BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JULIE HOKENSON, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. RED-02-0025 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, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held at the office of the Personnel Appeals Board, in Olympia, Washington, on June 24, 2003. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Julie Hokenson was present and was represented by Tracey Thompson, Attorney at Law, of Teamsters Local Union No. 117. Larry Paulsen, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of reduction in salary for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleged that Appellant grabbed an inmate's hair and caused his head to jerk backwards.

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1.4 **Citations Discussed.** WAC 358-30-170 Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Harper v. WSU, PAB No. RULE-00-0040 (2002); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Aquino v. University of Washington, PAB No. D93-163 (1995); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant 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 May 29, 2002.

2.2 Appellant is a Correctional Officer 2 at the McNeil Island Corrections Center. Appellant began working for the Department of Corrections on November 6, 2000.

2.3 By letter dated May 10, 2002, Alice Payne, Superintendent of McNeil Island Corrections Center, informed Appellant of her reduction in salary from Range 40, Step E to Range 40, Step C, effective May 26, 2002 through November 25, 2002. Superintendent Payne charged Appellant with neglect of duty, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleged that Appellant grabbed an inmate's hair and caused his head to jerk backwards.

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2.4 Appellant had received no prior formal discipline; however, she had received the following written reprimands and had been orally counseled on one occasion:

- Appellant's supervisor held a "supervisory conference" with her on April 27, 2001 to discuss the need for Appellant to write infractions containing only facts and in a timely manner. Appellant's supervisor also reminded her that she worked around inmates, to "dress for the position for which you are assigned," and "remember the type of work you have to do."
- An October 11, 2001 letter of reprimand for insubordination.
- A July 2, 2001 memo of counseling for unprofessional behavior towards a peer.
- A November 2, 2001 letter of expectation for interacting with staff and inmates in an unprofessional manner and a warning to follow directions from supervisors.
- A December 15, 2001 letter of reprimand addressing Appellant's absences from work.

2.5 The Department of Corrections' Employee Handbook contains the "Code of Ethics" and "Department Expectations" and states in part:

> CODE OF ETHICS
> High moral and ethical standards among correctional employees are essential for the success of the department's programs. The Department of Corrections subscribes to a code of unfailing honesty, respect for dignity and individuality of human beings, and a commitment to professional and compassionate service.
>
> DEPARTMENT EXPECTATIONS
> As a representative of the Department of Corrections, <u>you will be expected to</u> …
> - Treat fellow staff with dignity and respect;
> - Be impartial, understanding, and respectful to offenders;
> - Report through the chain of command any corrupt or unethical behavior that could affect an offender or the Department's integrity;
> - Conduct yourself and perform your duties safely;
>
> You are not allowed to: "Engage in personal relationships with offenders …"

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2.6 By signature dated November 8, 2000, Appellant acknowledged that she received the Department of Corrections' Employee Handbook and agreed to become familiar with its contents. Appellant also agreed that it was her responsibility to become familiar with the agency policies and directives.

2.7 In addition, staff was trained during new employee orientation to have a "hands off approach" with inmates except during a light escort, a situation of imminent risk or threat, or during an offender search. Staff was advised during training that a "hands off approach" reduces risks and protects employees from allegations of misconduct by offenders.

2.8 In making a determination of the above allegations, we carefully weighed the testimony of the witnesses and reviewed the documentary evidence in this case. Appellant denied touching the inmate. Based on the credible testimony provided by Jourdain Alexander, Registered Nurse, we find that Appellant more than likely touched the inmate's head and Ms. Alexander witnessed the inmate's resulting reaction. Based on a preponderance of the credible testimony and the written statements provided in this case, we find that the following occurred:

2.9 On December 9, 2001, Inmate Mickelson, a resident in the Lower E Unit, which is a treatment unit for inmates with mental issues, was standing at the base of a flight of stairs engaged in conversation with Jourdain Alexander, Registered Nurse. Ms. Alexander saw Appellant descend the staircase and stand a step or two behind Inmate Mickelson. Inmate Mickelson gave no indication that he was aware that Appellant was behind him. Ms. Alexander could not see Appellant's hands, but she saw Appellant looking at Inmate Mickelson's head and his head jerked backwards a couple of times. It appeared to Ms. Alexander that Appellant must have pulled Inmate Mickelson's hair.

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2.10 Appellant finished descending the stairs and walked away. Inmate Mickelson asked Ms. Alexander, “Did you see that?” and Ms. Alexander replied, “Yes I did.”

2.11 Inmate Mickelson approached Ms. Alexander a few hours later and reported that Appellant had been sexually harassing him.

2.12 A few days later, Inmate Mickelson reported to Correctional Officer Amber Thompson that Appellant had sexually harassed him. Inmate Mickelson stated that Appellant had twirled her fingers in the back of his hair and that Ms. Alexander witnessed it. Inmate Mickeson also stated that Appellant on another occasion “blew him a kiss.”

2.13 During a smoke break on December 12, 2001, Ms. Thompson questioned Ms. Alexander about the incident between Inmate Mickelson and Appellant. Mr. Ron Ruby, the Unit Supervisor, overheard the conversation and asked Ms. Alexander to write a statement to report what she observed. Ms. Alexander was reluctant to submit a statement against another co-worker because she was a new employee in the unit. However, Ms. Alexander submitted a statement after Mr. Ruby specifically directed her to do so.

2.14 Shortly thereafter, Ms. Thompson informed Appellant of Inmate Mickelson’s accusations. Appellant denied pulling Inmate Mickelson’s hair and stated that she had simply “pointed” at the back of his head. Appellant did not provide a reason for “pointing” at the back of Inmate Mickelson’s head.

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2.15 On December 19, 2001, Jim Cooper, Correctional Specialist, initiated an investigation. On February 15, 2002, an Employee Conduct Report was completed.

2.16 On March 5, 2002, Alice Payne, Superintendent of McNeil Island, conducted an administrative review with Appellant, Appellant's representatives, and Cynthia Gay, Human Resource Consultant. Appellant stated that the allegations were false. Appellant also stated that Inmate Mickelson saw her coming down the stairs and she "pointed" at the back of his head because he had left the door to his room open despite her prior warnings to keep his door closed. Superintendent Payne asked Appellant why Inmate Mickelson would lie, and Appellant responded that, "Inmates lie to get the upper hand and that they try to divide and conquer staff."

2.17 Superintendent Payne reviewed the Investigation Report, the Employee Conduct Report, the relevant agency policies, and Appellant's responses. Superintendent Payne determined that she did not find Appellant's responses to be credible because there was no information to corroborate her statements. Further, Superintendent Payne concluded that Appellant's claim that she "pointed" at the inmate's head did not make sense if she was standing behind him and he could not see her.

2.18 Superintendent Payne found Inmate Mickelson credible because he had never been infracted for lying and had never before brought a complaint forward against a staff member. Superintendent Payne also considered a report submitted by Dr. Karie Rainer, Inmate Mickelson's psychologist, who stated that she found the inmate to be credible in his reporting of the event. Dr. Rainer also stated that Inmate Mickelson was close to release to Work Release and had indicated that he did not want to do anything to complicate that transition.

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2.19 Superintendent Payne was aware of Inmate Mickelson's claim that Appellant had twirled her fingers in the back of his hair. Regardless of whether Appellant had "grabbed" the inmate's hair or twirled her fingers in his hair, Superintendent Payne considered any kind of touching to be inappropriate. However, based on what Ms. Alexander saw, Superintendent Payne concluded that Appellant had "grabbed" the inmate's hair.

2.20 Superintendent Payne considered Ms. Alexander's reluctance to provide her statement, so she clearly did not have any retaliatory intentions toward Appellant. Superintendent Payne found the statements of Ms. Alexander and Inmate Mickeson to be consistent and credible. Superintendent Payne determined that Appellant had engaged in misconduct by touching an inmate in a situation that did not constitute a light escort, imminent risk or threat, or an offender search. Superintendent Payne concluded that Appellant had neglected her duty, engaged in gross misconduct, and willfully violated published agency rules.

2.21 In determining the level of discipline, Superintendent Payne reviewed Appellant's personnel file including the documented supervisory conference, letters of reprimand, letter of expectation, and memo of counseling. Superintendent Payne considered Appellant's behavior to be unacceptable because it constituted a serious lawsuit risk and safety risk if the inmate considered the touch to be a sign of aggression and decided to respond with violence. Superintendent Payne was concerned about Appellant's failure to take responsibility for her actions and her failure to change her behavior despite prior corrective action taken by the department. Based on Appellant's history, Superintendent Payne concluded that a six-month reduction in pay was the appropriate disciplinary action to get Appellant's attention, change her behavior, and prevent a recurrence.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argued that Ms. Alexander clearly saw Inmate Mickelson's head jerk back twice and logically concluded that Appellant must have pulled his hair. Respondent asserted that Appellant gave no other explanation for the inmate's head jerking back that was reasonable or credible. Respondent contended that not only were Ms. Alexander and Inmate Mickelson's statements consistent, but that Dr. Rainer found Inmate Mickelson to be credible as well. Respondent argued that Appellant failed to follow the training provided by the agency to maintain a "hands off" approach with inmates. Respondent asserted that Appellant had a history of corrective actions even though she had been employed with the agency for a relatively short period of time. Respondent contended that Appellant's history of unprofessional behavior had not been corrected by the past corrective actions taken by the agency. Respondent argued that a six-month reduction in salary was not too severe and should be affirmed by the Board.

3.2 Appellant argued that there was no credible evidence to prove she "grabbed Inmate Mickelson's hair and caused his head to jerk backwards" as stated in the disciplinary letter. Appellant asserted that Inmate Mickelson's claim that she "twirled her fingers through his hair" was contrary to the allegation made by Superintendent Payne. Appellant contended that Ms. Alexander did not see her touch the inmate, and she denies touching the inmate in any way. Appellant contended that the state has insufficient evidence to support the disciplinary sanction of a six-month reduction in salary, and she asks the Board to reverse the sanction.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter.

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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).

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 Gross misconduct is flagrant misbehavior that 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).

4.5 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).

4.6 Respondent has not met its burden of proving that Appellant "grabbed Inmate Mickelson's hair and caused his head to jerk backwards" as stated in the disciplinary letter. However, based on Ms. Alexander's credible testimony, we conclude that Appellant more likely than not touched Inmate Mickelson's head which caused him to react with movement since he could not have known that Appellant was behind him. Although we do not find that the touch went to the extent of

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"grabbing" the inmate's hair, it clearly did not occur within the acceptable boundaries of "… a light escort, a situation of imminent risk or threat, or … an offender search."

4.7 Respondent has met its burden of proof that Appellant neglected her duty and willfully violated agency rules and regulations when she touched Inmate Mickelson's hair. Appellant had a duty to treat inmates with respect. Further, any kind of touch outside the parameters described above is inappropriate and in violation of the agency's Employee Handbook, Code of Ethics, policies, directives, and practices taught in new employee training.

4.8 Based on our conclusion that Appellant did not "grab" the inmate's hair as charged in the disciplinary letter, Respondent has failed to meet its burden of proof that Appellant's actions rose to the level of gross misconduct and adversely impacted the agency's ability to carry out its functions. We have determined that the action was not "grabbing" with the intent to inflict harm, but more than likely a touch on his head with the intent to get the inmate's attention.

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 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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4.11 By a preponderance of the credible evidence, Respondent has met its burden of proving two of the causes for the disciplinary action. In light of the two causes that were proven and Appellant's history of oral counseling and written reprimands, we conclude that a six-month reduction in salary is appropriate under the facts and circumstances. Therefore, the disciplinary action of a six-month reduction in salary should be affirmed.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Julie Hokenson is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Gerald L. Morgen, Vice Chair

_____
Busse Nutley, Member

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