STATE OF WISCONSIN

PERSONNEL COMMISSION

JAMES McCREADY,
RONALD PAUL,

Appellants,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 85-0216-PC
85-0217-PC

DECISION AND ORDER ON APPELLANTS' MOTIONS FOR SUMMARY JUDGMENT

NATURE OF THE CASE

These are appeals pursuant to §230.44(1)(c), Stats., of discharges that have been consolidated for hearing purposes pursuant to stipulation. The parties further agreed that before proceeding to a plenary hearing on the merits, they would submit for decision on motions for summary judgment and stipulations of fact the issue of whether the appellants were denied their procedural due process rights in connection with pre-termination proceedings. The parties have submitted briefs with respect to said motions. In accordance with the parties' stipulation, the Commission adopts as and for its findings of fact with respect to the motions for summary judgment the parties' stipulations of fact which are attached hereto and incorporated by reference as if fully set forth.

DECISION

The appellants' motions for summary judgment involve the issue of whether appellants' rights to procedural due process of law were violated by the manner in which the respondent handled pretermination proceedings.

The civil service code itself (Subchapter II, chapter 230, Stats., and rules promulgated thereunder) does not provide for any hearing procedure prior to discharge, although discharge can only be for "just cause," §230.34(1)(a), Stats.; and §230.44(1)(c), Stats., provides for a post-termination appeal to and hearing before this Commission, where the employer has the burden of demonstrating "just cause" for the discharge.[1] Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). For many years, a pretermination hearing has not been considered constitutionally required. Bender et al v. DHSS, 81-382, 383, 384-PC (3/19/82).

In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Supreme Court held that due process requires at least a limited pretermination hearing prior to the discharge of an employe who is protected by a "just cause" type restriction on termination under the civil service law.

Therefore, it is clear that the appellants were entitled under the due process clause to a pre-termination hearing. As to the nature of the hearing required, the Court held in Loudermill as follows:

> ... the pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings.'... In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action.... Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.
>
> ... Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action....

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[1] The Commission does not reach the question of which party has the burden of proof on the procedural due process issue because this matter has been submitted on fact stipulations and the Commission would reach the same result regardless of how this burden was allocated.

> The essential requirements of due process, and all that respondents seek or the court of appeals required, are notice and an opportunity to respond.
>
> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.... 84 L.Ed. 2d at 506.

Before addressing the adequacy of the specific points concerning the instant pretermination hearings, it is necessary to consider the question of whether the respondent was required as a matter of constitutional due process to have followed all the pre-termination procedures set forth in the DHSS Supervisor's Manual. There is some authority for the proposition that the due process clause does require that the state follow its own procedures regardless of whether they would be required by the due process clause alone.

In Arnett v. Kennedy, 416 U.S. 134, 163, 94 S. Ct. 1633, 1649, 40 L.Ed. 2d 15 (1974), the Court held as follows:

> In sum, we hold that the Lloyd-LaFollette Act, in at once conferring upon nonprobationary federal employes the right not to be discharged except for 'cause' and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employes requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations.... (emphasis added)

The underscored language could be interpreted to mean that whatever procedures local government provides in connection with a statutorily-provided property right constitute not only the maximum requisite procedural protections under the due process clause, but also the minimum.

In Wolfe-Lillie v. Kenosha Co. Sheriff, 504 F. Supp. 1, 4 (E.D. Wis. 1980), vac. other grounds, Wolfe-Lillie v. Lanquist, 699 F. 2d 864 (7th Cir. 1983), the Court held:

> Where the State has established a procedure which comports with due process, state and local officials are bound to follow those procedures. Arnett v. Kennedy, 416 U.S. 134, 94. S. Ct. 1633, 40 L. Ed. 2d 15 (1984).

In Intl. Assn. of Firefighters v. City of Sylacaugya, 436 F. Supp. 482, 490 (N.D. Ala. 1977), the Court held: "A further procedural due process violation is found in defendant Civil Service Board's failure to follow its own rules...."

However, it is questionable whether any vitality which may have inhered in this approach remains following the Supreme Court decision in Cleveland Bd. of Educ. v. Loudermill, supra. While the lead opinion in Arnett v. Kennedy, supra, held that no more process was due the individual than that which was provided by the legislature when it established the substantive entitlement or property interest, Loudermill may be said to have "uncoupled" the requirements of the due process clause and the procedures set forth in the state law that provides the property interest:

> ... the Due Process Clause requires that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property' cannot be defined by the procedures provided for its deprivation anymore than can life or liberty....
>
> In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.' Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). The answer to that question is not to be found in the Ohio statute. 84 L. Ed. 2d at 503.

This holding was applied in D'Acquisto v. Washington, 640 F. Supp. 594, 619 (N.D. Ill. 1986), as follows:

> ... State law controls only the substance of property interests, not their procedure, and 'property' is not defined by the procedures for its deprivation.... The question of delay before a hearing is granted, of the timing of the opportunity to be heard, is just as much a procedure governed by constitutional standards as is the quality of the opportunity.... It cannot be avoided by an attempt to characterize it as part of the state law defining property....

Also, see Levitt v. U. of Texas - El Paso, 759 F. 2d 1224, 1230 (5th Cir. 1985):

> ... There is not a violation of due process every time a university or other government entity violates its own rules. Such action may constitute a breach of contract or violation of state law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation. Garrett v. Matthews, 625 F. 2d 658, 660 (5th Cir. 1980) ('Even if [a] university depart[s] from its own regulations, not every violation by an agency of [its own] rules rises to the level of a due process claim.') Accord, United States v. Caceres, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979).
>
> The additions to the 'constitutional minimum' we referred to in Ferguson arise only when the procedures promised are denied in such a manner that the constitutional minimum is itself denied or an independent constitutional deprivation is effected.

Accord, Goodisman v. Lytle, 724 F. 2d 818, 820-21, (9th Cir. 1984); Wells v. Dallas Independent School Dist., 793 F. 2d 679, 682 (5th Cir. 1986); Williams v. Seattle, 607 F. Supp. 714, 719-720 (W.D. Wash. 1985); Danielson v. City of Seattle, 45 Wash. App. 235, 724 P. 2d 1115, 1120 (Wash. App. 1986).

In the Commission's view, the Supreme Court's "uncoupling" of the procedural due process requirements and the procedures provided by state law in Loudermill removes any basis for a conclusion that because the state has provided certain pre-disciplinary procedures by its own regulations, that per se those procedures are required as a matter of constitutional due process.

However, this does not mean the provisions of the Supervisors' Manual have no relevance to this matter. The cases applying the due process clause stress the point that the determination of what specific procedures are due is a flexible exercise and in each case depends on the particular circumstances and the interests involved, both the interests of the employe and the employer. In light of this, the Commission would give some weight to the fact that this particular employer had made a formal determination that certain procedures are necessary elements under the due process clause

before discipline can be imposed on its employes, not in the sense, as set forth in Arnett v. Kennedy, that these elements are legislatively-engrafted constitutional minima, but in the sense that they are part of the overall circumstances and reflect to a certain extent the employer's assessment of its own interests and what procedures it can and should afford its employes.

Another factor that must be kept in mind in evaluating the adequacy under the due process clause of the specific procedures involved in the instant matter is that in Loudermill the Court held that the nature of the procedures required in a pretermination hearing must be evaluated in connection with the extent of the post-termination appeal procedures that are available. Many of the cases cited by the appellants are of limited applicability because they address the procedures that are required in a single, plenary hearing, rather than in a preliminary hearing followed by a full post-termination appeal hearing such as is available here.

No. 85-0217-PC (PAUL)

The particular aspects of the process Mr. Paul alleges deprived him of due process are summarized in his brief in support of his motion for summary judgment at p. 9 as follows:

> ... The appellant was denied his express right to have a representative present at the pre-disciplinary hearing. Stip., ¶ 9. The appellant was not notified prior to or during his pre-disciplinary hearing which work rules he had allegedly violated. Stip. ¶¶ 10, 11. The employer never notified the appellant that discharge was contemplated and in fact, misled the appellant as to the scope of the discipline under consideration. Stip., ¶¶ 6, 7, 10....

The Commission will discuss these individually.

The stipulation does not support a conclusion that Mr. Paul was denied whatever right he had to have a representative present. While management

never expressly told him he was entitled to representation, it certainly can be implied he was aware of this right by virtue of his status as a member of management, and because he requested immediately prior to hearing that Mr. McCready represent him. This was denied because Mr. McCready also was subject to discipline with respect to the same incident in which Mr Paul had been involved. Although management never told Mr. Paul why his request to have Mr. McCready as his representative was denied, it simply does not follow that Mr. Paul was denied any right to representation by this scenario. Given Mr. Paul's status in management, the Commission cannot infer from these circumstances and this record that Mr. Paul inferred from these circumstances that any right to representation, as opposed to his request to have Mr. McCready as his specific representative, was denied or, that the institution would not have granted a request to have someone other than Mr. McCready represent him.

The question of the adequacy of the notice of the charges must be considered in the context of all the circumstances involved in the prehearing process. In some cases, due process might not require, as appellant contends, notice of the specific work rule infractions that were suspected.

For example, if an employe were discovered leaving the institution with a DOC tool box concealed under his jacket, and subsequently informed that he would have a predisciplinary hearing concerning these alleged facts, it probably would add little to the notice of charges to cite a violation of a work rule against stealing.

However, in this case, appellant was never given notice of what aspects of the October 14th incident were considered problematical by management. The notice of discharge cites a number of work rule violations that involve various conceptual bases for disciplinary action -- disorderly

or illegal conduct, including horseplay; unauthorized possession of weapons; violation of safety procedures, directions, and requirements; disobedience, negligence, or refusal to carry out written or verbal assignments, directions or instructions; failure to provide accurate and complete information when required; and unauthorized use of state-owned property, equipment or supplies.

Given this range of management concerns about the incident, it cannot be inferred that the appellant would have been aware of what charges were being considered by the notice he received that there would be a pre-disciplinary hearing concerning the October 14th incident, or even by what transpired at the hearing. This lack of specific notice obviously was compounded by management's inability or unwillingness to cite any work rule infractions when queried during the predisciplinary hearing, and by their specific denial, when queried, that appellant was being charged with a violation of any work rule requiring that a report be filed upon discharge of a firearm, although this was one of the charges recited in the notice of discharge. Appellant also had no way of knowing, either by the preliminary notice or by what transpired at the hearing, that he would be charged with unauthorized use and procurement of material.

In Loudermill the Court held:

> ... The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement... The tenured public employe is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.... 84 L.Ed. 2d at 506.

Given the entirety of the process followed here, it must be concluded that appellant did not receive adequate notice of the charges against him or an adequate explanation of the employer's evidence as it related to those

charges, and that this contributed to him not having an adequate opportunity to present his side of the story as to the charges.

Another deficiency in the pretermination notice is the inaccurate information concerning the degree of possible discipline. Mr. Paul told management prior to the predisciplinary hearing that if serious discipline were contemplated he would retain counsel. Mr. Luhm responded that:

> ... the Director of the Bureau of Adult Institutions, Darrell A. Kolb, had told Luhm that the incident would most likely result in an oral reprimand but, if pushed, Kolb would agree to a written letter of reprimand, at most. Stipulation, p. 2, ¶7.

Again, management not only failed to inform appellant as to what was involved, but also misled him to believe that no serious discipline was being considered. He obviously was substantially deprived of his "... opportunity to present reasons... why proposed action should not be taken...," id., when he did not know what the proposed action was, and indeed was laboring under the misperception that no serious disciplinary action was being considered. An employe who knows he or she is facing possible discharge may well marshal entirely different arguments and prepare differently for the predisciplinary hearing, including the decision on whether to retain counsel, than would be the case if the employe believes he or she is facing only a possible reprimand.

Based on all of the foregoing, the Commission concludes Mr. Paul was denied his right to procedural due process of law in connection with the pretermination process.

No. 85-0216-PC (McCREADY)

With respect to Mr. McCready's predisciplinary proceeding, management followed much the same process, although there were some differences in the circumstances.

Mr. McCready did not make any inquiry into the degree of disciplinary action being contemplated, so although respondent never informed him in advance that discharge was possible, it never misled him to think that no more than a reprimand was being considered, as occurred with Mr. Paul.

At the predisciplinary hearing, Mr. McCready was never told what specific alleged work rule violations were involved, although unlike the situation with respect to Mr. Paul, he never inquired whether he was being charged with failure to have filed a written report, and accordingly, this was never denied by management.

The Commission's conclusions as to denial of representation are the same as with respect to Mr. Paul -- i.e., there was no denial of any right to representation.

With respect to the issues concerning the adequacy of the notice of the charges and the notice of the degree of discipline contemplated, Mr. McCready's case involves less exacerbated circumstances than Mr. Paul's situation and is a good deal closer case as to the overall question of whether his right to procedural due process was violated. However, the Commission believes that the pretermination procedures afforded Mr. McCready also were inadequate.

Even though he was not misled as to the degree of discipline being contemplated, it still is significant that he was not told that he might be discharged. In the absence of some indication in the record to the contrary, it must be assumed that having such information would be important to an employe in deciding how to prepare for a predisciplinary hearing and

how to respond to the charges. For example, an employe might be willing to simply concede substantive misconduct in a case where no serious discipline appears likely. However, if an employe realizes that discharge is a possibility, he or she may be less likely to admit misconduct and more likely to stress extenuating circumstances and to present a rationale why that degree of discipline is unwarranted. Furthermore, the employe would be more likely to retain counsel if he or she is aware of the possibility of discharge. This discussion is in keeping with the Court's stress in Loudermill on the necessity of giving the employe an opportunity to present reasons "why proposed action should not be taken...." 84 L. Ed. 2d at 506.

However, in this case, the Commission does not need to decide whether the absence of notice that discharge was possible constituted a violation of due process, because, according to the stipulation, McCready received no notice that any discipline was contemplated as a result of the October 14, 1985, incident. It can be argued that he should have been aware discipline was being considered because he had been suspended with pay. However, the Supervisors' Manual explicitly states at ¶264.2 B that at the pre-disciplinary hearing management "presents the findings of management's investigation and tentative conclusion that disciplinary action is warranted." (emphasis added) This never occurred in this case, and this omission of this minimal requirement violated McCready's rights to due process of law.

As to the notice of the charges against him, Mr. McCready was never apprised of the full range of management's concerns about the incident, as reflected in the notice of discharge, either by way of preliminary notice or at the predisciplinary hearing, and it cannot be inferred on this record that he had actual or imputed knowledge thereof. Mr. McCready's discharge

was based in part on a number of charges that were never aired prior to the termination.

Therefore, the Commission also concludes with respect to Mr. McCready that he was denied his right to procedural due process of law in connection with the pretermination process.

FURTHER PROCEEDINGS

There does not appear to be any dispute that if the Commission concludes the appellants were denied their right to due process in connection with the pre-disciplinary proceedings, they would be entitled to prevail on these appeals and be reinstated with back pay and benefits. The Commission will order that result,[2] but will retain jurisdiction to deal with any issues that may be present as to the specifics of the remedy and as to appellants' motions for costs pursuant to §227.485, Stats., which were filed with their reply briefs in support of their motions for summary judgment.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.44(1)(c), Stats.

2. These matters are appropriate for summary judgment pursuant to the stipulation of the parties, and based on the fact stipulations on file herein.

3. The appellants were denied due process of law by the process followed by respondent prior to their discharge.

4. The appellants are entitled to be reinstated with back pay and benefits, less mitigation.

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[2] This decision does not address the substantive merits underlying the discharges, but only the procedural aspects of this matter.

ORDER

1. The appellants' motions for summary judgment are granted.

2. The respondent's actions discharging appellants are rejected and these matters are remanded to respondent for action in accordance with this decision.

3. The Commission retains jurisdiction over these matters in order to deal with any disputes as to remedy and to dispose of appellants' motions for costs pursuant to §227.485, Stats. Counsel are directed to consult to determine if there are any disputes as to those questions that cannot be resolved, and to report to the Commission within 10 working days of the date of service of this order as to the results of such consultations. The Commission will then decide on the nature of any further proceedings that may be required.

Dated: May 28, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
JMF02/3

Attachments

Parties:

James McCready
Route 1, Box 157
Eden, WI 53019

Ronald L. Paul
Route 1
Fox Lake, WI 53933

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN
PERSONNEL COMMISSION

JAMES McCREADY,

Appellant,

v.

Case No. 85-0216-PC

SECRETARY, Department of
Health and Social Services,

Respondent.

STIPULATION OF FACTS

THE PARTIES HERETO by their respective attorneys hereby stipulate that the following shall be considered as established facts for purposes of the Appellant's to be filed motion for summary judgment based upon a denial of due process at the pre-disciplinary hearing held on October 30, 1986.

1. James McCready, born February 18, 1946, was first employed by the Wisconsin Department of Health and Social Services in July, 1981, at the Waupun Correctional Institute. On march, 1982, he transferred to the Kettle Moraine Correctional Institute.

2. In September of 1983, Complainant's position was that of Sergeant, Officer III. In December of 1984, he was promoted to Office V (Lieutenant) which position he occupied on October 14, 1985, the date in question. The Officer V position is supervisory. As a supervisor, James McCready was familiar with the provisions of Chapter 264 (Exhibit D).

3. On October 14, 1985, James McCready was serving a promotional probationary period.

4. An alleged incident occurred on October 14, 1985, in the sallyport of the Kettle Moraine Correctional Institute which incident is the subject of these proceedings.

5. From October 14, 1985, through October 22, 1985, James McCready continued in his normal activities and employ at Kettle Moraine Correctional Institute.

6. On October 23, 1985, on Mr. McCready's scheduled day off, he received a telephone call from Mr. John Luhm stating that he was suspended indefinitely with pay as the result of the October 14, 1985 incident.

7. Between October 23, 1985, and October 30, 1985, James McCready received a telephone call at his home from Catherine Mlsna stating that his presence was requested at a meeting to be held on October 30, 1985, at 9:00 a.m. He was informed that the meeting would be a pre-disciplinary hearing.

8. On the morning of October 30, 1985, immediately prior to the scheduled 9:00 a.m. meeting, James McCready told Catherine Mlsna that he wanted Captain Ron Paul as his designated representative. James McCready was not allowed to have Ronald Paul as his representative at the meeting, because both of them were subject to discipline for their actions at the same sallyport incident. James McCready was not told the reason for not permitting Ronald Paul as his representative at the meeting.

9. Neither during nor immediately prior to the meeting was James McCready told what work rules, if any, may have been violated as the result of the alleged incident of October 14, 1985, nor was he informed that a tentative decision had been reached that any discipline was warranted as a result of the alleged incident.

10. During the course of the meeting on October 30, 1985, James McCready was questioned by Catherine Mlsna as to how he came in possession of the training rounds used during an ERU exercise on October 14, 1985. James McCready explained that they had been received in a trade for a baton. At no time during the course of the meeting of October 30, 1985, was James McCready ever told that acquisition or possession of the training rounds violated any work rule. Also, James McCready was never informed that he had unauthorized possession of a weapon; nor was he told that he had disobeyed or refused to carry out written or verbal assignments, directions or instructions; nor was he told that he had failed to provide accurate and complete information after being requested to do so.

11. Attached hereto as Exhibit A is the report of Catherine Mlsna regarding the meeting held on October 30, 1985.

12. It was not until James McCready received a letter of termination dated November 8, 1985, that he was ever apprised of any work rules that had been violated a result of the October 14, 1985, alleged incident or that other conduct never addressed at the meeting of October 30, 1985, also comprised reasons for his termination from employment. A copy of the letter of termination is attached hereto as Exhibit B.

13. During James McCready's unemployment compensation hearing, Catherine Mlsna testified that the purpose of the October 30, 1985, meeting was to investigate what occurred on the evening of October 14, 1985, from Mr. McCready's standpoint. She further confirmed that no notice of violation of any work rules was ever imparted to Mr. McCready. A copy of that portion of her testimony is attached hereto as Exhibit C.

14. Attached hereto as Exhibit D are the written procedures set forth in Chapter 264 of the Department of Health and Social Services Supervisor Manual regarding employee discipline which rules were in effect during 1985.

Dated this 11 day of December, 1986.

Bryan D. Woods
Attorney for James McCready

Kathryn R. Anderson
Attorney for the Department of
Health and Social Services.

October 30, 1985

TO: Richard H. Franklin, Superintendent, KMCI

FROM: Catherine Mlsna, Personnel Manager, KMCI

RE: Pre-Disciplinary Hearing for Lt. James McCready

Today, October 30, 1985, a pre-disciplinary hearing was held for Lt. James McCready, regarding the incident at the gatehouse on October 14, 1985, during which a firearm was discharged. John Luhm, Security Director, and I conducted the meeting.

Lt. McCready agreed that the incident report he submitted is accurate; he did not feel that firing a handgun loaded with practice rounds was a violation of the firearm policy because the officers on duty were trained ERU members. He was not ordered to fire the handgun nor does he recall making the statement, "I can hear the phones ringing already." He does not recall any specific conversation at the time of the incident.

The practice caps came from an MATC exercise McCready attended last April where 134 rounds were swapped for a wooden baton. These caps were used on May 8-9 in Oshkosh at an ERU exercise.

The incident, which took place on a Monday evening, was not repeated when the ERU squad met that Wednesday evening because on Wednesday the gatehouse personnel were not part of an ERU squad.

Lt. McCready does not feel he did anything wrong but was concerned that the incident was being blown out of proportion and thereby causing a problem for Mr. Luhm.

CM:ma

EXHIBIT A

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS
KETTLE MORAINE CORRECTIONAL INSTITUTION
P.O. BOX 31
PLYMOUTH, WISCONSIN 53073

November 8, 1985

Mr. James McCready
Route #1, Box 157
Eden, WI 53019

Dear Mr. McCready:

You are hereby discharged from employment with the Kettle Moraine Correctional Institution for violation of the work rules cited below. The discharge is effective November 8, 1985.

This action is based on the following incident. During the evening of October 14, 1985, when exiting the institution following an Emergency Response Unit exercise, you, and four others, including Capt. Paul were passengers in an institution vehicle. As the vehicle was parked in the sallyport, you fired a 357 caliber handgun containing training cartridges at or in the direction of Officer Baumann the Tower Officer. An incident report concerning this incident was filed by Officer Baumann. Your action is in violation of the following work rules:

Work Rule #5: Disorderly or illegal conduct including, but not limited to,....horseplay.... .

You demonstrated flagrant disregard for basic rules pertaining to weapons safety and common sense. You provided a very poor role model, acting in a manner diametrically opposed to the training repeatedly provided to trainees. Your conduct demonstrated a lack of self-discipline and good judgment in a situation where both qualities are essential.

Work Rule #13: Unauthorized possession of weapons.

Possession of an unholstered, unsecured weapon in the institution sallyport is not permitted without prior authorization. You had no such authorization.

Work Rule #6: Violation of....safety....procedures, directions and requirements

Violation of this rule is demonstrated by your failure to comply with SIMP 306.4A, D as discussed under Work Rule #1 below.

Work Rule #1: Disobedience....negligence, or refusal to carry out written or verbal assignments, directions or instructions.

EXHIBIT B

It is clear that in removing a handgun from its holster, pointing it out the window of a vehicle and firing it at or near another person you exhibited negligence of basic rules of weapons safety, specifically SIMP 306: 4-A (pp. 1 D) which states:

1. General Rules

   (a) Treat all guns as though they are loaded;

   (b) Never point a firearm at anyone unless you are justified in killing that person.

2. Specific Rules

   (r) A firearm must be unloaded prior to leaving the firing point.

Violation of this work rule is further demonstrated in the use of unapproved equipment contrary to SIMP 306: 3 (pp. 1):

1. Description

   A. Only the weapons, chemicals and related equipment listed below are authorized for use by BAI personnel in the performance of their duties. (The training rounds used in the ERU exercise and in the activity in the sallyport which followed, are not authorized equipment.)

2. Purchasing

   A. All future purchasing of firearms, chemicals, ammunition or equipment must conform to criteria listed in this procedure.

   C. Any recommendation for addition, deletion or modification of the standards established in this Security Internal Management Procedure must be submitted for approval to the Director, Bureau of Adult Institutions.

The practice rounds in question were not used with the knowledge or approval of the Superintendent of KMCI or the Director of the Bureau of Adult Institutions. They were secured from MATC by you (134 rounds) in trade for a wooden baton. This procurement was also in violation of SIMP 306.3.

Work Rule #7: Failure to provide accurate and complete information when required.

You failed to file a written report or otherwise report the incident to your supervisor as required in HSS 306.07(7)b.

Work Rule #3: ....Unauthorized use....of state owned....property, equipment or supplies.

You engaged in unauthorized use of a 357 Caliber handgun and SPEER 38 training cartridges.

On October 30, 1985, a pre-disciplinary meeting was held for you. You were in attendance at this meeting with Catherine Mlsna, Personnel Manager, and John Luhm, Security Director. During the meeting you were provided a copy of the October 28, 1985, memorandum from me to Mr. Kolb. After you read the memorandum, the October 14, 1985, incident was discussed. During the discussion, you admitted discharging a handgun containing practice cartridges while in the institution sallyport. In addition, you indicated that you did not feel your actions were wrong and that the intent was to test the weapon and test the officer's response to gunfire.

Sections 230.34(1)(a) and 230.44(1)(c) of the Wisconsin Statutes, provide that you are entitled to appeal this action to the State Personnel Commission, 121 E. Wilson Street, Madison, WI 53702. If you do not feel this action was taken for just cause, your written appeal must be received by the Commission within thirty (30) calendar days of the effective date of this action, or within thirty (30) calendar days after you have been notified of the action, whichever is later.

Sincerely,

Richard H. Franklin
Superintendent

RHF/na

Transcription of hearing (partial) 2/17/86

Q: Now, this--well--I have a question about the pre-disciplinary hearing.

A: Yes.

Q: Which I believe you and Mr. Luhm...?

A: Mr. Luhm, John Luhm. L-U-H-M He's the security director.

Q: Could you tell us what happened at that meeting? Was there any formal reading of charges--is that the usual procedure?

A: At this point what we---we're in the process of during a pre-disciplinary is finding out Mr. McCready's story. This is an investigatory meeting to find out his version of the incident as it took place.

Q: Was he aware at the time that there were any charges pending? Was he made aware of it at that time?

A: He was as far as I recall, when Mr. Luhm and I met with Mr. McCready. Uh--he didn't feel that there was anything wrong. He was concerned that the incident was being blown out of proportion or causing a problem for Mr. Luhm. He understood that there is a serious incident because there was--conversations going around that there was a possible termination.

Q: And this was an investigatory hearing or pre-disciplinary hearing?

A: They are used one and the same.

Q: Okay, you say they are one and the same. So was he made aware of the specific work rules that he---

A: No, he was not. No, he was not.

Q: All right. I think that covers our questions.

EXAMINER: Anything else you want to tell me Ms. Mlsna?

A: No.

EXHIBIT C

CORRESPONDENCE/MEMORANDUM — STATE OF WISCONSIN

Date: June 24, 1985 File Ref:

To: DHSS Supervisor's Manual Holders

From: Kenneth W. DePrey, Director KWD
Bureau of Personnel and Employment Relations

Subject: Changes in Chapter 264: Employe Discipline

Attached is a copy of the revised Chapter 264. Please remove the existing Chapter 264 from your DHSS Supervisor's Manual and replace it with the attached revised chapter. If your manual contains the pink Employment Relations Bulletin PP-4, retain it at the end of Chapter 264. The significant changes effected by this revision are:

1. Section 264.1A has been expanded to more fully discuss the philosophy of employe discipline.

2. Section 264.1C more clearly establishes that the Department operates under a system of progressive discipline.

3. Section 264.2A covering the investigation of work rule infractions has been expanded to more fully discuss the investigatory interview, the employe's right to representation and the documentation of the investigation.

4. Section 264.2B dealing with the pre-disciplinary hearing has been expanded to more fully discuss the need for employe "due process."

5. Section 264.2C covering the selection and administration of disciplinary action has been expanded to discuss the effect of employe personal problems on disciplinary situations; referral to the Employe Assistance Program; and to provide more information on the content and distribution of disciplinary letters.

6. A sample disciplinary letter formerly contained in the Appendix to the manual (Chapter 298) is now an attachment to Chapter 264 for easier reference and has been expanded to include statements of appeal rights for both represented and non-represented employes.

7. This chapter is now printed on pink paper to more readily identify it as employment relations related material in the manual.

All changes are in effect immediately. Questions or concerns in regard to Chapter 264 should be directed to your Personnel Manager. The Personnel Manager will consult with BPER Employment Relations Section staff as necessary.

Attachment

174s/107

EXHIBIT D

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MANAGEMENT SERVICES
Bureau of Personnel & Employment Relations
Room 687, 1 West Wilson Street
P O. Box 7850
Madison, WI 53707

PERSONNEL AND EMPLOYMENT RELATIONS DIRECTIVE

Subject: Employe Discipline

June, 1985 CHAPTER 264

264.1 BACKGROUND

264.1A The Meaning of Discipline

Any formal organization must establish policies, procedures and standards of conduct (i.e., work rules) to provide direction to its members so that the mission and goals of the organization can be accomplished. An important aspect of discipline in organizations involves the creation of attitudes and a "climate" where employes willingly conform to the the established policies, procedures and rules. This is accomplished by management through clear communication and feedback regarding expectations; positive motivation and leadership by example; recognition that individual differences among employes may at times require different approaches to supervision; equal and consistent application of rules; and fair treatment afforded all employes.

Instilling a sense of "self-discipline" in employes is a necessary part of a supervisor's job; however there will be occasions when an employe commits a violation of a DHSS work rule (refer to Chapter 250: Department Work Rules) which may be determined serious enough to warrant disciplinary action. Disciplinary action involves the use of penalties to influence employes to obey orders and adhere to the work rules of the Department and policies of their employing unit.

264.1 B "Just Cause" for Disciplinary Action

Provisions of state civil service and employment relations statutes establish the right of agency management to take disciplinary action against an employe for just cause. State collective bargaining agreements also specify this right as applied to represented employes.

The concept of "just cause" consists of the following collective set of guidelines or standards developed over the years upon which courts, labor arbitrators and quasi-judicial review panels rely when evaluating the appropriateness of disciplinary action imposed on employes.

- Forewarning: The employe must have been forewarned that the particular behavior would result in disciplinary action. The warning can be given individually or by means of a general work rule.

264.1 B (Cont.)

- Reasonableness: The broken rule or disobeyed order must be reasonably related to orderly, efficient, and safe operations. When an employe thinks a rule or order is unreasonable, s/he generally must follow the "work now, grieve later" principle. An employe generally can question an order, but unless s/he reasonably believes obeying it would endanger his/her health and safety or that of other employes, the employe should obey the order and file a grievance afterward. But to avoid time investment in unnecessary grievances, all rules and orders should meet the "orderly, safe, and efficient operations" standard.

- Consistency: Disciplinary action must be applied in a consistent manner. A particular employe should not be disciplined for a violation that has been tolerated, in similar circumstances, when committed by others. Nor should an employe be disciplined more or less than others who committed similar violations in similar circumstances.

- Investigation: Before taking disciplinary action, management must make an effort to discover whether the rule was actually broken or the order disobeyed. In cases of serious offenses, the supervisor will usually work with higher authority in conducting an investigation which should always be fair and objective.

- Substantial Evidence: The person making the disciplinary decision must have substantial evidence that the employe has committed the alleged act. Although the standard of proof varies with the type of charge involved, the evidence cannot be mere rumor or unsupported accusations. The Personnel Manager should be consulted as to what evidence is necessary to sustain a disciplinary action.

- Degree of Discipline: The degree of discipline must be related to the seriousness of the offense and to the employe's record and should not be more severe than what is necessary to influence the employe to correct his/her behavior. Minor offenses generally result in lesser discipline. Stronger discipline should be reserved for serious offenses, or cases of continued problems where progressive discipline has been followed and has failed to correct the situation.

264.1 C

Progressive Discipline

When management finds it necessary to take disciplinary action against an employe, the DHSS operates under a system of progressive discipline: applying progressively more severe penalties for repeated infractions of Department work rules (and related employing unit policies) and providing appropriate assistance to help an employe correct the unacceptable conduct.

A progressive disciplinary system typically involves the following three steps before discharge:

- Verbal Warning (or oral reprimand) is the first step in a progressive disciplinary system and is applied when regular discussions between employe and supervisor regarding inappropriate conduct do not result in satisfactory improvement. The supervisor must tell the employe

264.1 C (Cont.)

specifically that "this is a verbal warning" and that further disciplinary action will result if the unacceptable conduct is not corrected.

- Written reprimand is the second step in a progressive disciplinary system and is typically administered when a previous verbal warning(s) has not resulted in satisfactory improvement in the employe's conduct. A written reprimand may also be administered without a prior verbal warning when the misconduct is serious enough to immediately require stronger corrective action. A written reprimand is communicated in the form of a letter to the employe.

- Suspension without pay is the third step in a progressive disciplinary system and involves relieving an employe from work without pay for a period from a minimum of one to a maximum of thirty calendar days. A suspension without pay is administered when a previous written reprimand(s) has not resulted in satisfactory improvement in the employe's conduct, or when a particularly serious offense occurs. A suspension is communicated in the form of a letter to the employe. (NOTE: An employe may be suspended with pay for a brief period of time pending completion of an investigation when a serious offense has allegedly been committed, and the appointing authority determines that the employe should not remain on duty because of the potential for disrupting operations or hindering the investigation.)

- Discharge is the ultimate penalty imposed only when an employe's misconduct or failure to perform required work is so serious or protracted that termination becomes the only feasible alternative available to management. A discharge is communicated in the form of a letter to the employe.

Progressive discipline is built on the principle of employe awareness, thereby eliminating any element of surprise which would violate the standards for just cause. As employes move through each step in progressive discipline, they receive actual notice that their behavior is in violation of specific rules. However, management is not required to apply progressive discipline in cases of offenses regarded as so serious that no specific warning or prior disciplinary action need precede discharge (e.g., serious physical assault, major theft). In addition, an offense that by itself would justify no more than a written reprimand may call for suspension or even discharge if the employe has a recent history of similar offenses and has not responded to progressive discipline involving lesser penalties (e.g., repeated tardiness).

264.2 STEPS IN THE DISCIPLINARY PROCESS

The general disciplinary process outlined in this section should be followed for all represented and non-represented employes with permanent status and for project employes. The Personnel Manager should be consulted regarding specific employing unit procedures. There are two other types of cases to consider:

- Employes serving an original probationary period: A work rule violation that would result in a written reprimand or suspension without pay, if

264.2 (Cont.)

committed by a permanent employe, should normally result in termination of an employe serving an original probationary period. The reason for this is that acceptable personal conduct is a part of overall job effectiveness and is expected, in addition to acceptable performance of job duties. During probation, the new employe should demonstrate the ability to respond to ongoing supervision and counseling, including verbal warnings. If, as demonstrated by a work rule violation that would result in a written reprimand or suspension for a permanent employe, the new employe does not show this ability to respond to direction, the employe should be terminated. (Refer to Chapter 212: Probationary Periods.)

- Employes serving a permissive or promotional probationary period: Violations of a work rule (not arising from an inability to perform job duties) committed by an employe serving a permissive or promotional probationary period are subject to the disciplinary process. They should be handled in the same manner as a rule violation by an employe with permanent status in the classification. On the other hand, if an employe on permissive or promotional probation, after appropriate instruction and training, experiences job performance problems that indicate a lack of ability to perform at an acceptable level, the probation should be terminated and the employe returned to his/her previous position. (Refer to Chapter 212: Probationary Periods.)

264.2 A (STEP 1)

Management Investigates to Establish the Facts and Determine Just Cause

When a possible infraction of a work rule occurs, the supervisor or other designated management representative will immediately investigate the situation to establish the facts. The investigation process is a vital part of establishing just cause for subsequent disciplinary action. All relevant facts must be gathered, but the process must also be fair and objective. Any actual, or appearance of, harassment, intimidation or entrapment of an employe could result in the disciplinary action being overturned at a later date by an outside reviewer (e.g., arbitrator).

In conducting the investigation, the management representative should focus on answering the following questions to help establish that there is just cause for disciplining the employe:

- What policy or procedure and related work rule is alleged to have been violated?
- Who was involved?
- When did the alleged infraction occur?
- Where did the alleged infraction occur?
- Who were the witnesses?
- Were there any extenuating circumstances?

264.2 A1

The Investigatory Interview

In order to answer these questions thoroughly, the management representative frequently will find it necessary to conduct one or more investigatory interviews. An investigatory interview is a meeting or discussion with an employe (and his/her representative if one is requested) for the purpose of gathering information about the potential violation of a work rule. Such interviews normally are scheduled as part of the investigative process; however, any meeting or discussion can become an investigatory interview if facts indicating that a work rule violation has occurred emerge during the course of the meeting or discussion, and the potential violator is present. When the facts of a violation are already well-documented or known by the supervisor, an investigatory interview may not be necessary (e.g., when the facts of tardiness or absenteeism are known or when a supervisor directly observes the commission of a work rule violation).

264.2 A1a

Employe's Right to Representation During An Investigatory Interview

An employe's right to representation during an investigatory interview is well established by case law and state collective bargaining agreements.

- A represented employe has the right to be represented by a designated local union grievance representative (or union-paid field representative if a local representative is not available): (1) if the employe has reasonable grounds to believe that the results of the interview may be used to support disciplinary action against him/her; and (2) if the employe requests a representative. (If the potential work rule violation could result in criminal charges against the employe, the employe's personal attorney may also attend but strictly as an observer and not a participant in the discussion.) Normally, an employe who is merely being questioned about what s/he may have witnessed in regard to an incident involving another employe would not have reason to believe that s/he may be disciplined; however, if the witness requests representation, his/her request should be granted.

- A non-represented employe has the right, if requested, to be represented by a representative of his/her choice (i.e., an employe in a supervisory position may select another non-represented employe, a personal attorney, or other non-employe representative; an employe in a non-supervisory position may select any employe, a personal attorney or other non-employe representative).

The role of the representative is essentially that of an observer on behalf of the employe to ensure that the employe's rights are not abridged. In listening to the employe's version of the incident, the management representative must allow the representative to help the employe present his/her version and relevant facts. However, the

264.2 A1a (Cont.)

representative does not have the right to interfere with or obstruct the investigation or disrupt the meeting. The employe can be requested to personally respond to the management representative's job-related questions.

264.2 A1b

Scheduling and Conducting the Investigatory Interview

An investigatory interview may be scheduled verbally or by memo to the employe. The employe should be clearly informed of the purpose, date, time and location for the meeting and that s/he has the right to have a representative present. If the employe then requests a representative, the representative's attendance should be coordinated with the employe's supervisor and the representative's supervisor.

The interview should be conducted privately. The management representative should be fully prepared and maintain a professional demeanor during the meeting, reflecting concern without being emotional. At the outset of the interview, the employe/representative should be told the reason for the meeting, and the management representative should make a general statement identifying the alleged work rule violation. The employe should then be asked to fully explain his/her version of the incident in question. If the employe refuses to answer legitimate questions about job-related conduct, s/he should be advised that management will then be forced to rely on other sources of information and its own conclusions of fact.

The management representative should write down the employe's responses to the important questions and note all major points covered. A typewritten summary may be prepared shortly after the interview. Such proceedings should not be tape-recorded by either party because of the potentially "chilling effect" on the free flow of information, the possibility of alteration, and the problem of admission as evidence in an arbitration/Personnel Commission hearing.

264.2 A2

Documentation of the Investigation

Successful defense of a disciplinary or discharge action depends on accurate and thorough documentation of the factual evidence and information that led management to conclude that just cause existed for the action. Some common types of factual evidence, as applicable, that should be collected to document a disciplinary case include:

- Personnel and other "business" records: employe timesheets and attendance records; official forms; pertinent previous disciplinary or performance records;
- Complaints: written, signed and dated citizen, client or patient/inmate complaints or incident reports from supervisors or other employes;
- Summary of investigatory interview(s): (discussed in section 264.2 A1b);

264.2 A2 (Cont.)

- Witness statements: written, signed and dated statements from all witnesses to an incident, preferably in their own handwriting, recorded as soon as possible after the incident; such statements should be sufficiently detailed to relate a complete story of what they know or observed. For witnesses who have difficulty expressing themselves, the management representative may prepare a summary of an interview with the witness and have the witness sign the summary as being "true and correct";

- Photographs: photos can be valuable evidence to show damage to property, injury to people, etc.; the photographer should sign and date the back of each photo, and they should be placed in an envelope marked to identify each photo by date, time and place.

- Examples of unsatisfactory work: for example, letters and reports with clerical errors identified; all such items of evidence should be marked by the supervisor to indicate date, time and name of employe;

- Communications to employes: all relevant bulletins, posted notices, written management statements, employe handbooks, etc., used to communicate rules, policies or directives to employes must be preserved to prove that the violated rule or policy was communicated to the employe in a timely manner.

264.2 B (STEP 2)

Management Presents the Findings of The Investigation in a "Due Process" Pre-disciplinary Hearing

If, after a thorough review of the results of the investigation, management tentatively determines that there is just cause for disciplinary action, the designated management representative of the employing unit will conduct a pre-disciplinary hearing with the accused employe. A pre-disciplinary hearing is a meeting with the employe who is accused of violating a work rule (and the employe's representative if requested) at which the management representative presents the findings of management's investigation and tentative conclusion that disciplinary action is warranted. The pre-disciplinary hearing is scheduled and conducted in the same manner as an investigatory interview. (Refer to section 264.2 A 1b.)

264.2 B1

Maintaining "Due Process"

The pre-disciplinary hearing is scheduled by the management representative prior to making a final decision on any disciplinary action. This meeting is an essential element of due process in the context of employe discipline. In addition to the standards for just cause discussed in section 264.1 B, courts, labor arbitrators and quasi-judicial review panels require that an employer adhere to the concept of "due process" in disciplinary situations whereby an accused employe is (1) allowed to know the facts supporting a finding that a violation of work rules did occur; and (2) is given an opportunity to defend him/herself. Failure to maintain due process in disciplinary situations may result in management's action being overturned upon later review by an outside party (e.g., arbitrator).

264.2 B1 (Cont.)

In order to maintain due process, a verbal (and written if desired) summary of the evidence upon which management bases its tentative conclusions is presented to the employe/representative at this meeting. The employe/representative are then given the opportunity to refute management's findings and to introduce additional facts or evidence not considered by management, including any extenuating circumstances that they urge management to consider in making a final decision.

If the pre-disciplinary hearing does not produce evidence which would alter the just cause determination, the pre-disciplinary hearing is concluded and management proceeds with the imposition of disciplinary action as outlined in section 264.2 C. If the employe/representative introduce relevant new evidence or questions, further investigation by management will be required before a determination on the disciplinary action can be made.

While the management representative may refer in the hearing to the type of disciplinary action being considered by management, the final management decision to administer disciplinary action should not be communicated to an employe/representative at the pre-disciplinary meeting. This should be done afterward by the appropriate management representative and then communicated to the employe/representative in writing as described in section 264.2 C.

264.2 B2

Employe's Right to Representation During a Pre-disciplinary Hearing

As a matter of DHSS policy, an employe has the right, if requested, to be represented during a pre-disciplinary hearing. The role of the employe's representative is the same as in an investigatory interview. (Refer to section 264.2 A 1a.)

264.2 C (STEP 3)

Management Selects and Administers Appropriate Disciplinary Action

If, after thorough investigation and opportunity for employe "due process" rebuttal, management determines that there is just cause for taking disciplinary action, the appropriate action should be administered according to the progressive discipline system discussed in section 264.1C. Disciplinary action must be commensurate with the particular offense committed, given the employe's history of previous related infractions within the past twelve months, and consistent with actions taken against other employes in similar situations. In addition, any action taken should not be more severe than what is necessary to influence the employe to correct his/her behavior.

NOTE: The imposition of disciplinary action beyond a written reprimand requires prior consultation with staff of the BPER Employment Relations Section. Division administrators may establish division-wide procedures which may alter this requirement.

264.2 C1

Effect of Employe Personal Problems on Disciplinary Situations

In cases of chronic absenteeism or other misconduct involving a violation of DHSS work rules, it is possible that an employe is experiencing personal

264.2 C1 (Cont.)

problems (e.g., alcohol or drug dependency, marital, emotional) which are affecting his/her behavior and performance on the job. In such cases, supervisors should seriously consider referring potentially "troubled" employes to the Employe Assistance Program (EAP) according to procedures outlined in Chapter 270 of the DHSS Supervisor's Manual. Also, a formal written notification of the existence of EAP is required to be attached to all disciplinary letters (refer to section 264.2 C2).

However, personal problems should not be considered as a reason for delaying or postponing disciplinary action or setting aside an appropriate action. Employes are expected to meet and maintain norms and standards of conduct and performance related to the job. If just cause exists for disciplinary action, then appropriate action should be taken. Any deviation from this policy must be discussed with BPER Employment Relations Section staff prior to communication with the employe and/or his/her representative.

264.2 C2

Written Reprimand, Suspension, Discharge

Once management determines the appropriate disciplinary action, a written reprimand, suspension or discharge is communicated as soon as possible to the employe in the form of a letter containing the following information (number keyed to paragraphs of the sample disciplinary letter, attachment 1-264 at the end of this chapter):

- a statement that the letter is notification of reprimand, suspension or discharge (1);
- a citation of the specific DHSS work rule(s) violated (2);
- a brief description of the nature of and facts concerning the violation (time, place, people involved, statements made, etc.) (3);
- a summary of previous disciplinary action for similar offenses administered within the past twelve-month period (to make the employe aware of the progressive nature of the discipline) (4);
- a statement that a repetition of the offense may result in further disciplinary action (except for discharge actions) (5);
- the procedure for appeal if the employe believes the action was not for just cause (6);
- a reference to material to be attached to the letter which describes the Employe Assistance Program (except for discharge actions) (7).

Letters of suspension or discharge are to be signed only by the appointing authority of the employing unit. A letter of reprimand may be signed by the appointing authority, the employe's immediate supervisor or another management representative as determined by employing unit policy.

All disciplinary letters are distributed as follows:

264.2 C2 (Cont.)

- original to employe;
- copy to employe's official personnel file maintained by the personnel office;
- copy to appropriate supervisor(s) and other management representatives as determined by employing unit policy;
- for represented employes, a copy must be sent to the applicable union/association. (For WSEU-represented employes, the copy is sent to the president of the WSEU local union having jurisdiction over employes in the employing unit or geographical area of the state; for employes represented by other unions/associations, the copy is sent to the statewide union/association president; the current DHSS/BPER Employment Relations Bulletin PP-1 filed with Chapter 258 of the DHSS Supervisors' Manual lists the jurisdiction, names/addresses of union/association presidents);
- copy to the DHSS Bureau of Personnel & Employment Relations, Employment Relations Section, in Madison.

264.2 C3

Verbal Warning

A verbal warning (oral reprimand) is documented by a supervisor's handwritten notation on his/her desk calendar indicating employe's name, date, and reason for the warning or in a handwritten note filed in the supervisor's general desk file covering all employes supervised (not labeled by individual employe). Such documentation of a verbal warning is not filed in the employe's personnel file and a copy is not sent to the union/association. However, documentation should be maintained to prove the administration of the disciplinary action under the progressive discipline system.

264.3 GUIDELINES FOR HANDLING COMMON DISCIPLINARY PROBLEMS

264.3 A

Insubordination

(Refer to Chapter 250.2, DHSS Work Rule 1.)

The willful refusal or failure of an employe to carry out a direct order instruction may be just cause for discipline. To make a case insubordination, it must be clear that the employe was ordered to something, not merely asked. A supervisor who customarily puts instructi in the form of a request as a matter of courtesy should not necessa change; however, when a problem appears with getting a partic instruction obeyed, it should be put in the form of a direct order, and employe should be informed that refusal to obey the order will resu disciplinary action.

Merely protesting an order is not insubordination and normally is no for discipline if not carried to an extreme. An employe genera question an order but, unless s/he reasonably believes it would endang

264.3 A (Cont.)

his/her immediate health and safety or that of other employes, the employe should obey the order and file a grievance afterward.

An employe's union or other representative normally is not subject to discipline for insubordinate actions taken as a representative. For instance, a supervisor meeting with an employe and his/her representative in an investigatory interview or grievance hearing cannot issue orders to the representative during the meeting, even though the representative may be an employe under the same supervisor. If such a meeting is getting out of control, the supervisor should adjourn and reconvene after a "cooling off" period.

264.3 B

Actual or Threatened Physical Violence

(Refer to Chapter 250.2, DHSS Work Rule 2.)

An altercation between an employe and a supervisor, involving actual or threatened physical violence may be just cause for discipline. To warrant discipline, an altercation need not occur on state property or during working hours if it is work related stemming from the employer-employe relationship; however, an altercation occurring off state property and outside working hours resulting from a purely personal matter would not justify disciplinary action.

In determining the seriousness of actual or threatened physical violence, management must consider whether a threat was made in front of other employes; whether the employe intended to carry out the threat; and whether the employe was provoked by a supervisor's remark or action.

264.3 C

Use of Profane or Abusive Language

(Refer to Chapter 250.2, DHSS Work Rule 5.)

Use of profane or abusive language by an employe is not necessarily just cause for discipline. Just cause exists when such language is accompanied by refusal to carry out an order or is used to embarrass, ridicule or degrade a supervisor especially if other employes are present to hear it. Common use of such language in a particular office or shop by all employes including the supervisor can be a mitigating factor in judging the seriousness of an offense.

264.3 D

Absenteeism

(Refer to Chapter 250.2, DHSS Work Rule 14.)

Chronic or excessive absenteeism or tardiness may be just cause for discipline. In evaluating whether excessive absenteeism or tardiness justifies a disciplinary penalty, a supervisor should consider whether or not the employe's attendance record has fallen below an acceptable range. Other factors to be considered include the employe's previous attendance record, length of service, desire to improve attendance, the nature of the absences, and the effect on efficiency and morale of the work unit.

264.3 D (Cont.)

For discipline to be effective and to meet the standards of just cause, the supervisor must make a reasonable effort to help the employe correct the absenteeism. In addition to trying to find the reason for the absenteeism, it is advisable in some cases to suggest referral to the Employe Assistance Program (refer to Chapter 270) or to consider changes in the employe's work situation that might help resolve the problem.

SAMPLE DISCIPLINARY LETTER

May 1, 1985

Mr. John Jones
123 West Main Street
Anywhere, WI 53111

Dear Mr. Jones:

Key Ref. to Sec. 264.2 C2

(1) This is official notification of a disciplinary suspension of five (5) days without pay for violation of Department of Health and Social Services
(2) Work Rule #14 which prohibits in part "absenteeism." Your days of suspension without pay will be May 13, 14, 15, 16 and 17, 1985. You are to return to work on May 20, 1985, for the 3:00 p.m. to 11:00 p.m. shift.

(3) This action is being taken based on the following incident. On April 23, 1985, at 5:50 a.m. you telephoned the institution and stated to your supervisor, Mary Smith, that you needed the day off for personal reasons. She then informed you that she could not grant you a personal holiday. After some argument on your part, she stated that she would have to give you eight hours of leave without pay and refer you for disciplinary action if you failed to report for duty as scheduled at 7:00 a.m. You then stated to the supervisor "give me a WOP". You then failed to report for work as scheduled on April 23, 1985.

(3) On April 24, 1985, during an investigatory meeting including you; your union representative, Joan Turner; Supervisor Mary Smith; and Assistant Superintendent Thomas Gordon, you admitted making the above-referenced phone call. You then stated that on April 22, 1985, you had been taken into custody by the Anywhere Police Department as a witness to a shooting, and they would not release you to go to work on April 23. You were advised by Mr. Gordon that if you could produce written verification of this fact from the Anywhere Police Department you would not be disciplined for your absence. You failed to produce such verification and, on April 29, 1985, stated to Supervisor Smith that you did not have any such verification to offer.

(4) You have received the following disciplinary action during the last twelve months for similar violations of Work Rule #14: a three day suspension without pay on January 20, 22, 23, 1985; a one day suspension without pay on October 15, 1984; and a written reprimand on August 8, 1984.

(5) Future violation of this work rule or other work rules may lead to further disciplinary action up to and including discharge.

(6) (Represented employes: written reprimand, suspension, discharge) If you believe this action was not taken for just cause you may appeal through the grievance procedure according to Article IV of the collective bargaining agreement.

(6) (Non-represented employes: written reprimand) Section ER 46, Wisconsin Administrative Code (Rules of the Department of Employment Relations), provides that you are entitled to grieve this action through the non-contractual grievance procedure. If you do not believe this action was taken for just cause, your completed Employe Grievance Report (DER-25) must be received by me within thirty (30) calendar days from the effective date of this action, or within thirty (30) calendar days after you have been notified of this action, whichever is later.

(6) (Non-represented employes: suspension, discharge) Sections 230.44 (1), (2) and (3), Wis. Stats., provide that you are entitled to appeal this action to the State Personnel Commission, 131 West Wilson Street, Madison, WI 53702. If you do not believe this action was taken for just cause, your written appeal must be received by the Commission within thirty (30) calendar days of the effective date of this action, or within thirty (30) calendar days after you have been notified of the action, whichever is later.

Sincerely,

Robert C. Anderson
Superintendent

RCA:ph

cc: Personnel File
Mary Smith
President, WSEU Local #10
BPER ER Section

(7) Attachment (Employe Assistance Program Information)

STATE OF WISCONSIN
PERSONNEL COMMISSION

RONALD PAUL,

Appellant,

v.

Case No. 85-0217-PC

SECRETARY, Department of
Health and Social Services,

Respondent.

STIPULATION OF FACTS

THE PARTIES HERETO by their respective attorneys hereby stipulate that the due process issues concerning the alleged denial of the Appellant's procedural rights at his pre-disciplinary hearing, which are before the Commission by agreement of the parties at the June 10, 1986 prehearing conference, shall be considered and decided without an evidentiary hearing based upon the following stipulation of facts.

1. Ronald Paul was first employed by the Wisconsin Department of Health and Social Services on December 2, 1968 at the Fox Lake Correctional Institution.

2. Ronald Paul was transferred to Kettle Moraine Correctional Institution (KMCI) in September, 1977, as a Second Lieutenant/Officer 4. He was promoted to Captain in March, 1982, and occupied this position on October 14, 1985.

3. The incident at issue occurred on October 14, 1985.

4. Ronald Paul was a permanent employee on October 14, 1985. Prior to October 30, 1985, he had never been the subject of either an investigatory interview or a pre-disciplinary hearing; however, as a supervisor he had participated in investigatory interviews.

5. From October 14, 1985 through October 23, 1985 Ronald Paul continued in his normal activities and employ at KMCI.

6. On or about October 21, 1985, Security Director John Luhm informed Captain Paul that the October 14 incident had been reported and would be investigated. In response to Paul's inquiry, Luhm stated that Paul would not need an attorney because the October 14 incident was not that serious.

7. After returning from work at KMCI at approximately 5:00 p.m. on October 23, 1985, Ronald Paul received a call from John Luhm informing him that he would be suspended with pay pending review of the October 14 incident by the Superintendent. During this conversation, Paul told Luhm that he would retain an attorney if the discipline under consideration was serious, and Luhm replied that the Director of the Bureau of Adult Institutions, Darrell A. Kolb, had told Luhm that the incident would most likely result in an oral reprimand but, if pushed, Kolb would agree to a written letter of reprimand, at most.

8. On October 29, 1985 at approximately 4:00 p.m., Luhm phoned Paul and informed him that his pre-disciplinary hearing

would be held the next morning. Luhm did not inform Paul that he was entitled to bring a representative to the pre-disciplinary hearing.

9. On October 30, 1985, Ronald Paul was not informed either before or during his pre-disciplinary hearing that he was entitled to representation. Nonetheless, Paul told Personnel Manager Catherine Mlsna immediately prior to the hearing that he requested Lieutenant James McCready as his designated representative. Pauls' request for representation was denied because both of them were subject to discipline for their actions on October 14, 1985. Ronald Paul was never told the reason for denying his request to have James McCready as his designated representative. The pre-disciplinary hearing was conducted with only Security Director Luhm, Personnel Manager Mlsna and Ronald Paul present. Mlsna's memo to Richard Franklin, Superintendent of KMCI concerning the October 30, 1985 pre-disciplinary hearing is attached as Exhibit A.

10. At no time prior to or during Ronald Paul's pre-disciplinary hearing was he informed which, if any, work rules were alleged to have been violated on October 14, 1985. He was not informed that a tentative decision had been reached that any discipline was warranted as a result of the October 14 incident, although Security Director Luhm again stated that Darrell Kolb had told him the discipline would not exceed a letter of reprimand. Paul specifically asked during the course of the pre-

disciplinary hearing what rules he allegedly had violated. Personnel Manager Mlsna did not reply. Security Director Luhm responded that he did not know. Paul asked whether any rules requiring reports to be filed upon discharge of a weapon were violated and Luhm responded that those rules were not applicable in this situation.

11. During the course of the pre-disciplinary hearing on October 30, 1985, Ronald Paul was only asked to review and comment upon the incident report prepared by Richard Franklin for Darrell Kolb, which is attached as Exhibit B. Paul agreed that the incident report was basically correct but modified several statements attributed either to him or to Lt. McCready. Ronald Paul was not informed that he had unauthorized possession of weapons, had violated safety procedures, disobeyed or refused to carry out written or verbal assignments, failed to provide accurate and complete information when required or used without authorization state-owned property.

12. It was not until Ronald Paul received a letter of termination dated November 8, 1985 that he was ever informed that the employer believed that work rules were violated on October 14, 1985 and that conduct which was not addressed at his predisciplinary hearing was relied upon in the decision to terminate his employment. The termination letter is attached as Exhibit C.

13. Attached as Exhibit D are the procedural rules in effect for employee discipline in 1985 as set forth in Chapter

264 of the Department of Health and Social Services Supervisor's Manual. These procedural rules have been followed in disciplinary proceedings for other permanent non-represented employees. On or before October 30, 1986, Ronald Paul was familiar with the provisions of Chapter 264.

Earl H. Munson
Robert J. Dreps
Attorneys for Ronald Paul

Dated: February 4, 1987

Attorney for Department of
Health and Social Services

Dated: February 5, 1987

F RP-ST

October 30, 1985

TO: Richard H. Franklin, Superintendent, KMCI

FROM: Catherine Misna, Personnel Manager, KMCI

RE: **Pre-Disciplinary Hearing for Capt. Ron Paul**

Today, October 30, 1985, a pre-disciplinary hearing was held for Capt. Ron Paul regarding the incident at the gatehouse on October 14, 1985, during which a firearm was discharged. John Luhm, Security Director, and I conducted the meeting.

Captain Paul maintained that the incident report he submitted is accurate; he did not report the incident immediately because he did not feel it was significant. He still thinks it was insignificant, as attributable to the fact that nobody directly involved made a complaint. The practice caps fired at the gatehouse were procured at an MATC Survival School attended by Capt. Paul last April. These practice caps, or rounds, were demonstrated in May of [illegible], at an ERU exercise, with Central Office staff in attendance.

Capt. Paul stated that the Gatehouse Officer, Brian Bass, responded appropriately to being shot at because he did not appear startled, nor did he cringe; rather, he just smiled. Capt. Paul did make a statement to the effect that, "We'd better stop this before we get in trouble." The context of his statement was that he was concerned about alarming residents who live nearby the institution, who might become disturbed if they overheard gunshots.

The incident at the gatehouse occurred spontaneously, and Capt. Paul did not order Lt. McCready to fire. Capt. Paul stated that McCready "asked for it and I gave it to him."

Capt. Paul stated that he was acting within his authority both as an ERU commander and as a firearms instructor. He was concerned that people who aren't committed to ERU might have input into a decision on the merits of his actions.

CM:ma

EXHIBIT A

CORRESPONDENCE/MEMORANDUM — STATE OF WISCONSIN

Date: October 28, 1985 File Ref.

To: Carroll A. Kolb, Director
Bureau of Adult Institutions

From: Richard H. Franklin, Superintendent
Kettle Moraine Correctional Institution

Subject: **Weapons Incident of 10-14-85**

I have reviewed the written report of the participants in the 10-14-85 incident in which a 357 handgun, containing plastic training rounds, was fired in the sallyport of the institution. The following is a summary of those reports.

Captain Paul and Lt. McCready who fired shots report the following:

3. On 10-14-85 an ERU exercise was held in the Food Service Building specifically dealing with room clearing skills. Three handguns had been issued to the "bad guys", each containing three to six training rounds. The room clearing team had no prior knowledge that their "opponents" were armed.

Before the exercise Captain Paul repaired a handgun which was subsequently issued. Following the exercise he noted that none of the rounds in the weapon had been fired.

Upon entering the sallyport Captain Paul fired the weapon to the left of Officer Bass to test the weapon and also the officer's (an ERU member) reaction. Captain Paul states he then instructed Lt. McCready to fire the remaining shots in the air. He states he knew the tower officer would not be effected as he was in the tower operating the gates. He states he did not wish to test the weapon at the Motel as he did not want to disturb Mrs. Neumann who lives across the road.

Lt. McCready indicates that he called to Officer Baumann in the tower to avoid surprising him before firing two shots at the base of the tower.

4. Both Supervisors point out that safety is an utmost concern in all ERU activities and no lethal rounds of ammunition were in the institution at any time.

Statements were also received from Captains Opitz and Scott and Lt. Barber who were present during the incident. The statements include these elements:

1. During the exercise described in (1) above, handguns, 12 ga. shotguns, and mini 14 rifles were used. All the weapons were checked by Captains Opitz and Paul and they were empty. The pistols were then loaded with practice rounds.

EXHIBIT B

3. When the exercise was completed and the van transporting officers and weapons entered the sallyport, Captain Paul fired one of the rounds at Officer Bass (gatehouse officer) who was standing about ten feet from the van.

3. Lt. McCready took the weapon and fired twice in the direction of Officer Baumann in the tower after having said something to him.

4. The officers did not respond, appeared not to be upset and Captain Paul commended Officer Bass on his reaction to gunshot.

Statements have also been received from Officers Rademann, Klumpyan, and Sauer who were in the van at the time of the incident. These statements essentially support the statements of Supervisors Opitz, Scott and Barber with few differences or additions:

1. As does one supervisor report, the officer reports indicate that Lt. McCready asked Captain Paul to give him the weapon.

2. Some of these reports indicate that statements to the effect "I'll get Bass" and "I'll get Baumann" were spoken.

3. Following the incident statements to the effect "we'd better stop this before we get in trouble" and "Yes, I can hear the phones ringing already" were made.

The statements of Officers Bass and Baumann indicate that shots were fired at them by Supervisors Paul and McCready.

RHF:ma

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS
KETTLE MORAINE CORRECTIONAL INSTITUTION
P O BOX 31
PLYMOUTH, WISCONSIN 53073

November 8, 1985

Mr. Ron Paul
Route #1
Fox Lake, WI 53933

Dear Mr. Paul:

You are hereby discharged from employment with the Kettle Moraine Correctional Institution for violation of the work rules cited below. The discharge is effective November 8, 1985.

This action is based on the following incident. During the evening of October 14, 1985, when exiting the institution following an Emergency Response Unit exercise, you, and four others, including Lt. McCready, were passengers in an institution vehicle. As the vehicle was parked in the sallyport, you fired a 357 caliber handgun containing training cartridges at or in the direction of Officer Bass, the Gatehouse Officer, who was in the immediate vicinity. An incident report concerning this incident was filed by Officer Bass. Your action is in violation of the following work rules:

Work Rule #5: Disorderly or illegal conduct including, but not limited to,....horseplay.... .

You were acting in your official capacity of Field Commander. In this role you demonstrated flagrant disregard for basic rules pertaining to weapons safety and common sense. You provided a very poor role model, acting in a manner diametrically opposed to the training repeatedly provided to trainees. Your conduct demonstrated a lack of self-discipline and good judgment in a situation where both qualities are essential.

Work Rule #13: Unauthorized possession of weapons.

Possession of an unholstered, unsecured weapon in the institution sally port is not permitted without prior authorization. You had no such authorization.

Work Rule #6: Violation of....safety....procedures, directions and requirements

Violation of this rule is demonstrated by your failure to comply with SIMP 306.4A, D as discussed under Work Rule #1 below.

EXHIBIT "C"

Work Rule #1: Disobedience....negligence, or refusal to carry out written or verbal assignments, directions or instructions.

It is clear that in removing a handgun from its holster, pointing it out the window of a vehicle and firing it at or near another person you exhibited negligence of basic rules of weapons safety, specifically SIMP 306: 4-A (pp. 1 D) which states:

1. General Rules

   (a) Treat all guns as though they are loaded;

   (b) Never point a firearm at anyone unless you are justified in killing that person.

2. Specific Rules

   (r) A firearm must be unloaded prior to leaving the firing point.

Violation of this work rule is further demonstrated in the use of unapproved equipment contrary to SIMP 306: 3 (pp. 1):

1. Description

   A. Only the weapons, chemicals and related equipment listed below are authorized for use by BAI personnel in the performance of their duties. (The training rounds used in the ERU exercise and in the activity in the sallyport which followed, are not authorized equipment.)

2. Purchasing

   A. All future purchasing of firearms, chemicals, ammunition or equipment must conform to criteria listed in this procedure.

   C. Any recommendation for addition, deletion or modification of the standards established in this Security Internal Management Procedure must be submitted for approval to the Director, Bureau of Adult Institutions.

The practice rounds in question were not used with the knowledge or approval of the Superintendent of KMCI or the Director of the

Bureau of Adult Institutions. They were secured from MATC by Lt. McCready (134 rounds) in trade for a wooden baton.

Work Rule #7: Failure to provide accurate and complete information when required.

You failed to file a written report or otherwise report the incident to your supervisor as required in HSS 306.07(7)b.

Work Rule #3: ....Unauthorized use....of state owned....property, equipment or supplies.

You engaged in unauthorized use of a 357 Caliber handgun and SPEER 38 training cartridges.

On October 30, 1985, a pre-disciplinary meeting was held for you. You were in attendance at this meeting with Catherine Mlsna, Personnel Manager, and John Luhm, Security Director. During the meeting you were provided a copy of the October 28, 1985, memorandum from me to Mr. Kolb. After you read the memorandum, the October 14, 1985, incident was discussed. During the discussion, you admitted discharging a handgun containing practice cartridges while in the institution sallyport in the direction of Officer Bass. In addition, you indicated that you did not feel your actions were wrong and that the intent was to test the weapon and test the officer's response to gunfire.

Sections 230.34(1)(a) and 230.44(1)(c) of the Wisconsin Statutes, provide that you are entitled to appeal this action to the State Personnel Commission, 121 E. Wilson Street, Madison, WI 53702. If you do not feel this action was taken for just cause, your written appeal must be received by the Commission within thirty (30) calendar days of the effective date of this action, or within thirty (30) calendar days after you have been notified of the action, whichever is later.

Sincerely,

Richard H. Franklin

Richard H. Franklin
Superintendent

RHF/na

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MANAGEMENT SERVICES
Bureau of Personnel & Employment Relations
Room 687, 1 West Wilson Street
P O Box 7850
Madison, WI 53707

PERSONNEL AND EMPLOYMENT RELATIONS DIRECTIVE

Subject: Employe Discipline

June, 1985 CHAPTER 264

264.1 BACKGROUND

264.1A The Meaning of Discipline

Any formal organization must establish policies, procedures and standards of conduct (i.e., work rules) to provide direction to its members so that the mission and goals of the organization can be accomplished. An important aspect of discipline in organizations involves the creation of attitudes and a "climate" where employes willingly conform to the the established policies, procedures and rules. This is accomplished by management through clear communication and feedback regarding expectations; positive motivation and leadership by example; recognition that individual differences among employes may at times require different approaches to supervision; equal and consistent application of rules; and fair treatment afforded all employes.

Instilling a sense of "self-discipline" in employes is a necessary part of a supervisor's job; however there will be occasions when an employe commits a violation of a DHSS work rule (refer to Chapter 250: Department Work Rules) which may be determined serious enough to warrant disciplinary action. Disciplinary action involves the use of penalties to influence employes to obey orders and adhere to the work rules of the Department and policies of their employing unit.

264.1 B "Just Cause" for Disciplinary Action

Provisions of state civil service and employment relations statutes establish the right of agency management to take disciplinary action against an employe for just cause. State collective bargaining agreements also specify this right as applied to represented employes.

The concept of "just cause" consists of the following collective set of guidelines or standards developed over the years upon which courts, labor arbitrators and quasi-judicial review panels rely when evaluating the appropriateness of disciplinary action imposed on employes.

- Forewarning: The employe must have been forewarned that the particular behavior would result in disciplinary action. The warning can be given individually or by means of a general work rule.

EXHIBIT "D"

264.1 B (Cont.)

- Reasonableness: The broken rule or disobeyed order must be reasonably related to orderly, efficient, and safe operations. When an employe thinks a rule or order is unreasonable, s/he generally must follow the "work now, grieve later" principle. An employe generally can question an order, but unless s/he reasonably believes obeying it would endanger his/her health and safety or that of other employes, the employe should obey the order and file a grievance afterward. But to avoid time investment in unnecessary grievances, all rules and orders should meet the "orderly, safe, and efficient operations" standard.

- Consistency: Disciplinary action must be applied in a consistent manner. A particular employe should not be disciplined for a violation that has been tolerated, in similar circumstances, when committed by others. Nor should an employe be disciplined more or less than others who committed similar violations in similar circumstances.

- Investigation: Before taking disciplinary action, management must make an effort to discover whether the rule was actually broken or the order disobeyed. In cases of serious offenses, the supervisor will usually work with higher authority in conducting an investigation which should always be fair and objective.

- Substantial Evidence: The person making the disciplinary decision must have substantial evidence that the employe has committed the alleged act. Although the standard of proof varies with the type of charge involved, the evidence cannot be mere rumor or unsupported accusations. The Personnel Manager should be consulted as to what evidence is necessary to sustain a disciplinary action.

- Degree of Discipline: The degree of discipline must be related to the seriousness of the offense and to the employe's record and should not be more severe than what is necessary to influence the employe to correct his/her behavior. Minor offenses generally result in lesser discipline. Stronger discipline should be reserved for serious offenses, or cases of continued problems where progressive discipline has been followed and has failed to correct the situation.

264.1 C

Progressive Discipline

When management finds it necessary to take disciplinary action against an employe, the DHSS operates under a system of progressive discipline: applying progressively more severe penalties for repeated infractions of Department work rules (and related employing unit policies) and providing appropriate assistance to help an employe correct the unacceptable conduct.

A progressive disciplinary system typically involves the following three steps before discharge:

- Verbal Warning (or oral reprimand) is the first step in a progressive disciplinary system and is applied when regular discussions between employe and supervisor regarding inappropriate conduct do not result in satisfactory improvement. The supervisor must tell the employe

264.1 C (Cont.)

specifically that "this is a verbal warning" and that further disciplinary action will result if the unacceptable conduct is not corrected.

- Written reprimand is the second step in a progressive disciplinary system and is typically administered when a previous verbal warning(s) has not resulted in satisfactory improvement in the employe's conduct. A written reprimand may also be administered without a prior verbal warning when the misconduct is serious enough to immediately require stronger corrective action. A written reprimand is communicated in the form of a letter to the employe.

- Suspension without pay is the third step in a progressive disciplinary system and involves relieving an employe from work without pay for a period from a minimum of one to a maximum of thirty calendar days. A suspension without pay is administered when a previous written reprimand(s) has not resulted in satisfactory improvement in the employe's conduct, or when a particularly serious offense occurs. A suspension is communicated in the form of a letter to the employe. (NOTE: An employe may be suspended with pay for a brief period of time pending completion of an investigation when a serious offense has allegedly been committed, and the appointing authority determines that the employe should not remain on duty because of the potential for disrupting operations or hindering the investigation.)

- Discharge is the ultimate penalty imposed only when an employe's misconduct or failure to perform required work is so serious or protracted that termination becomes the only feasible alternative available to management. A discharge is communicated in the form of a letter to the employe.

Progressive discipline is built on the principle of employe awareness, thereby eliminating any element of surprise which would violate the standards for just cause. As employes move through each step in progressive discipline, they receive actual notice that their behavior is in violation of specific rules. However, management is not required to apply progressive discipline in cases of offenses regarded as so serious that no specific warning or prior disciplinary action need precede discharge (e.g., serious physical assault, major theft). In addition, an offense that by itself would justify no more than a written reprimand may call for suspension or even discharge if the employe has a recent history of similar offenses and has not responded to progressive discipline involving lesser penalties (e.g., repeated tardiness).

264.2 STEPS IN THE DISCIPLINARY PROCESS

The general disciplinary process outlined in this section should be followed for all represented and non-represented employes with permanent status and for project employes. The Personnel Manager should be consulted regarding specific employing unit procedures. There are two other types of cases to consider:

- Employes serving an original probationary period: A work rule violation that would result in a written reprimand or suspension without pay, if

264.2 (Cont.)

committed by a permanent employe, should normally result in termination of an employe serving an original probationary period. The reason for this is that acceptable personal conduct is a part of overall job effectiveness and is expected, in addition to acceptable performance of job duties. During probation, the new employe should demonstrate the ability to respond to ongoing supervision and counseling, including verbal warnings. If, as demonstrated by a work rule violation that would result in a written reprimand or suspension for a permanent employe, the new employe does not show this ability to respond to direction, the employe should be terminated. (Refer to Chapter 212: Probationary Periods.)

- Employes serving a permissive or promotional probationary period: Violations of a work rule (not arising from an inability to perform job duties) committed by an employe serving a permissive or promotional probationary period are subject to the disciplinary process. They should be handled in the same manner as a rule violation by an employe with permanent status in the classification. On the other hand, if an employe on permissive or promotional probation, after appropriate instruction and training, experiences job performance problems that indicate a lack of ability to perform at an acceptable level, the probation should be terminated and the employe returned to his/her previous position. (Refer to Chapter 212: Probationary Periods.)

264.2 A (STEP 1)

Management Investigates to Establish the Facts and Determine Just Cause

When a possible infraction of a work rule occurs, the supervisor or other designated management representative will immediately investigate the situation to establish the facts. The investigation process is a vital part of establishing just cause for subsequent disciplinary action. All relevant facts must be gathered, but the process must also be fair and objective. Any actual, or appearance of, harassment, intimidation or entrapment of an employe could result in the disciplinary action being overturned at a later date by an outside reviewer (e.g., arbitrator).

In conducting the investigation, the management representative should focus on answering the following questions to help establish that there is just cause for disciplining the employe:

- What policy or procedure and related work rule is alleged to have been violated?
- Who was involved?
- When did the alleged infraction occur?
- Where did the alleged infraction occur?
- Who were the witnesses?
- Were there any extenuating circumstances?

264.2 A1

The Investigatory Interview

In order to answer these questions thoroughly, the management representative frequently will find it necessary to conduct one or more investigatory interviews. An investigatory interview is a meeting or discussion with an employe (and his/her representative if one is requested) for the purpose of gathering information about the potential violation of a work rule. Such interviews normally are scheduled as part of the investigative process; however, any meeting or discussion can become an investigatory interview if facts indicating that a work rule violation has occurred emerge during the course of the meeting or discussion, and the potential violator is present. When the facts of a violation are already well-documented or known by the supervisor, an investigatory interview may not be necessary (e.g., when the facts of tardiness or absenteeism are known or when a supervisor directly observes the commission of a work rule violation).

264.2 A1a

Employe's Right to Representation During An Investigatory Interview

An employe's right to representation during an investigatory interview is well established by case law and state collective bargaining agreements.

- A represented employe has the right to be represented by a designated local union grievance representative (or union-paid field representative if a local representative is not available): (1) if the employe has reasonable grounds to believe that the results of the interview may be used to support disciplinary action against him/her; and (2) if the employe requests a representative. (If the potential work rule violation could result in criminal charges against the employe, the employe's personal attorney may also attend but strictly as an observer and not a participant in the discussion.) Normally, an employe who is merely being questioned about what s/he may have witnessed in regard to an incident involving another employe would not have reason to believe that s/he may be disciplined; however, if the witness requests representation, his/her request should be granted.

- A non-represented employe has the right, if requested, to be represented by a representative of his/her choice (i.e., an employe in a supervisory position may select another non-represented employe, a personal attorney, or other non-employe representative; an employe in a non-supervisory position may select any employe, a personal attorney or other non-employe representative).

The role of the representative is essentially that of an observer on behalf of the employe to ensure that the employe's rights are not abridged. In listening to the employe's version of the incident, the management representative must allow the representative to help the employe present his/her version and relevant facts. However, the

264.2 A1a (Cont.)

representative does not have the right to interfere with or obstruct the investigation or disrupt the meeting. The employe can be requested to personally respond to the management representative's job-related questions.

264.2 A1b

Scheduling and Conducting the Investigatory Interview

An investigatory interview may be scheduled verbally or by memo to the employe. The employe should be clearly informed of the purpose, date, time and location for the meeting and that s/he has the right to have a representative present. If the employe then requests a representative, the representative's attendance should be coordinated with the employe's supervisor and the representative's supervisor.

The interview should be conducted privately. The management representative should be fully prepared and maintain a professional demeanor during the meeting, reflecting concern without being emotional. At the outset of the interview, the employe/representative should be told the reason for the meeting, and the management representative should make a general statement identifying the alleged work rule violation. The employe should then be asked to fully explain his/her version of the incident in question. If the employe refuses to answer legitimate questions about job-related conduct, s/he should be advised that management will then be forced to rely on other sources of information and its own conclusions of fact.

The management representative should write down the employe's responses to the important questions and note all major points covered. A typewritten summary may be prepared shortly after the interview. Such proceedings should not be tape-recorded by either party because of the potentially "chilling effect" on the free flow of information, the possibility of alteration, and the problem of admission as evidence in an arbitration/Personnel Commission hearing.

264.2 A2

Documentation of the Investigation

Successful defense of a disciplinary or discharge action depends on accurate and thorough documentation of the factual evidence and information that led management to conclude that just cause existed for the action. Some common types of factual evidence, as applicable, that should be collected to document a disciplinary case include:

- Personnel and other "business" records: employe timesheets and attendance records; official forms; pertinent previous disciplinary or performance records;

- Complaints: written, signed and dated citizen, client or patient/inmate complaints or incident reports from supervisors or other employes;

- Summary of investigatory interview(s): (discussed in section 264.2 A1b);

264.2 A2 (Cont.)

- Witness statements: written, signed and dated statements from all witnesses to an incident, preferably in their own handwriting, recorded as soon as possible after the incident; such statements should be sufficiently detailed to relate a complete story of what they know or observed. For witnesses who have difficulty expressing themselves, the management representative may prepare a summary of an interview with the witness and have the witness sign the summary as being "true and correct";

- Photographs: photos can be valuable evidence to show damage to property, injury to people, etc.; the photographer should sign and date the back of each photo, and they should be placed in an envelope marked to identify each photo by date, time and place.

- Examples of unsatisfactory work: for example, letters and reports with clerical errors identified; all such items of evidence should be marked by the supervisor to indicate date, time and name of employe;

- Communications to employes: all relevant bulletins, posted notices, written management statements, employe handbooks, etc., used to communicate rules, policies or directives to employes must be preserved to prove that the violated rule or policy was communicated to the employe in a timely manner.

264.2 B (STEP 2)

Management Presents the Findings of The Investigation in a "Due Process" Pre-disciplinary Hearing

If, after a thorough review of the results of the investigation, management tentatively determines that there is just cause for disciplinary action, the designated management representative of the employing unit will conduct a pre-disciplinary hearing with the accused employe. A pre-disciplinary hearing is a meeting with the employe who is accused of violating a work rule (and the employe's representative if requested) at which the management representative presents the findings of management's investigation and tentative conclusion that disciplinary action is warranted. The pre-disciplinary hearing is scheduled and conducted in the same manner as an investigatory interview. (Refer to section 264.2 A 1b.)

264.2 B1

Maintaining "Due Process"

The pre-disciplinary hearing is scheduled by the management representative prior to making a final decision on any disciplinary action. This meeting is an essential element of due process in the context of employe discipline. In addition to the standards for just cause discussed in section 264.1 B, courts, labor arbitrators and quasi-judicial review panels require that an employer adhere to the concept of "due process" in disciplinary situations whereby an accused employe is (1) allowed to know the facts supporting a finding that a violation of work rules did occur; and (2) is given an opportunity to defend him/herself. Failure to maintain due process in disciplinary situations may result in management's action being overturned upon later review by an outside party (e.g., arbitrator).

264.2 B1 (Cont.)

In order to maintain due process, a verbal (and written if desired) summary of the evidence upon which management bases its tentative conclusions is presented to the employe/representative at this meeting. The employe/representative are then given the opportunity to refute management's findings and to introduce additional facts or evidence not considered by management, including any extenuating circumstances that they urge management to consider in making a final decision.

If the pre-disciplinary hearing does not produce evidence which would alter the just cause determination, the pre-disciplinary hearing is concluded and management proceeds with the imposition of disciplinary action as outlined in section 264.2 C. If the employe/representative introduce relevant new evidence or questions, further investigation by management will be required before a determination on the disciplinary action can be made.

While the management representative may refer in the hearing to the type of disciplinary action being considered by management, the final management decision to administer disciplinary action should not be communicated to an employe/representative at the pre-disciplinary meeting. This should be done afterward by the appropriate management representative and then communicated to the employe/representative in writing as described in section 264.2 C.

264.2 B2

Employe's Right to Representation During a Pre-disciplinary Hearing

As a matter of DHSS policy, an employe has the right, if requested, to be represented during a pre-disciplinary hearing. The role of the employe's representative is the same as in an investigatory interview. (Refer to section 264.2 A 1a.)

264.2 C (STEP 3)

Management Selects and Administers Appropriate Disciplinary Action

If, after thorough investigation and opportunity for employe "due process" rebuttal, management determines that there is just cause for taking disciplinary action, the appropriate action should be administered according to the progressive discipline system discussed in section 264.1C. Disciplinary action must be commensurate with the particular offense committed, given the employe's history of previous related infractions within the past twelve months, and consistent with actions taken against other employes in similar situations. In addition, any action taken should not be more severe than what is necessary to influence the employe to correct his/her behavior.

NOTE: The imposition of disciplinary action beyond a written reprimand requires prior consultation with staff of the BPER Employment Relations Section. Division administrators may establish division-wide procedures which may alter this requirement.

264.2 C1

Effect of Employe Personal Problems on Disciplinary Situations

In cases of chronic absenteeism or other misconduct involving a violation of DHSS work rules, it is possible that an employe is experiencing personal

264.2 C1 (Cont.)

problems (e.g., alcohol or drug dependency, marital, emotional) which are affecting his/her behavior and performance on the job. In such cases, supervisors should seriously consider referring potentially "troubled" employes to the Employe Assistance Program (EAP) according to procedures outlined in Chapter 270 of the DHSS Supervisor's Manual. Also, a formal written notification of the existence of EAP is required to be attached to all disciplinary letters (refer to section 264.2 C2).

However, personal problems should not be considered as a reason for delaying or postponing disciplinary action or setting aside an appropriate action. Employes are expected to meet and maintain norms and standards of conduct and performance related to the job. If just cause exists for disciplinary action, then appropriate action should be taken. Any deviation from this policy must be discussed with BPER Employment Relations Section staff prior to communication with the employe and/or his/her representative.

264.2 C2

Written Reprimand, Suspension, Discharge

Once management determines the appropriate disciplinary action, a written reprimand, suspension or discharge is communicated as soon as possible to the employe in the form of a letter containing the following information (number keyed to paragraphs of the sample disciplinary letter, attachment 1-264 at the end of this chapter):

- a statement that the letter is notification of reprimand, suspension or discharge (1);
- a citation of the specific DHSS work rule(s) violated (2);
- a brief description of the nature of and facts concerning the violation (time, place, people involved, statements made, etc.) (3);
- a summary of previous disciplinary action for similar offenses administered within the past twelve-month period (to make the employe aware of the progressive nature of the discipline) (4);
- a statement that a repetition of the offense may result in further disciplinary action (except for discharge actions) (5);
- the procedure for appeal if the employe believes the action was not for just cause (6);
- a reference to material to be attached to the letter which describes the Employe Assistance Program (except for discharge actions) (7).

Letters of suspension or discharge are to be signed only by the appointing authority of the employing unit. A letter of reprimand may be signed by the appointing authority, the employe's immediate supervisor or another management representative as determined by employing unit policy.

All disciplinary letters are distributed as follows:

264.2 C2 (Cont.)

- original to employe;
- copy to employe's official personnel file maintained by the personnel office;
- copy to appropriate supervisor(s) and other management representatives as determined by employing unit policy;
- for represented employes, a copy must be sent to the applicable union/association. (For WSEU-represented employes, the copy is sent to the president of the WSEU local union having jurisdiction over employes in the employing unit or geographical area of the state; for employes represented by other unions/associations, the copy is sent to the statewide union/association president; the current DHSS/BPER Employment Relations Bulletin PP-1 filed with Chapter 258 of the DHSS Supervisors' Manual lists the jurisdiction, names/addresses of union/association presidents);
- copy to the DHSS Bureau of Personnel & Employment Relations, Employment Relations Section, in Madison.

264.2 C3

Verbal Warning

A verbal warning (oral reprimand) is documented by a supervisor's handwritten notation on his/her desk calendar indicating employe's name, date, and reason for the warning or in a handwritten note filed in the supervisor's general desk file covering all employes supervised (not labeled by individual employe). Such documentation of a verbal warning is not filed in the employe's personnel file and a copy is not sent to the union/association. However, documentation should be maintained to prove the administration of the disciplinary action under the progressive discipline system.

264.3 GUIDELINES FOR HANDLING COMMON DISCIPLINARY PROBLEMS

264.3 A

Insubordination

(Refer to Chapter 250.2, DHSS Work Rule 1.)

The willful refusal or failure of an employe to carry out a direct order or instruction may be just cause for discipline. To make a case for insubordination, it must be clear that the employe was ordered to do something, not merely asked. A supervisor who customarily puts instructions in the form of a request as a matter of courtesy should not necessarily change; however, when a problem appears with getting a particular instruction obeyed, it should be put in the form of a direct order, and the employe should be informed that refusal to obey the order will result in disciplinary action.

Merely protesting an order is not insubordination and normally is not cause for discipline if not carried to an extreme. An employe generally can question an order but, unless s/he reasonably believes it would endanger

264.3 A (Cont.)

his/her immediate health and safety or that of other employes, the employe should obey the order and file a grievance afterward.

An employe's union or other representative normally is not subject to discipline for insubordinate actions taken as a representative. For instance, a supervisor meeting with an employe and his/her representative in an investigatory interview or grievance hearing cannot issue orders to the representative during the meeting, even though the representative may be an employe under the same supervisor. If such a meeting is getting out of control, the supervisor should adjourn and reconvene after a "cooling off" period.

264.3 B

Actual or Threatened Physical Violence

(Refer to Chapter 250.2, DHSS Work Rule 2.)

An altercation between an employe and a supervisor, involving actual or threatened physical violence may be just cause for discipline. To warrant discipline, an altercation need not occur on state property or during working hours if it is work related stemming from the employer-employe relationship; however, an altercation occurring off state property and outside working hours resulting from a purely personal matter would not justify disciplinary action.

In determining the seriousness of actual or threatened physical violence, management must consider whether a threat was made in front of other employes; whether the employe intended to carry out the threat; and whether the employe was provoked by a supervisor's remark or action.

264.3 C

Use of Profane or Abusive Language

(Refer to Chapter 250.2, DHSS Work Rule 5.)

Use of profane or abusive language by an employe is not necessarily just cause for discipline. Just cause exists when such language is accompanied by refusal to carry out an order or is used to embarrass, ridicule or degrade a supervisor especially if other employes are present to hear it. Common use of such language in a particular office or shop by all employes including the supervisor can be a mitigating factor in judging the seriousness of an offense.

264.3 D

Absenteeism

(Refer to Chapter 250.2, DHSS Work Rule 14.)

Chronic or excessive absenteeism or tardiness may be just cause for discipline. In evaluating whether excessive absenteeism or tardiness justifies a disciplinary penalty, a supervisor should consider whether or not the employe's attendance record has fallen below an acceptable range. Other factors to be considered include the employe's previous attendance record, length of service, desire to improve attendance, the nature of the absences, and the effect on efficiency and morale of the work unit.

264.3 D (Cont.)

For discipline to be effective and to meet the standards of just cause, the supervisor must make a reasonable effort to help the employe correct the absenteeism. In addition to trying to find the reason for the absenteeism, it is advisable in some cases to suggest referral to the Employe Assistance Program (refer to Chapter 270) or to consider changes in the employe's work situation that might help resolve the problem.