

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TODD STENDER,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. RED-02-0035

)
) 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, and GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on August 5, 2003.

1.2 **Appearances.** Appellant Todd Stender was present and was represented by Jill Harwick, Attorney at Law, of Hillier, Scheibmeir & Vey, P.S. Laura Wulf, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a three-month reduction in pay for neglect of duty, gross misconduct and willful violation of agency policy. Respondent alleges that Appellant asked a female coworker an inappropriate and unprofessional question about another female coworker.

II. FINDINGS OF FACT

2.1 Appellant Todd J. Stender is a permanent employee for Respondent Department of Social and Health Services at the Green Hill Training School. 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 July 26, 2002.

2.2 By letter dated July 1, 2002, Sandra Youngen, Superintendent of the Green Hill Training School (GHTS), notified Appellant of his reduction in pay from Range 27, Step K, to Range 27, Step I, effective July 15, 2002 through October 15, 2002. Ms. Youngen charged Appellant with neglect of duty, gross misconduct and willful violation of agency policy. Ms. Youngen specifically alleged that Appellant asked Sabrina Eames, a Juvenile Rehabilitation Residential Counselor, questions of a personal and sexual nature about Rebecca Heishman, an Office Assistant at the school.

2.3 Appellant is a Juvenile Rehabilitation Security Officer 1. He began his employment at GHTS in 1997.

2.4 Rebecca Heishman was an office assistant at the time the alleged incident in the disciplinary letter occurred. When Ms. Heishman first started working at Green Hill School, she and Appellant had a friendly relationship. Eventually, the work relationship deteriorated. In April 2000, Ms. Heishman reported to management that Appellant was sexually harassing her. Ms. Heishman eventually obtained an Order for Protection against Appellant. As a part of that Order for Protection, Appellant was prohibited from entering and exiting the workplace through Building A, where Ms. Heishman's work station was located.

1 2.5 Sabrina Eames was a Juvenile Rehabilitation Counselor at the school. On January 20, 2002,
2 Appellant and Ms. Eames were working in the Spruce Living Unit - C Wing. On that day,
3 Appellant engaged Ms. Eames in a conversation related to his legal problems, and he was
4 attempting to show Ms. Eames some legal documents related to his civil matter with Ms. Heishman.
5 Ms. Eames indicated that she was not interested and had to get her work done. Appellant asked Ms.
6 Eames to contact his attorney.

7
8 2.6 Ms. Eames returned to her work duties. However, Appellant approached her again later and
9 made some inquiries about Ms. Heishman. The nature of that inquiry is in dispute. Ms. Eames
10 contends that Appellant asked her about the sexual orientation of Rebecca Heishman and whether
11 Ms. Eames knew if Rebecca Heishman was “fucking” Mike Parker, a Juvenile Rehabilitation
12 Residential Counselor.

13
14 2.7 During his testimony, Appellant denied that he asked Ms. Eames about Ms. Heishman’s
15 sexual orientation, and he testified that he was aware Ms. Heishman and Mr. Parker were dating, so
16 it was unnecessary for him to ask whether Ms. Heishman and Mr. Parker were sexually involved.
17 Appellant contends that his intent in speaking to Ms. Eames was to gather information to present
18 during an upcoming court hearing to get the Order of Protection lifted. Appellant admits that he
19 asked Ms. Eames whether Ms. Heishman called her at work to ask for a “threesome.”

20
21 2.8 Ms. Eames was recalled by Respondent as a rebuttal witness. During questioning, she
22 admitted that on January 20, 2002 Appellant asked her if Ms. Heishman had asked Ms. Eames to
23 join her for a “threesome.” Ms. Eames had not previously disclosed this information

24
25 2.9 After reviewing the testimony of Appellant and Ms. Eames, we find that even the question
26 Appellant admits he posed to Ms. Eames, about whether Ms. Heishman asked her to participate in a

1 “threesome,” was clearly inappropriate. Appellant denies he engaged in misconduct; however, his
2 own testimony generally confirms Ms. Eames’ claim that Appellant engaged her in an inappropriate
3 and unprofessional conversation related to Ms. Heishman’s sexual activity. Therefore, we find that
4 Ms. Eames, who had nothing to gain by coming forward, is more credible than Appellant. Further,
5 we find, more likely than not, that Appellant made inappropriate inquiries to Ms. Eames about Ms.
6 Heishman’s sexual activities, including whether she was “fucking Mike Parker.” Ms. Eames
7 credibly testified that she was shocked and uncomfortable and offended by the nature of Appellant’s
8 questions.

9
10 2.10 DSHS has adopted and published Administrative Policy 6.02 which requires employees to
11 maintain high ethical and professional standards at all times and which prohibits sexual harassment.
12 The policy defines sexual harassment as behavior of a sexual nature which is unwelcome and
13 personally offensive to the recipient of the action. The policy further defines a hostile working
14 environment as a working situation in which the employee has not suffered any tangible economic
15 loss as a result of the alleged harassment but rather the employee has been subjected to a working
16 environment that is sexually offensive or intimidating to the employee. The policy ensures that
17 employees work in an environment free from unsolicited, unwelcome, and inappropriate sexual
18 overtones. Examples of inappropriate behaviors of a sexual nature include verbal communication,
19 which includes demeaning or offensive comments.

20
21 2.11 Green Hill School Training Policy #27 addresses standards of conduct in the workplace and
22 prohibits employees from using profane, vulgar or other offensive terms and from engaging in
23 sexual suggestions, such as intimate discussions of sex.

24
25 2.12 Appellant was aware and familiar with Administrative Policy 6.02 and Training Policy #27
26 and of his duty to comply with them.

1
2 2.13 Sandra Youngen, Superintendent, was Appellant's appointing authority. Prior to making a
3 determination of misconduct, Ms. Youngen reviewed the allegations, Appellant's written response
4 to the allegations, and information gathered during a fact-finding investigation. Ms. Youngen also
5 met with Appellant and his attorney prior to making a determination as to the level of discipline. At
6 the meeting, Appellant denied making any sexual comments or making the inquiry into Ms.
7 Heishman's sexual orientation. Appellant indicated that Ms. Eames may have misunderstood his
8 questions, which were related to the court proceedings he was engaged in with Ms. Heishman. Ms.
9 Youngen ultimately found, however, that Ms. Eames was more credible than Appellant. Ms.
10 Youngen concluded that Appellant engaged in misconduct when he asked Ms. Eames about
11 whether Ms. Heishman was engaged in a sexual relationship with another employee and when he
12 made an inquiry about Ms. Heishman's sexual orientation. Ms. Youngen also concluded that
13 Appellant neglected his duty to treat Ms. Eames with respect.

14
15 2.14 In determining the level of discipline, Ms. Youngen considered Appellant's length of
16 service and his employment record, which included a disciplinary action in May 2001 regarding
17 inappropriate interactions with Ms. Heishman. After weighing Appellant's work history to the
18 nature of his comments to Ms. Eames, which Ms. Youngen found were graphic and inappropriate,
19 Ms. Youngen concluded that a reduction in pay was the appropriate sanction.

20 21 **III. ARGUMENTS OF THE PARTIES**

22 3.1 Respondent argues Ms. Eames' testimony is credible and that the evidence supports that
23 Appellant engaged her in an inappropriate conversation by asking her personal questions about Ms.
24 Heishman. Respondent argues that Appellant's questions about whether Ms. Heishman was
25 "fucking Mike Parker" and his question about Ms. Heishman's sexual orientation were clearly
26 made in relation to sexual behavior, which violated agency Policy 6.02 on sexual harassment.

Respondent argues that Appellant created a harassing, intimidating and offensive work environment not only for Ms. Eames, but also for Ms. Heishman. Respondent argues that the proven allegations support the appointing authority's conclusions that Appellant violated policy, neglected his duty to treat others in a professional manner and with respect and that his behavior amounted to gross misconduct. Therefore, Respondent argues that the reduction in pay should be affirmed.

3.2 Appellant contends that Respondent failed to present any credible evidence to prove that he harassed coworkers, neglected his duty, violated agency policy or engaged in gross misconduct. Appellant asserts that when he approached Ms. Eames, he wanted to ask her a specific question about a phone conversation Ms. Eames had with Ms. Heishman, a question that Ms. Eames denies took place until she was questioned on rebuttal. Appellant asserts that Ms. Eames finally admitted that the conversation occurred, that she has a history of changing her testimony, and that she is not a credible witness. Appellant asserts that he has never changed his story. Appellant further denies that his question to Ms. Eames can be classified as sexual harassment. Appellant argues that Respondent has not met its burden of proof and that his appeal should be granted.

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).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
3 of Social & Health Services, PAB No. D86-119 (1987).

4
5 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant
7 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
8 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

9
10 4.4 Willful violation of published employing agency or institution or Personnel Resources
11 Board rules or regulations is established by facts showing the existence and publication of the rules
12 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
13 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

14
15 4.5 Respondent has met its burden of proof that the nature of Appellant's questions to
16 Ms. Eames were inappropriate and sexual in nature. Respondent has an obligation to provide its
17 employees with a working environment that is free from harm, and Appellant's misconduct affected
18 the agency's ability to do so. Appellant willfully violated the agency's sexual harassment policies
19 and his actions rose to a level of gross misconduct. Further, Appellant neglected his duty when he
20 failed to treat a fellow coworker with dignity and respect.

21
22 4.6 In determining whether a sanction imposed is appropriate, consideration must be given to
23 the facts and circumstances, including the seriousness and circumstances of the offenses. The
24 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
25 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
26 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

1
2 4.7 Under the facts and circumstances presented here, we conclude that the sanction imposed is
3 not too severe and is sufficient to prevent recurrence, to deter others from similar misconduct and to
4 maintain the integrity of the program. Therefore, the appeal of Todd Stender should be denied.

5 **V. ORDER**

6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Todd Stender is denied.

7
8 DATED this _____ day of _____, 2003.

9
10 WASHINGTON STATE PERSONNEL APPEALS BOARD

11
12 _____
13 Walter T. Hubbard, Chair

14
15 _____
16 Gerald L. Morgen, Vice Chair