STATE OF WISCONSIN PERSONNEL COMMISSION

MARK REIMER,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 92-0781-PC

INTERIM DECISION AND ORDER

Nature of the Case

This is an appeal pursuant to §230.44(1)(c), stats., of appellant's suspension without pay for 10 days.

Findings of Fact

1. Appellant has been employed at Taycheedah Correctional Institution (TCI) in the classified civil service as a Captain (Supervisory Officer 2) since 1989.

2. Appellant has been assigned to supervise the third shift. He is the highest ranking supervisor at the institution during third shift, and thus is effectively in charge of the entire institution during this shift.

3. On the night of July 9, 1992, at approximately 10:39 p.m., appellant was alerted over the institution radio by the officer in the control center that there was a fire alarm in Addams Hall.

4. Addams Hall is a three story building which houses the most difficult inmates at the institution, some of whom are in segregated confinement. All the inmates are kept locked in their cells at night and can only be released by a correctional officer (CO) using a key.

5. As appellant ran toward Addams Hall to respond to the alarm, he saw a flickering in a second story window which he identified as the location of the fire. (This turned out to be an accurate conclusion.)

6. When appellant reached Addams Hall, he unlocked the front door and headed up the stairs to the second floor. At this point, he noted a few

inmates exiting the building. He did not notice any smoke or flames. The fire alarm, which is extremely loud, was sounding continuously.

7. On the second floor he observed Sgt. Simon at the door of inmate Watts' room, which he previously had identified as the location of the fire. He also observed approximately five or six inmates in the TV room at the end of the hall on the second floor.

8. Appellant instructed Sgt. Simon to open the door and she did. He observed the inmate on the other side of the room and a fire on her bed. He entered and escorted her out of the room. At his direction, Sgt. Simon then extinguished the fire with a fire extinguisher. At this point there was smoke in the second floor hall at ceiling level.

9. Another inmate in the adjacent room at this point was pounding on her door to be let out. The officers on the scene opened the door, and Sgt. Simon escorted her away. Appellant handcuffed inmate Watts and directed another CO to take inmate Watts to the infirmary.

10. Appellant then opened windows and set up fans to ventilate the smoke in the building. After inspecting some rooms and finding them relatively smoke-free, he decided to halt the evacuation and return the inmates to their rooms.

11. Appellant then instructed the control officer to turn off the fire alarm, and directed the officers on the scene to halt the evacuation of inmates from their rooms and to return the evacuated inmates to their rooms. Approximately half of the inmates ultimately had been evacuated and needed to be returned.

12. The basis for appellant's decision to halt the evacuation and to return to their rooms those inmates who had already been evacuated, was that the emergency had been negated, and that the CO's who were on duty that night were for the most part relatively new and inexperienced and without much training. He was concerned about keeping the inmates, many of whom were boisterous, adequately controlled if all had been evacuated.

13. Many inmates were upset and/or frightened about being kept confined in their rooms under the circumstances.

14. Although appellant had reason to believe that the fire alarm had been triggered by the fire in inmate Watts' room, he had no way of being certain that there were no fires in other areas of Addams Hall. However, as he

testified, any additional fires would have been discovered in the process of returning the inmates to their rooms, at which point another evacuation could have been ordered.

15. At some point that night, after evacuation had been halted, appellant removed the bedding from Ms. Watts' room from the building. He did this as a precaution in case there had been an imperceptible fire smoldering inside the mattress, a situation he had observed in the past.

16. Appellant previously had made arrangements to be relieved halfway through his shift that night, at 2:00 a.m. This was because he had a 9:00 a.m. promotional interview scheduled the next morning at KMCI (Kettle Moraine Correctional Institution), and he wanted to get some sleep. Due to the circumstances surrounding the fire and due to the appellant attending to inmates who complained of smoke inhalation, it was about 2:30 a.m. before he actually was finished with work and the relief was completed.

17. TCI had two written policies concerning fires and inmate evacuation in effect at the time in question. One policy was general in nature, and one applied solely to Addams Hall. The general policy (Respondent's Exhibit 3) includes the following:

> Subject: Staff Responsibilities in the Event of Fire and/or Emergency
>
> Please note that in the event of fire and/or emergency, the following actions should occur.
>
> 1. Notify control center immediately and request assistance as needed.
> 2. Unlock all doors as necessary to permit inmates to leave the area. Close appropriate doors to prevent spread of fire.
> 3. If inmates are confined, go to confinement area and release inmates from confinement rooms and direct them to exit route from the area.
> 4. Escort handicapped (wheelchair, crutches, walkers), to nearest handicapped accessible exit. If the exit is blocked, secure necessary assistance and, if necessary, carry inmate through another exit.
> 5. Check all building areas under your supervision to assure that all inmates have exited from the area.
> 6. When conditions permit, all inmates should return to their rooms or the area to which they were assigned and a security count will be taken.
> 7. Inmates in Simpson Hall should be returned to their housing units, if so instructed by supervisory staff.

8. Once the danger is negated, staff and inmates will be advised verbally to reenter the affected area.
9. In the event of a tornado warning, inmates will return to the housing units. Staff and inmates will stay in the basements until the warning is lifted.

The Addams Hall policy (Respondent's Exhibit 2) includes the following:

The following will be utilized in evacuating Addams Hall in the event of a fire or other emergency.

FIRE ALARM - CONTINUOUS HORN

General Instructions:

All inmates and staff are required to respond to and immediately exit the building during fire drills and actual fire alarm or other emergency situation. Close all doors and windows. All property will remain in the rooms. During drills inmates will line up in columns of two on the sidewalk.

In case of an actual fire, all Addams Hall inmates will be routed to Simpson Hall gym where security count will be taken.

If a fire or emergency occurs, the shift supervisor and security support should immediately report to the appropriate building to assist with evacuating inmates Shift supervisors will evaluate the situation and report to control what action should be taken.

18. There have been fire alarms and fires during the period of appellant's employment at TCI with respect to which no evacuation was ordered, and management approved the decision by the supervisor not to evacuate, as being in compliance with management's interpretation of institutional policy. These incidents are set forth in the following findings.

19. In an incident in 1990 involving appellant, an inmate threatened to set off a fire alarm as part of an attempt to get out of segregation so she could smoke. When appellant was advised of this he gave instructions not to evacuate if the alarm in that inmate's room went off, which it did shortly thereafter.

20. In another incident in 1991, appellant was on the site in Addams Hall where a mattress had been ignited by an inmate and was smoldering and emitting smoke but not flames, and where no alarm had sounded. Appellant did not order an evacuation.

21. In another incident which occurred in 1992, a different captain, twice in one shift, did not evacuate a building when the fire alarm went off. This occurred on a hot, humid day when the fire alarm system tended to malfunction. After several false alarms and evacuations, the captain did not require an evacuation when she was on the floor in question and observed no fire. On another occasion that day, she found out from control that an alarm had been caused by a maintenance worker, and she also cancelled an evacuation.

22. Management held an investigatory interview with appellant on July 15, 1992. A July 13, 1992, letter had informed him that the purpose of the meeting was "to discuss your actions in the fire that occurred in Addams Hall on Thursday evening, July 9, 1992." (Respondent's Exhibit 7). At that meeting, appellant provided a narrative of what had occurred on July 9th and answered questions. At one point, appellant stated that he was familiar with policy and procedure regarding fire drills and fire, and believed that while he had not followed policy by not having evacuated all the rooms before going into inmate Watts' room, he believed this was necessary to have saved her life. (Appellant was under the impression there was an unwritten TCI policy to evacuate the inmate whose cell was on fire last.) Management inquired about his decision not to continue the evacuation, noting that this had upset the inmates. Appellant responded that the inmates had a right to be mad, but his main priority was to protect and maintain life and that this overrode the fire procedure.

23. Management held a predisciplinary hearing for appellant on July 27, 1992. Management provided notice of this meeting by a July 20, 1992, letter (Respondent's Exhibit 7) which included the following:

> The purpose of this meeting is to discuss your alleged violation of Department of Corrections Work Rules No. 1 and No. 6. Specifically, on July 9, 1992, you violated health and safety policies and procedures during a fire at Addams Hall.
>
> This violation's discipline, if it should be deemed necessary, would fall into Category "B: of the DOC Disciplinary Guidelines."

24. After having advised him of the work rules that were allegedly violated, management stated that they had determined from the investigation that he had ordered the evacuation halted, and that many inmates had filed

complaints and were upset about not having been evacuated during a real fire when they always were evacuated during drills and false alarms. Appellant's response included specific reference to parts of the policies on fire alarms and evacuation (Respondent's 2 & 3) in contending that he had not violated the policies. He also stated that if he had to deal with the situation again, he would have evacuated the building completely, but at the time he felt that due to the limited staffing on third shift (while third shift has fewer CO's than other shifts, the third shift on the night in question had its full complement of employes on duty), that he knew he had to send an inmate to the hospital which would require his presence to check her restraints, and that he didn't want to leave 60 boisterous inmates under the supervision of the inexperienced CO's, he had decided to halt the evacuation.

25. By a letter dated July 31, 1992, (Respondent's Exhibit 1) respondent notified appellant that he was being suspended, without pay for ten (10) working days. This letter included the following:

> This action is being taken because you are in violation of the following Department of Corrections Work Rules. #1: "Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions,, and #6: "violation of health, safety, and sanitation procedures, directions and requirements." You have acknowledged receipt of the Department of Corrections Handbook, DOC Disciplinary Guidelines, and knowledge of related TCI Procedures.
>
> Specifically, on July 9, 1992, you were the Shift Captain on duty when a fire broke out in an inmate's room on second floor at Addams Hall. A complete investigation regarding this incident, was initiated on July 10, 1992, and completed on July 15, 1992. The results of the investigation indicate that after the fire was extinguished, you were negligent in your duties as Shift Captain, when you ordered your staff to stop the evacuation of inmates. This is a direct violation of TCI Policies and Procedures #1, 2, and #2.OH, which state in part, "In the case of an actual fire, all Addams Hall inmates will be routed to Simpson Hall gym where a security count will be taken. If a fire or emergency occurs, the shift supervisor and security support should immediately report to the appropriate building to assist with evacuating inmates."

26. Appellant had one prior disciplinary action at TCI, a written reprimand for having violated institutional policy by having taken home his institutional key ring.

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 did not violate appellant's due process rights in connection with the predisciplinary procedures he was provided.

4. Respondent had just cause for the imposition of some discipline.

5. The ten days suspension without pay respondent imposed on appellant was excessive and should be reduced to three days.

Opinion

The first matter to be addressed is a motion for default judgment by appellant that was taken up at the beginning of the hearing and denied by the examiner. Respondent was five days late in producing some documents in January 1993 in response to a discovery request. There was no indication of any specific prejudice arising from this delay. These circumstances do not justify a default judgment against respondent. While appellant also asserts that respondent failed to produce some notes of a conversation by Warden Switala, respondent denied that any notes were ever taken, and there is no contrary evidence in the record.

The next issue to be addressed is whether appellant was denied due process during the predisciplinary procedure respondent followed. This issue was not formally noticed for hearing. However, appellant raised the issue in his appeal letter and both parties addressed this subject at length during the hearing. Therefore, the Commission will address this issue. However, before doing so, it should be noted that appellant raised many complaints about the quality of the investigation respondent conducted. These matters are outside the lawful scope of this hearing. The Commission only considers whether there was just cause for the discipline and whether the predisciplinary hearing management provides the employe is adequate under the due process clause. Regardless of whether management conducted a competent investigation, it can prevail if it establishes that it provided the employe an adequate predisciplinary hearing, and it also establishes, based on the evidence presented at the hearing before the Commission, that there was just

cause for the discipline imposed. The Commission hearing is not intended to be an appellate type review of what occurred during respondent's investigation, but a de novo hearing at which both parties can present whatever relevant evidence each believes will support its case. See, e.g., Jellings v. Smith, Wis. Pers. Bd. Nos. 75-44, 75-45, (8/23/976).

The Commission outlined the general principles concerning the due process requirements for predisciplinary hearings in McCready & Paul v. DHSS, 85-0216-PC, 85-0217-PC (5/28/87), by citing Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed 2nd 494, 506, (1985) as follows:

> The predetermination 'hearing,' though necessary, need not be elaborate. We have pointed out '(t)he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings." In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.
>
> Here, the predetermination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employe are true and support the proposed action.
>
> The essential requirements of due process, and all that respondents seek or the court of appeals required, are notice and an opportunity to respond.
>
> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employe is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (citations omitted)

In analyzing what occurred here under these standards, it is necessary to focus on the Court's admonition that the requirements of the predisciplinary hearing will vary depending on "'the importance of the interests involved and the nature of subsequent proceedings,'" and that "in general, 'something less than a full evidentiary hearing is sufficient." id. This case does not involve as substantial an interest as a discharge, and the employe

is entitled to a full trial-type hearing before this Commission at which the employer has the burden of proof. While appellant objected during the predisciplinary hearing to management's failure to have given him complete disclosure of all the evidence against him that was acquired during the course of the investigation, this is not required in a hearing of this nature. The most the employe is entitled to is "an explanation of the employer's evidence." id. The essential basis for appellant's suspension was set forth in the July 31, 1992, letter providing notice of suspension (Respondent's Exhibit 1) as follows: "after the fire was extinguished, you were negligent in your duties as Shift Captain, when you ordered your staff to stop the evacuation of inmates. This is a direct violation of TCI, Policies and Procedures NO. 1, 2, and Number 2. OH..." During the course of the investigative hearing which preceded the predisciplinary hearing, appellant specifically addressed the issue of whether he had followed proper procedures concerning fire alarms and fires. Management specifically asked him about not evacuating the rest of the inmates and noted that this is what the inmates were concerned about. There is no question but that at the time of the predisciplinary hearing, appellant knew respondent was concerned about his handling of the evacuation, and management had a concern that his actions violated, institutional policy. At the predisciplinary hearing, management discussed the evidence on which they were relying. There is no requirement under Loudermill that they had to have turned over the entire investigative file to him as an element of due process. In conclusion, while the procedure respondent followed could have been more extensive, it was sufficient under the due process clause as a prerequisite to this suspension.

Turning to the question of just cause, the Supreme Court held in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974), that just cause for discipline of an employe exists when: "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.". The basis for the disciplinary action taken against respondent was summarized in respondent's letter of July 31, 1992 (Respondent's Exhibit 1) as follows: "after the fire was extinguished, you were negligent in your duties as Shift Captain, when you ordered your staff to stop the evacuation of inmates. This is a direct violation of TCI Policies and

Procedures Number 1.2 and Number 2.) OH..." If appellant's actions were negligent or in violation of these policies, there would be just cause for discipline under the circumstances of this case.

With respect to the question of insubordination or disobedience of the institutional policies, "respondent must establish first, that there was in effect a policy which appellant violated, second, that appellant either had actual knowledge of the policy or should have had knowledge under an objective test, and third, that appellant knew or should have known under an objective test, " Larsen v. DOC, 90-0374-PC, 91-0063-PC-ER (5/14/93), that his actions were contrary to that policy.

It is clear from this record, including statements appellant made during the course of the investigation and the prehearing deposition, that on the night of July 9th, appellant had a general familiarity with the policies in question, but was not completely aware of their contents. As a captain and as the third shift commander effectively in charge of the entire institution, he should have been aware of these policies under an objective test, i.e., what a reasonably prudent captain similarly situated should have known. Accordingly, the next question is whether his actions were in violation of the policies.

The parties strenuously disagree as to whether the policies as written require a complete evacuation under the kind of circumstances that existed on July 9, 1993. In the Commission's opinion, respondent has sustained its burden of persuasion on this issue.

The more specific policy (Addams Hall, Respondent's Exhibit 2) states: "all inmates and staff are required to respond to and immediately exit the building during fire drills and (an) actual fire alarm or other emergency situation." This is pretty straightforward. Appellant seizes on two provisions in the more general policy (Respondent's Exhibit 3):

> 6. When conditions permit, all inmates should return to their rooms or the area to which they were assigned and a security count will be taken.
>
> * * *
>
> 8. Once the danger is negated, staff and inmates will be advised verbally to reenter the affected area.

Given the context of the rest of this policy and the Addams Hall policy (which is specifically cross-referenced in the general policy), these provisions should not be interpreted as meaning that inmates can be turned around and sent back into the building in the middle of the evacuation. Such an interpretation is inconsistent with the proposition that "all inmates...are required to immediately exit the building." (emphasis added) Paragraph 6 and 8 of the general policy can be interpreted consistently with the requirement that "all inmates ... are required to ... immediately exit" by interpreting those paragraphs as referring to the situation after all inmates have been evacuated, rather than as to any point prior to the completion of the evacuation. This interpretation of paragraphs 6 and 8 is reinforced by the immediately preceding paragraph: "5 check all building areas under your supervision to assure that all inmates have exited from the area." (emphasis added).

However, even if his actions were in violation of the policies as written, appellant can not be held accountable for acting contrary to institution policy if his actions were in keeping with the policies as observed and enforced by management. Management's actual approach in practice to these policies effectively overrides a contrary interpretation of their literal language. If it is determined that appellant did not violate institutional policy, or did not violate institutional policy as management has interpreted and applied it, he would not be guilty of disobedience or insubordination, although such a conclusion would not rule out negligence. While appellant's actions were inconsistent with written institutional policy, they were not inconsistent with that policy as interpreted and enforced in practice by management. The written policies do not differentiate between fire drills, false alarms, and real fires -- all inmates must be evacuated. In practice, this has not been required and management has condoned supervisors not evacuating when the supervisor was in a position to have a degree of assurance that a fire alarm was false (see findings 19 and 21). Management also tacitly approved appellant's handling of an incident involving an actual fire in a mattress where there was smoke but no flames, and the alarm did not go off (see finding 20). There is no basis in the written policies for exempting these situations from the complete evacuation policy. Once management has tacitly approved these deviations, it is in no position to draw the line they are attempting to do

here and to say that those situations would not be considered deviations from policy but appellant's actions on July 9, 1992, would be considered a deviation. The problem with respondent's position is illustrated by excerpts from its post-hearing brief:

> TCI policy and procedures in the case of an actual fire, a false alarm or a fire drill is to evacuate the inmates...Generally, the TCI shift supervisor does not have discretion or the authority to halt an evacuation in progress...TCI administration did not discipline its captains when they did not evacuate a building when the captain was on site and knew there was no fire or knew the fire alarm was a false alarm...those incidents constituted common-sense, rational exceptions to the general rule on evacuating buildings where the supervisor or another person was on the scene and knew no fire existed or the supervisor knew the alarm was false. In this situation we had a real fire with smoke in the hallways and an evacuation underway." pp. 3,19 (n.1).

If the institution's written policies are subject to unwritten "common-sense, rational exceptions to the general rule on evacuating buildings," then the policy per se did not prohibit what appellant did, and he cannot be guilty of disobedience or violation of safety requirements. However, he still could have been negligent in the performance of his duties.

In the Commission's opinion, respondent has established that appellant was negligent in the performance of his duties. Appellant by his own statements effectively has admitted his negligence. This is illustrated by excerpts from his deposition referred to for impeachment purposes during the hearing. Appellant admitted that he had not been thoroughly familiar with institution policy:

> Q Okay. So, you weren't thoroughly familiar with the policy that everyone was to be evacuated in the case of fire, to Simpson Gym, and you decided to just kind of, or you substitute (sic) your own judgement for that?
>
> A That is correct.
>
> * * *
>
> Q But you were aware the policy was, in an actual fire, to take them over to Simpson?
>
> A I wasn't aware that we had to follow the policy to that extent.
>
> Q But you were aware of the policy?

A I knew there was policy in place. I couldn't, at that time, quote it verbatim.

Q But you knew they had to go over to Simpson Hall Gym?

A No, I did not.

Q You not know that?

A Not specifically, no.

Deposition, pp. 77, 80.

The record establishes that a third shift captain is effectively in charge of the entire institution, and under an objective standard; i.e., the standard of care attributable to a similarly-situated, reasonably prudent captain, should be thoroughly familiar with all institutional policies pertaining to safety and security. Appellant was negligent in the performance of his duties by his limited knowledge of the policies in question.

The record also establishes that appellant was negligent in his decision to halt the evacuation and to return the inmates to their rooms. Again, this conclusion is supported by appellant's own statements. He admitted that when he made his decision he had not thought in terms of the possibility that there was a fire (other than the one in inmate Watt's room) in another part of the building. He said if that had been the case, it would have been discovered when the inmates were being returned to their rooms. However, as respondent points out in its post-hearing brief, it can be inferred that trying to reinitiate the evacuation at that point would have presented a substantial risk of a chaotic situation. Furthermore, appellant testified that there could have been a hidden fire smoldering in the mattress even after the more visible fire had apparently been extinguished. Because of this possibility, the mattress was taken outside after the inmates had been returned to their rooms. However, if there had been such a smoldering fire, it could have burst out at any point.

Appellant also contradicted himself, in attempting to explain his justification for his actions. Initially in his deposition, he testified as follows:

Q Okay. Why then--but if there were other blue shirts in the building who were unlocking doors pursuant to policy to

evacuate people, when then, if they were dealing with Patty Watts, did you tell them to stop evacuating people?

A There came a point where it was evident that they were not evacuating as it should have been.

Q And what was that?

A The inmates should have been evacuated within minutes of that building. But much time had already elapsed by the time I was clearing the smoke. I realized we weren't going to have an evacuation as we normally would have had. The emergency was already negated.

***

A But when I gave the directive to put them back in their rooms, it was evident that we weren't going to have a proper evacuation. The emergency was already negated.

Q Okay. The emergency may have been negated, but why wasn't there going to be a proper evacuation?

A Staff had already failed, blue shirts had already failed to evacuate in a timely manner, and I suspect that's because of the lack of training. (emphasis added).

Deposition, pp. 72, 78.

Subsequently, he testified as follows:

Q Do you remember being asked this question and giving this answer during the investigatory meeting, Question: When you have false alarms on third, do you evacuate? answer: Full and total evacuation. The quickest we have done it is in three minutes.

A It usually takes a very short period of time, and that's what--that, I suspect, is one of the reasons I gave the directive to bring the inmates back in. I was under the impression that we were very close to a total evacuation. I didn't know that we didn't have the inmates out on first floor or third floor. I thought they were out, and the situation and the emergency was negated; bring them back in. (emphasis added).

Deposition, p. 79.

These conflicting explanations are inconsistent with a conclusion that appellant acted reasonably on the night in question.

The Commission must next address the degree of discipline imposed. While respondent has established just cause for the imposition of some discipline, it failed to show that appellant acted in violation of the institution's actual policy. The record establishes that respondent's primary concern with appellant's actions was that he had violated institutional policy. Therefore, respondent's failure to have satisfied its burden of proof in this regard leads to the conclusion that the discipline should be reduced. Determination of the amount of reduction presents difficulty, partially because management is vested with a broad range of discretion in this area to begin with, and the conduct involved evades any attempt at quantification. Furthermore, although there was some evidence in the record concerning management's handling of other situations, they are insufficiently comparable to this transaction to aid materially in this analysis.

In Barden v. UW-System, No. 82-0237-PC (6/9/83), the Commission outlined certain criteria to be considered in evaluating the severity of the discipline imposed:

> In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior record.

Even if appellant did not violate an actual institutional policy by his actions, the fact remains that he admittedly was not that familiar with policies on evacuation in case of fire or alarm. As the officer effectively in charge of the institution on the third shift, this lack of knowledge is significant, and certainly would have the potential to seriously impair respondent's primary goal of maintaining safe custody of the inmates sentenced to the corrections system. In addition, his failure to have completed the evacuation caused many of the inmates to be afraid for their safety, and appellant admitted they had a right to be upset. However, appellant had no prior disciplinary record, except for a minor reprimand. Also, as discussed above, he was not found to have violated actual institutional policy, which was management's primary concern with respect to his conduct.

Another mitigating factor involves what the Commission considers is a subtext for respondent's disciplinary decision. Respondent contends that

appellant halted the evacuation and began returning inmates to their rooms at least partially because he wanted to avoid having to stay at the institution beyond his 2:00 a.m. scheduled relief, and that this in turn was because of his interest in getting some sleep prior to a promotional interview scheduled for the next morning at 9:00 a.m. There is insufficient evidence on this record that appellant was so motivated. The Commission observes in this regard that the fire alarm sounded at 10:39 p.m., more than three hours before his scheduled relief.

Based on all of the factors discussed above, in the Commission's opinion the suspension should be reduced substantially but that some significant discipline is warranted, and the suspension will be modified to three days.

ORDER

Respondent's action is modified to three days suspension without pay, and this matter is remanded to respondent for action in accordance with this decision.

Dated: February 3, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

AJT:jah

JUDY M. ROGERS, Commissioner

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