STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD L. PAUL,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 87-0147-PC

FINAL DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered appellant's written objections to the proposed decision and has consulted with the examiner. The Commission will address what it perceives to be the most significant objections. Those objections not addressed have been considered by the Commission and rejected.

FAILURE TO MAKE FINDINGS REGARDING ALLEGED VIOLATIONS OF WORK RULES

Although the examiner made no specific findings as to whether appellant violated the work rules in question, it is implicit from the proposed decision that the examiner reached the conclusion that appellant violated Work Rule #1 (Disobedience . . . negligence, or refusal to carry out written or verbal assignments, directions or instructions), Work Rule #5 ("Disorderly or illegal conduct including, but not limited to . . . horseplay.") by engaging in horseplay, and Work Rule #6 ("Violation of . . . safety . . . procedures, directions and requirements."), and such findings are supported by the record. With respect to "engaging in horseplay," the Commission notes particularly the points that the sallyport incident was not part of a lesson plan and the contemporaneous comments attributed to appellant that are indicative of horseplay.

With respect to the violation of safety procedures, appellant contends there were no firearm safety procedures for ERU training, and since the

standard firearm safety procedures obviously have no application to ERU training activity, they could not have been violated by the sallyport incident. However, this contention is undermined by the finding that what occurred in the sallyport constituted horseplay. Assuming, arguendo, the validity of appellant's hypothesis -- i.e., that ERU exercises could not be subject to the regular firearm safety procedures -- since what occurred in the sallyport is more appropriately characterized as an act of horseplay related to a just-completed ERU exercise rather than an ERU exercise per se, this removes the premise of appellant's position.

The Commission also finds that appellant violated Work Rule # 1 both in terms of the weapon safety rules or procedures and his negligent conduct with regard to the use of a firearm during the sallyport incident.

FAILURE TO PROVIDE FOREWARNING

Appellant contends respondent failed to establish just cause because it failed to show it had forewarned him that his actions would result in disciplinary action. He argues that as a result the discipline imposed amounts to second guessing him because of a difference of opinion over an exercise of discretion. Appellant points to this statement in respondent's internal directive for disciplinary action (Respondent's Exhibit 60, §264.1B):

> 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.

However, this directive subsequently notes "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). "id., §264.1C. Furthermore, it should be obvious that respondent cannot be required to anticipate every possible wrong turn that a captain can make and then give that employe a set of directives that will cover every such eventuality. An employe at that level in management will frequently be required to exercise discretion. While such an employe should not be disciplined over a mere difference of opinion regarding such exercise of discretion, management should not be prevented from imposing discipline where the judgment exercised by the employe is as

egregiously bad as occurred here, simply because the employe has not been forewarned that disciplinary action would result. See Alff v. State Personnel Comm., No. 84-264 (Ct. App. 11/25/85), affirming Alff v. DOR, Wis Pers. Comm. 78-227, 243-PC (10/1/81),; p.15:

> Alff could be dismissed without a prior order by the department. Under Safransky, the circumstances of the particular case determine the requirements of just cause. Just cause in this case does not require an employer before discharge of an employe to inform him formally of every requirement of employment. As a certified public accountant and director of the bureau, Alff had assumed significant responsibilities. Because of his position of significant responsibility, the absence of a prior order did not deny Alff just cause. An employe in his position has a responsibility to observe certain standards without continuous reminders and oversight by the employer.

FAILURE TO MEET SAFRANSKY TEST

Appellant contends that because ERU was a voluntary activity, his regular duties cannot be considered to have been impaired as a result of the sallyport incident. It is not contested that appellant was in paid status at the time of the incident in question, and that the ERU function was approved by management. The Commission cannot perceive any distinction between complainant's "regular" duties and duties for which be had volunteered and that management expected him to perform.

Appellant further argued that there was no evidence that his conduct actually "set a poor example and undermined the confidence of his subordinates," Appellant's Objections, p. 16, nor that it "impaired the public image of the institution." id. Some confusion with regard to the legal standard being applied in the proposed decision and order may have been engendered by an inaccurate quotation from Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974) at p. 16, n.1, of the proposed decision and by the discussion at pp. 25-26. The correct quote from Safransky is as follows, with emphasis provided the part inadvertently omitted from the proposed decision:

> '[O]ne 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 Comm. (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 199.

The same quotation from Gudlin also includes the following:

> It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service. In such case the conduct can reasonably be deemed cause of suspension or discharge even though it has no direct bearing upon his performance of his duties, 27 Wis. 2d at 87.

Therefore, it is not necessary for respondent to show that the charged activity actually impaired the performance of the duties of his position or the group with which he works, but rather respondent needs only show that the activity could be reasonably concluded to have had a tendency to do so. With respect to the matter of undermining public confidence in the institution, this test is usually applied, as in Gudlin, to off-duty misconduct. However, if an employe can be disciplined under a just cause standard for off-duty misconduct which erodes public confidence in the civil service, there should be no reason why this factor (undermining public confidence) cannot be considered in the context of just cause or degree of discipline in connection with a disciplinary transaction which is also supported, as in this case, by a showing that the misconduct had a tendency to impair the employe's performance or the efficiency of his unit.

In the discussion of the public impact issue in the proposed decision and order, emphasis was placed on the question of whether it was likely anyone in the public would have heard the sound of gunfire and what effect that would have had. This discussion should have considered whether, if appellant's actions had become known to the public, it would have had a tendency to have undermined the public image of the institution. See Voigt v. State Personnel Board, Dane Co. Circuit Court No. 142-120 (5/6/74):

> "The [Personnel Board] opinion seems to express . . . that in order for a finding that the conduct undermined the public confidence in D.N.R., there must be a positive showing by witnesses that somehow the image of D.N.R. was damaged in the eyes of the beholder. We do not think such proof was necessary. In State ex rel Gudlin v. C.S.C., 27 Wis. 2d 77, there was no proof that the municipality's reputation did in fact suffer from the employee's acts . . . . We are of the opinion that respondent could have found good cause for discipline from the fact that a D.N.R. employee was found guilty of violating a simple game law, even though there was no positive proof of witnesses that as a result D.N.R.'s image was tarnished. That fact can be determined from the offense . . . . The fact that it may, up to now, have been covered up so that it is not known is not as important as what effect it may probably have as it cannot be concealed forever . . . ."

Therefore, the Commission finds that if appellant's conduct in connection with the sallyport incident were known to the public, it would have a tendency to impair the public confidence in the institution based on the serious lack of judgment and safety hazards involved in this incident.[1]

EXCESSIVE PENALTY

Appellant contends that the examiner mistakenly placed on appellant the burden of proof with respect to the issue of whether the discipline imposed was excessive. This stems from a typographical error in the proposed decision, which states at p.18:

> The issue to be resolved is whether appellant's actions warranted termination. The appellant raises a number of issues apparently in an attempt to establish a case that management was either forced into the termination action or had some underlying desire to "get" him. In support of these propositions, appellant points to the contacts from union officials Sgt. Peters and Officer Gaidy (Finding #19) and the fact that appellant had been in a position to recommend discipline of certain employs based on his observation of certain activities (Finding #29). These arguments are refuted by Mr. Franklin who testified that in almost any disciplinary or other adverse action, it was not unusual to get staff contacting him both pro and con. Mr. Franklin further testified that he did not feel pressured into any decision. Even if Mr. Franklin did feel pressure to act a certain way, the issue in the instant case is whether appellant committed certain acts, whether respondent's disciplinary action was merited, and whether the discipline is excessive. The state of mind of respondent does not bear on these issues since respondent has the same burden of proof no matter what his state of mind was.
>
> The same can be said for the references appellant makes to previously filed discrimination complaints. While Mr. Franklin was aware of these complaints, that knowledge is not determinative in deciding the issue of just cause. The standard and burden of proof for respondent in cases of this nature is not affected by such knowledge, since motive in taking the disciplinary action is not a defense. Rather, respondent simply must show that based on his actions, the discipline was excessive. While some of these issues could present a reason why respondent might take excessive discipline, they do not of themselves make the discipline excessive. (emphasis supplied)

The underscored sentence should read: "Rather, respondent simply must show that based on his (appellant's) actions, the discipline was not excessive." That

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[1] The Commission notes that it considers this facet of this case to be relatively ancillary, and that it would reach the same result upholding the discipline imposed without considering this public image element.

this was in fact the approach to the burden of proof followed by the examiner is illustrated by the discussion, including particularly the paragraph preceding this sentence with the typographical error which states: "respondent has the same burden of proof no matter what his state of mind was." Furthermore, Conclusion of Law #2 specifically states:

> The burden of proof is on the respondent to demonstrate to a reasonable certainty by the greater weight of credible evidence that there was just cause for the imposition of discipline and for the amount of discipline imposed.

The Commission, in reviewing the discussion at p. 18 of the proposed decision, quoted above, of the materiality or relevance of the appointing authority's alleged retaliatory intent does not conclude that if just cause can be established, the discharge must be sustained regardless of the appointing authority's state of mind. In trying to determine if a disciplinary action is excessive, evidence of an appointing authority's intent to retaliate could have some probative value.

For example, if a discharged employe had available a tape-recorded admission against interest of the appointing authority to the effect that the appointing authority was intent on retaliating against the employe, this evidence of retaliatory intent would make it more likely than not that the appointing authority imposed a more severe penalty than would have been imposed on an employe otherwise similarly-situated except for not having opposed management, and this in turn would tend to show that the punishment was without just cause and/or excessive based on an objective standard.

While the Commission does not reach the conclusion that the appointing authority's state of mind is not material, the examiner also found that the appointing authority did not have an ulterior motive, and the Commission sees no basis on which to disturb this finding.

Appellant also contends in essence that the examiner has characterized his work record as good when it should have been characterized as excellent. However, it cannot be concluded based on this difference of opinion regarding wording that the examiner gave short shrift to appellant's good/excellent work record. The Commission has considered the specific facts about his work record appellant raises in his objections and is not persuaded that the disciplinary action here imposed was excessive when considered in light of

the extremely serious threat to safety that was occasioned by appellant's actions.

Appellant also raises concerns with respect to the statement in respondent's disciplinary directives regarding progressive discipline and the related concept that "the degree of discipline . . . should not be more severe than what is necessary to influence the employee to correct his/her behavior." Respondent's Exhibit 60, §264.1B. However, as discussed above, respondent's directive also recognizes that:

> 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. id., §264.1C.

Furthermore, progressive discipline is not a requirement for just cause. See, e.g., Zehner v. Personnel Board, Dane Co. Circuit Ct. 156-399 (2/20/78).

ORDER

The attached proposed decision and order is adopted and incorporated by reference as if fully set forth with the additional findings that appellant's conduct violated Work Rules #1, #5 and #6. Also, the discussion on p. 18 of the proposed decision is deleted. As has been discussed above, the Commission has considered appellant's contentions regarding alleged ulterior motives on the part of management and has concluded that no ulterior motives were present. The Commission further amends the discussion at p. 25, §3., by amending the final sentence in the first paragraph to read: "In the instant case, the Commission concludes that the

misconduct had a tendency to impair public confidence," and the remainder of the discussion in that section is deleted. Respondent's action discharging appellant is affirmed and this appeal is dismissed.

Dated: April 19, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT:gdt

Parties:

Ronald L. Paul
Route 1
Fox Lake, WI 53933

Patricia Goodrich
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD PAUL

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES

Respondent.

Case No. 87-0147-PC

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This is an appeal by Ronald Paul, appellant, of a decision by the Department of Health and Social Services, respondent, to terminate his employment as an Officer 6 at the Kettle Moraine Correctional Institution (KMCI) for an incident that occurred on October 14, 1985. The appellant was originally terminated on November 8, 1985. Appellant appealed the termination and, the Commission issued a decision in the case (Case No. 85-0216-PC) on May 28, 1987, which rejected the discharge due to procedural defects in the pre-termination process. Upon remand, the appellant was restored to an Officer 6 position at KMCI on July 14, 1987.

Respondent subsequently conducted a pre-termination hearing and determined that the appellant should be discharged, effective July 30, 1987. The appellant appealed this decision and filed a motion for summary judgment on the grounds that respondent failed to provide appellant with the minimum requirements of due process at the pre-termination hearing in that the appointing authority (the Superintendent of KMCI), and final decision maker, was not present at the hearing. On January 12, 1989, the

Commission issued a Decision and Order on Motion for Summary Judgment denying appellant's motion.

The following issues[1] were set for the hearing held in the instant case (appellant's appeal of his July 30, 1987, discharge):

"2. Whether there was just cause for discharge.
3. Whether the discipline imposed was excessive."

FINDINGS OF FACT

1. Appellant has been employed as an officer in the Division of Corrections (DOC) in the Department of Health and Social Services (DHSS) since December 2, 1968. Appellant was promoted in March of 1982 to Officer 6 (Captain) at KMCI, a medium security adult institution. At all times relevant to the issues in this case, appellant was classified as an Officer 6.

2. As an Officer 6, appellant served as the first shift captain with responsibility to supervise other officers in maintaining the security of the institution by monitoring and controlling the activities of inmates. Appellant also had additional security responsibility for the perimeter (fence) and all institution land and buildings outside the fence.

3. In October, 1984, appellant reported to Mr. John Luhm, Institution Security Director who in turn reported to Mr. Franklin, the Institution Superintendent. The chain of command outside of the institution continued on to Mr. Darrell Kolb, Director, Bureau of Audit Institutions, who reported to Mr. Walter Dickey, Administrator of DOC.

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[1] The Issue Number 1 dealt with the adequacy of the pre-termination hearing, and was addressed (as agreed by the parties) prior to the hearing in the Commission 1/12/89 Decision and Order on Motion for Summary Judgment.

4. At the time of appellant's termination on July 30, 1987, Mr. James Nagle was the Institution Security Director for KMCI and Mr. Stephen Bablitch was the Administrator of DOC. Both Mr. Nagle and Mr. Bablitch participated in the disciplinary process.

5. Appellant was designated as a field commander for the Emergency Response Unit (ERU) at KMCI. An ERU is a group of officers who are specifically trained to respond to disturbances in a correctional institution. Appellant was the recipient of considerable weapons and tactics training and was himself an ERU instructor.

6. In his capacity as field commander of ERU, the appellant reported to Mr. Luhm. While Mr. Franklin was in the chain of command for ERU activities, Mr. Kolb had considerable involvement in ERU, such as in the development of emergency plans.

7. There were few guidelines and standards for conducting ERU training, and appellant was given flexibility by Mr. Luhm to conduct training. While appellant discussed, at least generally, the training with Mr. Luhm, no formal procedures or guidelines were in place that identified what could or couldn't be done by an ERU, other than those that apply generally to institution security. These latter directives are issued as Security Internal Management Procedures (SIMP). SIMP #2 entitled "Emergency Response Unit Training-Security" (Respondent's Exhibit #62) provides basic guidelines and structures, and general concepts on responding to disturbances. There is no information on tactics or formations and nothing is listed under the equipment heading. SIMP #4-A entitled "Weapons Training-Range and Classroom" (Respondent's Exhibit #65) provides information on general use and safety of firearms as well as specific rules related to range and firearms safety.

8. Appellant was responsible for training the Emergency Response Unit (ERU) at KMCI. In this capacity, training had been conducted within the perimeter of the institution on June 4 and 11, 1984 to practice room entry procedures; May 1, 1985, to practice room clearing procedures; and on October 14 and 16, 1985, also to practice room clearing procedures. The ERU members had weapons for all of these exercises. In addition, the ERU had dummy rounds with them during the May 1, 1985, and October 14 and 16, 1985, training sessions. The dummy rounds were discharged during both the October 14 and 16, 1985 training sessions.

9. Mr. Luhm was aware that weapons were being brought into the institution during these training exercises, but he was not aware that dummy rounds were being used until he observed the October 16, 1985, exercise.

10. The only institution position routinely assigned a weapon is a tower guard. Each tower guard has a rifle which is locked in a case and ammunition which is kept separate from the rifle. The tower guard is authorized to use the weapon (referred to as use of deadly force) in cases of escape, serious assault, or serious disorder (riot). An officer can fire the weapon (i.e. use deadly force) to protect the community, for self-protection or to protect other staff. The use of firearms in an institution is covered in the Administrative Code HSS 306.07 (Respondent's Exhibit #54). HSS 306.07(5) indicates steps to take before discharging a firearm. Basically, the steps used involve observing a situation where deadly force may be necessary, calling the control center to report the incident, obtaining the weapon and ammunition, chambering a round and issuing a verbal warning, firing a warning shot, and as a final step fire shots to stop the activity. The tower guard does not have to follow all of these steps. The guard is expected to assess and reassess the situation

and use deadly force only if no other alternative is available. The training and procedures to use related to firearms and use of deadly force are contained in SIMP 4 entitled "Weapons Training - General" (Respondent's Exhibit #64). This SIMP further elaborates on the provisions of HSS 306.07 as summarized above.

11. Lesson summaries were developed for all training exercises conducted in 1985 (Appellant's Exhibit #4) and maintained by appellant and in an inventory binder kept at the "motel" (outside of the institution) which served as the ERU headquarters. There was no requirement to submit lesson plans to any institution (KMCI) or DOC personnel. Subsequent to the October 14, 1985, incident, lesson plans were required to be submitted in advance.

12. ERU training exercises conducted within the perimeter of the institution were always done in a controlled environment. The area used was sealed off and cleared of all inmates and personnel not involved in the training exercise. While staff who were on-duty could be a part of the ERU team, no other staff on-duty at the time of training exercise would be a part of the exercise, with the exception of the exercise conducted on October 14, 1985.

13. On Monday, October 14, 1985, appellant directed an ERU training exercise on room clearing at the food service building. Members of the unit in addition to appellant were Captains (Officer 6's) Opitz and Scott, Lieutenants (Officer 5's) Barber and McCready, Sergeants (Officer 3's) Rodemann, Klumpyan, and McCrary, and Staff Officers (Officer 2's) Lautenbach and Sauer. In general, the exercise involved classroom training at the "motel" on room clearing using an outline that appellant had obtained at training conducted by the FBI (Respondent's Exhibit #61). Once the classroom training was completed, the ERU proceeded through the institution

gatehouse to the food service building where a practical room clearing exercise was conducted. Once the exercise was completed the ERU went back through the gatehouse to the "motel" where a debriefing was held. There was no training planned for the gatehouse.

14. The approximate times and specific activities for the October 14, 1985, training exercise are as follows:

6:30 p.m. - appellant presented room clearing lecture.

7:30 p.m. - ERU entered the institution gatehouse in a 12-passenger room. Lt. McCready was driving the van and appellant was seated in the front seat on the passenger side. The gatehouse officer (Bryan Bass) was informed of the ERU exercise and that weapons were being brought into the institution. Officer Bass was not told that dummy rounds were also being brought in. Officer Bass contacted the institution's Central Control officer and informed him of the exercise. The Control officer had not been previously informed.

7:30 - 8:45 p.m. - The training exercise conducted in the food service building included having officers play the role of inmates. Unknown to other ERU members, these "inmates" were given 3-6 dummy rounds. One of these "inmates" actually fired a number of his dummy rounds. After the exercise and on the way to the gatehouse, appellant asked for a handgun he had repaired, which one of the "inmates" had been issued. It had not been fired, and appellant wanted to test it to see if it worked.

8:45 - 9:00 p.m. - The van approached the gatehouse and Lt. McCready stepped from the van and was recognized by the tower

guard (Michael Baumann). The inner gate was opened by Officer Baumann and the van entered the sallyport (an enclosed area on the perimeter of the institution). The van stopped and was enclosed by a gate both in front and in back of it. As Officer Bass approached the van, appellant rolled down the window and fired a shot at but slightly to the left of Officer Bass. Officer Bass's reaction was to laugh. Lt. McCready was given the handgun. He called to Officer Baumann and fired two shots in his direction. Officer Baumann was on the tower catwalk and took no action. The outside gate was opened, and the van and ERU members proceeded to the "motel" for the debriefing.

15. The training exercise of October 14, 1985, was unique in that it was the first time that dummy rounds had been expended within the perimeter of the institution, and that on duty officers had been involved (Bass and Baumann). Both officers Bass and Baumann had received ERU training.

16. The same training exercise occurred on October 16, 1985, in the food service building, including the firing of dummy rounds. There was no incident in the sallyport (gatehouse) other than the van having to pass through the area and be checked going into and coming out of the institution.

17. No report of the incident was made until Friday, October 18, 1985. At that time, Lt. Barber informed Mr. Luhm of the incident. Mr. Luhm immediately informed Mr. Franklin, who indicated that the institution personnel manager (Catherine Mlsna) had just told him about the October 14, 1985, incident based on information she received from a Captain Nurek.

18. Mr. Franklin asked Mr. Luhm on Monday, October 21, 1985, to investigate the incident and file a report. Mr. Luhm completed his investigation and submitted his report on October 23, 1985 (Respondent's Exhibit #2). Mr. Luhm's report contained incident reports from all those involved in the October 14, 1985, incident, except Sgt. McCrary who was on his days off (Respondent's Exhibits 3-12, inclusive). Mr. Luhm also attached a cover note (Respondent's Exhibit #14) stating that the Sheriff's Department was going to clear a complaint they had received from an anonymous officer. Mr. Luhm recommended a verbal reprimand and made reference to the discharge of an Officer Lisowe as not being comparable to this situation.

19. On October 21, 1985, Mr. Franklin found a copy of a memorandum from appellant addressed to him and Mr. Luhm on his desk (Respondent's Exhibit #1). Appellant stated he had heard from Captain Scott and Captain Opitz and others that Captain Nurek had reported as an unsafe act his pointing of pointing a loaded gun at Officer Bass and condoning unsafe acts of others. The memorandum explained training practices, and outlined appellant's version of what happened and why it was not unsafe. A copy of the training outline (Respondent's Exhibit #61) was attached. On the same day, Mr. Franklin received three calls (Sgt Peters, Officer Gaidy and an unidentified tower officer) and one visit (Officer Bailey) from other officers concerned that there was some cover-up.

20. In October, 1985, Mr. Franklin felt the incident was serious misconduct and that discharge was appropriate. Mr. Dickey agreed with Mr. Franklin, but Mr. Kolb felt that while the incident could not be condoned discharge was too severe. Mr. Kolb felt a verbal reprimand would be sufficient, although a written reprimand would also be acceptable. Appellant was suspended with pay pending the investigation. In reaching

his decision on termination, Mr. Franklin reviewed Mr. Luhm's report (Finding #15), an October 29, 1985, memorandum from Jay Sandstrom entitled "Use of Deadly Force" (Respondent's Exhibit #18) which he requested, and discussed the incident with Kolb and Dickey.

21. In a letter dated July 2, 1987 and signed by Mr. Franklin (Respondent's Exhibit #25), appellant was reinstated on July 14, 1987, consistent with the Commission's May 29, 1987, Decision and Order.

22. In a separate letter dated July 2, 1987, and signed by Mr. Franklin (Respondent's Exhibit #24), appellant was notified of a rediscipliinary hearing as follows.

> "This letter will serve to notify you that a predisciplinary hearing is scheduled for you for Tuesday, July 14, 1987, at 11:00 a.m. The hearing will be held at the State Patrol Headquarters, District III, Route 5, Fond du Lac, Wisconsin. You are entitled to representation.
>
> A preliminary determination has been made that you violated Departmental Work Rules No. 1, 3, 5, 6, 7, 13 stemming from your conduct during the sallyport incident of October 14, 1985, as specified in the attached draft letter of termination.
>
> Based on the information available at this time, termination is the recommended disciplinary action. The purpose of this hearing is to present this information and allow you an opportunity to respond before a final decision is made."

23. In a letter dated July 14, 1987, and signed by Mr. Franklin, appellant was suspended with pay "pending disposition of the alleged violations of the Departmental Work Rules as cited in the predisciplinary notice dated July 2, 1987." (Respondent's Exhibit #26)

24. The pre-disciplinary hearing was held on July 14, 1987. Present were appellant and his counsel, James Nagle, Security Director, Kettle Moraine Correctional Institution; Oscar Reyes, Personnel Manager, Kettle Moraine Correctional Institution; and Michael Frahm, Personnel Manager, Division of Corrections, who conducted the hearing. Mr. Frahm prepared a

summary of the hearing and sent it in a memorandum dated July 20, 1987, to Mr. Franklin (Respondent's Exhibit #29). In addition, Mr. Frahm prepared a list of questions that he felt needed to be answered as a result of information provided and questions raised by the appellant (Respondent's Exhibit #27). Mr. Franklin made some handwritten notes relative to those questions (Respondent's Exhibit #28). Mr. Stephen Kronzer, Director, Bureau of Program Services in the Division of Corrections (DOC) also looked at the questions. Based on this, Mr. Kronzer interviewed Mr. Luhm on July 22 and 23, 1987, and asked a number of related questions and recorded the responses. (Respondent's Exhibits 30 and 31)

25. Subsequent to this investigation, appellant was discharged effective July 30, 1987. The letter of discharge, dated July 29, 1987, and signed by Mr. Franklin (Respondent's Exhibit #32), states in pertinent part:

> This action is based on the following incident. On October 14, 1985, you and eight other officers engaged in an ERU exercise in the Food Service Training Building. When exiting the institution, you and the others boarded an institution van in route to the motel. When the van entered the sallyport, you aimed a 357 handgun at Gatehouse Officer Bass and fired a training round. You then handed the gun to Lt. McCready and instructed him to fire the two remaining training rounds. Following your instructions, Lt. McCready fired the gun in the direction of Tower 1 Officer Baumann. Neither Officer Bass nor Officer Baumann were scheduled for ERU training. Your actions are in violation of the following Departmental work rules:
>
> Work Rule #1: Disobedience...negligence, or refusal to carry out written or verbal assignments, directions or instructions.
>
> Work Rule #5: Disorderly or illegal conduct including, but not limited to..... horseplay.....
>
> Work Rule #6: Violation of....safety....procedures, directions and requirements.
>
> You were acting in your official capacity of Field Commander. In this role you demonstrated flagrant disregard for basic rules pertaining to weapons safety. In addition, you provided a very poor role model, acting in a manner diametrically opposed to the training

repeatedly provided to trainees. Further, your conduct as a captain and correctional officer demonstrated a lack of self-discipline and good judgment in a situation where both qualities are essential. Your conduct placed the officers on duty, the officers you were leading, and you in a potentially dangerous situation. Your actions clearly exceeded any authority granted to you as field commander or captain. Your behavior was grossly negligent.

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. 1D) 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.

26. Mr. Franklin reached his decision after consulting with Mr. Kolb, Mr. Kronzer and Mr. Bablitch, who had replaced Mr. Dickey as Administrator of DOC. Mr. Bablitch was involved in part because of a DOC policy which required the administrator's involvement and approval for any employe discharged, and in part because of the continuing disagreement between Mr. Franklin and Mr. Kolb over what discipline was appropriate.

27. Mr. Franklin supported discharge because appellant was a leader and his actions adversely affected the staff's confidence in him; the incident involved serious misconduct in pointing a gun at a fellow officer, particularly in light of the fact that appellant is suppose to be a role model; and the potential consequence of appellant's action if the tower guard had used deadly force. Mr. Bablitch concurred with Mr. Franklin that the incident was serious misconduct. In addition, he supported discharge because the facts had not changed, there was no training scheduled for the

sallyport, the incident was a severe breach of security and adversely affected the image of the appellant and the institution, and the potential consequences of appellant's actions were severe.

28. In appellant's letter of discharge (Finding #22) there is reference made to three (3) work rules violations, while the notice of the pre-disciplinary hearing identifies six (6) work rules that appellant allegedly violated. The three work rules not included in appellant's discharge letter are, in pertinent part: (Respondent's Exhibit #22)

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

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

Work Rule #13: Unauthorized possession of weapons."

Mr. Franklin eliminated these work rule violations because Work Rule #3 and #13 were redundant of Work Rule #5 and #6, and Mr. Luhm had told appellant that he didn't need to file an incident report for discharging a dummy round (Work Rule #7). Mr. Franklin felt that Work Rules #1, #5 and #6 were the primary basis for taking disciplinary action. Mr. Bablitch considered these to be the most significant. While the other alleged work rule violations were important, these (Work Rules #1, #5 and #6) were the biggest.

29. Appellant had never been the subject of a pre-disciplinary hearing and investigation prior to his discharge. Appellant as a supervisor had been involved in conducting pre-disciplinary hearings and investigations. Appellant is a strict disciplinarian and had previously informed managers about other employes and asked for discipline. Specifically, Officer Gumieny in October, 1984, for discharging a weapon out of tower window, Officer Damm for leaving a loaded shotgun unattended in the gatehouse with an inmate present, Sgt. Peters in early 1985 for fraternizing

with inmates and making long distance telephone calls, Officer Bailey for operating a basketball pool and taking time away from work, and Officer Nygaard for having unauthorized materials in inmate lockers in the gatehouse. Respondent took no disciplinary action in these instances.

30. At hearing, the following disciplinary actions involving use or misuse of firearms were presented.

a) Officer John Lisowe - Officer Lisowe was terminated for pointing a shotgun loaded with buckshot at fellow officers, and working the pump mechanism until the shells had been ejected (Respondent's Exhibit #70). Officer Lisowe had received discipline previously including suspension without pay.

b) Officer Damm - While Officer Damm was not disciplined for the incident in Finding #29, he did receive a written reprimand for bringing an unsecured loaded weapon into the institution in his car (Respondent's Exhibit #69).

c) Officer Majerus - Officer Majerus was a tower officer who was warned repeatedly about chambering live rounds in the rifle without cause. Captain Opitz instructed her on proper procedures twice. The incidents were repeated and she received unspecified progressive discipline, but was not terminated.

31. Appellant's work record was clean, except for a November 14, 1984 written reprimand for violating DOC policy on harassment, affirmative action, and equal employment opportunity relating to physical contact with

female staff (Respondent's Exhibit #43), and a September 12, 1984 memorandum warning him about socializing with a staff member (Mr. Meyer) on a day when he made a fabricated sick leave call in order to get a day off (Respondent's Exhibit #41). Appellant's evaluations were good, although on one occasion, the Institution Superintendent informed Mr. Luhm that he thought appellant needed to work on his people skills and be less abrasive and more diplomatic (Respondent's Exhibit #42).

32. For his involvement in the October 14th incident, Lt. McCready was suspended without pay for 30 days, and reduced in rank from an Officer 5 to an Officer 3. No appeal of this disciplinary action was filed.

33. Appellant filed a timely appeal of his discharge with the Commission on August 25, 1987.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to s. 230.44(1)(c), Stats.

2. The burden of proof is on the respondent to demonstrate to a reasonable certainty by the greater weight of credible evidence that 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 discipline.

4. The discharge of appellant did not constitute excessive discipline.

DISCUSSION

Before discussing the issue of just cause and whether the discipline was excessive, the Commission will address the due process considerations in this case. The issue of due process will be decided based on what was done subsequent to appellants reinstatement as a result of the Commission's

Decision and Order issued on May 28, 1987, and without regard for what occurred previously.

The notice of the pre-disciplinary hearing was sufficient (Finding #22) and clearly outlines the incident, the alleged work rule violation, and the degree of discipline anticipated (discharge). The work rule violation alleged were the same as those contained in the previous termination letter (Respondent's Exhibit #22), and appellant has made no showing that he wasn't aware of what he was charged with and why. The pre-disciplinary hearing held on July 14, 1987, provided appellant and his counsel an opportunity to respond to each and every allegation respondent was considering in taking disciplinary action. This meets the due process test articulated in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed. 2d 494(1985)

> "...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.

Based on the pre-termination process used, including respondent's investigative efforts after the pre-disciplinary hearing (Finding #24), and the Commission's previous ruling denying a motion for summary judgment because the final decision maker (Mr. Franklin) wasn't present at the pre-disciplinary hearing, the Commission concludes the appellant was not denied due process in the respondent's discharge action.

In addressing the issue of just cause in disciplinary cases, the Commission identified in Mitchell v. DNR, Case No. 83-228-PC (8/30/84) the following three questions to be used as a guide in reaching a determination:

> "1. Whether the greater weight of credible evidence shows that appellant has committed the conduct alleged by respondent in its letter of discharge.

2. Whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes (just) cause[1] for the imposition of discipline, and

3. Whether the imposed discipline was excessive. Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79)"[2]

On the first question of whether the appellant has committed the conduct alleged by respondent, there is no factual dispute between the parties about what occurred in the sallyport on the evening of October 14, 1985 (Finding #13 and #14). The appellant fired one dummy round from a handgun at Officer Bass as he came out of the gatehouse, and then gave the gun to Lt. McCready who fired two dummy rounds at Officer Baumann in the tower.

The second question to be addressed is whether the greater weight of credible evidence shows that the chargeable conduct, if true, constitutes just cause for the imposition of discipline. The respondent has presented

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[1] The definition of just cause was set forth by the Wisconsin Supreme Court in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974), as follows:

> [O]ne appropriate question is whether some deficiency has been demonstrated which can reasonably be said 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 Comm. 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965).

[2] In Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79), the Commission discussed these concepts as follows:

> In the opinion of the Commission, the current statute clearly requires a two-step analysis of a disciplinary action or appeal. First the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded that 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. See, e.g., State ex rel. Iowa Merit Employment Commission, 231 N.W. 2d 854, 857 (1975) p.6.

a credible case for taking disciplinary action. The appellant was a management employe with major security and ERU responsibilities. As such, appellant is a role model and is held to a high standard in terms of his conduct and actions. The discharge of a weapon by a management employe within an institution, under these circumstances, is certainly conduct that cannot be condoned. Not only because of the example set for staff, but also for the total lack of judgment in discharging a weapon in an uncontrolled setting. As an ERU field commander, appellant is aware of the volatile nature of an adult correctional institution setting and of the concern management has about the possibility of inmate disturbances, an issue the ERU is specifically designed to address. There can be no rationalization of appellant's action which would justify not taking disciplinary action, and the Commission concludes that there was just cause for the imposition of discipline.

The third question deals with whether the discipline imposed was excessive. On this issue the parties are in considerably disagreement. In making this determination, the Commission considers the weight or enormity of the employe's offense, including the degree to which, under the Safransky test, it impairs the employer's operation, and the employe's prior work record with the employer. Barden v. UW-System, Case No. 82-237-PC (6/9/83).

The appellant's work record is good, and while there is one letter of reprimand in his personnel file, it hardly establishes, on the surface at least, a basis for discharge under a progressive disciplinary scheme. However, it is anticipated under a progressive disciplinary process that the discipline should match the offense. Not all first offenses result in a verbal warning, and depending upon the seriousness, an employe's first offense may well result in discharge.

The issue to be resolved is whether appellant's actions warranted termination. The appellant raises a number of issues apparently in an attempt to establish a case that management was either forced into the termination action or had some underlying desire to "get" him. In support of these propositions, appellant points to the contacts from union officials Sgt. Peters and Officer Gaidy (Finding #19) and the fact that appellant had been in a position to recommend discipline of certain employes based on his observation of certain activities (Finding #29). These arguments are refuted by Mr. Franklin who testified that in almost any disciplinary or other adverse action, it was not unusual to get staff contacting him both pro and con. Mr. Franklin further testified that he did not feel pressured into any decision. Even if Mr. Franklin did feel pressure to act a certain way, the issue in the instant case is whether appellant committed certain acts, whether respondent's disciplinary action was merited, and whether the discipline is excessive. The state of mind of respondent does not bear on these issues since respondent has the same burden of proof no matter what his state of mind was.

The same can be said for the references appellant makes to previously filed discrimination complaints. While Mr. Franklin was aware of these complaints, That knowledge is not determinative in deciding the issue of just cause. The standard and burden of proof for respondent in cases of this nature is not affected by such knowledge, since motive in taking the disciplinary action is not a defense. Rather, respondent simply must show that based on his actions, the discipline was excessive. While some of these issues could present a reason why respondent might take excessive discipline, they do not of themselves make the discipline excessive.

Appellant also raised concerns about the elimination of three work rules from the July 29, 1987, discharge letter. Appellant claims they could have found this out before if they had done a decent investigation. However, the fact that some work rule violations listed in the 1985 discharge letter were dropped before the issuance of the 1987 discharge letter does not show that the discipline (discharge) must also be reduced and has nothing to do with whether the work rule violations cited in the 1987 letter form a basis for discharge. In reviewing the record, including appellant's and Mr. Franklin's testimony and the results of the pre-termination hearing and investigation, it is apparent that respondent removed those allegations which related to ERU training and equipment, and concentrated primarily on appellant's action in the sallyport on the evening of October 14, 1985.

The record shows that respondent in general was motivated to have Emergency Response Units (ERU's) in place because of the potential for and need to control quickly any inmate disturbance. Respondent, however, did not monitor ERU activities closely or have specific guidelines on appropriate ERU training locations, involvement of on-duty officers in training, and having weapons and dummy rounds in a institution during training. As a matter of fact, there was no standard format for lesson plans and they were not even required in advance until after the October 14, 1985, incident. In part, this lack of specific guidelines may reflect the lack of experience with ERU, the uncertainty as to what situation may arise, and the time it takes to develop an effective overall program. Certainly respondent had taken action to provide and encourage training exercises for ERU's and maintain a state of readiness. However, field commanders (such as appellant) were given considerable flexibility in conducting training.

This flexibility also resulted in specialized equipment being made and traded between ERU's which was not on the department's authorized equipment list. Regardless of the state of ERU policies and procedures, respondent in this case did not discipline appellant for general activities related to ERU, but rather for his specific actions in discharging a handgun in the direction of a fellow officer.

Dealing specifically then with the incident in the sallyport, the Commission looks, under the Safransky test, at whether the employe's offense could reasonably be said to impair the employer's operation. The question is answered affirmatively for the following reasons.

1) The appellant is a management employe who, as a supervisor of other staff, is a role model. Discharging a firearm in the direction of another officer who is approximately ten (10) feet away does not show bad judgment, it shows a total lack of judgment. Appellant argues that the officers were ERU trained, and he was taught to take advantage of training opportunities as they arise in order to improve realism and inject the element of surprise. Appellant characterizes the incident as part of a training exercise, albeit impromptu. This is just not credible based on the lesson summary (Respondent's Exhibit #53) and the fact that all other training within the institution was done under strict control. During its exercise in the food service building, steps were taken to insure that the building was secure and no one was in it. The van pulled in by a loading dock in order to be inconspicuous and not attract undue attention of inmates. After the training exercise, considerable care was

taken to insure all equipment was accounted for and the area secured.

The incident in the sallyport had no such training elements. At the time the van went into the sallyport (approximately 8:45 p.m.) the inmates would most likely not be there because the final evening count occurs at 8:55 p.m. The potential for volunteers or visitors to be walking through gatehouse at this time would be considerable. While there apparently weren't any persons (other than Bass) in the gatehouse, ascertaining that fact by scanning the area quickly (as appellant claims he did) is not consistent with the safety and security measures associated with the ERU training exercise in the food service building that evening.

If by some stretch of the imagination, the incident is considered impromptu training, there are a number of planning and security measures which require consideration in advance of the training. The three major concerns are the involvement of on duty officers who were not a part of the training exercise, conducting training in an area accessible by the public and other staff, and the discharge of a firearm within the institution. Appellant stated at the hearing that incorporating the element of surprise into the training and taking advantage of training opportunities as they present themselves is something he was taught. Surprise can be incorporated into a training exercise even in those cases when staff know they are going to be involved. For example, in the exercise conducted in the food service building on October 14, 1985, the officers doing the room

clearing didn't know that the "inmates" would have dummy rounds. Certainly this added an element (and a well planned element) of surprise. Claiming that discharging the firearm in the sallyport was also surprise training just does not square with what had been done in past training exercises. The officers in the sallyport could well have been informed in advance that they would be part of the exercise, and still would have been surprised at what happened.

The Commission must conclude that this was not a training exercise at all, but an unreasoned act, committed on the spur of the moment. Based on the comments attributed to appellant in the incident reports (Respondent's Exhibits 4-12), the mood in the van seemed to be light and congenial, and the action to determine Officer Bass' reaction to gunfire was approached with less than serious concern about security issues and the seriousness of the contemplated action. Characterization of the act as "horseplay" by respondent seems very appropriate.

2. Pointing of a firearm at another officer is against even the most basic rules of firearm safety.

Appellant argues that there were no specific guidelines on ERU training and the other guidelines (SIMP's) related to security and weapons don't apply specifically to ERU. While in general sense the Commission might concede that ERU procedures and guidelines were almost non-existent, it can not conclude that no other security or weapons policies and procedures apply to ERU.

As indicated in appellant's discharge letter, SIMP 306: 4-A states that a weapon is never pointed at anyone unless you intend to use it, as in deadly force. All weapons are considered loaded and dangerous whether with live or dummy ammunition. No matter how sure anyone is about what a weapon is loaded with, there could always be a mistake. In this case, there was no mistake, but that doesn't change the basic act.

Appellant argues that the dummy rounds are safe and only fire a cotton ball for a distance of 20 feet. First of all, Officer Bass was only about 10 feet away, and while the cotton ball may not cause any damage even if they hit an employe's eye, basic safety measures would dictate eye protection even for firing dummy rounds. Appellant testified that he fired to the left of Officer Bass so nothing would hit him. While that may be true, a weapon was still pointed at a fellow officer who had no idea what was going on. In this situation, the fact that Officer Bass was ERU trained or could see that there were dummy rounds in the chamber is inconsequential. What is significant is that a management employe, specially trained in weapons would so easily violate basic weapon's safety and security provisions by discharging a weapon at another officer.

The respondent also argued that this action could have elicited a response from the tower guard to use deadly force. While this is certainly a possibility, the steps of assessment and reassessment before the tower guard even chambers a round are substantial. Additionally, chambering a round when there is no substantial justification is a basis for the employe to be

disciplined. Respondent further argues that all the steps need not be followed if it appears the public or staff are in immediate danger, as in the instant case where the tower guard (Officer Baumann) observes a fellow officer being shot at. There is nothing on the record as to what Officer Baumann knew about what was going on, whether he was there when the van came in and was told by Officer Bass (who called the Control Center) about weapons coming into the institution, and his perception of who was in the van when he let it into the sallyport. In his incident report (Respondent's Exhibit #5), all he states is that Lt. McCready called him out to the catwalk and he saw the flash from the two shots fired in his direction.

Appellant points out that nothing happened and everybody was on top of the situation. Appellant testified that the "training" was a failure because he expected Officer Bass to employ cover and concealment techniques. Perhaps it is a good thing he didn't because the tower officer may have taken different action. The Commission agrees with respondent that the potential for serious escalation of the situation existed. The Commission does not conclude that deadly force would have been or should have been used, in part, because no disciplinary action for an inappropriate response was imposed on the tower guard. However, it is the Commission's conclusion that live ammunition may well have been introduced into the situation even if the weapon wasn't fired.

In any case, a situation where a weapon is discharged within an institution and in the direction of another officer gives rise

to a number of possible scenarios. The fact that nothing happened does not serve to justify the act.

3. The incident impaired the public image of the institution.

The Commission held in Voight v. State Personnel Board, Dane County Circuit Court 142-120 (May 6, 1974) that the respondent is not required, as part of its case, to provide direct proof of the public's perception of an employe's behavior, but rather the Commission can infer from the facts of the misconduct its tendency to impair public confidence. In the instant case, the Commission concludes that the public confidence was impaired.

On the surface alone, the discharging of a weapon in the sallyport which is immediately adjacent to the outside perimeter of the institution would certainly cause concern on the part of anyone in the area about what was going on. Appellant was at least aware that the public might become involved. After discharging the weapon, appellant said words to the affect that "we'd better stop this before we get in trouble," and Lt. McCready responds with words to the affect, "Yes, I can hear the phones ringing already." (Respondent's Exhibit #8 and #17). This is apparently a reference to a Ms. Neuman who lives near the institution and has previously called the institution on some unspecified matters.

Certainly the public expects that respondent will protect their safety while at the same time insuring that inmates are properly controlled. The sound of gunfire from an institution

will seriously detract from respondent's image and the public's confidence that they are in control of the situation.

There is no indication on the record that anyone else in the institution heard the shots in the food service building, or that any other institution staff heard the shots fired in the sallyport. What is of note is that the training exercise in the food service building was set up to avoid contact with inmates or other staff including observing or hearing weapons being fired. The sallyport incident would not even minimize the possibility of the shots being observed and/or heard. Again, nothing actually happened, but the seriousness of appellant's actions and his lack of consideration for the image of the institution are at best bad judgment and misconduct.

4. The incident was not serious because no one reported it immediately.

In Mr. Luhm's investigatory report of the October 14, 1985, incident (Respondent's Exhibit #2) addresses this issue. The staff officers said they didn't report it either because as ERU members they felt a sense of camaraderie or hoped the incident would be overlooked or both. The other supervisory officers found it difficult to file a report on a co-worker.

The Commission concludes that the incident was so unusual and happened so quickly that no one knew exactly how to react. Even Mr. Luhm told appellant that it wasn't necessary to file a report. These actions, or more appropriately, lack of actions, do not justify the act or show that the discipline was excessive.

In addition to the above items, the Commission considered the other disciplinary actions involving weapons which were introduced into the record. The only one that involved discharge of an employe was Officer Lisowe. Officer Lisowe had a history of problems, and had been disciplined on a number of occasions. His action to point a shotgun loaded with live ammunition at fellow officers certainly justified his discharge.

Appellant argues, and it is supported by Mr. Luhm, that the incident he was involved in was nowhere near as serious because he was using dummy rounds. This argument is not persuasive. First of all, appellant was only ten (10) feet from Officer Bass. Second, a weapon is a weapon and whether loaded with dummy rounds or live ammunition, it is to be considered dangerous. Third, appellant is a management employe and is held to a higher standard of behavior and action than staff officers. Appellant, based both on his experience and training, is expected to conduct himself appropriately, particularly when it comes to handling weapons.

Other incidents of rounds being fired from or being chambered in a tower also involved staff officers. While these acts are not to be condoned and warrant discipline, the standard that these officers are judged by would include consideration of the amount of experience and training they have had. Appellant is expected to be a role model not only as a shift captain, but also as an ERU field commander which during an inmate disturbance places him in a position of reporting directly to the Institution

Superintendent with significant responsibility for dealing with the disturbance.

Based on the reasons cited above, the seriousness of the incident, and the fact that appellant is a management employe, the Commission concludes that there was just cause for the imposition of discipline, and that the discharge of the employe was not excessive discipline.

ORDER

The action of respondent in discharging appellant is affirmed and this case is dismissed.

Dated: _____, 1989 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

GFH:gdt
JMF10/1

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

Parties:

Mr. Ronald Paul
Route 1
Fox Lake, WI 53933

Patricia Goodrich
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707