BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KENNETH WILSON, Appellant, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. DISM-99-0026 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; GERALD L. MORGEN, Vice Chair; and NATHAN S. FORD JR., Member. The hearing was held in the Superintendent's Conference Room at the Washington State Penitentiary in Walla Walla, Washington, on November 17, 1999.

1.2 **Appearances.** Appellant Kenneth Wilson was present and was represented by Mark A. Anderson, In-House Counsel for Teamsters Local 313. Respondent Department of Corrections was represented by Robert W. Kosin, Assistant Attorney General.

1.3 **Nature of Appeal.** Appellant was dismissed from his Recreation Specialist 3 position because he lied to the superintendent about an incident that resulted in Appellant being cited by the police for possession of marijuana.

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); Rainwater v.

School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Kenneth Wilson was a Recreation Specialist 3 and a permanent employee of Respondent Department of Corrections (DOC) at the Washington State Penitentiary. 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 May 11, 1999.

2.2 By letter dated April 30, 1999, Respondent notified Appellant of his suspension without pay from May 1, 1999 through May 15, 1999, followed by his immediate dismissal from his position effective May 15, 1999. Respondent charged Appellant with neglect of duty, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant had lied to Superintendent John Lambert about a situation which culminated in Appellant being cited by a Walla Walla police officer for possession of marijuana.

2.3 Appellant was employed with Respondent for 11½ years. As a Recreation Specialist 3, Appellant worked directly with inmates in the institution's recreation program and coordinated special activities and performances at the institution with community groups and individuals outside the institution. Appellant performed the duties of his position independently and with little day-to-day supervision.

2.4 Appellant is a musician. On the evening of Valentine's day 1999, Appellant was out with his wife. They went to dinner and then to a local club which has live music and allows local musicians to participate in jam sessions.

2.5 After Appellant and his wife arrived at the club, the band that was playing took a break and one of the band members asked Appellant if he would like to jam with the band. Appellant agreed and left the club to go to the parking lot behind the club to get his saxophone out of his car.

2.6 Two band members, Bishop and DeFord, were standing outside behind the club near Bishop's pick-up truck. While Appellant was walking to his car, one of the band members motioned him to join them. As Appellant approached the two band members, he smelled the odor of burnt marijuana. When Appellant reached them, DeFord held out his hand as if to shake hands with Appellant. Instead, DeFord place a small pipe and lighter in Appellant's hand.

2.7 Walla Walla Police Officer Steven Echevarria drove into the parking lot and saw Appellant, Bishop and DeFord. At approximately the same time, Appellant realized that DeFord had handed him a marijuana pipe. Appellant walked around the truck and placed the pipe on the bumper.

2.8 Officer Echevarria approached the group and asked them what they were doing. Officer Echevarria also smelled the odor of burnt marijuana. After being questioned by Officer Echevarria, Appellant disclosed the location of the pipe. DeFord acknowledged that the pipe was his, not Appellant's. Officer Echevarria conducted a search and found a small quantity of marijuana in one of DeFord's pockets, but none on Appellant. Officer Echevarria cited DeFord and Appellant for possession of marijuana.

2.9 The charge against Appellant was subsequently dismissed.

2.10 Walla Walla Police Department routinely reports incidents involving employees of the prison to prison authorities. After the police reported this incident, on February 16, 1999, Jim Hartford, Investigator 3, initiated an Employee Conduct Report (ECR) against Appellant.

2.11 Superintendent Lambert was on vacation when the ECR was initiated, however, when he checked in with his office, he was told about the incident. Upon his return from vacation, he reviewed the ECR packet.

2.12 On March 4, 1999, Superintendent Lambert met with Appellant and his representative. Appellant admitted being cited for possession of marijuana, asserted that the pipe was not his and that he did not smoke marijuana, denied having possession of the pipe, and denied placing the pipe on the bumper of the pick-up truck. After meeting with Appellant, Superintendent Lambert questioned Officer Echevarria about the incident and learned that Appellant did have possession of the pipe and that he did place the pipe on the bumper of the truck.

2.13 On March 12, 1999, Superintendent Lambert again met with Appellant and his representatives, including his criminal attorney. Superintendent Lambert confronted Appellant with Officer Echevarria's version of the incident and told Appellant that Appellant's story did not make sense. Appellant confessed to Superintendent Lambert that he had been untruthful and admitted that he held the pipe and had placed it on the bumper of the truck.

2.14 Superintendent Lambert reviewed the information from the ECR investigation and the information provided to him by Appellant during their meetings. In addition, he reviewed

Appellant's personnel file. He found that Appellant had received no previous corrective or disciplinary actions and that his performance exceeded or far exceeded the normal requirements for his position. Nevertheless, Superintendent Lambert concluded that Appellant had knowingly lied and had irreparably damaged his credibility. Superintendent Lambert determined that Appellant's actions were in conflict with the vision and mission of the agency, that nothing could mitigate the severity of Appellant's behavior, and that termination was appropriate.

2.15 DOC's vision and mission encompass the expectation that employees will behave in a manner consistent with working toward a safe community and enhancing public safety. The DOC Employee Handbook sets forth the department's expectations that employees abide by a high moral and ethical standard and subscribe to a code of unfailing honesty. (Emphasis added.) The Handbook further states that employees are expected to be good citizens and obey laws while on and off-duty. DOC Policy 859.005 advises employees that "an arrest citation for possession of drugs off the work site may result in disciplinary action up to and including dismissal.

2.16 Appellant was aware of the department's policies and expectations.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant admitted that he lied. Respondent further argues that Appellant attempted to conceal drugs and that his conduct constitutes gross misconduct. Respondent asserts that the department must trust its employees to follow policies and to be truthful. Respondent contends that Appellant's actions violated policies and violated the trust place in him. Respondent contends that regardless of Appellant's popularity among his co-workers or his reason for lying, such behavior cannot be tolerated in a correctional institution. Respondent argues that Appellant neglected his duty, irreparably damaged his credibility with the agency, and

knowingly violated department expectations and policies. Respondent asserts that because Appellant can no longer be trusted, anything less than termination would adversely affect the department's ability to carry out its functions and would damage the integrity of the institution's programs.

3.2 Appellant concedes that lying is totally inappropriate and admits that he was untruthful. However, Appellant contends that he lied because he feared losing his job, but that he felt so guilty about lying that he intended to tell the truth at the second meeting, even before Superintendent Lambert confronted him with Officer Echevarria's version of the incident. Appellant agrees that discipline is appropriate but argues that in this case, dismissal is too severe. Appellant contends that he did not legally possess marijuana and that the only issue in this case is his dishonesty. Appellant argues that he has acknowledged his dishonesty and has expressed regret and remorse for his actions. Appellant asserts that this was an unfortunate incident of exceedingly bad timing and that he would never engage in such behavior again. In light of his unblemished employment record, Appellant asks the Board to modify his disciplinary sanction from dismissal to a three-month suspension without pay, or at the very least, to a six- month suspension without pay.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

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 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).

4.6 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. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.7 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances including the seriousness and circumstances of the offense. 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. An action does not necessarily fail if one charge is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

4.8 Respondent has met its burden of proving that Appellant neglected his duty and violated agency policies and expectations. However, Respondent has failed to prove that under the unique

circumstances of this case, Appellant's behavior rose to the level of gross misconduct. It is undisputed that Appellant lied to Superintendent Lambert and that his lie caused Superintendent Lambert to question the veracity of Officer Echevarria. But, Appellant mitigated the severity of his misconduct by coming forward and admitting his wrongdoing. He then told the truth, showed regret for his actions, and was truly remorseful for his behavior. In light of Appellant's unblemished employment history and under the unique circumstances of this case, dismissal is too severe a sanction.

4.9 By modifying the discipline in this case, we are not condoning Appellant's behavior and we do not believe that Respondent should tolerate untruthfulness from its employees. Appellant's behavior in this case was egregious and warrants a serious disciplinary sanction. Therefore, we conclude that a six-month suspension without pay is sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the institution's program. The disciplinary sanction of dismissal should be modified.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kenneth Wilson is granted in part and the sanction of dismissal is modified to a six-month suspension without pay.

DATED this _____ day of _____ 1999.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

Nathan S. Ford Jr., Member