BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

VICTOR DELEON, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-05-0018 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, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the Attorney General's Office in Spokane, Washington, on January 25 and 26, 2006.

1.2 **Appearances.** Appellant Victor DeLeon was present and was represented by Christopher J. Coker, of Younglove, Lyman & Coker, P.L.L.C. Kari Hanson, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of suspension followed by immediate dismissal for neglect of duty, violation of agency policy, and gross misconduct for exhibiting overly friendly behavior toward an offender while transporting/escorting that offender to a dental appointment in the community.

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II. FINDINGS OF FACT

2.1 Appellant was 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 March 30, 2005.

2.2 Appellant began his employment with the Department of Corrections (DOC) in February 1990, and he was employed by Pine Lodge Correctional Center for Women (PLCCW) at the time of his dismissal. Appellant's duties as a Correctional Officer (CO) 2 included transporting and escorting offenders into the community for various reasons such as medical appointments or work and community service projects. In September 1996, Appellant received a reduction in pay for failing to use good judgment when escorting an offender to a funeral, which included dining with the offender and his family and allowing the offender to change clothes in the restroom of a public restaurant.

2.3 As a correctional officer, Appellant received training on the proper relationships between staff and offenders that included working with female offenders, offender manipulation, and ethics. In addition, Appellant was required to understand DOC Policy Number 850.030, Employee Relationships/Contacts with Offenders, which prohibits favoritism and states that staff "shall use caution when dealing with offenders . . . and be mindful of the appearance of improper association." The policy also prohibits "[a]ssociation with offenders, beyond that which is required in the performance of official duties . . . in the interest of professional unbiased service" and prohibits personal communications with offenders.

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2.4 Appellant also had knowledge of DOC's Policy Number 800.010, Ethics, requiring employees to "conduct themselves in a professional manner" and "refrain from knowingly associating in any manner with offenders . . ."

2.5 On October 7, 2004, Appellant transported Offender Rebecca B. from PLCCW to Oral Surgery Plus, a private dental clinic that contracts with DOC. During the visit, members of the dental staff witnessed what they characterized as "flirty" and "very friendly" behavior between Appellant and Offender Rebecca B.

2.6 Approximately a week later, April Walkley, the registered nurse who cared for Offender Rebecca B. throughout her oral surgery, reported Appellant's behavior to CO 2 Mark Sprecher when he was at the clinic escorting an offender from Airway Heights Corrections Center (AHCC). CO Sprecher encouraged Ms. Walkley to report Appellant's behavior to DOC, and he reported the incident to his superior at AHCC.

2.7 On October 14, 2004, DOC received a written statement from Corinna Keyser, a receptionist at Oral Surgery Plus, describing Appellant's inappropriate behavior in the waiting area, including taking a seat next to the offender, sitting very close to her, and whispering and giggling with the offender. Ms. Walkley wrote a similar statement, also signed by Konni Baxter, a surgical assistant, that described whispering, touching, and friendly behavior between Appellant and the offender.

2.8 Specifically, Ms. Walkley noticed Appellant and Offender Rebecca B. sitting in chairs side by side in both the waiting area as well as the consultation room. While in the surgery room, Ms. Walkley observed Appellant standing directly behind the head rest of the surgery reclining chair of the offender, which was not normally the case because officers typically sit on a bench or stand near the doorway. Prior to and after the offender's oral surgery, Ms. Walkley also observed Appellant

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leaning toward the offender and resting his hand on her hand and arm to reassure her of the procedure.

2.9 While Offender Rebecca B. was in the recovery room, Ms. Baxter was in an adjacent room sterilizing instruments and was able to view the offender through a glass partition. At that point, Ms. Baxter also observed Appellant leaning forward and talking to the offender. Ms. Walkley, Ms. Baxter, and Ms. Keyser all believed Appellant's behavior was unusual and not the typical behavior exhibited by other correctional officers escorting offenders to the clinic.

2.10 Appellant denied the allegations of misconduct. However, during the investigative process, Appellant admitted that he talked with Offender Rebecca B. during the car ride to the dental clinic and that he mentioned his daughter had a similar procedure when the offender expressed anxiety over the surgery. Both Appellant and Offender Rebecca B. admitted Appellant discussed his children and that he looked forward to picking them up at the end of the day. In addition, Appellant discussed the auto detailing business with Offender Rebecca B., who said she did that type of work prior to her incarceration.

2.11 Superintendent Donna Cayer met with Appellant on December 17, 2004, to allow him the opportunity to discuss the allegations. Appellant, however, continued to deny any allegations of wrongdoing and referred to the dental staff's comments as "preposterous." Appellant did admit that he discussed aspects of his personal life during the offender's transport to the dental clinic. Superintendent Cayer ultimately decided that misconduct occurred, and on February 1, 2005, she conducted a pre-termination meeting. Appellant, however, did not provide any information to mitigate his actions.

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2.12 In determining the level of discipline, Superintendent Cayer considered Appellant's length of service and his employment record, including his training and prior discipline. Superintendent Cayer was particularly concerned that Appellant shared personal information with an offender, despite his previous discipline relating to boundary issues between himself and an offender. Additionally, Superintendent Cayer did not believe the dental staff at Oral Surgery Plus had any motivation to fabricate the allegations, and she did not find that Appellant's denials were credible. In fact, Superintendent Cayer believed Appellant's failure to recognize that his actions compromised safety and security during an offender transport, along with his failure to take responsibility, left her no alternative other than termination.

2.13 By letter dated March 7, 2005, Superintendent Cayer notified Appellant of his suspension without pay followed by immediate dismissal, effective March 22, 2005. Superintendent Cayer charged Appellant with neglect of duty, violation of agency policy, and gross misconduct for his "overly friendly" and inappropriate interaction with Offender Rebecca B. while transporting her and later supervising her during her oral surgery appointment.

2.14 The dental employees who witnessed Appellant's interaction with Offender Rebecca B. consistently reported that Appellant's behavior was inappropriate and unusual compared to the behavior of other correctional officers who had escorted offenders to the clinic. We find no reason for the staff at Oral Surgery Plus to be untruthful. Rather, we find the employees provided credible testimony to support that Appellant more likely than not crossed the boundaries of professionalism and engaged in an inappropriately casual and friendly interaction with Offender Rebecca B.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues a preponderance of the evidence supports Appellant engaged in inappropriate conduct with an offender. Respondent asserts the dental staff at Oral Surgery Plus

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consistently described an inappropriate closeness between Appellant and the female offender, contending the dental staff had no motive to fabricate the allegations. Rather, Respondent asserts the dental staff simply reported an observation of Appellant's behavior, which the department argues was inappropriate, unprofessional, and created a safety risk to Appellant and the community. In addition, Respondent asserts Appellant established an inappropriate bond with an offender when he discussed personal, family information and, as a result, became vulnerable to offender manipulation and compromised security. Respondent argues Appellant's unwillingness to take responsibility for his actions leaves the department with no alternative other than dismissal.

3.2 Appellant argues the evidence does not support he committed misconduct. Appellant asserts the perceptions of the staff at Oral Surgery Plus were blown out of proportion and mischaracterized. Appellant contends the department asked the dental employees to provide written statements, which he argues were inaccurate. Appellant admits he engaged the offender in some discussion to alleviate her fears about the surgical procedure but asserts it was only in an effort to calm the offender. Appellant asserts he is a long term employee with positive evaluations, and he argues termination is too severe.

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).

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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 had a duty to act professionally and maintain appropriate boundaries with offenders. Respondent has proven that Appellant neglected that duty when he engaged the offender in a personal discussion and displayed overly friendly behavior toward her by sitting in close proximity to her throughout the appointment and comforting and reassuring her by rubbing her hand and arm. Appellant's actions caused the dental staff to question his relationship with the offender and compromised his integrity. Appellant's behavior not only damaged his credibility but also compromised his effectiveness as a correctional officer and created a safety risk for the community.

4.5 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).

4.6 Appellant fully understood the department's mission, policies, and expectations of a correctional officer. Appellant's misconduct interfered with the department's ability to ensure integrity, as well as safety. Therefore, Respondent has proven the charge of gross misconduct.

4.7 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).

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4.8 Appellant was a seasoned correctional officer who had received training on offender relationships, offender manipulation, and ethics with respect to dealing with offenders. Respondent has proven that Appellant violated DOC Policy 850.030 with regard to offender contact and favoritism because he showed unnecessary interest and affection toward an offender and gave the appearance of having an improper association with that offender. Furthermore, Appellant violated DOC's Ethics Policy 800.010 when he established a personal bond with an offender by discussing personal family matters and admittedly engaging the offender in a conversation about an auto detailing business. Even if Appellant's intent was to redirect the offender's anxiety over the surgery, he willfully violated the policies governing DOC staff association with offenders.

4.9 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).

4.10 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness 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).

4.11 In this case, Appellant received a previous disciplinary action for failing to use good judgment when transporting an offender. Despite Appellant's training on proper relationships with offenders, he failed to maintain professionalism and set appropriate boundaries. As a result, Appellant was susceptible to offender manipulation, which posed a safety threat and undermined his credibility with the department and the community. The fact that Appellant was unwilling or

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unable to recognize the seriousness of his misconduct left the department no choice other than termination. Therefore, under the facts and circumstances, the sanction of suspension followed by immediate dismissal was warranted.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Victor DeLeon is denied.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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