BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MIKE LAMBERT, Appellant, v. DEPARTMENT OF CORRECTIONS Respondent.	Case No. DISM-02-0027 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 in the Superintendent's Conference Room at the Washington State Penitentiary in Walla Walla, Washington, on May 1, 2003 and May 2, 2003. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Mike Lambert was present and represented by Kristian Hedine, Attorney at Law. Morgan Damerow, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant left a threatening message on another employee's work voice mail.

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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); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant was a permanent employee of 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 March 19, 2002.

2.2 At the time of his dismissal, Appellant was a Correctional Industries Supervisor 2, with the Office of Correctional Operations within Correctional Industries. Appellant was the supervisor of the Metal Shop and had been employed by the Department of Corrections since 1984.

2.3 By letter dated March 11, 2002, Howard Yarbrough, Program Administrator of Correctional Industries, informed Appellant of his suspension without pay from March 11, 2002 through March 25, 2002, followed by his immediate dismissal at the end of his shift on March 26, 2002. Mr. Yarbrough charged Appellant with neglect of duty, gross misconduct, and willful violation of published employing agency policies. Respondent alleges that Appellant "knowingly, willingly, and deliberately left a voice message on co-worker Don James' state telephone answering equipment threatening to kill him."

2.4 Appellant has no history of prior formal disciplinary action.

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2.5 The facts of what occurred on January 2, 2002 are not in dispute. Appellant admitted that he left the voice mail message and acknowledged that it was inappropriate.

2.6 Don James, Appellant's co-worker, was gathering information from each of the Correctional Industries sites to prepare a cost analysis report for his supervisor. After his first request to Appellant for cost information related to the Metal Shop, Appellant provided inaccurate information to Mr. James. After further communication by fax and telephone to explain to Appellant what he needed, Appellant appeared frustrated with Mr. James' request and was having difficulty providing the information due to problems with his computer. On January 2, 2002, Mr. James received the following voice mail message from Appellant:

> Lambert here. How rude of me to think one of you bureaucrats would be sitting at your desk at 1:25. I'm faxing you over some bullshit to put in your database. I guarantee you that material is accurate within five percent and that's close enough for right now to get Mr. Krouse and Larry McKinstry off my ass. And if you do this to me again, I'll fuckin kill ya. Bye!

2.7 During January 2002, Mark Warner was a subordinate under Appellant's direct supervision. Mr. Warner entered Appellant's office in time to hear the final portion of the voice message, and was immediately concerned. Mr. Warner warned Appellant that leaving the voice mail message was a mistake and could result in serious consequences.

2.8 Mr. James was shocked and he felt intimidated, uncomfortable, and frightened by the threat. He was especially alarmed by the tone, inflection, and intensity of Appellant's voice. Mr. James reported the voice mail message to management, and on January 3, 2002, he also filed a police report.

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2.9 Mr. James testified that the threat has impacted his life both at work and at home. He does not know Appellant very well, however, he observed that Appellant was sometimes abrupt and abrasive in his communication style. Therefore, Mr. James determined that he should take the threat seriously to ensure his safety. Since receiving the threat, Mr. James is nervous and cautious at home and is concerned about his wife being home alone. He is also cautious at work because he might encounter an inmate who felt loyal to Appellant, and therefore pose a threat to his safety. Appellant's threat caused Mr. James to seek the assistance of a psychologist.

2.10 The DOC Employee Handbook directs employees to treat fellow staff with dignity and respect and refrain from profanity or inflammatory remarks. By signature dated December 27, 1993, Appellant acknowledged receipt of the agency handbook and agreed to become familiar with and have a thorough knowledge and understanding of the contents.

2.11 The DOC Workplace Violence Policy Number DOC 850.125 states that "verbal assaults, threatening behavior, or physical assaults occurring or arising from the workplace will not be tolerated." The policy directs the appointing authority to investigate any reports of violence in the workplace and implement control measures to prevent future workplace violence and ensure the safety and security of individuals.

2.12 By signature dated May 27, 1986, Appellant acknowledged that he understood he was responsible for knowing and following the Department of Corrections' Personnel Policy Directives. He also acknowledged that he was informed of where the manual was located, and that he was expected to be familiar with the manual and keep current on the policy directives. Appellant also agreed to contact his supervisor or personnel officer if he had any questions.

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2.13 A workplace violence pamphlet is attached to all agency paychecks once a year, and a pamphlet was attached to Appellant's paycheck in August 2001. The pamphlet states that workplace violence is any verbal assault, threatening behavior, or physical assault occurring in or arising from the worksite. The pamphlet directs all department employees to treat co-workers with dignity and respect and refers employees to the Workplace Violence Policy Number DOC 850.125.

2.14 In addition, expectations were provided to Correctional Institutions staff on September 27, 28, and 29, 2000 during an annual meeting in Kennewick, Washington. Mr. Yarbrough spoke during that meeting to make it clear to staff that the department expected a positive change in workplace attitudes and requested staff to "pull together" and build teamwork. Mr. Yarbrough directed staff to get along with each other, cease gossip, assist each other, and encourage each other.

2.15 An investigation was initiated regarding Appellant's threat and an employee conduct report was prepared. During the investigation, Appellant reported that he accepted responsibility for leaving the voice mail message, however, he felt the reaction of the department was out of context and proportion to the incident. Appellant stated that he did not intentionally "threaten" Mr. James, and he had no intention of harming or threatening anyone.

2.16 On January 9, 2002, Appellant sent an e-mail to his supervisor, Randy McEwen, expressing shame and embarrassment over his behavior. He stated that he owed Don James and all of Correctional Industries an apology. Appellant proposed the following remedy:

1. A letter of apology to Don James and Correctional Industries management to share with whomever they felt necessary.
2. A five percent cut in his salary for 3 months.
3. A corrective interview with continuing feedback.
4. An anger management class.

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2.17 After listening to the tape of the voice mail message, Mr. Yarbrough conducted an administrative hearing on January 29, 2002 to give Appellant an opportunity to respond. During the meeting, Mr. Yarbrough asked Appellant to provide an explanation to help him understand why he left the voice mail message. Appellant responded by saying, "I don't know, I just lost it." Appellant reported that he was under a lot of stress to provide information to Mr. James on very short notice. Appellant also reported that he was frustrated because his computer was not functioning properly and prevented him from gathering the information Mr. James requested. Appellant told Mr. Yarbrough that he was suffering from problems with his blood pressure (hypertension), which prevented him from thinking clearly the day he left the voice mail message. Appellant also stated that staff engage in the common practice of "trash talking" at the prison, which includes meaningless threats.

2.18 Mr. Yarbrough was not convinced by Appellant's response that he was suffering from hypertension and was frustrated over the improper functioning of his computer. Further, Mr. Yarbrough decided that Appellant's explanation about the common practice of "trash talking" was irrelevant because "trash talking" was not acceptable behavior and Appellant's threat went far beyond that sort of explanation.

2.19 Mr. Yarbrough reviewed Appellant's personnel file and noticed a pattern of past behavior involving his temper. Mr. Yarbrough also reviewed Appellant's training profile. Mr. Yarbrough noted that Appellant had received "First and Second Level Supervision" training, "Stress Management" training, and "Violence in the Workplace" training.

2.20 Mr. Yarbrough considered the serious nature of Appellant's behavior and the fact that he was a supervisor with the responsibility of being a role model for both staff and offenders. Mr. Yarbrough decided that Appellant did not provide any logical or convincing explanation for his

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behavior. In addition, Mr. Yarbrough was troubled by the fact that Appellant did not attempt to retract the message or apologize to Mr. James.

2.21 Mr. Yarbrough decided that the severity of Appellant's threat to kill a co-worker clearly constituted misconduct. Mr. Yarbrough considered the fear that Appellant's threat caused Mr. James and determined that Appellant's behavior constituted neglect of duty, gross misconduct, and willful violation of published employing agency policies.

2.22 In determining the level of discipline, Mr. Yarbrough considered Appellant's behavior to be severe and completely unacceptable and he decided that substantial disciplinary action was necessary. He considered suspension, reduction in pay, and demotion, however, Mr. Yarbrough believed those sanctions would not have addressed the problem. Also, he clearly felt he could not trust Appellant to avoid repeating the behavior. As the appointing authority, Mr. Yarbrough had a responsibility to provide a safe working environment. Although it was a difficult decision considering Appellant's length of time with the department, Mr. Yarbrough concluded that termination was the only appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant offered no credible explanation for his outrageously unacceptable behavior. Respondent asserts that Appellant was repeatedly provided with information about workplace violence. Respondent contends that Appellant was a leader and manager of the Metal Shop with a responsibility to set standards for appropriate conduct. Respondent argues that Appellant's threat had a severe negative impact on Mr. James. Respondent asserts that the Department of Corrections has a responsibility to keep its environment safe and has an obligation to enforce its policies. Respondent contends that Mr. Yarbrough could not trust

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Appellant not to repeat this kind of behavior, especially since he did not provide a logical explanation as to what caused the threat. Respondent argues that dismissal was the only possible recourse and asks the Board to affirm that decision.

3.2 Appellant argues that a vast majority of the Department of Corrections' employees "trash talk" and it is part of the workplace culture. Appellant asserts that he realized after he left the voice mail message that he had made an inappropriate mistake, but he did nothing to correct his mistake because he was embarrassed and ashamed. Appellant argues that he did not intend to threaten Mr. James with his life, he had no intention of harming anyone, and he regrets leaving the voice mail message. Appellant admits his behavior constituted neglect of duty, gross misconduct, and policy violation. Appellant argues that he offered a list of reasonable remedies that were ignored. Appellant asserts that he was a long-time employee with the Department of Corrections, he has learned his lesson, and he would never repeat this type of behavior if he were reinstated. Appellant contends that the sanction of dismissal was too severe under the circumstances and should not be upheld.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto 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 We listened to the tape of the voice mail message that Appellant left for Mr. James. We noted that Appellant's message was calmly stated in a threatening manner. We conclude that Mr. James reasonably perceived that the message was a threat, and his fear for his safety was reasonable.

4.5 Respondent has met its burden of proving that Appellant neglected his duty to adhere to the Department of Corrections' policies to ensure safety for staff when he threatened to kill Mr. James. Appellant also neglected his duty to set a leadership example of appropriate behavior for others. Appellant's explanation that the workplace culture included "trash talking" is completely unacceptable and does not mitigate his behavior. Appellant neglected his duty to act in a professional manner and treat co-workers with respect and courtesy.

4.6 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).

4.7 Respondent has met its burden of proving that Appellant's behavior constituted gross misconduct when his threat to kill a co-worker affected the agency's ability to provide a safe, secure, and healthy work environment. Further, we are troubled by Appellant's failure to take immediate steps to correct his behavior especially since his subordinate, Mr. Warner, cautioned him about the seriousness of his threat.

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4.8 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).

4.9 Appellant had knowledge of the agency's Employee Handbook and the Department of Corrections' Workplace Violence Policy Number DOC 850.125. Further, Appellant attended the Correctional Industries annual meeting in Kennewick, Washington on September 27, 28, and 29, 2000 during which Mr. Yarbrough stated the agency's expectation for staff to work together in a positive manner. Appellant, as a supervisor in a management level position, had a higher responsibility to keep abreast of agency policies, rules, and regulations. Respondent has met its burden of proof that Appellant willfully violated the agency handbook, policy, and directives when he threatened to kill Mr. James.

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. An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.11 Appellant admits that his threat to Mr. James was completely inappropriate. Even if Appellant did not intend to carry out his threat, any threat of violence in the workplace is unacceptable and should be taken seriously. Further, an employer cannot wait for an employee to follow through with threats of violence before taking action. Under the facts and circumstances of

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this case, and in light of the seriousness of the offense, we conclude that Respondent has proven that the sanction of dismissal is appropriate and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Mike Lambert is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Gerald L. Morgen, Vice Chair

_____
Busse Nutley, Member

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