Appellant and to carry out the functions of their positions. In turn, this adversely impacted the agency. Furthermore, Appellant was aware of the agency policy and guidelines and he was aware of the agency's expectation for professional behavior by correctional officers. Yet, he knowingly and repeatedly engaged in a pattern of inappropriate behavior of a sexual nature in violation of agency policy, guidelines and expectations.

5.8 There is no legal requirement that a victim of sexual harassment complain to the offender or report the harassment to his/her supervisor or employer. In this case, the DOC policy provides guidelines for reporting sexual harassment, but this guideline is not a requirement and failure to follow the guideline does not negate Appellant's actions.

5.9 The Board has discussed the elements of sexual discrimination/harassment in detail in the past. See e.g., Jackson v. Dept. of Social and Health Services, PAB No. D94-172 (1996).

5.10 Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. Schonauer v. DCR Entertainment, 79 Wn. App. 808 (1995). Conduct may constitute unlawful sexual harassment even when well-intentioned or when harassers do not realize that their conduct creates a hostile working environment. Chung v. University of Washington, PAB No. D94-079 (1995)(citing Ellison v. Brady, 924 F.2d 872,880 (9th Cir., 1991). In this case, Appellant's behavior was undesirable and offensive and created a hostile working environment for Ms. Riches, Ms. Ayers and Ms. Christ.

5.11 Respondent conducted thorough, comprehensive investigations of the allegations and after giving careful consideration to all the information provided, including the information provided and the concerns raised by Appellant, Superintendent Fiala appropriately dismissed Appellant. Under the facts and circumstances of this case, we concur with the sanction of dismissal and conclude that Appellant engaged in an egregious pattern of inappropriate behavior that created a hostile work environment. Respondent has proven that the discipline sanction of dismissal should be upheld, and the appeal should be denied

## VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of John F. Liniger is denied

DATED this _____ day of _____, 1999.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Howard N. Jorgenson, Chair

_____
Walter T. Hubbard, Member

NOTE: The Board is troubled by the fear and reluctance to testify exhibited by witnesses for both Respondent and Appellant. The Board encourages Respondent to ensure that the

employees who testified before the Board are not subject to retaliation as a result of their testimony or participation in this process.

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