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BRIAN KETTERHAGEN,

Appellant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (Parkside),

Respondent.

Case No. 90-0323-PC

* * * * *

DECISION
AND
ORDER

This is an appeal of a decision by the University of Wisconsin-Parkside to suspend the employment of Brian Ketterhagen for a period of three days without pay. The following findings are based on evidence presented at a hearing before an examiner designated by the Personnel Commission under §227.09(1), Stats.

FINDINGS OF FACT

1. Appellant Brian Ketterhagen has been employed by the University of Wisconsin-Parkside as a campus police officer since March 1988.
2. University of Wisconsin-Parkside is one of thirteen universities, fourteen 2 year centers and a statewide extension in the University of Wisconsin System. It is located in the southeast part of Wisconsin, between Racine and Kenosha, Wisconsin.
3. Ketterhagen had transferred to U.W. - Parkside from the Division of Corrections, Department of Health and Social Services. In October 1989, he was promoted to Campus Police Supervisor 1 and had the working title of "sergeant" and was serving a probationary period.
4. On the evening of July 6, 1990, Ketterhagen was working the night shift. Two other officers were also on duty: Officer Steve Rawson and Student Reserve Officer Thomas Steiner.
5. At some time after Steiner came on duty at 11:00 p.m., he engaged Ketterhagen in a discussion about weapon retention and disarming techniques. At the time, Steiner and Ketterhagen were alone in the office standing

in the dispatch area. Steiner as a student reserve officer was not authorized to possess a firearm or take firearm training. He was asking the questions only out of curiosity.

6. The conversation between Steiner and Ketterhagen was interrupted when Steiner went to the door to let in Officer Rawson, who had been out on "rounds."

7. Rawson came in, sat down at his desk, some ten feet away, and began working on some paperwork. Steiner resumed his conversation with Ketterhagen.

8. Shortly after the conversation resumed, Rawson went out to his squad car. During the intervening time Ketterhagen went to the back room to obtain the department's mock weapon.

9. As Rawson returned to the office and approached his desk, Ketterhagen rushed out from his office cubicle, made a statement using expletives, ending with "I'm going to shoot you" and shoved the mock-weapon into Rawson's ribs. Rawson was momentarily startled until he looked down and recognized the training firearm.

10. Steiner observed the incident from the dispatch area, some five to ten feet away. He could not distinguish, exactly, what Ketterhagen said to Rawson nor see Rawson's facial expression during the incident.

11. Immediately afterwards, Steiner walked over to both of the officers and asked first Ketterhagen, and then Rawson about how to disarm a suspect.

12. The incident had not been a preplanned demonstration by Ketterhagen of weapon retention or disarming techniques. Neither Rawson nor Steiner knew Ketterhagen was going to engage in this conduct.

13. The mock-weapon used in this incident is made from the mold of the real weapon and is the same weight, size, shape and feel of the real weapon carried by U.W. Parkside campus police.

14. Normally, U.W.- Parkside police do not wear firearms, except in special instances and emergencies.

15. Rawson reported the incident to his immediate supervisor, Douglas Wielgat, Assistant Director of Campus Security and Wielgat's supervisor, David Ostrowski, Director of Campus Security.

16. Subsequently, Ostrowski and Wielgat met with Ketterhagen to discuss the incident reported by Rawson.

17. Officer Ketterhagen admitted he drew the mock-weapon on Rawson, but denied using profanity. He said he intended it as a joke.

18. Following the discussion with Ketterhagen, Ostrowski and Wielgat proceeded with disciplinary action.

19. By letter dated July 10, 1990, respondent suspended the appellant for three days. The letter stated in part:¹:

The intent of this letter is to inform you that you are being suspended for three (3) days, without pay, as a result of your actions surrounding an incident on July 6, 1990. On that date, sometime after midnight, you pointed a realistic-looking "practice" pistol at Officer Steve Rawson's chest. While the weapon was pointing (touching) in his chest, you said, "You fucking son of a bitch, I had enough of your shit."

Officer Rawson did nothing to provoke this action from you. This behavior violated the following University of Wisconsin System Classified Employees Work Rules:

IV.B. Threatening, intimidating, interfering with, or using abusive language towards others.

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

I.G. Negligence in performance of assigned duties.

20. Appellant had previously been disciplined for his conduct. In February, 1990, appellant was verbally admonished for unauthorized wearing of a firearm while on campus. In March, 1990, appellant was given a written reprimand for vulgar language and overly assertive conduct while involved in a traffic stop. In June 1990, just before the current incident, appellant was counselled about horse play which caused the same subordinate officer to have pain in his arm for three days.

21. Appellant filed an appeal of his suspension to the Commission within thirty days after the effective date of the suspension.

¹ This finding has been expanded to more fully set forth the content of the suspension letter.

CONCLUSIONS OF LAW

1. The Commission has authority to consider this matter pursuant to §230.44(1)(c), Wis. Stats.

2. The respondent has the burden of proof to demonstrate, to a reasonable certainty, that there was just cause for the discipline imposed on appellant.

3. The respondent has met its burden of proof and established just cause for the discipline imposed on appellant.

DISCUSSION

Using the analytical framework expressed in Mitchell v. DNR, Case No. 83-228-PC (8/30/84) the first question is whether appellant violated respondent's work rules as charged in his letter of discipline².

It is the Commission's belief that appellant did engage in the conduct alleged by the respondent and that such conduct violated the work rules as charged. The appellant does not deny he drew the mock-weapon on Officer Rawson but does deny he used profanity or threatening language and argues that the incident was a demonstration in conjunction with ongoing discussions about weapon retention between Officer Rawson, Student Officer Steiner and himself. However, this argument is not substantiated by the evidence.

The plain evidence shows that the discussion about weapon retention was between Student Officer Steiner and appellant. Steiner was not authorized to have a firearm nor participate in firearm training. During this conversation between appellant and Steiner, Officer Rawson entered the office and took a seat at his desk some five to ten feet away. Contrary to appellant's argument, there is no evidence Rawson was cognizant of the subject matter or took part

² Under Mitchell v. DNR, Case No. 83-228-PC (8/30/84), three questions were identified as a guide to determining the issue of just cause in a discharge case:

1. Whether the greater weight of credible evidence shows that appellant has 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 cause for the imposition of discipline, and
3. Whether the imposed discipline was excessive. Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79)

NOTE: The Commission has revised this footnote to more completely set forth the holding in Mitchell.

in the discussion between appellant and Steiner. Later, Rawson left the office for a short period. When he returned and approached his desk, he was surprised by appellant, who, while saying something, thrust an object — later recognized as a mock-weapon — into Rawson's side. Rawson testified that initially he thought it was a real firearm.

Also, contrary to appellant's argument, there is little evidence that appellant was demonstrating weapon retention or disarming techniques to Steiner. Steiner testified that appellant had not advised him of any planned demonstration of disarming techniques and did not know appellant was going to rush Rawson with the mock-weapon. As previously noted, Rawson testified he was surprised by appellant's actions. Only appellant's testimony supports this assertion. And this particular assertion had not been previously articulated by appellant during meetings with his supervisors.

Concerning respondent's allegation that appellant used threatening, intimidating and abusive language (Work Rule IV.B) Rawson testified: "He came rushing out from behind an office cubicle and said, 'You f_____g s_____o_____b_____, I'm going to shoot you.'"³ Student Officer Steiner testified that as he was returning from the dispatch center, he saw the appellant come from the back room with the weapon and point it at Officer Rawson. Also, Steiner testified that appellant said something to Rawson, but he couldn't remember what appellant said and he could not say whether or not it was profanity. The appellant never testified directly about his comments to Rawson at the moment he pointed the weapon at Rawson. He only testified that he denied the use of threatening or abusive language at the meeting with his supervisors.

Based on the evidence presented, the Commission believes there is sufficient evidence to support a finding that appellant, while on duty June 6, 1990, engaged in threatening, intimidating and abusive language in violation of respondent's Work Rule IV.B. Also, the Commission finds it equally plain, that appellant on the evening of June 6, 1990 failed to use good judgment, and violated respondent's Work Rule IV.J.

The evidence also supports respondent's charge that appellant violated Work Rule I.G. The testimony of Assistant Director Weilgat and Director

³ This language differs somewhat from that expressed in appellant's letter of suspension. The last phrase in the sentence is: "I've had enough of your shit."

Ostrowski, appellant's supervisors, was that firearms and mock-weapons are taken seriously and handled with care. He testified that the mock-weapon used in firearm training was stored in the department locker and office policy required the scheduling of all firearms training. Ostrowski testified that appellant's firearm demonstration and use of the mock-weapon was not authorized. If appellant was demonstrating disarming techniques, as he argues, he did so without obtaining proper authorization.⁴ Clearly, this behavior demonstrated, among other things, a failure to clear the demonstration with his supervisors and obtain proper authorization.

Having concluded that appellant violated his department's work rules as charged, it is self-evident that respondent satisfied the definition of just cause as set out in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d. 379 (1974), which requires a demonstration of impaired performance of duties of the person disciplined or impaired efficiency of the group with which he worked.

The remaining question is whether the imposed discipline was excessive. Appellant argues that his suspension was given without "just cause" because the suspension decision was based on an incomplete investigation. And, had all the facts been considered, respondent would not have concluded appellant had engaged in "aggressive horseplay." While these arguments are provoking, they are not supported by fact or law. In a meeting with his supervisors prior to the suspension, appellant admitted that he pointed a mock-weapon at Officer Rawson. His explanation was that it was a joke. He never told his supervisors that he was demonstrating disarming techniques. The evidence clearly shows that appellant failed to inform Rawson or Steiner that he was going to demonstrate weapon disarming techniques. Student Officer Steiner was returning from the dispatch center when the incident occurred and was too far away to hear the exact statement made to Rawson by appellant. Rawson was taken unaware. Based on these facts, it is difficult to believe, as appellant argues, that he was demonstrating disarming techniques with the full knowledge, consent and participation of Rawson and Steiner. Finally,

⁴ Weilgat and Ostrowski testified that appellant said he was joking when he pointed the mock-weapon at Rawson. He never mentioned a weapon disarming demonstration.

appellant cites no law which requires exhaustive investigation prior to imposing discipline in order to sustain a "just cause" finding.

Based on the facts, appellant's three day suspension without pay is not excessive. On at least two prior occasions, appellant had been warned about his misconduct. These previous incidents involved misuse of a weapon, aggressive behavior, inappropriate language and poor judgment as a supervisor. This prior record of misconduct surely supports the discipline imposed.

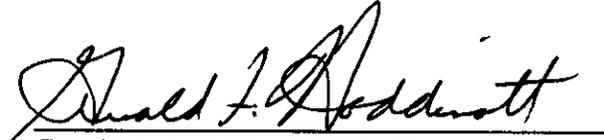
ORDER

The action of respondent, imposing a three day suspension without pay on appellant, is affirmed and this matter is dismissed.

Dated: December 3, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:gdt/2


GERALD F. HODDINOTT, Commissioner

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