STATE OF WISCONSIN PERSONNEL COMMISSION

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ALAN L. ASCHE,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 90-0159-PC

* * * * * * * * * * * * * * * * * *

ORDER

After reviewing the Proposed Decision and Order and the objections and arguments filed by the parties in relation thereto, and after consulting with the hearing examiner, the Commission adopts the Proposed Decision and Order with the following modifications:

I. Finding of Fact 6 on page 3 is modified to read as follows:

> 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.

The changes in this finding were made to more accurately reflect the record. These changes do not affect the Commission's decision on the underlying issue, however, since it was appellant's awareness of this incident and failure to take any action in regard to this incident, not the nature of Officer Wollin's participation, which are relevant.

II. The following language is added to the first paragraph on page 10 for purposes of clarification:

> Respondent did show that appellant's actions and inactions 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, disdorderly, or disruptive, regardless of whether the form of conduct violates State and Federal laws and statutes."

Dated: March 10, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/lrm/rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

STATE OF WISCONSIN PERSONNEL COMMISSION

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ALAN L. ASCHE,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 90-0159-PC

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PROPOSED DECISION AND ORDER

Nature of the Case

This is an appeal of a disciplinary suspension and a reassignment. A hearing on the merits was held on April 8 and 9 and May 20 and 21, 1992, before Laurie R. McCallum, Chairperson. The parties were required to file briefs and the briefing schedule was completed on August 28, 1992.

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 Finding 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 You 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 singing the song and one of the other Officers asked him how to "find the bluebird." Officer Wollin 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 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, negli-

gence, or refusal to carry out written or verbal assignments, directions, 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 acts 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 of 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. The issue of whether there was just cause for the subject suspension is properly before the Commission pursuant to §230.44(1)(c), Stats.

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

3. The respondent has sustained this burden.

4. The Commission does not have subject matter jurisdiction over the issue of whether the subject reassignment was illegal or an abuse of discretion.

Opinion

The parties agreed to the following issues:

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.

Just Cause for Suspension

In Mitchell v. DNR, 83-0228-PC (8/30/84), 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.

In the instant case, as the result of the Commission's Interim Decision and Order issued April 3, 1992, not all of the conduct alleged in the subject letter of discipline was concluded to have been properly noticed. This Interim Decision and Order summarized the conduct specified in the subject letter of discipline as follows:

> 1. [Appellant] bringing into his work unit a photo of a naked boy and showing it to other staff, including a UWHC staff member who objected to its presence;
>
> 2. [Appellant's] use of profane language in the work unit; and
>
> 3. [Appellant's] failure to take appropriate action when he was aware that subordinate staff were using profane language, language with a sexual connotation, or otherwise inappropriate language in the work unit; or that subordinate staff were engaging in other inappropriate behavior.

The Interim Decision and Order went on to conclude that the notice provided in the subject disciplinary letter was sufficient as to all of the conduct specified except that summarized in item 3. above as "Appellant's failure to take appropriate action when he was aware . . . that subordinate staff were engaging in other inappropriate behavior." This conduct had been generally described by respondent as follows:

> a. Sgt. Schultz slamming the door in front of hospital staff faces.
>
> b. Sgt. Schultz arguing with correctional and hospital staff.
>
> c. Correctional staff interfering with direct patient care.

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 the Commission has concluded was properly noticed.

In regard to the photo of the naked boy, the appellant concedes that he brought it 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.

In regard to the appellant's alleged use of profane language on the unit, the appellant concedes that he used the words "hell" and "damn" on occasion.

In regard to the appellant's alleged failure to take appropriate action when he was aware that those under his supervision were using inappropriate language on the unit, the record shows that Sgt. Schultz and Sgt. Clemons, two of the Officers under appellant's supervision, engaged in the conduct summarized in Findings of Fact 2. and 3., above. The record further shows that appellant was aware of the conduct specified in these findings except that described in Findings of Fact 2.b., and that he failed to take corrective action in relation to any of this conduct except that specified in Finding of Fact 2.d.

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 as detailed in 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; through Sgt. Schultz's frequent and demeaning identification of members of the nursing staff by reference to body shape or condition; and through Sgt. Schultz's frequent shouting to members of the nursing staff that he "hated nurses" and that they "didn't know what they were doing." Although appellant counseled Sgt. Schultz regarding the latter, he did not take action in regard to the profanity or references to body shape or condition. Such conduct was the subject of frequent complaints to appellant. Since no action was taken, the members of the nursing staff were reduced to trying to stay out of Sgt. Schultz's and Sgt. Clemons' way or to "cajole" them into responding to the nurse' requests with a minimum of profanity and verbal abuse. No one should have to work under such conditions and the respondent clearly sent such a message to its supervisors through the implementation of its harassment policy. The photo incident (See Finding of Fact 8, above) and the bluebird tattoo incident (See Finding of Fact 6, above), although isolated incidents, serve to further demonstrate that appellant 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. As a supervisor, it was appellant's responsibility to assure that the security unit was harassment-free and this he did not do. The Commission concludes that such conduct 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.

In regard to appellant's use of profanity, the Commission agrees with appellant that, in view of the fact that appellant's use was occasional; it included only such words as "hell" and "damn;" that it was generally directed at situations, not individuals; and that most of the members of the nursing staff engaged in similar conduct, it could be regarded as "shop talk" and could not be concluded to constitute just cause for the imposition of discipline.

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.

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 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. Not only does the statement of issue to which the parties agree limit the just cause issue to the 15-day suspension but this is also required by §230.44(1)(c), Stats., which does not list "reassignment" as one of the disciplinary actions which the Commission can review on appeal.

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.

Reassignment

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) 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 result, should have required approval by the Department of Employment Relations, the record does not support such a conclusion. A transfer is defined in §1.02(46), 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 and this appeal is dismissed.

Dated:_____, 1992 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

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