STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

BERT J. STITT,

Appellant,

v.

Secretary, DEPARTMENT OF DEVELOPMENT,

Respondent.

Case No. 88-0090-PC

* * * * * * * * * * * * * * * * *

FINAL DECISION AND ORDER

This matter is before the Commission following the issuance of a proposed decision and order by a hearing examiner. The Commission has considered the objections thereto filed by appellant and arguments by both parties, and has consulted with the examiner.

As its final disposition of this matter, the Commission adopts the proposed decision and order, (a copy of which is attached hereto and incorporated by reference as if fully set forth) except as noted below. The Commission agrees with the proposed decision's conclusion that respondent's evidence concerning appellant's derogatory statements about the urban renewal efforts of certain communities and local officials meet the just cause test set forth in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N. W. 2d 379 (1974), and constitute a violation of respondent's work rules in that the language in context was abusive. Appellant argues that in order for there to be a violation of this work rule, which refers to the use of "abusive language toward others," (emphasis added) the language has to be used in a "personally confrontational" manner. However, the dictionary definition of "toward" includes not only "in the direction

of" but also "concerning; regarding; about...." Webster's New World Dictionary (Second College Edition) (1972), p. 1504.

The Commission makes the following changes in the Proposed Decision and Order:

A. Finding of Fact 8 is modified to read as follows, for the reasons set forth below in paragraph C:

> 8. Appellant's remarks about the downtown and Main Street programs as set forth in Finding #4.a., above, can be reasonably 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.

B. Finding of Fact 10 is modified to read as follows, for the reasons set forth below in paragraph D:

> 10. Appellant's comments about the state legislator as set forth in Finding #4.b., above, can reasonably be said to have a tendency to impair appellant's performance of the duties of his position and the efficiency of the group with which he works.

C. The following language should be added at the end of the paragraph which begins on the bottom of page 7 of the Proposed Decision and Order and ends on the top of page 8:

> However, the Commission would conclude that such a statement by appellant in his speech would "have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works" within the meaning of the Safransky decision. One of the primary purposes of conferences such as that under consideration here is to encourage those in attendance to use respondent DOD's programs. One of the responsibilities of appellant's position is to encourage the use of respondent DOD's programs. To have appellant, a member of DOD's professional staff, make a presentation at such a conference which negatively portrays the manner in which one or more of DOD's programs is being administered certainly would reduce the likelihood that those in attendance would use the programs that DOD is trying to sell, and, as a consequence, would clearly have a tendency to impair the performance of one of appellant's responsibilities and those of his agency.

D. The first full paragraph on page 12 of the proposed decision and order is modified to read as follows:

> It does not appear that appellant is contending that his suspension for what he said at the Ashland conference violated his

First Amendment rights in a substantive sense. In any event it does not appear that such a contention could succeed. Appellant's speech was on a matter of public concern. It could be argued he was disciplined because of the abrasive way in which he expressed himself rather than because of the substance of his criticisms. See McAdams v. Matagorda Co. Appraisal Dist., 798 F. 2d 842, 846 (5th Cir. 1986). However, it would be attempting to draw too fine a distinction to conclude he was not being disciplined for the context of his speech. The caustic and abrasive nature of his comments, about which respondent was concerned, cannot meaningfully be separated from the substance of his remarks. However, even if it is concluded that appellant was disciplined for the substance of his criticisms, in the context of the nature of appellant's job, the employer's interest in maintaining good working relationships with local officials would outweigh appellant's interests in being able to express his opinions under the balancing test mandated by Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, (1968). Cf. Dicks v. City of Flint, 684 F. Supp. 934 (E.D. Mich. 1988); Schultz v. Industrial Coils, Inc., 125 Wis. 2d 520, 373 N.W. 2d 74 (Ct. App. 1985).

E. The paragraph which begins on the bottom of page 12 of the Proposed Decision and Order and ends on the top of page 13 should be modified as follows:

As to appellant's comments about the unnamed state legislator as set forth in Finding #4.b., the Commission cannot conclude on this record that they were so harsh as to fall within the meaning of abusive language (Work Rule 4.2). The only specific testimony about this was as follows:

> Wanner: " ... it [appellant's statement] was obviously related to the retreat that was held out-of-state, and the discussion, in terms of the concerns of the legislator being somewhat silly, or something to that effect. I can't remember if he used those exact words ... sort of implying it was silly on the legislator's part to raise it or, I don't know if silly is the correct word, but it didn't make sense.
>
> Q [CROSS]: Do you remember Bert saying something about it didn't make sense because the Chicago Bears trained in Wisconsin and if we're going to close the border then nothing from Chicago would come to Wisconsin?
>
> A: Yes, I believe there was something of that."

While these remarks could be characterized as critical and possibly somewhat demeaning, they are not abusive. They would, however, satisfy the Safransky test of just cause. It is obvious that the continued funding and existence of programs such as the economic development programs administered by DOD and by appellant rely to a large extent on the continued good will of the Legislature. To have a member of DOD's professional staff imply in a presentation such as

> that under consideration here that DOD should disregard the concerns of a legislator and that DOD feels comfortable spending state tax dollars out of state while at the same time trying to convince others to spend their dollars in Wisconsin, certainly would not give those in the audience any confidence in DOD's ability to deal successfully with the Legislature, i.e., to earn and keep the good will of the Legislature, and would not persuade them that DOD was setting a good example for the business community. This goes to the essence of DOD's mission and appellant's job responsibilities and the Commission concludes that appellant's statements in relation to the concerns of the legislator tended to impair the performance of appellant's job responsibilities and the efficiency of the agency for which he works within the meaning of the Safransky decision.

F. The following sentence is added to the paragraph in the Proposed Decision and Order which begins on the bottom of page 13 and continues on to page 14 after the sentence which states "Two of the three work rules were found not to have been violated.":

> This is an important consideration in this case in view of the fact that the issue to which the parties agreed made specific reference to the work rule violations cited in the letter of discipline and framed the just cause question by reference to such work rule violations. The Commission agrees with the proposed decision that under these circumstances, those charges against appellant which were found not to violate the work rules as alleged cannot be considered with respect to either the just cause or severity of discipline questions, notwithstanding that viewed in isolation they would satisfy the Safransky test. However, the Commission concludes that the suspension should be reduced to two days rather than one day. This is because the remaining conduct is so at odds with the professional nature of appellant's position and his obligation to encourage the use of DOD programs, as well as the fact that he had previously been twice counseled regarding similar problems.

G. The final sentence in the paragraph which begins on the bottom of page 13 of the Proposed Decision and Order and which continues on to page 14 is modified as follows:

> Accordingly, the Commission will modify the disciplinary action by reducing it to a two day suspension.

H. The language of the Order is modified as follows:

> Respondent's action suspending appellant for three working days without pay is modified by reducing it to a suspension of two working days without pay, and this matter is remanded to respondent for action in accordance with this decision. Appellant's motion to dismiss that was made at the close of respondent's case is denied in part and

granted with respect to those elements of the charges against appellant for which just cause was not established.

Dated: June 19, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT/LRM:rcr
JMF04/3

Parties:

Bert Stitt
120 South Franklin
Madison, WI 53703

Bruno Mauer
Secretary, DOD
P.O. Box 7970
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

BERT J. STITT,

Appellant,

v.

Secretary, DEPARTMENT OF DEVELOPMENT,

Respondent.

Case No. 88-0090-PC

PROPOSED INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a suspension without pay for three working days.

FINDINGS OF FACT

1. At all relevant times, appellant has been employed in the classified civil service by respondent Department of Development (hereafter DOD).

2. Appellant's position is professional in nature and his responsibilities include encouraging the use of DOD's programs. He is the manager of the "Downtown" program.

3. On June 2, 1988, appellant, as part of his employment duties and responsibilities, gave an address at the Wisconsin Economic Development Association spring conference at Ashland. The title of the conference was "New Dimensions in Economic Development." The conference was attended by a large number of economic development professionals from both the private and public sector. The title of appellant's talk was "Main Street: New Age Partnerships in Economic Development."

4. Appellant's speech included the following:

a. Appellant spoke about the relationship between two DOD programs, the Downtown program and the "Main Street" program. He said that there was some confusion about the differences between these programs, and that there were people within DOD who were unsure of the difference between the two programs. He attempted to clear up some of this perceived confusion by his remarks. He also said that the Main Street program was new and under development within DOD, and he wasn't sure that within DOD it had been fully thought through how the Downtown and Main Street programs would be coordinated.

b. Appellant recounted a disagreement he had had with a legislator concerning an out-of-state site appellant had selected for a retreat. Appellant's remarks implied that the legislator's position objecting to an out-of-state site was silly. Appellant did not mention the legislator's name. As part of his remarks, appellant drew an analogy to the Chicago Bears training in Platteville, and implied that a "closed border" policy would not be advisable.

c. Appellant spoke about a number of downtown areas in various cites which were mentioned by name. He also spoke about various local officials (mayors, alderpersons, committee members, etc.) involved with those areas, and identified between two and six such officials by name. His remarks were uncomplimentary and caustic in nature. For example, he said, with respect to Peshtigo that it was a disaster area, it was "the pits," and it was too bad the fire wasn't still burning or another fire wouldn't hurt, or words to that effect. His remarks clearly implied that the officials involved were dumb or not very bright.

d. Appellant described a dispute or problem he had been involved in with the mayor of South Milwaukee, and said he had had to apologize to the mayor.

e. Appellant said that the pay and pension benefits associated with his job weren't enough to keep him from speaking his mind.

5. Appellant's supervisor, Rolf Wegenke, administrator, Division of Economic Development, heard about appellant's speech from various sources which included certain DOD employes who had been in attendance. After meeting with appellant on June 13, 1988, concerning the matter, he and Deputy Secretary Borden issued a letter dated June 20, 1988 (Respondent's Exhibit 3) which notified appellant of his suspension without pay for three working days, as follows:

> This letter is to notify you that you are hereby suspended without pay for three (3) working days... This disciplinary action is being taken because of your unprofessional behavior and conduct.
>
> On Monday, June 13, we discussed the incidents relating to your behavior and job performance at the Wisconsin Economic Development Association (WEDA) meeting in Ashland. At that conference you publicly made statements critical of and demeaning to elected public officials (a legislator) and to Wisconsin communities. You characterized the legislator's opinions on the sites for your meetings as worthless. You dismissed certain communities (e.g., Peshtigo) as disasters.
>
> Numerous economic development professionals in and outside the Department were present and have expressed concern about your comments and behavior.
>
> In conversations with both of us you acknowledged making those statements and indicated you realized your behavior was inappropriate and a mistake. You made these acknowledgements after we informed you of our concern about the charges. Your "shock treatment" technique while effective in some instances is <u>counter-productive</u> in others. The repeated lapses call into question your professional judgment and ability to manage the Department's downtown program in an objective, cooperative way.

> Your verbal actions clearly undermine the Department's program and serve to damage the reputation of the Department. Your behavior was very unprofessional and embarrassed the Department. You have violated the following Department work rules:
>
> 1.2 Neglecting job duties or responsibilities.
>
> 1.5 Falsifying records or giving false information to the public, other state agencies, private organizations or to employees responsible for record-keeping.
>
> 4.2 Threatening, intimidating, inteferring [sic] with, or using abusive language toward others.
>
> You have been counseled verbally in the past about unprofessional behavior. The most recent conversations concerning your behavior (e.g., regarding your conduct in Elroy) occurred in April and May. You have also received a memo (e.g., regarding South Milwaukee) expressing our concern and the seriousness of your treatment of and comments about and to public officials at public meetings. Your misconduct in the incident described in this letter is serious and must not be repeated.
>
> Future violations of the above work rules or other Department Work Rules may result in further discipline up to and including discharge.

6. Mr. Wegenke played the primary role in the aforesaid disciplinary action. With respect to the allegation of violating Work Rule 1.5 ("Falsifying records or giving false information...."), while it is not apparent from the aforesaid letter (Respondent's Exhibit 3), he was relying as support for that allegation on appellant's comments concerning the alleged confusion or management disorganization with respect to the Downtown and Main Street programs as set forth above in Finding #4.a. In Mr. Wegenke's opinion, there was no such confusion or disorganization.

7. There is an inadequate basis on this record to find that appellant's remarks about the Main Street and downtown programs as set forth in Finding 4.1. were false, and the Commission finds that they were not false

and did not violate Work Rule 1.5, but rather reflected a difference of opinion on this subject between appellant and Mr. Wegenke.

8. Appellant's remarks about the downtown and Main Street programs as set forth in Finding 4.a. cannot be reasonably 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.

9. Appellant's comments about the state legislator as set forth in Finding #4.b., above, did not constitute a violation of work rule 1.2 ("Neglecting job duties or responsibilities") or a violation of work rule 4.2 ("Threatening, intimidating, interfering with, or using abusive language toward others").

10. Appellant's comments about the state legislator as set forth in finding #4.b., above, cannot reasonably be said to have a tendency to impair appellant's performance of the duties of his position and the efficiency of the group with which he works.

11. Appellant's remarks about various downtown areas and local officials as set forth in Finding #4.c., above, did not constitute a violation of work rule 1.2 ("Neglecting job duties or responsibilities") but did constitute a violation of work rule 4.2 ("Threatening, intimidating, interfering with, or using abusive language toward others").

12. Appellant's remarks about various downtown areas and local officials as set forth in Finding #4.c., above, can be reasonably said to have a tendency to impair appellant's performance of the duties of his position and the efficiency of the group with which he works.

13. Appellant's remarks about his problem with the Mayor of South Milwaukee, as set forth in Finding #4.d., and about his pay and benefits not being high enough to prevent him from speaking his mind, as set forth in Finding #4.e., were not elements of the alleged misconduct as such.

14. Prior to the Ashland conference, appellant had been counseled regarding caustic and abrasive behavior at a conference in Elroy and toward the Mayor of South Milwaukee. These incidents included appellant's use of harsh language of a similar vein as was used in Ashland, and appellant taking away a microphone from the Mayor of South Milwaukee at a meeting or conference because appellant was of the opinion that the Mayor's remarks were irrelevant to the subject.

CONCLUSIONS OF LAW

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

2. Respondent has the burden of proving there was just cause for the discipline imposed.

3. Respondent having failed to satisfy its burden in part, and in consideration of the surrounding circumstances, including appellant's prior disciplinary record, the suspension imposed will be modified pursuant to §230.44(4)(c), Stats., from three days to one day.

DISCUSSION

In disciplinary appeals of this nature, the employing agency or appointing authority has the burden of proving that the discipline imposed was for just cause, and the "required burden of proof is that of other civil cases, that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." Reinke v. Personnel Board, 53 Wis. 2d 123, 132, 137, 191 N.W. 2d 833 (1971). In Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974), the Court held that the test for determining whether just cause exists is as follows:

> '...one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties

> of his position or the efficiency of the group with which he works....' State ex rel. Gudlin v. Civil Service Comm. (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 799.

In the instant case the parties stipulated to the following issue for hearing:

> Whether there was just cause for respondent's decision suspending appellant three days without pay, from June 28, 1988, through June 30, 1988, for violating work rules cited by respondent in its June 20, 1988, letter of suspension to appellant. Prehearing Conference Report dated October 6, 1988.

Due to the manner in which the issue is worded, it is necessary that the Commission make a determination whether there were violations of the work rules, as alleged, as part of the just cause determination.

At the hearing, appellant made a motion to dismiss at the close of respondent's case. Pursuant to §PC 5.01(2), Wis. Adm. Code, a hearing examiner may not "decide any motion which would require final disposition of any case...." The examiner took the motion under advisement, and appellant declined to put in a case. Therefore, the record consists of the evidence offered by respondent: the testimony of four DOD employes who attended the Ashland conference, the testimony of Division Administrator Wegenke and three exhibits -- the program for the conference, a memo that was written by one of the aforesaid DOD employes who had attended the conference to the DOD secretary complaining about appellant's speech, and the letter providing appellant with notice of suspension.

Appellant's remarks about the department's handling of the downtown and Main Street programs (Finding 4.a.) were cited by Mr. Wegenke as the false information provided by appellant in violation of Work Rule 1.5. However, this part of appellant's speech was not mentioned in the notice of discipline (Respondent's Exhibit 3) and therefore cannot be relied on by

respondent to support the disciplinary action. Furthermore, the only evidence in the record that would support a finding that these remarks were false was Mr. Wegenke's testimony that the department was not disorganized in its handling of these programs. This conclusory statement is opposed by appellant's comments to the effect that there was a degree of misunderstanding or confusion. The record in this regard is insufficient to sustain respondent's burden of proof that would be necessary to establish that appellant gave false information.

Appellant's other statements were summarized in the notice of suspension as follows:

> ...statements critical of and demeaning to elected public officials (a legislator) and to Wisconsin communities. You characterized the legislator's opinions on the sites of your meetings as worthless. You dismissed certain communities (e.g., Peshtigo) as disasters." Respondent's Exhibit 3.

Respondent established through its evidence that appellant's remarks about the communities were demeaning. Respondent also established that these remarks satisfied the Safransky just cause test. Mr. Wegenke provided uncontradicted testimony that the scathing nature of these remarks would discourage people from making use of agency programs. This opinion was supported by testimony from other DOD management employes present at the Ashland conference. Furthermore, both the notice of discipline (Respondent's Exhibit 3) and Mr. Wegenke's testimony reflects that appellant admitted his comments were inappropriate.

Appellant contends that respondent's evidence concerning what he said at the meeting was vague and non-specific, that it was not clear which names of local officials, if any, he was alleged to have mentioned, and, in effect, that the statements that were established by the evidence were

inoffensive and not inimical to the department's interests. While respondent did rely for the most part on general recollections of what was said, there was sufficient uncontradicted testimony to support a conclusion that appellant's statements could reasonably be said to have a tendency to have impaired the performance of the duties of his position and of the group with which he works, pursuant to Safransky. Some examples of the testimony are as follows:

> Gruentzel: "That it [Peshtigo] was a disaster area... it was the pits, and that the people there should not have let it get into that condition."
>
> Wanner: "I don't remember the specific language used, but he made a reference to the condition of the community [Peshtigo], and I believe, in those remarks, used something related to a fire wouldn't hurt, or something of that type of comment."
>
> Albert: "The one I remember [about Peshtigo] was they shouldn't have put the fire out and that their downtown efforts were poor-downtown development efforts were poorly managed."
>
> Anderson: "...the remarks were humorous in their intent, but the ones I particularly took note of were the ones where personal names were brought into the discussion, names of mayors and cities and council members and naming villages, towns and cities in quite derogatory ways... I particularly remember Peshtigo, where there were references made to the Peshtigo fire, and paraphrasing now, something on the order of that it's too bad the fire isn't still burning, or it would have been better if Peshtigo would burn again type of thing... my opinion was it was an embarrassing situation on behalf of the administration, our department, and for the peoples whose names had been used as examples of people that weren't too intelligent, that were kind of dumb because they didn't do things as Bert had suggested in their various community meetings or the fact of the community being called the pits of Wisconsin... in my opinion, his reaction to almost all the communities he used as negative examples as far as their willingness to do Main Street programs on his terms and his conditions were ridiculed and belittled in his remarks, from naming mayors of communities and members of downtown committees, aldermen, so forth. The inference was that these people were not very smart, that they didn't do it his way and therefore he

> kind of mocked and ridiculed them in his comments and he went through a number of examples... his remarks implied very clearly that these people were not very bright, were dumb, they didn't do it his way, they haven't gotten their programs off the ground, all those kinds of things."

While appellant put a good deal of stress on the fact that respondent's witnesses either weren't sure whether specific names of individuals were used, or couldn't recall the names of the individuals, this is not of great significance because appellant did mention officials associated with specific communities, as well as, according to Mr. Anderson, two to six specifically by name. For example, appellant's comments about Peshtigo discredits the officials involved in Peshtigo's downtown development regardless of whether appellant referred to them by name. On this record, there certainly is nothing suspect about Mr. Wegenke's testimony concerning appellant's talk:

> ...it is his responsibility as set out in his position description to represent the department, to encourage use of his programs and of the department's programs, and by speaking in an abusive manner... he was not carrying out those responsibilities in his position description.

Since there is nothing intrinsic in respondent's case that would lead to the conclusion that Mr. Wegenke's concerns were unfounded, in the absence of any contradictory evidence from appellant, the Commission is constrained to conclude that respondent has satisfied its burden under Reinke and Safransky.

However, this is not the end of the inquiry. As pointed out above, the nature of the stipulated issue requires that the Commission determine whether appellant's actions violated the following work rules:

1.2 Neglecting job duties or responsibilities.

1.5 Falsifying records or giving false information....

> 4.2 Threatening, intimidating, interfering with, or using abusive language toward others."

As was discussed above, the record does not support a finding that appellant gave out false information, and there was no notice provided in the notice of suspension identifying the statements which formed the basis for this alleged rule violation.

With regard to the charge of neglecting job duties or responsibilities, the Commission agrees with appellant that the conduct involved here simply does not fit within any reasonable definition of "neglect," which connotes a failure to attend to something rather than to the improper or inadequate performance of duties:

> ...to ignore or disregard... to fail to care for or attend to sufficiently or properly... to fail to carry out (an expected or required action) through carelessness or by inattention; leave undone.... WEBSTER'S NEW WORLD DICTIONARY, 1972 (Second College Edition), p. 951.

As to Work Rule 4.2, appellant did not threaten, intimidate or interfere with anyone by his remarks. The question is whether it can be said he used "abusive language" toward anyone. The word "abusive" has been defined as: "...coarse and insulting in language; scurrilous; harshly scolding...." supra, p. 6.

Whether language is abusive depends to some extent on the context and setting. A casual remark made to a co-worker which might not be considered abusive might be considered "coarse and insulting" or "harshly scolding" when made to a customer or a member of the public. Given the context of appellant's position and the setting in which the remarks were made, it can be concluded that appellant's remarks fit within the definition of abusive language.

Appellant contends that this kind of an interpretation would raise constitutional First Amendment issues by imposing overly-broad and vague

restrictions on speech. The Commission cannot agree. Assuming, arguendo, that this Constitutional provision would apply to a work rule of the kind involved here, appellant is chargeable on this record with actual notice that his remarks would not be acceptable to management, because he was a management-level, professional employe who had been twice counseled previously regarding caustic speech. Indeed, he was in fact aware that his talk could very well get him into hot water with the department, as he told the audience that his pay and pension benefits weren't enought to keep him from speaking his mind.

It does not appear that appellant is contending that his suspension for what he said at the Ashland conference violated his First Amendment rights in a substantive sense. In any event it does not appear that such a contention could succeed. While appellant's speech would probably be considered to have been on a matter of public concern, he was disciplined because of the abrasive way in which he expressed himself rather than because of the substance of his criticisms. See McAdams v. Matagorda Co. Appraisal Dist., 798 F. 2d 842, 846 (5th Cir. 1986). Furthermore, even if respondent's concerns could be characterized as running to the substance of his criticisms, in the context of the nature of appellant's job the employer's interest in maintaining good working relationships with local officials would outweigh appellant's interests in being able to express his opinions under the balancing test mandated by Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, (1968). Cf. Dicks v. City of Flint, 684 F. Supp. 934 (E.D. Mich. 1988); Schultz v. Industrial Coils, Inc., 125 Wis. 2d 520, 373 N.W. 2d 74 (Ct. App. 1985).

As to appellant's comments about the unnamed state legislator as set forth in Finding 4.b., the Commission cannot conclude on this record that

they were so harsh as to fall within the meaning of abusive language (Work Rule 4.2) or the Safransky test of just cause. The only specific testimony about this was as follows:

> Wanner: " ... it [appellant's statement] was obviously related to the retreat that was held out-of-state, and the discussion, in terms of the concerns of the legislator being somewhat silly, or something to that effect. I can't remember if he used those exact words ... sort of implying it was silly on the legislator's part to raise it or, I don't know if silly is the correct word, but it didn't make sense.
>
> Q [CROSS]: Do you remember Bert saying something about it didn't make sense because the Chicago Bears trained in Wisconsin and if we're going to close the border then nothing from Chicago would come to Wisconsin?
>
> A: Yes, I believe there was something of that."

While these remarks could be characterized as critical and possibly somewhat demeaning, they are not abusive.

The last question the Commission must address is whether the discipline imposed was excessive in light of the performance problems that were documented. In Barden v. UW-System, No. 82-237-PC (6/9/83), the Commission held:

> "In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior record."

In the instant case, there is very little information about appellant's prior record within DOD, other than that he had been counseled twice concerning inappropriate, caustic language or behavior. There is also not a great amount of information concerning the dimensions of appellant's misconduct. While respondent satisfied the Safransky test, appellant's actions did not appear to be that egregious, as compared for example with the prior situation where he took a microphone away from the mayor of South Milwaukee. Furthermore, not all of the misconduct relied on by the

appointing authority in imposing a three-day suspension was established. Two of the three work rules were found not to have been violated. Therefore, it is appropriate to reduce the discipline imposed. The Commission does not believe it would be appropriate to completely eliminate the suspension, because of appellant's record of having failed to respond to two prior counseling attempts involving similar problems. Appellant should have been aware as a result of the counseling that the department was very concerned with his confrontational, abrasive style of dealing with clients and the public, yet he persisted in this kind of approach with his speech before a large group of urban development professionals. Accordingly, the Commission will modify the disciplinary action by reducing it to a one day suspension.

ORDER

Respondent's action suspending appellant for three working days without pay is modified by reducing it to a suspension of one working day without pay, and this matter is remanded to respondent for action in accordance with this decision. Appellant's motion to dismiss that was made at the close of respondent's case is denied in part and granted with respect to those elements of the changes against complainant for which just cause was not established.

Dated: _____,1989 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

AJT:jmf
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DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

Parties:

Bert Stitt
120 South Franklin
Madison, WI 53703

Bruno Mauer
Secretary, DOD
P.O. Box 7970
Madison, WI 53707