BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DOUGLAS L. NOBLE, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	)	Case No. RED-99-0086 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; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held on October 17, 2000, in the Personnel Appeals Board hearing room in Olympia, Washington.

1.2 **Appearances.** Appellant Douglas Noble was present and represented himself *pro se*. Respondent Department of Corrections was represented by Lawrence W. Paulson, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of a reduction in salary for insubordination and gross misconduct. Respondent alleges that Appellant walked out of a corrective interview with his supervisor.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110 (1998); Goodman v. Boeing Co., 127 Wn.2d 408, P.2d 1265 (1995); West v. Dep't of Corrections, PAB No. DISM-97-

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481

0016 (1998); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Douglas L. Noble was a Classification Counselor 3 and permanent employee of Respondent Department of Corrections (DOC) at the Washington Corrections Center (WCC). 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 on December 16, 1999.

2.2 By letter dated November 23, 1999, James Blodgett, Superintendent of WCC, notified Appellant that effective December 16, 1999, his salary was being reduced for a period of three months. Mr. Blodgett alleged that Appellant was insubordinate and committed gross misconduct when he walked out of a corrective interview with his immediate supervisor.

2.3 On June 23, 1999, Appellant's supervisor, Samuel Cannon, informed him that he was going to conduct a corrective interview with him. Appellant requested that a shop steward be present during the meeting. Mr. Cannon rescheduled the meeting for June 24 to allow Appellant an opportunity to contact a shop steward.

2.4 Shop stewards are generally available on all shifts at WCC. Employees are not restricted from contacting and seeking the assistance of any of the WCC shop stewards. Appellant did not locate a shop steward before the June 24 meeting and he arrived for the meeting without a shop steward.

2.5 When Appellant arrived for the meeting, his supervisor was present as well as Lester Dickson, a human resource representative. Shortly after the meeting began, Appellant stood and indicated that he was leaving the meeting and that he had a medical problem. Mr. Cannon directed Appellant to stay and complete the interview. Instead, Appellant threw a piece of paper on Mr. Cannon's desk, then grabbed the paper before Mr. Cannon had an opportunity to review it, and left the office.

2.6 Mr. Cannon later found the paper in his "in-box." The paper was a note from Appellant's medical provider stating that Appellant was disabled for work beginning June 15, 1999, through July 6, 1999. Appellant had not produced the note prior to the June 24, 1999 meeting. Mr. Cannon was not aware that Appellant had medical concerns until the June 24, 1999 meeting.

2.7 On June 29, 1999, Mr. Cannon initiated an Employee Conduct Report (ECR). The ECR was investigated by Lieutenant Lonnie Earles. Lt. Earles forwarded his report to Mr. Blodgett. On September 1, 1999, Mr. Blodgett conducted an administrative hearing with Appellant. During the meeting Appellant admitted that he used poor judgment. Mr. Blodgett determined that misconduct had occurred.

2.8 Mr. Blodgett had previously sent Appellant for two separate fitness for duty independent medical examinations (IME) because of his concern about Appellant's behavior. Appellant's previous IMEs were on March 3, 1999 and July 23, 1999. The results of the IMEs were that Appellant had no limitations on his ability to work and that his "job difficulties were based on long-standing character style, NOT due to depression." (Exh. R-3). Appellant never requested accommodation and never provided any proof of a disability.

2.9 Appellant's employment history includes a September 1, 1998 letter of reprimand for acting contrary to management directives and creating a security risk for the institution, and a May 28, 1999 letter of reprimand for the use of profanity and unprofessional conduct. In addition, in June 1999, Appellant was given a three-day suspension for acting contrary to verbal and written directives and creating a security risk for the institution. Appellant's performance evaluations from July 1997 through July 1999 showed a continued pattern of deteriorating work performance.

2.10 Prior to determining the level of discipline, Mr. Blodgett reviewed the issues and considered Appellant's personnel history and the prior attempts to correct his pattern of misconduct. Mr. Blodgett determined that Appellant had sufficient time to obtain a shop steward prior to the corrective meeting, that there was no evidence he was in need of reasonable accommodation, and that he should be held accountable for his behavior. Mr. Blodgett concluded that Appellant failed to conduct himself in a professional and courteous manner, that he was insubordinate when he walked out of the meeting after being directed to stay, and that he exercised poor judgement when he failed to follow the direction of his medical provider when he reported to work on June 15, 1999. Mr. Blodgett decided that a reduction in salary was the appropriate level of discipline.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant should have stayed at the meeting and that he understood that it was not appropriate for him to walk out of a meeting with his supervisor. Respondent further argues that Appellant did not bring his alleged disability to management's attention and that there is no medical evidence that Appellant had a disability requiring accommodation. Respondent alleges that Appellant's difficulties were a personality issue, that his behavior was unprofessional and that he disregarded his supervisor's directive.

3.2 Appellant does not dispute that he engaged in the alleged misconduct. He argues that he was unable to locate a shop steward prior to the corrective meeting. He also argues that during the period of his misconduct, he was suffering from depression and sleep apnea, which attributed to his actions and constituted a disability. Appellant contends that disciplinary action is not warranted in light of his medical conditions.

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 In Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110 (1998), appellant Maxwell, a diabetic and manic depressive, asserted that the Board should excuse his admitted misconduct because it was caused by his medical condition. The Court of Appeals upheld the Board's ruling that without evidence that appellant Maxwell's condition caused his behavior, he could not show he was disciplined because of his condition or discriminated against because of his condition. The Court also stated that an employer's duty to accommodate does not arise "unless there is a need for accommodation." The court, quoting from Goodman v. Boeing Co., 127 Wn.2d 408, P.2d 1265 (1995), stated that "the employee, of course, retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications. . . . . Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and

shares information to achieve the best match between the employee's capabilities and available position."

4.4 In West v. Dep't of Corrections, PAB No. DISM-97-0016 (1998), the Board concluded that because appellant West did not make her employer aware of her need for accommodation until after her admitted misconduct was discovered, the employer was under no obligation to accommodate her disability at the time of her misconduct.

4.5 In this case, Appellant raises the issue of his alleged disability as a defense. Appellant did not request accommodation and no evidence exists to support his claim that he was disabled. Respondent did not fail to accommodate Appellant's condition.

4.6 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 and Health Services, PAB No. D94-025 (1995).

4.7 Respondent has met its burden of proving that Appellant's actions during the corrective interview with his supervisor constituted insubordination. Appellant had ample opportunity to contact a shop steward prior to the meeting. His failure to bring a shop steward to the meeting does not excuse his misconduct. Appellant was clearly insubordinate when he blatantly disregarded his supervisor's lawful directive.

4.8 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).

4.9 Respondent has failed to prove that Appellant's behavior rose to the level of gross misconduct. Respondent presented no evidence that Appellant's behavior had an adverse impact on WCC or the agency's ability to carry outs its functions.

4.10 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances including the seriousness and circumstances of the offense. 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 charge is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

4.11 Under the totality of the proven facts and circumstances in this case, including Appellant's history of misconduct of a similar nature, Respondent has proven that the disciplinary sanction is appropriate. The appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Douglas L. Noble is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Leana D. Lamb, Member

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481