

BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

DAVID O'CONNOR,

Appellant,

vs.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

CASE NO. R-DISM-12-002

FINDINGS, CONCLUSIONS  
AND ORDER OF THE BOARD

**I. INTRODUCTION**

**1.1 Hearing.** This matter came before the Personnel Resources Board, DJ MARK, Chair; JOSEPH PINZONE, Vice Chair; and NANCY HOLLAND YOUNG, Member. The hearing was held on October 31 and November 1, 2012, in Olympia, Washington. Written closing arguments were due November 30, 2012. Respondent submitted their written closing by fax on November 30, 2012. Appellant submitted his written closing by mail on December 3, 2012. Although Appellant's written closing was submitted after the due date, the Board accepted the document and gave it due weight.

**1.2 Appearances.** Appellant David O'Connor was present and was represented by Michael Hanbey, Attorney at Law. Marlo Oesch, Assistant Attorney General, represented Respondent Department of Social and Health Services (DSHS).

**1.3 Nature of Appeal.** This is an appeal from a dismissal for violation of DSHS policy by allegedly touching staff or intruding on their personal space in ways that made them feel uncomfortable.

**II. FINDINGS**

**2.1** Appellant David O'Connor was a permanent employee for Respondent Department of Social and Health Services (DSHS). Appellant and Respondent are subject to Chapter 41.06

1 RCW and the rules promulgated thereunder, Title 357 WAC. Appellant filed a timely appeal  
2 with the Personnel Resources Board on April 3, 2012.

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4 2.2 By letter dated March 29, 2012, Kelly Cunningham, former Chief Executive Officer of  
5 the Special Commitment Center (SCC), notified Appellant of his dismissal, effective March 29,  
6 2012. Mr. Cunningham alleged that Appellant had intruded on or touched subordinate staff in  
7 ways that made them feel uncomfortable. Mr. Cunningham alleged that Appellant's actions  
8 violated DSHS policies 18.64 and 18.66.

9  
10 2.3 At the time of his dismissal, Appellant was the Security Operations Manager at SCC. He  
11 had been employed by the State of Washington since February 1985. A review of Appellant's  
12 employment history shows that he had received no formal discipline but in November 2011, he  
13 received one corrective action in the form of a letter of reprimand. In addition, Appellant had an  
14 extensive training history including training on sexual harassment, ethics, and non-  
15 discrimination. He also attended supervisory and management training.

16  
17 2.4 In 2009 and 2011, Appellant signed an Employee Annual Review Checklist confirming  
18 that he was aware of his responsibility to comply with DSHS policies and procedures including  
19 Administrative Policy 18.64 and Administrative Policy 18.66

20  
21 2.5 DSHS Administrative Policy 18.64, Standards of Ethical Conduct for Employees, Section  
22 A, states in relevant part:

23 All DSHS employees . . . are required to perform their duties and responsibilities in  
24 a manner that maintains standards of behavior promoting public trust, faith, and  
25 confidence as described below:

26 . . .

27 2. Promote an environment of public trust free from fraud, abuse of authority, and  
28 misuse of public property.

29 3. Strengthen public confidence in the integrity of state government by  
demonstrating the highest standards of personal integrity, fairness, honesty, and  
compliance with law, rules, regulations, and DSHS policies.

1 . . . .

2  
3 2.6 DSHS Administrative Policy 18.66, Discrimination and Harassment Prevention, states, in  
4 relevant part:

5 Purpose: This policy identifies and prohibits behaviors that are inconsistent with a  
6 safe and harassment-free work environment.

7 Scope: This policy applies to all DSHS employees . . . regardless of their position.

8 . . .

9 B. Harassment

10 1. Harassment, including sexual harassment or creating a hostile work environment  
11 is prohibited. . . .

12 2. Examples of harassment include, but are not limited to:

13 . . .

14 c. Physical: Any unwelcome, unwanted physical contact, including but not limited  
15 to, touching, tickling, pinching, patting, brushing up against, hugging, cornering,  
16 kissing, fondling, forced sexual intercourse or assault.

17 . . .

18 F. Roles and Responsibilities

19 1. Managers and supervisors shall model appropriate behavior . . . .

20 . . . .

21 2.7 Prior to the complaint that led to the issue on appeal, SCC went through reorganization and  
22 some SCC staff were laid off. Some of them remained employed in lower level positions at SCC.  
23 Following the layoffs, staff were occasionally asked to perform the on-site supervisor (OSS) duties  
24 which was work they had performed prior to their layoff. Some of the staff felt they were not being  
25 fairly compensated for the OSS work that they were being asked to perform. This situation created  
26 tension between certain SCC employees and their supervisors and some employees refused to  
27 perform the higher level work. Mr. Cunningham ultimately issued a 2011 memo to staff directing  
28 them that they were expected to perform higher level work as assigned by Appellant. Also in 2011,  
29 some of the Residential Rehabilitation Counselor 4's (RRC4) at SCC submitted reallocations  
requests to Appellant.

1 2.8 Subsequent to Mr. Cunningham's memo, RRC4 Byron Eagle filed a written complaint  
2 alleging harassment and creation of a hostile work environment by Appellant. Mr. Eagle addressed  
3 his complaint to SCC's human resources (HR) staff. Included in the multiple concerns raised by  
4 Mr. Eagle was what he felt was inappropriate touching by Appellant. Mr. Eagle's complaint was  
5 dated June 28, 2011 and referenced several undated occasions in which he felt uncomfortable when  
6 Appellant touched him or invaded his personal space.

7  
8 2.9 Mr. Cunningham met with SCC HR staff and Mark Davis, Chief Administrative Officer, to  
9 discuss Mr. Eagle's complaints. They determined that the complaints warranted further  
10 investigation. Mr. Davis assigned the investigation to Larry Pfisterer, SCC Resident Records  
11 Manager.

12  
13 2.10 Mr. Pfisterer's role was to gather facts and report them to SCC management. As part of his  
14 investigation, Mr. Pfisterer interviewed Appellant and various staff members. A number of the staff  
15 expressed concerns with Appellant touching them or getting in their personal space but indicated  
16 that when they told Appellant to stop, he did not repeat the behavior. The incidents described  
17 included touching or rubbing staff on the shoulder, touching or attempting to touch staff on the face  
18 or stomach, feigning tripping to rub up against a person, and encroaching on individuals' personal  
19 space. Appellant's supervisor, Cathi Harris, described the tripping incident as inappropriate  
20 horseplay and in early 2011, counseled Appellant that horseplay was not appropriate behavior in the  
21 work place. In addition, several of the staff indicated that they had not experienced any problems  
22 with Appellant's behavior.

23  
24 2.11 Mr. Pfisterer compiled his report, including his summary of the facts and his summaries of  
25 individual interviews, and submitted his initial report to Mr. Davis. Mr. Davis asked him to conduct  
26 follow up interviews with some staff and with Appellant. Mr. Pfisterer provided his final report to  
27 Mr. Davis on September 12, 2011. Several of the staff who had been interviewed by Mr. Pfisterer  
28 appeared as witnesses and testified at the hearing before the Board. Two of the witnesses who  
29

1 reviewed the individual summary statement that Mr. Pfisterer had written of their interview,  
2 testified that Mr. Pfisterer included statements in their interview summaries that they had not made.

3  
4 2.12 The events of unwanted touching and invading the personal space of others occurred over a  
5 period of several years, as early as 2007. The reorganization of staff occurred in 2009. SCC staff's  
6 refusal to perform higher level work and the memo from Mr. Cunningham occurred in 2011.

7  
8 2.13 Mr. Cunningham reviewed the investigation report and scheduled a pre-disciplinary  
9 meeting. He provided Appellant with a pre-disciplinary letter on February 1, 2012 and with an  
10 amended letter on February 8, 2012. A pre-disciplinary meeting was scheduled for February 15,  
11 2012. Appellant did not attend the meeting, rather, he responded to the allegations in the pre-  
12 disciplinary letter through his counsel by letter dated February 12, 2012.

13  
14 2.14 Mr. Cunningham considered the facts contained in the investigation report and Appellant's  
15 written response. He determined that discipline was warranted. In determining the level of  
16 discipline to impose, Mr. Cunningham considered Appellant's length of service and his  
17 employment history, including his training history. Mr. Cunningham determined that Appellant's  
18 behavior further harmed the trust between staff and management at SCC and that even though he  
19 stopped his behavior when asked, he would continue to inappropriately touch and invade the space  
20 of other staff. Mr. Cunningham felt that as a WMS employee, Appellant should be held to a higher  
21 standard of conduct and should act as a role model for others. Mr. Cunningham concluded that  
22 Appellant failed to model appropriate behavior, failed to abide by DSHS policies, and continued to  
23 engage in inappropriate behavior when he should have known that the behavior was unacceptable.  
24 Mr. Cunningham felt that Appellant's behavior was egregious, had a harmful impact on staff and  
25 eroded the fragile trust that existed between staff and management at SCC. When considering  
26 Appellant's lengthy history of employment with the state, his training record, his knowledge of  
27 DSHS policy and the totality of his egregious behavior, Mr. Cunningham concluded that  
28 termination was the appropriate level of discipline.

1  
2 2.15 By letter dated March 29, 2012, Mr. Cunningham notified Appellant of his dismissal  
3 effective March 29, 2012.  
4

### 5 **III. ARGUMENTS OF THE PARTIES**

6 3.1 Respondent argues that Appellant was aware of DSHS policies and he was aware that  
7 unwanted touching was prohibited. Respondent further argues that Appellant knew he was expected  
8 to comply with the policies and to act as a role model for others. Respondent asserts that Appellant  
9 violated the policies and expectations when he touched staff and invaded their personal space in  
10 ways that made them feel uncomfortable. Respondent contends that the disciplinary process,  
11 including the investigation, was thorough and fair and substantiated the allegations. Respondent  
12 explains that Appellant was provided with the allegations and was given an opportunity to respond  
13 which he did. Respondent argues that the preponderance of the evidence shows that Appellant  
14 engaged in a pattern of touching staff and invading their personal space and that when he was told  
15 to stop the behavior he did but then he continued the behavior by directing his actions toward other  
16 staff. Respondent contends that given the repeated nature of Appellant's actions, his position as a  
17 WMS employee, the harm his actions caused to the already fragile trust between employees and  
18 management at SCC, and his years of experience, training and knowledge of DSHS policies,  
19 dismissal was the appropriate sanction to prevent recurrence, deter others and maintain the integrity  
20 of the program.  
21

22 3.2 Appellant argues that Respondent failed to prove termination was warranted. Appellant  
23 contends that the staff who complained about his conduct disagreed with SCC management's  
24 expectation that they perform as the OSS when assigned to do so by Appellant. Appellant asserts  
25 that they raised their complaints in retaliation. Appellant further asserts that any touching that  
26 may have occurred was unsubstantial or insignificant, that the incidents occurred long before  
27 they were revealed during the investigation, and that the incidents did not rise to a level to  
28 warrant formal discipline. Appellant argues that when staff said they did not want to be touched,  
29

1 he did not repeat the behavior. Appellant admits that he was aware of the DSHS policies, the  
2 expectation that he comply with the policies and the expectation that he model appropriate  
3 behavior in the workplace. Appellant argues that his actions did not violate DSHS policies or  
4 expectations and that the incidents raised by staff did not rise to the level of harassment or  
5 offensive touching. Appellant also asserts that the staff failed to report his alleged behavior in  
6 accordance with the policy. Appellant contends that the disciplinary action imposed was  
7 unwarranted and too severe given the totality of the circumstances at SCC.

#### 8 9 **IV. CONCLUSIONS OF LAW**

10 4.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.  
11

12 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
13 the charges upon which the action was initiated by proving by a preponderance of the credible  
14 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
15 sanction was appropriate under the facts and circumstances. WAC 357-52-110.  
16

17 4.3 Respondent has met its burden of proof that Appellant engaged in unwanted touching of  
18 subordinate staff, invaded the personal space of staff and failed to comply with policies that were  
19 known to him. We find it particularly troubling that when Appellant was asked to stop touching  
20 or to stop getting too close to staff, he ceased the behavior but then directed similar behavior  
21 toward other staff. Given Appellant's lengthy work history including his training in harassment  
22 and ethics, he should have realized that such behavior was not appropriate in the workplace and  
23 should have ceased unwanted touching or invading the personal space of all staff when he  
24 learned that even one staff person was uncomfortable with his actions.  
25

26 4.4 We have considered Appellant's argument that staff failed to properly report their  
27 complaints as required by DSHS policy. However, it is not unusual for victims of harassing behavior  
28 to be reluctant to come forward especially when the behavior was that of their supervisor. The fact  
29

1 that incidents involving others came forward during the investigation into Mr. Eagle's complaints  
2 does not negate the seriousness of Appellant's actions. Furthermore, while staff may have been  
3 unhappy about the expectation that they perform higher level duties, nothing in the record supports a  
4 deliberate conspiracy or collusion against Appellant. Rather, the record clearly establishes that  
5 Appellant engaged in an ongoing pattern of unwanted touching and invading the personal space of  
6 staff.

7  
8 4.5 As a WMS employee, Appellant should be held to a higher standard of conduct and  
9 professionalism, be expected to abide by agency policies, and be expected to act as a role model for  
10 subordinate staff. [See Oliver v. Dept. of Social and Health Service, PRB Case No. R-DEMO-08-  
11 006 (2009) and Ahearn v. Dept. of Corrections, PAB Case No. DEMO-02-0016 (2003)].

12  
13 4.6 The Board has previously ruled on disciplinary actions for WMS employees. For example,

- 14 • Mack v. Dept. of Social and Health Services, PRB Case No. R-DEMO-08-001 (2008). The  
15 Board upheld the sanction of demotion and concluded that the appellant "engaged in an  
16 ongoing pattern of making inappropriate comments, gestures and unwanted physical contact  
17 of a sexual nature toward female staff" and that his behavior violated agency policies.
- 18 • Mayhew v. Dept. of Corrections, PRB Case No. R-DEMO-06-002 (2006). The Board  
19 upheld the sanction of demotion for "making threatening and vulgar communications to  
20 co-workers and/or agency staff and failing to satisfactorily administer inmate disciplinary  
21 hearings." The Board also determined that the appellant's actions were not "negated by the  
22 failure of others to complete a workplace violence reporting form." The Board concluded  
23 that the appellant, who was a WMS employee with 17 years of experience and no history  
24 of corrective or disciplinary actions, should have been aware of his obligation to comply  
25 with the department's Code of Ethics and policies.
- 26 • Oliver v. Dept. of Social and Health Services, PRB Case No. R-DEMO-08-006 (2009). The  
27 Board upheld the demotion of a WMS employee after determining that she was not effective

as a manager or leader, that her behavior was inappropriate and at times, abusive, and that she did not demonstrate the skills to needed to manage people.

4.7 Additionally, In Gutierrez v. Dept. of Social and Health Services, PRB Case No. R-DISM-07-001 (2007), the Board modified the dismissal of a WMS employee to a suspension followed by a reduction in salary. The Board found that the appellant engaged in unprofessional and unethical business practices, failed to comply with DSHS policies, used state resources for personal business, and used state resources to send inappropriate emails to another staff person. However, given the appellant's positive work history of more than 30 years with the agency and his lack of any prior disciplinary action, the Board concluded that dismissal was too severe.

4.8 In this case, as a WMS employee, Appellant should be held to a higher standard of conduct and professionalism, should be expected to comply with agency policies, and should be expected to fulfill his duty to act as a positive role model for staff. Appellant failed to fulfill these expectations. Respondent has proven that a severe disciplinary sanction is appropriate. However, under the totality of the circumstances of this case, including Appellant's 27-year work history and the lack of any prior formal disciplinary actions, dismissal is too severe.

4.9 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).

4.10 In consideration of Appellant's length of service, the lack of any formal disciplinary actions in his work history, and in keeping with the disciplinary sanctions imposed in similar cases, Appellant's dismissal should be modified to a suspension, effective March 29, 2012, to the date of this order, followed by a 15-percent reduction in salary. Appellant should be returned to a WMS

1 position that represents a 15-percent reduction in salary and that does not have supervisory  
2 responsibilities. This sanction should be sufficient to prevent recurrence, to deter others from  
3 similar misconduct, and to maintain the integrity of the program. After Appellant's return, if his  
4 position no longer meets the criteria to be included in WMS or other factors exist that would impact  
5 the agency's need for the position, the agency may take appropriate actions within the civil service  
6 rules to properly align the position with the mission and goals of the agency.

7  
8 **V. ORDER**

9 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of David O'Connor is granted in  
10 part and the dismissal is modified to a suspension without pay, effective March 29, 2012, to the  
11 date of this order, followed by a 15-percent reduction in salary. Appellant is returned, effective the  
12 date of this order, to a WMS position that represents a 15-percent reduction in salary and that does  
13 not have supervisory responsibilities for subordinate staff.

14 DATED this \_\_\_\_ day of \_\_\_\_\_, 2013.

15  
16 WASHINGTON PERSONNEL RESOURCES BOARD

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18 \_\_\_\_\_  
DJ MARK, Chair

19  
20 \_\_\_\_\_  
JOSEPH PINZONE, Vice Chair

21  
22 \_\_\_\_\_  
NANCY HOLLAND YOUNG, Member