STATE OF WISCONSIN PERSONNEL COMMISSION

RODNEY A. ARNESON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 90-0184-PC

INTERIM DECISION AND ORDER*

This matter is before the Commission following the promulgation of a proposed decision by the hearing examiner. The Commission has considered the parties' objections and oral and written arguments and consulted with the examiner. The Commission will adopt the proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, as its final disposition of this matter, and adds the following comments in response to certain of the parties' arguments.

With respect to the adequacy of the predisciplinary hearing, it is correct, as set forth at page 6 of the proposed decision, that at the April 2, 1991, meeting complainant was told he was facing possible discipline ranging from reprimand to discharge. However, the record reflects that this did not occur until the end of the meeting, when its notice value to appellant was very limited. Overall, as in Showsh v. Personnel Commission, Brown Co. Cir. Ct. No. 89-CV-445 (6/29/90); affirmed, Court of Appeals Branch III No. 90-1985 (4/2/91), it must be concluded that appellant was neither given adequate notice that he was the target of possible discipline, nor adequate notice of the charges against him, nor an adequate explanation of the employer's evidence. Showsh, pp 4-5.

Respondent also argues that appellant is not entitled to be restored to his MIS 4 - Supervisor position by way of remedy, because at the time of his demotion he was serving a probationary period and the Commission lacks

* This decision is being issued on an interim basis so that the Commission will have the opportunity to decide appellant's petition for costs under §227.485, Stats., before issuing a final order.

jurisdiction over a probationary termination. §230.44(1)(c), Stats.; Bd. of Regents v. Wis. Pers. Commn., 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. App. 1981). However, respondent not only terminated his probationary employment as a MIS 4 - Supervisor, it also suspended him for 30 days without pay, reduced his pay rate, and demoted him to a position in a classification with a lower pay range. It is undisputed that the Commission has jurisdiction over this transaction. Section ER-Pers 14.03, Wis. Adm. Code, provides with respect to an employe promoted within the same agency who is serving a probationary period, inter alia:

> At any time during this period the appointing authority may remove the employe from the position to which the employe was promoted without the right of appeal and shall restore the employe to the employe's former position or a similar position and former rate of pay . . . . Any other removal, suspension without pay, or discharge during the probationary period shall be subject to §230.44(1)(c), Stats.

If respondent had simply terminated appellant's probationary employment as a MIS 4 - Supervisor and restored him to a position in his previous MIS 3 classification, or one in the same pay range, appellant would not have had the rights to have appealed under §230.44(1)(c), Stats However, having gone further than that and effected a transaction cognizable by this Commission, there is no basis for it now to argue that appellant is not entitled to restoration to his previous position.

ORDER

The proposed decision and order is adopted as the Commission's disposition of this matter on the merits. Respondent's disciplinary action is rejected and this matter is remanded for action in accordance with this decision.

Dated: February 6, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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STATE OF WISCONSIN PERSONNEL COMMISSION

RODNEY A. ARNESON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 90-0184-PC

PROPOSED DECISION AND ORDER

This is an appeal of a decision by the University of Wisconsin-Madison to suspend appellant from work for 30 days without pay and demote him to a non-supervisory position for alleged violation of work rules and sexual harassment policies. The following findings, conclusions, discussion and decision are based on the evidentiary record made at the hearing on this matter. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Appellant, Rodney Arneson, at the time of this appeal, had worked nine years at the University of Wisconsin-Madison, of which the last 4 months were as a Management Information Specialist Supervisor (MIS) 4, a position in classified civil service.

2. On January 14, 1990 Arneson was promoted from MIS 3 to MIS 4. Arneson worked at Administrative Data Processing (ADP) at UW-Madison, which is located in the basement of the Computer Science building on the campus.

3. Arneson's work schedule was 3:30 p.m. to 11:30 p.m., Monday to Friday. He usually arrived at work early and sometimes remained after 11:30 p.m.

4. Arneson supervised six classified civil service employes, plus one or two students — typically from UW-Madison.

5. Dan Thoftne, Computer Operation Manager, was Arneson's immediate supervisor. Thoftne was supervised by the ADP Assistant director, Durwood (Woodie) Meyer. Jack Duwe was the Director of ADP.

6. In late January 1990, a female high school student, was hired by ADP to a trainee position. At the time of hire, ADP was fully staffed with student help, but she was hired in connection with its minority student training.

7. The student employe was born October 24, 1971 in Managua, Nicaragua. She came to the United States in 1985, when hired at ADP she was an eighteen year old senior in high school and a member of the U..S Army Reserves. Prior to employment at ADP, she worked at U.W. Hospitals and Clinics from June to November 1989 .

8. ADP hired the student employe as a tape operator. Her work site was the tape library, one of three work rooms, which housed the unit's offices.

9. Initially, the employe's work hours were four hours each night, starting at 3:30 p.m., Monday through Friday. Later, to accommodate problems getting to work by bus, her starting time was changed to 4:15 p.m.

10. The tape library is a large room filled with computers and tape racks. The employe normally worked alone, but occasionally other employes walked through the area and went there to work on other systems and made back-up tapes.

11. Rod Arneson was the employ's immediate supervisor. He assigned Brad Hellenbrand, second shift lead worker, to train her. She was also trained by other co-employes.

12. Typically, Rod Arneson would begin work early and after 3:30 p.m. would circulate around the various work areas.

13. On Friday, March 9, 1991, while the employe was looking at a bridal magazine she had brought to work, Rod Arneson began talking and joking with her about the magazine and her wedding plans.

14. Later that evening, while at the help desk the employe gave the magazine to Arneson, as a consequence of his prior teasing.

15. After glancing through the magazine and laying it aside, Arneson returned the magazine to the employe at her work station.

16. When Arneson returned the magazine he told her that the most interesting thing in the magazine was a girl modeling a bra.

17. Arneson also told the employe that he owned a camera, enjoyed taking pictures of beautiful things and that he believed the most beautiful thing was a woman in her bra.

18. During the ensuing conversation, the employe volunteered that she was not interested in modeling, but her sister had modeled and might be interested.

19. Arneson asked the employe about her sister's looks and she showed him a picture of her.

20. Arneson asked the employe to telephone her sister. She called her sister and, as was their practice, spoke in Spanish.

21. Afterwards, Arneson talked with the employe's sister. Arneson told the sister that he wanted to take pictures of her wearing a bra and underslip.

22. Arneson told the sister that he took photos as a hobby and that he would pay her twenty dollars per hour.

23. In response to the sister's questions, Arneson told her that he had taken similar photos; that specifics about posing could be decided later; that he was married; that the photos were for personal use and that they could be taken at his house, her house or possibly some place on campus.

24. Arrangements were made for the sister to come in to ADP the following Monday evening to talk further. The employe participated in the arrangement for the sister to continue discussions with Arneson on Monday about taking photos.

25. On the following Monday, March 12th, the employe, upon inquiry, told Arneson that her sister was not interested and that they did not believe taking the photos was right.

26. Arneson asked the employe if her sister refused because of the amount of money offered and if she knew anyone else who would be interested. She answered no to both questions, the conversation ended shortly afterwards and the subject of taking photos was never brought up again.

27. The employe did not go to work on Tuesday, March 13th, but she returned on the following day.

28. On March 15th, the employe informed the Assistant Director of ADP, Durwood Meyer that she had been sexually harassed by Rod Arneson; that she did not want him to tell Arneson and that she just wanted protection from Arneson.

29. That same afternoon, Meyer contacted Marcia Jezwinski, ADP Personnel Coordinator, and advised her of the employe's allegations against Arneson.

30. The next day, the employe left work an hour early, the following day, March 17th Jezwinski telephoned the employe at home and scheduled an appointment to discuss her allegations.

31. On Monday, March 19th, Jezwinski interviewed the employe and her sister and they filled-out and filed formal sexual harassment reports. The employe was instructed not to discuss the matter with anyone.

32. The following evening, the employe told a coworker about her incident with Arneson. At some time later that week, the employe told another coworker about Arneson's actions.

33. On Thursday, March 22nd, a subordinate informed Arneson that the employe had made a complaint against him for sexual harassment.

34. On March 23rd, Arneson inquired of Jezwinski as to any complaints against him regarding sexual harassment. Jezwinski answered affirmatively and a meeting was scheduled later that day with Arneson's immediate supervisor Don Thoftne.

35. The meeting took place as scheduled. At the meeting, Jezwinski asked Arneson questions about his interaction with the employe and her sister regarding taking photos. Jezwinski told Arneson very little about the employe's allegations, except to the extent they were corroborated by Arneson's statements. At the close of the meeting, Arneson was directed to stay away from the employe and not talk to anyone about the matter. The employe was reassigned to the print room.

36. On Monday, April 2nd, Arneson was suspended with pay, pending the investigation of the employe's complaint. At the beginning of the second shift, a letter of suspension was given Arneson by Thoftne and Meyer in Meyer's office.

37. On April 19, 1990, Rod Arneson was given a letter of discipline. He was called into a meeting with his supervisors, Thoftne and Meyer.

38. They went over the disciplinary portion of the letter with Arneson, telling him: he was suspended for 30 days without pay, demoted to a position to be determined, reduced in pay rate from $15.51/hr to $12.659/hr and required to meet a counselor on June 5, 1990.

39. On May 3, 1990, Rod Arneson was informed by letter that he was assigned to a Data Processing Operations Technicians 4 (DPOT4) (PR6-13) position. His schedule was 7:30 a.m. to 7:30 p.m. Saturday and Sunday, and 11:30 p.m. to 7:30 a.m. Monday and Tuesday, starting May 19, 1990.

40. On May 15, 1990, Rod Arneson filed an appeal of respondent's disciplinary action with this commission.

CONCLUSIONS OF LAW

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

2. Respondent has the burden of proof.

3. Respondent was required to have provided appellant with a predisciplinary hearing sufficient under the standards set forth in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105, S.Ct. 1487, 84 L. Ed. 2d 494 (1985).

4. Respondent failed to provide an adequate predisciplinary hearing.

5. This disciplinary action is defective and must be rejected.

DISCUSSION

The issue in this matter is: whether there was just cause for imposition of the demotion and suspension of the appellant. Implicit in this issue is the requirement that respondent must prove that its particular disciplinary action against appellant was for "just cause." Accordingly, the respondent must show, by the greater weight of credible evidence, that appellant committed the conduct it alleges was the basis for the imposed discipline, that such conduct constituted cause for imposition of discipline and that the imposed discipline was not excessive, Holt v. DOT, Wis., Pers. Comm. No 79-86-PC (11/8/79).

Before considering the issue of just cause, the question of the adequacy of the predisciplinary hearing raised by appellant must be addressed.

The leading case on the issue of adequacy of predisciplinary hearings is Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 84 L.Ed. 2nd 494, 105 S.Ct 1487 (1985). In Loudermill the court said that under the Due Process Clause of the constitution certain substantive rights cannot be deprived, except if "preceded by notice and opportunity for hearing appropriate to the nature of the case." While the court said that the "pretermination" hearing need not be elaborate, it concluded that the tenured public employe was entitled to:

1) Oral or written notice of the charges against him, 2) an explanation of the employe's evidence and 3) an opportunity to present his side of the story.

There is a serious question as to adequacy of Arneson's predisciplinary hearing. The plain evidence is that Rod Arneson called Don Thoftne on March 23, 1990 about rumors concerning him regarding sexual harassment. He was told to call Marcia Jezwinski, who upon being called, confirmed that the high school student employe had accused him of sexual harassment. A meeting was arranged for the afternoon, there Arneson was given an opportunity to talk and was asked questions about the incident. Only parts of the employe's allegations were provided Arneson. Before the meeting ended, Jezwinski told Arneson that she did not know what was going to happen, that she was going to consult with others and that any level of discipline — reprimand, suspension or termination — was possible. Later on April 2, 1991, Arneson was called to a meeting with supervisors Thoftne and Meyer. They told appellant that he was being suspended immediately with pay, pending an investigation of the employe's complaint against him of sexual harassment. When Arneson asked about the possibility of discipline, he was again told they were not sure, but that it could range from minimal to severe. Arneson's supervisors did not discuss the matter with him again, until he was given the disciplinary letter.

The Commission believes Arneson's 30 day suspension without pay and demotion were covered by the Due Process Clause, and as found in Loudermill and a recent Wisconsin Circuit Court case Showsh v. Wis. Pers. Comm, No. 89-CV-445 (Cir. Ct. Brn Cty 1990), required a pre-disciplinary hearing. It is clear Thoftne and Jezwinski's meeting with Arneson was focused on corroborating the employe's allegations of sexual harassment, instead of providing Arneson a pre-disciplinary hearing. In view of the severity of the discipline imposed, the Commission concludes that respondent failed to meet the due process requirement for depriving a tenured public employe of wages and position as expressed in Loudermill.

Even though a conclusion that respondent failed to satisfy the requirement of the Due Process Clause, regarding deprivation of property, extinguishes the jural validity of respondent's disciplinary action, the merits will be addressed because a plenary hearing was held.

Respondent charged appellant with violating two employe work rules and its sexual harassment policy. They are:

Work Rules:

I. Work Performance
B. Loafing, loitering, sleeping or engaging in unauthorized personal business.

IV. Personal Actions and Appearance
B. Threatening, intimidating, interfering with, or using abusive language towards others.

G. Unauthorized solicitation for any purpose.

J. Failure to exercise good judgment, or being discourteous, in dealing with fellow employes, students or the general public.

Sexual Harassment Policy:

II. Definition
Sexual harassment of employes and students at UW-Madison is defined as any unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of sexual nature, when:

A. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.

C. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or educational experience, or creates an intimidating, hostile, or offensive work or educational environment.

The basis of respondent's charges against appellant involves the circumstances of appellant's telephone conversation with a female employe's minor sister and his subsequent action toward her.

Regarding violating Work Rule I, respondent argues that appellant's effort to obtain a model for photographs of a young woman undressing and in her bra constitutes personal business. In support, respondent cites Massenberg v. University of Wisconsin System, 81-PC-ER-44, 9-14-84, where an employe was discharged for among other things receiving and processing a controlled substance on the worksite. The Massenberg citation appears

misplaced. That case was before the Commission on the question of racial discrimination. In addition, in the present case, there is no evidence that Arneson's efforts to obtain a female model was illegal, as was the circumstance involving an illegal drug in Massenberg. Also, the evidence does not support respondent's contention. Several employes testified that personal phone calls, studying, reading and socializing were allowed on the worksite as long as such activity did not interfere with work production. This testimony supports the conclusion that respondent did not consider such conduct, in and of itself, cause for discipline, and that it would not have disciplined appellant, but for the sexual nature of his conversation with the student.

Under work Rule IV B, respondent argues that appellant's actions toward the employe were threatening and intimidating. Respondent argues that the employe testified she was intimidated by appellant. She expressed her fears and concerns to her sister and several coemployes. However, there is no evidence of actions by appellant, which support the employe's statement of intimidation. While there appears to be no doubt that the employe suffered fears or anxieties after the March 12th incident, appellant's actions do not constitute a violation of this workrule under an objective standard — i.e., his actions would not be deemed intimidating or threatening to the average reasonable similarly situated employe.

Respondent also argues that it was only reasonable for the employe, an inexperienced high school student to be intimidated by appellant's supervisory status. At the time of the incident the employe was eighteen, a member of the Army Reserves and engaged to be married. She had previous experience with respondent as an employe and knew appellant had no authority to fire her. There is no evidence to support a finding that the employe was in awe of appellant. Shortly after her employment, she entreated appellant to treat her in the same friendly manner as he did other more tenured employes. And, later, she was comfortable enough to discuss some personal family matters with him. Other employes testified that appellant's supervisory manner was not intimidating. Also, while the employe's absences immediately after the March 12 incident may have been due to her fears, she testified that appellant gave her no reason to believe he would physically hurt her.

Respondent argues that appellant violated Work Rule IV G — unauthorized solicitation for any purpose — when he attempted to obtain the services

of the employe or her sister. As appellant argues, neither the word "solicitation" nor the term "unauthorized solicitation" was defined in the rule and no evidence was presented regarding their meaning. The plain evidence is that after appellant told the employe he liked to take photographs of women in their undergarments, the employe said she was not interested in modeling, but her sister had modeled and might be interested in posing for him. The conversation between the two continued, the employe showed appellant a photograph of her sister and appellant asked her to call her sister about modeling. Appellant did not ask the employe to model for him. Whether appellant's request to the employe to telephone her sister constitutes unauthorized solicitation is problematic. Work Rule IV G is vague and no definitions of the substantive words were placed in the record. On this basis, respondent failed to present sufficient evidence to sustain its charge.

Under Work Rule IV J appellant is charged by respondent for failing to exercise good judgment. Appellant conceded this allegation in his testimony. He testified that at some point during course of attempting to arrange the photo session with the employe and her sister, he questioned his action and later, in a meeting with his supervisors, he acknowledged that his actions were inappropriate for a supervisor.

Violation of the University's Sexual Harassment Policy is the most serious charge against appellant. Respondent argues that appellant's conduct violates its sexual harassment policy. Specifically, respondent argues that:

> (1) appellant made unwelcome sexual advances and verbal comments of a sexual nature to the employe and her sister, (2) submission to the conduct was an implicit term of the employe's employment, (3) appellant's conduct unreasonably interfered with her work performance and created an intimidating, hostile and offensive work environment.

The University Sexual Harassment Policy in force at the time of the incident in pertinent part provides[1]:

> Part 1: Sexual favors as a basis for actions affecting an individual's welfare as a student or employee.

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[1] While this policy refers only to university faculty and academic staff, it applied to all employes, employes-in-training and graduate assistance.

I. A member of the university faculty or academic staff is subject to discipline if he or she behaves, while engaged in official university business, toward another university employee, student, or recipient of university services in any of the following ways:

A. Uses, offers to use, or threatens to use one's status as a member of the university faculty or academic staff to bring about decisions or assessments affecting an individual's welfare on the basis of submission to, or rejection of, requests for sexual favors.

B. Accepts an offer of sexual favors in exchange for an agreement to use one's status as a member of the university faculty or academic staff to bring about favorable decisions or assessments affecting an individual.

Part II: Flagrant or repeated sexual advances, requests for sexual favors, and physical contacts harmful to another's work or study performance or to the work, study, or service environment.

II. A member of the university faculty or academic staff is subject to discipline if in a work- or learning-related setting, he or she makes sexual advances, requests sexual favors, or makes physical contacts commonly understood to be of a sexual nature, and if

1. the conduct is unwanted by the person(s) to whom it is directed, and

2. the actor knew or a reasonable person could clearly have understood that the conduct was unwanted, and

3. because of its flagrant or repetitious nature, the conduct either

a. seriously interferes with work or learning performance of the person(s) to whom the conduct was directed, or

b. makes the university work, learning, or service environment intimidating or hostile, or demeaning to a person of average sensibilities.

Part III: Repeated demeaning verbal and other expressive behavior. . .that is harmful to another's work or study performance or to the work study or service environment.

III. A member of the university faculty or academic staff is subject to discipline if, in a noninstructional but work- or learning-related setting, he or she:

A. Repeatedly addresses or directs to university employee(s), student(s) or recipient(s) of university services epithets, comments or gestures that explicitly demean their gender, race, cultural background, ethnicity, sexual orientation, or handicap if

1. the gestures, comments or epithets are commonly considered by members of the group demeaned to be disparaging to that group, and

2. repetition of such conduct either

a. seriously interferes with the work or study performance of the person(s) to whom the conduct is addressed or directed, or

b. makes the work study, or service environment hostile or intimidating, or demeaning to members of average sensibilities of the group demeaned.

In respect to respondent's first argument, it can not be concluded that appellant's attempt to obtain the employe's sister as a model constituted "sexual advances" or that appellant's comments were unwelcome. First, respondent's harassment policy was applicable only to the employe and not her sister. Second, appellant never asked the employe to pose for him. In addition, the employe voluntarily participated in this entire process. In fact, she anticipated appellant's interest and suggested her sister as a subject. Respondent argues, citing Meritor Savings Bank v. Vinson, 477 US 57, 106 S.Ct. 2399, 40 FEP Cases 1822 (1986), that the correct inquiry is whether the sexual advances were unwelcome. In this case, before the Commission, there is no evidence that supports the employe's testimony that appellant's conduct was unwelcome. Once the employe made it clear that her sister was not interested in posing for him, and she did not want to discuss it further, appellant never again approached her about it. Clearly the employe was a voluntary participant in appellant's conduct.

In support of its second argument, respondent, citing Meritor, asserts that the mere existence of an offensive work environment is sufficient to demonstrate that submission to conduct is an implicit term of employment. Then respondent proceeds to argue its third assertion that appellant's conduct created an offensive work environment.

Meritor involved claims of sexual harassment in the workplace. The District Court concluded that Vinson, the respondent, had not been sexually

harassed or sexually discriminated against. The Court of Appeals reversed. It stated that under Title VII there are two types of sexual harassment: harassment that involves employment benefits in exchange for sexual favors and non-economic harassment which creates a hostile work place. The Appellate Court concluded that the District court had failed to consider whether Vinson's claim was the hostile environment type. It held that unwelcome sexual advances could create a hostile environment. On certiorari the question was whether there was "tangible loss" or an "economic character." Meritor, separates sexual harassment cases into two groups: those involving sexual favors for employment benefits and those linked to job environmental factors, conditions of employment. Consequently, the Commission does not believe Meritor, speaks to respondent's second argument, which links terms of employment — economic factors — to questions concerning the workplace environment.

Regarding respondent's argument on the question of hostile environment, the Commission believes it is not in concert with the evidence and applicable standards. Under the University Harassment Policy an employe is subject to discipline if he or she engages "repeatedly" in conduct of a sexual nature which interferes with another's work. It is clear that appellant did not engage in "repeat[ed]" conduct of a sexual nature or meet the standards of prohibited conduct set out in Meritor. In Meritor, the court said (quoting):

> Of course, as the courts in both Rogers and Henson recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See Rogers v. EEOC, supra, at 238, 4 FEP Cases, at 95 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); Henson, supra, at 904, 29 FEP Cases, at 793 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." Ibid. Respondent's allegations in this case — which include not only pervasive harassment but also criminal conduct of the most serious nature — are plainly sufficient to state a claim for "hostile environment" sexual harassment.

Having concluded that the evidence supports only one of respondent's specific charges against appellant, the Commission turns to the question of

charges against appellant, the Commission turns to the question of just cause for discipline and answers in the affirmative. The evidence supports the conclusion that appellant's misconduct meets the standard expressed in Safransky v. Personnel Board, 62 Wis. 2d 264, 474 N.W. 2d 379 (1974)[2].

Finally, addressing the question of whether the imposed discipline was excessive, the commission again answers in the affirmative. The particular discipline imposed on appellant, primarily was the result of respondent's determination that he violated its sexual harassment policy. However, the Commission believes the evidence only supports respondent's claim against appellant of a much lesser offense. The imposed discipline was one of the most severe measures of punishment possible, short of termination. In view of the fact respondent was able to sustain only one of its five charges against appellant, it is clear the discipline meted-out by respondent was excessive. considering appellant's 20 years in state civil service, his record of no prior disciplinary action and the gravity of the offense, it appears a suspension of 5 days without pay is more commensurate to the misconduct.

Credibility determinations play a significant role in cases of this kind. In the instant case, the employe's various accounts of the material parts of these charges against the appellant to various office staff and coworkers resulted in much factual misinformation, many of respondent's participating administrators had inaccurate impressions of material parts of the events under investigation. In contrast appellant's account of the events of March 9 and 12, 1990 to respondent administrators was more consistent.

As previously stated, the entire disciplinary action must be rejected because of the due process determination.

However, if contrary to the Commission's belief, the merits of this case are a proper consideration, respondent is modified to a 5 day suspension without pay.

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[2] Regarding just cause for discipline, the court said in Safransky v. Personnel Board, 62 Wis 2nd 464, 215 N.W. 2d 379 (1974):

> "'. . . one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or efficiency of the group with which he works . . .'"

ORDER

Respondent's disciplinary action is rejected and this matter is remanded for action in accordance with this decision.

Dated:_____, 1991 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

DRM:gdt/2

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DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

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