BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

GARY CHARRON, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-01-0071 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 RENÉ EWING, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on April 11, 2001. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Gary Charron was not present but was represented by Rick Engelhart, Business Agent for Teamsters Local 117. Lawrence Paulson, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of an immediate suspension followed by dismissal for neglect of duty, insubordination, gross misconduct and willful violation of agency policies for Appellant's failure to report to work or call in his absences.

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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 was a Truck Driver 2 and permanent employee for Respondent Department of Corrections. 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 27, 2001.

2.2 By letter dated July 17, 2001, Howard E. Yarbrough, Program Administrator for Correctional Industries, informed Appellant of his immediate suspension without pay effective July 17 through July 31, 2001, followed by his dismissal, effective August 1, 2001. Mr. Yarbrough charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of agency policy, specifically alleging that Appellant failed to report to work or to notify his supervisor of his absences on March 23, 2001, and March 27 through April 6, 2001.

2.3 Appellant began his employment with the Department of Corrections, Division of Correctional Industries, in 1990. Appellant acknowledged his awareness of Respondent's policies, including Policy 830.150, which requires employees who are going to be absent from work to notify their supervisor prior to the absence as well as the reason for the absence.

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2.4 In October 2000, Appellant suffered an on-the-job injury. From October 2000 to March 6, 2001, Appellant was placed on a modified work duty due to his injury. Appellant temporarily reported to Sheila Pearson. During this time period, Appellant failed to call several absences prior to the start of his shift. On November 13, 2001, Appellant received a memo that reminded him of his responsibility to arrive to work on time, and if unable to do so, he was required to report his absence to his supervisor 30 minutes prior to his starting work time.

2.5 By memo dated January 6, 2001, Ms. Peterson provided Appellant with another memo that reminded him of his duty to call in at least 30 minutes prior to the start of his shift if he was unable to report to work for any reason. Ms. Peterson issued the memo to Appellant as a result of numerous occasions when he failed to comply with the earlier directive.

2.6 On March 1, 2001, Appellant's physician, Dr. Dirk Havlak, indicated that Appellant could return to his regular work assignment with some lifting restrictions. On March 6, Appellant and his union representative met with Appellant's supervisor, Terry Peterson, and other agency representatives to discuss expectations regarding Appellant's return to work. Appellant was directed to call his supervisor at least 30 minutes prior to the start of his shift if he was not going to report to work or report to work at his scheduled time. During March 2001, Appellant reported at work on a sporadic basis and he either called in late but failed to report to work, or he failed to call in absences.

2.7 On March 13, the department issued a memo to Correctional Industries employees, including Appellant, which directed them to arrive to work on time and to report any sick leave use at the beginning of the absence directly to Supervisors Terry Peterson or Jeff Martin.

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2.8 On March 21, 2001, Appellant left his supervisor, Mr. Peterson, a phone message in which he indicated that he was suffering from back pain and would not be to work "for a while, if at all, ever again, so I don't know what's going on with it, it just doesn't want to work and I'm in a lot of pain so I'll just take pain pills and wait for the doctor's office to open ..." On March 22, Mr. Peterson directed Appellant to keep him apprised of his medical status.

2.9 On March 23, 27, 28, 29, 30 and April 3, Appellant did not report to work nor did he call his supervisor or anyone else in the department to report his absences.

2.10 On March 28, 2001, Mr. Peterson initiated an Employee Conduct Report (ECR) as a result of Appellant's failure on March 23 to report for work and his failure to call in his absence. On April 3, 2001, Mr. Peterson made numerous attempts to contact Appellant, however, he was unsuccessful.

2.11 On April 5, 2001, Appellant faxed the Human Resources Office a response to the March 22 ECR and a written note from Dr. Havlak, dated March 23, which stated that Appellant "cannot work right now due to fear of disc problem. RTW [return to work] to be determined." Appellant had not previously provided the doctor's note to his supervisor. In his written response, Appellant indicated that he was unable to work due to the job injury of October 2000 and that he had told Mr. Peterson of his condition on March 22. Appellant also wrote that Mr. Peterson did not direct him to phone the warehouse every morning to report his status.

2.12 On April 9, 2001, Mr. Peterson initiated a second ECR for Appellant's failure to report to work and his failure to call in his absences on March 27, 28, 29, 30 and April 3. Appellant provided no response to this ECR.

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2.13 Appellant worked in a warehouse where orders for office furniture were collected and delivered. It was essential that Appellant call his absences in ahead of time so that delivery appointments and delivery of products could be appropriately scheduled. The timely delivery of products to customers was central to the department's mission and Appellant's absences and failure to timely report his absences had a negative impact on the department. Appellant's absences and his failure to call in required other drivers to cover his deliveries and/or resulted in the cancellation of deliveries. As a result, the workload of other staff doubled and created morale problems within the department.

2.14 Howard Yarbrough, Program Administrator for Correctional Industries, was Appellant's appointing authority. In determining whether Appellant engaged in misconduct, he reviewed the results of the ECR and investigative reports. In addition, Mr. Yarbrough reviewed Appellant's history with the department, which included prior issues addressing Appellant's failure to appear to work and his failure to notify his supervisor of his absences. Mr. Yarbrough scheduled a time to meet with Appellant prior to determining whether Appellant's actions constituted misconduct and to give Appellant an opportunity to present his versions of the events. However, Appellant did not appear at the conference.

2.15 Mr. Yarbrough ultimately concluded that Appellant engaged in misconduct when he failed to call in or to report for work. Mr. Yarbrough concluded that Appellant's failure to contact the department was abandonment of his position, a neglect of his duty and a violation of policy. Mr. Yarbrough felt that Appellant's failure to report to work was insubordination because Appellant's supervisor had counseled Appellant on numerous occasions regarding his absences and his responsibility to call in.

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2.16 Mr. Yarbrough consequently scheduled a pre-termination hearing to give Appellant another opportunity to respond to the charges and present mitigating circumstances, however, Appellant did not appear. Mr. Yarbrough concluded that termination was appropriate based on his review of Appellant's work record, Appellant's absences and failure to report them and his failure to modify his behavior regarding calling in absences.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the department made every reasonable effort to assist Appellant to return to work. Respondent asserts that Appellant was given repeated directives of his responsibility to call in all absences prior to the start of his work shift. Respondent asserts, however, that Appellant continued to fail to report to work and to call in and report his absences. Respondent recognizes that there were medical issues regarding Appellant, but asserts that Appellant clearly had a duty to keep his employer apprised of those issues. Respondent asserts that Appellant showed a lack of interest in working for the department and that Appellant's failure to report to work was a neglect of duty, insubordination, and willful disregard of agency policy.

3.2 Appellant presented no defense to the charges.

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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).

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).

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4.7 Respondent has met its burden of proof that Appellant's misconduct constituted a neglect of his duty. Appellant had a duty to communicate with his supervisor regarding his absences and to provide the department with any updates regarding his medical condition. Additionally, Respondent made numerous attempts to obtain this information from Appellant, but Appellant failed to respond or he responded in an untimely manner when he provided a medical note after his absences. Appellant failed to act in a manner consistent with his duties. Furthermore, Appellant's misconduct interfered with Correctional Industries' ability to meet customer needs on delivery of items and negatively impacted other employees who had to cover Appellant's deliveries. Therefore, Appellant's misconduct rises to the level of gross misconduct.

4.8 Respondent has met its burden of proof that Appellant's behavior constituted willful violation of published employing agency or department of personnel rules or regulations. Appellant was aware of the agency's rules and policies regarding leave requests, and his failure to properly report his absences violated DOC Policy Number 830.100.

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. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.10 Respondent has met its burden of proof that Appellant's misconduct warranted termination, and the appeal should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gary Charron is denied.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
René Ewing, Member

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