BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ELAINE HARMON, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DEMO-04-0034 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 office of the Personnel Appeals Board in Olympia, Washington, on October 4, 2005. BUSSE NUTLEY, Vice Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Elaine Harmon was present and was represented by Michael Hanbey, Attorney at Law. 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, insubordination, gross misconduct and willful violation of policy as a result of Appellant's use of profanity toward her supervisor, her refusal to follow a directive, and for leaving work without notifying her supervisor.

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II. FINDINGS OF FACT

2.1 Appellant Elaine Harmon is 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 1, 2004.

2.2 Appellant has been employed by the state of Washington since 1986. Approximately 11 years ago, she became employed by the Department of Corrections (DOC) and in 1989, she began working at the Cedar Creek Corrections Center (CCCC) as a Classification Counselor (CC) 2, and she promoted to a CC 3 approximately a year later. As a CC 3, Appellant served in a lead capacity mentoring lower level correctional counselors.

2.3 On June 15, 2004, Correctional Unit Supervisor (CUS) Greg Stewart met with several community corrections officers, including Appellant, to discuss an issue related to an inmate's good conduct time. During the course of the meeting, CC 2 Vicky Briggs disagreed with Appellant's recommendation not to reinstate the inmate's good conduct time. Based on Mr. Stewart's interpretation of DOC policy, he agreed with Ms. Briggs's position that the inmate's good conduct time should be restored. Appellant, however, believed Mr. Stewart's interpretation of the policy required a review that created unnecessary work. Appellant became frustrated because Mr. Stewart did not support her (Appellant's) recommendation, and she felt he undermined her attempts to train and mentor Ms. Briggs.

2.4 After the group meeting ended, Appellant met with Mr. Stewart privately and she vented her frustration and expressed her dissatisfaction and anger. Mr. Stewart had an "open door policy"

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where he allowed his employees to voice their frustrations. Appellant told Mr. Stewart that she did not appreciate him "fronting her off." Appellant also stated that Mr. Stewart was undermining her ability to train Ms. Briggs by overriding her recommendation and she expressed her unwillingness to continue working with Ms. Briggs. Mr. Stewart was cognizant of the problems Appellant was experiencing with Ms. Briggs, and he reiterated to her his expectation that she get along with and work with Ms. Briggs.

2.5 Appellant was admittedly angry when she left Mr. Stewart's office. As she was walking down a hallway, Mr. Stewart was behind her. Appellant stopped, turned around and told Mr. Stewart that she was no longer going to work with Ms. Briggs. Appellant also told Mr. Stewart to "fuck off." Mr. Stewart observed several inmates in the foyer who turned their heads to look in Appellant's direction. Mr. Stewart told Appellant that they needed to finish their conversation, and he directed her to return to his office. Appellant refused, told Mr. Stewart again that he could deal with Ms. Briggs and that he could write her (Appellant) up. Appellant walked away and returned to her office.

2.6 After the confrontation with Mr. Stewart, Appellant decided to go home as a result of a migraine headache she developed. Appellant was aware that Mr. Stewart was in a meeting, and she filled out a leave slip and placed it in his in-box. Mr. Stewart had previously directed Appellant to leave him a voice mail message or send him an e-mail if she had to leave unexpectedly and he was unavailable. Appellant made no attempt to contact Mr. Stewart nor did she leave him an e-mail or voice mail message. Rather, Appellant informed a co-worker that she was leaving.

2.7 Superintendent Dan Pacholke was Appellant's appointing authority when the discipline was imposed. During a pre-disciplinary meeting with Mr. Pacholke, Appellant claimed she "mouthed"

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the words “fuck off.” On the other hand, Mr. Stewart claimed Appellant said the words in a voice loud enough to be heard by others. Mr. Pacholke found Mr. Stewart’s account of the events to be more credible and concluded that Appellant’s comment to Mr. Stewart was inappropriate and a failure on her part to treat others with dignity and respect. In addition, he concluded she was insubordinate when she refused to return to Mr. Stewart’s office after he directed her to do so. Mr. Pacholke further concluded that Appellant violated agency policy for leaving the institution without permission, violated the Workplace Violence Prevention Policy and created a security risk for others.

2.8 In determining the level of discipline, Mr. Pacholke considered Appellant’s employment history which contained a letter of counseling dated September 11, 2000, resulting from Appellant’s inappropriate interaction with an inmate that culminated in Appellant pulling the inmate’s shirt. After considering Appellant’s response to the charges, Mr. Pacholke determined that demotion to a non-lead position was appropriate, because Appellant failed to conduct herself in the manner expected of an employee responsible for mentoring others.

2.9 By letter dated October 18, 2004, Mr. Pacholke notified Appellant of her demotion from her position as a Classification Counselor 3 to a position as a Classification Counselor 2 effective November 5, 2004. Mr. Pacholke charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of agency policies. Specifically, Mr. Pacholke alleged Appellant violated the department’s policies on Unscheduled Leave, Workplace Violence Prevention Program and the Code of Ethics, which prohibits employees from using profanity towards others.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant's actions of directing profanity at her supervisor, refusing his directive to return to his office and departing the institution without notifying him constitutes neglect of duty, insubordination, gross misconduct and willful violation of the department's policies. Respondent argues the sanction imposed by the appointing authority was appropriate because Appellant, as a Corrections Counselor 3, had a higher duty and obligation to serve as a role model and follow agency policies. Respondent argues that by telling her supervisor to "fuck off" Appellant failed in her responsibility to act appropriately and professionally, and because she had corrective action for similar disrespectful behavior, the demotion was appropriate.

3.2 Appellant does not deny that she told Mr. Stewart to "fuck off" but she contends that she mouthed the words and no one else could have heard her. Appellant admits that the words she used were disrespectful and unprofessional but she claims others, including Mr. Stewart, used profanity in the workplace. Appellant contends that she and Mr. Stewart came to an agreement after the incident and that the incident should have been handled in an informal manner rather than taking it through the disciplinary process. Appellant asserts that demotion is too severe and contends that a reduction in pay or a five-day suspension would have been more appropriate for her actions.

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

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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 Appellant failed to behave in a professional manner when she directed profanity toward Mr. Stewart. Although Mr. Stewart had an "open door policy" where he allowed his employees to vent to him behind closed doors, Appellant's comment was made in a public area and more likely than not in a voice loud enough to be heard by others. Respondent has met its burden of proof that Appellant neglected her duty to treat her supervisor with respect and she failed to model appropriate behavior in her role as a lead worker. Appellant further neglected her duty when she failed to inform Mr. Stewart, either by voice mail or e-mail, that she was leaving the institution for the day. Although Appellant told a coworker why she was leaving, she gave no explicit instruction for that coworker to notify Mr. Stewart of her departure.

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

4.6 Respondent has met its burden of proving that Appellant was insubordinate when she refused a directive from Mr. Stewart that she return to his office to continue their discussion.

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4.7 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).

4.8 Appellant's behavior toward Mr. Stewart was clearly inappropriate and unprofessional and is not condoned by the Board; however, it did not rise to the level of gross misconduct.

4.9 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).

4.10 Respondent has proven by a preponderance of the credible evidence that Appellant neglected her duty and violated the DOC Code of Ethics when she told her supervisor to "fuck off" and that she violated the Unscheduled Leave policy by departing the institution without her supervisor's permission or, at minimum, ensuring he was aware of why she was leaving. However, there was no showing that Mr. Stewart felt threatened by Appellant's comment or that she posed a threat to the safety of others; therefore, Respondent failed to show that Appellant violated the department's Workplace Violence Prevention Policy.

4.11 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).

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4.12 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).

4.13 Under the totality of the proven facts and circumstances the disciplinary sanction is warranted for Appellant's inappropriate behavior toward her supervisor. Therefore, the appeal of Elaine Harmon should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Elaine Harmon is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Busse Nutley, Vice Chair

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