BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ANTHONY GRANT, Appellant, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	))))))))))	Case No. DISM-04-0006 ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

1.1 **Consideration of Respondent's Motion.** This matter came before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member, on June 6, 2005, for consideration of Respondent's Motion for Summary Judgment.

1.2 **Representation.** Laura Wulf, Assistant Attorney General, represented Respondent Department of Social and Health Services. Christopher J. Coker, of Parr, Younglove, Lyman & Coker, PLLC, represented Appellant Anthony Grant.

1.3 **Documents Considered.** The Board considered the files and documents in this matter, including:

a. Respondent's Motion for Summary Judgment and attached exhibits, filed May 16, 2005;

b. Appellant's Response to Respondent's Motion for Summary Judgment, with attachments, filed May 26, 2005; and

c. Reply to Appellant's Brief In Opposition to Motion for Summary Judgment.

II. BACKGROUND AND FACTS

2.1 Appellant Anthony Grant was a Psychiatric Child Care Counselor (PCCC) 1 at the Child Study and Treatment Center. As a PCCC 1, Appellant was responsible for providing treatment counseling and supervision to emotionally, behaviorally and psychologically disturbed children and adolescents at the Child Study and Treatment Center.

2.2 By letter dated January 15, 2004, Norm Webster, Chief Executive Officer, notified Appellant of his immediate suspension without pay from January 16, 2004, through February 2, 2004, followed by his dismissal effective on February 3, 2004. Mr. Webster charged Appellant with neglect of duty, malfeasance, gross misconduct and willful violation of agency policies 6.04 (Standards of Ethical Conduct for Employees), 8.02 (Client Abuse), and CSTC policy 204 (Staff Patient Relations). Mr. Webster wrote to Appellant:

> Specifically, you are being disciplined for the following acts of misconduct:
>
> While in your position as a Psychiatric Child Care Counselor 1 and while on the ground of the CSTC, you developed an inappropriate personal and sexual relationship with fourteen year old Crystal A., who at the time of the incidents was a resident of CSTC;
>
> Between January 1, 2003 and April 18, 2003, you had sexual contact with Crystal A., including penile-vaginal sexual intercourse, digital sexual intercourse, and fellatio with Crystal A., while on duty as a Psychiatric Child Care Counselor for the Child Study and Treatment Center;
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> On November 19, 2003, based upon the above behaviors, you were arraigned in the Pierce County Superior Court and charged with three counts of Rape of child in the Third Degree and one count of Child Molestation in the third degree.

2.3 On January 21, 2004, Appellant filed an appeal of his dismissal.

2.4 On February 22, 2005, Appellant entered an Alford/Newton Plea to the charge of Communication with a Minor for Immoral Purposes, in violation of RCW 9.68A.011(4) and RCW 9.68A.090. Contained within the plea form, Appellant provided a statement to the court in reference to his case. At paragraph #11 of the State of Defendant on Plea of Guilty, Appellant wrote:

> Newton Plea: I have reviewed the evidence in this case with my attorney, and although I continue to maintain my innocence, I believe if the case were to proceed to trial there is a substantial likelihood I will be found guilty. Therefore, I am entering this plea to take advantage of the prosecutor's recommendation.

Appellant further agreed in the plea form that the court could review the police reports and/or statement of probable cause supplied by the prosecutor to establish a factual basis for the plea.

2.5 On June 30, 2004, Respondent filed a Motion for Summary Judgment, arguing that summary judgment affirming Appellant's suspension and dismissal from his position as a Psychiatric Child Care Counselor 1 is appropriate. Respondent asserts there is no dispute that Appellant engaged in the misconduct charged in the disciplinary letter. Respondent argues that under Washington law, under RCW 9.68A.090, ""Communicate' includes conduct as well as words, and 'immoral purposes' refer to sexual misconduct." Therefore, Respondent asserts there is no factual question regarding whether Appellant engaged in the illegal conduct alleged as the basis for his dismissal. Respondent argues that Appellant's conviction for Communication with a Minor for Immoral Purposes constitutes a neglect of duty, rises to the level of gross misconduct, violated DSHS policies, and constitutes malfeasance.

2.6 On May 26, 2005, Appellant filed his response to Respondent's Motion. Appellant argues summary judgment is not appropriate because material questions of fact exist regarding whether or not he engaged in the conduct as alleged in the disciplinary letter. Appellant asserts he entered an Alford plea to the charge of Communication with a Minor for Immoral Purposes but that such a plea did not necessarily mean he was guilty, just that enough evidence existed to convict him of criminal charges. Appellant asserts he is innocent of the allegations contained in the disciplinary letter, and he denies that he developed or maintained an inappropriate personal or sexual relationship with a resident. Appellant further denies he had sexual contact with the resident while employed or not employed with the state of Washington. Appellant asserts that before the Board are the issues of whether any of the bases for discipline specific in WAC 345-34-010 are present and what disciplinary action, if any, is appropriate.

2.7 On June 1, 2005, Respondent filed a reply to Appellant's response, arguing that Appellant agreed to a conviction for the crime of Communicating with a Minor for Immoral Purposes by virtue of signing the "Statement of Defendant of Plea of Guilty." Respondent asserts that while Appellant pled to a lesser crime than originally charged, his crime meant that the conduct was sexual misconduct. Respondent asserts that Appellant cannot claim that he is innocent of all charges while having pled guilty to a crime of sexual misconduct with a child under his supervision. Respondent argues that the factual bases which support dismissal have been established and that termination is the appropriate sanction because Appellant used his position of trust to harm a fourteen year old child.

III. DISCUSSION

3.1 Summary Judgment may be rendered where there is no genuine issue as to any material fact and the appeal should be decided or dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. See Hall v. University of Washington, PAB No. 3863-V2 (1995).

3.2 In order to preclude summary judgment, the non-moving party must set forth specific facts by affidavit or otherwise show a genuine dispute of material fact. A material fact is one upon which the outcome of the litigation depends. Hudeman v. Foley, 73 Wn.2d 880, 886, 441 P.2d 532 (1968).

3.3 Appellant was dismissed from his employment based on allegations that he 1) "developed an inappropriate personal and sexual relationship with fourteen year old Crystal A. who was at the time … a resident of the CSTC"; 2) "had sexual contact with Crystal A. …"; and 3) was "charged with three counts of rape of a Child in the Third Degree and one count of Child Molestation in the third degree." It is undisputed that the charges against Appellant were amended and he was later convicted of the crime of Communicating with a Minor for Immoral Purposes. The facts show that Appellant engaged in sexual misconduct with a child. The issue here is whether Appellant's misconduct warranted termination from his employment.

3.4 As a Psychiatric Child Care Counselor, Appellant was held to a high moral and ethical standard, he was expected to be role model, and he had a fundamental responsibility to engage in appropriate therapeutic interactions with residents. Appellant failed to maintain appropriate

boundaries with a resident when he engaged in criminal behavior that resulted in his conviction for Communicating with a Minor for Immoral Purposes.

3.5 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).

3.6 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).

3.7 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).

3.8 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995).

3.9 Respondent has proven by a preponderance of the credible evidence that Appellant neglected his duty to engage in appropriate therapeutic interactions with residents and that his actions were willful, contrary to the mission and policies of the agency and rose to the level of gross misconduct.

Appellant's sexual misconduct towards a fourteen year old female resident were also illegal and clearly affected the performance of his official duties as a Psychiatric Child Care Counselor.

3.10 Appellant's misconduct created a risk to the mission of the Child Study and Treatment Center to provide a safe and therapeutic environment for residents. Appellant should not be retained in a position where he treats and counsels children and adolescent. Under the totality of the proven facts and circumstances, dismissal is appropriate and the appeal should be denied. Therefore, Respondent's Motion for Summary Judgment should be granted.

The Board having reviewed the files and documentation and being fully advised in the premises, now enters the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion for Summary Judgment is granted, and the appeal of Anthony Grant is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member