

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ALIEU FOFANA,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0120-PC


* * * * *

INTERIM
DECISION
AND
ORDER

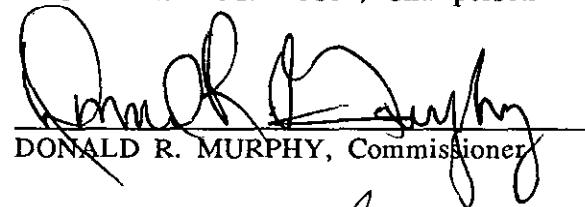
After considering the objections filed by respondent and consulting with the hearing examiner, the Commission adopts the attached proposed decision and order, issues it as an interim decision and order in this matter, and adds the following language to the opinion section:

The respondent contends that there "is no evidence to support a claim that professionals [such as Mr. Whitley] are '... expected to function at a high level in matters involving security....'" Even though Mr. Whitley was not on the institution's security staff, Phil Macht, the director of the Wisconsin Resource Center, testified that all institution employes had a security component in their responsibilities. Mr. Macht believed that there was some security responsibility specifically noted in Mr. Whitley's position description. Mr. Whitley clearly had not been assigned security responsibilities at a level greater than the appellant's. However, Mr. Whitley still had significant security responsibilities, as testified to by the institution director, and, therefore, was expected to perform at a "high level" regarding security matters.

Dated: June 28, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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ALIEU FOFANA,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case No. 90-0120-PC

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PROPOSED
 DECISION
 AND
 ORDER

This is an appeal of a decision by the Department of Health and Social Services, suspending from work the appellant, Alieu Fofana, three days without pay for alleged violation of a work rule. While the Commission concludes that the suspension must be rejected because the predisciplinary proceedings were inadequate in terms of procedural due process, since this decision is being issued on a proposed basis under §227.46(2), Stats., it will address all issues.

FINDINGS OF FACT

1. Alieu Fofana, appellant and permanent classified civil service employe with respondent, is a Psychiatric Care Supervisor at the Wisconsin Resource Center.
2. The Wisconsin Resource Center (WRC) is a medium security correctional institution (prison) housing 160 male inmates.
3. As a Psychiatric Care Supervisor (formerly called an Institution Aide 5), appellant was responsible for management of a unit operation during an eight-hour shift. This includes assigning and coordinating schedules for aides and supervision of assigned Psychiatric Care Technician 3 staff members. He had no formal disciplinary record prior to the instant suspension.
4. Appellant's position description, dated August 4, 1987, assigns twenty-five percent (25%) of the time to the duty captioned: Responsibility for shift management of center operation. Under this general heading are nine (9) specific listings, including the duty to:

(A.2) Investigate, take appropriate action and inform unit chief of all unusual incidents involving residents, staff, work unit and building environmental management problems for consideration, evaluation, recommendations and solutions.

5. On February 28, 1990, WRC Director, Phillip Macht, advised appellant by letter that he was being suspended without pay for three days — March 12, 13, and 14, 1991 — for violation of the department's Work Rule No. 1. It in pertinent part provides: "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."

6. Macht further stated, in the letter, that appellant was being disciplined as a consequence of his failure to report a violation of the WRC fraternization policy by another employe.

7. The respondent identified Paula Cloud as the employe appellant failed to report as violating respondent's fraternization policy. Ms. Cloud was employed at WRC as an Institution Aide 3, not under appellant's supervision, until she was given a disciplinary termination on February 26, 1990.

8. Paula Cloud's husband was Robert Cloud, a non-state employe, from whom she was estranged.

9. One evening, early 1990, Robert Cloud, escorted by local police as the result of an injunction placed against him by his wife, arrived at appellant's residence to live for a short period of time.

10. That evening, while at appellant's residence, Robert Cloud talked to appellant about his wife. He talked about many things: killing his wife, setting a bomb in her car, stealing the children. He also said his wife was "going out" with a former inmate on parole and he was going to get her in trouble.

11. Appellant advised Cloud of the seriousness of the allegation about his wife, because she could possibly lose her job.

12. Robert Cloud refused to name the former inmate or supply any other information to appellant about his allegation of fraternization by his wife.

13. The next day appellant called Paula Cloud and questioned her about Robert Cloud's allegations. Paula Cloud denied any involvement with any inmate.

14. Three days later Robert Cloud told appellant he had fabricated the fraternization accusations about his wife and that he had done so because he had been angry and wanted to hurt his wife.

15. During this same time period, Robert Cloud made three telephone calls to WRC:

First call: Cloud asked about the institution's fraternization policy.

Second call: Cloud told WRC he knew some employe who was violating the fraternization policy.

Third call: Cloud identified himself and told WRC he had fabricated his prior story about fraternization.

At least two of Cloud's calls were received by Henry Klemmer, the Security Shift Captain at WRC.

16. Robert Cloud also told Gary Whitley and Robert Nyang that Paula Cloud was fraternizing with an inmate.

17. Gary Whitley, a Social Worker 1 at WRC, was a life long personal friend of Robert Cloud. He advised Cloud not to report it to WRC.

18. Robert Nyang was a boyhood and closest friend of appellant. He formerly was employed at WRC, but currently works at Ethan Allen School, Wales, Wisconsin, as a Youth Counselor. Nyang had known Robert for ten years.

19. Later, Robert Cloud talked with Byran Bartow on two occasions about Paula Cloud fraternizing with an inmate. On each occasion the conversation was preceded by a telephone call from Cloud to Bartow. Bryan Bartow was the Treatment Director at WRC. He supervised the institution's direct care staff. He and the Security Director reported directly to the WRC Director, Phil Macht. Bartow Directly supervised appellant's supervisor, Jerry Bendrowski.

20. During the first conversation Cloud told Bartow that Paula was fraternizing with an inmate and he could prove it.

21. Two or three days later Cloud returned to Bartow's house for another conversation about his allegations against Paula.

22. During one of these conversations, Cloud informed Bartow he had made similar allegations about his wife to Gary Whitley and appellant.

23. Mr. Bartow had known the appellant, Robert Nyang, Gary Whitley and the Clouds for several years. He was among their circle of social friends. At one time Bartow and appellant were close personal friends and lived in the same household, but since 1987 their friendship had deteriorated to the point of antagonism.

24. Mr. Bartow informed his supervisor Phil Macht, WRC Director, about Cloud's allegations concerning his wife Paula Cloud. Macht assigned Bartow to investigate the incident, but was unaware of Bartow's social relationship with Paula Cloud, Robert Cloud, Gary Whitley, Robert Nyang and appellant. Normally, the immediate supervisor conducts such investigations.

25. On February 16, 1990, during a pre-disciplinary meeting conducted by Macht and Bartow, Paula Cloud admitted to prohibited contacts, in violation of the fraternization policy, with a former inmate on parole. Paula Cloud was suspended with pay and later terminated from service with respondent.

26. Later, on February 16, 1990, Byran Bartow conducted individual investigation meetings with appellant and Gary Whitley. Whitley admitted Robert Cloud had made allegations about Paula Cloud and he advised Cloud not to inform WRC. Bartow recommended Whitley not be disciplined, but receive further counseling. WRC did not discipline Whitley for his failure to report Cloud's allegations to his supervisor.

27. On February 21, 1990, a pre-disciplinary hearing was held with appellant, his representative Robert Whittaker, WRC Personnel Manager, Kathy Karkula and Byran Bartow. Appellant acknowledged that he had not informed his supervisor of Robert Cloud's allegations about his wife.

28. By a letter dated February 28, 1990, appellant was officially notified he was being given a disciplinary suspension of three days without pay for violating DHSS Work Rule No. 1 effective March 12, 1990.

29. On March 22, 1990, the Personnel Commission received a letter from appellant appealing his disciplinary suspension by respondent.

CONCLUSIONS OF LAW

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

2. Respondent failed to provide a predisciplinary process that was adequate in terms of due process.

3. The three-day suspension without pay is rejected.

DISCUSSION

The Commission in Mitchell v. DNR, Case No. 83-228-PC (8/30/84) identified three questions as a guide to reaching a determination in disciplinary cases:

1) Whether appellant committed the conduct alleged by respondent in its letter of suspension,

2) Whether such conduct, if true, constitutes just cause¹ for imposition of discipline, and

3) Whether the imposed discipline is excessive.

Addressing the first question, respondent's letter of suspension states that appellant was disciplined for violating the department's Work Rule No. 1 by failing to report that an employe had violated the WRC fraternization policy. Respondent's Work Rule No. 1 is a listing of employe prohibited acts. They are: "disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directives, or instructions."

Since appellant admits to failing to report an allegation that an employe had violated WRC's fraternization policy, the initial question is whether this constituted "[d]isobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions," as respondent charges. In this regard, the parties devoted considerable discussion to the question of whether the WRC fraternization policy required appellant to make such report. In addressing this question, it is necessary to scrutinize the fraternization policy in connection with the respondent's contentions.

The WRC fraternization policy in pertinent part provides:

¹ In Safransky v. Personnel Board, 62 Wis 2d 464, 474, 215 N.W. 2d 379 (1974) the court defined "just cause" 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 . . .

"POLICY:

Employees of WRC:

1. May not have a non-job related relationship with an inmate, client, or resident under the supervision or custody of the Division of Corrections or WRC, DCTF.

* * *

APPLICATION:

This policy is applicable to all employees of WRC (whether permanent, project, or limited term, and also includes students and interns) in relationship to all adult and juvenile offenders under the custody and supervision of WRC and the Division of Corrections. This would include individuals on adult probation and parole, juvenile aftercare, or adults and juveniles committed to state correctional institutions including the Wisconsin Resource Center. This policy also applies to relationships between WRC employees and the spouse of an inmate, client, or resident or an individual that lives in the household or former household of an inmate, client or resident. This policy does not apply to former inmates, clients, or residents not currently under the custody o[r] supervision of the Division of Corrections. The policy also does not apply to relationships between WRC employees and immediate members of the employee's family who are inmates, clients, or residents under the custody or supervision of the Division of Corrections.

EXCEPTION PROCEDURES:

1. Each employee is responsible:
 - a) For informing his/her immediate Supervisor in writing of any relationship he/she is considering or is presently involved in which has the potential of violating this policy
 - b) For reporting unanticipated non-employer-directed contacts with inmates, clients, or residents.
 - c) To see that any of the contracts in (b) are brief and business-like in nature
 - d) For requesting any exceptions to this policy through his/her Immediate Supervisor.
2. Supervisors shall submit the specifics of any contacts or requested exceptions referred to in Exception Procedures (1)(a)(b)(c)(d) to the Director through the appropriate Unit Chief, Security Director, or Treatment Director. The report should include a recommendation from the supervisor. The Director shall review all recommendations and either approve or deny the request."

* * *

Interpretive Notes 1

* * *

APPLICATION continued

The policy governs relationships between employes and all adult and juvenile offenders under the custody and supervision of the Division of Corrections and Wisconsin Resource Center, including individuals on adult probation and parole, juvenile aftercare (including juveniles on aftercare where the county is providing the aftercare service), and adults and juveniles committed to state correctional institutions, including the Wisconsin Resource Center. Offenders not under Division custody or supervision ("off paper") are not covered by this policy. Juveniles under county probation or adults serving jail time and no concurrent probation term would also not be covered by this policy.

The policy also does not apply when the inmate is an immediate member of the employes' family as discussed under the definition of immediate member of an employes' family. The policy does apply to relationships between employes and spouses of inmates who live in the households or previous households of the inmates as discussed under the definition of inmate.

Respondent contends that, under the fraternization policy, employes are required to report allegations of violations by another employe. In support respondent makes the arguments as follows:

... a majority of witnesses who testified on this question stated one of the following:

1. The policy contains such a requirement explicitly or implicitly,
2. WRC policies generally imply such a requirement, or
3. They would report such a situation because they believe it to be consistent with the intent, if not the letter, of WRC fraternization policy.

Upon review of the record, the evidence shows that none of the witnesses identified language in the fraternization policy which specifically requires an employe or supervisor to report allegations of fraternization policy violation by other employes. Mary Klemz, WRC Acting Personnel Director, testified the policy does not specifically require reporting of allegations of policy violations, but in her opinion a supervisor has that responsibility. Phillip Macht, WRC Director, testified: "I don't know if it

(fraternization policy) specifically states that. I think there is enough inferences in there that a reasonable person could assume that they would have to report it." Other supervisors, who were peers of appellant, testified they would report allegations of fraternization policy violations because they believed it was required and it would protect them from possible criticism. However, two of these supervisors testified they had not reported all allegations of WRC rule violations by other employees.

It is the belief of the Commission that no language in WRC's fraternization policy specifically requires an employe or supervisor to report allegations of violations by other employes. While a reading of the policy might suggest such requirement, it is not plainly expressed. In addition, respondent's directive regarding employe discipline requires management to clearly communicate standards of conduct to the employes.²

Respondent also argues that appellant received direct instructions in two Performance Planning and Development Reports (P.P.D.) and his Position Description (P.D.) to report "potential work rule violations" by any WRC staff member. In the referenced P.P.D.'s under the heading "Performance Expectations or Standards," it states:³

- 1.g Complete supervisory related tasks as identified in all policies and procedures under Chapter 3: Personnel of WRC Manual including:

* * *

3.1.6 Fraternization

* * *

- 3.e Document any observed inappropriate behavior or potential work rule violation of any institutional staff and report to supervisor as soon as possible.

The pertinent language in appellant's P.D. is:

25% A. Responsibility for shift management of center operation.

² Personnel and Employment Relation's Directive, Subject: Employe Discipline, ch.264, June 1985.

³ This language is found in PPD, report period 2/1/89 through 2/1/90 (Respondent's Exhibit 13). Similar language is found in PPD, report period 6/26/89 through 6/26/90 (Respondent's Exhibit 14).

- A1. Interpret, and implement as instructed, policies, procedures, and directions given by the unit chief as they relate to residents and staff.
- A2. Investigate, take appropriate action and inform unit chief of all unusual incidents involving residents, staff, work unit and building environmental management problems for consideration, evaluation, recommendation and solutions.

This language supports respondent's position. Appellant was required to "[d]ocument any observed inappropriate behavior or potential work rule violation of [emphasis added] any [emphasis is original] institutional staff and report to supervisor as soon as possible." On the face of it, this applies to appellant's situation. Once he became aware of Mr. Cloud's allegation that his wife was involved with a former inmate/parolee, appellant was aware of a potential rule violation by a WRC staff member, and according to his P.P.D. he should have documented this and reported it up the chain of command as soon as possible. Therefore, appellant's failure to have done this constituted either negligence or refusal to carry out written directions, or both, as alleged in the letter of suspension, with respect to the directives set forth in his P.P.D.

The second question is whether appellant's inaction constitutes just cause cause for discipline. Under Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W.2d 379 (1974) "just cause" is established when "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 efficiency of the group with which he works." Respondent presented strong and basically uncontradicted evidence that violation of the fraternization policy by staff would have a tendency to endanger institutional security, and that, as a corollary, failure of a supervisor to report an allegation of such a violation would contribute to the security risk involved. On the other hand, it also was established that supervisors typically were privy to a wide range of information about possible work rule or institutional policy violations by staff, ranging from rank rumors to more reliable reports, and that supervisors had to use some discretion in deciding how to respond. Whether appellant's failure to have reported Cloud's allegations that his wife had been violating the fraternization policy would be considered to fit within the Safransky test depends on whether he acted as a reasonable supervisor would have under the circumstances. As might be expected, the parties differed substantially on this

point. On one hand, appellant argued that Cloud's allegations about his wife were part of an angry diatribe that was laced with outrageous threats, and could not be taken seriously. On the other hand, respondent pointed out that appellant took the allegation seriously enough to check it out with Mrs. Cloud, only to take her obviously self-serving denial at face value and drop the matter there. While appellant's decision not to pursue the matter can be said to have been confirmed to some extent by Mr. Cloud's subsequent retraction of his allegation, caution must be exercised in attempting to evaluate appellant's actions with the benefit of hindsight. The application of hindsight also could require the Commission to consider Ms. Cloud's even later admission of guilt when pressed on the subject in the course of Mr. Bartow's investigation.

To sum it up, in the Commission's view it is a close question whether appellant's actions can be said to have been reasonable under the circumstances. However, in light of the institution's legitimate, overriding concerns about security, and the fact that appellant himself took the allegation seriously enough to have warned Mr. Cloud about the severity of his accusation and to have confronted Mrs. Cloud about it, only to have dropped the matter after her denial, in the Commission's opinion respondent has sustained its burden of proof.

Regarding the level of discipline imposed, respondent contends it was not excessive and makes two arguments: One, that prison security involves the safety of prison staff members, inmates and the general public; and is a relevant factor in the discipline imposed. Two, appellant's status as supervisor is cause to hold him to a higher standard than subordinates. In response, appellant argues that respondent's fraternization policy applies to all department employees and treatment of violators should be consistent. The record indicates that Robert Cloud informed Gary Whitley, Robert Nyang, Bryan Bartow, Henry Klemmer and appellant that he believed his estranged wife, Paula Cloud, was violating the fraternization policy. Of record, only Bryan Bartow reported Cloud's allegations to his supervisor. The record also indicates that only Paula Cloud, Gary Whitley and appellant were investigated for violating the fraternization policy. Paula Cloud admitted fraternizing with a former inmate of WRC and was terminated. Both Whitley and appellant admitted Robert Cloud told them of Paula's infractions. Whitley received no discipline. Appellant was suspended three days without pay.

Respondent argues there was insufficient evidence to discipline Whitley, and appellant had a greater responsibility as supervisor.

Robert Cloud testified he made the same allegations about his wife to Whitley and appellant. Both Whitley and appellant admitted they failed to report Cloud's allegations to their supervisors. While appellant did contact Paula Cloud to determine the validity of the allegations, neither Whitley nor appellant reported the matter. There appears to be little difference between the two employes on that basis. Also, respondent's employe disciplinary policy provides for similar discipline for similar violations and circumstances.

While the Commission agrees with respondent that some distinction can be drawn between the cases on the basis of the fact that appellant as a supervisor has more responsibility with respect to possible disciplinary matters involving other employes, this distinction is tempered somewhat by the fact that Whitley had a professional status and was expected to function at a high level in matters involving security. Furthermore, Whitley not only failed to report Cloud's allegation, but also advised Cloud not to go to WRC management with it. Also, the record does not reflect that when Cloud spoke to Whitley he was in the same highly agitated condition he was when he spoke to appellant. The fact that Whitley was given no disciplinary action at all, while appellant received a three day suspension, suggests that appellant's discipline was excessive.

Another factor to be considered is appellant's prior disciplinary record, Mitchell v. DNR 83-0028-PC (8/30/84). Since there was nothing in the record concerning appellant's prior disciplinary record and respondent has the burden of proof, the Commission must assume that appellant had no prior disciplinary record.

The final factor to be considered pursuant to Mitchell is the "weight or enormity of the employe's offense or dereliction." As discussed above, appellant was faced with a judgment call in deciding whether to report Cloud's allegation. While the Commission concluded that respondent narrowly sustained its burden of proof with respect to the Safransky test, the highly unusual context of Cloud's allegation must at least be considered a substantial mitigating circumstance with regard to the amount of discipline imposed.

In conclusion, the Commission concludes the discipline imposed was excessive and must be reduced to a verbal counseling, which is consistent with Whitley's treatment.

Finally, appellant argues that respondent's investigation procedure was irregular, unfair, and vindictive.⁴ The Commission believes some aspects of appellant's arguments are supported by the evidence. The evidence establishes that normally employe misconduct investigations are conducted by the subject employe's immediate supervisor. While respondent articulated a logical explanation for designating Bartow as the investigator, instead of appellant's immediate supervisor, the evidence makes clear probable incompatible interests caused by Bartow's prior relationships with the various parties involved in the incident. Also, whether Mr. Bartow's actions affecting appellant were vindictive is indeterminable, but again the long standing acrimony between Bartow and appellant taints the integrity of the investigation, and, more significantly, violates appellant's due process rights. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed. 2d 494, 105 S. Ct. 1487 (1985) (predisciplinary hearing required by due process clause). An essential ingredient of a constitutionally adequate predisciplinary hearing is an impartial decision maker. See Goldberg v. Kelly, 397 U.S. 270, 271, 90 S.Ct. 1011, 1022, 25 L.Ed. 2d 287 (1970). In the instant case, the key role in the investigation, predisciplinary hearing, and disciplinary recommendation was played by Mr. Bartow, and it is undisputed that he and appellant had a long-standing personally acrimonious relationship that was not merely a matter of workplace disagreements. While the Commission is not questioning Mr. Bartow's good faith, the fact remains that under these circumstances he could not be considered an impartial decisionmaker. Cf Guthrie v. WERC, 107 Wis.2d 306, 320 N.W.2d 213 (1982), Spoooner Dist. v. N.W. Educators, 136 Wis.2d 263, 401 N.W.2d 578 (1987).

Because appellant was not given an adequate predisciplinary hearing, his suspension must be rejected. If respondent wishes to proceed with disciplinary action on remand, it must provide an adequate predisciplinary hearing.

⁴ Appellant was unrepresented by counsel. The Commission will address his arguments in the context in which they are primarily relevant -- i.e., whether he was denied due process of law.

ORDER

The action of respondent is rejected and this matter is remanded for action in accordance with this decision.

Dated: _____, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM:dah

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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