BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ROBIN SCHULER, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	)	Case No. DISM-99-0036 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 GERALD L. MORGEN, Vice Chair. The hearing was held on April 21 and June 9, 2000, in the Superintendent's Conference Room at the Washington State Penitentiary in Walla Walla, Washington. LEANA D. LAMB, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Robin Schuler was present and was represented by Rene Erm II, Attorney at Law of Reese, Baffney, Schrag and Frol, P.S. Respondent Department of Corrections was represented by Robert Kosin and Lawrence W. Paulsen, Assistant Attorneys General.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, gross misconduct and willful violation of published agency policy. Respondent alleges that (1) in an act of horseplay or hazing, Appellant pulled down his pants and approached a co-worker and (2) Appellant reached toward another co-worker and grabbed the co-worker's penis through his pants.

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1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

II. FINDINGS OF FACT

2.1 Appellant Robin Schuler was a Correctional Officer (CO) 2 and permanent employee of Respondent Department of Corrections (DOC) at the Washington State Penitentiary (WSP). 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 July 19, 1999.

2.2 By letter dated July 6, 1999, John Lambert, Superintendent, informed Appellant of his dismissal effective July 21, 1999. Mr. Lambert alleged that on April 28, 1999, during an act of hazing or horseplay, Appellant pulled down his pants and most likely, his underwear and approached CO Brandon Clarke. In addition, Mr. Lambert alleged that during a shift change on or around April 25, 1999, Appellant reached out as if to touch CO Mark King's belt buckle, but instead, reached down and grabbed CO King's penis through his pants.

2.3 Appellant had been employed at WSP from June 1985 until January 1987 and again from June 1991 until his dismissal. Appellant had received no prior formal disciplinary action. Appellant was considered a senior officer and was responsible for being a role model to less senior staff and for training new staff. Appellant had received training regarding sexual harassment and was aware of the agency's policy prohibiting sexual harassment. In addition, Appellant was aware of the provision of the DOC Employee Handbook that requires employees to respect the dignity and individuality of others. The handbook also includes the expectation that employees will treat fellow staff with dignity and respect.

2.4 In the past, joking and horseplay were commonly used by employees at WSP to reduce stress. Management had taken steps to reduce the incidents of unprofessional and inappropriate behavior. In February 1999, Appellant's supervisor, Shift Sergeant Russell Williams, counseled Appellant about the expectation that he model appropriate and professional behavior.

Incident 1

2.5 Appellant admits that on April 28, 1999, while engaging in an act of horseplay, joking and camaraderie, he removed his duty belt, pulled down his pants and walked towards CO Clarke. CO Clarke was a probationary officer who had been on the job for less than three months. The incident occurred in the Unit 6 Sergeant's Office and was witnessed by CO Clarke, CO Gary Hilliard Jr., and CO Sheldon Weaver. In addition, CO Terry Grindstaff witnessed Appellant walking towards CO Clarke. The credible testimony establishes that Appellant did not expose his penis.

2.6 Later the same day, CO Hilliard told other staff that Appellant had dropped his pants and put his penis on Officer Clarke's arm. Appellant and CO Clarke were present when CO Hilliard told an embellished version of events that took place in the Unit 6 Sergeant's Office. Appellant admitted that he had made an "ass" of himself, but he did not deny his actions or indicate that any portion of CO Hilliard's story was false.

2.7 CO Clarke felt uncomfortable and embarrassed by Appellant's actions. CO Clarke was also embarrassed by CO Hilliard telling the embellished story. Appellant later apologized to CO Clarke and advised him to deny that the incident had occurred.

Incident 2

2.8 On or around April 25, 1999, Appellant was waiting to leave the institution at the end of his shift. Appellant was waiting outside of Master Control. CO King and CO Smith were also present.

CO King told Appellant that he could touch CO King's belt buckle. However, instead of touching the buckle, Appellant admits that he attempted to do a "cup check" and touched CO King's groin area. This incident was observed by CO Deresa Smith. Both CO King and CO Smith credibly described the "cup check" as an intentional, quick grab of Mr. King's penis through his pants. Mr. King later overheard Appellant describing the incident to other staff in the locker room. Mr. King was upset and offended by Appellant's actions.

2.9 Appellant later approached CO King and said he did not mean to offend him.

2.10 Employee Conduct Reports (ECRs) were initiated against Appellant for each incident. Investigator 3 Jim Hartford investigated the Clarke incident. Unit 6 Manager Al Walter investigated the King incident. The results of both investigations were forwarded to Superintendent Lambert.

2.11 Superintendent Lambert met with Appellant. Regarding the first incident, he felt that Appellant did not understand the seriousness of his inappropriate behavior. Regarding the second incident, he felt that Appellant viewed his actions as a practical joke. Mr. Lambert concluded that Appellant's actions in both incidents, went too far, humiliated COs Clarke and King, and could not be tolerated.

2.12 Superintendent Lambert determined that Appellant's actions were unwelcome, unwanted, unsolicited, inappropriate and inexcusable. Superintendent Lambert found no mitigating factors in the joking atmosphere in which these events occurred. Rather, Superintendent Lambert determined that Appellant behaved in an unprofessional manner, neglected his duty, violated published policy, engaged in inappropriate and unacceptable horseplay that interfered with WSP's interests, created a

liability for the agency, and detrimentally impacted the morale of the institution. Superintendent Lambert concluded that dismissal was the appropriate disciplinary sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that regardless of whether Appellant's actions were meant to be malicious, he humiliated two co-workers. Respondent contends that Appellant's actions were inappropriate, unprofessional, offensive, bizarre and juvenile. Respondent maintains that Appellant failed to fulfill his duty to model professional behavior and to be a role model for others. As a result, Respondent asserts that Appellant could no longer be trusted to deal with stress in an appropriate way. Respondent argues that the institution must provide a safe work place that is free from hostility and harassment and that it cannot tolerate behavior that creates an objectively offensive work environment. Respondent asserts that the investigations into these incidents were appropriate, that they were conducted by two different investigators and that they resulted in the same conclusion. Respondent maintains that Appellant's actions were intentional and in violation of agency policy, that he failed to treat CO Clarke and CO King with dignity and respect, that he created an offensive working environment for them, and that his behavior disrupted the work place. Therefore, Respondent contends that termination is appropriate.

3.2 Appellant admits that he did not treat CO Clarke and CO King with dignity and respect, that he knew that his actions were inappropriate, and that he deserves to be disciplined for his actions. However, Appellant argues that his actions were in response to on-the-job stress, were not illegal, were not done with malicious intent, and were merely a lack of judgment and a bad joke. Appellant contends that his actions did not humiliate CO Clarke, but rather asserts that CO Clarke was humiliated by CO Hilliard's embellished version of the incident. Appellant further contends that he did not grab CO King's penis but merely brushed his hand against the ridge of CO King's zipper. Appellant asserts that the ECR investigations were blatantly inappropriate and perhaps vindictive, that the results were not supported by the evidence, and that the conclusions are suspect. Appellant

maintains that while his conduct was inappropriate, in light of his exemplary career, termination is too severe.

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 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. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.6 Respondent has met its burden of proving that Appellant failed to model professional behavior and to treat his co-workers with dignity and respect. Furthermore, Respondent has established that Appellant was aware of agency policies yet acted contrary to the published expectations found in the policies. Appellant's actions were intentional, flagrant and egregious and such behavior cannot be tolerated in the work place. When viewed in their totality, Appellant's proven misconduct clearly warrants the most severe disciplinary action. Moreover, based on Appellant's admitted behavior alone, termination is warranted. No credible evidence was offered to mitigate the severity of the discipline in this case.

4.7 Respondent has met its burden of proving that under the totality of the proven facts and circumstances, Appellant neglected his duty, knowingly violated published agency policies, and his actions rose to the level of gross misconduct. Therefore, based on a preponderance of the credible evidence, the sanction of dismissal should be affirmed and the appeal of Robin Schuler should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Robin Schuler is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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