BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

NORMA COTE, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-02-0055 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, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Department of Social and Health Services' Conference Room in Everett, Washington, on May 20, 2003. Busse Nutley, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Norma Cote did not appear and no representative appeared on her behalf. Amy Cook, 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, insubordination, gross misconduct, and willful violation of the published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant failed to properly manage cases under her supervision.

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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); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); 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 was a permanent employee of Respondent Department of Corrections (DOC) in the Marysville Field Office. 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 July 25, 2002.

2.2 By letter dated June 13, 2002, Dennis Thaut, Regional Administrator of the Northwest Region, informed Appellant of her dismissal effective at the end of her shift on June 28, 2002. Mr. Thaut charged Appellant with neglect of duty, insubordination, gross misconduct, and willful violation of the published employing agency or Department of Personnel rules or regulations. Mr. Thaut alleged that Appellant failed to properly manage cases under her supervision by her failure to properly classify cases, report violations per policy, follow her supervisor's work instructions, and follow appropriate procedures for transferring cases.

2.3 Appellant began her employment with the DOC in November 1981. At the time of her dismissal, Appellant was a Community Corrections Officer 2 (CCO) and managed a caseload of adult criminal offenders. Appellant's responsibilities included completing timely intakes, assisting offenders as they transitioned from custody back to the community, identifying risk factors for re-offending, intervening in the crime pattern cycle, and preventing criminal behavior.

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2.4 Appellant has been the subject of prior formal disciplinary action and has a history of prior counseling and corrective action. Appellant's personnel file includes the following:

1. A Letter of Expectation dated October 9, 2001 addressing her failure to complete an Interstate Investigation on Offender W, #821925, which also addressed her supervisor's concerns that she was unaware of state certified programs as an available resource for offenders as well as her understanding of the process for Secretary's Warrants.

2. A Medical Verification letter dated May 22, 2001 directing her to obtain written medical verification whenever she was absent from work due to personal or family illness/injury.

3. An Employee Development and Performance Plan for the period of 3/31/98 – 8/22/00 in which her supervisor addressed her tendency to "personalize things" when dealing with offenders on her caseload. Her supervisor noted that she needed to be able to "step back" and look at a case objectively. Her supervisor noted in the future performance expectations section that she "should continue to staff technical details of a case with the supervisor when she is unsure of how to deal with a given case."

4. A Special Employee Performance Evaluation for the period 11/28/97 – 3/31/98 addressing missing chrono entries, as well as her need to pay close attention to jurisdictional and classification issues.

5. An Employee Performance Evaluation for the period of 11/28/96 – 11/28/97 addressing deficiencies with regard to her administrative and operational case management, specifically classification and tracking errors.

6. An Employee Performance Evaluation for the period 11/28/93 – 11/28/94 addressing her failure to complete Notice of Violation reports on five cases. The evaluation also addressed her failure to chrono any type of contact or attempt to contact offenders on her caseload.

7. An Employee Performance Evaluation for the period 11/28/92 – 11/28/93 addressing concerns relative to misclassification of cases on her caseload.

8. A Special Employee Performance Evaluation for the period 11/28/87 – 4/1/88 addressing her need to broaden her base of experience to improve her judgment and decision-making.

9. A Letter of Discipline dated December 18, 1987 demoting Appellant from Classification Counselor 3 to Classification Counselor 2 for failure to notify management that Inmate R, #906155, reported to her that he was seriously thinking about escape if he were transferred to the Washington State Reformatory Honor Farm. An Employee Conduct Report was initiated on October 27, 1987.

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10. An Employee Performance Evaluation for the period of 11/28/86 – 11/28/87 addressing her lack of leadership/judgmental requirements.

11. A Memo of Counseling dated November 3, 1987 addressing an inappropriate fifteen-minute telephone conversation with an inmate no longer assigned to her caseload.

12. A Memo of Counseling dated August 24, 1987 addressing her inappropriate behavior of giving Inmate Irons, #278678, a greeting card regarding his progress.

13. A Memo dated August 28, 1986 addressing her failure to calculate Inmate Portrey's, #232759, RMED date appropriately and her failure to send this inmate to Unit Team for custody promotion.

14. An Employee Performance evaluation for the period 11/28/85 – 11/28/86 addressing her failure to meet with inmates on a regular monthly basis. Chronological record notations were further evidence of this.

15. A Letter of Reprimand dated March 17, 1986 addressing reporting errors by her in a Classification Referral/Progress Report.

16. An Employee Performance Evaluation for the period of 11/28/84 – 11/28/85 addressing her need to do reports more than once due to inaccuracies. The evaluation also addressed her failure to meet with inmates.

2.5 On August 23, 1990, Appellant signed the Personnel Policy Directive Acknowledgement, which states:

> I have reviewed and understand that I am responsible for knowing and following the Department of Corrections' Personnel Policy Directives. I was told where the Department Policy Directive Manual is kept and realize that I am expected to be familiar with the manual and to keep current on policy directives. If I have any questions, I understand that I am to contact my supervisor or my personnel officer.

2.6 DOC Policy #320.410 states, in part, that: "Offenders will be assigned RM-A if they meet one or more of the following criteria: 3) Have committed a sexual/violent act where the victim was vulnerable, due to age (i.e., 5 years or younger) or visible disability …"

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2.7 DOC Policy #320.155, states, in part, that: "CCO's take appropriate action when they learn an offender has violated conditions of supervision, probation, or parole …" and "Community Corrections Officers are responsible for taking action on known offender violations based on risk …"

2.8 DOC Policy #390.570, states, in part, that: "CCO's are to submit a Notice of Violation when an offender fails to make satisfactory progress in treatment, as verified through a written report from the treatment provider …"

2.9 DOC Policy #380.600 states, in part, that: "The Department will initiate an in-state transfer when it is in the best interest of the offender and/or community safety …" and "When an offender establishes residence in another catchment area that appears to be in the best interest of the offender and the community safety, the supervising CCO will initiate a request for transfer to the assignment officer …"

2.10 DOC Policy #310.100, states, in part, that: "Community Corrections Officers will complete the intake process within 30 calendar days of the assignment…."

2.11 Community Corrections Officers in the Marysville Field Office work with a caseload of over 100 offenders that vary from low risk to high risk classification. In 2001, Sandra Silver, Community Corrections Supervisor, reduced Appellant's caseload due to numerous problems with her performance and her inability to manage a normal caseload. After Appellant's caseload was reduced, she was limited to low-level risk cases that totaled approximately 70 to 80 offenders.

2.12 On March 12, 2002, Ms. Silver became aware that Appellant had failed to follow her instructions on a particular offender case. Because Ms. Silver had been concerned for a number of

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months about Appellant's performance, she conducted an audit of Appellant's caseload on March 20, 2002. The audit revealed a number of serious performance issues. Therefore, Ms. Silver initiated an Employee Conduct Investigation on March 22, 2002 and discovered the following:

2.13 Offender K, #811664

Appellant failed to properly classify Offender K to RM-A risk classification (the highest risk level) even though he met the criteria by committing a sexual act to a victim of five years or younger. When she failed to properly classify Offender K, Appellant violated DOC Policy #320.410.

Further, Appellant failed to take action after being informed in writing by a therapist that Offender K violated his supervision and treatment conditions by accessing pornography. Four months later, Appellant was again made aware of Offender K's high risk behavior after the offender admitted, during a polygraph examination, to viewing pornography and having contact with minors. Despite receiving notification on two separate occasions, Appellant failed to submit a Notice of Violation and disregarded DOC Policy #320.155 and DOC Policy #390.570.

2.14 Offender C, #800633

Offender C was convicted of child molestation in the first and second degree. Appellant failed to comply with her supervisor's instructions to confirm the employment status of the offender, contact the offender's treatment provider for a case review, conduct a home visit to investigate allegations that the offender had a drug lab in his home, and have the offender report twice a month for urinalysis testing. Appellant failed to reclassify the offender appropriately and violated DOC Policy #320.155. Appellant requested an in-state transfer after the offender moved, and the in-state transfer was denied because the offender's new address was next to a preschool. However, Appellant allowed the offender to remain at the prohibited address and in doing so, she violated the DOC Policy #380.600.

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2.15 Offender W

Appellant sent a letter to the offender directing him to report to her, and then failed to take any action after receiving notification from the Post Office that the letter was not deliverable because the address had no mailbox. Approximately three months later, Appellant send a second letter to the offender and the offender's term of supervision expired two days later. Appellant violated DOC Policy #310.100 by failing to complete the intake process within 30 calendar days of the assignment. Appellant also violated DOC Policy #320.155 by failing to classify the offender appropriately.

2.16 Offender B

Offender B received a juvenile conviction for eight separate counts of Rape of a Child, first degree. Offender B's victim was four years old. Appellant took no action after receiving a letter from Offender B stating he was living in Spokane. Appellant failed to comply with her supervisor's instructions to contact the offender and his counselor, in addition to contacting the Spokane DOC to ask for courtesy supervision on Offender B. Appellant also failed to reclassify the offender appropriately. In this case, Appellant violated DOC Policy #380.600, DOC Policy #320.155, and DOC Policy #320.410.

2.17 Offender A

Appellant failed to comply with conditions outlined in the stipulated agreement for Offender A. Appellant also failed to enforce the weekly urinalysis testing and did not report noncompliance as required. Offender A admitted during a polygraph examination that he had a rifle at his grandfather's house. However, Appellant failed to make any attempt to confiscate the rifle or report this violation of the offender's supervision conditions. By failing to take action, Appellant violated DOC Policy #320.155.

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2.18 Offender F

Offender F was diagnosed as suffering from antisocial personality, with homosexual pedophilia, exhibitionism, and sexual psychopathy. His doctor stated, "In conclusion, we have found him to be a sexual psychopath and unsafe to be at large and not amenable to treatment." Offender F asked Appellant for permission to travel to Yakima to secure employment as a carnival worker at the County Fair. Appellant granted that request, which placed Offender F in direct, unsupervised contact with minors.

2.19 After reviewing the Employee Conduct Investigation report, Mr. Thaut, Appellant, Appellant's representatives, and Linda Gilstrap, Human Resource Consultant, met on April 30, 2002 to give Appellant an opportunity to respond to the allegations. Appellant claimed that her workload was too large and she had not received adequate training. Mr. Thaut was not convinced by Appellant's claims because her workload had been reduced so that it was lower than the other CCOs, and documentation in her personnel file reflected that she had received all the necessary training in order to perform her duties. Mr. Thaut concluded that Appellant failed to provide any mitigating circumstances for her actions.

2.20 Mr. Thaut determined that Appellant's poor work performance was unacceptable, and she had clearly engaged in misconduct. Mr. Thaut concluded that Appellant failed to demonstrate the level of professional judgment required by a CCO and that Appellant had neglected her duty, engaged in gross misconduct, was insubordinate, and willfully violated published agency rules.

2.21 In determining the level of discipline, Mr. Thaut reviewed Appellant's personnel file including the letter of expectations, letter of discipline, memos of counseling, and letter of reprimand. Mr. Thaut reviewed Appellant's pattern of consistent poor judgment by her failure to

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respond to intakes in a timely manner, recognize and report high risk offender behaviors, classify offenders in a timely manner, and failure to document. Mr. Thaut realized that Appellant's poor performance had virtually resulted in some very high risk offenders going unsupervised.

2.22 Mr. Thaut determined that Appellant did not have the necessary skills or judgment to properly perform the duties of her position. Mr. Thaut determined that Appellant should have had a clear understanding of DOC policies after being employed with the agency since 1981. Mr. Thaut considered the possible adverse impact that Appellant's unacceptable performance could have had on public safety, DOC's credibility with the court, and the potential liability for the department.

2.23 Mr. Thaut determined that Appellant's failure to satisfactorily perform her duties in spite of a reduced caseload to be unacceptable and he decided that substantial disciplinary action was necessary. Mr. Thaut concluded that termination was the appropriate sanction based on Appellant's history and the serious nature of her poor performance.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that a fundamental aspect of the Department of Corrections' mission is community safety, and a negligent Community Correction Officer such as Appellant can have a devastating effect on the critical transition of offenders from custody to community. Respondent asserts that Appellant failed to properly manage cases under her supervision despite a reduced caseload. Respondent contends that Appellant had a number of instances of progressive discipline over the years with unsuccessful results. Respondent argues that Appellant failed to demonstrate the level of professional judgment required by a Community Corrections Officer. Respondent asserts that Appellant failed to provide any mitigating circumstances for her misconduct, and that dismissal was the appropriate sanction in this case.

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3.2 Appellant did not provide a defense to the allegations.

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).

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 Respondent has met its burden of proving that Appellant neglected her duty when she failed to adequately perform her job duties and properly manage cases under her supervision, comply with department policies, and comply with instructions from her supervisor.

4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995).

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4.6 Respondent has met its burden of proving that Appellant was insubordinate when she disregarded her supervisors specific instructions on various offender cases.

4.7 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).

4.8 Respondent has met its burden of proving that Appellant engaged in gross misconduct by her disregard for the agency's goals and objectives to protect the community and monitor and address offender behavior in the community. Appellant's actions hampered the department in its efforts to enhance community safety and administer sanctions to offenders for their misconduct.

4.9 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).

4.10 Respondent has met its burden of proving that Appellant had knowledge of and willfully violated Department of Corrections Policies #320.410, #320.155, #390.570, #380.600, and #310.100.

4.11 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).

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4.12 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).

4.13 In light of Appellant's egregious actions, Respondent has established that the disciplinary sanction of dismissal was not too severe and was appropriate under the circumstances presented here. Therefore, the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Norma Cote is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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