

policy for unexpected absences. (See, for example: a) cross examination by Ms. Garner's counsel found on Tape 2, starting at 1821; b) re-direct by DOC's counsel found on Tape 3, starting at 2059; and c) Exh. R-68, p. 5, Category B violation for absence without notice.)

Ms. Garner contended that although the record was unclear, Mr. Cina knew her chosen union representative would be unavailable on January 14, 1994, when Mr. Cina called Ms. Garner the first time on January 13, 1994. The examiner's impression was to the contrary. At one point during her counsel's cross examination, Mr. Cina said he "did a little research" on the availability of her union representative "for Ms. Garner". This testimony is found on Tape 2, in an exchange which begins at 2977, and resumes at 3007. In context, the examiner interpreted Mr. Cina's testimony as his checking after Ms. Garner raised the issue of her union representative's availability. Otherwise, it would make little sense to say he did the check for Ms. Garner.

Ms. Garner objected to the contents of paragraph 21 of the Findings of Fact in the proposed decision contending the information was not used as a basis for her discharge. The information in this paragraph is based on Mr. Buchler's testimony at hearing, to explain why he decided termination was warranted rather than some lesser punishment. (See, for example: a) testimony of Buchler on direct examination by DOC's counsel found on Tape 4, starting at 95, which continues at 290, and again at 489; and b) Buchler testimony on cross examination found on Tape 4 at 1440.) Ms. Garner's counsel objected to such testimony at hearing because these were not reasons given in the termination letter for Ms. Garner's termination. The examiner correctly ruled such testimony was relevant and admissible to explain why Mr. Buchler felt discipline short of termination would be ineffective.

Ms. Garner contended that Mr. Cina lied at hearing about the memo described in paragraph 27 of the Findings of Fact in the proposed decision. She said the examiner should have imposed more severe sanctions for Mr. Cina's lie. The examiner acknowledged in the cited finding that Mr. Cina's version of events were impossible in that the memo "could not have been prepared and delivery could not have been

attempted prior to her leaving at about 5:00 p.m.", when the memo itself recites the fact that she left at about 5:00 p.m.

The examiner's impression, however, was not the same as Ms. Garner's. The examiner observed that Mr. Cina did not understand the conflict in his memo and therefore, his answers about the conflict were unhelpful. Later, Mr. Cina's failure to acknowledge the conflict appeared to be borne out of stubbornness and an inability to explain the conflict. His testimony was frustrating to the examiner, but the examiner did not feel he purposefully lied in an attempt to mislead the examiner. In fact, the examiner made it clear to Mr. Cina that she felt it was impossible for him to recite Ms. Garner's leaving time in a memo he attempted to give her before she left.

Ms. Garner objected to the alternative analysis on page 15 of the proposed decision. She characterized the cited discussion as concluding that the discharge would have occurred even if the January 13, 1994 incident had not occurred, a finding she claims is unsupported by the record. The Commission first wishes to note that Ms. Garner has incorrectly characterized the import of the alternative analysis. The alternative analysis holds that just cause would have existed for Ms. Garner's termination even if the final incident of January 13, 1994, were not considered. This is not the same as holding that respondent would have terminated Ms. Garner even if the final incident had not occurred.

The holding in the alternative analysis is supported by the record. Mr. Cina testified that he could not say if termination would have been his recommendation to Mr. Buchler, if the final incident had not occurred. He noted, however, that termination was a potential for Mr. Buchler's consideration under DOC's progressive disciplinary process. (See, for example, Cina's testimony found on Tape 3, starting at 880, during cross examination.)

DOC objected to the examiner's ruling stated on page 13 of the proposed decision, to the effect that testimony regarding the first Class B violation was a permissible line of inquiry at hearing. The Commission considered DOC's arguments, but ultimately agreed with the examiner's ruling which is consistent with prior Commission cases. See, for example, Higgins v. Wis. Racing Board, Case No. 92-0020-PC

(1/11/94), where the Commission considered all incidents listed in the termination letter of January 1992, as reasons for discharge; including the first violation under respondent's progressive disciplinary system for which Higgins received a written reprimand dated March 22, 1991; a discipline which he did not appeal separately from his termination.]

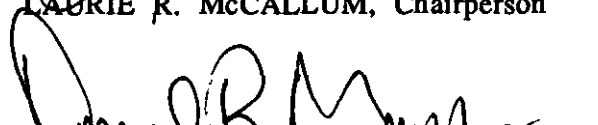
ORDER

That Ms. Garner's appeal be dismissed.

Dated: November 22, 1994 STATE PERSONNEL COMMISSION

JMR


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

* * * * *

W. JEAN GARNER, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

CORRECTIONS, *

Respondent. *

Case No. 94-0031-PC *

* * * * *

PROPOSED
DECISION
AND
ORDER

A hearing was held in the above-noted case on August 23 and 24, 1994.¹ Oral arguments were made at the close of hearing.

The parties agreed to the following hearing issue at a prehearing conference held on June 9, 1994:

Whether there was just cause for the appellant's discharge.
Subissue: Whether the degree of discipline imposed was excessive.

FINDINGS OF FACT

- Ms. Garner began working for the Racine Correctional Institution (RCI) in the Department of Corrections (DOC) on January 26, 1992, as an Inmate Complaint Investigator (ICI) classified as an Administrative Assistant 3 - Confidential. Warden Oscar Shade supervised the ICIs until 8/93, when Mr. Shade left his employment and Deputy Warden Dan Buchler took the assignment of Acting Warden. During the time Mr. Buchler was Acting Warden, he delegated ICI supervision to Mr. Wayne Cina, RCI's Personnel Manager. Mr. Buchler had Mr. Cina supervise the

¹ A combined hearing was scheduled for 8/23- 25/94, to include this appeal and a related discrimination claim (Case No. 94-0014-PC-ER). Ms. Garner withdrew her discrimination case on 8/24/94, which the Commission dismissed in a separate order.

ICIs because Mr. Cina had past experience performing investigative duties.

2. Ms. Garner received a termination letter from DOC on 3/4/94. (Exh. C-1) The letter indicated the termination was due to 3 recent rule violations and history of prior violations, as noted below.

- Category A violation for use of 13.5 hours of leave during pay period 1 of 1994, when she had no leave available. (Work rule #14) This was the third Category A violation in the past 12 months. (The record does not contain details regarding the first two Category A violations.)

- Category B violation for taking time off work on 12/28/93, for a specific task and failing to perform the task or to return to work when the task was completed. (Work rule #7) This was the fourth² Category B violation in the past 6 months.

- Category B violation for insubordination to Mr. Cina on 1/13/94. (Work rule #1) This was characterized as the fifth Category B violation in the past six months.

3. DOC has written guidelines to implement the disciplinary process for all institutions, including RCI. (Exh. R-68) Work rule violations are characterized either as Category A for absenteeism; Category B for misconduct; or Category C for the most serious offenses, such as abuse of inmates and illegal conduct.
4. DOC's disciplinary guidelines address the concept of progressive discipline for Category A violations, as shown below in pertinent part. (Exh. R-68, p. 4-5)

<u>Violations Within Prior 12-Month Period</u>	<u>Corrective Disciplinary Action</u>
- First Violation	Counseling from supervisor (no disciplinary action)
- Second Violation	Verbal reprimand
- Third Violation	Written reprimand

² In the termination letter, DOC characterized the 12/28/93 violation as the fifth Category B violation in the past 6 months, and the 1/13/94 violation as the fourth. DOC's numbering is reversed in this decision so the violation number progresses chronologically with the date of violation. Therefore, this decision terms the 12/28/93 violation as the "fourth" violation and the 1/13/94 violation as the "fifth".

- Fourth Violation 1-day suspension without pay

- Seventh & Additional From a ten (10) day suspension without
Violations pay up to and including discharge...

In addition to being subject to these [above-noted] disciplinary action(s), time missed because of tardiness/improper notification of absence will be charged as unauthorized absence without pay.

Violations which seriously jeopardize or disrupt the security, health, safety or operation of the institution, inmates, residents, and/or staff may be exempted from this disciplinary sequence and subject to disciplinary action up to and including discharge as determined by the Appointing Authority.

5. Pursuant to respondent's progressive disciplinary process for Category A violations, Ms. Garner was subject to a one-day suspension without pay for the fourth Category A violation.
6. A pre-disciplinary hearing was held on 1/28/94³, to consider the Category A violation, the report of which is marked as Exh. R-48⁴. The incident occurred as alleged and just cause existed for imposing discipline.
7. DOC's guidelines regarding progressive discipline for Category B violations is shown below in pertinent part. (Exh. R-68, p.6)

<u>Misconduct Work</u> <u>Rule Violations</u>	<u>Corrective</u> <u>Disciplinary Action</u>
- First Violation	Written reprimand
- Second Violation	1-day suspension without pay
- Third Violation	3-day suspension without pay
- Fourth Violation	From a 5-day suspension without pay up to and including discharge...

Violations which seriously jeopardize or disrupt the security, health, safety and/or operations of the institution,

³ The Category A violation was initially scheduled for DOC hearing on 1/10/94 (Exh. R-33), but Ms. Garner called in sick. It was rescheduled for 1/14/94, (Exh. R-33), and later to 1/24/94 (Exh. R-37) and ultimately to 1/28/94.

⁴ The disciplinary report (Exh. R-48) concluded that Ms. Garner should not be disciplined for use of leave in pay period 1 of 1994. However, the recommendation was based upon the erroneous (however logical) assumption that pay period 1 of 1994, commenced on or after 1/1/94, when Ms. Garner's entitlement to annual leave would have been replenished. Pay period 1 of 1994, commenced in 12/93, when Ms. Garner had no leave time available.

inmates/residents, and/or staff may be exempted from this disciplinary sequence and subject to disciplinary action up to and including discharge as determined by the Appointing Authority.

8. Ms. Garner's prior history of work-rule violations was addressed in an earlier Commission decision. (Exh. C-19⁵, regarding Case No. 94-0013-PC⁶) The first Class B violation involved her failure to tell the entire truth about a conference she attended out of state while she claimed and received medical disability money from respondent.⁷ Ms. Garner's counsel attempted to minimize the nature of the falsehood. Ms. Garner, however, falsely claimed to have pre-registered for the conference in an attempt to add credibility to her statement that ex-Warden Shade gave advance permission for her to attend. Ms. Garner acknowledged the untruthfulness of the statement after respondent checked with the conference organization and was unable to verify her pre-registration. Under these circumstances, Just Cause existed for the first Category B violation and for the discipline imposed - a written reprimand.
9. The issues in the prior case (94-0013-PC) related to discipline imposed for Ms. Garner's second and third Category B violations. The second Category B violation involved Ms. Garner's failure to provide medical verification to support her absences, for which the Commission upheld the resulting 1-day suspension dated 12/27/93. The third Category B violation involved a "lost" key incident, for which the Commission upheld the discipline but reduced the suspension from three to two days.

⁵ Complainant marked the Commission's decision in the prior case, #94-0013-PC, as an exhibit twice; to wit: as Exh. C-8 and C-19. Complainant offered Exh. C-8 which was accepted in the record without objection. This decision refers to Exh. C-19 instead of Exh. C-8, because Exh. C-8 is missing several pages from the Commission's prior decision, whereas Exh. C-19 is a complete copy.

⁶ Exhibit C-19 is comprised of the examiner's Proposed Decision and Order, as well as the full Commission's decision to adopt the proposed decision with amendments. The full Commission's decision was issued as an "Interim Decision and Order" to provide Ms. Garner an opportunity to submit a request for costs. She did not file such a request. Therefore, the interim decision was voted as the Commission's final decision at the Commission's meeting held on 9/14/94.

⁷ Ms. Garner did not appeal the first Category B violation.

10. Ms. Garner's fourth Category B violation left her facing the potential of either a 5-day suspension or discharge under DOC's progressive discipline. She also faced the potential of discharge for the fifth violation.

Alleged Fourth Category B Violation--Time Off on 12/28/93

11. On 11/27/93, Mr. Cina sent Ms. Garner a memo (Exh. R-81) regarding an independent medical examination (IME) with Dr. Kokemoor at Chiron, Ltd., in Madison; scheduled for Monday, 1/3/94. The memo included the following statement:

I am directing you to assemble all pertinent medical records, films, etc., and send them to Chiron at the above address no later than December 17, 1993.

12. On 12/16/93, Mr. Cina sent Ms. Garner a memo about obtaining medical records for the IME. (Exh. R-82) The memo addressed Ms. Garner's stated concern (of 12/7/93) that she would not be able to meet the December 17th deadline. In the memo, Mr. Cina described his efforts to contact her medical providers to determine what was reasonable for DOC to expect in regard to a time table for Ms. Garner to produce medical records. He concluded the prior request was reasonable and warned as noted below:

Failure [to] comply with the IME shall result in disciplinary action up to and including discharge. I have already accommodated you once by rescheduling this IME due to your stating inability to obtain medical records. The institution has already incurred a \$250.00 late cancellation fee due to the first IME having to be rescheduled.

13. Ms. Garner did not meet the December 17th deadline for providing medical records to Dr. Kokemoor.
14. On Monday, 12/27/93, Ms. Garner was scheduled to have her neck and back condition evaluated at the Rehabilitation Institute of Chicago. On 12/24/93, she sent a memo to Mr. Cina requesting time off for various medical appointments. She included the following request:

I would also like to take the medical records from my appointment Monday in Chicago to Madison [on] Tuesday, December 28, 1993 morning. I do plan to report for work as I return from Madison.

Mr. Cina approved the above-noted request and expected Ms. Garner to report to work on December 28th, shortly after the lunch hour. His expectation was reasonable because the driving time involved for her trip to Madison was about 4 hours (round trip).

15. On 12/28/93, Ms. Garner was gone for work the entire day. She did not use the day off to take the Chicago medical records to Madison. Rather, she attempted to rectify her earlier failure to supply medical records to Dr. Kokemoor for the IME. (See pars. 10 - 12 above.) Specifically, her daughter drove her to several providers in the Milwaukee area to obtain copies of her treatment records. Travel time was slowed due to the weather (snowing). She obtained copies of the medical records but did not take any records to Madison that day because it took her until about 3:30 p.m. to obtain the medical records and she felt she would not get to Madison before the clinic closed due to the snow and resulting slower-than-usual travel times. She did not report to work at any time on December 28th, nor did she call RCI to inform them she would not come in as she previously promised. Her only excuse for failing to call was that she did not think of it.
16. A pre-disciplinary hearing was held on 2/3/94⁸, to consider the fourth Category B violation; the report of which is marked as Exh. R-51, and contains the following comments.

Summary of Facts: On 12-24-93 Ms. Garner gave Mr. Cina a memo ... in which she stated . . . [see par. 13 above]. Ms. Garner did not go to Madison on this date, nor did she report for work. Ms. Garner did not notify her supervisor, Wayne Cina, of any change in plans. Mr. Cina did not give Ms. Garner authorization to change her plans on 12-28-93, nor did he approve her to miss the entire day of work on 12-28-93. Ms. Garner had been granted a different day off work in order to gather medical information. Ms. Garner did take records to Chiron on 01-03-94, the date of her IME. Ms. Garner was approved to be in leave without pay status

⁸ The matter of Ms. Garner's time off work on 12/28/93, initially was scheduled for an investigatory hearing on 1/24/94 (Exh. R-37), but was rescheduled and held on 1/28/94. The pre-disciplinary hearing followed on 2/3/94.

on 12-28-93 for the purpose of taking records she had obtained in Chicago to Madison; she was then to report to work. Ms. Garner did not do this.

Conclusion: After an in-depth review of the facts and circumstances in this case it would appear that Just Cause exists to pursue disciplinary action as deemed appropriate by the appointing authority. Ms. Garner did not follow the course of action for which her absence was approved nor did she notify her supervisor of her inability to report for work as agreed upon with her supervisor.

17. Mr. Cina said he probably would have given Ms. Garner the time off work on 12/28/93, if she had said she planned to gather medical records in Milwaukee for the IME. His stated willingness to do so, however, does not change the circumstances here that Ms. Garner did not use the time off work for the purpose requested, she failed to report to work on 12/28/93 as previously promised and she failed to telephone RCI to say she would not be in to work. The fourth Category B violation occurred as alleged. Accordingly, just cause existed for imposing discipline. Ms. Garner was subject to discipline for this fourth Category B violation ranging from a 5-day suspension up to and including discharge.

Alleged Fifth Category B Violation--Insubordination on 1/13/94

18. The pre-disciplinary hearing for the Class A violation initially was scheduled to occur on 1/10/94, but was cancelled because Ms. Garner called in sick.
19. Mr. Cina telephoned Ms. Garner (both were at work) on 1/13/94, at about 3:55 p.m.; about 35 minutes before Ms. Garner's shift ended at 4:30 p.m. He informed Ms. Garner that the previously cancelled pre-disciplinary hearing (of 1/10/94) would be held the following day at 3:00 p.m. She became upset due to the short notice and to her representative's unavailability for the rescheduled meeting. Mr. Cina did not know Ms. Garner's representative would be unavailable the following day until she told him. During the telephone call, Ms. Garner requested a workers compensation (WC) form from Mr. Cina, which he indicated could be obtained in his office.
20. Ms. Garner went to Mr. Cina's office and obtained a WC form. She told him she would not return to work until he treated her better. She then

went to the squad room to complete the form. On the form, she claimed injury stemming from the short notice of rescheduling the pre-disciplinary hearing for the following day which she characterized as Mr. Cina's continuing pattern of harassment, disrespect and unprofessional behavior. (Exhs. R-35 & R-36) She had previously made similar accusations against Mr. Cina as noted in the following paragraph.

21. Ms. Garner previously had contacted Mr. Buchler several times stating disagreement with Mr. Cina's supervision, as well as supervisory decisions and directives. She had accused Mr. Cina of harassment and treating her badly, allegations which Mr. Buchler investigated and determined were unfounded. Mr. Buchler concluded that Ms. Garner could not accept direction from Mr. Cina and that her continued unfounded allegations were disrespectful to Mr. Cina.
22. After receiving the WC form, Ms. Garner went to the squad room to complete the form. Mr. Cina went to the squad room and gave Ms. Garner written notification of the pre-disciplinary hearing scheduled for the following day. (Exh. R-33) The memo concluded with the following paragraph:

This hearing has been rescheduled due to your calling in sick on the original date of the hearing which was January 10, 1994. This is your opportunity to state your side of the story. Failure to appear at this meeting will force us to base our finding on what we already know to be true.

23. While in the break room, Mr. Cina reviewed Ms. Garner's completed WC form and informed her that a portion was completed incorrectly because she wrote in space reserved for office use. Ms. Garner's reaction was hostile and defensive. She said he could re-work the information correctly on the form and submit it for her, which he declined to do. He returned to his office at about 4:20 p.m.
24. Ms. Garner returned to Mr. Cina's office at about 4:25 p.m., to tender the completed WC form. She also returned the pre-disciplinary notice he had given her in the squad room (Exh. R-33), with her handwritten reply on the bottom half of the notice stating as follows:

1-13-93 4:25/pm

I have no idea what this hearing is about. I have received no information that I have done anything wrong.

25. While Ms. Garner was still in his office at about 4:25 p.m. on 1/13/94, he requested the name of her mental health professional. He requested the information due to her comment that she would not return to work. (See par. 20 above.) He was thinking ahead to when she might attempt to return to work at which point he would have the right to ask for a medical fitness-for-duty return-to-work report. Such reports may be completed by physicians only. Therefore, he wanted sufficient information about her mental health professional to determine if he/she was a physician (psychiatrist) who could complete a fitness-for-duty form. He did not explain his reasons to Ms. Garner. She refused his first request for the doctor's name saying she already had provided the name. He requested it a second time saying he would like her to provide it again. She refused his second request as well. After he made a third request, she left his office, returned to her own office and attempted to locate an appointment card with the psychiatrist's name on it. She found the card after about a 20 minute search, returned to Mr. Cina's office and provided the requested name.
26. At about 4:45 p.m., when Ms. Garner returned to Mr. Cina's office, he attempted to address his concerns about Ms. Garner's statement that she would not return to work. (See par. 20.) He started to explain what she would have to do if she did not return to work. Tempers escalated on both sides and Ms. Garner began crying. She started to leave his office. He said they were not done talking yet and asked her not to stay. She continued to leave despite two additional requests for her to remain. She left the building shortly before 5:00 p.m.
27. Mr. Cina said he also attempted to give Ms. Garner a second memo before she left on 1/13/94, but she refused to take it. The referenced memo is in the record as Exh. R-34. The examiner did not credit this testimony. The memo recited the events of 1/13/94, including Ms. Garner's leaving the institution at about 5:00 p.m. Therefore, this memo could not have been prepared and delivery could not have been attempted prior to her leaving at about 5:00 p.m. Mr. Cina could provide no explanation for the

- noted discrepancy. Even so, he re-confirmed his prior testimony. The examiner did not find Mr. Cina's re-confirmation persuasive.
28. Mr. Cina telephoned Ms. Garner's psychiatrist after she left the institution on 1/13/94. The psychiatrist's office was closed but he left a message on the doctor's answering machine requesting a return call. He never received a return call.
 29. Ms. Garner reported for work as scheduled on 1/14/94. She sent a memo (Exh. R-38) to Mr. Cina re-iterating her concerns about proceeding with the pre-disciplinary hearing without her representative. She further indicated that she attempted to but could not find substitute representation on such short notice.
 30. Acting Warden Buchler over-ruled Mr. Cina on the decision to proceed to pre-disciplinary hearing on 1/14/94. The hearing was re-scheduled to 1/24/94. The topics scheduled for discussion included the Category A and both Category B recent violations cited in the termination letter. (See par. 2 above.)
 31. The pre-disciplinary hearing ultimately was re-scheduled to and occurred on 1/28/94. The resulting written report of the insubordination allegation (fifth Category B violation) is in the record as Exh. R-49. The report contained the following information.

Conclusion: Based on the facts available to us and the statements made by Ms. Garner we find Just Cause to exist to find Ms. Garner guilty of violating Work Rule #1. If Ms. Garner feels she is the victim of harassment related to race or gender issues the Department has formal policies in place for her to have their complaint fairly investigated. She indicated that she has brought this to your [Acting Warden Buchler's] attention although she never mentioned race or gender as a motive for the harassment she perceives. Ms. Williams and I agree that Ms. Garner by her own admission willfully disregarded her supervisor's directives to take her letter of job instruction [Exh. R-34⁹] and again willfully disregarded her supervisor's directives to return to his office until he had completed his meeting with her. Ms. Garner presented no evidence that she would have been medically unable to carry out her supervisor's direction. We recommend that you impose the appropriate corrective action for a category B offense. We would ask that the message you send her clearly

⁹ The Commission's decision disagrees with this first finding of the pre-disciplinary committee. (See paragraph 26 of the Findings of Fact.)

compels her to carry out her supervisor's directives in the future.

32. Ms. Garner routinely resisted or refused to follow Mr. Cina's supervisory directives. He attempted to maintain control over her as a difficult employee. She made false accusations against him to his superiors. Over time, he began reacting to her behaviors.
33. The call Mr. Cina made on 1/13/94, to reschedule the pre-disciplinary hearing upon less than 24 hours advance notice was made in his attempt to resolve the matter within a reasonable time. Mr. Cina did not intend to provoke Ms. Garner by making the request. He was unaware that Ms. Garner's representative would be unavailable until Ms. Garner told him.
34. Mr. Cina continued to insist that the pre-disciplinary hearing be held the following day even after he knew Ms. Garner's representative was unavailable. This was a stubborn reaction on his part, as well as further attempt to control her as a difficult employee. With hindsight, it was not the best decision. Ms. Garner understandably was upset.
35. DOC's disciplinary guidelines provide that mitigating or aggravating circumstances are to be considered in determining whether just cause exists to impose discipline and in determining the appropriate discipline to impose. Ms. Garner mentioned her emotional status at the pre-disciplinary hearing. (Exh. R-49, last two sentences of par. 2) DOC also considered her emotional state on 1/13/94, as a mitigating circumstance.¹⁰
36. Just cause existed for imposing discipline for Ms. Garner's actions on 1/13/94. She was insubordinate in her initial refusals to provide Mr. Cina with the name of her mental health professional and in her refusals to return to Mr. Cina's office. Her actions evidenced a continued resistance to directions from her supervisor.

¹⁰ Ms. Garner's emotional state on 1/13/94, is listed as a mitigating circumstance on the incorrect pre-disciplinary report. Specifically, it is listed as a consideration of her time off work on 12/28/93 (Exh. R-51, final paragraph) rather than the correct report regarding the insubordination (Exh. R-49).

Termination as the Form of Discipline Imposed

37. Mr. Cina recommended Ms. Garner's dismissal to Acting Warden Buchler. Mr. Cina's recommendation was based on the number of Ms. Garner's Category A and B violations and his perception that she had an attitude which resulted in her refusal to communicate with him as her supervisor and that such attitude was worsening without reason to believe it would improve.
38. Acting Warden Buchler considered and ultimately approved Mr. Cina's recommendation to terminate Ms. Garner. Mr. Buchler considered but rejected imposing lesser forms of discipline. He concluded that alternatives had been tried previously without significant change in Ms. Garner's performance and, especially, in her unresponsiveness to Mr. Cina as her supervisor. For example, Ms. Garner previously had been referred to the Employee Assistance Program and had been provided job instruction and counselling by both Mr. Cina and Mr. Buchler. Mr. Buchler concluded termination was appropriate because he had no reason to believe lesser discipline or other remedial steps would enable Ms. Garner to correct her behavior.
39. Acting Warden Buchler views all violations as serious, but acknowledged that the Category A violation (for claiming non-existent leave in pay period 1 of 1994) was less serious than the fourth and fifth Category B violations (for the 12/28/93 time off work, and for insubordination on 1/13/94).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this appeal pursuant to s. 230.44 (1)(c), Stats.
2. Respondent had the burden to show by a preponderance of credible evidence that there was just cause for the termination of appellant.
3. Respondent met its burden.

DISCUSSION

Admissibility of UC Decision (Exh. C-20)

Complainant requested inclusion of a Unemployment Compensation (UC) decision as part of the record. The examiner conditionally denied this request at hearing due to her recollection that such inclusion was prohibited under Ch. 108, Stats. The ruling was conditional to provide the examiner with an opportunity to check the statutes when she returned to her office.

The Commission confirms the examiner's conditional ruling. Section 108.101, Stats., prohibits admission of a UC decision in other forums. The referenced statute provides as follows:

- (1) No finding of fact or law, determination, decision or judgment made with respect to rights or liabilities under this chapter is admissible or binding in any action or administrative or judicial proceeding in law or in equity not arising under this chapter, unless [an exception which does not apply in Ms. Garner's case].

Ruling on Evidence Relating to Ms. Garner's First Class B Violation:

Ms. Garner presented evidence at hearing regarding her first Class B violation and such testimony was taken over the objection of respondent. Respondent contended the Commission lacked jurisdiction to review the first Class B violation because Ms. Garner did not appeal the resulting discipline of a written reprimand. Ms. Garner argued she should be able to present the evidence because the termination letter stated its reliance on her past history of violations which included the first Class B violation. The examiner reserved ruling on this objection and allowed testimony to proceed so the record would be complete if she later overruled respondent's objection.

The Commission concludes it is appropriate to accept testimony regarding the first Class B violation as part of the record because respondent relied on the violation as a reason for termination. Ms. Garner did not appeal the first Class B violation and, therefore, the Commission lacks jurisdiction to over-turn the discipline imposed.

The "Just Cause" Issue

The two-step analysis for disciplinary cases was discussed by the Commission in Barden v. UW-System, 82-2237-PC (6/9/83), as follows:

First the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded that there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. (Cites omitted.)

The "just cause" standard was described in Barden, relying on the Wisconsin Supreme Court case of Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379, ___ (1974), as follows:

. . . one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to impair his performance of the duties of his position or the efficiency of the group with which he works. (Cites omitted.)

RCI's disciplinary policy requires consideration of mitigating circumstances in determining whether just cause exists for imposing discipline and in determining the appropriate sanction to impose. This aspect of the policy is consistent with the cases cited above.

Insubordination on January 13, 1994

This decision concludes that Ms. Garner was insubordinate on 1/13/94, and that just cause existed for imposing termination. Ms. Garner felt Mr. Cina intentionally acted to provoke her, an allegation denied by Mr. Cina.

It is undisputed that Mr. Cina did not know Ms. Garner's representative would be unavailable when Mr. Cina first re-scheduled the disciplinary hearing. This fact tended to dispel inferences of bad motive on his part. Also, Mr. Cina did not expect Ms. Garner to claim that such notice would be inadequate for her to prepare for the pre-disciplinary hearing. He reasonably expected she would be ready to go on shorter notice because she should have been ready by the originally-scheduled date of 1/10/94, which was cancelled only because she called in sick.

The examiner anticipates that Ms. Garner will strongly disagree with the conclusion made in the prior paragraph. Therefore, the following analysis is provided in the alternative, to illustrate that her dismissal would be upheld even if the insubordination incident were not considered.

Did Just Cause Exist for the Discharge Not Considering the January 13, 1994 Incident? -- Alternative Analysis

DOC clearly demonstrated that Ms. Garner unreasonably resisted or would not accept direction from Mr. Cina, and that she held this attitude prior to the fourth Category B violation.

Ms. Garner faced either further suspension or discharge as the result of her fourth Category B violation. (See par. 7 of the Findings of Fact.) Just Cause exists for termination in response to the fourth Category B violation due to Ms. Garner's entrenched negative attitude toward Mr. Cina and to her past demonstration that lesser remedial measures would be ineffective to correct her behavior.

ORDER

Respondent's termination of appellant is affirmed and this case is dismissed.

Dated _____, 1994.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JMR/jmr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner