STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES C. HARRON,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 91-0204-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a suspension of twelve days without pay.

FINDINGS OF FACT

1. At all times relevant to this case, appellant has been employed at the Wisconsin Resource Center (WRC), Department of Health and Social Services (DHSS), as an Institution Aide 5, a supervisory position, with permanent status in class.

2. The parties stipulated to the entry into the record of the following findings of fact from a June 27, 1990 Commission decision in a prior appeal filed by appellant, No. 89-0152-PC:

> 3. In both 1987 and 1988, the appellant was rated in the highest of four categories ("exceeds expectations") on his discretionary award reports for previous 12 month periods. Prior to that time, the appellant's evaluations rated his performance at or above the satisfactory level.
>
> 4. The appellant is generally regarded as quite friendly.
>
> 5. Kathy Karkula served as the personnel director for WRC. On at least one occasion Ms. Karkula spoke with the appellant due to concerns Ms. Karkula had about the appellant's interrelationships with female employes at WRC, including the appellant's physical contact with the female employes. Ms. Karkula was concerned that the appellant's friendly nature, which included comments and physical contact, would be misinterpreted by the

employes. This conversation with the appellant was not conducted by Ms. Karkula as a disciplinary action but occurred as part of a casual conversation with the appellant.

6. On April 18, 1989, Karen Moyle, a WRC employe, filed a memo with her supervisor which stated, in part:

> On Thursday, April 13th, at approximately 10:45, I met Aide 5 Jim Harron in the hallway of B-side basement. This had been about the 4th time I had seen him that morning in the area. I jokingly said, "Did they move your office down here too?" As I remember, he didn't hear me the first time so I repeated myself because he turned and asked me what I had said. All I remember after that is he had hold of my right wrist and it hurt. In the next 20 seconds or so I asked him to let go several times. I looked down the hallways to see if anyone else was there, but didn't see anyone. By this time he also had my right elbow in his other hand. His grasp hurt me and I felt panicky. I wanted to go back to class and get away from him. I looked at the stairs and in the mirror on the wall. I told him to let me go. I remember saying, "What if an inmate comes. We could get into trouble " I pushed my arm towards him and then pulled it away quickly. He let go at this and I said as I left that I had to go back to class and help with the role plays. He make some comment about us not being able to role play. I felt very frightened throughout the incident I have just described. I was totally caught off guard and surprised by Aide Harron's actions. I remember much of what occurred, but exact words or time sequence are blurry. My main thought was to get out of there.
>
> I reported the incident to Jerry Bednarowski, my Supervisor ..
>
> On Friday, April 14th, I met with Scott Trippe and asked if he would sit in while I discussed this with Aide 5 Harron. Scott, Jim and I met for about 20 minutes in Scott's office. Jim said he was only horseplaying and said he was shocked that I was hurt, both physically and emotionally. I still do not understand why he did what he did, but I feel the air was cleared and I can work with Jim in a professional manner without fear of this occurring again.

The appellant was counselled informally regarding the incident but did not receive any formal discipline. During the counselling, the unit chief cautioned the appellant against being too friendly with subordinate staff.

7. On or about September 14, 1989, the appellant and approximately 25 other supervisors at WRC participated in a half-day

training seminar on the topic of sexual harassment. The seminar was conducted by Frank Humphrey of the Department of Employment Relations. The seminar included several handouts, role-playing exercises and a videotape of a related segment from the ABC television program "20/20."

8. Respondent has a policy prohibiting the sexual harassment of any employe. The policy defines sexual harassment to include:

> [u]nwelcome sexual advance. . .and other verbal or physical conduct of a sexual nature . .when. . . [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The appellant was aware of the policy.

9. The appellant was also aware of an administrative directive issued by the respondent in April of 1988 setting forth the department's harassment policy. The directive stated, in part:

> BACKGROUND
> This directive is being issued to clearly and unequivocally state the expectation of all employes be treated with respect in a harassment free work environment. . . .Harassment of employes by co-worker[s], supervisors or managers in the Department of Health and Social Services will not be tolerated.
>
> GUIDELINES
> Sexual Harassment is defined as unwelcome sexual advances[,] unwelcome verbal or physical conduct of a sexual nature, or unwelcome physical contact of a sexual nature. This includes but is not limited to deliberate, repeated display of offensive sexually graphic materials. [emphasis in original]

3. Appellant was suspended for twelve days without pay for alleged violation of DHSS Work Rules Nos. 1, 2 and 5, in connection with an incident which occurred on August 22, 1991. These work rules provide:

> All employes of the Department are prohibited from committing any of the following acts:
>
> 1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
>
> 2. Abusing, striking, or deliberately causing mental anguish or injury to patients, inmates, or others.

5. 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 employe.

4. On August 22, 1991, appellant entered an office where Kelly Yelmene, a female summer intern limited term employe was seated. She remained seated throughout the incident. Appellant shook hands with her as he congratulated her with respect to a recent newsletter article. He then kissed her on the front of the neck, after which she stated this made her feel uncomfortable. Ms. Yelmene remained seated throughout the incident and did not put her hand on appellant's shoulder at any time.

5. Appellant's action of kissing Ms. Yelmene constituted, with respect to her, an unwelcome sexual advance which had the effect of creating an intimidating, hostile, and offensive working environment. Said action by appellant would have had the same effect on any reasonable person similarly situated to appellant.

6. Ms. Yelmene's job at the WRC had been to teach Spanish. She was not supervised by appellant. Appellant had been enrolled in a Spanish class she had taught prior to this incident. There was nothing that had occurred between Ms. Yelmene and appellant at any time prior to this incident that would have given a reasonable person similarly situated to appellant the impression that the act which occurred on August 22, 1991, would not have been unwelcome by Ms. Yelmene.

7. Immediately after the August 22, 1991, incident, Ms. Yelmene complained about it to management.

8. Following investigatory and predisciplinary hearings, appellant was suspended for twelve days without pay by Phillip Macht, WRC Director (Respondent's Exhibit 9). In deciding on a twelve day suspension, Mr. Macht relied at least in part on the fact that appellant had been suspended for five days without pay for sexual harassment in 1989,[1] and that this had not stopped him from engaging in this similar conduct in 1991.

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[1] This was the transaction which had precipitated the earlier appeal (No. 89-0152-PC (see Finding #2, above).

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 to establish by a preponderance of the evidence that there was just cause for appellant's suspension without pay for twelve days.

3. Respondent has sustained its burden and it is concluded that there was just cause for said suspension and that it did not constitute an excessive penalty

OPINION

Respondent has the burden of proof and must establish by a preponderance of the evidence that there was just cause for the discipline imposed. Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). In Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974), the Court set forth the following test for the determination of just cause:

> "[O]ne 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. . " State ex rel. Gudlin v. Civil Service Commn. (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 799.

In this case, the record establishes that appellant kissed a female employe on the front of the neck under circumstances which would have led a reasonable person to believe that this was unwelcome conduct and offensive to the recipient. This conduct was in violation of respondent's policy on sexual harassment, see finding #2, which defines sexual harassment to include:

> [u]nwelcome sexual advance. . and other verbal or physical conduct of a sexual nature. . .when. . [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Furthermore, conduct of this nature by a member of management in all likelihood constitutes a violation of the Fair Employment Act (FEA) which defines "sexual harassment" as "unwelcome sexual advances, unwelcome physical conduct of a sexual nature or unwelcome verbal or physical conduct of a sexual

nature." §111.32(13), Stats. Finally, there was uncontradicted testimony that if an inmate had seen this happen it could have led to a security problem. Clearly respondent has established just cause for discipline.

There was a conflict between Ms. Yelmene's and appellant's testimony as to whether he kissed her. The Commission has no hesitation in resolving this dispute in favor of respondent. One of the reasons is the discrepancies between appellant's testimony under oath at the hearing and his statements during the investigative and prediscIplinary hearings. In the latter statements he denied having kissed her and stated that he shook hands with her, that she "reached up with her hand and put it on my shoulder. I was leaning forward and was tipped off balance. I caught myself to keep from falling on top of her." Respondent's Exhibit #4.

Appellant's sworn testimony at the hearing of this appeal included the following:

> I walked in to congratulate her, and reached out to shake her hand, I recall, I believe . . I stumbled, tripped . . . whether my feet were too close together, I don't really know I momentarily lost my balance and reached over to catch myself, and yes I believe I had some papers in one hand, and again, whether I caught my balance on the back of her chair or her shoulder, I don't recall.

While appellant denied kissing Ms. Yelmene, when asked if his lips came in contact with her neck in any way, he testified:

> I don't believe so Whether I did tip forward, as I just said a few minutes ago I didn't, I, the letter says I fell on her, flopped on top of her — if she was leaning forward if my head went down far enough to even be in that close proximity, I don't think so.

In addition to denying that he kissed Ms. Yelmene, appellant also contended, more or less in the alternative, that any touching that did occur on that occasion would not have been "unwanted," because of previous situations in connection with the Spanish course she taught where some physical contact had occurred. For example, he alleged she had patted him on the arm. Ever assuming this had occurred,[2] a reasonable person could not have drawn

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[2] Ms. Yelmene testified that she didn't recall any such incidents, but would not deny categorically that they had occurred.

an inference from this that appellant's action on August 22, 1991, would have been appropriate — i.e., would not have been unwelcome.

Appellant also argues there was no violation of DHSS work rules. In light of the above findings, it can be concluded there was a violation of the work rules. Based on the training on sexual harassment respondent has provided, as well as the individual counseling appellant has received in connection with earlier incidents, appellant should have been on notice that kissing Ms. Yelmene on the neck constituted sexual harassment, that it was against agency policy, and that he was not supposed to do it. He also knew, or would be charged with awareness under an objective or "reasonable person" standard, that his actions had a high likelihood of causing mental anguish.

Finally, appellant contends that a twelve day suspension was excessive. Considering appellant's past record of similar behavior, which was not limited to October 1989 the incident for which he had been disciplined for five days, the Commission cannot agree.

Appellant contends that DHSS policy prohibits reliance for progressive disciplinary purposes on a disciplinary transaction that is more than twelve months old. However, the only competent evidence of this policy was a copy of the policy attached to a posthearing brief. Respondent objected to this document because it was not exchanged prior to hearing pursuant to § PC 4.02, Wis. Adm. Code. Appellant contends that the Commission should take official notice of this document pursuant to §227.45(3), Stats.:

> An agency or hearing examiner may take official notice of any generally recognized fact or any established technical or scientific fact; but parties shall be notified either before or during the hearing or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice. (emphasis added)

On its face, the chapter from the DHSS "Supervisors Manual/Personnel and Employment Directive" appellant submitted does not appear to constitute either an "established technical or scientific fact" or a "generally recognized fact." Appellant cites Chicago & N.W.R. Co. v. Railroad Commission, 156 Wis. 47, 145 N.W 216 (1914), which involved a judicial review of an administrative decision fixing railroad freight rates. The Court rejected the contention that the

Commission had acted on the basis of facts which had not been made part of the hearing record. The Court noted the Commission often had explained its cost computation methodology in its published decisions, which "are public records entitled to judicial notice" 156 Wis. at 60. The Court also noted that all railroads were required to file annual reports with the Commission, and that the Commission also could take judicial notice of these official records.

Setting to one side the fact that the Court was not interpreting the statutory provision involved in this case, there is a substantial difference between taking official notice of decisions of and reports filed with the administrative agency which is conducting the proceedings, and taking official notice of a document generated by one of the parties to the proceeding. Appellant argues that this is a public record, which it undoubtedly is. However, this does not make it a "generally recognized fact," §227.45(3), Stats., particularly considering the broad scope of the current public records law, §19.32(2), Stats., which includes the following:

> "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.

Finally, the Commission notes there was evidence in the record that another employe received a 10 day suspension on a first offense sexual harassment. While the facts of that case were not completely analogous to the instant matter, it does provide support for respondent's imposition of a twelve day suspension here, even if the prior five day suspension had not been considered.

ORDER

Respondent's action of suspending appellant for twelve days without pay is affirmed and this appeal is dismissed.

Dated: August 26, 1992 STATE PERSONNEL COMMISSION

AJT/gdt/2

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.