

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JOHN LAVERTY,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. DISM-97-0042

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; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held in the Personnel Appeals Board hearing room in Olympia, Washington, on February 10 and 14, 2000.

1.2 **Appearances.** Appellant John Laverty was present and was represented by Rick Cordes, Attorney at Law of Cordes Brandt, P.L.L.C. Respondent Department of Corrections was represented by Elizabeth Delay Brown, Assistant Attorney General, and Lawrence W. Paulsen, Assistant Attorney General.

1.3 **Nature of Appeal.** Appellant was dismissed for misrepresenting his request for emergency leave, failing to return to work when his need for emergency leave ceased and instead working for a second employer, and lying to his supervisor about working for a second employer when he should have been working for Respondent.

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1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

## II. FINDINGS OF FACT

2.1 Appellant John Lavery was a Correctional Officer 2 and a permanent employee of Respondent Department of Corrections (DOC) at the McNeil Island Corrections Center (MICC). 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 August 21, 1997.

2.2 By letter dated July 17, 1997, Respondent notified Appellant of his dismissal effective August 2, 1997. Respondent charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant misrepresented his request for emergency leave from March 13–24, 1997, when he was only gone from March 13–17, 1997; failed to report to work during his regularly scheduled work shift beginning March 20, 1997 and instead worked for the Roy Police Department on March 20 and 21, 1997; and lied to his supervisor when he asked Appellant if he worked for the Roy Police Department during his emergency leave.

2.3 Appellant had a history of informal disciplinary actions. In January 1997, he was given a letter of reprimand for unprofessional interactions with a peer and in February 1996, he was given a letter of reprimand for taking leave prior to receiving approval.

1  
2 2.4 In addition, Appellant had a history of corrective and formal disciplinary actions related to  
3 his employment with the Roy Police Department. In June 1996, the agency learned that Appellant  
4 was working for the Roy Police Department, however, Appellant had not requested authorization  
5 for outside employment. Appellant subsequently submitted a request for authorization for outside  
6 employment. However, on September 30, 1996, Belinda Stewart, Superintendent, denied  
7 Appellant's request. In November 1996, the agency learned that Appellant had continued his  
8 employment with the Roy Police Department. In December 1996, he was given corrective action  
9 for failing to obtain approval for his outside employment with the Roy Police Department and in  
10 July 1996, he was given a reduction in pay for calling in sick and then working for the Roy Police  
11 Department. Subsequently, in February 1997, Ms. Stewart gave Appellant approval to work at the  
12 Roy Police Department. However, Ms. Stewart instructed Appellant that he could work for the Roy  
13 Police Department on his regular days off or during pre-approved annual leave only

14  
15 2.5 Appellant worked the third shift in "F" unit at MICC beginning Thursday through Monday.  
16 Appellant's regular days off were Tuesday and Wednesday.

17 2.6 On March 8, 1997, Appellant requested emergency leave to be with his mother in California  
18 because she was having surgery for cancer. Appellant requested leave from March 13-24, 1997.  
19 Appellant's request for leave was approved. As a result, he was on emergency leave from March  
20 13-17, 1997, on his normal days off from March 18-19, on emergency leave from March 20-24,  
21 and on his normal days off from March 25-26.

22  
23 2.7 The testimony of Appellant and his supervisor, Sergeant David Pennington, differs  
24 regarding the meeting they had during which Appellant requested emergency leave. We find the

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1 testimony of Sgt. Pennington more credible. Appellant's actions subsequent to his request for leave  
2 discredit his version of the event. For example, subsequent to his request for leave, Appellant  
3 admittedly altered his boarding pass, he failed to follow the chain of command when he had a "gut  
4 feeling" that he needed to call into work, and he was untruthful when confronted about working for  
5 the Roy Police Department while he was on emergency leave. Because we find Sgt. Pennington to  
6 be more credible, we make the following findings.

7  
8 2.8 Appellant told Sgt. Pennington that the reason for his request for emergency leave was to be  
9 with his mother during her surgery. Sgt. Pennington credibly testified that because Appellant was  
10 required to use leave without pay (LWOP) for part of his emergency leave, he told Appellant to  
11 return to work when he returned from California. Because Appellant was on medical verification,  
12 Sgt. Pennington also told him that he was required to submit a copy of his plane ticket or his  
13 boarding pass and a statement from his mother's doctor upon his return to work.

14 2.9 Appellant bought an airline ticket to San Francisco leaving on March 13, 1997 and returning  
15 on March 17, 1997. When he returned to work, he submitted his boarding pass. However,  
16 Appellant admittedly altered his boarding pass to reflect that he had returned on March 19, 1997.

17  
18 2.10 When Appellant returned from California, he worked for the Roy Police Department on  
19 March 18-19, his regular days off. In addition, the Chief of the Roy Police Department asked  
20 Appellant to work on March 20-21. March 20 and 21, 1997 were not Appellant's regular days off  
21 and he was not on pre-approved annual leave as specified in Ms. Stewart's approval of his  
22 authorization for outside employment. Before working the additional days, Appellant testified that  
23 he had a "gut feeling" that he should call MICC to check whether it was appropriate for him to  
24 work those days.

1 2.11 When Appellant called MICC after his return from California, Sgt. Pennington was not  
2 available. Rather than follow the chain of command, Appellant spoke with his former supervisor  
3 and shop steward, William Allinger. Mr. Allinger informed Appellant that because he was on  
4 approved leave, he could work for the Roy Police Department. However, Appellant did not tell Mr.  
5 Allinger that he was on LWOP or that he and Sgt. Pennington had a conversation about Appellant  
6 returning to work when he returned from California.  
7

8 2.12 Appellant worked for the Roy Police Department on March 20-21, 1997. He returned to  
9 work at MICC on March 27, 1997.  
10

11 2.13 Subsequently, Lieutenant F.D. Fitzpatrick spoke with the Chief of the Roy Police  
12 Department and learned that Appellant had worked for the Roy Police Department on March 20-21,  
13 1997. When Sgt. Pennington asked Appellant if he had worked for the Roy Police Department on  
14 those dates, Appellant said that he had not.

15 2.14 On April 3, 1997, Sgt. Pennington initiated an Employee Conduct Report (ECR) as a result  
16 of Appellant misrepresenting his leave time. On April 9, 1997, Lt. Fitzpatrick initiated an ECR as a  
17 result of Appellant working for the Roy Police Department on March 20-21, 1997.  
18

19 2.15 Appellant was provided copies of the ECRs but he indicated that he had “nothing to say until  
20 a formal hearing [was] conducted.” The ECRs were investigated by Lt. Fitzpatrick. Appellant  
21 declined to be interviewed by Lt. Fitzpatrick during the ECR investigations. Lt. Fitzpatrick  
22 forwarded the ECRs and the results of his investigations to Superintendent Stewart.  
23  
24

1 2.16 On May 5 and 12, 1997, Ms. Stewart met with Appellant for an administrative review of the  
2 ECRs. During the administrative review, Appellant was given an opportunity to respond to the  
3 allegations in the ECRs. Based on all of the information presented, Ms. Stewart determined that in  
4 both instances, misconduct had occurred.

5 2.17 By letter dated June 12, 1997, Appellant was notified of a pre-termination meeting regarding  
6 the two ECRs. On June 19, 1997, Ms. Stewart conducted a pre-termination meeting with Appellant.  
7 Ms. Stewart considered Appellant's response during the pre-termination meeting as well as the  
8 other available information. She concluded that Appellant exhibited a continuing pattern of failing  
9 to follow policies and regulations and that he did not take any responsibility for his actions. Ms.  
10 Stewart also concluded that Appellant failed to fulfill his duty to report to work when he had been  
11 told to do so which caused an undue burden on other employees. In addition, Ms. Stewart  
12 determined that Appellant was dishonest and falsified documents. After considering all of the  
13 available information, including Appellant's history of corrective and disciplinary actions, Ms.  
14 Stewart concluded that termination was the appropriate sanction.  
15

16 2.18 WAC 356-18-140 provides, in relevant part:

17 (1) Leave without pay may be allowed when such leave will not operate to the  
18 detriment of the state service.

19 (2) Leave without pay may be authorized for any reasons applicable to:  
20 (1) Leave with pay.

21 2.19 WAC 356-18-060 addresses paid sick leave and provides, in relevant part, that sick leave  
22 may be used as follows:

23 (3) Illness of relatives or household members: Up to five days of accumulated sick  
24 leave shall be granted for each occurrence or as extended by the agency when an

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1 employee is required to be absent from work to provide care to members of the  
2 employee's household or relatives of the employee or the employee's spouse who  
experience an illness or injury. For purposes of this subsection, "relatives" shall be  
limited to:

3 . . . .

(c) Grandparent or parent.

4  
5 (Emphasis added).

6 2.20 The DOC Employee Handbook includes a Code of Ethics which provides:

7 High moral and ethical standards among correctional employees are essential for the  
8 success of the department's programs. The Department of Corrections subscribes to  
9 a code of unfailing honesty, respect for dignity and individuality of human beings,  
and a commitment to professional and compassionate service.

10 2.21 DOC Policy 801.011 provides, in relevant part

11 PURPOSE:

12  
13 This policy provides direction to the Department of Corrections employees to assist  
14 them in making appropriate choices, acting in a manner that demonstrates high  
ethical standards and complying with provisions of the state ethics law, Chapter  
42.52 RCW.

15 POLICY:

16  
17 In keeping with the Department role of responsibly serving the people of the State of  
18 Washington, Department employees are expected to maintain high professional and  
ethical standards at all times.

19 Responsibilities:

20 Employees are responsible for knowing and adhering to applicable ethic laws,  
21 policies, and directives and for making choices that exemplify an adherence to high  
ethical standards.

22 Violations of the State Ethics Law and/or this policy may lead to corrective or  
23 disciplinary action up to and including dismissal.

### III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant violated policies and regulations, neglected his duty and was insubordinate when he misrepresented his emergency leave. Respondent asserts that Appellant's actions created an undue hardship on the agency because it required that staff coverage be arranged and that overtime costs be incurred. Respondent further asserts that Appellant was untruthful, failed to abide by the directive given to him by Ms. Stewart in regard to his employment at the Roy Police Department, altered his boarding pass, lied to his supervisor, and that his actions rose to the level of gross misconduct. Respondent asserts that Appellant intended to be in California for one week rather than for the two weeks for which he requested emergency leave. Respondent contends that when the purpose for Appellant's emergency leave no longer existed, he had an obligation to report to work, particularly in light of the understanding between he and Sgt. Pennington. Respondent contends that the department has proven the charges in the disciplinary letter by a preponderance of the credible evidence and that termination is the appropriate disciplinary sanction.

3.2 Appellant argues that Respondent failed to meet its burden of proof. Appellant asserts that there is no question that his mother underwent cancer surgery and that he went to California to be with her. However, Appellant contends that he did not know how long he would need to be gone and that he could have changed his plane ticket if necessary. Appellant acknowledges that he returned on March 17 but he contends that he did not misrepresent the initial reason for his emergency leave. Appellant asserts that he was on approved leave and that he was not required by policy or regulation to return to work. Appellant denies that he had a conversation with Sgt. Pennington about his return to work. Appellant asserts that this appeal turns on the credibility of the witnesses, that Sgt. Pennington has been inconsistent, that no documentation exists to support

1 Sgt. Pennington's testimony, and he asserts that Sgt. Pennington fabricated the conversation  
2 because he was out to get him.

#### 3 4 **IV. CONCLUSIONS OF LAW**

5 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
6 herein.

7 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
8 the charges upon which the action was initiated by proving by a preponderance of the credible  
9 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
10 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
11 Corrections, PAB No. D82-084 (1983).

12 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
13 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
14 of Social & Health Services, PAB No. D86-119 (1987).

15 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
16 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

17 4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior  
18 and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v.  
19 Dep't of Social and Health Services, PAB No. D94-025 (1995).

20 4.6 Willful violation of published employing agency or institution or Personnel Resources  
21 Board rules or regulations is established by facts showing the existence and publication of the rules

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
2 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
3 Health Services, PAB No. D93-053 (1994).

4 4.7 Based on a preponderance of the credible evidence, Respondent has met its burden of  
5 proving that Appellant misrepresented the amount of time he needed for emergency leave; failed to  
6 report to work when his need for emergency leave ceased and instead worked for the Roy Police  
7 Department during two days of his emergency leave; and lied to his supervisor when he questioned  
8 him about working for the Roy Police Department. Appellant's actions were a neglect of his duty,  
9 insubordinate, a violation of policies and regulations, and rose to the level of gross misconduct.  
10 Respondent has failed to prove that Appellant misrepresented his initial need for emergency leave.  
11

12 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to  
13 the facts and circumstances including the seriousness and circumstances of the offense. The penalty  
14 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent  
15 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.  
16 An action does not necessarily fail if one charge is not sustained unless the entire action depends on  
17 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).  
18

19 4.9 Even though Respondent failed to prove that Appellant misrepresented his need for leave,  
20 Respondent has established that termination is the appropriate level of discipline in this case.  
21 Considering Appellant's history of misconduct, his failure to contact his supervisor upon his return  
22 from California as directed, his decision to work for the Roy Police Department even though he  
23 knew that it was contrary to the conditions of his approval for outside employment, and his  
24 untruthfulness when questioned about working for the Roy Police Department, Appellant has failed

1 to demonstrate the high moral and ethical standards of unfailing honesty required by department  
2 employees. Furthermore, Appellant's attempts, after the fact, to deceive the department shows that  
3 his proven misconduct warrants termination. Therefore, Appellant's dismissal should be affirmed  
4 and his appeal should be denied.

5 **V. ORDER**

6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of John Lavery is denied.

7 DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2000.

8 WASHINGTON STATE PERSONNEL APPEALS BOARD

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10 \_\_\_\_\_  
11 Walter T. Hubbard, Chair

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14 Gerald L. Morgen, Vice Chair

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