BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICHARD HOLCOMB, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DEMO-04-0017 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; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN, Member. The hearing was held at the Department of Labor & Industries in Everett, Washington, on April 13, 2005.

1.2 **Appearances.** Appellant Richard Holcomb was present and was represented by Christopher J. Coker, of Parr, Younglove, Lyman & Coker, P.L.L.C. Rachelle Wills, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of

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Personnel rules or regulations. Respondent alleges Appellant used his work computer to access personal, non-work related Internet sites and printed sexual, discriminatory, and offensive material from his work computer and posted those items in the men's restroom.

II. FINDINGS OF FACT

2.1 Appellant is a Community Corrections Officer 2 and 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 June 9, 2004.

2.2 Appellant began his employment with the Department of Corrections (DOC) in June 1991. Appellant started working in the Everett Office of Correctional Operations in 2001 as a Community Corrections Officer (CCO) 2 and promoted to a CCO 3 in January 2002. Appellant's personnel file reflects one letter of counseling in 2001 for failing to obtain proper authorization prior to leaving the work facility.

2.3 On February 18, 2004, DOC management authorized an inspection of Appellant's work computer for a review of Appellant's email and Internet use for January and February 2004. Appellant's email activity reflected a large volume of personal emails containing racially and/or sexually discriminatory material in the form of a written joke or picture. Appellant admitted to using his work computer for non-work related activity during work hours.

2.4 On the same day, February 18, 2004, Corrections Manager Ricardo Rosales discovered racially, sexually, and religiously offensive jokes posted on the men's restroom wall in the Everett office. Consequently, supervisors in the Everett office began asking employees about their

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knowledge of the jokes. When Appellant's supervisor, Debra Garner, asked him if he was aware of the jokes, Appellant admitted he had posted jokes on the wall.

2.5 The DOC Employee Handbook, Code of Ethics, states that DOC "subscribes to a code of unfailing honesty, respect for dignity and individuality of human beings, and a commitment to professional and compassionate service." DOC's Code of Ethics also prohibits employees from discriminating against other employees based on "race, color, religion, gender, sexual orientation, age, creed, national origin, marital status, veteran status, or disability."

2.6 DOC has adopted Policy Directive 800.010, Ethics, which states in relevant part, "employees are prohibited from using state resources for private benefit or gain." Further, "employees are expected to maintain high professional and ethical standards at all times . . ."

2.7 DOC has also adopted Policy Directive 280.820, Internet, which states, "[a]cess and postings to the Internet using the Department equipment and/or equipment that is part of the Department's wide area network shall be made solely for official business."

2.8 The department sends periodic emails to all employees regarding the use of computer technology, including appropriate use of the Internet and email.

2.9 Kathryn S. Bail, Regional Administrator, was Appellant's appointing authority when the discipline was imposed. In determining the level of discipline, Ms. Bail reviewed Appellant's employment record and prior evaluations. Ms. Bail also considered the nature of Appellant's behavior and determined he spent work time sending and receiving inappropriate email messages. Further, Ms. Bail found the racially and sexually explicit nature of the email messages and posted

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material to be in extremely poor taste and unacceptable, as well as a violation of agency policy. Although Appellant did not believe the material was offensive, Ms. Bail did not find he offered any mitigating reasons for his behavior, especially in light of his role as a lead officer. In fact, Ms. Bail considered termination; however, due to Appellant's positive work history, she concluded demotion was the appropriate disciplinary action.

2.10 By letter dated May 24, 2004, Ms. Bail notified Appellant of his demotion from a Community Corrections Officer 3 to a Community Corrections Officer 2. Ms. Bail charged Appellant with neglect of duty, gross misconduct, and willful violation of published employing Department of Personnel rules or regulations for using his DOC authorized Internet access to view sites for personal, non-work related activities during the period of December 4, 2002, through February 18, 2004. In addition, Ms. Bail alleged Appellant posted sexual, discriminatory and offensive material in the men's restroom that he had printed form his DOC computer.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant neglected his duty and violated agency policy when he received and forwarded inappropriate emails and posted offensive material on the men's restroom wall. Respondent asserts Appellant's misconduct rises to the level of gross misconduct due to the graphic sexual and racially offensive content of the information he forwarded and posted in the workplace. Respondent, therefore, contends Appellant compromised the department's ability to provide a safe and respectful environment for its employees. Respondent further argues Appellant's actions were particularly egregious due to his position as a lead worker and asserts Appellant failed to model appropriate behavior. Therefore, Respondent argues demotion is the appropriate sanction.

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3.2 Appellant admits to misconduct and contends he has taken responsibility for his actions. Appellant argues there was an atmosphere in the office that condoned posting and sharing jokes and asserts he exercised discretion when forwarding emails to others. Appellant contends that he did not believe he was passing along offensive material, asserts he was poking fun at various stereotypes, and contends he now understands the jokes were inappropriate. Appellant argues his performance evaluations reflect good work performance, and he asserts he has been a positive role model, providing leadership to other employees. Appellant, therefore, argues there are mitigating factors to consider and argues the level of discipline is too extreme.

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; [WAC 251-12-240(1)]; 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

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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).

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 Respondent has met its burden of proof that Appellant neglected his duty and willfully violated departmental policies when he utilized the department's computer and e-mail system for non-work related purposes. In addition, Appellant accessed, stored, and forwarded clearly inappropriate and offensive messages and posted discriminatory and offensive material in the work place. Furthermore, Appellant was in a lead position, and his inappropriate actions impacted the department's ability to encourage diversity and provide a respectful working environment for its employees. Therefore, Respondent has proven Appellant's actions rise to the level of gross misconduct.

4.7 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness 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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4.8 In assessing the level of discipline imposed here, we conclude that a demotion is not too severe and is appropriate under the circumstances. Therefore, the appeal of Richard Holcomb should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Richard Holcomb is denied.

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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