BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JAMES BRADLEY, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-04-0120 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 office of the Personnel Appeals Board in Olympia, Washington, on November 29 and 30, 2005, and January 30, 2006.

1.2 **Appearances.** Appellant James Bradley was present and was represented by Anna Jancewicz, Staff Attorney for Teamsters Local Union No. 117. Kari Hanson, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of suspension followed by immediate dismissal for the causes of neglect of duty and willful violation of agency policy. Respondent alleges that Appellant engaged in an inappropriate, sexually oriented, profane, unsolicited and verbally assaultive telephone conversation with a female staff member.

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II. FINDINGS OF FACT

2.1 Appellant James Bradley was 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 December 1, 2004.

2.2 Appellant began his employment at Stafford Creek Corrections Center on June 30, 2000. Appellant has a history of previous discipline in the form of a five-day suspension for failing to report a co-worker who engaged in threatening behavior toward an offender and for making the statement, "not a fucking thing," when asked by new corrections officers what to do about the incident they witnessed between the officer and the offender.

2.3 By letter dated November 23, 2004, Doug Waddington, Superintendent of Stafford Creek Corrections Center, notified Appellant of his suspension followed by immediate dismissal for the causes of neglect of duty and willful violation of agency policy. Appellant's termination was effective at the end of his regularly scheduled shift on December 8, 2004. Superintendent Waddington alleged that Appellant engaged in an inappropriate, sexually oriented, profane, unsolicited and verbally assaultive telephone conversation with female correctional officer, Jennifer Machovsky.

2.4 On July 28, 2004, a number of correctional staff met after work for dinner and drinks. In addition to Appellant, the following correctional staff members were present: Correctional Records Specialist Molly Stallard, former Sergeant Jason Roberson, Sergeant Greg Judd, Correctional Counselor Jeneva Cotton, Chaplain Terence Madden, Correctional Officer Jimmie Reed, and Correctional Counselor Edward Golla. Teresa Reed, CO Reed's wife, was also present. The group

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was sitting at two separate tables a few feet apart. Appellant and Mr. Roberson sat at one table and across from them sat Ms. Stallard and, at times, Ms. Reed. The remainder of the group sat at the second table.

2.5 CO Jennifer Machovsky was home asleep when she received a call from Ms. Reed, who was reportedly very intoxicated, at approximately 9 p.m. Ms. Reed, who babysat Ms. Machovky's children, invited Ms. Machovsky to join her and the other DOC staff at the bar. However, Ms. Machovsky declined the invitation and ended the conversation. Approximately 30 minutes later, Ms. Machovsky received a second call, but no one on the line responded to her greeting, and she hung up the phone. Within a few minutes, Ms. Machovsky received a third phone call.

2.6 There is no dispute that Ms. Reed initiated all three phone calls to Ms. Machovsky from the bar using Mr. Roberson's cell phone. After initiating the third phone call, Ms. Reed immediately handed the cell phone to Appellant and told him to invite Ms. Machovsky to join them at the bar. When Appellant took the phone from Ms. Reed, he identified himself as "James Bradley." What is disputed here is what Ms. Machovsky heard on the other end of the phone and who said it.

2.7 Ms. Machovsky testified she immediately recognized Appellant's voice because they previously worked as partners one day a week for about eight months. Ms. Machovsky testified that after Appellant stated his name, he immediately began talking as if he were talking to someone else, saying, "Put that four-foot, nine-inch bitch on the phone." Ms. Machovsky, who is small in stature, believed Appellant was referring to her and told him, "Fuck you!" Ms. Machovsky testified that Appellant's response to her was, "It'll be the best fuck you ever had." Ms. Machovsky also testified she heard voices in the background "egging on" Appellant by yelling, "Yeah, why don't you come over here, and we'll fuck you."

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2.8 Ms. Machovsky then heard Mr. Roberson get on the phone line and make a "disclaimer" that he could not be responsible for what things were said on his phone. In response to Ms. Machovsky's statement that she was going to hang up and turn off her phone, Mr. Roberson replied, "Good. Otherwise they'll keep calling you." Mr. Roberson, who was sitting on same bench and to the right of Appellant, acknowledges he took the phone from Appellant because he did not like Appellant and did not want him using his phone. Mr. Roberson admits he made the "disclaimer," but denies he heard Appellant make any derogatory statements to Ms. Machovsky. Sergeant Judd, who was also sitting on the bench and to the left of Appellant, denied he saw Appellant use a cell phone or that he heard Appellant make any inappropriate comments. It is unclear how noisy the bar was, but Sergeant Judd described the noise level at a "conversational tone."

2.9 Ms. Stallard, who was sitting across from Appellant, saw Ms. Reed hand the cell phone to Appellant. When interviewed after the incident, she told the investigator that Appellant may have used words to the effect of "put that five-foot nothing …" but she was not certain whether he used the word "bitch" or "short shit." She also claimed that she heard Appellant say, "You come here and I'll fuck you up" not, "I'll fuck you." Ms. Stallard also heard Mr. Roberson making the statement that he was not responsible for what was said from his telephone.

2.10 Besides Ms. Stallard's version of what was said, no one else at the gathering admits to having heard Appellant make the comments attributed to him by Ms. Machovsky, or anyone yelling, "Yeah, why don't you come over here, and we'll fuck you."

2.11 Appellant testified that when Ms. Reed handed him the cell phone, all he had time to do was identify himself, because Mr. Roberson immediately took the phone from him. He denies he used any profanity with Ms. Machovsky.

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2.12 Superintendent Doug Waddington was Appellant's appointing authority when the discipline was imposed. Mr. Waddington testified that he found Appellant engaged in misconduct when he made sexually charged comments to a fellow correctional officer. Mr. Waddington testified that good judgment is critical to a correctional officer and Appellant exhibited extremely poor judgment and failed to act in compliance with the expectations of a correctional officer when he made the comments to Ms. Machovsky. Mr. Waddington was also concerned that Appellant's behavior exposed the department to possible liability.

2.13 Although the incident occurred off duty, Mr. Waddington determined that termination was warranted because Appellant's behavior occurred in front of other officers and diminished Ms. Machovsky's credibility on the job and in so doing, created a negative impact on Ms. Machovsky's work environment. Mr. Waddington also found that even though Appellant and Ms. Machovsky did not work together at the time of the incident, there was no certainty that they would always continue work apart because they could be required to work together in an emergent situation. Mr. Waddington further found that a lesser form of discipline was not sufficient to adequately address Appellant's behavior because it negatively impacted the workplace, undermined the trust placed in Appellant and showed his inability to employ good judgment.

2.14 The department has adopted numerous policies that address ethical behavior by employees and that prohibit sexual harassment. The DOC Employee Handbook provides, 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**

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….

As a representative of the Department of Corrections, you will be expected to:

Treat fellow staff with dignity and respect;
. . . .

Be a good citizen, obey laws while on and off-duty. Your conduct off duty may reflect on your fitness for duty;

You are not allowed to:

… Use profanity or inflammatory remarks with offenders or individuals with which you work;

… Engage in verbal assault, threatening behavior …

2.15 In determining whether Appellant made the statements as described by Ms. Machovsky, we find her to be credible and that her testimony was, in part, corroborated by what Ms. Stallard heard Appellant saying on the phone. Nothing in the record supports that Ms. Stallard had any bias against Appellant or any motive to fabricate what she heard him say. We have also considered evidence presented by Appellant to show that it was actually Mr. Roberson who made the comments to Ms. Machovsky, that he was under investigation at work, was on the verge of being terminated, and was dealing with a serious alcohol problem. However, we are more persuaded by Ms. Machovsky's testimony that she could distinguish between Appellant's and Mr. Roberson's voices and that she clearly recognized Appellant as the person who made the comments to her. Furthermore, Appellant never raised the theory that Mr. Roberson was responsible for the comments during the entire investigation or during his pre-termination hearing. Therefore, we find that a preponderance of the evidence supports that Appellant, more likely than not, made the comments described by Ms. Machovsky.

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2.16 In describing how Appellant's comments negatively impacted her work environment, Ms. Machovsky testified regarding the difficulties of not only having to prove herself as a female in a male-dominated field, but as female correctional officer of small stature. Ms. Machovsky testified that Appellant's comments, which she found to be sexual in nature, were humiliating and belittling, more so because he was in the presence of her peers and other corrections staff, thereby undermining her reputation as an officer. Ms. Machovsky also felt she was placed in an untenable situation of reporting a fellow correctional officer when the work environment discouraged "telling on others." Ms. Machovsky felt her role and reputation as a correctional officer had been damaged and that the incident drastically changed her work environment because she "told on" a co-worker and because of the speculation it created in the workplace among other staff as to what happened, staff members taking sides, and her inability to discuss the incident and defend herself once the investigation ensued.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues the credible evidence supports Appellant made offensive, derogatory and sexually harassing comments to Ms. Machovsky. Respondent asserts that Appellant's misconduct violated the department's code of expecations that he treat other staff with dignity and respect, refrain from using profanity and not engage in verbal assaults. Respondent argues that Appellant verbally assaulted Ms. Machovsky, which was a neglect of his duty and also a violation the of the department's sexual harassment policy. Respondent further asserts that a workplace nexus exists because Appellant made the comments to a co-worker and, therefore, created an uncomfortable working relationship.

3.2 Appellant denies he made any inappropriate or sexual statements to Ms. Machovsky, and he contends it was more likely than not Mr. Roberson who made the statements after Appellant handed the phone back to him. Appellant asserts that Ms. Machovsky's ability to recognize voices that

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night was dubious because she was likely tired and annoyed at the repeated calls and, therefore, could have been mistaken. In addition, Appellant asserts that no one, including Ms. Stallard, could corroborate Ms. Machovsky's claims that she heard voices in the background egging on Appellant. Appellant asserts that the evidence does not support he made the comments, and he asks to be reinstated.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties 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).

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 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).

4.5 Appellant's comments to Ms. Machovsky were offensive, disturbing and clearly upsetting to her. Ms. Machovsky was conflicted about reporting the incident because of the culture within

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corrections that discourages officers from reporting each other for policy violations. This tacit "code of silence" is evident in the refusal of any of the other employees, with the exception of Ms. Stallard, to come forward and report Appellant's behavior. This reluctance is especially evident in Mr. Roberson's denial of having heard Appellant say anything inappropriate. Oddly enough, however, he was compelled to make a "disclaimer" about whatever may have been said on his phone. Additionally, Sergeant Judd, who was sitting next to Appellant, also claimed he heard nothing when Ms. Stallard, who sat across from Appellant, was able to hear at least some portions of the conversation. This code of silence is further evidenced by Appellant's own suspension for refusing to report a fellow correctional officer who engaged in threatening behavior toward an offender, thereby discouraging two new officers from reporting the incident.

4.6 The State Personnel Board previously determined "the fact that one is an employee does not thereby bestow on the employer the right to punish misconduct, unless such misconduct can be shown to affect the employment situation." Linney v. Dep't of Social & Health Services, State Personnel Board No. 81S-6 (1981). We agree that events occurring during an off-duty social gathering should not be regulated by an employer. However, we conclude that Appellant's off-duty conduct in this case had an adverse effect on CO Machovky's work environment.

4.7 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness 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). The appointing authority must impose a sanction which has the desired effect on the employee, for example, modifying or stopping the inappropriate behavior, without imposing a sanction which is too severe. The appointing authority

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may impose informal corrective action or impose formal discipline for just cause, including reducing the employee's salary, demotion, suspending or dismissing the employee. Frederick v. Office of Secretary of State, PAB No. DISM-98-0064 (1999).

4.9 In reviewing the level of discipline, we have given significant weight to the impact Appellant's behavior had on Ms. Machovsky's work environment. Nevertheless, Appellant's behavior was not so severe that Ms. Machovsky claimed to be unable to ever again work with or provide back up for him, or to trust him to provide back up for her, in the case of an emergency. Under the facts and circumstances, Appellant's conduct, especially in light of his previous disciplinary history, warrants a severe disciplinary sanction. However, we find that termination is too severe, and conclude that a long-term suspension is sufficient. Therefore, the appeal of James Bradley should be modified to a 12-month suspension without pay.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of James Bradley is modified to 12-month suspension without pay.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

_____
Gerald L. Morgen, Member

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