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 *
 LARRY W. MONSON, *
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 Appellant, *
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 v. *
 *
 Secretary, DEPARTMENT OF *
 HEALTH AND SOCIAL SERVICES, *
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 Respondent. *
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 Case No. 87-0076-PC *
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ORDER

The Commission, having considered the parties' objections and arguments and having consulted with the hearing examiner, adopts the attached proposed decision as the decision of the Commission with the following additions, deletions and substitutions:

Conclusions of Law: delete Conclusion number 4 and substitute the following:

"4. The one day suspension did not constitute excessive discipline."

Opinion: delete section under the heading, Excessiveness of the Discipline and substitute the following:

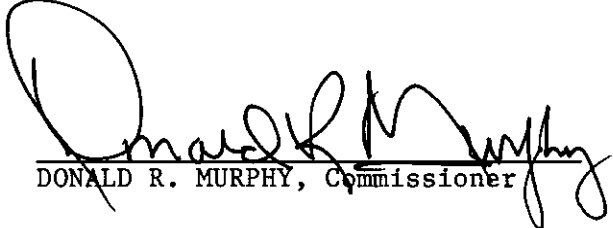
Level of Discipline

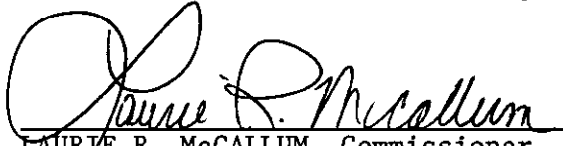
The Commission believes that appellant's high level position, which involved interaction with persons and agencies outside his Department, demanded a special sensitivity to Department concerns. His failure to comply with certain department directives on two occasions clearly justified the imposition of some level of discipline, particularly since appellant had been warned previously that his performance in this regard was inadequate. While the Commission may not have imposed a one-day suspension, the facts of this case do not cause us to believe such discipline is excessive.

Order: delete the proposed order in its entirety and substitute the following: The action of respondent in suspending appellant for one day is affirmed and this appeal is dismissed.

Dated: June 20, 1988 STATE PERSONNEL COMMISSION

DRM:rcr
DPM/2


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

Parties:

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Madison, WI 53707

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

STATE OF WISCONSIN

PERSONNEL COMMISSION

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PROPOSED
 DECISION
 AND
 ORDER

This matter is before the Commission as an appeal from the imposition of a one-day suspension. At a prehearing conference held on June 18, 1987, the parties agreed to the following issue for hearing: Was there just cause for the one-day suspension of appellant? A hearing was convened on November 3, 1987 and continued on January 4 and January 26, 1988. The parties argued the matter orally before the examiner on February 2, 1988.

FINDINGS OF FACT

1. Appellant has been employed continuously by the respondent since 1970 with responsibilities in the areas of alcohol and other drug abuse (AODA).
2. For the period from January 1, 1977 to August 1, 1982, appellant served as director of the Bureau of Alcohol and Other Drug Abuse in the respondent's Division of Community Services. For the period from 1978 to 1982, the deputy director of the bureau was Philip McCullough.
3. In 1979, there were approximately 75 employes within the bureau or supervised by persons within the bureau. Another 12 employes received

programmatic supervision from bureau employes but received day-to-day supervision from persons outside the bureau.

4. Since at least 1979, several state councils and boards have existed that relate to the areas of alcohol and other drug abuse and controlled substances.

5. In 1982, the respondent reorganized the Division of Community Services due both to a reduction in funding provided to the Division and a revision in the method of obtaining related federal funding. The reorganization abolished what had been separate bureaus relating to alcohol and other drug abuse, developmental disabilities, mental health and the hearing impaired and recreated them at the office level, which is one step lower in the organizational hierarchy. The Bureau of Community Programs was created to provide support staff and budget and management assistance to the newly created offices at minimum cost.

6. In August of 1982, as a consequence of the reorganization, appellant's title changed from Director of the Bureau of Alcohol and Other Drug Abuse to Director of the Office of Alcohol and Other Drug Abuse.

7. At the time of, or soon after the reorganization, several responsibilities of the former bureau were reassigned. A direct service AODA treatment unit at the Winnebago Mental Health Institute was reassigned to the Division of Care and Treatment Facilities. The Controlled Substances Board asked to move their operation out of the Office of Alcohol and Other Drug Abuse because they felt they lacked the support of the appellant as office director. The Controlled Substances Board is now located within the Office of Program Support which is also within the Bureau of Community Programs.

8. In the early 1980's the Citizens' Council on Alcohol and Other Drug Abuse requested the Legislative Reference Bureau to draft legislation to create an independent Commission on Alcohol and Other Drug Abuse. While the draft had some support among various advisory groups, the respondent strongly opposed the concept and the proposal was not adopted.

9. For the period from August, 1982 to 1985, Mr. Gerald Born served as Director of the Bureau of Community Programs and, as such, was appellant's immediate supervisor.

10. By letter dated March 31, 1983, the Administrator of the Division of Community Services, Gerald Berge, advised the appellant of a series of performance problems:

Recent events and allegations make it imperative that we begin to address a number of long-standing performance issues and basic problems with your performance as an effective OAODA Director and member of the Management Team. It is imperative that these job related performance concerns are accepted and addressed by you so that dissention in both the internal and external AODA community is not contributed to by your actions and that you clearly represent the Department position on policy matters. The items we want to discuss that illustrate our concerns are as follows:

* * *

3. Failure to consistently or credibly represent the Department of Health and Social Services' position or decisions on key issues.

Over the past year, numerous individuals have communicated to DCS that the OAODA Director has overtly or otherwise encouraged opposition to one or more of the following Departmental positions:

- Proposed changes in the legal drinking age;
- The DCS 1982 consolidation, including the creation of an Office of Alcohol and Other Drug Abuse;
- Specific Departmental recommendations for uses of ADAMH Block Grant dollars;
- The Departmental position on the creation of an independent AODA Commission;

- Staff reductions in the OAODA to meet mandated position reductions in DCS.

* * *

I want you to develop a specific plan to deal with these concerns and review it with us in two weeks. This assignment is to be accomplished without other staff or AODA community involvement. We want to work together with you to ensure these performance concerns are addressed strongly and without delay. Failure to address these concerns will in my judgement jeopardize your ability to successfully function as the OAODA Director. If you feel you cannot address these concerns in your current position, then we are open to discussing alternative assignments. (Emphasis added, in part).

11. Appellant's performance evaluation report dated August 27, 1983, lists a performance category of "satisfactory" and notes:

Since the time of the [March 31, 1983] letter, Larry has tried hard to comply with a plan he developed to address the concerns in Mr. Berge's letter. He clears policy issues and much of his correspondence for consistency with DHSS/DCS policy, has tried hard to be supportive of his staff in a more uniform fashion, and has been much more willing to delineate his role as a DHSS policy maker and representative as opposed to AODA Council Staff, etc. Larry needs to continue to be sensitive to the issues raised in Mr. Berge's letter and continue to implement his improvement plan as outlined.

12. Appellant's performance evaluation report dated May 25, 1984, lists a performance category of "needs improvement" and states, in part:

The major areas for improvement include the following:

* * *

2. More active involvement in presenting Departmental, Division and Bureau positions with consumer, citizen and advocacy groups, as well as Councils, is needed.
3. There is a need to convey to the AODA staff that the Bureau, Division and the Department are working along with AODA to ensure, within the limits of the resources available, appropriate services are provided for individuals with drug abuse and alcoholism. Staff should not be given the impression that the Bureau, Division and Department are entities that the Office staff are not an integral part of, and Larry must work to assure that there is much more harmony and consistency in policy, program direction and willingness to work together between the Office and the other units within the Bureau, Division and Department.

13. In approximately May of 1984, appellant made a lengthy presentation regarding the proposed commission to persons with AODA responsibilities at the county level. Because the presentation indicated support for the concept, Gerald Born, then Director of the Bureau of Community Programs, found it necessary to tell the audience that the respondent's secretary and the governor were opposed to the concept and that any legislation to create an AODA commission would probably be vetoed.

14. Early in 1985, Philip McCullough replaced Mr. Born as Director of the Bureau of Community Programs. Mr. Born became the Assistant Division Administrator for the Division of Community Services.

15. On May 28, 1985, Mr. Born and Mr. McCullough issued a joint memo to appellant, stating, in part:

Because of the transition in supervision, this memo has been jointly prepared by us so that we develop very clear expectations for your performance in the next year. Over the past year, there have been problems which we feel need to be specifically addressed. Briefly, the problems include:

* * *

4. There have been a number of discussions on a number of occasions since your being in the BCP regarding your manner of being a spokesperson for the Department, the Division and the Bureau. You have, on several occasions, not presented the perspective of the Department when meeting with various groups and this problem persists to the present time. As discussed back in December, feedback has again come to us regarding a presentation to WACHSP concerning the Department's not responding to the Governor's proclamation with appropriate budget items. There was also apparently some discussion at the Citizens' Council meeting regarding the Block Grant allocation, and we have been informed that a suggestion was made or at least intimated, that Block Grant funding should be going to alcohol and drug abuse rather than to mental health because of the state funds that mental health receives.

We believe it will be necessary for you to be more sensitive to what you are saying and how you are saying it. We are all aware that the Department is not able to meet every need and fund every program that every staff person, consumer and advocate would like. It is necessary for all of us to express the Department's support for these programs, but at the same time, express the

limitations that we have in resources. It seems you have a very difficult time in this respect. You cannot consider your job done just because you ask for the dollars. As a manager, it is imperative that you recognize funding realities and not consider your responsibilities discharged because you've asked for funds. This shallow approach is not management nor effective advocacy and it defeats our efforts in working with all disabilities and constituents.

16. In December of 1986, Mr. McCullough directed all of the office within the Bureau of Community Programs to schedule a staff retreat to "review current ... efforts, resources and develop short range and long range objectives." The Office of AODA held their retreat on February 12, 1987 at a Holiday Inn in Madison, from approximately 8:30 a.m. to 4:30 p.m. Only OAODA staff were in attendance. The retreat was conducted in the format of a "nominal group process" which was designed to solicit opinions from each group member, rather than allowing the most vocal member to dominate the discussion. One of the staff members present, Dorothy Houden, posed a question as to whether a department level AODA organization, as exists in Illinois, would generate additional authority to accomplish more in the program area. Appellant stated that such an organization was not realistic in the State of Wisconsin. After a few comments by one or more of the other staff members present, the discussion moved to another topic.

17. Appellant made no comments during the retreat that tended to indicate he was dissatisfied with the existing organizational structure.

18. On or about Friday, February 6, 1987, Dr. Roland Herrington, chairperson of the Alcohol and Other Drug Committee for the State Medical Society of Wisconsin, called John Vick, an OAODA employee. Dr. Herrington explained that he and another physician, David Benzer, had a meeting scheduled with Governor Thompson in Milwaukee on February 16th to discuss issues relating to AODA. Dr. Herrington asked Mr. Vick if there were any issues that Mr. Vick thought should be brought up in that meeting. Mr.

Vick identified three topics which had been discussed at the statewide councils/associations with responsibilities in the AODA area. Dr. Herrington also stated that he would be calling the appellant on the following Monday for some additional information.

19. On Monday, February 9th, Mr. Vick briefed the appellant on Dr. Herrington's call of the 6th. Later that day, Dr. Herrington called the appellant and asked him two questions: 1) How the appellant thought that the public and private sectors could work together on AODA issues; and 2) how the present Office of Alcohol and Other Drug Abuse differed from the previous Bureau of Alcohol and Other Drug Abuse. As to the second question, appellant informed Dr. Herrington that there were 17 employees in the existing Office, versus 87 employees in the former Bureau. Appellant also stated that the Controlled Substances Board (CSB) had been removed from the responsibility of the Office as well as other positions no longer within the Office. The appellant did not explain why the CSB had been removed. However, he did explain that the current office level organizational structure was more responsive to AODA issues because there were now persons in other areas of the bureaucracy, including the Division of Corrections and the Division of Health, who dealt with AODA issues. Appellant made reference to other positions within BCP that related to AODA issues including a position in the Office of Physical Disabilities, a position in the Bureau of Community Programs that had responsibilities for AODA grants management and to the joint effort of OAODA with the Office of Developmental Disabilities on the topic of fetal alcohol syndrome. Appellant also explained that the change from the Bureau level to Office level organization in 1982 had occurred as a result of reduced federal funding.

20. Drs. Herrington and Benzer developed an agenda for the meeting scheduled with Governor Thompson on February 16th. The part of the agenda entitled "Office of Alcohol and Other Drug Abuse" was developed from the information provided by the appellant and related to the drafters' contention that the state was assigning AODA issues too low a priority. It reads:

- A. Reduction in stature of BUREAU of Alcohol and Other Drug Abuse to OFFICE of Alcohol and Other Drug Abuse
- B. Reduction in number of employes. The 1980 BUREAU had 87 employes; today the OFFICE has 17 employes
- C. Removal of the State Controlled Substances Board responsibilities for various alcohol and drug programs
- D. The fiscal person overseeing alcohol and other drug programs was removed
- E. Program certification and program support was removed
- F. Third party payment specialist was removed
- G. Criminal justice diversion program was abolished

21. Respondent was provided a copy of the proposed agenda in advance of the February 16th meeting. At the request of the superiors, Mr. McCullough prepared, in advance of the meeting, a response to the agenda. The response provided a more complete explanation of those seven points listed above:

- A. The Bureau of Alcohol and Other Drug Abuse (BAODA) was consolidated into BCP in 1982 as part of the DCS reorganization. Included in BCP are the Offices of Mental Health (MH), Developmental Disabilities (DD), Hearing Impaired (HI), Blind & Visually Impaired Services (BVI), and Persons with Physical Disabilities (PPD). This consolidation has led to increased interdisciplinary coordination.
- B. The number of BAODA employees in 1980 was 67 (not 87); currently there are 21 in the Office of AODA. Some very major programs were transferred to other departments, i.e., Substance Abuse Treatment Program. 17.5 direct treatment positions were transferred to the Division of Corrections along with the entire program. Additionally, in 1982, all federal AODA/MH funds were

folded into a single block grant, and several positions in central office and six DCS regional offices were no longer needed to monitor individual programs. Overall staff reductions in OAODA have been due primarily to reduced federal funding affecting all states.

- C. At the request of the Controlled Substances Board, the Board was removed from OAODA and placed elsewhere in BCP. It continues to be an integral part of the BCP's response to alcohol and drug abuse programs. More than that, the Board is highly regarded in both Wisconsin and the United States for its pioneering and successful drug abuse control programs.
- D. Fiscal monitoring for alcohol and drug abuse programs have been greatly reduced and streamlined through the state/county contract and clearly has resulted in less administrative cost without sacrifice to local programs.
- E. Program certification continues to be done by the BCP for AODA/MH programs.
- F. Third party payment specialist duties were absorbed into other positions when federal funds were reduced.
- G. Criminal Justice Diversion has not been abolished; Clifford Roach, Correctional Specialist of 25 years, is lead for the program in OAODA.

22. The Office of AODA provides staff services to the Citizens Council on Alcohol and Other Drug Abuse. That Council provides citizen input regarding the AODA field to the State of Wisconsin. On March 24, 1987, the Planning/Funding Committee of the Council met in Madison. Among the items on the agenda for the meeting was an "Open dialogue with Phil McCullough and Larry Monson." One of the Council members, Dennis Owens, asked Mr. McCullough what the benefits were of having the status of a bureau in state government, rather than an office. The appellant indicated that Mr. Owens' question specifically related to the elevation of the areas of both aging and of children, youth and family to the bureau level. Mr. McCullough asked whether Mr. Owens was referring to whether the Office of AODA should be elevated to the Bureau level. Mr. Owens said that was not the question. Mr. McCullough proceeded to explain why the moves had been

made and the advantages of AODA's current structure. Mr. McCullough's response to the question was sufficiently complete not to require a response from the appellant regarding the benefits of the existing AODA structure, although appellant did have the opportunity to offer his comments.

23. On April 2, 1987, the Executive Committee of the Citizens Council on AODA held a meeting. During the course of the meeting, two citizen members of the committee, including the chairperson of the Citizens Council, Mark Strosahl, brought up the topic of an independent AODA commission. One of the reasons the topic was raised at the meeting was that it had been discussed informally by council members and Mr. Strosahl wanted to ensure that the various issues involved were more formally addressed. Appellant's only comment in response to the discussion was that the idea of a commission would not be supported by the department. Appellant was the highest ranking of the four OAODA staff persons at the meeting. None of the other staff persons present thoroughly explained the basis for the respondent's position.

24. At some time prior to April of 1987, OAODA received information for submitting a grant to the federal Office of Substance Abuse Prevention (OSAP). The deadline for submitting the grant application was May 15, 1987. Mr. McCullough asked OAODA to write a grant application and appellant in turn designated Bob Fry of the OAODA staff to head up a review team to identify possible grant proposals.

25. After meeting several times, the review team developed a list of four potential proposals which were submitted to Mr. McCullough. The highest ranked proposal was for a joint project with the University of Wisconsin System.

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26. By memo dated March 31, 1987, appellant informed Mr. McCullough as follows:

Previously, we submitted to you several suggestions regarding a possible OSAP grant application. Since then several things have occurred:

1. We have learned that a number of organizations in Wisconsin intend to apply or are seriously considering applying for an OSAP grant. Included are: Wisconsin Clearinghouse; U.W. System; VTAE System; Neenah M.A.D.D.; Positive Youth Development; WAAODA; Wisconsin Federation of Parents; and possibly the Milwaukee Council on Drug Abuse.
2. Several individuals have expressed concern to members of our staff that the state will be competing with community groups for these funds.
3. Steve Ojibway met with representatives of the U.W. System regarding the possibility of applying for a grant addressing our 1st priority suggestion, U.W. SAP. Steve was told that the U.W. System and campuses prefer to apply directly for grants rather than through our agency. Steve will continue to provide technical assistance regarding the U.W. grants.

Given the above, we now recommend that DCS not apply for an OSAP grant so as not to compete with other statewide resources. Rather, we should continue to provide technical assistance to applicants, with the objective that Wisconsin receive one or more grants.

27. Mr. McCullough responded to the memo by writing appellant: "I think we need to submit an application.... We need to get some grants going in OAODA -- it's been a long time."

28. Appellant wrote Mr. Fry that assignments for the grant application would be made at the staff meeting scheduled for April 6.

29. At the April 6th staff meeting there was a discussion as to how realistic it would be to pursue an OSAP grant in light of the hospitalization of one staff member and another staff member's vacation. Mr. McCullough, who attended the beginning of the meeting, stated that OAODA was going to file a grant application, that it had been a long time since its last application, especially in comparison to other BCP offices. Mr. McCullough left the meeting after the above comments and the appellant made

the assignments for pursuing the grant. The appellant did not act negatively toward the grant application once Mr. McCullough directed the office to pursue the grant.

30. By letter dated May 26, 1987, and after an investigation carried out by Mr. McCullough, respondent suspended the appellant for one day:

This is official notification of a disciplinary suspension of one (1) day without pay for violations of Department of Health and Social Services' (DHSS) work rule numbers 1 and 7. Work rules 1 and 7 prohibit, in part, insubordination in carrying out written or verbal assignments, directions or instructions and failure to provide accurate and complete information when required by management when acting as a spokesman for the Department and the Division of Community Services. Your day of suspension will be June 1, 1987. You will report again for work on Tuesday June 2, 1987.

This action is taken based on a number of interviews that we have had with staff that were shared with you in an interview on May 13, 1987. Those present in the meeting were you, Philip McCullough, Gerry Born and Dennis Feggestad. In that meeting we reviewed five incidents to include the following:

- [A] At the 4/6/87 staff meeting of the Office of Alcohol and Other Drug Abuse (OAODA) at least two staff indicated you exhibited a negative attitude and that your comments after the Bureau of Community Programs (BCP) Director, Philip McCullough, left the staff meeting led them to believe you were opposed to the Bureau/Office interest in pursuing an OSAP grant. (Refer to #5 of the attachment.)
- [B] At the 4/2/87 Citizens Council on Alcohol and Other Drug Abuse (CCAODA) Executive Committee, staffed by you, a discussion of an AODA commission took place. You indicated that Gordy Brandt was present, as well as other staff, when you spoke against the Executive Committee member's, Chuck Orth, recommendation that the commission idea be considered. Gordy Brandt is on record as having not heard any comments from you but, in fact, you remained silent and offered absolutely no comments in support of the Department, the Division or the Bureau position on this matter. (Refer to #4 of the attachment.)
- [C] On 3/24/87 at the Citizens Council Planning Committee, a discussion took place with a question directed toward you and Mr. McCullough about the Commission and/or AODA organization; Mr. McCullough indicates your only response was to ask him the confronting question why the Division of Community Services (DCS) had a Bureau on Aging and a Bureau of Children, Youth and Families. You offered no other comments or support for the existing structure and were "embarrassingly silent." (Refer to #3 of the attachment.)

- [D] The fourth incident includes the information that was supplied to Dr. Roland Herrington and Dr. David Benzer for their meeting with the Governor. The information was misleading, incomplete and biased. A great deal of information about the current Bureau of Community Programs' staffing of OAODA issues was omitted so that the entire picture was definitely not provided to Dr. Roland Herrington and Dr. David Benzer. They indicated that they received this information from you and Mr. John Vick. (Refer to #2 of the attachment.)
- [E] The fifth incident occurred on February 12, 1987, at the OAODA retreat where you indicated that AODA issues will never get the attention they deserve in the current structure. (Refer to #1 of the attachment.)

These five incidents show a pattern over the last two to three months of non-support for DHSS, DCS and BCP positions and, in fact, continue to represent a position on an issue that you have been told repeatedly by management is inappropriate.

Despite your impression that people misinterpret what you say, the pattern is clear that you continue to advocate a position contrary to DHSS/DCS. Considering that this has been a long-standing problem and situation over at least a two-year period of time and noted by two supervisors, I am suspending you without pay for one day.

31. Prior to the May 26th suspension, respondent had not formally disciplined the appellant.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to s. 230.44(1)(c), Stats.
2. The respondent has the burden of proof to demonstrate there was just cause for the imposition of discipline and for the amount of discipline imposed.
3. The respondent has established just cause for the imposition of some discipline but not for the imposition of a one-day suspension.
4. The one-day suspension constituted excessive discipline and should be modified to a written reprimand.

OPINION

In disciplinary appeals, the Commission is required to apply a two step analysis:

First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. Holt v. DOT, Case No. 79-86-PC (11/8/79).

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline as follows:

... one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. State ex rel Gudlin v. Civil Service Commn., 27 Wis. 2d 77, 98, 133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974).

The initial step is to determine whether the allegations contained in the letter of discipline are true.

The suspension letter issued to the appellant listed five incidents alleged to constitute violation of work rules 1 and/or 7 relating to insubordination and failure to provide accurate and complete information. The five incidents (listed in Finding 30) are addressed separately below.

1. OAODA Retreat on February 12th

Seven OAODA staff persons (including the appellant) who were present at the February 12th retreat testified as to what occurred at the retreat. The testimony indicates that Ms. Houden posed a question as to whether a department level AODA organization,¹ as exists in Illinois, would generate

¹ At various times and in various contexts in this matter, a variety of different organizational structures generally referred to as the "Commission concept" were discussed. As a general matter, they referred to an independent agency existing outside of DHSS and including AODA functions from throughout the state bureaucracy. Ms. Houden's reference to a department level AODA organization would fit within this broad definition.

additional authority to accomplish more in the program area. Appellant responded by saying that such an organization was not realistic in Wisconsin. One of the seven witnesses (Vince Ritacca) testified that there was a discussion that office priorities could not be handled within DHSS as it existed, that the best way to accomplish the priorities would be either in a separate organization outside DHSS or at a level within DHSS other than the office level, that appellant was "in the middle" of this discussion and through his comments indicated strong support for the concept of a different organizational entity. None of the other witnesses indicated that the discussion had been so extensive nor that the appellant had supported an organizational change. The appellant expressly denied any comments expressing support for an alternate organization and he also denied stating that "AODA issues will never get the attention they deserve in the current structure" as was alleged in paragraph E of the suspension letter.

Given the appellant's specific denials and the large number of witnesses who have no recollection of any comments by the appellant in support of an alternative AODA organization as well as testimony that the discussion prompted by Ms. Houden's question was far shorter than alluded to by Mr. Ritacca, the respondent has failed to sustain its burden as to paragraph E of the suspension letter.

It should also be noted that the scope of the topic discussed during the retreat was to be far-reaching and the appellant did not initiate the discussion.

2. Information supplied to Drs. Herrington and Benzer

Both Dr. Herrington and the appellant testified as to the information provided by the appellant during the relatively brief telephone

conversation with Dr. Herrington in preparation for the February 16th meeting with Governor Thompson. Dr. Herrington's recollection of the conversation was somewhat vague, as could be expected given the nine-month period between the conversation and this testimony. The appellant's testimony was much more specific.

There is only one significant discrepancy between Dr. Herrington's testimony and the appellant's testimony: Dr. Herrington indicated that the appellant had provided him with the specific number of Bureau employes (87) and Office employes (17) listed on the proposed agenda (Finding 21). On the other hand, the appellant denied any knowledge of how Dr. Herrington obtained the numbers. Because no other source for the information was identified, the Commission concludes that the appellant provided the numbers to Dr. Herrington during their February 9th conversation.² Respondent contended that the number of employes in the Bureau was actually much lower than 87. Finding of fact 3, which concludes that in 1979, there were 75 employes in the Bureau and another 12 employes who received programmatic supervision from Bureau employes, is based on a draft organization chart from that date. Because the record provides support for the statement that the Bureau of AODA did have 87 employes at one point, the Commission does not find that the appellant provided inaccurate information to Dr. Herrington as to the number of employes.

The remaining issue before the Commission on this topic is whether the information that appellant provided Dr. Herrington was misleading, incomplete

² The number of Bureau employes is also identical to the number of employes listed as supervised by the appellant "[p]rior to federal cutbacks in 1981" according to appellant's "Personal Resume." (Joint Exhibit #1)

and/or biased. Appellant did provide some explanations for the reduction in number of employees. He also gave an external reason (loss of federal funding) for the reorganization and a positive effect (greater responsiveness) of the Office organizational structure. The Commission finds that given the circumstances of this call, the appellant could reasonably be expected to provide additional justification for the existing structure. Dr. Herrington had been active on AODA for a lengthy period. He was active in statewide AODA organizations at the time, so he would be aware of at least some of the reasons for the reorganization. He testified that the reason for his call to appellant was to simply get specific as to what the differences were between the former Bureau and the existing Office, rather than to make judgments as to the desirability of these changes.

However, given the numerous prior directions given the appellant, he was clearly on notice to support the existing structure and the reasons for that structure. Even though Dr. Herrington was knowledgeable about AODA issues, he clearly was not familiar with the nuances of the existing OAODA structure. Appellant had an opportunity to fully inform Dr. Herrington of, for example, the reasons for the CSB move, and he failed to do so, despite the directives of his superiors.

3. Citizens Council Planning/Funding Committee Meeting, March 24,
1987

Finding 22 sets forth the conclusions of the Commission as to what occurred during the Citizens Council Planning/Funding Committee Meeting on March 24, 1987. The finding reflects aspects of testimony by four participants in the meeting: Owens, Fry, McCullough and the appellant. Ms. Koeshall's testimony as to the events of March 24th was both vague and

inconsistent with that of the other witnesses. The two areas of dispute as to this meeting are: 1) whether the appellant "asked [Mr. McCullough] the confronting question why the Division of Community Services (DCS) had a Bureau on Aging and a Bureau of Children, Youth and Families;" and 2) whether the appellant was "embarrassingly silent" as to the discussion regarding the existing organizational structure.

While the appellant admitted that he asked Mr. McCullough to explain why both aging and children, youth and families had been elevated to bureau status, appellant testified that he simply was repeating a question posed by Mr. Owens prior to the arrival of Mr. McCullough. In contrast, Mr. McCullough testified that Mr. Owens asked a very general question about alternative organizational structures and the appellant asked about the reorganization/elevation of the other two bureau with no indication that the question had been asked earlier. The Commission concludes that the appellant's version should be adopted. Both of the other witnesses, Mr. Fry and Mr. Owens, testified that it was Mr. Owens who had asked Mr. McCullough about the elevation of the other two bureaus. While this testimony is not identical to appellant's version of the discussion, it is clearly inconsistent with Mr. McCullough's view that it was the appellant who raised/originated the issue of the other two bureaus.

As to the second area of dispute, the testimony of Mr. Fry again is persuasive. Appellant testified that after Mr. McCullough answered Mr. Owens' question, appellant did not have an opportunity or the need to add anything. Mr. McCullough testified that there was an opportunity for the appellant to offer his own comments on the issue of organizational structure, presumably in a manner that would have been supportive of the existing structure. Mr. Fry testified that Mr. McCullough's response was

adequate, it seemed to satisfy Mr. Owens and there was no need for further response from the appellant. It is unrealistic to believe that there was no opportunity for comments from the appellant. However, more opportunity does not equate to a responsibility to comment where, as here, there was no need to comment given the extensiveness of Mr. McCullough's remarks. Given this record, the Commission must conclude that the appellant's conduct during this March 24, 1987 meeting did not constitute insubordination or a failure to provide accurate and complete information.

4. Citizens Council Executive Committee Meeting of April 2, 1987

Respondent contends that appellant again failed to support the department, division and bureau position when the AODA commission issue arose at this meeting. Seven of the ten participants in the meeting testified at the hearing. Of the seven witnesses, only the appellant testified that he had explained the respondent's opposition to the commission concept. At the very beginning of the hearing, the appellant testified that he had explained that the existing organizational structure was appropriate and that both the new governor and the new department secretary had expressed interest in the topic of AODA. At the very end of the hearing, appellant stated that it was unnecessary to explain the department's opposition to the commission concept because all of the persons present at the meeting were "seasoned" and the benefits of the existing structure had been covered in other meetings.

Mr. Strosahl, chairperson of the Citizens Council, testified that he had wanted to have a full discussion of the commission concept because it had been the subject of informal discussions by council members. Mr. Strosahl's testimony indicated that it certainly would have been in respondent's best interest to have its reasons against the commission

concept fully and articulately expressed. Appellant's response was simply that the department would not support the commission concept. There was no attempt to explain why the existing structure was preferable to the proposed alternative. In contrast to the March 24th Citizens Council Planning Committee, Mr. McCullough was not around to carry the ball and fully explain the respondent's position.³ As the ranking departmental employe in attendance, the appellant had the responsibility of providing a full explanation. Appellant failed to provide that explanation, despite clear directions he had been given previously.

5. OSAP Grant Application

Respondent's final basis for the imposition of discipline arises from appellant's conduct at the April 6, 1987 staff meeting after Mr. McCullough had informed the OAODA staff that they would be responsible for submitting an OSAP grant application. It is clear that earlier in the review process, the appellant had supported the OAODA staff view that there were sufficient reasons to withdraw support for pursuing the office's own grant application. But in advance of the April 6th staff meeting, Mr. McCullough had clearly written that he had expected OAODA to pursue the grant anyway.

Clem Jaquet, who was present at the April 6th staff meeting, testified that once Mr. McCullough had left the meeting, the "tone or whatever" of appellant's comments was that he didn't think it was a good idea to pursue the grant given the office's current workload and the application deadline. Another staff member, John Vick, testified that the appellant was neither

³ There is some testimony that John Vick, another OAODA staff member at the April 2nd meeting also stated that the commission concept was not supported by the department. However, there is no evidence that Mr. Vick explained the rationale for this position.

positive nor negative about the grant once Mr. McCullough left. Mr. Vick testified that the appellant simply went about handling the new assignment. Appellant agreed with Mr. Vick's testimony. Finally, Mr. Fry testified that appellant was positive about the grant application both before the March 31st memo and immediately after Mr. McCullough's written direction (prior to the April 6th meeting) to pursue the grant application.

Based on the above testimony, the Commission concludes that the respondent has failed to meet its burden of proof with respect to a negative attitude being expressed by the appellant at the April 6th meeting in regard to the OSAP grant.

Of the five allegations that form the basis for the suspension letter, the respondent has met its burden of establishing the accuracy of at least part of those allegations in paragraphs B (April 2nd Citizens Council Executive Committee) and D (information provided to Dr. Herrington. Respondent failed to establish the accuracy of the remaining allegations.

First Amendment Argument

Appellant contends that his comments which form the basis for the suspension letter are entitled to constitutional protection, citing Finnegan v. DLAD, 77-75 (6/16/78), Brodbeck v. Warren & Wettenzel; 74-114, (11/25/75); and Local 2106 v. City of Rock Hill, 660 F 2d 97 (4th Cir, 1981). None of these three cases support the appellant's arguments. In Finnegan, the Commission's predecessor, the Personnel Board, held that "while the employe need not tolerate [work-related communications that were] insubordinate and impolite, it is required to proceed in the least restrictive manner possible." The Board went on to state that the communications could serve as a basis for a reprimand, but "the imposition of discharge based in part on these actions is overly restrictive."

Nevertheless, the Board went on to uphold the discharge decision on other grounds. In Brodbeck, the Board merely denied respondent's motion to dismiss a grievance arising from the termination of the appellant's limited term employment where the appellant alleged her termination was based in part on a letter she had mailed to a public official in which she had complained about the misuse of the classification of her position as L.T.E. Finally, in Local 2106, the court held that a municipality had infringed on the appellant fire fighters' right to speak when they were denied permission to address the city council.

In the present case, the appellant, as OAODA director, was specifically instructed to support and fully explain the department's position, especially with respect to discussions regarding organizational structure, whenever the discussions arose. On two instances, the appellant failed to do that. There is no testimony that the appellant consciously declined to convey the information because he disagreed with it. Even if there were such testimony, appellant has failed to identify any case law suggesting that specific instructions of the nature given here to an upper level management employe infringes on the employe's first amendment rights even where the instructions relate solely to the employe's conduct as an employe.

The appellant also contended that it was impossible to know when he was fulfilling the function of an employe as compared to the times he was functioning as a member of the Citizens Council. The various agendas of Council Committee meetings list the appellant's name as staff to the council. Appellant acknowledged he had responsibilities to represent the department's interests when in the April 2nd meeting he stated that the department was opposed to the commission concept and when during the

telephone conversation with Dr. Herrington he explained some of the benefits of the current structure. The Personnel Commission cannot agree that the appellant was unaware of the "hat" he was wearing during these two incidents.

Excessiveness of the Discipline

The final step in the Commission's review of a disciplinary decision is described in Ruff v. Investment Board, 80-105, 160, 222-PC, (8/6/81):

The Commission cannot second guess the employer, and render its own independent decision in the matter, but can only examine the record to determine whether the action taken was excessive.

There was no direct evidence of the levels of discipline imposed by respondent on other employes for similar work rule violations. The one-day suspension was premised on five separate violations by the appellant. The Commission has concluded that the respondent has only established that two of those violations actually occurred. In addition, it should be noted that the appellant's misconduct in the telephone conversation with Dr. Herrington was to not fully explain the respondent's position rather than to not to offer any explanation of that position.

In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to impair the employer's operation, and the employe's prior work record with the respondent. Barden v. UW-System, 82-237-PC (6/9/83).

In the present case, it is easy to foresee how, when appellant simply stated the conclusion to the Citizens Council that the Department did not support the commission concept, the members of the council would become disenchanted with the Department. Appellant's comment at the April 2nd

meeting of the Executive Committee could be interpreted as a heavy-handed or dictatorial reaction by the Department to a proposal that could rearrange the power structure within the agency. The Citizens Council needed to be assured that the Department's goal was to provide the best possible AODA services rather than to merely maintain an existing bureaucratic structure. The appellant's failure to explain the conclusion could undermine the relationship between the Council and the Department.

The respondent also pointed out that as a consequence of the incomplete information provided to Dr. Herrington, appellant's superiors spent a substantial amount of time preparing a clarifying document.

Appellant is a long-term employe with respondent. Findings of fact 10 through 15 show that respondent had recognized problems with appellant's performance and had issued several letters of direction. Respondent utilized a "concentrated PPD" to more closely monitor the appellant's performance but did not impose any formal discipline until the subject suspension.

After balancing these various factors, the Commission finds the one-day suspension to be excessive. The suspension should be modified to a written reprimand, which better reflects the limited scope of the violations and the absence of prior formal discipline.

ORDER

The action of respondent in suspending the appellant for one day is modified and this matter is remanded for action in accordance with this decision.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

KMS:rcr
RCR03/2

DONALD R. MURPHY, Commissioner

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