BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

SCOTT MYKLEBUST, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	Case No. DISM-03-0066 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 BUSSE NUTLEY, Member. The hearing was held in the Personnel Appeals Board Hearing Room, 2828 Capitol Boulevard, Olympia, Washington, on July 6, 2004. GERALD L. MORGAN, Vice Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Scott Myklebust was present and was represented by Christopher Coker, of Parr, Younglove, Lyman & Coker, P.L.L.C. Emily Calkins, Assistant Attorney General, represented Respondent Department of Social and Health Services (DSHS).

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, malfeasance, and gross misconduct stemming from Appellant's conviction of fourth degree assault for domestic violence.

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II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Department of Social and Health Services. 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 August 8, 2003.

2.2 Appellant began his employment with DSHS in November 1995 and worked at Fircrest School before transferring to Rainier School. At the time of his dismissal, Appellant was an Attendant Counselor 2, and his duties included assisting developmentally disabled clients with daily skills while providing a safe and supportive environment. Appellant had no previous disciplinary action.

2.3 DSHS has adopted Personnel Policy 532. The purpose of Policy 532 is to establish "criteria and requirements the Department of Social and Health Services (DSHS) uses when conducting background checks on covered positions." Personnel Policy 532 applies to all DSHS employees serving in covered positions and is consistent with WAC 356-30-012. WAC 356-30-012(4), states, in relevant part:

> The secretary of the department of social and health services shall use the results of a background check solely to determine the character, competence and suitability of a person for a covered position. ...

2.4 Under the general requirements of Policy 532, Employment Background Checks, subsection (A) states:

> DSHS must complete a background check on an applicant prior to appointment to a covered position, and on current employees serving in a covered position in accordance with RCW 43.20A and RCW 72.05.440. Employees under final consideration for an appointment from one

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> covered position to another covered position in a different class and/or administration will be required to pass a background check prior to the effective date of the new appointment.

2.5 The policy also requires any employee in a covered position to report to their immediate supervisor within seven calendar days any conviction of a potentially disqualifying crime, disciplinary board final decision or, within seven calendar days, of being charged with a potentially disqualifying crime. DSHS created the Background Assessment Review Team (BART) to review background checks on current employees and to ensure fairness and consistency in the application of Policy 532.

2.6 As a current employee in a covered position, the department conducted a background check of Appellant in early 2002. Appellant cleared the background check.

2.7 On April 26, 2002, Appellant, who was off duty at the time, was involved in a domestic violence incident with his wife while their vehicle was stopped at an intersection in Enumclaw, Washington. Appellant notified the department of his arrest within a week of the incident. On May 14, 2002, Appellant pled guilty to Assault 4, Domestic Violence.

2.8 After Appellant's release from jail in July of 2002, he met with Acting Superintendent Jan Blackburn to discuss the details of his arrest. Appellant told Ms. Blackburn he had been drinking at the time of the altercation, he should have known better, and alcohol was the primary reason he engaged in the fight with his wife.

2.9 Ms. Blackburn placed Appellant on alternative assignment pending review of policies and procedures and relayed Appellant's version of the events to Superintendent Larry Merxbauer. In late August or early September of 2002, Mr. Merxbauer met with Appellant. Appellant testified he

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admitted to Mr. Merxbauer he and his wife were "having a little fight," he had been drinking, and he had "laid his hands on his wife." Appellant also admitted his actions were wrong. Sometime around September of 2002, Mr. Merxbauer returned Appellant to his attendant counselor position.

2.10 In March 2003, Mr. Merxbauer became aware of a restraining order against Appellant, which prompted him to request the Washington State Patrol (WSP) to further investigate the April 26, 2002, incident involving Appellant and his wife.

2.11 On June 10, 2003, Superintendent Merxbauer conducted a pre-termination meeting with Appellant and his representative. Human Resource Manager Alice Alfano also attended the pre-termination meeting. Mr. Merxbauer was unable to testify at the hearing before this Board. However, Ms. Alfano testified that after reviewing the WSP report, Superintendent Merxbauer was concerned that the WSP report described a much more violent and severe account of the incident than Appellant's portrayal of the incident.

2.12 Witnesses to the assault credibly testified before this Board that Appellant appeared drunk, agitated, and aggressive when he physically assaulted his wife and tried to prevent her from exiting the vehicle.

2.13 Based on the testimony and evidence presented, we find it more likely than not that Appellant diminished the seriousness of the assault when describing the events to Ms. Blackburn and Mr. Merxbauer.

2.14 By letter dated July 25, 2003, Mr. Merxbauer, notified Appellant of his dismissal effective August 10, 2003, for neglect of duty, malfeasance, and gross misconduct. Mr. Merxbauer wrote, "[Appellant's] actions are intolerable and detrimental to the basic mission of DSHS and Rainier

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School . . ." Mr. Merxbauer further wrote that Appellant provided no mitigating information to convince him to impose any sanction other than dismissal. In Appellant's dismissal letter Mr. Merxbauer wrote, "your attempt in the summer of 2002 to minimize the seriousness of this incident further destroys my trust and confidence in you."

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant committed and pled guilty to fourth degree assault but minimized the true nature of the incident when reporting it to his superiors. Respondent asserts Appellant's position as a caretaker for developmentally disabled adults required that he exercise patience and treat others with dignity and respect and argues his assault on his wife called into question his ability to provide quality care to the clients at Rainier School. Respondent argues, as a result of the assault, Appellant's credibility with the department is damaged. Respondent argues that Appellant was not entitled to a second BART review because he had already undergone a background check and was on notice that a conviction for assault would affect his employment. Respondent argues the agency is not required to risk the safety and well being of vulnerable citizens and asks the Board to uphold Appellant's dismissal.

3.2 Appellant asserts he fully disclosed the incident to the Superintendent in a timely manner and was under the impression the matter had been resolved when he was put back to work in his previous position. Appellant argues after Respondent reopened the investigation, the department should have complied with policy 532 and offered him a mitigating review or considered other employment options for him. Appellant argues an assault charge does not automatically preclude a person from employment and contends others have had similar charges and are still employed at Rainier School.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties 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 The first issue here is whether, as Appellant asserts, the department should have provided him with an opportunity to be reassessed by a Background Assessment Review Team (BART). However, once an employee has undergone and passed an initial background, this Board can find nothing in Policy 532 which requires the department to provide an employee with a BART review each time an employee is charged with or convicted of a potentially disqualifying crime. In this case, Appellant had already undergone a background check as required by WAC 356-30-012 and Policy 532.

4.4 The second issue before us is whether Appellant's criminal behavior impairs his ability to perform his job as an Attendant Counselor 2 working with developmentally disable adults.

4.5 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).

4.6 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).

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4.7 After reviewing the evidence, we conclude that Respondent has proven by a preponderance of the credible evidence that Appellant's violent assault on his wife was contrary to the accepted standards of behavior for state employees in general and for Attendant Counselors in particular. Appellant's actions irreparably damaged his trustworthiness and suitability to serve the citizens of the state of Washington when working with the vulnerable clients living at Rainier School. In addition, Appellant damaged his credibility because his characterization of the assault is contrary to the outcome of the WSP investigation, which was further supported by the credible testimony and evidence presented. Respondent has met its burden of proving the charges of neglect of duty and gross misconduct.

4.8 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an action that ought not to be done, that affects, interrupts or interferes with the performance of an official duty. Parramore v. Dep't of Social & Health Services, PAB No. D94-135 (1995), aff'd, Thurston Co. Super. Ct. No. 95-2-03516-4.

4.9 Respondent has failed to prove that Appellant's misconduct constitutes malfeasance.

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).

4.11 Under the facts and circumstances, Respondent has proven that it has a duty to protect its vulnerable clients, and Appellant could no longer be trusted to remain in a caretaker role.

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Therefore, termination is appropriate, and the appeal of Scott Myklebust should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Scott Myklebust is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Gerald L. Morgen, Vice Chair

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Busse Nutley, Member

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