BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

LLOYD TRACHTENBERG, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-03-0116 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, WALTER T. HUBBARD, Chair. The hearing was held at the Monroe Complex Center, Superintendent's Conference Room, Monroe, Washington, on January 5 and 6, 2005. BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Lloyd Tractenberg was present and was represented by Spencer Thal, General Counsel, Teamsters Local 117. Morgan Damerow, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, insubordination, gross misconduct and willful violation of agency rules. Respondent alleged Appellant made an inappropriate, unprofessional and disparaging remark to an inmate during a medical code.

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1.4 **Matters taken under advisement.** During the hearing, Appellant moved to admit exhibit A-22, a document authored by Jennifer Tone, dated July 17, 2003, and A-23, a memo from Jennifer Tone to Carol Van Buren, dated July 17, 2003. Respondent objected to the admission of both documents. Board Chair Hubbard took the documents under advisement, pending review of the appeal by additional Board members. The Board now admits exhibits A-22 and A-23.

Appellant's counsel also requested that he be allowed to conduct a test of a video camera to prove that the audio portion of the recording would have picked up voices in the background. Respondent objected, arguing that the equipment counsel planned to use was not the same camera used to record the medical code and that the demonstration would not be conducted under the circumstances under which the incident occurred. Board Chair Hubbard also took this issue under advisement pending review by additional Board members. The Board now denies Appellant's request, finding that Appellant had an opportunity through discovery to request from the department the same camera used to video tape the code, yet he failed to do so.

II. FINDINGS OF FACT

2.1 Appellant Lloyd Trachtenberg was a 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 November 19, 2003.

2.2 Appellant began his employment with the Department of Corrections in May 1997. Appellant has a history of corrective and disciplinary action. The department suspended Appellant effective March 28, 2001, followed by termination effective April 13, 2001, for neglect of duty, gross misconduct and willful violation of agency policy. Respondent alleged Appellant, who at the time was a Corrections Mental Health Unit Supervisor, engaged in unprofessional behavior toward

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a co-worker and subjected a subordinate to sexually offensive comments and behavior. Appellant appealed his termination, Trachtenberg v. Dep't. of Corrections, PAB No. DISM-00-0035 (2002), and by order dated May 13, 2002, the PAB modified Appellant's termination to a demotion to a non-supervisory position as a Corrections Mental Health Counselor 2.

2.3 Appellant's history of corrective actions includes the following:

- A July 25, 2004, letter of counseling issued by Superintendent Fleming for failure to follow the directions of his supervisor on two occasions.
- A February 5, 2003, letter of reprimand issued by Superintendent Robert Moore for misuse of the department's SCAN system for other than official business and for failing to protect his SCAN access PIN.
- A February 5, 2003, letter of reprimand from Superintendent Moore for failure to follow directives from his supervisors to meet with inmates on his caseload on a scheduled weekly basis.

2.4 Respondent has adopted Policy No. 801.005 that addresses employee relationships with offenders. The policy requires that employees have a professional relationship with offenders, and directs employees to treat offenders with dignity and respect. Appellant acknowledged that he was familiar with this policy.

2.5 By letter dated October 29, 2003, Superintendent Gary Fleming notified Appellant of his immediate suspension beginning October 30, 2003, through November 16, 2003, inclusive, followed by his immediate dismissal from his position as a Corrections Mental Health Counselor 2, effective at the end of his regularly scheduled shift on November 16, 2003. Superintendent Fleming charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of agency policy. Superintendent Fleming alleged that Appellant made an inappropriate, unprofessional and disparaging remark about a medically ill offender.

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2.6 The issue here is whether, during a medical code in which an unresponsive inmate regained consciousness, Appellant made the statement, "Too bad he is not dead. It would lighten my caseload." Although a video taping of the incident code exists, the taping did not capture any audible statement made by Appellant, who denies he made the statement. Rather, Appellant claims he made the statement, "I'll be damned if anyone dies on my shift."

2.7 In determining the events, we have reviewed the video tape, the testimony from Appellant, as well as the testimony from the following witness:

- Registered Nurse Gloria Wagoner testified that on June 4, 2003, she and Appellant were passing morning medications when they arrived at Inmate H.'s cell. The inmate was lying on his bunk, face down, and was unresponsive to their attempts to get him to respond to their verbal commands. Ms. Wagoner testified she and Appellant discussed the need to call a medical "code" and ask for assistance from a quick response team (QRT). Appellant subsequently went to call the medical code, and when he returned, Ms. Wagoner commended Appellant for his action. She testified that Appellant's response to her was, "Nobody's going to die on my shift." Ms. Wagoner further testified that Appellant made this comment just as the QRT was arriving on the scene. After the QRT arrived and opened the cell door to the inmate's cell and roused him, Ms. Wagoner entered the cell to assist the inmate. Ms. Wagoner also testified that Appellant's alleged statement, "Too bad he's not dead. It would lighten my caseload," was inconsistent with the individual she knew him to be.

- Sergeant Jeremy Haines, a member of the QRT, responded to the medical code, and he was the video camera operator. Sergeant Haines testified that he heard Appellant make the statement, "Too bad he isn't dead. It would lighten my caseload." The comment was made after the QRT entered the cell, roused the inmate, and at about the time medical staff entered the cell. Appellant was standing behind and to the right of Sergeant Haines, approximately three to four feet away. Sergeant Haines described Appellant's voice as a normal speaking tone. Sergeant Haines testified that when he heard Appellant make the statement, he looked at Appellant and pointed to the camera, to indicate that he was video recording the incident. Sergeant Haines testified that it is not unusual for the camera he was operating not to pick up noises or voices coming from behind or to the sides. Sergeant Haines was certain that Appellant did not say, "I'll be damned if anyone dies on my shift."

- Dwight Preston, a CMHC 3, was also present at the scene. Mr. Preston was standing next to Appellant and behind Sergeant Haines. Mr. Preston also testified he heard Appellant say,

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"Too bad he'd not dead. It would lighten my caseload." Mr. Preston looked over at Appellant and motioned at him to indicate the comment was not appropriate.

- Sergeant Haines and Mr. Preston credibly testified they did not know each other at the time of the incident and that they never discussed the incident with each other.

2.8 After reviewing the above testimony and reviewing the witnesses' written statements, we find that a preponderance of the credible evidence supports that Appellant made the statement, "Too bad he's not dead. It would lighten my caseload." We find no reason to disbelieve the testimony of either Sergeant Haines or CMHC Preston who have been consistent in their retelling of the events. We do not question the veracity of Ms. Wagoner's testimony. However, we find her testimony supports she and Appellant were engaged in conversation prior to the arrival of the QRT whereas the comment Sergeant Haines and Mr. Preston heard occurred after the code was called and Ms. Wagoner was in the cell attending to the inmate. Finally, the absence of Appellant's comment on a video tape recording is not persuasive evidence that he did not make the comment, especially in light of the credible testimony of both Sergeant Haines and CMHC Preston.

2.9 Gary Fleming was Appellant's appointing authority when the discipline was imposed. Superintendent Fleming met with Appellant to discuss the allegation. Appellant denied having made the statement. However, Superintendent Fleming found no reason to disbelieve the statement of Sergeant Haines and Mr. Preston and he did not find Appellant's denial credible. Superintendent Fleming found that Appellant's comment was shocking, especially for a mental health care provider to make regarding a medically ill inmate. Superintendent Fleming looked at Appellant's history with the department and found that the statement he made was not out of his character because he had a history of making inappropriate comments in the workplace.

2.10 Superintendent Fleming concluded Appellant lost credibility and integrity with staff and that he could not trust him to employ good judgment. Superintendent Fleming concluded that Appellant

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neglected his duty to treat offenders with dignity and respect, and that he violated the policy requiring that he conduct himself in a professional manner at all times. Superintendent Fleming found that Appellant's comment adversely impacted the ability of the agency to carry out its mission because Appellant showed a flagrant disregard for the welfare of a medically ill offender. In determining the level of discipline, he considered Appellant's length of service, his employment record, and the completely inappropriate nature of the comment. Mr. Fleming ultimately concluded that termination was appropriate.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues the credible evidence established that Appellant made the comment, "Too bad he's not dead. It would lighten my case load." Respondent argues that Sergeant Haines and CMHC Preston provided credible evidence as to the comment they heard, and there is no reason to disbelieve them. Respondent argues that all corrections staff are required to treat inmates with due respect, and that the comment Appellant made falls far short of the department's code of standards. Respondent further argues that in a corrections environment, where inmates are dependent on staff, the comment made by Appellant could cause inmate discontent and be detrimental to staff. Respondent asserts that Appellant created an incredible risk for the department and that the appointing authority could not trust Appellant to act in an appropriate and professional manner. Respondent argues that dismissal was the appropriate sanction and should be affirmed.

3.2 Appellant argues the video tape, which recorded the entire code, does not support he made the statement, "Too bad he's not dead. It would lighten my caseload." Appellant contends the quality of the video tape is excellent and does pick up voices off camera. Appellant asserts the camera evidence is a much more compelling and credible evidence than the state's two witnesses. Appellant contends that Mr. Preston is not credible because he denied, when questioned by Appellant's union representative, that he ever heard Appellant make the comment. Appellant

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further asserts that Mr. Haines is not credible because even though he claims he heard the comment, his testimony is not supported by the camera's audio. Appellant argues, on the other hand, that Ms. Wagoner is credible. Appellant asserts that the comment the department alleges he made is inconsistent with the type of person he is, and is not a comment he would make to an inmate with whom he shared a fatherly-type relationship. Appellant asserts that the department has singled him out since the PAB reinstated him and has been creating a corrective action paper trail to support his termination. Appellant argues the department's allegation does not support immediate termination and that his prior discipline is unrelated to this issue. Appellant asks that he be reinstated.

IV. CONCLUSIONS OF LAW

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

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). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

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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 Appellant had a duty to use good judgment, and conduct himself appropriately. Furthermore, he understood the department's expectation that he treat offenders with dignity and respect. Respondent has proven by a preponderance of the credible evidence that Appellant neglected his duty and willfully violated policy when he made an inappropriate, insensitive and callous comment about an inmate who had just been revived after being unresponsive for a period of time. Furthermore, we conclude that Appellant's misconduct rises to the level of gross misconduct. Although charged in the disciplinary letter, Respondent has failed to prove the cause of insubordination.

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).

4.8 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).

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4.9 Appellant has a history of demonstrating poor judgment in his actions and comments to others in the workplace, as demonstrated by the PAB's decision to demote him to a non-supervisory position after concluding that Appellant created an intimidating and hostile environment for a female subordinate and treated another co-worker in an unprofessional and inappropriate manner. Appellant asserts the department singled him out in an attempt to remove him from his employment; however, no credible evidence supports either Sergeant Haines or Mr. Preston fabricated their testimony as a part of any such plan. In determining whether the sanction imposed here is appropriate, we have considered the facts and circumstances presented, Appellant's tenure as a state employee, and his prior disciplinary history. However, Appellant has failed to present mitigating factors for why his termination should be reversed.

4.10 WAC 356-34-050 sets forth the conditions under which an employee may be immediately suspended followed by dismissal:

> (1) A permanent employee who is to be dismissed for cause may be suspended without pay for the period between the notice to dismiss and the effective date of the dismissal if the appointing authority believes the good of the service requires the immediate separation of the employee.

4.11 In this case, we are not persuaded that Appellant's immediate suspension was necessary to maintain the good of the service as set forth in WAC 356-34-050. We do not believe that Appellant's presence in the work place, pending his 15-day dismissal notification period, posed a threat to Respondent's program. Therefore, Respondent has failed to meet its burden of proving that Appellant's immediate suspension was necessary.

4.12 Nonetheless, 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.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Lloyd Trachtenberg is denied.

IT IS FURTHER ORDERED that Appellant shall receive full back pay and benefits for the period from October 30, 2003, through the effective date of his dismissal.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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