

BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

CLAN JACOBS,

Appellant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

CASE NO. R-DISM-08-005

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

**I. INTRODUCTION**

1.1 **Hearing.** This matter came before the Personnel Resources Board, MARSHA TADANO LONG, Chair; JOSEPH PINZONE, Vice Chair; and LAURA ANDERSON, Member. The hearing was held on October 1, October 20, October 21 and October 25, 2008, in the Personnel Resources Board hearing room in Olympia, Washington. Closing arguments were submitted in writing on November 7, 2008.

1.2 **Appearances.** Appellant Clan Jacobs was present and was represented by Dan Young, Attorney at Law. Morgen Damerow, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a dismissal for alleged failure to report three separate incidents in which alleged force was used against offenders.

**II. FINDINGS OF FACT**

2.1 Appellant Clan Jacobs was a permanent employee for Respondent Department of Corrections (DOC) at the Washington Corrections Center (WCC). 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 March 24, 2008.

2.2 Appellant began his employment with DOC in 1987. He began his employment as a Correctional Officer. Subsequently, he promoted through the ranks to the position of Correctional Lieutenant. In addition, Appellant was certified as a Master Instructor for control and defensive tactics. As an instructor, he provided training to other staff in defensive tactics, use of force techniques, and the use of force definition. During his employment, Appellant received numerous commendations including a Supervisor of the Year Nomination in 2006.

2.3 By letter dated February 14, 2007, Appellant was reprimanded for taking inappropriate actions during a use of force incident. The letter informed Appellant that he was to review all DOC policies and OMs related to use of force and ensure that they are followed by staff under his supervision.

2.4 As a Lieutenant, Appellant had significant responsibility and authority for subordinate staff and the safety and security of offenders, staff, and the facility. Appellant was aware of the DOC policies and training materials addressing use of force including when to report a use of force incident, when to utilize a planned use of force and how to react during an emergent use of force.

2.5 DOC Policy 410.200 Use of Force states, in part:

I. General Requirements

A. Staff will exercise good judgment, discipline, caution, and restraint when using force. . .

D. The following criteria will be followed when the use of force is necessary:

1. All reasonable steps will be taken to de-escalate or prevent any incident that would likely result in the use of force,
2. Resistance must be evident to justify the use of force. . .

II. Emergent Situations

A. Staff are authorized to use force, without prior approval, in the following emergency situations:

1. Self-defense
2. Defense of another
3. Maintenance of security . . .

I. Non- Emergent Situations

A. The Shift Commander will be notified before any force is used. . .

II. Use of Force Model

A. Force application will occur in a progressive manner consistent with the Use of Force Model (Attachment 4) and the Force Option Guidelines (Attachment 2). Staff will identify the level of threat/resistance exhibited by the offender and apply the level of force indicated by the Use of Force Model (Attachment 4).

. . . . .

B. Force Options

1. In all cases, staff presence and verbal intervention should occur prior to the following force options:

a. Physical intervention or control/impedance tactics requiring staff to physically control the offender(s),

. . . . .

C. Passive Resistance Response

1. In a non-emergent situation, where an offender displays passive resistance, any of the following may be used:

b. Staff at the incident site, . . . , attempt to reason with the offender or order the offender to comply with specific directions.

c. A video camera to record the actions of the offender(s).

d. A show of force that includes additional staff and/or equipment.

2. If the above actions fail to gain the compliance of the offender(s), other progressive means of force may be initiated.

D. Active Resistance Response

1. For non-emergent or emergent situations, interventions include, but are not limited to:

a. Escort and light control techniques, such as taking hold of the offender's arm or clothing and escorting him/her out of the area,

b. Control and restraint techniques,

c. Control and/or impedance tactics,

d. OC, and/or

e. EID.

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1 2.6 DOC Policy 400.100 Reporting of Incidents and Significant Events provides that incidents  
2 and significant events must be reported in a timely, accurate, and complete manner. The policy  
3 sets out the general requirements for reporting and identifies incidents and events as either  
4 Category 1 or Category 2. Attached to the policy is a document entitled Incident/Significant  
5 Event Categories. Category 2 events include all use of force incidents, offender fights and any  
6 assault committed by an offender.

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8 2.7 Policy 400.100 requires that for all Category 2 incidents, a tele-incident report (TIR) be  
9 prepared and submitted within 2 hours of the incident or by no later than 8:00 a.m. the following  
10 workday. Each officer involved in the use of force must submit a memo about the incident. And,  
11 whenever a use of force is employed, the offender must receive a medical examination.

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13 2.8 DOC employees are trained in the use of force and reporting requirements. Although the  
14 policies do not contain a definition of use of force, during various training events, employees are  
15 taught that use of force is, “the physical use of any weapon, implement, body movement, or  
16 chemical agent that causes an offender to comply with staff orders.” These training events include,  
17 for example, In-service Control Tactics training, Use of Force training, and Correctional Worker  
18 CORE training. Use of force is also discussed during the Supervisory Use of Force training.

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20 2.9 A preponderance of the credible testimony, including the testimony of Doug Waddington,  
21 Superintendent of WCC, establishes that at WCC the practice is to follow the use of force policy  
22 when an offender is non-compliant with staff orders. It is common for offenders to be placed in  
23 handcuffs and for staff to place a hand on the offender to guide or control him during escorts.  
24 This is not considered a use of force unless the offender is non-compliant. Staff does not report  
25 day-to-day interactions, use of control techniques or use of light escort techniques on offenders  
26 unless the offender does not comply with staff orders.

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28 2.10 Tony Dunnington is the WCC hearings officer for offender infractions. As early as 2005,  
29 he began hearing a number of offender complaints against Appellant alleging that he

1 inappropriately used force on them. During the process of hearing the complaints, Mr.  
2 Dunnington found that the alleged uses of force were undocumented. However, noting the  
3 number of allegations over time, Mr. Dunnington brought the matter to the attention of the  
4 former WCC Superintendent. The former Superintendent did not follow-up on Mr. Dunnington's  
5 concerns.

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7 2.11 By memo dated April 3, 2007, Mr. Dunnington reported his concerns to Don Wilbrecht,  
8 Correctional Investigation Manager, at DOC headquarters. Mr. Dunnington also provided a copy  
9 of the memo to Superintendent Waddington. After Mr. Waddington discussed the offenders'  
10 allegations with Mr. Wilbrecht and human resources staff, he instructed Mr. Wilbrecht to conduct  
11 an investigation. Even though, through the offender hearing process, the allegations against  
12 Appellant had been found unsubstantiated by Mr. Dunnington, Mr. Waddington ordered an  
13 investigation into the alleged use of force and custodial misconduct.

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15 2.12 Following Mr. Waddington's directive, Mr. Wilbrecht contacted DOC investigators from  
16 outside of WCC and assigned them to the investigation team. The team consisted of three  
17 investigators. Mr. Wilbrecht oversaw the progress of the team.

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19 2.13 The initial scope of the investigation was the alleged inappropriate use of force. While  
20 conducting interviews, the investigators also heard about allegations of inappropriate speeches  
21 Appellant gave to offenders and allegations that other officers typed and prepared reports that  
22 should have been done by Appellant which broaden the scope of the investigation.

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24 2.14 In addition to reviewing relevant documentation and tape recordings of offender infraction  
25 hearings, the investigators interviewed 16 offenders and 35 staff members, including Appellant.  
26 The investigation report included summaries of their interviews and written statements from staff.  
27 The investigators prepared the written statements and then asked staff to review and sign them.  
28 Some staff signed the statements as written, others rewrote the statements before signing them,  
29 and some staff refused or did not sign the statements. Testimony presented at the hearing before

1 the Board establishes that the statements were not a verbatim recitation of staff statements during  
2 the interviews. Some of the officers testified that their statements contained inaccurate  
3 representations and embellished facts.

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5 2.15 By memorandum dated October 16, 2007, the investigators forwarded their report to Mr.  
6 Waddington.

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8 2.16 On October 21, 2007, Mr. Waddington issued a pre-disciplinary letter to Appellant. Mr.  
9 Waddington determined that during eight of the incidents in the investigation report, Appellant  
10 displayed unprofessional behavior, violated use of force policies, failed to report the uses of force,  
11 and directed subordinate staff to change and falsify written reports.

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13 2.17 Mr. Waddington met with Appellant on November 5, 2007 to discuss the allegations.  
14 During the meeting, Appellant denied using excessive force and challenged the fairness of the  
15 investigation. Appellant alleged that the investigators did not interview some of the staff who  
16 were present during the incidents. As a result, Mr. Waddington asked the investigators to expand  
17 the investigation and interview the staff that Appellant named.

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19 2.18 By letter dated December 20, 2007, Mr. Waddington provided Appellant with copies of  
20 the transcripts from the additional witness interviews. In the letter, Mr. Waddington informed  
21 Appellant that he would consider the information and the additional witness statements and that  
22 he would provide his decision to Appellant.

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24 2.19 Mr. Waddington reviewed the entire investigation packet, including all the attachments.  
25 He determined that misconduct occurred in three of the incidents. The preponderance of the  
26 credible testimony establishes that the incidents for which Appellant was disciplined were based  
27 on offender reports and did not occur as Mr. Waddington described them in his disciplinary letter.  
28 As a result, the Board finds the following:

- 1 • On January 18, 2006, Correctional Officers (COs) were conducting pat-down searches on  
2 offenders during mainline. The pat-downs were performed while the offenders were in line  
3 and were leaving the dining room to return to their unit. CO Allison Comstock was one of  
4 the officers conducting the pat-downs. As Offender Brown approached CO Comstock,  
5 Brown became upset about the possibility of CO Comstock patting him down. Appellant  
6 heard Brown yelling and making threatening statements toward CO Comstock so he  
7 escorted Brown from the line. Appellant took Brown into the hallway in front of the  
8 control booth. Brown was placed in handcuffs. He then followed staff instructions to kneel  
9 on the floor and lay on his stomach. He was then placed in leg restraints. Although Brown  
10 continued to yell, he complied with staff direction during the incident.  
11
- 12 • On November 29, 2006, Correctional Sergeant Allen Gill and CO Ronald Lanoue went to  
13 retrieve Offender Sims from his cell to take him to the sergeant's office for a meeting.  
14 Sims was sitting on the toilet. Sgt. Gill and CO Lanoue left and returned several times, but  
15 Sims was still sitting on the toilet. Finally, Appellant went with Sgt. Gill and CO Lanoue  
16 to retrieve Sims. When they got to the cell, Sims was sitting on the toilet. His coveralls  
17 were open and tied around his waist. After a brief conversation, the door to the cell was  
18 opened and Appellant entered the cell to escort Sims out. When Appellant entered the cell,  
19 Sims stood up, Appellant took him by the elbow and Sims walked out of the cell.  
20 Although Sims alleged that he was removed from his cell while he was using the toilet and  
21 not allowed to clean himself, a preponderance of the credible testimony establishes that he  
22 was sitting on the toilet with his coveralls pulled up to his waist and that he exited the cell  
23 as instructed in compliance with staff directions.  
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- 25 • On December 30, 2006, Appellant and CO Richard Jorgensen were transporting Offender  
26 Alexander to the Intensive Management Unit (IMU) in the back of the Response and  
27 Movement (R&M) truck. Alexander was unhappy and appeared to be very agitated. He  
28 was in wrist restraints and was yelling, swearing and calling names. While seated in the  
29 back of the moving truck, Alexander rocked forward and made several attempts to stand

1 up. When Alexander rose up from the seat, he lost his balance. Appellant took his arms  
2 and told him to face the front of the truck. Alexander complied by turning toward the  
3 front of the truck. Appellant told Alexander to lie on the floor of the truck which he did.  
4 However, while lying on the floor, Alexander began kicking his feet. Appellant told  
5 Alexander to cross his ankles which he did. Appellant then placed his hands on  
6 Alexander's ankles as a control technique. When the truck arrived at the IMU, Appellant  
7 asked Alexander if he had hurt himself and he said no and indicated that he did not want to  
8 see medical staff. When they were inside of the IMU, Appellant told staff that if Alexander  
9 wanted to see medical staff, they should have the staff see him. There is no evidence in the  
10 record to show that Alexander failed to comply with staff directions or that he was injured  
11 during the truck ride.

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13 2.20 In determining the level of discipline to impose, Mr. Waddington considered the facts and  
14 circumstances described in the investigation reports regarding the charges against Appellant. He  
15 stated that he also considered Appellant's responses to the charges. Mr. Waddington determined  
16 that misconduct occurred as follows:

- 17 • Appellant used a leg movement to cause Offender Brown to fall down to the ground which  
18 was a violation of policy in that he failed to exercise good judgment, failed to de-escalate a  
19 potentially volatile situation, failed to accurately report the incident, and failed to file a use of  
20 force report.
- 21 • Appellant made no attempt to dialogue with Offender Sims and instead, pulled Sims off the  
22 toilet and did not allow him time to clean himself. Because it was not an emergent situation,  
23 Appellant's actions were excessive, created a breach of safety and security, and set a poor  
24 example for staff.
- 25 • Appellant used excessive force when he crossed and held Offender Alexander's legs and  
26 violated policy when he failed to file a use of force report and did not take Alexander to be  
27 checked by medical staff.

1 2.21 Mr. Waddington testified that he reviewed Appellant's employment history with the  
2 department and the information contained in Appellant's personnel file and training record. Mr.  
3 Waddington determined that Appellant disregarded the safety and security of the institution, staff  
4 and offenders; engaged in unprofessional behavior, violated agency policy and placed the  
5 department at risk; and failed to make sound decisions in accordance with policy and procedures.  
6 Mr. Waddington felt that he could no longer trust Appellant and could no longer allow him to  
7 remain in a position with decision-making authority over offenders. As a result, by letter dated  
8 February 22, 2008, Mr. Waddington notified Appellant of his termination from employment, effective  
9 March 17, 2008.

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

11 3.1 In summary, Respondent argues that Appellant used unauthorized and unnecessary force in  
12 three incidents and did not complete and file the use of force reports that are required by DOC policies.  
13 In addition, Respondent argues that Appellant provided false or intentionally vague information  
14 concerning these events. Respondent contends that the position of Lieutenant has significant authority  
15 and responsibility and that Appellant's actions demonstrated that he was no longer capable of  
16 exercising this authority or acting in accordance with DOC's expectations. Respondent asserts that the  
17 investigation into these events was fair, complete and unbiased and supported the conclusions of the  
18 Superintendent. Respondent contends that Appellant used a balance disruption technique on Offender  
19 Brown and placed him on the ground; used force against Offender Sims in removing him from his cell;  
20 and used force against Offender Alexander when taking him to the floor of the R&M truck and  
21 restraining his feet. Respondent further contends that the severity of Appellant's conduct was  
22 exacerbated by the fact that he was a Lieutenant. Respondent asserts that dismissal is the appropriate  
23 sanction for unauthorized and unreported uses of force in violation of policies and expectations.

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25 3.2 In summary, Appellant argues that the investigation into the alleged misconduct was highly  
26 questionable, expanded in scope without notification to Appellant, contained inaccurate witness  
27 statements, failed to include all witnesses to the events, and included unsubstantiated insinuations.  
28 Appellant argues that Respondent inappropriately gave more weight to offender accusations than to  
29 the testimony of the correctional officers present during all of the subject incidents. Appellant contends

1 that the DOC's policies contain no definition for use of force and the absence of such a definition  
2 causes confusion about what is considered a use of force and what must be reported as such. Appellant  
3 asserts that when DOC's policies do not provide clear guidance, an officer should not be terminated on  
4 the basis of ambiguous events interpreted in light of the policies. Appellant argues that the evidence  
5 does not support the conclusion that force was used and not reported in any of the three incidents that  
6 formed the basis for his termination. Appellant further argues that even if one incident, such as the  
7 Alexander incident, did support a finding that he failed to report a technical use of force in one incident,  
8 termination would not be justified or warranted. Appellant asserts that his termination should be  
9 reversed and he should be reinstated in accordance with RCW 41.06.220(2).

#### 10 11 **IV. CONCLUSIONS OF LAW**

12 4.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.  
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14 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the  
15 charges upon which the action was initiated by proving by a preponderance of the credible evidence  
16 that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was  
17 appropriate under the facts and circumstances. WAC 357-52-110.  
18

19 4.3 During the course of the multiple days of hearing on this matter, the Board heard testimony of  
20 numerous correctional officers and staff. Neither Respondent nor Appellant called any of the  
21 complaining offenders to testify at the hearing. Based on a preponderance of the credible testimony and  
22 evidence offered at the hearing and the proven facts of this case, Respondent has failed to meet its  
23 burden of proof. The record does not support a finding or conclusion that Appellant violated DOC  
24 policies, engaged in unprofessional behavior, placed the institution, staff or offenders at risk, failed to  
25 make sound decisions, or used unauthorized or unnecessary force in the Offender Brown, the Offender  
26 Sims or the Offender Alexander incident.  
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28 4.4 Under the totality of the proven facts and circumstances, the disciplinary sanction of  
29 dismissal is not warranted and the appeal should be granted.

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**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Clan Jacobs is granted.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

WASHINGTON PERSONNEL RESOURCES BOARD

\_\_\_\_\_  
MARSHA TADANO LONG, Chair

\_\_\_\_\_  
LAURA ANDERSON, Member

**I DISSENT.**

I dissent in part with the majority opinion. I concur that none of the alleged offenses rose to a level warranting termination and Respondent did not meet the burden of proof in the Sims and Brown incidents. However, in the Alexander incident, the offender was described as kicking violently and cursing loudly. It is reasonable to conclude there was a use of force in excess of what was consistently described by all officers as a "light touch" or "light escort" technique in controlling the offender. Because holding Alexander's ankles was technically a "use of force," a report should have been generated. Consequently, some level of discipline is warranted; however, the misconduct did not rise to a level meriting termination.

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JOSEPH PINZONE, Vice Chair