BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

SAM WOODS, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. RED-99-0054 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, GERALD L. MORGEN, Vice Chair, and LEANA D. LAMB, Member. The hearing was held at the Monroe Correctional Complex, Superintendent's Conference Room, Monroe, Washington, on September 22, 2000 and October 26, 2000. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Sam Woods was present and was represented by Jody Phillips, Business Agent for Teamsters Local 313. Respondent Department of Corrections was represented by Lawrence W. Paulsen, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a three-month reduction in salary for neglect of duty, insubordination, gross misconduct and willful violation of employing agency or department of personnel rules and regulations. Respondent alleges that Appellant 1) inappropriately counseled an inmate after being instructed not to do so; 2) allowed segregated and non-segregated inmates to

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mix in the same dayroom contrary to the institution's policy and practice; and 3) failed to follow his supervisor's directive to infract an 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); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Sam Woods is a Correctional Officer 2 and permanent employee for Respondent Department of Corrections at the Monroe Correctional Center. 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 April 16, 1999.

2.2 By letter dated April 1, 1999, Kenneth DuCharme, Superintendent, informed Appellant of his three-month reduction in salary effective April 17, 1999 through July 16, 1999. Mr. DuCharme charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of employing agency or department of personnel rules and regulations. Mr. DuCharme specifically alleged that Appellant 1) inappropriately counseled an inmate after being instructed not to do so, 2) allowed segregated and non-segregated inmates to mix in the same day room, and 3) failed to infract an inmate after being instructed to do so by his supervisor.

2.3 Appellant began his employment with the Department of Corrections (DOC) in 1990. Appellant's employment history with DOC indicates that by letter dated January 28, 1998, Appellant received a ten-percent reduction in salary for six months for bringing a pistol onto institutional grounds; failing to review

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entries in a unit log book; and for removing properly applied ambulatory restraints on inmates and then improperly reapplying the restraints. Appellant received a five-percent, three-month reduction in salary by letter dated January 15, 1993 for giving the appearance of sleeping while assigned to a suicide watch.

Allegation #1- inappropriate counseling of an inmate

2.4 At the time of the incidents, Appellant worked on A unit which houses mentally ill and violent inmates. Elaine Herzog, Correctional Mental Health Unit Supervisor, began to supervise Appellant in August 1996. Ms. Herzog had observed Appellant spending an inordinate amount of time with inmates. Ms. Herzog became concerned with Appellant's behavior when other correctional officers brought forward their concerns that Appellant was neglecting his correctional duties by spending long periods of times with inmates. Ms. Herzog spoke to Appellant on several occasions and advised him that it was not appropriate to have extended conversations with inmates, especially conversations during which he provided inmates with counseling. Ms. Herzog directed Appellant to guide inmates to the proper resources and to provide inmates with remedial correction rather than counseling them. Ms. Herzog most recently counseled Appellant regarding this subject in January 1998. Appellant admits that Ms. Herzog verbally instructed him not to counsel or spend an inordinate amount of time with the inmates

2.5 Correctional officers who witness or become aware of inmate misconduct can correct inappropriate behavior by making onsite adjustments. An onsite adjustment can consist of a verbal corrective counseling, warning or reprimand. Practice on A unit also included taking inmates into offices to provide them with verbal corrective counseling. Most on-site adjustments take an average of 3 to 5 minutes and can take as long 15 minutes, however, they rarely take 30 minutes.

2.6 On October 23, 1998, Officer Troy Bales observed Appellant in an office with an inmate for approximately 30 minutes.

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2.7 Appellant offered no testimony or evidence to controvert Mr. Bales' testimony and only asserts that he recalls taking inmate D. into an office because the inmate was highly agitated and he wanted to remove him from the area in order to deescalate the situation. The Board finds that it was more likely that not that Appellant spent 30 minutes in an office with an inmate, which was contrary to Ms. Herzog's directive that he limit his conversations with inmates. However, there is no evidence regarding the conversation which occurred between Appellant and the inmate or that Appellant was counseling the inmate.

Allegation #2 - allowing segregated inmates to mix with general population inmates

2.8 Prior to September 1998, segregated and general population inmates were housed together in all units within the institution. Segregated inmates are in disciplinary or intensive management status and are removed from the general prison population. Segregated inmates may also be in some form of restraints, such as wrist or leg restraints. In mid-September 1998, the units were restructured and all inmates in segregated status were placed in A unit. However, due to space restrictions, many general population inmates still remained in A unit. Respondent houses segregated and general population inmates on separate sides of A unit.

2.9 Ms. Herzog informed correctional staff through meetings that mixing of segregated and non-segregated inmates was prohibited. The only exception to this practice occurred when general population inmates retrieved supplies from the cleaning supply room which was located in the section of A-unit where the segregated inmates are housed. This limited contact occurs under the supervision of a correctional officer and is brief in duration.

2.10 In making a determination of the facts of this incident, we have weighed the testimony of Appellant, Ms. Herzog, Officer Bales and that of Eric Huffman, the Corrections Mental Health Officer who reported the incident. Appellant disputes the allegation that he allowed both the segregated and non-segregated inmates to enter the dayroom to watch television, and he asserts that the control booth officer allowed the mix of

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inmates to enter the dayroom. Appellant also asserts that he informed Ms. Herzog that he would have to use both segregated and non-segregated inmates to clean the silos and that she gave him permission to have the mixed inmates clean together.

2.11 However, Ms. Herzog disputes Appellant's testimony and she credibly testified that she did not give Appellant permission to have both segregated and general population inmates on the same work crew. Furthermore, Officer Bales credibly testified that Appellant was responsible for allowing the mixed inmates to watch television in the same day room. We find no compelling reasons for Mr. Huffman and Officer Bales to fabricate the events and we find their testimony credible and believable. Furthermore, Appellant's assertion that Ms. Herzog gave him permission to use both types of inmates to clean the silo is not credible when considering Ms. Herzog's clear direction to correctional staff that segregated inmates were not to mix with general population inmates. We do not believe Appellant's assertion that Ms. Herzog would give him permission to take actions contrary to this directive. Based on the credible evidence and testimony presented, the Board finds that the following occurred.

2.12 On October 25, Appellant assigned eight inmates to clean two silos. The grouping of inmates included both segregated and general population inmates. Appellant authorized segregated and non-segregated inmates to watch television in the same day room. Appellant was aware that segregated inmates were not allowed into the television dayroom when general population inmates were there.

2.13 Mr. Huffman was in the control booth when he noticed that both segregated and non-segregated inmates were in the dayroom watching television together. Mr. Huffman expressed his surprise that the inmates were mixed, and he commented, "we're not supposed to be doing this." The control booth officer responded, "that's Sam's thing."

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2.14 When Appellant entered the control booth, Mr. Huffman asked him what was going on. Appellant stated if it was okay for the inmates to clean together, why couldn't they watch television together. Appellant subsequently removed the inmates from the dayroom.

Allegation #3- failure to follow a supervisory directive

2.15 On October 29, 1998, Appellant made an entry into the duty log that he had overheard a conversation between Inmates J and F who were asking Inmate B to pass items to them. Appellant wrote that he had fired inmate B from his job because he told the inmates to go ahead and throw the items. After Ms. Herzog reviewed the log, she directed Appellant to initiate a serious infraction against Inmate B. Appellant disagreed with Ms. Herzog's instruction to initiate an infraction because he had already fired the inmate, which he considered an on-site adjustment. Appellant did not initiate the infraction despite a lawful directive from his superior.

2.16 Respondent has adopted Policy 320.200, Administrative Segregation, which requires that segregated offenders be segregated from general population offenders.

2.17 Carol Grandmontagne, Associate Superintendent, conducted an investigation into Appellant's alleged misconduct. Ms. Grandmontagne interviewed numerous employees and reviewed a written response from Appellant. In addition, Ms. Grandmontagne met with Appellant and his union representative on December 12, 1998 and gave Appellant an opportunity present any new or additional information. On January 4, 1999, Ms. Grandmontagne issued her written determination which concluded that Appellant had committed misconduct when he counseled an inmate, allowed segregated and general population inmates to mix, and then failed to follow his supervisor's directive to infract an inmate. Her findings were forwarded to the superintendent to determine the level of discipline.

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2.18 Kenneth DuCharme, former Superintendent of the Monroe Correctional Complex, was Appellant's appointing authority when the disciplinary action was taken. Mr. DuCharme reviewed Ms. Grandmontagne's investigative report as well as Appellant's statement regarding the allegations, Appellant's employment record, and his prior disciplinary actions.

2.19 *Allegation #1.* Mr. DuCharme concluded that Appellant neglected his duties when he was in the in the office with an inmate for 30 minutes rather than being present on the unit floor performing his duties. Mr. DuCharme concluded that the time Appellant spent in the office gave the appearance that he was counseling the inmate. Mr. DuCharme also considered Appellant's actions to be insubordinate because Ms. Herzog clearly informed Appellant that it was not appropriate for him to spend long periods of times with inmates. He also felt that Appellant's actions rose to the level of gross misconduct because Appellant's behavior did not follow the expectations or mission of the institution.

2.20 *Allegation #2.* Mr. DuCharme concluded that Appellant neglected his duties, was insubordinate and violated policy when he allowed segregated and general population inmates to mix in the dayroom despite clear directives regarding the institution's practice and policy. Mr. DuCharme believed that Appellant understood that mixing was not to occur in the unit, but that he nonetheless allowed it to occur. Mr. DuCharme believed that Appellant's actions rose to level of gross misconduct because they did not comply with expectations or mission of the unit.

2.21 *Allegation #3.* In considering the final allegation of misconduct, Mr. DuCharme concluded that Appellant had a responsibility to follow a direct order from his superior to infract an inmate and that he neglected his duty, was insubordinate and violated policy when he failed to do so. Mr. DuCharme testified that if Appellant had any concerns with the directive, he could have expressed them through the appropriate channels or memorialized his concerns in writing rather than defying Ms. Herzog's order.

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2.22 Mr. DuCharme concluded that based on Appellant's found misconduct, a reduction in salary was the appropriate sanction.

2.23 Appellant asserts that he has been disciplined for retaliatory reasons because 1) he initiated a WISHA complaint against the institution, 2) because he is African American and 3) because he had too much influence over the inmates on A unit. However, after reviewing the evidence and testimony presented, we find no evidence that the discipline imposed by Respondent was retaliatory or discriminatory in nature. In fact, the testimony suggests that management considers Appellant a valued and experienced correctional officer who serves as a role model for others. Furthermore, the evidence establishes that the Respondent conducted a fair and objective investigation into allegations of Appellant's misconduct.

III. ARGUMENTS OF THE PARTIES

3.1 *Allegation #1*. Respondent contends that Appellant had a problem overstepping his boundaries as a correctional officer and spent an inordinate amount of time with inmates. Respondent argues that Appellant was in an office with an inmate for a half hour, well beyond what is acceptable. Respondent further contends that the testimony presented leads to a reasonable conclusion that Appellant was counseling an inmate while in the office with him for 30 minutes. Respondent argues that Appellant's behavior could create a security risks and creates a potential for inmates to manipulate correctional staff.

Allegation #2. Respondent argues that Ms. Herzog made it clear to all staff, including Appellant, that segregated inmates and general population inmates were no longer allowed to mix. Respondent argues that Appellant allowed segregated and non-segregated inmates to watch a football game together in the same day room despite his knowledge of the institution's policy and practice. Respondent also argues that even if, as Appellant contends, the booth officer authorized the inmates to enter the day room, Appellant was the senior officer and had a responsibility to enforce the policy and prevent that from occurring.

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Allegation #3. Respondent argues that Appellant had a duty to follow supervisory directives. Respondent contends that Appellant failed to follow Ms. Herzog's instruction to infract an inmate. Respondent argues that Appellant if disagreed with the directive, he still had a duty to comply with a supervisory order.

Finally, Respondent contends that it conducted a thorough and fair investigation. Respondent argues that Appellant's suggestion that this discipline was retaliatory for a WISHA violation Appellant reported is unfounded and that the individuals involved in the allegations were not aware of the WISHA complaint. Furthermore, Respondent contends that the discipline resulted from Appellant's founded misconduct and not because he is an African American or in an attempt to remove him from A-unit.

3.2 *Allegation #1*. Appellant asserts that counseling inmates on how to follow guidelines is a part of a correctional officer's duties, however, he denies that he was providing problem-solving when he met with inmates. Appellant asserts that it is has been a long-time practice to take inmates into offices to address their behavior, that 30 minutes is not overly long, and asserts that he did nothing inappropriate.

Allegation #2. Appellant denies that he authorized segregated and non-segregated inmates to watch television in the day room together. Appellant asserts the booth control officer had responsibility over the movement of inmates and that it was the booth control officer who allowed the mixed inmates to enter the day room.

Allegation #3. Appellant contends that he and Ms. Herzog were having a disagreement over whether the inmate had committed a major infraction and that Ms. Herzog's instruction to infract the inmate was incorrect. Appellant further contends Ms. Herzog did not tell him that she was giving him a direct order to infract the inmate.

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Appellant contends that Respondent orchestrated the events in order to remove him from A-unit. Appellant contends that Respondent believed he had too much influence with the inmates, that there were racial motives for initiating the allegations against him and that the charges were initiated in response to a WISHA complaint he filed. Appellant further asserts that that the investigation was unfair and biased.

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 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995).

4.5 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).

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

4.7 Respondent has met its burden of proving by a preponderance of the evidence that Appellant neglected his duty when he allowed segregated and general population offenders to enter the same day room together, when he was unavailable to perform his duties on the unit while in an office with an inmate for 30 minutes and when he failed to initiate an infraction against inmate. Appellant was insubordinate when he failed to follow his supervisor's instructions not to spend an excessive amount of time with inmates and when he failed to follow Ms. Herzog's lawful directive to initiate an infraction. Appellant also willfully violated the agency's policy which prohibits segregated and general population offenders to mix. Respondent has met its burden of proving that Appellant's actions rise to the level of gross misconduct because he was unable to perform the primary duty of his position, to ensure the safety of the institution, while he was distracted from the unit while engaging in a lengthy conversation in an office with an inmate. Furthermore, Appellant's failure to follow lawful supervisory directives undermined the institution's ability to ensure the safety of staff and offenders.

4.8 Although it is not appropriate to initiate discipline based on prior formal and informal disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

4.9 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

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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).

4.10 In considering the level of discipline, we conclude that a three-month reduction in salary is reasonable based the seriousness of Appellant's misconduct and on Appellant's prior history of misconduct. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Sam Woods is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Gerald L. Morgen, Vice Chair

_____
Leana D. Lamb, Member

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