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ROBERT CHYBA,
 Appellant,

v.
 Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 94-0500-PC

* * * * *

FINAL
DECISION AND
ORDER

A Proposed Decision and Order was issued in the above matter on May 10, 1996, and a copy is attached hereto. After reviewing the documentary evidence of record and consulting with the hearing examiner, the Commission clarifies the Proposed Decision by making the changes notes below.

A. *The quoted portions of the respondent's work rules and Executive Directive 7, set forth on page 5 of the Proposed Decision have been amended to include additional language from those documents. The more complete version reads as follows:*

Department Work Rules:

All employees of the Department are prohibited from committing any of the following acts:

* * *

2. Abusing, striking, or deliberately causing mental anguish or injury to clients, inmates or others.

* * *

5. Disorderly or illegal conduct including, but not limited to, the use of loud, profane or abusive language; horseplay; gambling.

Executive Directive 7

* * *

2. Definitions

- A. Harassment: Offensive verbal, physical or graphic conduct constitutes harassment when this conduct: 1) has the purpose or effect of creating a hostile, intimidating or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual's work performance; or 3) otherwise adversely affects an individual's employment opportunities. Harassment is such offensive behavior when linked to protected status (race, sex, age, etc., for example.)

"Sexual harassment" includes unwelcome sexual advances, unwelcome physical contact, or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes, but is not limited to, the deliberate, repeated making of unsolicited gestures or comments, or the deliberate display of offensive sexually graphic materials which is not necessary for business purposes. Sexual harassment also includes general derogatory comments about either females or males.

* * *

3. Guidelines

.... All proven incidents will be met with counseling or appropriate discipline.

B. The first full paragraph on page 7 is deleted and replaced with the following language:

Even with these inconsistencies, the evidence supports a conclusion that Chyba did violate DOC Work Rules 2 and 5, and Executive Directive 7 by causing mental anguish to Lt. Nelson, using loud and abusive language toward Nelson, engaging in conduct which caused a hostile and intimidating working environment and making derogatory comments to Nelson and about females. These violations are "just cause" for the imposition of discipline.

Respondent based its discipline of appellant on the following alleged misconduct:

On this date you verbally and physically intimidated a subordinate, Lt. Sue Nelson, because of your dissatisfaction regarding a memo that she had sent to you about the repair of a broken lock on the U/A (urinalysis) refrigerator. Further, you asked her to step into a private office where you in a loud voice said, "this is chicken shit," referring to

the note that she had written. Your anger escalated, and while you were hollering and gesturing with your hand you struck Ms. Nelson with the memo. You then screamed at her that "if you ever do this again, I'll have your fucking ass in the fucking warden's office so fucking fast." At this point Ms. Nelson became extremely afraid, and asked to leave the office. When she attempted to exit, you, against her wishes prevented this by blocking her way through the door.

When the two of you finally left this private office and moved to the Security office you continued to harass Lt. Nelson, and were overheard by other staff tell her something to the effect "listen missy, we've run two other fucking female lieutenants out of here and you're going to be number three!" You also said, "it's not a fucking threat, it's a promise!"

The underlined portions of the suspension letter are those allegations which have been substantiated by respondent through the presentation of evidence.¹ This information is set forth in order to clarify the Commission's analysis of this matter. Even though respondent was unable to sustain its burden of proof as to some of the conduct described in the letter of suspension, the substantiated conduct provides just cause for the imposition of a one day suspension.

Respondent submitted no evidence or showing outside the letter of discipline that appellant violated Wisconsin Act 427, and the Commission finds accordingly.

C. The Commission responds as follows to an argument raised by complainant in his objections to the Proposed Decision:

Regarding appellant's claim in his letter objecting to the Proposed Decision and Order that he was denied the opportunity to present evidence as to discipline imposed by respondent in other similar cases, it is not clear whether he is referring to documentary evidence or testimony. Therefore, it is difficult to respond to this claim. However, documentary evidence is required to be filed at least three working days before the hearing pursuant to PC 4.01, Wis. Admin. Code, and there is no indication appellant satisfied this requirement.

¹The evidence supports a finding that appellant did not use foul or profane language in the security office, but in substance the quoted statements are accurate.

Even if the evidence had been supplied in advance of the hearing or if it could have been offered through testimony, it would have had only limited relevance and would not have affected the outcome of this matter. Appellant writes:

I tried to present Case No. 13163; Vincente Rincon vs. State of Wisconsin, Department of Corrections, Kettle Moraine Correctional Institution but was denied. The AWARD in this case is as follows:

It is concluded that the Employer violated Sections 4/9 and 11/7 when it suspended the Grievant for one day. The Employer is directed to expunge the discipline from the Grievant's record and restore all lost wages and benefits, including overtime, resulting from the suspension. Although there was not just cause for the discipline imposed on the Grievant, the Grievant did violate Work Rule 5. The Grievant is to be given a job instruction dated the same date as the letter os (sic.) suspension for his violation of Work Rule 5.

There are no grounds for removing records of the February 17, 1994, incident from the Employer's records. The incident did occur and discipline was appropriate. It is only the disciplinary penalty that was inappropriate given the Employer's own findings about the mutual culpability of the Grievant and the Complainant.

Based on this description of the Rincon award, it is clear that matter is not similar to the instant case. Unlike Rincon, no mutual culpability was found by the deciding body in the instant case. Therefore, had evidence of the Rincon award been received, it would have had no bearing on the outcome of this matter.


With the above clarification and findings, the Commission adopts the Proposed Decision and Order as its final disposition of this matter.

Dated: July 23, 1996

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

K:D:temp-7/96 Chyba


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Robert Chyba
W940 Kettle Moraine Ln.
Cambellsport, WI 53010

Michael Sullivan
Secretary, DOC
P.O. Box 7925
Madison, WI 53707-7925

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95

* * * * *

ROBERT CHYBA,
 Appellant,

v.

Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 94-0500-PC

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

This matter is an appeal by appellant Robert Chyba of a one day suspension without pay by respondent, Department of Corrections, from his work at Kettle Moraine Correctional Institute. The following is based on a hearing on this matter and written after the filing of briefs by the parties. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Appellant Robert Chyba commenced employment with the Department of Corrections (DOC) in 1981 at Kettle Moraine Correctional Institute at Plymouth, Wisconsin.
2. Kettle Moraine Institute (KMCI) is a medium security prison in the Division of Adult Institutions of DOC, which administers the state's prison and community correctional centers.
3. Chyba began employment at KMCI as an Officer 1 and was promoted through the ranks to his present position of Captain, which he has held since about 1990.
4. Current job responsibilities of Chyba include functioning as the relief captain for line captains on holidays and vacations and serving as the officer responsible for maintenance of locks and keys.
5. Chyba's direct supervisor is Thomas Nickel, KMCI Director of Security, who is supervised by KMCI Warden, Marianne Cooke.

6. On or about July 14, 1994, Captain Chyba received a note from Lieutenant Susan Nelson requesting repair of the lock on the U/A (urinalysis) refrigerator.

7. When Nelson arrived to begin her duties on the second shift that day, Chyba told Nelson that he wanted to talk with her.

8. Chyba and Nelson left the security supervisor's office and went to an unoccupied office, where Chyba confronted Nelson about the contents of her note requesting the lock repair.

9. During this discourse, Chyba made it clear to Nelson that he was not interested in an exchange, but only wanted to instruct Nelson regarding the procedure for obtaining lock repair services.

10. After some 5 minutes, the confrontation ended. Nelson went back to the supervisor's office followed by Chyba. There, a further verbal interchange took place between the two in front of two other staff members, Betty Kraemer, a Program Assistant, and Captain Robert Jones.

11. Shortly after this encounter, Nelson talked with the Administrative Supervisor, Captain Barber. Nelson told Barber that she'd just had a "heinous experience," that Chyba had yelled at her and threatened her with loss of her job.

12. Next, Nelson sought out Steven Beck, the acting Security Director. Nelson told Beck that she'd been harassed and intimidated by Chyba during a confrontation.

13. After Beck inquired and Nelson informed him that she was not at that time making a formal complaint, Beck advised Nelson of the various procedures she could follow: (1) Go to Chyba and tell him to stop; (2) make a formal complaint to him (Beck); (3) report the incident to the Madison office; or (4) inform the Warden.

14. Beck was in the office adjacent to the supervisor's office at the time of the incident. He did not hear anything, although it is possible to hear through the walls.

15. In August 1994, Nelson called KMCI Security Director Thomas Nickel at his home. Nickel had been away from work on medical leave since June 1994. Nelson told Nickel about her incident with Chyba.

16. Nickel advised Nelson to make a written record of the incident and report it to Warden Cooke upon returning to work. Afterwards, Nickel

immediately reported his conversation with Nelson to Warden Cooke, his supervisor.

17. That same evening, Warden Cooke called Nelson and inquired about the incident. Cooke directed Nelson to report to her office on her next work day with written notes regarding the incident. Cooke told Nelson the incident would be investigated and attended by appropriate action.

18. On her first day back to work, Nelson, as directed, reported to Cooke with written notes describing the incident. In response to this meeting, Associate Warden Barbara Earle was selected to conduct an investigation of the matter.

19. On August 25, 1994 a pre-disciplinary hearing for Chyba was held by Nickel and resulted in a recommendation of a one-day suspension without pay.

20. Subsequently, appellant was notified of a one-day disciplinary suspension without pay, effective September 7, 1994, in a letter dated September 1, 1994, and signed by Warden Cooke, the appointing authority for KMCI.

21. An amended letter was sent to the appellant the same day correcting the date of the incident and providing greater detail of the alleged inappropriate behavior, which resulted in the discipline.

22. The amended disciplinary letter stated that Chyba had violated DOC Work Rules 2 and 5, DOC Executive Directive 7 and Wis. Act #427.

23. The appellant made a timely appeal of his suspension by respondent to this Commission.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.
2. Respondent has the burden of proof.
3. Respondent has established there was just cause for the discipline imposed.
4. Respondent has established the discipline imposed was not excessive.

DISCUSSION

In a disciplinary proceeding before the Commission, the appointing authority has the burden of proving "to a reasonable certainty by a greater weight or clear preponderance of the evidence" that the discipline was for just cause. Reinke v Personnel Board, 53 Wis. 2d. 123, 191 N.W. 2d 833 (1971). Just cause is defined by the court in State ex rel. Gudlin v Civil Service Comm., 27 Wis 2d 77, 87, 133 N.W. 2d 799 (1965) as conduct by an employee "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." Thus, the Commission considers the following factors in determining discipline cases: (1) Did the appellant commit the conduct alleged by respondent in its letter of discipline. (2) If true, did the conduct constitute just cause for discipline, and (3) was the imposed discipline reasonable and not excessive.

As provided in the amended letter of suspension, dated September 1, 1994, respondent alleges that appellant engaged in inappropriate behavior and violated department rules as follows:

On this date you verbally and physically intimidated a subordinate, Lt. Sue Nelson, because of your dissatisfaction regarding a memo that she had sent to you about the repair of a broken lock on the U/A (urinalysis) refrigerator. Further, you asked her to step into a private office where you in a loud voice said, "this is chicken shit," referring to the note that she had written. Your anger escalated, and while you were hollering and gesturing with your hand you struck Ms. Nelson with the memo. You then screamed at her that "if you ever do this again, I'll have your fucking ass in the fucking warden's office so fucking fast." At this point Ms. Nelson became extremely afraid, and asked to leave the office. When she attempted to exit, you, against her wishes prevented this by blocking her way through the door.

When the two of you finally left this private office and moved to the Security office you continued to harass Lt. Nelson, and were overheard by other staff tell her something to the effect "listen missy, we've run two other fucking female lieutenants out of here and you're going to be number three!" You also said, "it's not a fucking threat, it's a promise!"

These actions described above constitute sexual harassment, and are in violation of the Department of Corrections Work Rules #2 and #5. Work Rule #2 prohibits employees from committing the following acts: "Abusing, striking, or deliberately causing mental anguish or injury to patients, inmates or others." Work Rule #5 prohibits employees from: "Disorderly or illegal conduct including, but not limited to, the use of loud and profane or abusive language; horseplay, gambling; or other behavior unbecoming to a state employee." Your conduct was also in

violation of the Department of Corrections' Executive #7 and the Wis. Act #427 which specifically forbid sexual harassment.

The rules and directives allegedly violated by Chyba are, in pertinent part, as follows:

Department Rules:

* * *

2. Abusing, striking, or deliberately causing mental anguish or injury to clients, inmates or others.

* * *

5. Disorderly or illegal conduct including, but not limited to, the use of loud, profane or abusive language; horseplay; gambling.

Executive Directive 7

* * *

2. Definitions

- A. Harassment: Offensive verbal, physical or graphic conduct constitutes harassment when this conduct: 1) has the purpose or effect of creating a hostile, intimidating or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual's work performance; or 3) otherwise adversely affects an individual's employment opportunities. Harassment is such offensive behavior when linked to protected status (race, sex, age, etc., for example.)

"Sexual harassment" includes unwelcome sexual advances, unwelcome physical contact, or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes, but is not limited to, the deliberate, repeated making of unsolicited gestures or comments, or the deliberate display of offensive sexually graphic materials which is not necessary for business purposes. Sexual harassment also includes general derogatory comments about either females or males. (emphasis added)

Lt. Nelson testified that in the private room Chyba "exploded." He was loud, extremely angry and used the "F" word frequently. She requested to leave five times, but he was between her and the door and told her "he was the

f___ g captain and she was the lieutenant and the conversation would be over when he said." Nelson also testified that Chyba accidentally struck her with the memo, leaving an eighth inch welt on her chin, but she did not tell anyone. Nelson's testimony regarding Chyba's comments in the supervisor's office was as written in the discipline letter.

Betty Kraemer, a Program Assistant, testified that as she entered the supervisor's office, Chyba and Nelson were having a disagreement. Kraemer testified that Chyba said that "he had gotten rid of two other females before her and he could get rid of her also." Also Kraemer testified that Chyba was very angry, but she never heard him use any "bad" language.

Captain Robert Jones was also in the supervisor's office at that time. Jones testified that Chyba said, "Look Missy, I've run two of your kind out of here. I'll have your ass. I'll have your job. I'll have your ass in front of the fucking Warden or..." Further Jones testified that Nelson said "I won't be threatened" and Chyba said, "It's not a threat, that's a promise." Jones had "shared living expenses" with Nelson during this period for approximately four months.

The appellant testified that he took Lt. Nelson aside to a private room to give her instructions for processing a request for lock repair. He denied using profanity, striking Nelson with a memo, or blocking Nelson from leaving the room. He also testified that he did not use the term "Missy" or the profanity alleged. The appellant acknowledged that he used profanity on occasion and presented evidence establishing that this is common practice with line staff, including Lt. Nelson.

As appellant argues, the answer to what took place between he and Lt. Nelson on July 14, 1994, rests on the credibility of the witnesses. On that point the appellant presented two witnesses, Lieutenant James Harper and KMCI Personnel Manager Arthur Thurmer, who testified that Nelson had less credibility with them because of her excuses for reporting late to work or failing to report to work on numerous occasions.

Based on the testimony of the various witnesses, it is apparent that Chyba was angry when he talked to Nelson alone about the memo, that he intimidated her because of his superior rank and physical strength. Chyba, himself, acknowledged that he speaks in a loud voice. Whether Chyba used the word "Missy" or profanity as described in the suspension letter is dubious. The

most impartial witness to the incident in the supervisor's office, Betty Kraemer, testified she never heard Chyba use any profanity. She said nothing about Chyba using the word "Missy." Jones, who corroborated Nelson's testimony that Chyba used the word "Missy," was living with Nelson during this period. Also Jones' testimony of what Chyba said included remarks about the deputy warden that Nelson testified were used by Chyba when they were alone in a private office.

Even with these inconsistencies, the evidence supports a conclusion that Chyba did violate the rules and directives as alleged by respondent. Also it is clear that Chyba's violation of these standards of good order in the work place is "just cause" for the imposition of discipline.

The remaining question is whether the discipline imposed was excessive. The evidence establishes Chyba talked to Nelson in a loud and abusive manner. During this discourse, the memorandum he was holding accidentally grazed Nelson's chin. Nelson was intimidated by the differences in gender and feared for her safety and her job. However, Chyba did not touch Nelson, make any sexual advances toward her or engage in sexual innuendo. If Chyba used the "F" word, such language was not uncommon among line staff. But Nelson found the word "Missy" demeaning to her as an adult female.

No evidence was presented of any prior disciplinary action against Chyba. Chyba argues there was no forewarning or indication from Nelson afterwards that his behavior was unacceptable to her. These factors must be considered as favorable to Chyba in deciding this question.

Also Chyba argues he was disciplined more severely than others who committed similar or more serious offenses and that he was not offered an opportunity to respond to Nelson's allegations. However, Chyba presented no evidence of respondent's disposition of other similar cases, and the record shows Chyba was provided a pre-disciplinary hearing on August 23, 1994.

In Jacob v. DOC, 94-0158-PC (5/15/95), this Commission observed that in sexual harassment cases, court decisions consistently reflect affirmation of strong measures by management against employees who engage in sexual harassment in the work place. Therefore, while the instant circumstance was not egregious in that it involved one incident of sexual harassment including intimidation and demeaning language and under ordinary circumstances of

progressive discipline might result in a written reprimand, the Commission cannot conclude the discipline imposed was excessive.

ORDER

Respondent's action suspending appellant for one day without pay is affirmed and this appeal is dismissed.

Dated: _____, 1996. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM
K:D:temp-7/96 Chyba 2

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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