BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

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| ROB CAMPBELL,<br><br>Appellant,<br><br>v.<br><br>DEPARTMENT OF CORRECTIONS,<br><br>Respondent. | Case No. RED-04-0033<br><br>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 May 10 and 27, 2005.

1.2 **Appearances.** Appellant Rob Campbell was present and was represented by Gregory Rhodes, of Parr, Younglove, Lyman & Coker, P.L.L.C. Morgan Damerow, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of reduction in salary for willful violation of published employing agency policy and gross misconduct for being arrested and charged with Driving Under the Influence (DUI).



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## II. FINDINGS OF FACT

2.1 Appellant is a Community Corrections Officer 2 and permanent employee for 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 June 30, 2004.

2.2 Appellant began his employment with DOC in August 2001. At the time of the alleged misconduct, Appellant spent part of his work day in an office located at the east precinct of the Vancouver Police Department, alternating between that office and the DOC office. Appellant had a positive work record and has no record of previous disciplines of any type.

2.3 The following facts are undisputed:

- On February 21, 2004, while off duty, Appellant was stopped for a traffic infraction by the Washington State Patrol (WSP), arrested, and charged with Driving Under the Influence (DUI).
- Appellant declined to do a portable breath test and was transported to the WSP office where he consented to two breathalyzer tests registering readings of .097 and .092, both over the legal limit of .08.
- Appellant was cooperative and responded with courtesy during the arrest.

2.4 After Appellant's arrest on February 21, Community Corrections Supervisor (CCS) 1 Jeff Frice, Appellant's supervisor, arrived at the WSP office and transported Appellant to his home. CCS 1 Frice subsequently initiated an Employee Conduct Report, which resulted in an investigation of Appellant's arrest, including interviews with CCS 1 Frice and Appellant and a review of the police report.



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2.5 Southwest Regional Administrator Ruben Cedeño, Appellant's appointing authority, reviewed the ECR and investigation and met with Appellant to offer him an opportunity to respond to the charges. Mr. Cedeño found the allegations that Appellant was arrested for DUI and registered over .08 on the breathalyzer test to be true; therefore, he concluded misconduct occurred.

2.6 By letter dated May 7, 2004, Mr. Cedeño notified Appellant of his five percent, two month reduction in pay. Mr. Cedeño alleged Appellant willfully violated publishing employing agency policy and committed gross misconduct when, as a Department of Corrections employee, Appellant engaged in the following actions:

> When on February 21, 2004 you were arrested by the Washington State Patrol (WSP) and charged with Driving under the Influence (DUI), arrested and taken to the WSP office. There you consented to a breathalyzer test and registered over .08, the legal limit for operating a vehicle while intoxicated.

Mr. Cedeño further wrote:

> . . . as an employee of the Department, [you] conducted yourself in public in such a manner that it caused your arrest. . . . Your conduct not only presented yourself, a Department employee, to the police and courts in an extremely negative manner, it may also have damaged the reputation of the Department as a whole. This arrest could affect your ability to perform your job due to your loss of reputation and the potential loss of your drivers license.

2.7 DOC's ethics policy, 801.010, directs employees to act in a manner that demonstrates high ethical standards. DOC informs all employees of their duty to "be a good citizen" and to "obey all laws while on or off duty."

2.8 In determining the level of discipline, Mr. Cedeño considered the negative impact Appellant's arrest had on the department's partnership with local law enforcement. Mr. Cedeño testified that DOC employees are expected to obey the laws and conduct themselves in a manner



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above reproach at all times. Because Appellant worked directly with the Vancouver Police Department, Mr. Cedeño believed Appellant's credibility had been damaged and stated the Vancouver Police Department no longer wanted Appellant to be a part of their work team due to his arrest for DUI, as well as for other reasons. Mr. Cedeño emphasized that Appellant's disciplinary action was based on his arrest and charge of DUI, regardless of any subsequent actions by the court. In addition, Mr. Cedeño considered Appellant's positive employment record and work ethic and concluded the more lenient sanction of reduction in salary was the appropriate discipline.

2.9 Subsequent to Appellant's disciplinary action, his DUI charge was reduced to Negligent Driving, 2nd Degree, and his license was not suspended.

## III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues Appellant is being disciplined for his conduct of operating a vehicle after consuming enough alcohol to exceed the legal limit of .08. Respondent argues Appellant's discipline is based on those actions, which caused him to be arrested for a DUI. Respondent argues Appellant's plea bargain to a lesser charge of negligent driving does not mitigate the fact that he chose to drive his vehicle after drinking alcohol. Respondent argues a criminal conviction is not necessary for the department to pursue disciplinary action in this case. Respondent asserts Appellant's behavior violated the agency's policy to be a law abiding citizen and rose to the level of gross misconduct because it affected the department's relationship with local law enforcement.

3.2 Appellant argues the only facts to consider are his arrest for DUI and his breathalyzer readings of .097 and .092. Appellant asserts that it is from these two actions that he was charged with violation of policy and gross misconduct. Appellant argues that while off duty conduct can be the basis for discipline, it must be based upon the employee's underlying behavior and not simply being arrested and charged with a crime without conviction. Appellant contends that his actions



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leading up to the arrest, not signaling before making a lane change and not wearing a seatbelt, did not warrant misconduct. Appellant further contends he was cooperative and respectful during his interaction with the Washington State Patrol. Appellant argues his off duty conduct had no effect on his ability to perform his duties and asserts the department has not met its burden of proving the charges in the disciplinary letter.

## 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 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).

4.4 Gross misconduct is flagrant misbehavior which 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).



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4.5 The first issue here is whether discipline can be based solely on an employee's arrest pending the outcome of court proceedings to adjudicate the charges. In Vargas v. Dep't of Social & Health Services, PAB No. DISM-96-0048 (1997), an Investigator 1 was terminated for being charged with the crime of delivering a controlled substance. The criminal charges were subsequently dismissed without prejudice, and the Board reversed the agency's decision to terminate. Similar to the concerns expressed by DOC in this appeal, DSHS was concerned about the negative impact Mr. Vargas' actions had on the agency. Nevertheless, the Board determined that Respondent failed to meet its burden of proof and concluded, "[b]ased on the specific charge in the disciplinary letter of being arrested and charged with selling cocaine from his home and the subsequent dismissal of the criminal charges against Appellant, . . . the charges resulting from this allegation should be dismissed." Therefore, consistent with Vargas, the Appellant here should not be disciplined solely because he was arrested and charged with DUI.

4.6 The second issue is whether Appellant's underlying conduct resulting in his arrest warranted misconduct. In Ahearn v. Dep't of Corrections, PAB No. DEMO-02-0016 (2002), Mr. Ahearn was also arrested and charged with DUI. In Mr. Ahearn's disciplinary letter the appointing authority wrote:

> . . . your conduct . . . negatively impacted the Department's program when you were arrested on McChord Air Force Base for failure to obey the Gate Officer, driving under the influence, trespassing/entry for unlawful purposes, having an open alcohol container in your vehicle and not possessing a valid driver's license.
>
> . . .
>
> You neglected your responsibility as an employee and supervisor of the department when your conduct resulted in your arrest for DUI.

In Ahearn, the Board granted partial Summary Judgment to Respondent because there was no dispute Mr. Ahearn engaged in the conduct outlined in his disciplinary letter, and the Board found



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the only issue before the Board was "the impact of Appellant's off-duty conduct on his position as a Correctional Unit Supervisor . . ." The Board upheld demotion based on the entirety of Mr. Ahearn's conduct, which alone warranted disciplinary action, regardless of his arrest. Here, Appellant's disciplinary action was based solely on the fact that he was arrested and charged with DUI, as confirmed by Mr. Cedeño's testimony. However, Respondent has failed to prove Appellant's arrest alone violated agency policy without any of the aggravating circumstances present in Ahern when the DUI charge was later amended to a lesser charge of 2nd degree negligent driving.

4.7 Furthermore, Appellant was arrested and charged with DUI outside of his normal working hours; therefore, the agency has the additional burden of establishing that Appellant's off duty conduct affected his ability to perform the duties of his Community Corrections Officer 2 position. 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). Although we understand Mr. Cedeño's concern about maintaining a positive, collaborative working relationship with local law enforcement, Respondent did not provide any evidence from the Vancouver Police Department to prove Appellant's arrest for DUI and breathalyzer readings irreparably damaged the department's ability to work with them. In addition, there is no evidence Appellant's arrest affected his ability to perform his duties (e.g. loss of Appellant's driver's license) in a way that would negatively impact the department.

4.8 The Board does not, by this decision, in any way condone Appellant's apparent decision to consume alcohol and operate a motor vehicle on a public roadway. However, Respondent has



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failed to meet its burden of proving the charges of willful violation of agency policy and gross misconduct, and the appeal of Rob Campbell should be granted.

## V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Rob Campbell is granted.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member



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