

BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

GUNNAR NIELSEN,

Appellant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

CASE NO. R-DISM-09-007

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** This matter came before the Personnel Resources Board, LAURA ANDERSON, Vice Chair, and DJ MARK, Member. The hearing was held on November 4, 2009, in the Personnel Resources Board hearing room in Olympia, Washington. Closing arguments were submitted in writing on November 19, 2009.

1.2 **Appearances.** Appellant Gunnar Nielsen was present and was represented by Michael Hanbey, Attorney at Law. Don Anderson, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a dismissal for violation of published DOC standards of conduct and policies for off-duty conduct, subsequent unscheduled absence from work and untruthfulness.

**II. FINDINGS OF FACT**

2.1 Appellant Gunnar Nielson is a permanent employee for Respondent Department of Corrections (DOC). Appellant and Respondent are subject to Chapter 41.06 RCW and the rules promulgated thereunder, Title 357 WAC. Appellant filed a timely appeal with the Personnel Resources Board on May 1, 2009.

1 2.2 Appellant had been employed with DOC for 13 years. At the time of the actions giving  
2 rise to this appeal, Appellant was a regional Safety Officer 2 assigned to the Clallam Bay  
3 Correctional Center (CBCC). Appellant was responsible for supervising the safety programs for  
4 four regional DOC prisons and the day-to-day safety operations at CBCC. His responsibilities  
5 included supervising and directing the work of three site safety officers. Although Appellant was  
6 a non-custodial employee, his work activities placed him in regular contact with staff and  
7 offenders in the institutions.

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9 2.3 Although Appellant's work history included good performance evaluations, he also had a  
10 prior formal disciplinary action in April 2007 for violating agency policies and misusing agency  
11 resources by using a DOC computer to access inappropriate internet sites. In addition, he  
12 received a letter of concern in November 2007 due to an alcohol odor in his proximity, which  
13 was not the first time this concern had been discussed with Appellant.

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15 2.4 Appellant admits that on January 31, 2009, which was a Saturday and a non-work day, he  
16 had been drinking while watching television in his home. At approximately 4 p.m., he decided to  
17 move his truck from the street in front of his residence to the alley behind his residence. In the  
18 process, he was contacted by a Port Angeles police officer who found that Appellant had in his  
19 possession, a small pipe containing unburned marijuana in the bowl. Appellant was arrested and  
20 charged with DUI and possession of marijuana. He was taken to Clallam County Jail where he  
21 remained until approximately 11:30 a.m., Monday, February 2, 2009. Although Appellant was  
22 scheduled to be at work at 8 a.m. on Monday, while he was in jail, he was unable to contact his  
23 employer and report his absence.

24  
25 2.5 Because Appellant had not reported for work and staff at CBCC indicated that he had  
26 been arrested, Appellant's supervisor, David Block, tried unsuccessfully to call Appellant. He left  
27 a message for Appellant to contact him. After Appellant was released from jail, he returned Mr.  
28 Block's call. Before receiving the call from Appellant Mr. Block had been informed that  
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Appellant was arrested for driving while under the influence of alcohol or drugs and for possession of marijuana under forty grams and that he was in jail.

2.6 After Appellant's release from jail, he returned Mr. Block's phone call. During the return, Appellant told Mr. Block that he was unable to report to work on Monday due to a domestic violence assault involving his daughter. Because Mr. Block had someone in his office when Appellant called, he made arrangements with Appellant to call him later.

2.7 Around noon on Monday, February 2, 2009, Mr. Block and Kathy Gastreich, the Director of the Risk Management Department, called Appellant. During the conversation, Appellant confirmed that he had been arrested and that he had lied to Mr. Block about the supposed domestic violence incident to buy time until he could talk to an attorney. In response to questioning by Ms. Gastreich, Appellant first denied, but later admitted the arrest involved marijuana.

2.8 After speaking with Appellant, Mr. Block and Ms. Gastreich consulted with DOC human resources staff and concluded that the matter should be investigated and that Appellant should be placed on home assignment pending the outcome of the investigation. The investigation was conducted by Don Wilbrecht. On February 12, 2009, Mr. Wilbrecht sent his completed investigation report to Ms. Gastreich.

2.9 Ms. Gastreich determined that the investigation supported findings of misconduct by Appellant for his off-duty behavior, his related unscheduled absence from work, and his lack of truthfulness when he told Mr. Block he was absent due to a domestic violence issue. Ms. Gastreich issued a pre-disciplinary letter to Appellant. On March 11 and 18, 2009, Appellant appeared at pre-disciplinary meetings. During the pre-disciplinary meetings, Appellant admitted to the allegations. He also stated that he illegally purchased, possessed and used marijuana to manage chronic pain.

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2 2.10 DOC standards of conduct are addressed in the DOC Employee Handbook. The  
3 handbook states, in part:

4 **CODE OF ETHICS**

5 High moral and ethical standards among correctional employees are essential for  
6 the success of the Department's programs. DOC subscribes to a code of unfailing  
7 honesty . . .

8 **DEPARTMENT EXPECTATIONS**

9 . . .

10 *As an employee of the Department of Corrections, you will be expected to:*

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

13 2.11 In addition, DOC Policy 800.010, Ethics, states, in part:

14 The Department expects staff to act with unfailing honesty . . . Staff will maintain  
15 high professional and ethical standards at all times . . . and comply with  
16 governmental statutes and regulations.

17 2.12 DOC Policy 850.150, Drug and Alcohol Free Workplace, states, in part:

18 The unlawful . . . possession or use of a controlled substance is prohibited.

19 . . .

20 Employees are strictly prohibited from:

21 . . . possession or use of a controlled substance.

22 . . .

23 Employees will notify their supervisor, not later than the next working day  
24 following any arrest, citation, or criminal conviction of incidents described in this  
25 policy.

26 2.13 As a long term employee, Appellant was aware of his responsibility to comply with DOC  
27 policies, expectations and standards of conduct.  
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1 2.14 After considering the information provided during the pre-disciplinary meetings including  
2 Appellant's explanation that he used marijuana to manage pain, but at the time of his arrest did  
3 not have a medical use permit, and his admission that he was in possession of marijuana when he  
4 was arrested for DUI, that he knew it was illegal, and that he knew it was illegal to purchase  
5 marijuana, Ms. Gastreich felt that misconduct had occurred. Ms. Gastreich determined that  
6 similar to his prior disciplinary action, Appellant once again demonstrated poor judgment and  
7 engaged in behaviors that violated agency policy, ethics and expectations. As a result, Ms.  
8 Gastreich concluded that termination was appropriate. Therefore, by letter dated April 23, 2009,  
9 Ms. Gastreich notified Appellant of his dismissal, effective April 24, 2009.

### 10 11 **III. ARGUMENTS OF THE PARTIES**

12 3.1 In summary, Respondent argues that there was just cause to dismiss Appellant from his  
13 position for engaging in off-duty misconduct including driving while intoxicated, illegally  
14 purchasing, possessing and using marijuana, and responding untruthfully when he reported that his  
15 unscheduled absence from work was due to a domestic violence issue involving his daughter.  
16 Respondent asserts that Appellant's actions were a violation of DOC's mission, policies and  
17 expectations. Respondent further asserts that there is a clear nexus between Appellant's off-duty  
18 conduct and his employment with DOC. Respondent contends that Appellant admitted his actions  
19 and presented no compelling defenses to the charges or reasonable excuses for his misconduct.

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21 Respondent argues that Appellant never requested a disability accommodation and that when his  
22 supervisor asked if he needed assistance, Appellant refused any assistance. Respondent further  
23 argues that after the issue about an alcohol odor in his proximity was raised, Appellant received the  
24 letter of concern which advised him to contact human resources if he had personal concerns, needed  
25 assistance, or wanted to know of any other resources. Respondent contends that even if DOC had  
26 known that Appellant suffered from alcoholism when it learned of his DUI arrest, he did not make  
27 DOC aware of a need for accommodation until after his admitted misconduct was discovered.

1 Therefore, Respondent contends that DOC was under no obligation to accommodate Appellant's  
2 disability at the time of his misconduct.

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4 Respondent argues that Appellant was responsible for oversight of safety policies and procedures  
5 and that he had regular contact with staff and offenders for whom he had a duty to serve as a role  
6 model. Respondent further argues that Appellant's behavior caused a loss of management trust and  
7 confidence in his judgment and compromised his ability to serve as role model for others. In light of  
8 the egregious nature of Appellant's behavior, his failure to demonstrate any remorse, his prior  
9 serious misconduct, management's loss of confidence, and the adverse impact on the mission of the  
10 agency, Respondent asserts that dismissal is the appropriate sanction.

11  
12 3.2 In summary, Appellant argues that DOC cannot regulate an employee's off-duty conduct  
13 and that DOC exceeded its authority when it used his off-duty conduct as a basis for his dismissal.  
14 Appellant argues that there is no evidence that he ever had drugs or alcohol in the workplace.  
15 Appellant admits that he misled his supervisor as to the reason why he was unable to appear at  
16 work in a timely manner. However, he asserts that he had no previous history of such behavior and  
17 he was not previously warned of potential disciplinary action for failing to appear for work or being  
18 tardy for work. Appellant contends that if providing untrue information to his supervisor constitutes  
19 misconduct, then the level of discipline imposed on him exceeds the harm occasioned by the  
20 misconduct.

21  
22 Appellant argues that he indicated on his employment application that he had a disability and  
23 asserts that the agency was aware of his disabling condition. Appellant contends that because the  
24 agency had this knowledge, it was DOC's duty to determine whether he should receive a reasonable  
25 accommodation. Appellant further contends that alcoholism is a disabling condition for which  
26 accommodation must be considered. Appellant admits that he did not request accommodation but  
27 asserts that the onus is on the Respondent to provide accommodation when the employer became  
28 aware he was unable to perform the essential functions of his position, in this case, appearing for  
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1 work. Appellant contends that Respondent failed to engage in an interactive process when it learned  
2 that he had alcoholism.

3  
4 Appellant argues that there is no evidence that his violation of the controlled substances act would  
5 subject him to manipulation and intimidation by offenders and that, because this fact is now known,  
6 there is no ability for someone to leverage this knowledge against him or to compromise him.  
7 Appellant further argues that Respondent failed to consider his work history with the agency  
8 because the appointing authority did not review his personnel file prior to determining the level of  
9 discipline to impose. Appellant also argues that Respondent failed to consider that he is under a  
10 five-year period of probation with the Court and that he is in compliance with his treatment  
11 program. Appellant asserts that his prior discipline and the instant case are not similar in nature and  
12 should not be compared in terms of his ability to exercise good judgment.

13  
14 Appellant admits that he did not appear for work and initially misled his supervisor and  
15 administrator as to his reason and he concedes that this behavior is a basis for disciplinary action.  
16 However, he contends that the punishment of dismissal does not comport with the severity of the  
17 offense. Appellant asserts that a two-week suspension would achieve the goals of enforcing agency  
18 policy, deterring repeated similar misconduct and ensuring compliance with DOC expectations. Or,  
19 if the Board determines that Appellant's ability to make good judgments is a concern, then a six-  
20 month demotion would be appropriate to remove him from his supervisory responsibilities, give the  
21 agency time to ensure that he completes his treatment as required by the Court, and preserve for the  
22 agency the cumulated knowledge, experience and capability he brings to his job.

#### 23 24 **IV. CONCLUSIONS OF LAW**

25 4.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.

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27 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
28 the charges upon which the action was initiated by proving by a preponderance of the credible  
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evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 357-52-110.

4.3 It is undisputed that Appellant committed the offenses set forth in the disciplinary letter and that Appellant was aware of DOC's policies, code of ethics and standards of conduct. Therefore, Appellant knew that he had a duty to obey laws while on and off duty and that his conduct off duty may reflect on his fitness for duty. Appellant's deliberate decision to engage in illegal activities when knowing that such conduct was contrary to DOC standards of conduct demonstrates an egregious lack of judgment, a clear violation of DOC policies and expectations, and undermines DOC's ability to place trust and confidence in his ability to use good judgment on the job. Respondent has established a nexus between Appellant's off-duty conduct and his employment with the Department of Corrections. Respondent has met its burden of proof.

4.4 In addition, under the facts and circumstances of this case, Respondent has established that it fulfilled its obligation in regard to accommodating any disability that was known at the time of the misconduct. At the time of Appellant's misconduct, Respondent was unaware of Appellant's alcoholism. Furthermore, alcoholism is not a defense for failing to comply with department policies, ethics and standards of conduct.

4.5 In Painter v. Dept. of Labor and Industries, PAB Case No. D94-034 (1995), aff'd Thurston Co. Super. Ct. No. 95-2-01406-0 (1998), the Personnel Appeals Board (PAB), predecessor to this Board, discussed alcoholism in relation to work activities and off-duty conduct. In Painter, the PAB concluded that while it was commendable that Painter recognized his alcoholism and assumed responsibility for treatment of his condition, he should also be held accountable for actions taken while under the influence of alcohol. Here, as in Painter, Appellant has recognized his alcoholism and is undergoing treatment, however, he must be held accountable for the actions taken while under the influence of alcohol and his subsequent actions of untruthfulness.

1 4.6 Under the totality of the proven facts and circumstances, including Appellant's length of  
2 service with the agency and history of previous corrective and disciplinary actions, the  
3 disciplinary sanction of dismissal is appropriate. Therefore, the dismissal should be affirmed and  
4 the appeal should be denied.

5  
6 **V. ORDER**

7 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gunnar Nielsen is denied.

8 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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10 WASHINGTON PERSONNEL RESOURCES BOARD

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LAURA ANDERSON, Member

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14 \_\_\_\_\_  
DJ MARK, Member