STATE OF WISCONSIN PERSONNEL COMMISSION

DALE R. BRENON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Milwaukee),
Respondent.

Case No. 96-0016-PC

INTERIM DECISION AND ORDER

A Proposed Decision and Order (PDO) was issued on October 6, 1997. Both parties filed written arguments, with the final argument received by the Commission on December 8, 1997.

The Commission consulted with the hearing examiner and considered the arguments raised by the parties. The Commission adopts the PDO as its final decision with the amendments noted below. This decision is issued as an Interim Decision and Order to enable the Commission to consider an application for fees and costs under 227.485, Stats.

Amendments

The amendments are made to clarify the record and/or to clarify the Commission's decision rationale. The Commission agreed with the examiner's credibility determinations and, accordingly, none of the amendments reflect disagreement on credibility issues.

1. The first paragraph on page 13 of the PDO is amended to clarify that "Holmes" is a male, as shown below:

> Allegation three: Again during the Clark investigation on January 12, 1996, Brenon initially denied discussing his sex

organs in front of any officers while on duty. Moments later he said he "may have" made the statement "I'm going to drain 'Lucky'," or similar words in reference to urination, but "probably" only in from of Sorrel or Peter Holmes (a male). With Boswell, on January 18, 1996, Brenon said he did not recall ever saying that in front of Panas or Neuman or any females. Panas signed a summary, by Hodermann, of an interview held by Hodermann, on January 10, 1996, which provides, "Sgt. Brenon talks about his penis, its size, it's 'lucky'. He talks about how he's got to drain 'Lucky'." But Panas testified that she had never heard Brenon say anything about the size of his penis.

2. The first full paragraph on page 14 of the PDO is amended to clarify that "Klobukowski" is a male, as follows:

The evidence supports the conclusion that Brenon simulated masturbation, while joking about Esler, on at least one occasion. Gregory Klobukowski (a male), Sorrell and Panas testified to being present when this occurred. Of the three witnesses, Klobukowski was the most credible. Sorrell admitted to imitating Esler, along with others, bet he denied simulating masturbation. Allegations that Brenon simulated masturbation never appear in Panas' signed interview summaries, or Hodermann's notes of her interviews with Panas, until after Sorrell alleged it occurred "in front of Panas." (R #73, A##21 & 22)

3. Amend the third full paragraph on page 11 of the PDO to read as follows (underlined text shown below is new):

During his testimony, Brenon, who is Irish, said that he may have told a joke about an Irishman buying a chain saw and returning it because it didn't work, after notification of the ten day suspension. Panas testified she heard Brenon tell jokes substituting Irishmen for Blacks. Panas did not otherwise identify these jokes or explain how she knew the original joke was about Blacks. Respondent presented no other evidence regarding these alleged Black jokes. The Commission concludes

that Brenon's telling Irish jokes about his own ethnic background was well within the parameters of joking at the workplace which had occurred without reprisal for a long time. Accordingly, respondent failed to show just cause for imposing discipline regarding this allegation.

4. Amend the first partial paragraph on page 12 of the PDO, as shown below:

. . . The two other complaints by Sorrell of retaliation were based upon and related to Sorrell's ~~need no comment, except to observe, based on the record, that Sorrell had enjoyed a~~ personal friendship with Brenon~~, prior to his complaint to Hodermann~~. The Commission concludes that respondent failed to show just cause for imposing discipline regarding the retaliation allegations.

5. Amend the third full paragraph on page 14 of the PDO, as shown below:

However, respondent has established there was just cause for disciplinary action. While most of the alleged misconduct occurred prior to the investigation linked with the ten day suspension, respondent only became aware of them after that initial investigation. Yet, as previously determined, respondent failed to present evidence sufficient to establish just cause for imposing discipline regarding two of the three principal allegations of misconduct.

6. Amend the second full paragraph on page 16 of the PDO, as shown below:

Based on the evidence presented, the Commission finds that there was not just cause for Brenon's discharge. Respondent failed to prove all the allegations of misconduct resulting in its discharge of Brenon. The evidence does not support a conclusion that Brenon told jokes about African-Americans~~ or other minorities~~ after notice of his suspension. Furthermore, respondent failed to show that the Irish jokes told by Brenon were outside the parameter of long-standing accepted behavior in the workplace. Respondent failed to present evidence regarding

> departmental policy or guidelines on jokes. The evidence established that banter was common in the workplace. Brenon was not alone in telling jokes, teasing and mimicking co-workers, and sometimes he was the butt of such activity. Here there is no evidence of any rules, policies or guidelines addressing this subject matter.

The Loudermill and Gilbert Case

The U.S. Supreme Court discussed due process concerns when a property right existed in regard to the disciplinary action of termination in the case of *Cleveland Bd. Of Educ. v. Loudermill*, 470 US 532, 105 S Ct 1487 (1985). The facts of *Loudermill*, briefly, are that Mr. Loudermill was dismissed for being dishonest in filling out his employment application wherein he indicated he had never been convicted of a felony. He was not afforded an opportunity to respond to the charge or to challenge his dismissal. He argued to the court that he thought his prior conviction was a misdemeanor rather than a felony.

The *Loudermill* court started with the proposition that before termination could be imposed due process required that the employee have "an opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 US 542. The court further explained that the required hearing has two basic components: 1) an investigation where the employe is allowed to present his/her side of the story in an attempt to clarify the facts, and 2) an opportunity to attempt to influence the decision-maker's exercise of discretionary action prior to the imposition of discipline.

> [S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involved factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect.

Loudermill, 470 US 543. (Citations omitted.)

Respondent contends the Supreme Court over-ruled *Loudermill* with respect to disciplinary suspensions in the case of *Gilbert v. Homar*, 117 S Ct 1807 (1977). (See respondent's brief filed on November 17, 1997, pp. 16-17.) The *Gilbert* case does not conflict with, supersede or overrule *Loudermill*. The facts of *Gilbert*, briefly, are that Mr. Gilbert was employed as a police officer. He was arrested in a drug raid and charged with related felony offenses. The employer suspended Mr. Gilbert pending an investigation of the matter and held no fact-finding hearing prior to the suspension. The *Gilbert* court found the suspension did not violate due process principles because the felony arrest provided the employer with a reasonable basis for believing the alleged conduct occurred and the employer had a significant interest in suspending Mr. Gilbert due to the felony charges and his status as a police officer, a position which involved great public trust and high public visibility. The *Gilbert* court emphasized, however, that its holding was based on the presumption of a post-suspension hearing where the employee could provide his side of the story and attempt to influence the decision maker's discretionary choice of what discipline to impose:

> . . . Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect" (citing *Loudermill*) in the case of a suspension there will be ample opportunity to invoke discretion later—and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. . . .

Gilbert, 138 L. Ed. 130.

Mr. Brenon's situation is unlike the circumstances presented in *Gilbert* in at least two significant ways. First, while Mr. Brenon is a police sergeant, his telling jokes about the "million man march", while inappropriate, are not akin to felony charges. Also, the suspension in Mr. Brenon's case was the discretionary discipline imposed rather than an interim step pending investigation prior to deciding what

discipline to impose. Respondent's arguments fail to acknowledge these differences between Mr. Brenon's case and the circumstances presented in *Gilbert*.

The Commission now turns to the question of whether due process requirements were met in Mr. Brenon's case. Mr. Brenon admitted to Sroka that he told "Million Man March" jokes which may be viewed as a sufficient factual basis for suspension pending investigation per *Gilbert*, to be followed by a due process hearing. What occurred, however, is Mr. Brenon's admission was, in effect, improperly treated by respondent as absolving respondent from according any further due process protections. Respondent's failure to provide further due process protections violates not only the *Louderman* and *Gilbert* decisions but further is subject to criticism where, as in Mr. Brenon's situation, the admission occurred in the context of the following notice defects: a) Mr. Brenon was asked to attend the meeting with Sroka without first being told of the nature of the complaints, b) Sroka failed to disclose either prior to or during the meeting the potential that respondent might view the charges as serious, and c) Sroka failed to disclose either prior to or during the meeting the potential that suspension or some other serious form of discipline could result. (See, PDO ¶¶18 and 19, and related discussion on pp. 8-9.) Clark then directed Sroka to impose a ten day suspension and Clark made this decision without first providing Mr. Brenon with an opportunity to at least attempt to influence Clark's discretionary exercise of determining what discipline to impose, thus failing to meet the due process requirements of *Loudermill* and *Gilbert*. As noted in the PDO (pp. 9-10), Clark's discretionary imposition of a ten-day suspension was excessive even when the due process considerations are put aside, meaning even when due process is not considered as part of the analysis. This finding underscores the importance of providing employes with an opportunity for input as to what discipline should be imposed prior to the decision being made. The most informed exercise of discretion would occur with full input, including input from the employe. An additional potential danger exists when the decision is made (as occurred in Mr. Benon's case) prior to obtaining input from

the employe in that the decision maker may be reluctant for a variety of reasons (such as to "save face") to change the initial decision despite persuasive arguments to the contrary.

Respondent further argued as noted below (from p. 21 of brief filed on 11/17/97):

> Even if the Commission finds that Sroka's meeting with Brenon did not comport with due process as provided by Commission precedent, any such defect was cured when Brenon met with Chief Clark. At the meeting with Chief Clark, Brenon was apprised of the seriousness of the charges, was given the opportunity to tell his side of the story and received notice that Sroka's "oral reprimand" was not the discipline he was being given.

The problem with the above-noted recitation of "facts" is they are unsupported by the record. At hearing, Clark could not recall what occurred during the conference, whereas Mr. Brenon could recall what occurred and had taken notes contemporaneous to the meeting. Mr. Brenon testified he told Clark he (Mr. Brenon) was shocked and surprised that a 10-day suspension would be imposed and he (Brenon) felt the level of discipline was wrong and too severe. According to Mr. Brenon's testimony, Clark replied that the decision was a "done deal" and he (Mr. Clark) would not reconsider it. According to Mr. Brenon's testimony, Clark further said if the discipline were overturned, then it would be overturned. In short, respondent did not establish that the due process defects previously discussed were "cured" during Mr. Brenon's conference with Clark.

ORDER

The Proposed Decision and Order as amended is adopted as the Commission's decision in this matter. Jurisdiction is reserved to consider a request for fees and costs.

Dated: February 12, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JMR/DRM
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DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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STATE OF WISCONSIN PERSONNEL COMMISSION

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PROPOSED
DECISION
AND ORDER

This as an appeal pursuant to §230.44 (1)(c), Stats., of a suspension without pay and discharge.

FINDINGS OF FACT

1. Appellant, Dale Brenon, began employment at the University of Wisconsin-Milwaukee (UWM) Police Department, in October, 1974, as a police cadet.

2. At all relevant times Brenon served with permanent status in class as a police sergeant and was supervised by Lieutenant Richard Sroka.

3. On December 20, 1995, Brenon received a letter advising him that he was suspended for ten days without pay, effective January 22, 1996.

4. The suspension letter, dated December 19, 1995, provided the following:

> This disciplinary action is based on your conduct, as related by four officers of this Department, that during the first week of November, 1995, you related racially demeaning jokes to them while in the performance of your duties as a police sergeant. Regardless of the motivation for relating such jokes, this conduct exhibits unprofessional behavior, demonstrates a lack of sensitivity and creates a hostile environment within a diverse workplace.
>
> This conduct constitutes violations of University of Wisconsin System Work Rules IV., B and J, which states:
>
> B. Threatening, intimidating, interfering with, or using abusive language towards others.

> J. Failure to exercise good judgment, or being discourteous in dealing with fellow employees, students or the general public.
>
> These actions violate University Police Rules and Regulations, Article 1-Conduct, Section 4, which states:
>
> 4. When dealing with any person, employees shall at all times conduct themselves in a courteous and helpful manner.

Also, it included a warning of possible discharge for "any further work rule violation."

5. The four officers who made complaints against Brenon were Kenneth Peters (Hispanic), James Learman (Caucasian), David Boyke (Caucasian) and John Jensen (Caucasian). Jensen was the only one of the four officers supervised by Brenon.

6. On two occasions in November, 1995, Officer Peters approached Lieutenant Pamela Hodermann, Special Assignments, alleging Brenon had been telling inappropriate jokes, but that he feared retaliation if he went to Sroka. Hodermann advised Peters that his case would be stronger if he had witnesses and that she would make every effort to prevent retaliation if he filed a complaint.

7. By memorandum, dated November 25, 1995, to Hodermann, Peters claimed that about the first week in November, 1995, Brenon told him the following jokes:

> What do you get when one million lesbians show up at the million man march? Two million people that don't do dick.
>
> What was the best thing about the million man march? Only four people missed work.

While delivering this memorandum to Hodermann, Peters provided her with the names of Officers James Learman and David Boyke as other witnesses to Brenon's jokes.

8. As a part of her investigation of this matter, Hodermann interviewed Officers Learman, Boyke and Linda Swenson.

9. Swenson stated she had not heard Brenon tell any inappropriate jokes. Learman and Boyke stated that they had, and provided Hodermann with written reports.

10. Learman's written report to Hodermann, dated Tues, 28 Nov 1995 17:24:01 CDT states:

> During the first week off (sic), November, 1995 (exact date unknown), Sgt. Brenon related a joke to me. This was at approximately 11:50 p.m. while I was in the Sgts. Office to hang up my keys and radio. Sgt. Brenon told me a joke about "The Million Man March." The joke was as follows: "What was the best thing about the Million Man March? Only 3 or 4 people missed work." I don't recall there being any other people present in the office when he told me this.

11. Boyke's report, dated Tues, 28 Nov 1995 15:24:05 CDT stated:

> On or about the first week of November, I was approached by Sgt. Brenon prior to the start of the third shift and nearing the end of my second shift tour. Sgt. Brenon asked if I wanted [to] hear a joke, this is not unusual as he often has done so. Although I can not specifically remember those jokes. There is one joke that I remember he told at or about the time given above. At the time I did not know if this would be a joke of racial overtones and slurs.
>
> The joke included well known Americans and their known quotes. These people included John F. Kennedy, Martin Luther King and Retired Detective Mark Furman, the joke included terms and language which are derogatory to African Americans, such as "Fucking Niggers."

12. Hodermann also interviewed Officers John Jensen and Paul Sorrell.

13. In a memorandum to Hodermann, dated December 5, 1995, Jensen alleged (1) a fellow officer told him Brenon had made a negative comment that he "was on Hodermann's lap," potentially causing problems between him and other officers, (2) that in June, Brenon criticized him for not making a sick call sooner, and (3) that in November, Brenon criticized Neuman for calling in sick early. About jokes, Jensen wrote:

> Also in November of 1995, shortly after the Million Man March, Sgt. Brenon brought some pages to roll-call and said that they were jokes that he had. He told one of them, which partly said, to the effect of, the good news was that none of the marchers missed work that day.

14. In response to his interview with Hodermann, on December 4, 1995, Sorrell P-mailed[1] Hodermann the next day and complained that Brenon had made many "demeaning statements" to him in front of his peers. Regarding jokes, Sorrell said, "I think there is a place for some fun and humor while at work, but [I] believe that Sgt. Brenon has stepped over the line and may cause some people to be offended by his words or actions." During the interview, Sorrell told Hodermann that he had not heard Brenon tell any racial jokes.

15. Dispatcher T. Howard, a female African-American, in a memorandum to Hodermann, dated November 28, 1995, stated that she was "hurt" and "insulted", when "[she] was told of Sgt. Brenon's joke regarding the Million Black Man March." The source of Howard's information was never revealed.

16. Lt. Sroka was first advised of the investigation in a meeting with his supervisor, UWM Police Chief Phillip Clark and Lt. Hodermann on December 4, 1995.[2] Sroka was directed by Clark to continue the Brenon investigation. Hodermann provided Sroka with memorandums from Peters, Learman, Boyke, Jensen, Sorrell and dispatcher T. Howard.

17. Sroka met again with Chief Phillips on December 5, 1995, and was directed by Clark to meet with Brenon to "get his side of the story."

18. The following is the P-mail message, to Brenon from Sroka, scheduling a meeting on December 8, 1995:

> Dale, I need to meet with you on Friday morning 12/08/95, regarding some recent personnel issues that I have just been made aware of . . . No big deal, won't take up much of your time, but; please wait.

19. On the morning of December 8, 1995, Sroka met with Brenon, and advised him of the memoranda regarding the "Million Man March" jokes. Brenon admitted to telling some of the "Million Man March" jokes and said he was sorry. Sroka reprimanded Brenon, said that such conduct was not satisfactory and directed him to cease

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[1] Respondent's electronic mail system.

[2] Lt. Sroka had been on vacation from November 23, 1995 (Thanksgiving Day) to December 4, 1995.

and desist. Brenon agreed to stop. Sroka told Brenon he believed the matter was closed.

20. While Brenon waited, Sroka reported his meeting with Brenon, including the oral reprimand, to Clark. Clark directed Sroka to prepare a ten day suspension letter. Sroka returned to Brenon and informed him of Clark's directive to prepare a suspension letter.

21. Immediately afterward, at Brenon's request, Clark met with Brenon. Clark did not change his directive to Sroka.

22. By an Interoffice Memo, dated December 23, 1995, to Chief Clark and Lt. Sroka, Police Cadet Lisa Panas alleged that she had been "subjected to numerous jokes told by Sgt. Brenon that contained sexist implications, and remarks, as well as racist," that Brenon had made "remarks about [employes] engaging in sexual activity, and demonstrating the type of sounds that they may make" and that she "[felt] that Sgt. Brenon ha[d] been dishonest with his duties."

23. On December 28, 1995, Officer Dawn Neuman, during an interview, with Adm. Program Specialist Boswell at the UWM Office of Diversity and Compliance (ODC), reported that she and Officer Panas had been harassed by Sgt. Brenon. Allegedly, Brenon thought she was stupid, never assigned her as Officer In Charge (OIC), talked dirty in front of her and never assigned her to work with Panas - only with male officers. Also, Neuman alleged Brenon told sexual jokes and made sexual remarks in the presence of Panas, and that Officer Klobukowski told "dumb blonde" jokes.

24. On January 3, 1996, Boswell, with her supervisor, Asst. Chancellor Charmaine Clowney, met with Chief Clark to discuss the Neuman allegations against Brenon. A joint investigation was contemplated by the two units. Later, Clark participated with Boswell during the first day of interviews, but afterward, Clark's participation was discontinued, because it was believed Clark's presence had a "chilling effect" on the interviewees. However, subsequently, the police department conducted interviews of some of the officers, immediately preceding interviews by ODC.

25. Brenon was placed on suspension with pay pending another investigation on January 3, 1996, and was directed not to contact any UWM police personnel except Sroka or Clark.

26. Hodermann was directed by Clark to conduct the investigation. In the course of her investigation, she interviewed Officers Sanchez, Panas, Klobukowski, Neuman, Holmes, Jensen, Sorrell, Breit and Price. Hodermann wrote summaries of the recorded interviews, which were signed by the interviewee. (R#67-74 & A#18)

27. On January, 12, 1996, Clark, with Shannon Bradbury, UWM Labor Relations Manager, interviewed Brenon regarding his conduct both before and after December 8, 1995. Brenon admitted mimicking Officer George Esler's speech pattern, making some variant of the statement "I'm going to drain 'Lucky'," printing jokes off the Internet, passing out copies of jokes when asked, but he denied telling racial jokes after notification of his suspension."

28. On January 31, 1996, Clark notified Brenon to report to a pre-disciplinary hearing on February 5, 1996. The notice identified the hearing subject matter as "*allegations of [Brenon] making sexually explicit and demeaning comments and jokes* to subordinates, . . . allegations of retaliation against subordinates in violation of UW System Work Rules and the University of Wisconsin-Milwaukee Sexual Harassment Policy, and continuing inappropriate activity subsequent to his suspension.

29. At the meeting on February 5, 1996, also attended by Bradbury, Clark explained the meeting to Brenon as follows, "This is an investigative type interview and this is a predisciplinary hearing." Next, Clark apprised Brenon of allegations by employes that he had told racial and sexual jokes after his suspension notice, created a hostile work environment, talked about "[his] sex organ," and retaliated against employes who had filed complaints against him. Clark informed Brenon that they were considering a disciplinary action ranging from thirty days without pay to termination.

30. By letter, dated February 9, 1996, UWM terminated Brenon's employment with them, effective February 11, 1996. The termination letter in part states:

> On December 19, 1995, you were given a 10 day suspension for telling inappropriate ethnic and racially demeaning jokes to your subordinates during November, 1995 . . .This termination is based on other complaints of your conduct, untruthfulness uncovered in the course of the investigation of those complaints and your retaliation against subordinates who cooperated in those investigations. Specifically, complaints were received that subsequent to your learning of your 10 day suspension, you continued to tell jokes to subordinate officers substituting "Irishman" for other ethnic groups. Additionally, new complaints were received about your making sexually explicit and demeaning comments, telling ethnically and sexually demeaning jokes.
>
> In November of 1995, while talking to Officer Sorrell about his stay in a motel, you made a comment to the effect that Sorrell was too cheap to get two beds and that the three of them (Sorrell, his wife and infant son), probably slept in the same bed. You then made reference to them having sex or a menage a trois. You then said that, "No, it was really (Security Officer) George Esler" or words to that effect (Esler, Sorrell and wife having sex) and made noises mimicking as if they were all having sex. This eventually became just Esler masturbating, you would do this "joke" grunting and making masturbating motions in front of both male and female employees. On other occasions, you referred to your penis as "Lucky," describing its size and making comments such as, "I'm going to drain Lucky," to both male and female employees.

31. Other allegations in the letter were that Brenon changed his pattern of appointing Sorrell as Officer in Charge after Sorrell's written statement, dated December 5, 1995, regarding Brenon's conduct, and that Brenon returned a Christmas card sent to him by Sorrell.

32. In addition to UW System Work Rule IV., B and J (See ¶ 4), the letter stated that Brenon had violated Work Rules I. E (Failure to provide accurate and complete information whenever such information is required by an authorized person), IV. D (making false or malicious statements concerning other employees, supervisors, students or the University) and Police Rules & Regulations, Art. 1-Section 4 (when dealing with any person, employee shall at all times conduct themselves in a courteous and helpful manner).

33. Appellant Brenon made a timely appeal of his suspension and termination to this Commission.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44 (1)(c), Stats.

2. Respondent has the burden of proof. *Reinke v. Personnel Board*, 53 Wis. 2d. 123, 191 N.W. 2d. 833 (1971).

3. Respondent failed to provide appellant the due process rights of an adequate predisciplinary hearing prior to imposing the ten day suspension. Therefore, this disciplinary action must be rejected.

4. With respect to the termination, respondent satisfied its burden of proof with respect to just cause for imposition of some discipline, but failed to establish that an appropriate degree of discipline was imposed.

5. The imposed discipline should not have been more than a ten day suspension.

OPINION

The issues are whether UWM had just cause to suspend Dale Brenon for ten days without pay, on January 22, 1996, and later, on February 11, 1996, whether UWM had just cause to discharge Brenon. The precepts set forth in *Mitchell v. DNR*, 83-0228-PC, 8/30/84, are utilized here in considering the just cause questions.

Ten Day Suspension

Brenon claims that UWM violated his right of due process by failing to provide him proper notice and hearing prior to his suspension, as established in *Cleveland Board of Education v Loudermill*, 470 US 532, 105 S.Ct. 1487 (1985). We agree. Pertinent facts in this case (F.O.F. ##18-24) are similar to those in *McCready & Paul v. DHSS*, 85-0216, 0217-PC, 5/28/87, where the appellants did not receive adequate

notice of the charges against them and as in *Paul* were led to believe no serious discipline was being considered.

In *Showsh v. Wisconsin Personnel Commission*, Case No. 89-CV-445 (Brown Co. Cir. Ct., 6/29/90); affd., 90-1985 (Ct. App. 4/2/91) (unpublished); the Court reversed a Commission decision which had concluded that a predisciplinary hearing prior to a five day suspension had been adequate. The Court held:

> While the *Loudermill* case requires something less than a full evidentiary hearing in a predisciplinary hearing, it does require the basic requirement of notice of the charges against the employe. No such notice was given to Dr. Showsh. Neither the memo requesting information on the events in June and July nor the supervisor in the meeting with Dr. Showsh gave any notice of any charges pending against Dr. Showsh. He was informed only that 'there was a possibility that disciplinary action would ensue,' although he [Mr. Dennison] did not state specifically that appellant was the target of the possible discipline. Mr. Dennison told appellant that it was a meeting to gather as much information as possible . . . (Finding No. 21). While he had an opportunity to tell Mr. Dennison what he knew about the 'situations around the June 29th and July missed inspections,' he did not have any idea that there were charges being considered against him or what they were, nor was he given any explanation of the employer's evidence. At no time was he informed that this was a predisciplinary hearing or that he had a right to an attorney.
>
> Based on these facts the hearing examiner correctly concluded that the petitioner was denied due process. Dr. Showsh did not receive notice of the charges against him, therefore he was deprived of any meaningful opportunity to respond to the charges prior to his suspension. Slip opinion, pp. 4-5.

In *Arneson v. UW-Madison*, 90-0184-PC, 2/6/92, the Commission concluded that the employe had not been given an adequate predisciplinary hearing prior to a suspension and demotion, where the employe was only informed about parts of the allegations against him, and was not informed that discipline was possible until near the end of the meeting.

Consistent with the foregoing authorities, the commission concludes that appellant was denied procedural due process prior to his suspension. Respondent's citations

to *Showsh v. DATCP*, 87-0201-PC, 11/28/88, and *Letzing v. DOD*, 88-0036-PC, 1/25/89, are unavailing, because *Showsh* was reversed in the above-cited court decisions and *Letzing*, which relied significantly on the Commission's decision in *Showsh* was issued prior to the reversal of *Showsh*.

Because of this conclusion of a violation of due process, the suspension must be rejected, *see e.g., Arneson, Id.* However, because there was a plenary hearing and this decision is being issued initially as a proposed decision pursuant to §227.46(2), Stats., the merits of the suspension also will be addressed.

The first question is whether Brenon engaged in the alleged conduct in violation of UW System Work Rules IV., B & J and UWM Police Rules and Regulations Art. 1, Section 4 (F.O.F. #4). Brenon admitted to telling jokes about the Million Man March. Contrary to respondent's contention, UWM Labor Relations Manager Bradbury testified that, "a racial or ethnic joke is a IV J violation" and "is only a IV B violation if somebody actually feels threatened, intimidated or abused." Respondent presented no evidence establishing that complainants Peters, Boyke, Learman or Jensen felt threatened, intimidated or abused by this conduct of Brenon. Brenon did not "exercise good judgment" and thus violated Work Rule IV, but the evidence falls short of establishing that he otherwise violated the work rules, as alleged.

The next question is "whether some deficiency has been demonstrated which can reasonably be said to have *a tendency to impair* his performance of the duties of his position or the efficiency of the group with which he works." *Safransky v. Personnel Board*, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974) (emphasis added). The Commission agrees with respondent that Brenon's choice of jokes lacks good judgment and perhaps affected perceived views of a "supervisor." While no evidence was presented concerning work performance impairment caused by Brenon's jokes, the record supports a conclusion it would have a tendency to do so. The evidence does support a conclusion that Brenon's conduct, violating Work Rule IV. J, was sufficient to warrant some disciplinary action.

The remaining substantive question is whether the imposed ten day suspension without pay was excessive. The evidence here establishes that appellant violated not three work rules as alleged, but one - a rule involving the failure to exercise good judgment. Respondent argues that Brenon was given notice on other occasions not to tell racially demeaning, or offensive jokes. As examples, respondent cites Brenon's May 1991-May 1992 performance evaluation; Hodermann's response to Brenon as to an incident in June 1993 involving Officer Peters, a Hispanic, and his wife; and Hodermann's response in January 1993, to Brenon regarding a complaint by Officer John Bach, a non-Catholic, about a joke Brenon told about nuns. The record shows that no comments regarding jokes are on Brenon's May 1991-1992 performance evaluation (R #64); and that the Peters incident took place at a wedding reception. Brenon's comments were not racial in nature, and Peters withdrew his complaint after Brenon apologized to Peters' wife. None of these examples involved racial jokes.

Also, the evidence was that Officer Sorrell initially brought the Million Man March jokes to the work place, discussed them with Brenon, who repeated them to various officers on cigarette breaks or shift changes.

Given the circumstances, the Commission concludes the imposed discipline was excessive. A more appropriate sanction would have been an oral or written reprimand.

Termination

In summary, respondent's letter of termination to Brenon says he was terminated for several reasons: continuing to tell jokes to subordinates substituting "Irishman" for other ethnic groups, retaliating against subordinates who cooperated in the suspension investigation, a new complaint about Brenon telling ethnically and sexually demeaning jokes, making sexually explicit and demeaning comments, and for being untruthful in the course of an investigation.

During his testimony, Brenon, who is Irish, said that after notification of the ten day suspension ,he may have told a joke about an Irishman buying a chain saw and returning it because it didn't work. Panas testified she heard Brenon tell jokes substituting Irishmen for Blacks. Panas did not otherwise identify these jokes or explain how

she knew the original joke was about Blacks. Respondent presented no other evidence regarding these alleged Black jokes.

Regarding the claim of retaliation, respondent claims Brenon retaliated against Sorrell by changing his pattern of appointing Sorrell as Officer In Charge (OIC), refusing to accept a Christmas card from Sorrell after he became aware that Sorrell complained against him, and treating Sorrell less friendly. Initially, Sorrell claimed Brenon never made him OIC subsequent to his notice of suspension. After investigating the matter respondent modified the retaliation charge, claiming Brenon changed his pattern of appointing Sorrell as OIC, beginning on December 11, 1995. Documentary evidence (R. 21) shows the OIC rotation pattern changed on December 4, 1995, when Brenon first assigned Klobukowski as OIC. The testimony of Klobukowski and Brenon was that prior to the December 4 assignment, they had engaged in discussions about Klobukowski being ready for assignment as OIC. Brenon's assignment of Klobukowski as OIC occurred days before Sorrell's complaint to Hodermann, on December 4, 1995. The two other complaints by Sorrell of retaliation need no comment, except to observe, based on the record, that Sorrell had enjoyed a personal friendship with Brenon, prior to his complaint to Hodermann.

Respondent argues that Brenon's untruthfulness during the investigation, which resulted in his discharge. In support, respondent cites four instances: (1) that on January 12, 1996, Brenon told Clark he had not told any jokes after his notice of suspension, but on February 5, 1996, Brenon changed his opinion and told Clark he had; (2) that on January 12, 1996, Brenon told Clark he had invited Panas to Fuzzy's Bar and also admitted the same during a January 12, 1996, interview with Boswell, but denied doing so to Clark on February 5, 1996; (3) that on January 12, 1996, during Clark's investigative interview, complainant first denied he referred to his penis as "Lucky," then admitted it, but denied doing so in the presence of female officers (Panas testified Brenon made the comment in her presence); and (4) that Brenon consistently denied making gestures simulating masturbation.

Regarding each allegation of untruthfulness, the record reflects the following:

Allegation one: On January 18, 1996, Brenon told Boswell that previously, in an interview with Clark, he had denied telling any jokes after his notice of suspension, but later remembered telling an Irish joke. Later on February 5, 1996, Brenon told Clark about his conversation with Boswell.

Allegation two: During the Boswell interview, Brenon was asked whether he had invited Panas to Fuzzy's. Brenon said Panas initiated the discussion, told him she lived near Fuzzy's and maybe was going out that night. Brenon said he replied, "Well hey, you and your boyfriend want to join me, fine. Come on down." On February 5, 1996, Clark again asked Brenon, "Did you ask Cadet Panas to meet you at Fuzzy's...", and Brenon replied, "that is something you asked me at the last conference we had here . . . I'll explain it to you the same way I did then . . . No. I did not ask her to join me."

Allegation three: Again during the Clark investigation on January 12, 1996, Brenon initially denied discussing his sex organs in front of any officers while on duty. Moments later he said he "may have" made the statement "I'm going to drain 'Lucky'," or similar words in reference to urination, but "probably" only in front of Sorrell or Holmes. With Boswell, on January 18, 1996, Brenon said he did not recall ever saying that in front of Panas or Neuman or any females. Panas signed a summary, by Hodermann, of an interview held by Hodermann, on January 10, 1996, which provides, "Sgt. Brenon talks about his penis, its size, it's 'Lucky'. He talks about how he's got to drain 'Lucky'." But Panas testified that she had never heard Brenon say anything about the size of his penis.

Allegation four: Throughout the investigations by Clark and Boswell, Brenon consistently denied making motions simulating masturbation when imitating Esler's speech pattern. However, in January 1996, Klobukowski, Sorrell and Panas signed summaries of their interviews with Hodermann, indicating they had observed Brenon making masturbation motions while imitating Esler's speech pattern.

The evidence presented shows that Brenon's statements to Clark and Boswell during their investigations about telling jokes after notice of suspension, inviting Panas

to Fuzzy's bar, and referring to his penis as Lucky were consistent. Contrary to respondent's argument, Brenon never admitted to telling any ethnic jokes after his notice of suspension, except for Irish jokes he believed were harmless because he is Irish. Also contrary to respondent's argument, Brenon did not deny using the term 'Lucky' while females were present. During his January 18, 1996, interview with Boswell, in answer to that question, he states:

> I cannot recall a single incident . . . especially since this came up last Friday . . . I've been trying to pull my memory . . . to find out if I'd ever said that in general in a general area where one of them [Panas or Neuman] might of heard and I don't believe I did.

Regarding whether Brenon invited Panas to Fuzzy's bar, Panas said he did. But even if we accept Brenon's recount, it appears to be a semantics question. There were also several inconsistencies between Hodermann's notes, rough draft and signed summaries of Panas' interview and her testimony. For instance, Panas signed an interview summary in which she states Brenon talked about the size of his penis, but during cross examination, she recanted. Panas also signed an interview summary, wherein she quotes a statement made by Brenon about Hodermann, and again, during testimony, she recanted.

The evidence supports the conclusion that Brenon simulated masturbation, while joking about Esler, on at least one occasion. Klobukowski, Sorrell and Panas testified to being present when this occurred. Of the three witnesses, Klobukowski was the most credible. Sorrell admitted to imitating Esler, along with others, but he denied simulating masturbation. Allegations that Brenon simulated masturbation never appear in Panas' signed interview summaries, or Hodermann's notes of her interviews with Panas, until after Sorrell alleged it occurred "in front of Panas." (R #73, A ##21 & 22)

In conclusion, the evidence presented by respondent establishes that Brenon, contrary to his claim, did simulate masturbation, but fails to establish that he told derogatory ethnic jokes after notification of the ten day suspension, that he retaliated against Sorrell or that he was otherwise untruthful during the investigation.

However, respondent has established there was just cause for disciplinary action. While most of the alleged misconduct occurred prior to the investigation linked with the ten day suspension, respondent only became aware of them after that initial investigation. Yet, as previously determined, respondent failed to present evidence sufficient to establish two of the three principal allegations of misconduct.

Clearly, the Esler masturbation joke is a vulgarity that need not be tolerated in the work place. But as to the other general allegations against Brenon of insensitivity toward subordinates, they should be considered based on the circumstances. Evidence shows that some levity was common during third shift, shift changes and roll call. Jokes, quips, snipes and gibes were tossed back and forth: Brenon was teased about his weight, size and roll call mannerisms; Sorrell was heckled about being stingy with money; Sorrell and others mimicked Esler's speech pattern; and profanity was not uncommon. In a P-Mail, dated December 5, 1995, to Hodermann, Sorrell wrote, "I think there is a place for fun and humor at work, but I believe that Sgt. Brenon has stepped over the line and may cause some people to be offended by his words and or actions." About alleged comments, by Brenon, to him, he believed were demeaning, Sorrell wrote:

> It was brought to your attention that Sgt. Brenon made a comment when I asked where my finger print cards were, I had them attached to the IQ's, Sgt. Brenon responded to me, stating, "I don't have an I.Q." . . . when I was injured responding to the man with a knife, 10-26-95 (slipped and fill on wet floor), Sgt. Brenon was making fun of the situation, playing like it was my fault . . . and complaining that if I went to the hospital . . . he would have to do hours of paper work . . . Sgt. Brenon recently made comments when I returned from two sick days off, something to the affect that "sick-o is back to work."

The response to Hodermann by Sorrell exemplifies allegations of others regarding "demeaning" comments made by Brenon to other officers and subordinates. Respondent's argument in support of its decision is that Brenon, a 21 year veteran of UWMPD has a history of disciplinary problems, since 1979, concerning "poor relations with his superiors, colleagues and subordinates" and "that has impaired the per-

formance of his duties as well as impairing the operations and personnel of the UWM Police Department."

Brenon's disciplinary record, excluding those at issue, is as follows: March 7, 1979, a four day suspension for being disrespectful to the OIC; November 10, 1991, a written warning from Hodermann for intimidating employes by telling them there are going to be some changes; February 18, 1992, a letter of reprimand from Hodermann for being unprofessional and rude to a female student; April 7, 1992, a two day suspension, by Hodermann, for yelling at a subordinate who refused to critique a complaint against Brenon, sending an officer recovering from pleurisy outside on patrol without a winter jacket and making some remark to an officer in the summer of 1991 about uselessness of keeping a list of grievances; January, 1993, an oral warning by Hodermann for telling a joke about nuns dressed as altar boys; November 10, 1993, a written warning from Hodermann for sarcastic remarks when an officer called in sick; and December 19, 1995 reassignments to non-supervisory duties based on Labor Management minutes. (In a letter, dated February 2, 1994, Clark said this change was not considered discipline.)

Without question, this record indicates that Brenon had poor relations with Hodermann and some subordinates and exercised poor judgment with some of his comments and attempts at humor. But the evidentiary record also shows that Brenon's current immediate supervisor and the majority of the subordinates under his supervision respected his competency as a police officer and enjoyed a good relationship with him. As to this matter, most of those who made complaints against Brenon did not work on third shift and were not supervised by him. The record reflects the existence of two distinct factions operating in a fractious department, fraught with concerns of retaliation from various quarters.

Based on the evidence presented, the Commission finds that there was not just cause for Brenon's discharge. Respondent failed to prove all the allegations of misconduct resulting in its discharge of Brenon. The evidence does not support a conclusion that Brenon told jokes about African-Americans or other minorities after notice of his

suspension. Respondent failed to present evidence regarding departmental policy or guidelines on jokes. The evidence established that banter was common in the work-place. Brenon was not alone in telling jokes, teasing and mimicking co-workers, and sometimes he was the butt of such activity. Here, there is no evidence of any rules, policies or guidelines addressing this subject matter.

The evidence supports respondent's allegations that Brenon, on at least one occasion, simulated masturbation while telling the "Esler joke" and that he misrepresented the truth about the incident to Chief Clark.

Without question, Brenon's pantomime was vulgar and his method of announcing his departure to the men's room tacky. Such behavior need not be tolerated.

After consideration of facts and circumstances in this case, the Commission concludes the discharge was excessive. Brenon was suspended for ten days for telling racial jokes. But respondent failed to prove Brenon engaged in that activity subsequent to his notice of suspension. Also respondent failed to prove that Brenon retaliated against Officer Sorrell. With the exception of the untrue statement Brenon made to Chief Clark, respondent's allegations of misconduct by Brenon occurred prior to his suspension. This particular conduct, as discussed, does not warrant a discharge. No evidence was presented establishing that Brenon did not otherwise perform the duties and responsibilities of his position.

ORDER

Respondent's decision imposing a ten day suspension without pay against appellant is rejected.

Respondent's decision terminating the employment of appellant is modified to a suspension of ten days without pay.

This matter is remanded to respondent for action in accordance with this decision.

Dated: _____, 1997.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

DRM:rjb
960016Adec2.2

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

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