

JAMES C. HARRON,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES

Respondent.

Case No. 89-0152-PC

DECISION
AND
ORDER

This matter is before the Commission as an appeal of a five day suspension. The parties agreed to the following statement of issue:

Whether respondent's suspension of appellant for five days without pay was for just cause.

FINDINGS OF FACT

1. The appellant, who at the time of hearing was 57 years of age, has been employed at the Wisconsin Resource Center (WRC) as an Institution Aide 5 for seven years. Appellant's responsibilities during that period have included supervision of subordinate aides at WRC.

2. WRC is a facility operated by the Department of Health and Social Services for the treatment of inmates.

3. In both 1987 and 1988, the appellant was rated in the highest of four categories ("exceeds expectations") on his discretionary award reports for previous 12 month periods. Prior to that time, the appellant's evaluations rated his performance at or above the satisfactory level.

4. The appellant is generally regarded as quite friendly.

5. Kathy Karkula served as the personnel director for WRC. On at least one occasion Ms. Karkula spoke with the appellant due to concerns Ms. Karkula had about the appellant's interrelationships with female employees at WRC, including the appellant's physical contact with the female employees. Ms. Karkula was concerned that the appellant's friendly nature, which included

comments and physical contact, would be misinterpreted by the employes. This conversation with the appellant was not conducted by Ms. Karkula as a disciplinary action but occurred as part of a casual conversation with the appellant.

6. On April 18, 1989, Karen Moyle, a WRC employe, filed a memo with her supervisor which stated, in part:

On Thursday, April 13th, at approximately 10:45, I met Aide 5 Jim Harron in the hallway of B-side basement. This had been about the 4th time I had seen him that morning in the area. I jokingly said, "Did they move your office down here too?" As I remember, he didn't hear me the first time so I repeated myself because he turned and asked me what I had said. All I remember after that is he had hold of my right wrist and it hurt. In the next 20 seconds or so I asked him to let go several times. I looked down the hallways to see if anyone else was there, but didn't see anyone. By this time he also had my right elbow in his other hand. His grasp hurt me and I felt panicky. I wanted to go back to class and get away from him. I looked at the stairs and in the mirror on the wall. I told him to let me go. I remember saying, "What if an inmate comes? We could get into trouble." I pushed my arm towards him and then pulled it away quickly. He let go at this and I said as I left that I had to go back to class and help with the role plays. He made some comment about us not being able to role play. I felt very frightened throughout the incident I have just described. I was totally caught off guard and surprised by Aide Harron's actions. I remember much of what occurred, but exact words or time sequence are blurry. My main thought was to get out of there.

I reported the incident to Jerry Bednarowski, my Supervisor

On Friday, April 14th, I met with Scott Trippe and asked if he would sit in while I discussed this with Aide 5 Harron. Scott, Jim and I met for about 20 minutes in Scott's office. Jim said he was only horseplaying and said he was shocked that I was hurt, both physically and emotionally. I still do not understand why he did what he did, but I feel the air was cleared and I can work with Jim in a professional manner without fear of this occurring again.

The appellant was counselled informally regarding the incident but did not receive any formal discipline. During the counselling, the unit chief cautioned the appellant against being too friendly with subordinate staff.

7. On or about September 14, 1989, the appellant and approximately 25 other supervisors at WRC participated in a half-day training seminar on the topic of sexual harassment. The seminar was conducted by Frank Humphrey of

the Department of Employment Relations. The seminar included several hand-outs, role-playing exercises and a videotape of a related segment from the ABC television program "20/20."

8. Respondent has a policy prohibiting the sexual harassment of any employe. The policy defines sexual harassment to include:

[u]nwelcome sexual advances ... and other verbal or physical conduct of a sexual nature ... when ...[s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

The appellant was aware of the policy.

9. The appellant was also aware of an administrative directive issued by the respondent in April of 1988 setting forth the department's harassment policy. The directive stated, in part:

BACKGROUND

This directive is being issued to clearly and unequivocally state the expectation that all employes be treated with respect in a harassment free work environment Harassment of employes by co-workers, supervisors or managers in the Department of Health and Social Services will not be tolerated.

GUIDELINES

Sexual Harassment is defined as unwelcome sexual advances, unwelcome verbal or physical conduct of a sexual nature, or unwelcome physical contact of a sexual nature. This includes but is not limited to deliberate, repeated display of offensive sexually graphic materials. [emphasis in original]

10. Early in October of 1989, two inmates on the appellant's unit in WRC assembled a scarecrow as part of Halloween decorations for the unit. One of the Aide 3's on the unit, Pat Briggs, remarked that when she had been employed as an Aide at Central Wisconsin Center, the patients there had also made a scarecrow.

11. The WRC security director concluded that the scarecrow represented a security risk and directed that it be removed from the unit. The security director understood that Ms. Briggs had authorized the construction of the scarecrow and asked the appellant to counsel her about the incident.

12. Ms. Briggs and the appellant worked on the same unit but on different shifts. They had a normal, friendly work relationship. Their sole social contact was one occasion when the appellant saw Ms. Briggs in a bar and bought her and her friend a drink.

13. On October 10, 1989, the appellant conducted the counselling session for Ms. Briggs in a vacant room on the work unit. The room had two windows so that staff or inmates in the hallway could see into the room.

14. The appellant and Ms. Briggs were the only persons present during the session. At the beginning of the session, Ms. Briggs asked whether she needed a union representative. The appellant indicated that no representative was necessary.

15. The appellant felt that the security director's concern about the scarecrow was unfounded.

16. Ms. Briggs did not agree with the decision to remove the scarecrow from the unit but she was not distressed or upset by the security director's action once she was told she would not be disciplined.

17. At the close of the session, both the appellant and Ms. Briggs stood up from the table. Ms. Briggs' arms were at her sides, the appellant approached her, put both his arms around her in an embrace and kissed her on the cheek in a manner best described as a "peck." The appellant immediately left the room and Ms. Briggs went back to her responsibilities.

18. Ms. Briggs was upset and shocked by the unwelcomed physical contact. She confided in a male co-worker who suggested she speak to someone else about it.

19. Had the appellant been scheduled to work the next day, Ms. Briggs would have confronted him about his conduct. However, because the appellant had the day off, Ms. Briggs contacted WRC management about the incident.

20. The appellant was suspended with pay and after an investigatory hearing and a predisciplinary hearing, respondent issued a letter dated October 25, 1989. The letter stated, in part:

This is official notification of a disciplinary suspension of five days without pay for violation of the Department of Health and Social Services Work Rules #1, 2, and 5 which state:

"All employes 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.
2. Abusing, striking, or deliberately causing mental anguish or injury to patients, inmates, or others.
5. Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employe."

Your days of suspension without pay will be October 30, 31, November 1, 2, 3, 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 based on the incident of 10/10/89, when you, after a counseling session with a staff member, hugged and kissed her on the cheek.

A predisciplinary meeting was held on October 23, 1989. In attendance were Jerry Bednarowski (Acting Unit Manager), Kathy Karkula (Personnel Manager), Stance Bergelin (Representative) and you. At that meeting you acknowledged that you did hug and give the staff member a peck on the cheek. You indicated it was a spontaneous reaction. You felt the staff member was upset and needed reassurance.

This behavior by a supervisor is not condoned. Workshops and job instructions regarding counseling and reassuring staff members have been provided to management staff at this institution.

21. The inmates at WRC are manipulative. Had the October 10th incident been observed by an inmate, the inmate could have attempted to use the information to exert influence on the staff of the institution.

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.

OPINION

In disciplinary appeals, the Commission is required to apply a two-step analysis:

First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded 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. Holt v. DOT, 79-86-PC, 11/8/79

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline as follows:

[O]ne appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974)

The initial step is to determine whether the allegations contained in the letter of discipline are true. Here, the appellant admitted that he both hugged and kissed Ms. Briggs. The contact was not welcomed by Ms. Briggs.

The respondent's letter of suspension states that this conduct violated three separate work rules:

1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
2. Abusing, striking, or deliberately causing mental anguish or injury to patients, inmates, or others.
5. Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employe.

The Commission agrees that the appellant violated work rule 5 in that his October 10th conduct constituted behavior unbecoming a state employe. The appellant also violated work rule 2 because he should have foreseen that the likely consequence of his conduct would be to cause mental anguish for Ms.

Briggs. However, appellant cannot be said to have violated work rule 1. While he was aware of the respondent's April, 1988 harassment policy which called for a "harassment free work environment," he did not fail to follow any specific instructions or directions as to how to carry out his counselling session with Ms. Briggs.

The Commission also concludes that the appellant's conduct clearly merited discipline. The unwelcomed physical contact would undermine the normal working relationship which otherwise would have existed between the appellant and Ms. Briggs. Knowledge of the contact also could have served as a tool for one or more WRC inmates to exert leverage over members of the staff. These results would certainly "have a tendency to undermine" the performance of the appellant, of Ms. Briggs and of the work unit. Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974)

There are a variety of other factors which support the imposition of a five-day suspension against the appellant. Just six months prior to the incident with Ms. Briggs, the appellant was counselled after he grabbed the arm of another female employe, Karen Moyle. The appellant also had been told informally on another occasion by the WRC personnel director to be careful about his physical contact with the female employes. Then, less than one month before the Briggs incident, the appellant was one of approximately 25 supervisors who attended a sexual harassment training program conducted at the institution. These events along with the respondent's sexual harassment policy and harassment directive clearly placed the appellant on notice that unwelcome physical contact of a sexual nature was inappropriate behavior.

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 impair the employer's operation, and the employe's prior work record with the respondent. Barden v. UW-System, 82-237-PC, 6/9/83. With the exception of the informal counselling for the Moyle incident, the appellant's prior work record was excellent. However, the appellant's positive work record is more than offset by the October 10 incident's potential to undermine the performance of the work unit, the fact that the appellant had been counselled about similar conduct just six months earlier and the failure of the appellant to heed the message contained in the respondent's

sexual harassment policy and harassment directive and in the sexual harassment seminar held in September of 1989.

The appellant contended that the information provided during the sexual harassment seminar was unclear. He noted that at the end of the seminar, the instructor posed twelve hypothetical situations and asked each attendee whether the conduct constituted sex discrimination ("Yes"), whether the conduct did not constitute sex discrimination ("No"), or whether it might be discriminatory ("Maybe"). Another attendee at the seminar testified that these scenarios were not clear and 9 or 10 of his answers were wrong. Yet the same witness stated that he learned from the seminar that you always have to be careful because determining whether sexual harassment occurred is a "judgmental thing" and that others will be judging your conduct. In addition, there was no evidence that the seminar suggested it would ever be appropriate for a supervisor to hug and kiss another employe in the workplace.

The appellant also argued that because of his age, it is more difficult for him to deal with society's revised standards of conduct in the workplace. The Commission cannot accept the appellant's implicit suggestion that earlier in his lifetime it would have been appropriate for a supervisor to hug and kiss another employe during a counselling session. The Commission also does not accept the appellant's request to be treated differently because of his age. An employer who applied two different standards of conduct for its supervisory employes based on the ages of those employes would run afoul of the statutory prohibition against age discrimination.

Finally, the appellant suggested that there were comparable incidents known to the respondent which did not result in discipline as severe as a five day suspension. However, for the most part, the incidents identified by the appellant are not comparable. The appellant did not identify any incidents involving unwelcome conduct of a sexual nature¹. Evidence relating to fights by inmates was properly excluded because it did not relate to an em-

¹The record does include a copy of a complaint of sex discrimination (Regina v. DHSS, 87-0071-PC-ER) filed by a female supervisor at WRC who failed to pass probation. The complaint included allegations of sexual harassment. However, those allegations were denied by the individuals named in the complaint, and there is no evidence in this record that the respondent ever concluded that sexual harassment took place in that case. The complaint of discrimination was ultimately dismissed by the Commission for lack of prosecution.

ploye/employer relationship. There is limited evidence in the record of a fight in November of 1987, between two aides, one of whom was a supervisor (Mark Nelezen). The supervisor was required to reimburse the respondent for damage to an intercom box caused by the fight. The supervisor was also counselled or verbally reprimanded regarding his conduct, although the record does not indicate when that counselling occurred. Bob Williams, WRC Treatment Director conducted an "investigatory/predisciplinary meeting" regarding the incident on December 22, 1987, and left his position shortly thereafter. In a memo dated January 28, 1988, the personnel manager of WRC pointed out that management was dissatisfied with the procedures followed by Mr. Williams and that there were timeliness problems with taking further action:

I have reviewed the brief notes left by Mr. Williams regarding the "hearing" which he held on December 22, 1987. From these notes it is not possible to document that due process for this employee took place. Even the memo that Mr. Williams sent to the employee does not state what the incident consisted of for which the employee was alleged to have violated work rules.

Inasmuch as it is essential that Management be consistent in handling work rule violations, my recommendation would be that a predisciplinary meeting be held with Mr. Nelezen, in a formal manner, to document exactly what happened and to afford Mr. Nelezen his due process rights as outlined by the two attorneys at the Director's meeting.

Obviously, Phil, there is a problem of timeliness in this particular incident handling; however, I fully concur with your feeling that we do not set a precedent that fights, assaults, or any other such is overlooked at WRC.

The Nelezen incident occurred nearly two years prior to the incident which serves as the basis for the instant appeal. The available evidence suggests that Mr. Nelezen should have been more severely disciplined for his conduct, that WRC management was not satisfied with the results of the disciplinary process undertaken by Mr. Williams and that by January of 1988, management recognized there were time problems with respect to reopening the investigation of Mr. Nelezen's conduct. Given these circumstances, the level of discipline imposed on Mr. Nelezen carries little weight in terms of reviewing the appropriateness of the degree of discipline imposed against the appellant.

Based on consideration of all of the above information, the Commission concludes that a 5 day suspension was not excessive discipline for the appellant's conduct.

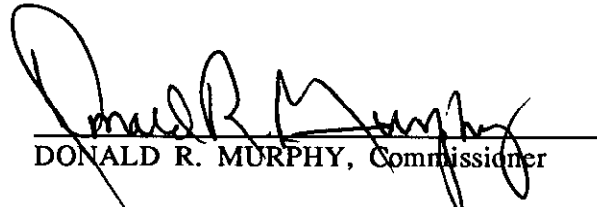
ORDER

Respondent's action of suspending the appellant for five days is sustained and this appeal is dismissed.

Dated: June 27, 1990 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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