STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA KODE,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0160-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a demotion and a fifteen day suspension.

FINDINGS OF FACT

1. Appellant at all relevant times has been employed by respondent Department of Health and Social Services (DHSS) in the classified civil service. She began her employment as a Corrections Officer 1 (CO 1) in 1979 and was promoted from CO 3 (Sergeant) to CO 5 (Lieutenant) at Kettle Moraine Correctional Institution (KMCI), a medium security adult correctional institution, in February 1986, and subsequently passed probation. She was demoted to CO 3 effective August 16, 1987.

2. During her employment as aforesaid, appellant's performance evaluations as reflected on this record have been average or satisfactory to good. This includes her tenure as a CO 3. She had never been subjected to formal discipline prior to the transactions which constitute the subject matter of this appeal. However, she had received counseling as a CO 5 concerning disregarding a direct order.

3. On July 28, 1987, James Nagle, KMCI Security Director and a supervisor of appellant, met with appellant as she began work as second shift supervisor. He informed her that an inmate, William Harris, had informed a staff member that he had had sexual contact with a CO 3, Jane Doe.[1] Nagle showed appellant a copy of Harris's statement which had been obtained in an investigatory meeting that had been held between Harris, Treatment Director James Hart, and Administrative Captain (CO 6) Benjamin Barber. Appellant expressed considerable skepticism about Harris's allegations, mentioning that she had been friendly with Doe for a long time and that she didn't believe what was alleged could have happened. Nagle determined that because appellant was a personal friend of Doe's, it would be difficult for her to remain objective about the matter, and she should not be involved in any investigation into it. He told her she was not to investigate the matter and to keep the information about it confidential.

4. Subsequently on July 28, Doe talked to appellant about the allegations. Doe's comments included that she was upset that Harris's charges seemed to be more or less common knowledge among both staff and inmates. Doe's union representative (Sgt. Peters) and Captain Strong also spoke to appellant about the allegations that day. Appellant listened to all of these individuals but did not reveal any of the information previously conveyed to her by Nagle.

5. After Doe spoke with appellant, she (appellant) spoke to Hart and Barber and suggested they speak to Doe and try to calm her down.

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[1] Due to the nature of and circumstances surrounding the charges against this officer, her real name will not be used.

6. Also on July 28th, appellant was instructed to and did move Harris from a cell in one status (building confinement in the R & O side) to another (temporary lockup (TLU) on the segregation side) within the Wisconsin Cottage.

7. The Wisconsin Cottage provides the most secure lockup facilities at KMCI. The orientation side of the building (R & O) is used to house newly-arrived inmates while the segregation side is used for punishment, observation, and other statuses which involve maximum segregation from other inmates. This includes TLU, which is a non-punitive status where inmates can be confined up to 21 days pending disposition of an alleged rule violation, for their own protection, etc.

8. Staff do not have access to inmates confined in TLU unless they have a specific reason -- e.g., conducting a clinical evaluation. Although there is no written rule to this effect, unwritten institutional policy prohibits other inmates from visiting inmates in TLU. However, there are other inmates from the general population who are assigned to Wisconsin Cottage to work in food service or janitorial roles who could conceivably have surreptitious communications with an inmate in TLU. Also, an inmate in the general population could send a letter via the U.S. Postal Service to an inmate in TLU.

9. On July 28, 1987, Doe asked CO 2 Bernard Brown if he could help in any way, and get out the truth with regard to Harris's allegations. The next day, Brown asked an inmate, Paul Dismuke, if he could be of assistance. Dismuke was known to Brown to have always provided reliable information in the past.

10. On July 30, 1987, Dismuke told Brown he had heard reliable information that would exonerate Doe. Brown took Dismuke to see Capt. Barber, the shift supervisor.

11. Brown told Barber that Dismuke had valuable information regarding the Doe matter. Barber said he really didn't have time for a lot of this today. He then saw appellant coming down the hall and said she could handle it. The four of them went to a vacant room. Dismuke said that when inmate Wesley had been at another institution, he had tried to set up another female officer in the same way he was trying to set up Doe. Barber said he knew about that and that he had to leave, and told appellant, "You can handle this," or words to that effect.

12. Barber then left. Dismuke explained to appellant what Wesley had done at the other institution and that he was sure Wesley had put Harris up to the accusations against Doe. He also suggested that she talk to Supt. Franklin who would be familiar with what had occurred at the other institution.

13. On July 31st, appellant went to see Franklin to apprise him of this information. He asked her to bring in Hart and Barber. She related to them what Dismuke had told her but did not mention his name. Franklin simply thanked her for the information, and no one gave her any instructions of any kind. Nagle was not aware of this meeting, and the three supervisors who were present were not aware at that time of his directive to appellant that she not become involved in the Doe investigation.

14. Also on July 31st, Dismuke approached Brown and said that if he (Dismuke) could talk to Harris he could get the true story out of him and it would clear Doe.

15. Both Dismuke and Harris were members of the Black Disciples, a prison gang. Dismuke was at a higher level in the gang hierarchy than Harris.

16. Brown then asked appellant if it would be possible to get Dismuke into the segregation building to speak to Harris.

17. On August 1st, appellant spoke to CO 3 (Sgt.) Haima, who was in charge of Wisconsin Cottage, and asked him if it would be all right to bring an inmate in to segregation to talk to Harris to clear his story up about Doe. Haima said it would be. He construed her request as "somewhat of an order," although he felt he "could have said no." At the time this request was made, Haima had just returned from vacation and was not familiar with the Doe matter.

18. Appellant then had Brown bring Dismuke to Wisconsin Cottage. She instructed Brown to allow Dismuke to talk to Harris briefly without opening the cell door, that he and Haima were to be as close to Dismuke as possible, to monitor the conversation as closely as possible and to assure there were no threats and that no articles were passed between them.

19. Dismuke spoke to Harris for approximately a minute under the aforesaid conditions. Dismuke asked Harris if Wesley had told him to do what he had done, and Harris said yes. Dismuke asked Harris if he could tell the truth and if he would be willing to sign a statement, and Harris said he would.

20. Appellant's action in arranging Dismuke's visit to, and communications with, Harris in TLU constituted a breach of security and of generally accepted although not specifically written policy. At the time she arranged this visit, she was not aware of the status of the official institution investigation of the Doe matter.

21. Later that day, appellant spoke to Harris. He maintained that his allegations against Doe were true.

22. The next day, August 2d, appellant spoke to Harris again as she made her routine rounds of the cottages. Appellant had been informed earlier by Brown that Harris was ready to make a statement. At this time, Harris stated he had lied and that he had been told to do so by another inmate, whom he refused to identify.

23. On August 4th, appellant informed Lt. Stephen Hafermann that Harris wanted to change his story, and that his allegations were untrue. She did not say how she acquired this information. Hafermann was an "investigating" lieutenant -- i.e., one who had been designated by management to handle substantial ongoing investigations in an effort to promote centralization in this area. Appellant was aware when she so informed Hafermann that he had been involved in the Doe investigation. In the course of her conversation with Hafermann on this occasion, she said she could have gotten a statement from Harris herself but management evidently didn't trust her.

24. Prior to August 4th, Hafermann had first become involved with the Doe matter on July 31st when he learned there earlier than been a "show of force" by the Black Disciples at the KMCI school while he had been on vacation. He learned from talking to gang members that this "show of force" had been related to the Doe matter. He concluded that one faction in the gang opposed Harris while another faction supported Harris.

25. As a result of the information he had received from gang members regarding the show of force, Hafermann interviewed Harris on July 31st. Harris maintained his earlier accusations concerning Doe. Hafermann conducted another interview with Harris on August 4th, and on this occasion

Harris readily recanted his accusations and signed a verified statement to that effect. At this point, Hafermann concluded that Harris had to have been lying either then or earlier, and that under the circumstances it would be pointless to continue the Doe investigation further. Harris was given a conduct report for lying, and Doe was declared exonerated.

26. Nagle convened an investigatory hearing on August 7, 1987. Nagle stated the purpose of his meeting was to discuss what had happened with respect to the Harris/Dismuke situation and to ascertain her rationale for her actions. She asked if disciplinary action were possible as a result, and he replied he didn't know. She then said she would get a representative and returned with Leroy Last, Superintendent of Buildings and Grounds. Nagle then recounted, in summary, that she had been ordered not to investigate the Doe allegations and to keep the information about it confidential, but that she had authorized the visit by Dismuke to Harris in TLU and this had resulted in Dismuke pressuring Harris with regard to his allegations. Appellant's response to this was essentially as set forth in Respondent's Exhibit 4. She did not deny that she had been ordered by Nagle not to investigate the Doe matter and to keep all the information she had about it confidential.

27. On August 11th, the KMCI personnel manager sent appellant a letter to her home address notifying her as follows:

> "This will serve as notification that your presence is requested at a predisciplinary hearing to be held at 10:00 a.m. on August 13, 1987. The hearing will be held in the Administrative Conference Room. You have the right to have a representative present."

28. Appellant did not receive this letter prior to the aforesaid hearing. However, she did receive a phone call from Nagle advising her of

the hearing in advance thereof, although this record does not reflect when. Appellant appeared at the hearing with an attorney. Her attorney was given copies of a number of documents relating to the Harris/Dismuke matter as follows:

a) A report to Franklin from Nagle dated August 11, 1987, that included allegations of a number of work rule violations (Exhibit 23);

b) A statement by Dismuke dated August 12, 1988;

c) A statement by Brown dated August 13, 1988;

d) A memo from Nagle to Franklin dated August 7, 1987, describing the investigatory hearing held that date (Exhibit 4).

29. Respondent did not tell appellant at this meeting what range of disciplinary action was possible. However, the August 11th memo from Nagle to Franklin, a copy of which was given to appellant's attorney at the beginning of the hearing, included the following:

> "Based on the nature of these violations, I am of the opinion that Lt. Kode lacks the skill at this time to appropriately handle supervisory responsibility. Institution responsibility, as is required of security supervisors, requires commitment to established security procedures and adherence to directions given. I cannot be confident that Lt. Kode will comply with directives."

30. Appellant at this meeting had the opportunity to and did respond to the charges and evidence against her. She either knew or should have been able to infer from all of the circumstances that management considered her actions in connection with the Harris/Dismuke matter were very serious and that there was a possibility of severe discipline as a result.

31. By letter dated August 14, 1987 (Exhibit 1), Franklin notified appellant of her demotion to CO 3 and a suspension of 15 days without pay, both effective on August 16, 1987, as follows:

> This is official notification of disciplinary action that includes both a demotion to Correctional Officer 3, and a suspension

of fifteen (15) days without pay for violation of Department of Health & Social Services Work Rules:

Work Rule #1 - which prohibits in part "Disobedience, insubordination, or refusal to carry out written or verbal assignments, directions, or instructions."

Work Rule #6 - which prohibits in part, "Violation of ....safety, ...procedures, directions and requirements."

Work Rule #7 - which prohibits in part, "....improperly disclosing confidential information."

Work Rule #10- which prohibits in part, "....permitting others to enter restricted areas without authorization."

The demotion and suspension are effective August 16, 1987....This action is being taken based on the following:

On Tuesday, July 28, 1987, Mr. James Nagle advised you that an investigation was being conducted based on allegations that were made by inmate William Harris about Sgt. Jane Doe. Mr. Nagle advised you that you were not to investigate this incident or to tell anyone about the incident. You were specifically told to keep confidential all information concerning the alleged incident.

On Friday, July 31, 1987, you authorized Officer Buddy Brown and Sgt. Haima to take inmate Paul Dismuke into the segregation portion of Wisconsin Cottage. This afforded Dismuke the opportunity to interject himself and his influence as a Black Disciple Gang leader into an investigation concerning staff misconduct with an inmate. Inmate Harris has indicated that inmate Dismuke ordered him to retract his statement in the name of the Black Disciples. This has placed Harris in jeopardy in the institution.

On August 7, 1987, an investigatory meeting was held at which you, your representative, LeRoy Last, Security Director James Nagle, and Treatment Director James Hart were present. During this meeting you stated that Officer Buddy Brown came to you concerning the Doe incident and inmate Paul Dismuke's knowledge of it. You indicated you then talked to Dismuke and that you discussed the incident with Officer Brown. You stated you talked to Harris regarding the allegations he made and talked with Lt. Hafermann about it. You stated that in talking to other inmates and staff about the Jane Doe investigation, you did not inhibit any other investigation that may have been going on. In addition, you also stated you knew Dismuke is a Black Disciple Gang leader who had an interest in the Jane Doe incident and that taking an inmate into the segregation area was a violation of security and safety procedures, and that Dismuke's involvement could impact (change) inmate Harris' account of the Doe incident.

Officer Buddy Brown was interviewed regarding the incident which occurred on July 31, 1987, in which he escorted inmate Paul Dismuke into the Wisconsin Cottage Segregation Unit. During this interview, Officer Brown stated that he asked you if he could take Dismuke into the segregation unit to talk to Harris. Officer Brown stated you did give him permission to take Dismuke to talk to Harris. Officer Brown stated that he was aware that inmates are not to go into the segregation unit and that is why he called you for permission. Officer Brown also stated that he was aware that an investigation was going on and that you discussed with him who you had talked to about the Jane Doe incident.

Inmate Paul Dismuke was interviewed regarding the incident on July 31, 1987, in which he was escorted to the Wisconsin Cottage Segregation Unit by Officer Brown and Sgt. G. Haima. Inmate Dismuke stated he was permitted to carry on a discussion with inmate William Harris in the segregation unit for approximately two to three minutes.

CONCLUSIONS OF LAW

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

2. Respondent has the burden of proof to establish just cause for the discipline imposed.

3. Respondent has satisfied its burden and demonstrated there was just cause with respect to part of the charges against appellant inasmuch as it has established on this record that appellant disobeyed Nagle's order not to become involved in investigating the Doe allegations, and that she compromised institution security by arranging for a Black Disciple's gang member to enter Temporary Lockup and have the opportunity to influence another gang member's statement with respect to a pending investigation.

4. Respondent failed to sustain its burden and has not demonstrated just cause with respect to part of the charges against appellant, inasmuch as it failed to establish that she disobeyed Nagle's order not to divulge information regarding the Doe matter or the work rule prohibiting the improper disclosure of confidential information, inasmuch as her initial contacts with people concerning the Doe matter were situations where people

came to her with comments, concerns or information about it, and she merely listened, and further contacts developed out of these and did not involve disclosure by her of information that the people involved were not already aware of.

5. Under these circumstances, respondent's disciplinary action will be sustained except to the extent it is modified by deleting the 15 days suspension.

6. Respondent did not violate appellant's due process rights with respect to the predisciplinary proceedings.

DISCUSSION

The charges relied on by respondent in imposing the demotion and 15 days suspension are set forth at Finding #30. In summary, respondent alleges that appellant disobeyed orders not to become involved in the Doe investigation and not to reveal any information concerning that matter, and, further, that she committed a serious breach of institutional security by arranging for a gang leader who had an interest in the Doe matter to be brought into the segregation unit to speak to, and have the opportunity to put pressure on, the key witness against Doe.

In disciplinary appeals under §230.44(1)(c), Stats., the respondent employing agency has the burden of proof to establish just cause for its action. Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). In the context of an appeal such as this, the test for just cause 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...." Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974); State ex

rel. Gudlin v. Civil Service Commn., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965).

The Commission will first address the insubordination charges. There is no question that if appellant in fact disobeyed these orders as alleged, this would be misconduct under the Safransky test.

With respect to the allegation that appellant violated an order not to investigate the Doe matter, appellant does not really deny that she conducted such an investigation, but argues that Nagle never gave her the order in question, and that in any event Barber subsequently ordered her to get involved in the matter.

The testimony of Nagle and appellant is in sharp disagreement as to whether he ordered her to stay out of the Doe investigation. However, respondent's position on this point is supported by substantial corroborating evidence.

Nagle's essentially contemporaneous memo of their August 7, 1987, investigatory meeting (Respondent's Exhibit 4) supports his testimony that at the meeting appellant never denied having received such an order. The thrust of her comments as reflected in this memo is to try to justify, and to provide extenuating circumstances with respect to, her investigatory activities.

Further corroborating evidence is provided by appellant's remark to Hafermann on August 4, 1987, when she told him that Harris had decided to change his story, that she could have gotten a statement from him herself, but that evidently the administration didn't trust her. This comment is consistent only with a realization on the appellant's part that she was not supposed to become involved in the Doe investigation.

As to Barber's role, he was approached by Brown on July 30, 1987, and told that he would want to hear what Dismuke had to say. Barber then told appellant to handle the matter. There is a sharp dispute of testimony as to whether at that time Barber was aware that what Dismuke had to say concerned the Doe matter. While the record supports a finding that he did, this point is far from critical.

At the time of this conversation, Barber was not aware of Nagle's order to appellant to stay out the Doe investigation, as Nagle had not told anyone besides appellant of that order. There was no apparent reason for appellant to think that he had. Therefore, for appellant to have interpreted Barber's instructions to handle the Dismuke matter as somehow superseding the orders of Nagle, who was superior to Barber in rank, she would have had to have interpreted Barber's instructions as extending beyond her getting a statement from Dismuke. She also would have had to have concluded that Barber was aware of Nagle's order, he intended to supersede it, and that in some manner this was authorized by Nagle. None of these conclusions or assumptions were supported by the record or were reasonable.

In the Commission's view, it is most likely that appellant's purported reliance on Barber's instructions was seized on after-the-fact. This conclusion is supported by the fact that appellant never raised this point in defense of her actions at the investigatory meeting held August 7, 1987, shortly after the incident occurred. It also is supported by her August 4, 1987, remark to Hafermann that she could have gotten a statement from Harris but evidently the administration didn't trust her. This is inconsistent with a contention that she had thought Barber's instructions

had somehow given her a green light from management to proceed with this investigation in the way she did.

The record does not support a finding that appellant violated Nagle's order to keep information concerning the Doe matter confidential. It is clear that many people in the institution, both staff and inmates, were aware,of the allegations, and a number of them approached appellant about it. The other key actor in the scenario (Brown) was deeply immersed in it before he became involved with appellant. It would be unreasonable to interpret Nagle's order as forbidding her to listen to what others came to her with, or to discuss the matter with people already involved in it.

The second key aspect of the charges concerns the fact that appellant arranged to have a gang leader brought into segregation to speak to (and have an opportunity to intimidate) the key witness against Doe. Both the superintendent and the security director testified that this was a serious breach of security because it violated the whole concept of TLU, where an inmate can be isolated from pressure from the rest of the population, and it sent a message to all inmates that there was no place in the institution where gang power did not extend. Appellant contended that her conduct should not be considered inimical to security for a number of reasons.

Appellant pointed out that there was a possibility an inmate in TLU could have been threatened through other sources -- by a letter sent through the mail or by an inmate working in Wisconsin Cottage having an opportunity to sneak a few words to him. These kinds of arguments do not really address the question of whether appellant's actions were improper. The fact that security in segregation may not be anywhere near complete does not lead to a conclusion that respondent does not have a legitimate security interest in what occurred in this case, where a gang leader was

brought into segregation to meet with another inmate under what amounts to official auspices.

Appellant also contends that she took extensive security measures to ensure that nothing untoward happened during this visit -- the two officers were instructed to stand close to Dismuke to ensure that no threats were made or contraband passed, and there was no possibility of violence at that point. This argument ignores the fact that under the circumstances present in this case, intimidation did not require an overt threat or action.

Also, appellant's argument that Haima did not object to the visit is of little moment, since he was dealing with a superior officer in appellant.

Appellant also argues that there was no specific rule or regulation prohibiting what she did, and that she was being punished for what amounted to a mere difference of opinion. While it is true that there is no specific rule or regulation covering what occurred, this does not reduce the matter to a "judgment call" or mere difference of opinion. It seems clear under the Safransky test that even if a situation is not covered by a specific rule or regulation, an employe, particularly a management or supervisory employe, who exercises poor enough judgment can be subjected to discipline.

As discussed above, respondent presented testimony by the superintendent and the security director that it was a serious breach of security for appellant to have arranged this visit. This point of view is supported by a number of factors. A major reason for putting an inmate like Harris in TLU pending investigation into his charges was to isolate him from the rest of the population and the possibility of being pressured by other inmates. Appellant argued that it was common in the institution for staff to rely on

inmate informants for information. However, she was not relying on Dismuke for information when she arranged for him to visit Harris; rather, she was relying on him as a gang leader to tell Harris to change his story. Furthermore, she did this at a point when she had no way of knowing exactly what the status of the official investigation was, not having gone back to Nagle since their initial meeting. Finally, appellant did not present any testimony from other staff that her actions were an appropriate exercise of judgment, or were within the parameters of the proverbial "judgment call."

One evidentiary matter concerns a ruling at the hearing sustaining a hearsay objection by complainant to part of Respondent's Exhibit 8, an incident report signed by Capt. Barber. The line objected to was: "Harris stated that Dismuke told him to 'come clean on the Doe incident, and that's an order.'"

The Commission rules provide at §PC 5.03(5), Wis. Adm. Code:

> "...Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances."

The decision as to whether a particular hearsay statement should be admitted obviously must be made on a case-by-case basis. McCormick on Evidence (2d Ed. 1972) contains a cogent discussion on hearsay evidence in administrative proceedings which includes guidelines that in the Commission's opinion provide a useful framework to follow. The work cites Judge Learned Hand's "classic formulation" that an administrative finding can be upheld if "supported by the kind of evidence on which reasonable persons are accustomed to rely in serious affairs." NLRB v. Remington Rand, 94F. 2d 862, 873 (2d Cir. 1938). McCormick then provides several specific criteria for evaluating the reliability of hearsay evidence:

"(a) What is the 'nature' of the hearsay evidence? If the hearsay is likely to be reliable, it usually becomes an exception to the hearsay rule. Moreover, if the evidence is intrinsically trustworthy, agencies have taken the next logical step and relied, if necessary upon this evidence in deciding cases, even though it technically constitutes hearsay and does not fall within any of the recognized exceptions...."

(b) Is better evidence available? The necessary substantiation for the reliability of hearsay evidence may arise from the failure of respondent to controvert the hearsay when the necessary proof is readily available to him, even though there is no testimonial or documentary exhibit of such available 'support'....

(c) How important or unimportant is the subject matter in relation to the cost of acquiring 'better' evidence?....

(d) How precise does the agency's fact-finding need to be? The ICC's reliance on 'typical evidence' and the FTC's use of survey evidence are examples of agency dependence on statistical averages to determine facts in particular cases where legal or policy decisions are not dependent upon exact determinations....

(e) What is the administrative policy behind the statute being enforced? The range of necessary reliability is affected by the type of policy which the administrative hearing is designed to promote....

When focusing on these criteria, it is essential to consider the central point that evaluation of hearsay and other technically incompetent evidence cannot be accomplished in the abstract; the evidence must be examined in the light of the particular record. This includes, at a minimum, on examination of the quality and quantity of the evidence on each side, as well as the circumstantial setting of the case." McCormick, supra, pp. 844-846.

In the instant case, there are competing considerations. On the one hand, the evidence in question is multiple hearsay which involves the remarks of convicted felons -- a report written by a staff member recounting what one inmate told him another inmate said. Also, two staff members overheard at least part of the conversation in question, and appellant's livelihood is at stake in this proceeding. On the other hand, in a correctional setting, reasonable persons probably are going to be more likely to rely on statements made by convicted felons than would be the case in the outside world. Also, there is a good deal of other hearsay evidence on this point in the record, including a statement attributed to appellant

which basically corroborates the statement to which objection has been made. That is, Nagle's account of the investigatory hearing (Respondent's Exhibit 4) states that appellant said: "Dismuke told Harris, tell the truth, don't lie, this is an order." The statement in question in Barber's incident report (Respondent's Exhibit 8) is: "Harris stated that inmate Dismuke told him to, 'Come clean on the Doe incident, and that's an order.'" Another point in favor of admission is that the inmates in question were no longer at KMCI.

In conclusion, the better approach would have been to admit the evidence set forth in Respondent's Exhibit 8, but to consider its infirmities in determining how much weight it should be accorded. Under circumstances like these, the court's admonition in Mass, Inc. v. FTC, 148 F. 2d 378, 386 (2d Cir. 1945), seems particularly apropos: "...in such proceedings as these [FTC] the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence...."

While the Commission would give more weight to the testimony of the officers who were present, there actually is not a great deal of dispute about what was said. Brown testified that Dismuke asked Harris if Wesley had told him to make the allegation, and Harris answered yes. Dismuke then asked him if he could tell the truth and sign a statement and Harris responded affirmatively. Haima testified that Dismuke asked Harris to straighten out his story, to straighten out the matter and tell the truth. Regardless of whether Dismuke explicitly told Harris that he was being given an order, under all the circumstances, including their positions in the gang hierarchy, the communication was inherently intimidating in nature.

Appellant contends the predisciplinary proceedings were deficient and violated her rights to due process. Respondent argues that appellant has waived this objection by not raising it until after the hearing. The Commission does not need to resolve this question, because the parties elicited a good deal of testimony concerning the predisciplinary proceedings, and in the Commission's view these proceedings were adequate.

To begin with, appellant raised certain points concerning the investigative hearing or meeting. Since such a hearing is not mandated by the due process clause, the only materiality of that proceeding is in the context of the question of whether the entire predisciplinary proceedings were adequate.

The actual predisciplinary hearing was held on August 13, 1987. While appellant did not receive advance written notice of this hearing, she did have verbal notice and she did appear with counsel. Appellant points out that she was not given advance notice of the work rules management deemed were violated. However, this was provided at the hearing, along with a considerable number of other documents, see Finding #28. Under Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 548, 84 L. Ed 2d 494, 506, 105 S. Ct. 1487 (1985), notice of the charges can be written or oral, so it is difficult to see how appellant's rights were violated by not having received written notice of the charges before the hearing.

Appellant also complains that she was not told what range of disciplinary action was possible as a result of the charges against her. While management did not explicitly tell her she could be subjected to demotion and a 15 day suspension, there was sufficient notice that management considered the matter very serious. It is particularly noteworthy in this regard that one of the documents given to appellant's attorney at the

beginning of the August 13, 1987, predisciplinary hearing was a copy of a memo from Nagle to Franklin dated August 11, 1987 (Respondent's Exhibit 6), which included the following:

> "It seems apparent, in Lt. Kode's response, that several Work Rules have been violated....
>
> * * *
>
> Based on the nature of these violations, I am of the opinion that Lt. Kode lacks the skill at this time to appropriately handle supervisory responsibility...."

This should have given appellant a substantial indication that serious disciplinary action was being considered. The situation is far from that prevailing in McCready & Paul v. DHSS, 85-0216-PC, 85-0217-PC (5/28/87), where the employe was told that an incident would most likely result in an oral reprimand, or at most a written reprimand, and he ultimately was discharged.

The final question to be considered is the degree of discipline imposed. In answering this question, 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 tend to impair the employer's operation, and the employe's prior work record with the respondent." Barden v. UW-System, 82-237-PC (1/9/83), Fauber v. DOR, 82-138-PC (8/21/84).

As discussed above, there were three major components of the charge against appellant: she disobeyed direct orders not to get involved in the Doe investigation and not to reveal information about the matter, and she exercised poor judgment in arranging for a gang leader to have access to another gang member being held in TLU pending the investigation of the Doe charges. While the charge of improper disclosure of information was not

sustained, the remaining charges were. In the opinion of the Commission, the established misconduct was very serious.

Appellant was given a direct order not to get involved in the Doe investigation, and she chose to ignore it. She also chose to breach the security of the segregation building by arranging to have brought in a gang leader, who had an explicit interest in the investigation, to influence another inmate who was a key witness in the investigation. As the security director testified, this sent a message to all inmates in the institution, which had a substantial gang problem, that there was no place in the institution immune from gang penetration. Also, she did this without knowing the status of the institution's investigation. While she points out she took precautions against physical violence or direct threats during the visit, this ignores the fact that intimidation can be practiced without overt action.

Appellant had a basically good work record before this incident, but she had been counseled once while a lieutenant with regard to disobedience of a direct order. Under these circumstances, the demotion should be sustained. The seriousness of the misconduct combined with the prior insubordination matter give management a sustainable basis for concluding that appellant could not be relied on to perform at the lieutenant's level and that lesser progressive discipline was not appropriate. However, since respondent failed to sustain one of the charges, and since its concern about appellant's capacity or willingness to function reliably as a lieutenant have been addressed by her demotion, it is concluded that the suspension on top of the demotion is excessive. Therefore, the disciplinary action will be modified by deleting the suspension.

ORDER

Respondent's disciplinary action against appellant consisting of a demotion to Correctional Officer 3 and a suspension of 15 days without pay, as set forth in its letter to her dated August 14, 1987 (Respondent's Exhibit 1), is modified by deletion of said suspension*, and this matter is remanded for action in accordance with this decision.

Dated: November 23, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr
JMF12/3

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Barbara J. Kode
310 Forest Avenue
Kewaskum, WI 53040

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

* This was served at a CO 3 level, so restoration of salary is to be at the CO 3 level.