STATE OF WISCONSIN PERSONNEL COMMISSION

ALAN L. ASCHE,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 90-0159-PC

INTERIM DECISION AND ORDER ON REMAND

The Commission, having reviewed the Proposed Decision and Order and the record in this matter and having consulted with the hearing examiner, adopts the Proposed Decision and Order with the following modifications:

I. That part of the Proposed Decision and Order which begins with the paragraph starting at the bottom of page 9 and which includes all of pages 10 and 11, is modified to read as follows:

Through his actions of bringing the subject photo into the security unit and showing it around, appellant, the on-site supervisor, engaged in an activity which violated respondent's harassment policy. The Commission concludes on this basis that the photo incident had a tendency to impair the performance of appellant's duties as a supervisor and the efficiency and effectiveness of the unit which he supervised.

Appellant argues that the conduct engaged in by appellant did not constitute sexual harassment within the meaning of the Fair Employment Act and Title VII. However, this is not a case brought under the Fair Employment Act and the respondent is not required to show that sexual harassment within the meaning of the FEA actually occurred. Respondent did show that appellant's actions in regard to the photo incident did violate the respondent's policy on harassment which includes not only harassment based on sex and other protected characteristics but also harassment in the form of

"conduct that might be considered abusive, disorderly, or disruptive, regardless of whether the form of conduct violates State and Federal laws and statutes."

Appellant also argues that the failure of the respondent to apply progressive discipline to appellant demonstrates a lack of just cause. However, respondent was not required to follow progressive discipline against appellant, a supervisory employee. Although progressive discipline is a common personnel practice, respondent's failure to follow it in this situation connotes little more than its opinion that the conduct merited more than a verbal warning which the appellant implies in his brief is the proper first step in progressive discipline. The Commission agrees with respondent's opinion.

The final question under *Mitchell* then is whether the discipline imposed was excessive. The discipline under consideration here is the 15-day suspension. In its original decision of this matter (*Asche v. DOC*, 90-0159-PC, 3/10/93), the Commission upheld the 15-day suspension of appellant based on the photo incident and on the failure of appellant to address the actions of Sgt. Schultz and Sgt. Clemons described in Findings of Fact 2.a., 2.c.,and 3., above. In reaching this conclusion, the Commission stated as follows:

> In view of the hostile, demeaning, intimidating, and pervasive nature of the conduct under consideration here; the fact that, by his actions and inaction, appellant tolerated, condoned, and participated in such conduct; and the fact that it was appellant's responsibility as a supervisor to identify and eliminate such conduct, the Commission concludes that a 15-day suspension was not excessive.

Appellant's failure to address the actions of Sgt. Schultz and Sgt. Clemons no longer constitutes grounds for discipline. This failure by appellant, and the resulting atmosphere of harassment, intimidation, and hostility which it fostered, served as the primary underpinning of the Commission's conclusion that a 15-day suspension was warranted. The photo incident, although a secondary consideration, was regarded as not insignificant by the Commission due to the message that it conveyed to the nursing staff that the individual with responsibility for enforcing respondent's harassment

policy on the security unit not only tolerated harassment but actually condoned and participated in it.

Consistent with the above discussion, the Commission concludes that a 15-day suspension is excessive, but that a 3-day suspension is warranted.

II. The following language is added to the Order:

Jurisdiction is retained by the Commission to address any application for fees and costs which may be filed.

Dated: May 21, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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STATE OF WISCONSIN PERSONNEL COMMISSION

ALAN L. ASCHE,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 90-0159-PC

PROPOSED DECISION AND ORDER ON REMAND

NATURE OF THE CASE

This matter reaches the Commission upon remand from the Wisconsin Court of Appeals. Neither party requested an evidentiary hearing. A briefing schedule was established and the final brief was filed on March 7, 1997. In reversing in part the Commission's Decision and Order of March 10, 1993, neither the Dane County Circuit Court nor the Wisconsin Court of Appeals overturned any of the Commission's findings of fact which are hereby adopted for purposes of this remand and set forth below.

FINDINGS OF FACT

1. At all times relevant to this matter, appellant has been employed as an Officer (Lieutenant) by respondent. From April 24, 1988, through February 8, 1990, appellant was the supervisor of a security unit at the University of Wisconsin Hospital and Clinics (UWHC) in which the security function was carried out by appellant and other Officers employed by respondent and the health care function was carried out by employees of UWHC. During appellant's supervision of this unit, each of the nurses assigned to the security unit was female and each of the Officers was male. This security unit is a unit of respondent's Oakhill Correctional Institution and its primary purpose is to provide a secure facility for inmates in need of inpatient medical

treatment. On December 31, 1989, the security unit ceased being a unit of Dodge Correctional Institution and became a unit of Oakhill Correctional Institution.

2. One of the Officers supervised by appellant was Sgt. Schultz. During the period of time relevant to this matter, Sgt. Schultz engaged in the following:

a. Instead of referring to members of the nursing staff by their names, he would frequently refer to them by describing certain body parts or conditions, e.g., "fat-ass nurse," "nice-ass nurse," "knocked-up nurse."

b. Stating, in reference to a member of the nursing staff, that he "wanted to lick her," and, when he was questioned about this comment by a member of the nursing staff, stating, "what do you think we think about when we walk behind you nurses?"

c. Frequently responding to routine work-related requests by members of the nursing staff with hostile and demeaning profanity delivered in a loud and angry voice.

d. Frequently shouting that he "hated nurses," and stating to members of the nursing staff that they "didn't know what they were doing."

3. Another of the Officers supervised by appellant was Sgt. Clemons. When Sgt. Clemons was scheduled to work at the same time as Sgt. Schultz, Sgt. Clemons would also frequently respond to routine work-related requests by members of the nursing staff with hostile and demeaning profanity.

4. Appellant was aware of the behavior on the part of Sgt. Schultz described in Findings of Fact 2.a., 2.c., and 2.d., above, and the behavior of Sgt. Clemons described in Finding of Fact 3., above, through his presence on the unit and as the result of complaints brought to his attention by members of the nursing staff. Appellant counseled Sgt. Schultz about frequently shouting that he "hated nurses" and this behavior on the part of Sgt. Schultz did improve after this counseling. Appellant did not counsel Sgt. Schultz or Sgt. Clemons about any other behaviors or recommend or take any other action relating to these behaviors. On one occasion, in response to a complaint regarding the noisy use of profanity by a group of Officers from the members of the nursing staff, appellant told the group to "knock it off." This group

primarily consisted of Officers from other correctional institutions accompanying inmates scheduled for outpatient treatment. Appellant was not aware of the behavior described in Finding of Fact 2.b.

5. Some of the members of the nursing staff and some of the other Officers, including appellant, also used profanity on the security unit but this use was occasional; was not egregious; was usually directed at a situation, not at another individual; and was not delivered in a hostile or demeaning manner.

6. Connie Rigdon was the supervisor of the nursing staff in the security unit. Ms. Rigdon had a tattoo of a bluebird on one of her breasts. Despite the fact that Ms. Rigdon did not tell any Officers about it or show it to any Officers, certain Officers became aware of this fact and these Officers would mention it on occasion and Officer Wollin would sing the song "I'm Going to Find Me a Bluebird" in her presence. Ms. Rigdon had indicated to these Officers when this first occurred that she didn't like it and wanted them to stop. On one occasion after this, Officer Wollin started whistling the song and one of the other Officers asked how to "find the bluebird." One of these other Officers answered by saying that you had to go, "kiss, kiss, kiss" and by making kissing sounds. There were 8 to 10 Officers, including appellant, present when this occurred. Ms. Rigdon indicated to the Officers that she wanted it to stop. Appellant did not take any action to counsel any of the Officers involved and did not take any other action in this regard.

7. On one occasion, Ms. Rigdon had called Rose Cook-Swingen, another member of the nursing staff, a "bubble butt." Ms. Rigdon was asked by Ms. Cook-Swingen not to do this again and she did not.

8. On one occasion, appellant brought into the security unit a photo of a naked boy with a drawing of a large penis superimposed on it. While appellant was showing this photo to other Officers present in the security unit, it was seen by Natalie Turnquist, a member of the nursing staff. Ms. Turnquist told appellant that it was disgusting and never to show her anything like that again.

9. In response to a written communication from officials of UWHC citing information provided by the members of the nursing staff at the security unit, respondent initiated an investigation of allegations made by UWHC in this communication. These allegations primarily related to conduct on the part of Officers in the security unit which was alleged to involve sexual harassment and to create a hostile work environment. As the result of this investigation, Catherine Ferrey, Superintendent, Oakhill Correctional Institution, directed the following letter to appellant on or around April 6, 1990:

> This is your official notification of the following discipline: (1) a disciplinary suspension of fifteen (15) days without pay and (2) reassignment to Oakhill Correctional Institution for violation of Department of Corrections Work Rules 1 and 5. Work Rule 1 prohibits "Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, direction, or instructions." Work Rule 5 prohibits "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 employee."
>
> In addition, while this reassignment is related to your misconduct while working on the Security Ward that has resulted in this disciplinary action, this reassignment is also based on our administrative responsibilities and concerns.
>
> This suspension is for the following workdays: April 8, 9, 10, 11, 12, 13, 16, 17, 18, 21, 22, 23, 24, 25, and 26, 1990.
>
> You will be expected to return to your regularly scheduled shift at Oakhill Correctional Institution on Friday, April 27, 1990.
>
> During February and March 1990, the Department of Corrections (DOC) investigated a complaint made by the University of Wisconsin Hospital and clinics (UWH&C) that alleged DOC Security staff working on the UWH&C Security Ward had engaged in conduct that constituted sexual harassment of and/or a hostile work environment for UWH&C employees.
>
> An investigatory meeting was held on February 28, 1990, which included you, your representative David Pope, and DOC Investigators Harvey Winans and Ana Secchi. A pre-disciplinary meeting was held on

> March 29, 1990, which included you (you declined representation), Security Director Glen Henderson, and Treatment Director Jeffrey Wydeven. At this pre-disciplinary meeting, the results of the DOC investigation into the allegations were summarized and presented to you for your comments.
>
> Based upon the facts obtained in this investigation and the meetings, I have concluded that you violated Work Rule 1 by your failure to follow the Department of Corrections Policy on Harassment and your failure to recognize and react to inappropriate DOC staff actions and behavior including harassment, and in violation of Work Rule 5 by your use of profane language and by bringing into the work unit a photograph of a naked boy with a large penis overlaid on it. You showed this picture to other staff, and it was seen by a UWH&C staff member who objected to its presence. This conduct would indicate to both DOC and UWH&C staff that you did indeed condone this type of behavior. It is a supervisor's responsibility to set a positive example, be aware of the work place climate and be proactive in terms of prevention.
>
> You have left me no alternative but to discipline you in this manner. This type of conduct can not be condoned. You are expected to conduct yourself in a professional manner at all times.
>
> Any future incidents of this nature or failure to follow Administrative and Work Rules in the future may result in further disciplinary action up to and including discharge.
>
> If you believe that this action was not based on just cause, you may appeal to the State Personnel Commission. This written appeal must be received by the Commission within thirty (30) days of the effective date of this action or within thirty (30) days after you have been notified of the action whichever is later.

10. Effective February 12, 1987, the Division of Corrections of the Department of Health and Social Services implemented the following policy:

> Any employee who engages in harassment of any other employee on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record violates state and/or federal laws. Any employee who permits employees under his/her supervision to engage in such harassment whether such actions were authorized or were forbidden or whether the

> employer knew or should have known of their occurrence also violates state and/or federal law. . . .
>
> In addition, the Division will not condone any form of conduct that might by considered abusive, disorderly, or disruptive, regardless of whether the form of conduct violates State and Federal laws and statutes. The Division believes harassment of any kind, including hazing, has no place in the workplace. Hazing disrupts the work environment, is a violation of this policy, will not be tolerated, and will be subject to appropriate discipline in accordance with this policy. . . .
>
> Offensive verbal or physical conduct constitutes harassment when this conduct (1) has the purpose or effect of creating an intimidating, hostile, or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.
>
> "Sexual harassment" means unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes.

This policy remained in effect when the Division of Corrections became the Department of Corrections (DOC). This policy was in effect and applicable to the DOC employees of the security unit at all times relevant to this matter. Respondent expected each of its supervisors to be familiar with this policy and to be responsible for implementing and enforcing it.

11. It was part of appellant's responsibilities to initiate action to resolve conflicts between the Officers and the members of the Nursing Staff in the security unit. Appellant did not have an on-site supervisor. Prior to the discipline which is the subject of this appeal, appellant's work record had met or exceeded expectations.

12. Appellant filed a timely appeal of this disciplinary action with the Commission.

CONCLUSIONS OF LAW

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

2. Respondent has the burden to show that there was just cause for the subject suspension.

3. Respondent has sustained this burden.

4. Respondent has the burden to show that the 15-day suspension without pay was not excessive.

5. Respondent has failed to sustain this burden.

OPINION

The parties agreed to the following issues on remand:

1. Whether there was just cause for the subject 15-day suspension.

2. If so, whether the discipline imposed was excessive.

The decision of the Circuit Court in this matter (*Asche v. State Personnel Commission,* 93-CV-1365, 12/8/93), stated as follows:

> The Petitioner filed this Petition for Review on April 6, 1993. The Petitioner raises two issues. First, did the Division of Corrections provide sufficient notice to the Petitioner as to the reasons for Petitioner's discipline and transfer/reassignment? Second, is there substantial evidence in the record supporting the Respondent's findings of fact? The court concludes Petitioner did not receive sufficient notice except for the "picture" issue. Therefore, the court remands this matter to the Respondent to revise its decision related to the picture incident or to take whatever other action it deems appropriate.
>
> Section 230.34(1)(b) of the Wisconsin Statutes requires, in part, that the appointing authority must furnish the employee its reasons for discipline in writing. The Petitioner received his notice in an April 6, 1990 letter from Warden Catherine Farrey. This notice is sufficient as to the "...photograph of a naked boy with a large penis overlaid..." claim (the court notes that the Petitioner erroneously refers to a "large pension" in its brief on page 10). The notice is woefully inadequate as to "inappropriate DOC staff actions and behavior including harassment (and) ...use of profane language..." Without more clues as to when, by

> whom, who was present, when the alleged violations occurred and in what context, it is virtually impossible for Petitioner to prepare and defend himself. An employee is not entitled to know every single incident and possible violation but sufficient specifics must be provided to insure fairness in the process. While the pre-disciplinary process may have provided some assistance to the Petitioner, the record does not support a conclusion that the process as a whole provided sufficient notice. State ex rel. Messner v. Milwaukee County, 56 Wis. 2d 438, Wis. Stats.
>
> Respondent is correct that deference by courts must be accorded to an agency's interpretation of a statute if such interpretation requires a knowledge or area of expertise not commonly found. However, whether notice is adequate and sufficient is not such an area. There is no serious factual dispute on the notice issue. Esparza v. DILHR, 132 Wis. 2d 402.
>
> Furthermore, Petitioner has not waived the notice issue by not more specifically stating that claim in his Petition for Review. Petitioner's brief clearly makes this claim apparent before Respondent had to respond.
>
> In conclusion, the court finds that the fairness of the proceedings have been impaired by inadequate notice to the Petitioner and the matter is remanded. The court does not reach the other issues raised by the parties.

This order was affirmed by the Wisconsin Court of Appeals in *Asche v. Wisconsin Personnel Commission & Wisconsin Department of Corrections*, 94-0450, 5/9/95.

In *Mitchell v. DNR*, 83-0228-PC, 8/3/084, the Commission set forth as follows the underlying questions to be answered in the application of a just cause standard to an employer's decision to impose discipline:

> 1. Whether the greater weight of credible evidence shows that appellant committed the conduct alleged by respondent in its letter of discharge;
>
> 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.

The first question under the *Mitchell* analysis then is whether the greater weight of the credible evidence shows that appellant actually engaged in the conduct which has been concluded to have been properly noticed, i.e., the photo incident. The appellant concedes here that he brought the photo into the work unit; that he showed it to other Officers in the work unit; and that, while he was showing it to these other Officers, it was seen by a member of the nursing staff, who found it highly offensive.

The next question is whether the charged conduct the appellant has been shown to have engaged in constitutes just cause for the imposition of discipline. The standard for determining just cause was enunciated in *Safransky v. Personnel Board*, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974) as follows:

> The court has previously defined the test for determining whether "just cause" exists for termination of a tenured municipal employee 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. . . .
>
> . . . Only if the employee's misconduct has sufficiently undermined the efficient performance of the duties of employment will "cause" for termination be found. In determining whether "cause" for termination exists, courts have universally found that persons assume distinguishing obligations upon the assumption of specific governmental employment. . . .

Appellant's responsibilities included supervising his Officers in such a way that both the security priorities and the health care priorities of the unit would be carried out as efficiently and effectively as possible. As a supervisor, these responsibilities necessarily included that of taking appropriate action to assure that the work unit was free of harassment, intimidation, or hostility. Respondent made that clear upon its issuance of its policy on harassment (Finding of Fact 10, above).

The record shows that appellant permitted Sgt. Schultz and Sgt. Clemons to create an atmosphere of hostility and intimidation through their frequent use of angry

profanity in response to the most routine requests from members of the nursing staff, and through Sgt. Schultz's frequent and demeaning identification of members of the nursing staff by reference to body shape or condition. Appellant took no action in regard to this behavior even though it was the subject of frequent complaints to him from members of the nursing staff. No one should have to work under such conditions, and the respondent sent a clear message to this effect to its supervisors, including appellant, through the implementation of its harassment policy.

The photo incident, viewed in the context of the atmosphere in the security unit described above, served to demonstrate that appellant, the on-site supervisor, tolerated and condoned and participated in this "boys will be boys" attitude on the unit which he knew certain members of the nursing staff found highly offensive, demeaning, and intimidating, and which he was aware or should have been aware violated his employer's harassment policy. This was not a situation where appellant was a passive observer. Appellant brought the photo into the work unit and showed it around. The Commission concludes that the photo incident had a tendency to impair the performance of appellant's duties as a supervisor and the efficiency and effectiveness of the unit which he supervised.

Appellant argues that the conduct engaged in by appellant did not constitute sexual harassment within the meaning of the Fair Employment Act and Title VII. However, this is not a case brought under the Fair Employment Act and the respondent is not required to show that sexual harassment within the meaning of the FEA actually occurred. Respondent did show that appellant's actions in regard to the photo incident did violate the respondent's policy on harassment which includes not only harassment based on sex and other protected characteristics but also harassment in the form of "conduct that might considered abusive, disorderly, or disruptive, regardless of whether the form of conduct violates State and Federal laws and statutes."

Appellant also argues that the failure of the respondent to apply progressive discipline to appellant demonstrates a lack of just cause. However, respondent was not required to follow progressive discipline against appellant, a supervisory employee.

Although progressive discipline is a common personnel pratice, respondent's failure to follow it in this situation connotes little more than its opinion that the conduct merited more than a verbal warning which the appellant implies in his brief is the proper first step in progressive discipline. The Commission would agree.

The final question under *Mitchell* then is whether the discipline imposed was excessive. The discipline under consideration here is the 15-day suspension. In its original decision of this matter (*Asche v. DOC*, 90-0159-PC, 3/10/93), the Commission upheld the 15-day suspension of appellant based on the photo incident and on the failure of appellant to address the actions of Sgt. Schultz and Sgt. Clemons described in Findings of Fact 2.a., 2.c.,and 3., above. In reaching this conclusion, the Commission stated as follows:

> In view of the hostile, demeaning, intimidating, and pervasive nature of the conduct under consideration here; the fact that, by his actions and inaction, appellant tolerated, condoned, and participated in such conduct; and the fact that it was appellant's responsibility as a supervisor to identify and eliminate such conduct, the Commission concludes that a 15-day suspension was not excessive.

Appellant's failure to address the actions of Sgt. Schultz and Sgt. Clemons, although relevant to the matters which remain under consideration here, no longer constitutes one of the grounds for discipline. This failure by appellant, and the resulting atmosphere of harassment, intimidation, and hostility which it fostered, served as the primary underpinning of the Commission's conclusion that a 15-day suspension was warranted. The photo incident, although a secondary consideration, was regarded as not insignificant by the Commission due to the message that it conveyed to the nursing staff that the individual with responsibility for enforcing respondent's harassment policy on the security unit not only tolerated harassment but actually condoned and participated in it.

Consistent with the above discussion, the Commission concludes that a 15-day suspension is excessive, but that a 5-day suspension is warranted.

Reassignment

The issues to which the parties agreed in the original proceeding were:

> 1. Whether respondent's disciplinary suspension of appellant for fifteen days without pay was for just cause.
>
> 2. Whether respondent's reassignment of appellant to Oakhill Correctional Institution was an illegal action or an abuse of discretion.

The issue relating to the reassignment of appellant was not part of the issues to which the parties agreed upon remand of the case to the Commission. In view of the fact, however, that the courts did not address this issue in their decisions, the Commission's disposition of this issue in the original decision is hereby adopted and is reproduced here to avoid any possible confusion:

The Commission is puzzled by the statement of the second issue. By the manner in which it is stated and the manner in which it was argued by the parties, the Commission must assume that the parties are invoking the jurisdiction of the Commission pursuant to §230.44(1)(d), Stats. However, this statutory section states as follows:

> **230.44 Appeal Procedures.** **(1)** APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a): . . .
>
> (d) *Illegal action or abuse of discretion.* A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The reassignment of appellant from the security unit to the Oakhill Correctional Institution is clearly not a personnel action "after certification which is related to the hiring process." As a result, the Commission concludes that it does not have subject matter jurisdiction over the second stated issue.

Appellant makes reference to *Basinas v. State*, 104 Wis. 2d 539 in this regard. However, the issue in that case was whether the Commission had jurisdiction pursuant

to §230.44(1)(c), Stats., over a reassignment of a career executive employee to a position in a lower pay range. If the appellant is arguing here that the issue of his reassignment is cognizable by the Commission pursuant to §230.44(1)(c), this argument would necessarily fail because "reassignment" is not one of the disciplinary actions listed in §230.44(1)(c), Stats., and, unlike the fact situation in *Basinas*, appellant is not in a career executive position and, due to the fact that his reassignment was not to a position in a lower pay range, he cannot argue that this action constitutes a "demotion."

Even if the Commission had subject matter jurisdiction over the reassignment issue as agreed to by the parties, the record does not show that respondent's actions in this regard were illegal or constituted an abuse of discretion. Although appellant contends that such a transaction should have been treated as a transfer and, as a result, should have required approval by the Department of Employment Relations, the record does not support such a conclusion. A transfer is defined in §ER 1.02(46), Wis. Adm. Code [now §ER-MRS 1.02(33), Wis. Adm. Code] as the "permanent appointment of an employee to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employee's current positions is assigned." The record shows that appellant remained in the same position with the same position number as the result of the reassignment, and, as a result, the transaction was not a transfer. Although appellant claims that the security unit was a part of Dodge Correctional Institution until July of 1990 and, therefore, appellant was "transferred" between employing units, not "reassigned' within the same employing unit, the record shows that the security unit became a part of Oakhill Correctional Institution on December 31, 1989. It does not appear that appellant has alleged any other illegality.

"Abuse of discretion" is defined for purposes of §230.44(1)(d), Stats., as ". . . a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Such abuse is not present here. Respondent concluded that, in view of appellant's failure as a supervisor to take action to correct hostile, intimidating, and

demeaning conduct on the part of his subordinates and in view of his actual participation in such conduct, he was not the supervisor who could successfully work to establish a good working relationship with the nursing staff and who could successfully work to establish an appropriate work environment, and he should be removed from the unit. It cannot be concluded that it is not justified by and clearly against reason and evidence for an employer to remove from a supervisory role an employee who not only failed to correct but actually played a part in creating an unacceptable work environment.

ORDER

The action of respondent is affirmed in part and reversed in part. This matter is remanded to respondent for action in accordance with this decision.

Dated: _____, 1997

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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