BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CYNDI WALTERS, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-03-0093 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Member. The hearing was held in the Personnel Appeals Board Hearing Room, 2828 Capitol Boulevard, Olympia, Washington, on September 9, 10, 15, 16, and October 4, 2004. GERALD L. MORGEN, Vice Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Cyndi Walters was present and was represented by David M. Rose of Minnick-Hayner, P.S. Valerie Petrie, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal. Respondent alleges Appellant failed to abide by the agency's policy regarding confidentiality when she inappropriately shared information with an employee outside of her departmental program.

II. FINDINGS OF FACT

2.1 Appellant, Dr. Cyndi Walters, was a permanent employee working in a Washington Management Service (WMS) Band 3 position as the Statewide Director of the Staff Resource Centers 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 a timely appeal with the Personnel Appeals Board on October 20, 2003.

2.2 In 1998 DOC appointed Appellant into a dual role as the Southeast Regional Counselor and the Statewide Director of the Staff Counseling program. As the staff counseling program evolved, Appellant had an instrumental role in developing program policies as well as writing the job description for her position.

2.3 The primary objective of the Staff Counseling program is to allow employees the opportunity to anonymously debrief after a critical or stressful incident with the assurance of confidentiality. The department believed that without the proper assurance of confidentiality, employees would be reluctant to participate in the program. Therefore, with Appellant's input, the department developed a policy to insure that attendance at counseling sessions and anything discussed in those sessions remained confidential. DOC Policy 870.800, Staff Counseling and Occupational Health Programs, reads in relevant part:

> II. All communication relating to staff counseling, intervention, and consulting services with the Staff Resource Center shall be confidential unless otherwise specified by law and/or department policy directive(s).

2.4 In 2001 Appellant began working full-time as the Statewide Director of the Staff Resource Center. Consequently, she stopped performing counseling duties to staff in the region but continued to counsel staff housed at DOC Headquarters in Olympia.

2.5 Appellant reported to Regional Administrator Marjorie Littrell until March 2003, when Assistant Deputy Secretary Lynne DeLano began supervising Appellant. Both Ms. Littrell and Ms. DeLano had discussions with Appellant regarding accountability issues and Appellant's tendency to use Policy 870.800 to justify not having to report her work activities to her supervisors. Appellant had the following history of corrective actions:

- On June 20, 2002, Appellant received a memo from Ms. Littrell as a follow-up to a Whistleblower Complaint investigated by the State Auditor's Office that found Appellant committed misconduct. In the memo, Ms. Littrell provided Appellant with a copy of the department's ethics policy and directed her to perform her duties in a professional manner that did not create the appearance of using her position for personal gain or using state resources for personal benefit.

- On September 30, 2002, Appellant received a memo of concern regarding issues specific to travel authorization and mileage reimbursement. Ms. Littrell's memo, in part, addressed Appellant's use of her personal vehicle instead of the available state vehicle state business travel. Ms. Littrell stated her expectation that Appellant provide a sufficient explanation for travel reimbursement, due to Appellant's previous refusal to provide such information by citing her belief it violated confidentiality laws.

- On May 30, 2003, Appellant received a letter of reprimand for failing to comply with her supervisor's directives to produce e-mails related to a public disclosure request she had known about for more than a year. Appellant's supervisor, Lynne DeLano, wrote that Appellant "asserted a confidentiality privilege on documents [Appellant could not] even identify." Ms. DeLano considered Appellant's actions to be "deliberately evasive and dishonest" and concluded Appellant's actions demonstrated a lack of integrity.

- On June 9, 2003, Appellant received a letter of expectations from Ms. DeLano in an effort to improve Appellant's communication, accountability, and credibility. Specifically, Ms. DeLano asked Appellant to provide her with an updated work schedule and calendar for accountability purposes. Ms. DeLano also addressed Appellant's numerous claims of protection for communications due to

confidentiality. Ms. DeLano reminded Appellant she was serving as the Statewide Director of the Staff Counseling Program and not a staff counselor. Ms. DeLano also noted that Appellant's credibility was at risk due to her inappropriate use of the confidentiality statutes.

- On August 22, 2003, Appellant received a letter of reprimand from Ms. DeLano for her refusal to respond to her supervisor's request for information concerning work activities. Ms. DeLano wrote as follows:

> . . . I have on several occasions requested additional details of your work activities in order to ensure accountability and performance, as well as to verify your claims for excessive hours of work. I have only requested the names of persons you see and never the content of your discussions. You have continued to deny my requests based on your claim that release of such information will violate confidentiality laws and undermine the Staff Resource Center program. You are seemingly unable to separate the Staff Resource Center program from your individual role and responsibilities as an employee of the Department of Corrections. . . .

2.6 By letter dated September 22, 2003, Assistant Deputy Director Anne Fiala notified Appellant of her dismissal, effective October 7, 2003. Respondent alleged Appellant neglected her duty and violated the department's confidentiality policy when she shared information regarding a crisis situation at DOC Headquarters following the publicized arrest of the Secretary of the Department's son. Specifically, Ms. Fiala alleged Appellant discussed the situation regarding Secretary Lehman with an office assistant lead in the Walla Walla Field Office, including making the comment that Mr. Lehman was "in hiding."

2.7 Appellant was in Olympia on agency business on or about February 6, 2003, when the news media reported the arrest of Secretary Lehman's son. Appellant believed the news to be a critical incident for DOC and volunteered to assist at Headquarters. Appellant briefly met with Mr. Lehman's Chief of Staff, Patria Robinson-Martin, who informed Appellant that Mr. Lehman and DOC were considering the situation a personal matter.

2.8 While in Olympia, Appellant spoke with DOC emergency response managers and regional counselors regarding the need for counseling services, and she made the decision to remain at Headquarters an extra day. Appellant spoke with numerous DOC managers and counselors and based on her statements to them, they believed that the purpose for Appellant's presence at Headquarters was to provide counseling services to Mr. Lehman and other administrative staff. Appellant sent a February 6, 2003, email to her supervisor, Marjorie Littrell, and wrote:

> I spoke with Patria today and will be visiting with Mr. Lehman tomorrow. I'm going to offer my assistance to his wife as well. I talked with a lot of staff today and will continue to 'mill about' tomorrow at HQ. Staff are speechless and agonizing with Mr. Lehman. . . .

2.9 Appellant never met with Secretary Lehman, and she returned to the Walla Walla Field Office on or about February 10, 2003. Appellant engaged in a conversation with Office Assistant Lead Mary Sutliff, who was in Appellant's office to work on technical problems related to Appellant's office equipment, regarding the arrest of Secretary Lehman's son. Located on Appellant's desk was a laminated news article that referred to Mr. Lehman. The exact nature of the conversation between Appellant and Ms. Sutliff is in dispute.

2.10 Ms. Sutliff testified Appellant engaged her in a conversation regarding Mr. Lehman's son, told her she was in Olympia to assist in the "crisis" and mentioned the names of managers at Headquarters. She testified Appellant also remarked that Mr. Lehman was in "hiding" in order to avoid discussing the issue. Ms. Sutliff also testified that based on Appellant's comments to her, she believed the purpose for Appellant's presence at Headquarters was to perform counseling services to staff.

2.11 During her testimony, Appellant denied sharing any confidential information with Ms. Sutliff. Appellant asserted she told Ms. Sutliff people in Olympia might call her and instructed Ms. Sutliff to give her cell phone number to anyone trying to reach her. We find inconsistencies in Appellant's version of the conversation. Appellant first testified that Ms. Sutliff initiated the conversation about Secretary Lehman. However, Appellant later said she pointed to the laminated article regarding Mr. Lehman on her desk and asked Ms. Sutliff if she had been aware of the incident, indicating she might be receiving related calls. Appellant also testified she never told anyone or insinuated to anyone that she met with Secretary Lehman. We find a preponderance of the evidence presented supports that Appellant went to DOC Headquarters to act in a counseling capacity and implied to other DOC employees that she would be offering counseling services to Mr. Lehman and administrative staff. Additionally, Appellant's email to Ms. Littrell clearly substantiates Appellant's intent to provide counseling services.

2.13 We find Ms. Sutliff's testimony before this Board, as well as throughout the investigative process, to be consistent and credible. Ms. Sutliff's testimony is further corroborated by the general consensus of the DOC managers and counselors that Appellant either had met or was going to meet with Mr. Lehman and offer counseling services to administrative staff. Furthermore, we do not find any motive for Ms. Sutliff to be untruthful about her discussion with Appellant.

2.14 Regional Administrator Jim Blodgett was selected to investigate the Employee Conduct Report (ECR). Appellant had previously worked with Mr. Blodgett when he was the superintendent at the Washington State Penitentiary. During the interview with Mr. Blodgett, Appellant stated she had been in Olympia counseling "secretaries and janitors." Appellant also expressed to Mr. Blodgett her theory that her supervisor and others were conspiring against her.

When Mr. Blodgett asked Appellant to provide him with information substantiating her theory, she said she could not comply with his request for confidentiality reasons.

2.15 Ms. Fiala, Appellant's appointing authority, held a meeting on May 12, 2003, to discuss the allegations. Appellant denied the allegations, stated it was Ms. Sutliff who initiated the discussion about Mr. Lehman, and thought Ms. Sutliff either overheard another conversation or was manipulated into writing the complaint. On July 18, 2003, Ms. Fiala advised Appellant of her preliminary decision to dismiss her from her position. Ms. Fiala met with Appellant again on September 11, 2003, to provide another opportunity for Appellant to mitigate the allegations. Appellant revised statements previously provided to Ms. Fiala, but did not provide any new substantive information. Appellant also changed her original statement regarding the comment about Mr. Lehman "hiding out" to say she must have "parroted" that statement back to someone in a phone conversation, suggesting once again that Ms. Sutliff might have overheard the comment. Ms. Fiala determined Appellant continued to be inconsistent and focus on unrelated issues, while Ms. Sutliff's account of the conversation remained consistent and credible. Therefore, Ms. Fiala concluded termination was the appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues the testimony and evidence presented confirm Appellant acted in a counseling role at Headquarters, gave the appearance of counseling, and then shared that information with another employee outside of her division. Respondent contends Appellant clearly understood DOC Policy 870.800 because she helped write the policy, had an integral role in implementing the Staff Counseling program, was a counselor, and the lead manager of the program. Respondent contends the policy is more restrictive than mandates related to health care providers and patient confidentiality and that even alluding to others that an employee has received

counseling services from the Staff Resource Center is a violation of the policy. Respondent further contends Appellant's past history of referencing confidentiality as the reason for not complying with supervisory directives proves she understood the stringent intent of the policy. Therefore, Respondent argues Appellant's inappropriate and indiscreet actions damaged her credibility and harmed the integrity of the Staff Counseling program.

3.2 Appellant categorically denies having disclosed any confidential information to Ms. Sutliff or any other person outside of the Staff Counseling program. Appellant asserts that as a highly qualified professional she understands confidentiality. Appellant agues she could not have divulged privileged or confidential communications because she never met with or counseled Secretary Lehman. Appellant argues a professional consultation had to occur for confidential information to exist and her supervisors were aware of the fact she never counseled Secretary Lehman. Appellant also asserts Ms. Sutliff initiated the conversation, mentioned it to her supervisor days later, and was then directed to write the email that resulted in the allegations against Appellant. In addition, Appellant contends DOC Policy 870.800 is vague, does not list specific guidelines for counselors, and could not be clearly explained by DOC managers with regard to confidential communications. Therefore, Appellant argues her dismissal was unwarranted and improperly motivated by Respondent.

IV. CONCLUSIONS OF LAW

4.1 Washington Management Service employees may appeal disciplinary actions to the Personnel Appeals Board under WAC 356-56-600.

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 As the Statewide Director of the Staff Counseling program and a Washington Management Service Manager, Appellant had a duty and responsibility to maintain confidentiality as required by the department's policy. A preponderance of the credible evidence supports Appellant had a clear understanding of DOC Policy 870.800 because she had a key role in developing the Staff Counseling program and writing the policy. While there is no question the situation with Secretary Lehman's son was public knowledge because of the media coverage, we conclude Appellant's decision to discuss the matter with Ms. Sutliff was highly inappropriate and unethical. Even though Appellant did not disclose specific information related to a counseling session, the policy clearly states that "all communication relating to staff counseling, intervention, and consulting services shall be confidential" (emphasis added). Despite the policy, Appellant gave DOC employees the impression she went to headquarters to perform counseling services and then proceeded to discuss the situation and specific names of individuals with Ms. Sutliff, which was contrary to the intent of the policy.

4.4 In assessing the level of discipline, we have considered the totality of the credible evidence, Appellant's position of responsibility and authority within the department and her history of corrective action. We find no reason to overturn Appellant's termination. An individual in the position of Statewide Director of the Staff Resource Center must be held to a higher standard and must be a credible and trustworthy resource for DOC employees. Appellant's actions harmed her credibility, damaged her effectiveness as Statewide Director, and undermined the credibility of the

Staff Counseling program. Under the totality of the proven facts and circumstances, Respondent has proven that dismissal is the appropriate disciplinary sanction, and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Cyndi Walters is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Gerald L. Morgen, Vice Chair

_____

Busse Nutley, Member

Personnel Appeals Board
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Olympia, Washington 98504