BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MARIE RISMOEN-THRESHER (LAVERTY), Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case Nos. RED 96-0089 & DISM 96-0020 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** These appeals came on for hearing before the Personnel Appeals Board, HOWARD N. JORGENSON, Chair; ROGER F. SANFORD, Vice Chair, and WALTER T. HUBBARD, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on July 29 and 30, 1998.

1.2 **Appearances.** Appellant Marie Rismoen-Thresher (Laverty) was present and was represented by Mark Lyon, Washington Public Employees Association General Counsel. Respondent Department of Corrections was represented by Elizabeth Van Moppes and Roosevelt Currie Jr., Assistant Attorneys General.

1.3 **Nature of Appeal.** These are appeals from two separate disciplinary sanctions: a reduction in salary and a suspension followed by immediate dismissal. Appellant's salary was reduced for neglect of duty, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations following two alleged instances of misconduct in which : (1) Appellant grabbed a child and (2) used inappropriate language toward children.

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Appellant was suspended followed by her immediate dismissal for three alleged instances of misconduct in which: (1) she directed profanity toward two coworkers; (2) intentionally missed the ferry boat to work; and (3) failed to call in and failed to report to work.

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, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992); Aquino v. University of Washington, PAB No. D93-163 (1995).

II. FINDINGS OF FACT

2.1 Appellant Marie Rismoen-Thresher (Laverty) was a Correctional Officer and permanent employee for Respondent Department of Corrections (DOC). 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 timely appeals with the Personnel Appeals Board. Her appeal of the reduction in salary, PAB Case Number RED 96-0020, was filed on May 22, 1996, and the appeal of her suspension followed by her immediate dismissal, PAB Case Number DISM 96-0089, was filed on December 6, 1996.

2.2 Appellant began her employment with DOC in August 1991. Appellant primarily met or exceeded normal requirements in most performance dimensions of her performance evaluations. (Exhs. A-5, A-17, A-23, and A-24). Appellant's performance evaluation for 1994-95 indicates that Appellant "has many positive qualities and the potential to develop into an excellent correctional officer and supervisor if she can overcome recent problems with use of profanity towards other staff while at work. . . . ." (Exh. A-5).

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2.3 Appellant received a letter of reprimand dated August 23, 1995, for making inappropriate remarks to a coworker. The letter notified Appellant that "future incidents of the same or of a similar nature will be considered insubordination and will result in appropriate corrective or disciplinary action, up to and including termination." (Exh. R-2, Att.8). Appellant received a letter of reprimand dated April 28, 1995 for inappropriate behavior which included horseplay and inappropriate use of hand cuffs. (Exh. R-2, Att. 9). Appellant received a "corrective counseling follow up" memo dated April 26, 1995, which addressed her efforts to improve her use of negative comments and language. (Exh. R-2, Att. 10). Appellant received a corrective counseling memorandum, dated April 5, 1995, which advised her that "you [need] to be aware of your language and its [e]ffect on others." The memo further advised Appellant that "you need to modify your language." (Exh. R-2, Att. 10).

2.4 The department's Employee Handbook requires employees to be treat each other with dignity and respect and requires employees to maintain high professional standards at all times. (Exh. R-1, Att. 4). Appellant was aware of the policies and handbook. (R1, Att. 3).

Reduction in Pay

2.5 By letter dated May 13, 1996, Appellant's pay was reduced, effective June 1, 1996 through November 30, 1996, for neglect of duty, gross misconduct, and willful violation of the published employing agency or department of personnel rules or regulations. Respondent charged Appellant with two incidents of misconduct.

Incident #1

2.6 McNeil Island has approximately 50 homes that are owned by DOC and rented to employees of the institution. Employees and family members going to or from the island utilize the institution's ferry boat. Credible testimony established that employees and island residents

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understood the practice that institutional employees were allowed to board and disembark before the children riding the ferry to and from school. Credible testimony also established that on or about January 1996, children of island residents were behaving in an unruly manner on the ferry, were zigzagging past people on the dock to and from the ferry boat, and were boarding and disembarking the ferry boat before correctional employees did.

2.7 Credible testimony established that the bus driver responsible for transporting the children from the island dock to their homes told them not to "dawdle" from the boat to the bus. The children interpreted this to mean "hurry" to the bus or they would be left behind. This worry on the part of the children precipitated some of their hurried behavior when disembarking the boat.

2.8 On January 16, 1996, Appellant was on the 3:25 p.m. ferry boat to the island. When the boat arrived at the McNeil Island dock, several children, including Matthew (Matt) Wilson, the son of a correctional officer, passed correctional employees as they were disembarking. As he passed Appellant on the landing, Appellant asked Matt for the name of his father. He did not respond. As Matt Wilson proceeded to pass Appellant, Appellant, without permission, grabbed him by his jacket. Taneisha Macklin, the daughter of a correctional officer, witnessed Appellant grabbing Matt. Appellant again asked for and eventually received the name of Matt's father. Appellant reported her concerns with Matt's behavior to his father.

Incident #2

2.9 On January 22, 1996, upon the ferry's arrival at McNeil Island, passengers were preparing to disembark when a number of children began to hurry towards a stairwell. Appellant extended her arm across the stairwell preventing the children from passing. Shaun Bottoms, the son of correctional employee, told Appellant that he needed to get off the boat in order to make it to his bus on time.

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2.10 Appellant and Shaun presented conflicting testimony about the exchange that took place and whether Appellant used the words "rat's ass" and "punk ass bitch." Appellant testified that Shaun was angry, rude and disrespectful and that he was "cussing" at her. She described his stance as threatening and challenging. Appellant denies using profanity but does admit that she may have used the term "rat's ass." Shaun's testimony that Appellant told him that she "didn't give a rat's ass" if he missed the boat was corroborated by Correctional Officer Mays and Correctional Sergeant David Flynn who overheard the exchange of words. The Board finds Shaun's testimony credible and that Appellant told him, "I don't give a rat's ass."

2.11 After disembarking, Appellant was walking behind Shaun, when he heard Appellant say, "that's right you punk-ass bitch." Shaun's testimony is corroborated by Taneisha Macklin, the daughter of a correctional officer who also resided on the island. Taneisha credibly testified that she heard Appellant call Shaun "a little bitchy-ass kid." In weighing the credibility of these witnesses we have considered the children's motive and find no reason or motive for them to fabricate their statements. Furthermore, the children's testimony was consistent with their previous statements.

Dismissal

2.12 By letter dated November 18, 1996, Appellant was immediately suspended, effective November 22, 1996, followed by dismissal, effective December 8, 1996, for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent charged Appellant with three incidents of misconduct.

Incident #1

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2.13 On May 3, 1996, Appellant was working the "officer's desk" in the institution's hospital. Correctional Officer (CO) Curt Taylor was escorting an inmate to the hospital. Although Appellant and CO Taylor presented conflicting testimony, we find that the credible testimony established that when he arrived at the hospital's salleport, CO Taylor was met by Appellant who asked him, "what the fuck are you doing?" CO Taylor explained to Appellant that he was escorting the inmate for his routine medication.

2.14 Shortly thereafter, CO Stephanie Fredericks arrived at the hospital to return a packet of medication. Because Appellant was busy completing paperwork, CO Taylor commented to Appellant that CO Fredericks was waiting for Appellant to let her enter through a locked gate. Both CO Taylor and CO Fredericks heard Appellant say, "the little bitch will have to wait." Appellant let CO Fredericks into the unit and CO Fredericks proceeded to take the packet of medication to the hospital ward.

2.15 The inmate escorted by CO Taylor was still in the area when Appellant made the comments to COs Taylor and Fredericks.

2.16 After the inmate was escorted to the ward to receive his medication, CO Taylor told Appellant that he did not appreciate her comments or the way she had talked to him in front of the inmate. Appellant and CO Taylor engaged in a heated conversation in which CO Taylor admittedly used the word "fuck." Appellant denies using any profanity during their verbal exchange and states that she only recalls "bits and pieces" of what happened and what was said. CO Taylor credibly testified that Appellant stated to him, "what the fuck are you doing."

2.17 CO Frederick was returning from the hospital ward heard Appellant say to CO Taylor "you want this" as she pointed to her crotch.

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2.18 We find the testimony of COs Taylor and Fredericks credible. CO Taylor's testimony that Appellant was using inappropriate language toward him was corroborated by CO Fredericks. Neither employee had reason or motive to fabricate the incidents, and their recounts of the events have been consistent.

Incident #2

2.19 On July 11, 1996, Appellant had a dental appointment at 9 a.m. Because of oral surgery performed that morning, Appellant was in pain and took a prescription strength pain medication. At approximately 2:50 p.m. Appellant called the institution and notified the lieutenant that she would report to work late. At approximately 3 p.m., Appellant was seen by the ferry boat captain, James Shinn, at the Steilacoom dock boarding the 3:25 p.m. boat that would have taken her to the institution to begin her regular shift on time. Prior to the boat departing, Appellant was seen getting off the boat. Appellant reported to work that day at the time she had notified the lieutenant that she would be there.

Incident #3

2.20 On July 25, 1996, Appellant's daughter went into labor. Appellant made several attempts throughout the day to call work and notify staff that she would not be reporting to work and that she would be at the hospital with her daughter. Appellant's calls to the institution were unsuccessful due to difficulties with the phone lines. Respondent logged Appellant as a "no call/no show." A first time "no call/no show" would not warrant formal disciplinary action.

2.21 Respondent does not dispute that problems with the phone lines to McNeil Island create occasional difficulties in getting calls through to the institution.

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2.22 Appellant had no prior history of attendance problems.

2.23 Belinda Stewart, Superintendent and Appellant's appointing authority, concluded that misconduct occurred in each of the incidents involving Appellant. Superintendent Stewart was concerned that despite attempts to counsel and modify Appellant's behavior, Appellant continued to exhibit a pattern of inappropriate and unprofessional conduct. Superintendent Stewart was especially concerned that Appellant, who felt the need to address the children's behavior on the ferry, took matters into her own hands rather than going through the appropriate chain of command. Superintendent Stewart concluded that dismissal was the appropriate sanction because of Appellant's flagrant disregard for the rules and regulations of the institution, her failure to get Appellant's attention by implementing a program of progressive discipline and because of her pattern of unprofessional and inappropriate conduct. She determined that the reduction in pay and the ultimate sanction of dismissal were warranted because of the totality of Appellant's actions.

III. ARGUMENTS OF THE PARTIES

3.1 ***Reduction in pay***: Respondent argues that Appellant behaved in an uncontrolled, aggressive and disrespectful manner, which escalated in her blocking the path of a child and then grabbing the child. Respondent argues that Appellant's behavior occurred on a state-owned ferry, that she was in her correctional officer uniform and that the actions occurred while she was on her way to work. Respondent maintains that Appellant had the duty to positively represent the institution. Respondent asserts that Appellant's remarks and language to the children were inappropriate and that despite repeated counseling and disciplinary action which addressed her inappropriate behavior, Appellant failed to respond appropriately. Respondent argues that it has met its burden of proof and the reduction in pay should be affirmed.

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***Dismissal*:** Respondent argues that Appellant directed profanity at two coworkers, intentionally missed the ferry boat, and failed to call in or report to work. Respondent argues that its attempts to apply corrective and disciplinary steps to help modify Appellant's behavior failed and that Appellant continued to create a negative work environment, was unable to control her temper, and failed to improve her attitude and behavior. Respondent argues that it has met its burden of proof beyond a preponderance of the evidence and asserts that the sanction of dismissal is warranted.

3.2 ***Reduction in pay****:* Appellant argues that the children riding the ferry to McNeil Island were behaving inappropriately and not following proper protocol for disembarkation. Appellant argues that after Matt Wilson brushed up in front of her she grabbed him by the fabric of his jacket's sleeve. Appellant denies making any inappropriate remarks to the children. Appellant asserts that she was not on duty when the incidents occurred and therefore her conduct was not work related.

Dismissal*:* Appellant argues that she did not use profanity toward COs Taylor and Fredericks and asserts that CO Taylor initiated the incident and directed profanity at her. Appellant argues that on July 11, she had a dental appointment and felt groggy, that she called into work late and that she reported to work at the time she had made arrangements to be there. Appellant further argues that on July 25, 1996, she attempted to call her workplace to advise staff that her daughter was in labor and that she would not be reporting to work. Appellant argues that difficulties with the island's phone lines prevented her from getting through. Appellant finally asserts her immediate suspension was not warranted.

IV. CONCLUSIONS OF LAW

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

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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 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).

4.5 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 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).

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4.7 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).

Reduction in Pay

Incidents 1 & 2

4.8 We conclude that Respondent has proven by a preponderance of the credible evidence that Appellant's behavior with the island children was inappropriate, unprofessional and unacceptable. Regardless of the children's behavior on the boat, Appellant did not have permission to touch Matt Wilson. Furthermore, Appellant remarks to Matt Wilson and Shaun Bottoms were inappropriate and disrespectful. Appellant conduct was unprofessional and she neglected her duty to positively represent the institution. While Appellant may have wanted to address the manner in which the children were behaving on the ferry, grabbing Matt Wilson was totally inappropriate and showed a lack of respect. Respondent provided sufficient evidence that Appellant's actions were a neglect of her duty, a willful violation of agency rules and regulations and that her action rose to the level of gross misconduct. In assessing the level of discipline here, we find that a reduction in pay is sufficient to prevent recurrence, to deter others from similar misconduct and to maintain the integrity of the program. Therefore, the disciplinary sanction of a reduction in pay should be affirmed.

Dismissal

Incident #1

4.9 Respondent has met its burden of proof that Appellant failed to treat CO Taylor and CO Fredericks with dignity and respect. Appellant's use of profanity had been addressed with her and she had been advised that failure to refrain from such behavior could lead to further disciplinary

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action. Furthermore, Appellant's comments and language toward COs Taylor and Fredericks were unwarranted, unprofessional and demeaning and her gestures toward CO Taylor were inappropriate. Furthermore, Appellant's conduct occurred while in the presence of an inmate, which affected the agency's ability to carry out its mission to redirect the behavior of adult felony offenders. Respondent provided sufficient evidence that Appellant's actions were a neglect of that duty, a willful violation of agency rules and regulations, and her actions rose to the level of gross misconduct.

Incidents 2 & 3

4.10 Respondent failed to meet its burden of proof that Appellant's actions on July 11, 1996 and July 26, 1996 constituted a neglect of her duty, gross misconduct or willful violation of agency rules and regulations. On July 11, Appellant complied with the agency's policy that she call in sick prior to her work shift. Appellant provided a reasonable explanation for why she went to the dock in time to catch the 3:25 ferry but decided not to do so. Furthermore, although she tried, Appellant was not able to reach the institution on July 25, 1996, to notify staff that she would not be in because of problems with the telephone lines to the institution. Further, testimony was presented that a first time "no call/no show" would not have warranted disciplinary action.

4.11 In light of Respondent's attempts to correct Appellant's previous behavior, including her use of profanity, the Board finds that the sanction of dismissal is warranted. Appellant received appropriate training and received guidance regarding her inappropriate behavior. Appellant was responsible for knowing and understanding the rules and expectations of the department. Appellant continued to behave contrary to the department's expectations. We find dismissal is sufficient to prevent recurrence, to deter others from similar misconduct and to maintain the integrity of the program. The seriousness and circumstances of the incidents involving Appellant's coworkers which occurred in the presence of an inmate warrants a severe disciplinary sanction. However,

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Respondent has failed to meet its burden of proof that Appellant's immediate suspension was required. Therefore, the disciplinary sanction of suspension is overturned and the dismissal should be affirmed.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Marie Rismoen-Thresher's appeal of her reduction in pay (PAB Case No. RED 96-0089) is denied and

IT IS FURTHER ORDERED that Marie Rismoen-Thresher's suspension followed by immediate dismissal (PAB Case No. DISM 96-0020) is modified and her suspension is overturned and her dismissal is affirmed.

DATED this _____ day of _____, 1998.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Howard N. Jorgenson, Chair

_____
Roger F. Sanford, Vice Chair

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Walter T. Hubbard, Member

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