BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JOHN BIDDULPH, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DEMO-03-0039 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 Department of Transportation, Spokane County East and West Conference Room, 2714 North Mayfair Street, Spokane, Washington, on November 10 and 12, 2004.

1.2 **Appearances.** Appellant John Biddulph was present and was represented by Christopher J. Coker, Attorney at Law, of Parr, 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 demotion for neglect of duty, gross misconduct and willful violation of published employing agency or department of

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

personnel rules or regulations. Respondent alleged Appellant engaged in inappropriate and unprofessional behavior toward a subordinate employee.

II. FINDINGS OF FACT

2.1 Appellant John Biddulph is a permanent employee for Respondent Department of Corrections (DOC). 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 December 23, 2003.

2.2 Appellant began his employment with DOC in 1992 as a Correctional Officer working with high-risk level 3 sex offenders, drug offenders and violent offenders and then promoted into an Acting Correctional Officer 3 position at Pine Lodge Pre-Release in approximately 1995. In late 1996 or early 1997, Appellant promoted to a Washington Management Service position as a Correctional Unit Supervisor (CUS) at Pine Lodge Pre-Release.

2.3 Appellant's personnel file reflects one letter of concern dated May 28, 2003, for failure to follow supervisory expectations regarding job duties and for insubordinate behavior.

2.4 By letter dated November 25, 2003, Kaye Adkins, Regional Administrator, notified Appellant of his demotion to a Classification Counselor 2 at Airway Heights Corrections Center, effective December 10, 2003. Ms. Adkins charged Appellant with neglect of duty, gross misconduct and willful violation of agency policy. Ms. Adkins specifically alleged Appellant walked up behind Ms. French, Appellant's subordinate, and directed his voice to her left ear stating, "Are you afraid?" Ms. Adkins determined Appellant's comment had the effect of frightening and intimidating Ms. French.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

2.5 On July 14, 2003, Appellant returned to work in his CUS position after working on temporary assignments away from Pine Lodge Pre-Release for an extended period of time, followed by an emergency medical leave six weeks prior to returning to Pine Lodge. During Appellant's absence, Community Corrections Officer (CCO) 2 Fran French was hired and reported to Acting CUS Ron Pederson, who was filling in for Appellant. Appellant and Ms. French had never met or worked together prior to Appellant's first day back to work on July 14, 2003.

2.6 On the morning of July 17, 2003, Ms. French met with her lead worker, CCO3 Harley Farwell to discuss case management procedural concerns she had experienced with Appellant. During the course of the conversation, Ms. French mentioned a July 14 interaction she had experienced with Appellant in which he commented to her, "Are you afraid?"

2.7 Shortly after meeting with Mr. Farwell, Ms. French approached Acting CUS Ron Pedersen and told him Appellant had made a comment to her about being afraid, and she felt threatened by Appellant's comment. Mr. Pedersen then advised Ms. French to report the incident to Correctional Program Manager (CPM) Sherri Tucker. Ms. Tucker filled out a Workplace Violence Report and attached Ms. French's handwritten statement, signed on July 18, 2003.

2.8 In her initial handwritten statement, Ms. French wrote that she and Appellant, as well as four other employees, "were standing in front of the administration building in front of the CPM window facing the parking lot" when Appellant asked, "Are you afraid?" over her left shoulder and into her ear. Ms. French responded, "No why should I be, you seem like an ok supervisor, and I'm a good CCO."

2.9 During the investigative process, Ms. French stated the alleged incident took place as a group of employees were beginning a walk at break time. Ms. French later reported the alleged

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

incident happened as the work unit was preparing to go to lunch for a co-worker. In a statement to Superintendent Donna Cayer in September 2003, Ms. French wrote, in part, "I was standing in front of Correctional Program Manager (CPM) Sherri Tucker's window in the Pine Lodge Pre-Release (PLPR) parking lot when John Biddulph walked up behind me . . . . Subsequently, the rest of the unit joined us in the parking lot . . ."

2.10 Appellant denied the allegation. Appellant testified he attended lunch with his work unit on July 14 and stated that, as a group, members of his work unit walked toward administration and the Secured Housing Unit (SHU) area, as they were leaving for lunch. Appellant testified that when the rest of the group exited toward the parking lot, he took the walkway to the administration building to pick up his wife, Helen Biddulph, who works in the administration building.

2.11 Ms. Biddulph testified Appellant entered through the back door of the administration building around 11 a.m., and the two of them walked through the SHU to leave for lunch. As they were leaving, Appellant and Ms. Biddulph encountered Correctional Sergeant Marcia Loosmore, who also testified she saw Appellant and his wife in the SHU. Ms. Loosmore also observed members of Appellant's work unit, including Ms. French, in the parking lot as she was returning to the SHU. Ms. Loosmore secured Appellant's and Ms. Biddulph's keys prior to them exiting the SHU, a common practice for employees leaving the facility.

2.12 In determining the facts of this case, we find that Ms. French's retelling of the events has been inconsistent. For example, Ms. French first stated the alleged remark occurred on a group walk but later recalled the incident must have happened prior to lunch for a co-worker. Further, Ms. French initially reported her co-workers from the work unit were standing in front of the administration building when Appellant approached her from behind but subsequently stated that others joined them after he made the alleged comment. By contrast, we find the testimony provided

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

by Ms. Loosmore corroborates the testimony of Appellant and Ms. Biddulph that Appellant was not in the parking lot as Ms. French alleged.

2.13 On September 18, 2003, Ms. Adkins, Appellant's appointing authority, met with Appellant and his representative to discuss the charges outlined in the ECR. Appellant told Ms. Adkins he did not make the statement to Ms. French and indicated he was not aware of anything that would have provoked this type of allegation. In addition to reviewing the investigative report, Ms. Adkins made additional inquiries into the incident, and statements were provided to Superintendent Donna Cayer.

2.14 On October 20, 2003, Ms. Adkins held a pre-termination meeting and informed Appellant of her intent to demote him. Ms. Adkins provided an opportunity for Appellant to give her additional information that he believed she should consider as she contemplated disciplinary action. Appellant asserted he made no such comment to Ms. French and provided examples of his accomplishments with the department to demonstrate why he should remain in his CUS position.

2.15 In determining the level of discipline Ms. Adkins testified she considered Appellant's length of employment, his personnel file, and the skills he brought to the department. Ms. Adkins testified that while she did not want to terminate Appellant, she did not want him to remain in a supervisory role. Ms. Adkins testified that Appellant appeared to exhibit intimidating behavior in the past, and she did not believe he should remain in a position where he had power over other individuals. Ms. Adkins also considered Appellant's unwillingness to take responsibility or provide an explanation for his behavior. Given the seriousness of the offense, Ms. Adkins testified demotion was the only option available to prevent recurrence, deter others, and maintain respect for the agency program.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues this case is about intimidation and credibility. Respondent argues Ms. French consistently described the manner in which Appellant approached her from behind and whispered in her left ear. Respondent further argues Ms. French's physical memory and consistent gestures used to explain the incident confirm her distinct recollection of what occurred. Although there were no witnesses to the incident, Respondent contends Ms. French had no motive to invent such an accusation. Respondent argues that as a WMS employee, Appellant was held to a higher standard and had a duty to act in a responsible manner.

3.2 Appellant denies making any inappropriate comment to Ms. French and argues Ms. French's assertion was not corroborated by credible evidence. Appellant argues Ms. French's statements were inconsistent about when the incident occurred. Appellant further argues Ms. Loosmore's testimony supported his contention he exited the facility with his wife on the way to lunch and, therefore, was not in the parking lot as described by Ms. French. Appellant contends he had no motive to make such a statement and asserts the idea he would approach someone he did not know and, out of nowhere, ask her about being afraid is inconceivable. Therefore, Appellant argues Respondent has failed to prove the allegation and asserts his appeal should be fully granted.

IV. CONCLUSIONS OF LAW

4.1 Washington Management Service employees may appeal disciplinary actions to the Personnel Appeals Board under WAC 356-56-600.

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

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

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 Allegations regarding workplace violence are serious in nature, especially in an institutional setting. Although Ms. Adkins credibly conveyed her genuine concern about intimidation in the workplace and the department's inability to tolerate abusive behavior, the preponderance of the credible evidence does not support the charge that Appellant made a threatening remark to Ms. French in the parking lot on July 14, 2003, at approximately 11 a.m.

4.4 Respondent has failed to meet its burden; therefore, the appeal of John Biddulph should be granted, and he should be fully reinstated with back pay and benefits.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of John Biddulph is granted.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504