STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM A. HEBERT,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 89-0093-PC

DECISION AND ORDER

Nature of the Case

This is an appeal of a five-day suspension without pay. A hearing was held before Laurie R. McCallum, Chairperson, on October 19 and November 27 and 28, 1989. The parties were permitted to file briefs and the briefing schedule was concluded on or around May 6, 1990.

Findings of Fact

1. At all times relevant to this appeal, appellant has been employed by respondent as a Program Assistant Supervisor 2 at the Wisconsin Resource Center (WRC). The duties and responsibilities of appellant's position include the administration and coordination of the WRC's mail and property control operation, laundry operation, tailor shop, forms ordering and distribution, and supply ordering and distribution; assisting in the administration of the WRC canteen; and supervising and directing the activities of subordinate staff and inmate workers in these areas of responsibility.

2. The WRC is a medium security correctional institution with 160 adult male inmates. Most of the WRC's inmates are incarcerated at the WRC for treatment purposes related to emotional or mental disabilities. It is manage-

ment policy at the WRC to treat all inmates the same as much as possible or practicable since actual or perceived favoritism can cause great agitation for an emotionally vulnerable inmate which, in turn, can cause a security problem for the institution. Appellant was aware of this policy. The WRC also has very detailed and stringent policies and procedures governing inmate clothing and inmate personal property. These policies and procedures are considered necessary in order to maintain the security of the institution, i.e., by limiting the types of clothing and property inmates are allowed to possess or acquire, the institution is able to reduce the opportunity for more dominant, aggressive inmates to take property from other inmates or to establish commercial ventures to gain control over other inmates. Anything of value is used by inmates to purchase drugs, for blackmail, for paying off gambling debts, etc. Appellant was a member of the WRC's seven-member Property Committee which was responsible for overseeing the institution's property control system, reviewing the institution's policies and procedures relating to property, and recommending changes to these policies and procedures. Appellant was very familiar with these policies and procedures.

3. Appellant was also familiar with the WRC's work rules for its employees. Not only did appellant acknowledge in writing on March 17, 1987, that he was aware of his responsibility to read such rules but he also attended a training session for supervisors, which included information on the institution's work rules, and a training session relating to institution security. These work rules specifically prohibit, in section 250.2, the unauthorized use of state-owned property, equipment or supplies, and, in section 254.2 C5, the use of state property for the private benefit of the employee.

4. Some time in March of 1989, WRC inmate Duanell Johnson was being transferred out of the institution and asked appellant if he could keep a state-owned bedspread which had faded from red to pink when it had been washed. Appellant allowed inmate Johnson to keep the bedspread and to add it to his list of personally owned property. When this action was questioned by Mark Johnson, one of appellant's subordinates, who was checking inmate Johnson out of the WRC, Mr. Johnson called appellant who confirmed that he had given his approval for the action. Appellant did not have the independent authority to approve this action.

5. WRC's policies and procedures relating to inmate property do not permit inmates to possess bedspreads and permit inmates to use only those bedspreads provided by the institution.

6. On or around May 5, 1989, WRC inmate Chris Dettman took material from three new state-owned bathrobes and had one larger bathrobe constructed by another inmate in the WRC tailor shop. This larger bathrobe also had lapels, buttons, and button holes. Appellant directed that this larger bathrobe be added to inmate Dettman's list of personally owned property. When Dave Launders, one of appellant's subordinates, told appellant that he could not do this, appellant directed Mr. Launders to add the robe to inmate Dettman's list of personally owned property. Appellant testified at the hearing that inmate Dettman told him that he had found a damaged bathrobe in the rag barrel and asked if he could repair it for his use and that, on that basis, appellant had given his approval. Appellant did not have independent authority to approve adding this bathrobe to inmate Dettman's list of personally owned property.

7. Bathrobes are not an item of clothing included in the standard clothing issue to inmates at WRC. Inmates are permitted to use personally owned bathrobes in the institution but these bathrobes are not permitted to have buttons or button holes.

8. It is appellant's responsibility to inspect the items in the rag barrel, to maintain control over new and used state-owned robes, and to monitor work done by inmates in the tailor shop.

9. Some time in March or April of 1989, appellant was counseled by Delphine Johnson, his first-line supervisor, not to use state time or state-owned WRC word processing equipment for purposes of completing assignments for the college classes in which he was enrolled. Ms. Johnson had observed appellant using WRC equipment for such a purpose.

10. Some time early in 1989, appellant approached Phil Macht, WRC Director, and asked that he be permitted to undertake a project which would involve the introduction of a quality control system into the institution and which would satisfy certain requirements for an assignment he had received for one of the college classes in which he was enrolled. Mr. Macht advised appellant to present a written proposal to him. Appellant prepared a two-page written proposal for Mr. Macht on state time and using a state-owned typewriter and presented it to Mr. Macht on or around March 30, 1989. Mr. Macht advised appellant that he would need further information on the cost of such a project in terms of employee time and other WRC resources before he could reach a decision. Appellant failed to provide such additional information to Mr. Macht and the project was never approved.

11. Some time between February 28, 1989, and June 26, 1989, appellant used a state-owned typewriter on work time to type four single-spaced pages

for an assignment for one of the college courses in which he was enrolled and to draft two chapters for the project for which he had solicited but never received Mr. Macht's approval. Appellant did not have his supervisor's approval for this action.

12. Ms. Johnson had approved adding state-owned bedding to WRC inmate Ball's personal property list after inmate Ball had made restitution for damaging such bedding. This action was consistent with WRC policies and procedures, i.e., inmates are allowed to keep as their personal property damaged state-owned items for which they have made restitution.

13. WRC inmate Green, who was the size of an average 7-year-old, was permitted to add certain state-owned clothing and shoes to his personal property list after the institution ordered these items for him to accommodate his small size. The institution's standard issue clothing and shoes did not fit inmate Green. This action was approved by WRC supervisors at a higher level than appellant.

14. WRC inmate Vanderbeek, who was too large to fit into the institution's standard issue clothing, was permitted to add certain state-owned clothing to his personal property list after the institution ordered these items for him to accommodate his large size. This action was approved by WRC supervisors at a higher level than appellant.

15. In response to allegations of improper actions on the part of appellant made by WRC inmate Dockerty, including those summarized above relating to the bedspread, bathrobe, and appellant's use of a state-owned typewriter on state time, Ms. Johnson scheduled an investigative meeting which was held on May 25, 1989. Inmate Dockerty was very agitated about these alleged incidents and felt that appellant was playing favorites. Appellant was represented

by Chris Vanevenhoven whom he had selected to represent him. Appellant had originally been given 10 minutes' notice of the meeting but this time period was extended at appellant's request to allow him an opportunity to locate a representative. At this meeting, appellant stated that all of the allegations against him were false. At the end of the meeting, appellant was advised that he was suspended with pay until an investigation of the allegations could be completed.

16. In a memo dated June 20, 1989, appellant was advised by Ms. Johnson that a second investigatory meeting had been scheduled for June 22, 1989, at 2:00 p.m.

17. This second investigatory meeting was conducted by Ana Secchi, WRC Personnel Director, and appellant was again represented by Mr. Vanevenhoven. At this meeting, appellant stated that he requested and received approval from Ms. Johnson to have the bathrobe altered and given to inmate Dettman; that he requested and received approval from Jay Sandstrom, WRC Security Director, to give the bedspread to inmate Johnson; and that he denied using state time or state-owned equipment for school work. Ms. Johnson was asked whether she gave such approval and she stated that it had never been requested and, if it had, she would have denied it. Mr. Sandstrom was asked whether he gave such approval and he stated that it had never been requested and, if it had, he would have denied it.

18. In a memo dated June 27, 1989, from Ms. Secchi, appellant was advised that a predisciplinary hearing had been scheduled for June 30, 1989.

19. At this predisciplinary hearing, appellant was again represented by Mr. Vanevenhoven. Also present were Mr. Macht and Ms. Secchi. Appellant reiterated that he had requested and received approval for his actions in re-

gard to the bedspread and bathrobe from Ms. Johnson and Mr. Sandstrom and had noted such on his desk calendar or in the inmate's property files. After appellant indicated that such notations had been made, the hearing was recessed and the calendar and inmate files were retrieved. Neither the calendar nor the inmate files contained any such notation and appellant was never able to locate or produce these notations. Also at this predisciplinary hearing, appellant denied using state time or equipment for school work until he was shown a transcript prepared using the ribbon from the typewriter located at his work station. Appellant then stated that he had forgotten about using the typewriter for this purpose.

20. In a letter from Mr. Macht dated July 5, 1989, appellant was advised as follows, in pertinent part:

> This is official notification of a disciplinary suspension of five (5) days without pay for violation of the Department of Health and Social Services Work Rules Nos. 1 and 3 which state:
>
> "All employees of the Department are prohibited from committing any of the following acts:
>
> 1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
>
> 3. Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment, or supplies."
>
> Your days of suspension without pay will be July 3, 4, 5, 6 and 7, 1989. You should not report to work on those days. You will be expected to report to work at the start of your regularly scheduled shift on all other days.
>
> This action is being taken because you gave inmate Duanell Johnson a State owned faded red bedspread for his use and you authorized inmate Chris Dettman to alter considerably a State owned bathrobe and gave it to him for his use. In both instances you failed to obtain authorization from your supervisor before you directed your subordinate staff to place these items in the inmates' property list.

> Also, you used a State owned typewriter and ribbon to do personal school work without the prior approval or knowledge of your immediate supervisor.

21. The only comparable disciplinary action cited for comparison purposes in the record involved a non-supervisory employee at Winnebago Mental Health Institute (WMHI) who was suspended without pay for 5 days for preparing billing statements for a private physician using state time and state equipment. WMHI and WRC are considered a single employing unit.

22. Appellant filed a timely appeal of this suspension with the Commission.

Conclusions of Law

1. The Commission has jurisdiction over this appeal of a disciplinary suspension without pay pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden to prove that there was just cause for the subject disciplinary action and that such action was not excessive.

3. Respondent has sustained this burden of proof.

Decision

The underlying questions in an appeal of a disciplinary suspension under §230.44(1)(c), Stats., are: (1) whether the greater weight of the credible evidence shows that appellant 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 for the imposition of discipline; and (3) whether the imposed discipline was excessive. (See Mitchell v. DNR, Case No. 83-0228-PC (8/30/84)).

In regard to the bedspread incident, the record clearly shows that appellant allowed an inmate to keep a state-owned bedspread, to add it to his list

of personally owned property, and to remove it from the institution. In regard to the bathrobe incident, the record clearly shows that appellant allowed an inmate to alter a state-owned bathrobe and to add it to his list of personally owned property. The record also clearly shows that these actions are inconsistent with institution policy and procedures and with WRC work rules 1 and 3, that appellant was familiar with such policies and procedures and work rules, and that appellant did not have the independent authority to authorize such exceptions to such policies and procedures. Appellant alleges that he solicited and received approval from Mr. Sandstrom for his action in regard to the bedspread incident and from Ms. Johnson for his action in regard to the bathrobe incident and that he made contemporaneous notations of such approvals. However, not only did Mr. Sandstrom and Ms. Johnson deny that they gave such approval, they also indicated that they would not have given such approval had they been asked for it since such action would create a breach of security. In addition, appellant was never able to locate and/or produce the notations he claimed to have made of Mr. Sandstrom's or Ms. Johnson's approvals. The Commission concludes on this basis and on the basis that appellant made other misrepresentations in regard to the typewriter incident, that appellant did not receive approval from Mr. Sandstrom for his actions in regard to the bedspread incident or from Ms. Johnson in regard to the bathrobe incident. Appellant also seeks to justify his actions by citing incidents he feels were comparable which were approved by WRC management, i.e., the Green, Ball, and Vanderbeek incidents summarized in Findings of Fact 12, 13, and 14, above. However, the record shows that these incidents are each distinguishable from the bedspread incident under consideration here. The action taken in the Ball incident was consistent with WRC policies and procedures and was

approved by a higher level supervisor than appellant. The action taken in the Green and Vanderbeek incidents was necessary because of the unusual sizes of the inmates involved and was approved by a higher level supervisor than appellant. Appellant also seeks to justify his actions in regard to the bathrobe incident by stating that inmate Dettman only requested that he be allowed to alter a bathrobe found in the rag barrel, i.e., that he was not aware of the fact that three new bathrobes were used to make one larger bathrobe. However, appellant was responsible for not only the contents of the rag barrel but also for the maintenance and distribution of new bathrobes and for work performed in the tailor shop. Appellant may not have been aware of what was done to create the bathrobe for inmate Dettman but, as a result of the duties and responsibilities of his position, he should have been. In addition, this argument does not address the fact that appellant allowed a bathrobe to be created which had buttons and button holes, in clear violation of WRC clothing requirements, and that appellant allowed this robe to be added to inmate Dettman's list of personally owned property. Respondent has shown that appellant committed the conduct alleged by respondent in regard to the bedspread and bathrobe incidents and that such conduct constituted a violation of WRC policies and procedures and WRC work rules 1 and 3.

To determine whether respondent has shown just cause for the discipline taken in relation to the bedspread and bathrobe incidents, the Commission looks to the general framework for analysis of just cause for disciplinary action enunciated in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974):

> " . . . 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 . . . "

It seems obvious to the Commission that such a showing has been made here. By allowing an inmate to add a state-owned bedspread to the list of his personal property and to remove it from the institution, and by allowing an inmate to alter three state-owned bathrobes, to create a larger bathrobe from the three which has buttons and button holes, and to add it to the list of the inmate's personally owned property, in clear violation of WRC policies and procedures, appellant set a poor example for his subordinates and created a potential security problem by showing favoritism for particular inmates and by investing particular inmates with a property advantage over other inmates. Failing to set a good example for subordinate employees would certainly have a tendency to impair the performance of the duties of a supervisory position and creating a potential security problem in a correctional institution would certainly have a tendency to impair the efficiency of the group with which appellant works.

In regard to the typewriter incident, the record shows that appellant used a state typewriter on state time to complete homework assignments for a college level course in which he was enrolled. The record also shows that appellant did not have the authorization of his supervisor for this action and, in fact, had been warned earlier by his supervisor not to engage in such activities. The record also shows that this action is inconsistent with institution work rules 1 and 3 and that appellant was familiar with such work rules. Appellant argues that at least part of such work was prepared for a project authorized by Mr. Macht. However, it is clear from the record that Mr. Macht authorized only that appellant prepare a proposal for such project and did not give his approval for appellant to proceed with the project. In addition, appellant's credibility in regard to this incident is certainly impaired by the fact that he continued to deny that he was using state time and resources to do school work

until he was confronted with a transcript prepared using the ribbon from the typewriter located at his work station. Respondent has shown that appellant committed the conduct alleged by respondent in regard to the typewriter incident and that such conduct constituted a violation of WRC work rules 1 and 3.

Applying the Safransky test to the typewriter incident, the Commission has consistently held that the use of state time and state resources for personal reasons in violation of agency work rules has a tendency to impair the performance of the duties of the employee's position and the efficiency of the group with which he works. (See Zabel v. DOT, Case No. 82-137-PC (11/30/83); Blake v. DHSS, Case No. 82-208-PC (1/4/84)). Once again, appellant's role as a supervisor would render this result even more compelling.

The final question under Mitchell is whether the discipline imposed was excessive. In view of the fact that respondent has shown just cause for the imposition of discipline for three separate incidents, at least two of which resulted in the creation of a potential security problem in a correctional institution; and that, as a supervisor, appellant was and should have been held to a higher standard than a non-supervisory employee, the Commission concludes that the imposition of a five-day suspension was not excessive. This conclusion is buttressed by an examination of the elements of the only comparable disciplinary action cited for comparison purposes in the record (See Finding of Fact 21, above). In that action, a non-supervisory employee was suspended for five days without pay for a single incident which did not have any security ramifications. Although the record does not indicate how long this employee may have been engaging in the subject activities, which could have a bearing on the length of discipline imposed, the evidence which is present in the

record in regard to this WMHI disciplinary action tends to strengthen respondent's position that the discipline imposed on appellant was not excessive.

Order

The action of respondent is affirmed and this appeal is dismissed.

Dated: June 27, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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