

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ALI FOFANA

Appellant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 88-0150-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal of a decision of the Department of Health and Social Services, respondent, to suspend Ali Fofana, appellant, for one day without pay. The issue agreed to by the parties which governed the hearing held in this case was:

"Whether respondent's action to suspend Ali Fofana for one day on November 30, 1988, was for just cause."

FINDINGS OF FACT

1) At all times relevant to the issues under review in this case, the appellant was an Institution Aid 5 at the Wisconsin Resource Center (WRC) and reported to Ms. Kaye Craven, a Unit Manager classified as a Social Services Supervisor 2.

2) Ms. Craven is one of three unit managers and is responsible for 2 buildings (units), each with 20 patients. She directly supervises four Institution Aid 5's, one Program Assistant 1, one Social Worker, and a Psychologist. The Institution Aid 5's are responsible for supervising a staff of Institution Aid 1, 2 and 3's from both a personnel and a program standpoint.

3) Ms. Craven was appointed Unit Manager in August 1987. The appellant was not initially assigned to Ms. Craven's unit. The appellant was subsequently assigned to Ms. Craven in October, 1987, as part of a plan implemented to address staffing problems related to supervisory coverage.

4) One of the significant elements of the plan was that supervisory coverage and scheduling would be changed from an institution wide basis to a unit basis. All unit managers and Institution Aid 5's attended a meeting in which the treatment director (Robert Williams) discussed his concerns with staffing and the new scheduling method to be used, which included Institution Aid 5's.

5) On April 20, 1988, Mr. Harron wrote a memorandum to Ms. Craven (appellant's Exhibit 2) identifying problems associated with monitoring tardiness of Institution Aid 5's. Mr. Harron was then Roster Book Supervisor, a position which serves as a central repository for all employee schedules. He was located in the break room (also referred to as the shift room) and was responsible for monitoring employee attendance based on the schedule. Mr. Harron identified several problems with monitoring Institution Aid 5's, such as their not reporting to the break room prior to their shift, last minute schedule changes of which he was not aware, and being rebuffed by unit managers (other than Ms. Craven) when he brought issues concerning Institution 5's to their attention. Mr. Harron suggested several steps to take to formalize the monitoring of Institution Aid 5's and make it the responsibility of the Roster Book Supervisor. No changes were made as a result of this memo and the monitoring of Institution Aid 5's remained the responsibility of each unit manager.

6) Ms. Craven issued memorandums on 2/23/88 (Respondent's Exhibit #7) and 10/17/88 (Respondent's Exhibit #8) addressing issues such

as scheduling leave time, unanticipated calls from employes to use sick leave, and scheduling leave time on an ad hoc basis. The 10/17/88 memorandum indicated that use of leave time not previously approved would be contingent upon obtaining adequate supervisory coverage for the unit. Adequate coverage was defined as a minimum of two supervisors on the unit. These supervisors would first be drawn from other Institution Aid 5's assigned to her unit, or, in the alternative, from another unit if the other unit manager approved. The appellant received copies of both of these memorandums.

7) The written institution policy on tardiness is contained in a policy and procedures manual, specifically Policy Number 3.5.6., Subject: Tardiness Work Rules Interpretation, dated June 15, 1987 (Respondent's Exhibit #4). The policy states that for violations within the preceding 12 months the following disciplinary actions are normally to be taken.

a) First and second violation - Counseling from supervisor but no formal disciplinary action.

b) Third violation - Verbal reprimand

c) Fourth violation - Written reprimand

d) Fifth violation - One (1) day suspension without pay

e) Sixth violation - Three (3) day suspension without pay

f) Seventh violation - Five (5) day suspension without pay

g) Eighth and additional violations - From a ten (10) day suspension without pay up to and including discharge (to be determined by the appointing authority).

8. The appellant knew of this policy and Ms. Craven had discussed it with him.

9. The appellant was tardy on 2/5/88, 4/3/88, 7/13/88, 9/28/88 and 11/9/88. Each tardiness policy violation was addressed consistent with the progressive discipline policy identified above in Finding #5. An investigatory/pre-disciplinary meeting was held before taking any discipline action for the third (7/13/88), fourth (9/28/88), and fifth (11/9/88) times appellant was tardy. Appellant was disciplined for each of these incidents as identified in Finding #7 b., c. and d., respectively.

10. The appellant had on at least 3 occasions mentioned to Ms. Craven that the tardiness policy was not being administered uniformly on an institution-wide basis and asked her to investigate. Ms. Craven did speak to Phil Macht (WRC Director) and the other unit managers during regularly scheduled meetings about this issue, but no action was taken and Ms. Craven did not follow up with the appellant after these discussions.

11. Until November 14, 1988, the only Institution Aid 5 documented as being tardy was appellant. Mr. Harron stated in his April 20, 1988 memorandum (Finding #5) that as of that time, the appellant was the only Institution Aid 5 who had documented tardies. Mr. Harron had written up tardies on other Institution Aid 5's but there was no further documentation of them in the Roster Book.

12) On occasions an incident of tardiness may be excused by the supervisor and not charged to the employee. Ms. Craven had previously excused a January, 1988, tardiness of the appellant because her unit had adequate coverage.

13) On the morning of November 9, 1988, appellant was scheduled to be at work at 6:00 a.m. He called Ms. Craven at 5:40 a.m. at home and said that he would be late and asked to use holiday time. Ms. Craven asked about supervisory coverage on the unit. Appellant said he had called the

institution and there was coverage at the institution. Ms. Craven felt that there was not adequate coverage for her unit since the second supervisor (Mr. Harron) on her unit was not scheduled to come in until 7:00 a.m. Ms. Craven denied appellant's request and told him to report to work as soon as possible.

14) At the investigatory/pre-disciplinary hearing on November 16, 1988, (Respondent's Exhibit #1) and in a November 14, 1988, memorandum from Ali Fofana to Phil Macht (Appellant's Exhibit #1), appellant pointed out problems he felt existed with the uniform administration of the tardiness policy on an institution-wide basis by all supervisors. The record reflects testimony that other Institution Aid 5's had called in before a shift and been allowed to use leave time to cover times when they would be late (tardy). Ms. Craven would approve the use of unscheduled leave time in these cases only if there was adequate coverage.

15) Ms. Craven did counsel two other Institution Aid 5's (other than appellant) on the issue of tardiness. Ms. Craven's administration of the tardiness policy was consistent and uniform.

16) The one day suspension of the appellant was consistent with the notice and hearing requests for due process. Specifically, Mr. Fofana received a memorandum dated November 15, 1988, from Ms. Craven (Respondent's Exhibit #1) identifying the date of the meeting (November 16, 1988) as well as the time and location. The specific incident (30 minutes late for work on 11/9/88) and work rule violation (Work Rule #14) were identified. Mr. Fofana was informed he could have a representative at the meeting and did have a union official (Mike Lillie) at the November 16, 1988 investigatory/pre-disciplinary hearing.

17) Respondent issued a formal letter of suspension dated November 22, 1988 (Respondent's Exhibit #1) suspending appellant for one day on November 30, 1988.

18) The appellant filed a timely appeal of his one day suspension with the Commission on December 23, 1988.

#### CONCLUSIONS OF LAW

1) This case is properly before the Commission pursuant to 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 the 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 a one-day suspension of the appellant for tardiness.

#### DISCUSSION

In reaching a determination on the issue of just cause, the Commission identified the following questions as a guide to its inquiry in Mitchell v. DNR, Case No. 83-0228-PC (8/30/84).

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

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

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<sup>1</sup> 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),

... one 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. (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 799.

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

In the instant case, the Respondent identified a specific disciplinary policy to deal with the issue of tardiness (Finding #7). The appellant was aware of this policy and was given sufficient opportunity to discuss the charged conduct and to present his side of the story before any disciplinary action was taken. Appellant's defense centers around the uniform application of the policy between various units (and unit managers) at the Wisconsin Resource Center. There is no indication on the record that he was not aware of the policy or wasn't given notice of the reasons for the Respondent to consider discipline and an opportunity to be heard.

More specifically, an analysis of the three questions raised in Mitchell indicates the following.

1) Appellant has committed the conduct alleged by respondent — There was no dispute of fact presented at the hearing which showed that the appellant was not tardy on the 5 days during the preceding 12 months identified by the respondent (Finding #9). The appellant argues that the administration of the tardiness policy for other units was more lenient and that he was being singled out. There is no indication on the record that appellant was being singled out. To the contrary, Ms. Craven was uniform in administering the tardiness policy in her unit, and had in effect

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<sup>2</sup> "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 Employment Security Commission v. Iowa Merit Employment Commission, 231 N.W. 2d 854, 857 (1975).... p.6."

counseled other Institution Aid 5's about their tardiness consistent with this policy. In addition, Ms. Craven also took the necessary administrative steps to cancel one of appellant's tardies because she had adequate coverage. Her concern about adequate coverage and the use of unscheduled leave time was further emphasized in her October 17, 1988 memorandum (Finding #7).

2) The conduct constitutes cause for the imposition of discipline — The disciplinary policy provides a progressive scheme for addressing tardiness. Based on the need for punctuality to address program needs, provide an orderly process for scheduling employes, and to avoid having to change other employes' schedules, the Commission concludes that there was cause for discipline to be imposed.

The appellant argues that other units and unit managers are more lenient and allow their Institution Aid 5's to call in before a shift and use leave time to cover being tardy. One witness (Mike Lillie) did state that he had knowledge of this occurring. The record, however, contains no information on how often this happens, how many Institution Aid 5's are involved, and what if any, the basis is for other unit managers to allow leave time to be used to cover being tardy.

Appellant asked Ms. Craven to investigate this matter. While she did talk to her supervisor and other unit managers at staff meetings, she did not talk to any Institution Aid 5's or provide any feedback to the appellant about her discussions. Ms. Craven testified that, in part, this was due to the lack of specificity by appellant on who was allowed to take leave time to cover a tardy. Ms. Craven did, however, reinforce how the policy would be enforced in her work unit. The record shows uniform application and contains no information which indicated that she treated



any other Institution Aid 5's that she supervised differently or allowed them, in similiar circumstances, to take leave time to cover a tardy. The evidence in record also does not show that there was any ambiguity in appellant's mind about what the policy was or how Ms. Craven would administer it. Appellant was not mislead or placed in a situation where he could not conform his behavior to the policy.

To the extent that appellant argues that calling before the time an employ is scheduled to work is sufficient to allow use of leave time to cover a tardy, the Commission rejects this argument as inconsistent with the institution's policy and with the specific guidance provided by Ms. Craven. While extenuating circumstances and adequate coverage may result in an employe not being marked tardy, none of these elements are present in the instant case.

The appellant also argued that the Institution Aid 5's were in a better position to know the staffing needs at 6:00 a.m. because they were present and unit managers, like Ms. Craven, normally came to work at 8:00 a.m. The appellant indicated that no programming occurred between 6:00 and 7:45 a.m. and, therefore, his tardiness wasn't really a problem. This argument goes to the staffing pattern for units and the policy on tardiness. The Commission does not find these arguments persuasive, and concludes that the staffing patterns and disciplinary policy on tardiness are reasonable. An employe's conclusion that different actions could be taken, or staffing levels set on a different basis, does not show management's policy to be unreasonable.

3) The Commission concludes that in the instant case the amount of discipline imposed was not excessive. This is based on the progressive

nature of disciplinary policy on tardiness, and that the appellant received four warnings prior to the imposition of the one-day suspension.


The appellant argued that when he called Ms. Craven on the morning of November 9, 1988, he only wanted to use enough leave time to cover his being tardy. Ms. Craven testified that she thought the appellant wanted the entire day off. This issue was discussed at the investigatory/ predisciplinary meeting on November 16, 1988. The record does not reflect whether agreement was reached on what was requested. More importantly to this case, however, is that the record does not show that respondent's action to direct appellant to report to work as soon as possible or to treat his tardiness as the fifth offense would have been different.

The appellant made reference to a Department of Health and Social Services manual which defined just cause (Appellant's Exhibit #1) which talked about applying discipline in a consistent manner to all employees in similar circumstances. In Ms. Craven's unit, all Institution Aid 5's were treated similarly. Whether other Institution Aid 5's in other units may have been allowed to use leave time to cover tardiness is not something Ms. Craven has control of. The Commission cannot therefore conclude that she did not have just cause to impose discipline just because some other unit manager might handle the situation differently.

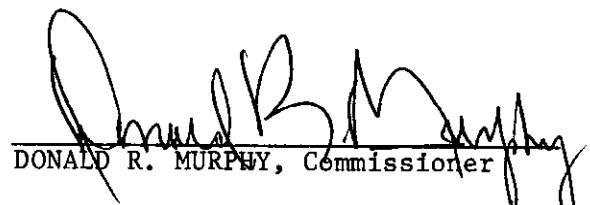
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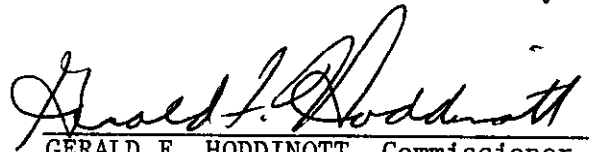
The action of respondent to suspend the appellant for one-day is affirmed and this case is dismissed.

Dated: January 10, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

GFH:gdt  
JMF08/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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