BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CHRISTOPHER HOARE, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. RED-02-0046 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 Department of Transportation Maintenance Building, 1707 C. Street, Port Angeles, Washington, on March 16, 2004.

BUSSE NUTLEY, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Christopher Hoare was present and was represented by Spencer Thal, General Counsel, Teamsters Local 17. Elizabeth Delay Brown, Assistant Attorney General, represented Respondent Department of Corrections.

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1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a reduction in salary for neglect of duty, insubordination, gross misconduct and willful violation of agency policy after Appellant brought an unauthorized chemical into the institution.

II. FINDINGS OF FACT

2.1 Appellant was a Correctional Sergeant 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 September 24, 2002.

2.2 Appellant has been employed by the Department of Corrections for approximately 10 years. Appellant has not been the subject of prior disciplinary actions; however, on November 13, 2001, he received a corrective counseling for engaging in an inappropriate conversation with a female staff member.

2.3 By letter dated August 23, 2002, Sandra Carter, Superintendent of Clallam Bay Corrections Center, notified Appellant that his salary would be reduced from range 40, step K, to range 40, step G, effective September 11, 2002 through March 11, 2003. Superintendent Carter charged Appellant with neglect of duty, insubordination, gross misconduct and willful violation of agency rules after he entered the institution with ammonia, an unauthorized chemical.

Background

2.4 In February 2002, an inmate working in the institution's laundry mixed hot water with a chemical, which created a chlorine gas. Consequently, staff and inmates were evacuated from the area. Following this incident, the institution conducted a review of dangerous chemicals and many products were banned from the institution. Ammonia and other products containing ammonia were

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removed from the institution because of the potential that ammonia could be used with other chemicals to create a hazardous mix. Safety Officer Michelle Morgan also conducted a hazardous communication class on March 15, 2002, during which she discussed the chlorine incident, and she explained that window cleaners were no longer authorized for use within the facility or for use by inmates because glass cleaners contained ammonia. Appellant was present at the training.

Incident resulting in discipline

2.5 In February/March 2002, Appellant was in the process of overseeing an inmate cleaning crew. Edwin Reetz was the shift lieutenant when Appellant reported to work on March 3, 2002. Lt. Reetz conducted an "allowable items check" of Appellant's bag and discovered a bottle of ammonia. Lt. Reetz informed Appellant that ammonia was not allowed inside the facility, and he instructed Appellant to store the ammonia bottle in his staff locker. Appellant explained that the ammonia was for cleaning the windows.

2.6 Sergeant Gary Gort was standing nearby and overheard the exchange between Appellant and Lt. Reetz. Lt. Reetz again informed Appellant that the ammonia had to be secured prior to entering the institution, and Appellant responded, "Pretend you didn't see this." After Appellant departed the area, Lt. Reetz called Correctional Sergeant Brian McGarvie, Appellant's supervisor and informed him that he had directed Appellant not to enter the institution with the ammonia.

2.7 Appellant entered the facility with the ammonia bottle, which he diluted with water in two spray bottles. Appellant provided one bottle to an inmate on his work crew who used the solution to clean windows. The other spray bottle was provided to an inmate on a work crew supervised by a different correctional officer. After the window washing was completed, Appellant retrieved the spray bottle from the inmate he supervised and disposed of the remaining contents. However, the

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other spray bottle remained with the inmate, until the inmate turned it over to Officer Richard Borkenhagen, who subsequently reported the incident.

2.8 Several days later, Sergeant McGarvie learned that Appellant had, in fact, taken the ammonia into the institution. Sergeant McGarvie approached Appellant about the incident, and Appellant admitted that he took ammonia into the institution and told Sergeant McGarvie, "You may as well slap my hands."

2.9 Appellant testified that in February 2002, Unit Supervisor Tina Adams, his second-line supervisor, directed him to get the windows cleaned. Appellant testified that when he told Ms. Adams the cleaning crew was having difficulties cleaning windows, she suggested he use vinegar and "do whatever it takes" to get the windows clean. Appellant also testified that he discussed the difficulty of getting the windows clean with Barbara Watt, who had overall responsibility for supervising all inmate janitors, and that she suggested he use ammonia[1].

2.10 Respondent has adopted Field Instruction Policy 890.000, which addresses safety within the institution. The policy states, in pertinent part, that, "Staff members are responsible for complying with all safety and health standards that apply to their own actions on the job." The policy further requires employees to support the institution's safety program. Appellant was aware of his responsibility to comply with safety standards within the institution.

2.11 Superintendent Sandra Carter was Appellant's appointing authority when the discipline was imposed. On April 26, 2002, Ms. Carter met with Appellant to discuss the incident. Appellant admitted that he brought the ammonia into the facility to clean the windows because his supervisor,

[1] During the hearing, Appellant moved to admit exhibit A-28, a March 30, 2002, memo from Ms. Watt. Appellant also moved to admit exhibit A-27, a Search Report dated October 23, 2001. Respondent objected to the admission of both documents. Board Chair Hubbard took the documents under advisement, pending review of the appeal by additional Board members. The Board now admits exhibits A-27 and A-28.

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Tina Adams, had authorized its use for that purpose. Ms. Carter credibly testified that she later spoke to Ms. Adams about Appellant's claim, and Ms. Adams denied knowing about or approving Appellant's use of ammonia to clean the windows.

2.12 Ms. Carter concluded that Appellant knew ammonia was an unauthorized chemical, but deliberately brought it into the facility, disregarding the facility's ban on ammonia. Ms. Carter also concluded that Appellant disregarded both the facility's safety policies and Lt. Reetz' verbal order not to enter the facility with the ammonia and to secure it in his locker instead. She further concluded that Appellant's action had an adverse impact on the institution, because he created a safety concern, compromised the integrity of staff with the inmate population, and created anxiety among staff who were concerned about an inmate having access to ammonia.

2.13 In determining the level of discipline, Ms. Carter considered Appellant's length of service, his employment and training record, and his attendance at the hazardous communication class just two weeks prior to the incident. While Ms. Carter believed that the seriousness of the misconduct warranted termination, she settled on a six month reduction in pay because Appellant's record reflected only one prior corrective action, no other formal disciplinary actions, numerous letters of commendation and satisfactory performance evaluations.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant not only violated agency policy, but he failed to follow the directive of a superior when he entered the facility with the ammonia. Respondent argues that Appellant is not credible when he contends that his conversation with Lt. Reetz was inconsequential, and that he could not recall receiving a directive prohibiting him from entering the institution with the ammonia. Respondent also argues that Appellant created a safety risk when he

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allowed an inmate to have ammonia, especially because the inmate had possession of the ammonia for an entire work shift.

Respondent contends that the evidence supports that Appellant neglected his duty, willfully violated policy and was insubordinate. Respondent further asserts that Appellant's misconduct rose to the level of gross misconduct because it had an adverse impact on the department's ability to create a safe environment. Respondent asserts that the reduction in pay was appropriate to prevent recurrence.

3.2 Appellant admits he brought ammonia into the institution, but asserts that his superior authorized his use of ammonia to clean the windows. Appellant contends that there is no policy prohibiting the introduction of ammonia into the institution, that the amount he brought in was minimal and that there was no negative impact from its use. Appellant also contends that he faced a conflict because his superior told him to do "whatever it takes to get the windows clean" including the use of ammonia, but that he was also told to put it in his locker. Appellant further contends that Lt. Reetz' instruction was given so casually and offhanded, that he did not understand that it was an order. Therefore, Appellant denies he was willfully disobedient.

Appellant denies that he engaged in misconduct and the sanction should be reversed. In the alternative, Appellant asserts that if misconduct is found, the level imposed was overly harsh and failed to take into account his 10-years as a correctional employee with no previous discipline of any type and with numerous commendations.

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

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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).

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 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).

4.5 Respondent has proven by a preponderance of the credible evidence that Appellant neglected his duty to conduct to perform his job in a safe and responsible manner when he brought ammonia into the institution on March 30, 2002. The evidence supports that Appellant was aware that ammonia was no longer authorized within the facility and that he was clearly directed by Lt. Reetz to lock the ammonia in his locker and not enter the facility with the ammonia. Nonetheless, Appellant disregarded Lt. Reetz' lawful directive, he entered the facility with ammonia, and later provided two inmates with bottles containing an ammonia solution. Appellant testified that Ms. Watt suggested he use ammonia to clean. However, Appellant presented no credible evidence to support his assertions. Appellant's disregard for Lt. Reetz' lawful directive constitutes insubordination.

4.6 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

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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).

4.7 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 Respondent has proven by a preponderance of the credible evidence that Appellant willfully violated agency policy regarding the institution's safety standards when he brought ammonia into the institution. Respondent has also met its burden of proving that Appellant's actions interfered with the institution's ability to maintain a safe environment and rose to the level of gross misconduct.

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).

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4.10 Under the facts and circumstances, Respondent has proven that the reduction in pay was appropriate based on the nature of the misconduct. Therefore, the appeal of Christopher Hoare should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Christopher Hoare is denied

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Busse Nutley, Member

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