

STATE OF WISCONSIN

PERSONNEL COMMISSION

**DOUGLAS BERGH,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

DECISION  
AND  
ORDER

Case No. 98-0018-PC

This matter is before the Commission as an appeal from a decision to demote the appellant. The parties agreed to the following statement of issue for hearing:

Whether there was just cause for the demotion of the appellant by letter dated March 10, 1998.

Subissue: Was the degree of discipline imposed excessive?

After an administrative hearing that covered 4 days, the parties declined to file post-hearing briefs.

#### FINDINGS OF FACT

1. Columbia Correctional Institution (CCI) is a maximum security institution operated by respondent Department of Corrections. CCI houses approximately 750 inmates. Security employees staff the institution on three shifts during a 24-hour period.

2. Security staff is divided into two primary groups, management or "white shirts," and correctional officers or "blue shirts."

3. The third shift runs from 10 p.m. until 6 a.m. for blue shirts while white shirts start at 9:30 p.m. Approximately 30 or 35 correctional staff are on duty at the facility during third shift.

4. Inmates at CCI reside in various housing units (HU) or two segregation units (DS1 and DS2).

5. In addition, SDU1 is a barracks unit at CCI that was opened late in 1997 or early in 1998. The unit has two wings, with a Sergeant's bubble between the wings in a control center. During the 3<sup>rd</sup> shift, one correctional officer was assigned to A side and a second officer was assigned to the B side. In these two barracks units, inmates are not confined to individual cells.

6. During 3<sup>rd</sup> shift, staff at CCI generally perceive the segregation units and the barracks to be the least desirable assignments, while the intake, support and 6/7 officer assignments are the most desirable. Housing units and tower assignments are generally viewed as falling in the middle.

7. During all relevant time periods, Jeffrey Endicott has been the Warden at CCI, Richard Schneiter has been the Security Director, and Bruce Schneider has been Human Resources Director.

8. The appellant has worked for the Department of Corrections (or its predecessor agency) since 1980. In July of 1992, while employed at Waupun Correctional Institution (WCI), he attained the rank of Captain. Appellant sought to transfer from WCI to CCI in 1994. Warden Endicott was cool to the idea, but Mr. Schneiter and Human Resources Director Schneider convinced the warden to accept the transfer.

9. Appellant was employed at CCI as a 3<sup>rd</sup> shift captain from July of 1994 until his demotion. When he was on duty during the 3<sup>rd</sup> shift, the appellant was the shift commander, i.e., he was the person in charge of security at the institution.

10. Appellant typically reported to work at 9:15 p.m. When the shift started, he would go into the squad room to take roll and give the daily report. Once staff dispersed to their shift assignments, he would do paper work for 1 or 1½ hours and then conduct rounds. He usually ate a meal between 2 and 4 a.m., and would return to his office around 4:30 a.m. to make calls to arrange any necessary overtime staffing for the next (1<sup>st</sup>) shift. As shift captain, appellant was responsible for making rounds to the various operational areas of the institution on a regular basis during the shift.

11. The support officer assignment essentially served as an assistant to the shift captain.

12. Ms. Christine Oaks has been employed as a Correctional Officer at CCI since the fall of 1996. Officer Oaks works on the 3<sup>rd</sup> shift.

13. In the late summer or early fall of 1997, Officer Oaks and the appellant began carpooling to work. Before they began to carpool, appellant and Officer Oaks discussed the perception of favoritism that might result if they carpooled.

14. Once they started carpooling, Officer Oaks and the appellant made it a regular practice to purchase snacks or other foods on their way to work and then to eat together at Officer Oak's assigned unit during the shift.

15. Prior to January 4, 1998, Officer Oaks' regular work assignments were on the segregation units and as the 6/7 officer. Approximately 15 times per month, appellant also assigned Officer Oaks the responsibility of typing up the daily report. This responsibility was performed in the office area of the shift captain and took approximately 1 to 1.5 hours.

16. Officer Oaks separated from her husband in November of 1997.

17. Around the beginning of January of 1998, a 3<sup>rd</sup> shift sergeant informed appellant that there were rumors about a relationship between the appellant and Officer Oaks. The appellant considered the report to be the sergeant's problem.

18. On January 4, 1998, Officer Oaks began working as a utility officer on 3<sup>rd</sup> shift. As such, she could be slotted to fill any open officer position in the institution. Appellant spoke to Officer Oaks at that time and told her that other staff would be watching to see if she received more favorable treatment. Officer Oaks told the appellant to put her on a housing unit and to move her around and not to give her the more desirable assignments.

19. Throughout this period, a significant portion (though still a minority) of the 3<sup>rd</sup> shift staff, perceived favoritism by appellant towards Officer Oaks. These perceptions were discussed by staff.

20. Appellant's performance evaluation for the period from July 11, 1996, through July 10, 1997, shows he met standards during that period except as to expectation B5 ("Act in the capacity of a role model and assume a leadership role with subordinate security staff") where the results were "below standards." (App. Exh. 2)

21. Appellant was suspended from employment for a period of 10 days commencing May 25, 1997. The letter of suspension (Resp. Exh. 102) states, in part:

This action is being taken based on conclusions of an investigation that revealed on May 11, 1997, during your routine rounds you stated the following joke to subordinate staff Sergeant Linda Hinickle, Officer Jodi Risen and Lieutenant Phil Brooks in the R&O area: "Trattles and Leege have the same dentist, they both have those snags hanging out in front of them. Can you imagine if they were homosexual, and I am not sure they aren't, the drag marks they would leave on you."

This statement is a violation of DOC Executive Directive #7 on harassment. You have received training on this policy. It has been explained to you more than once. This institution and the department have a substantial interest in maintaining a harassment-free work environment for their employees, whether they be male or female, and regardless of their sexual orientation. Your comments not only demean the people you were talking about and the people to whom you made your statement, they demean you, your position and this institution as well. As a Supervising Officer 2 (Captain), you are responsible for the supervision of security staff and enforcement of DOC work rules and policies, and acting as a professional role model for subordinate staff. This substantial violation of the policy erodes your credibility as a representative of DOC management and your ability to carry out the responsibilities of your position.

This letter serves as a Last Chance Warning to you about your conduct which violates the letter and spirit of Executive Directive #7. Any subsequent failure on your part to comply with the DOC Harassment Policy will result in demotion from the supervisory ranks or termination of your state employment.

22. On approximately January 7, 1998, another captain approached Mr. Schneider and stated that other staff on 3<sup>rd</sup> shift had approached him regarding the relationship between appellant and Officer Oaks. The captain relayed comments that Offi-

cer Oaks was frequently being relieved to do typing for appellant and that he was spending a lot of time with her.

23. On January 14, 1998, Mr. Schneider met with the appellant to insure appellant had adjusted to the disciplinary suspension and because of the report from the captain during the prior week. Mr. Schneider's contemporaneous notes from the January 14<sup>th</sup> meeting read as follows:

We discussed how things were going in general. Capt. Bergh said he was "being *very* careful what he was saying to others." I asked how he felt his job performance was being affected, if any, by his new approach. He said that he "was more on edge, but its no big deal."

I told him I had been advised that some staff felt he was spending more time with Ofcr. Oaks than other staff, i.e. having her up front to type, etc. He said he probably did cause he gets along with her and they car-pool together. I told him NOT to spend more time with her or consistently have her relieved to type - Stated how this is the opposite of what occurred with Sgt. C. Jones but just as bad. He said, "Don't worry boss, it won't be a problem."

I told him not to have officers type up Daily Reports as we have 2 supervisors on shift. He said he understood.

I told him that his actions during diversity training were being reviewed and we may be meeting with Colleen James to review more issues. He was very concerned. I told him NO discipline is being considered. End of meeting. (Emphasis in original)

At the time of the meeting, Mr. Schneider did not know that appellant was, on a regular basis, eating his shift meal with Officer Oaks or that appellant telephoned Officer Oaks regularly from work when Officer Oaks was not on duty.

24. Between November 18, 1997, and January 13, 1998, appellant telephoned Officer Oaks' home telephone number 23 times from the telephone in the 3<sup>rd</sup> shift captain's office and for reasons unrelated to overtime. The calls ranged from 2 minutes to 41 minutes in length. On three different shifts during that period, appellant telephoned Officer Oaks, at home, three times. App. Exh. 3. The majority, if not all, of the 23 calls were for personal rather than work reasons. Fourteen of the calls were

made between the hours of midnight and 3:00 a.m. The direct cost to respondent for these calls was approximately \$17.

25. CCI instituted a telephone use policy (App Exh. 1) in 1995. The purpose of the policy was to “regulate the use of state phones so that calls do not interfere with job functions and responsibilities.” The policy included the statement that “[s]tate phones are to be used primarily for transacting CCI business” and established the following procedure for “Personal Non-Emergency Calls”:

Personal, non-emergency calls, either in-house or outside, are to occur during breaks and are strictly prohibited when staff are responsible for supervising inmates or maintaining security in an area. Shift Supervisors do have the authority to relieve staff who do not receive breaks to make such calls. Outgoing calls must be made from a payphone, unless approved by a Supervisor. When a supervisor does approve the use of a state phone, all costs to the institution for using that phone for personal use are to be assumed by the caller unless this policy or the contract dictates otherwise.

The policy included the following language regarding the length of personal calls:

With the exception of personal calls placed on break from a pay phone, *allowable* personal calls as defined above, emergency or non-emergency placed or received, in-house or outside are limited to two minutes in length. (Emphasis in original.)

26. At approximately the same time as the January 14<sup>th</sup> meeting, a second supervisor was added to the 3<sup>rd</sup> shift and was assigned the responsibility of typing up the shift report.

27. After the January 14<sup>th</sup> meeting, Officer Oaks and the appellant continued their practice of purchasing snacks or other foods on their way to work and then eating together at Officer Oak’s assigned unit during the shift.

28. In early February of 1998, Mr. Schneiter received a report from Deputy Warden Fran Paul raising questions as to whether the appellant was properly carrying out his supervisory responsibilities during the 3<sup>rd</sup> shift. The questions arose when the Deputy Warden conducted an administrative round of the institution on the 3<sup>rd</sup> shift while appellant was the shift commander.

29. One of the responsibilities of the Intake officer on the 3<sup>rd</sup> shift is to conduct a "fire round" of the institution. The fire round, also known as a security round, institution round, or intake round, is an extensive check of every area of the institution to look for fires or any other problems. It includes remote areas and every nook and cranny of the institution. During much of the round, the Intake officer cannot be seen by any other security personnel.

30. Lt. Tom Schoeneberg was promoted to Supervising Officer 1 in January of 1998 and frequently served in the new second supervisor position on 3<sup>rd</sup> shift. Shortly after he began working on the 3<sup>rd</sup> shift, Lt. Schoeneberg told appellant that he wanted to take a fire round with the Intake Officer to familiarize himself with the entire facility.

31. Approximately 2 days later, during the 3<sup>rd</sup> shift for February 11<sup>th</sup>, the appellant took a fire round with the Intake Officer on that shift, Officer Oaks. It was the first time in his 3½ years as 3<sup>rd</sup> shift supervisor that appellant had taken a fire round. It was the only time that a supervisor had ever accompanied Officer Oaks on a fire round. The round took approximately 70 minutes.

32. Shift captains normally do not participate in a fire round, although it would be a helpful experience for a new shift captain.

33. Between January 14 and February 17, 1998, appellant telephoned Officer Oaks' home telephone number 11 times from the telephone in the 3<sup>rd</sup> shift captain's office, extension 239, and for reasons unrelated to overtime. The calls ranged from 1 minute to 11 minutes in length. On one shift during that period, appellant telephoned Officer Oaks, at home, three times. App. Exh. 3. The majority, if not all, of these calls were for personal, rather than work reasons. Six of the calls were made between the hours of midnight and 3:00 a.m. The direct cost to respondent for these calls was approximately \$5.

34. Respondent maintains a sign-in log system for the various work units within the institution.

35. For the 3<sup>rd</sup> shift on February 18, 1998, the appellant was responsible for handling rounds for units DS1 and SDU2. It was the responsibility of the other supervisor on duty for the 3<sup>rd</sup> shift on February 18<sup>th</sup>, Lt. Schoeneberg, to handle the rounds for the Housing Units and Barracks on that shift. The only entry on the housing unit logs for the appellant on that shift was for HU8. Officer Oaks was assigned to HU8 for the 3<sup>rd</sup> shift on February 18<sup>th</sup> and the appellant went there to eat.

36. The Housing Units all have kitchen areas with grills. The barracks have a servery but no grill.

37. On February 19<sup>th</sup>, Lt. Bill Parker was assigned to the 3<sup>rd</sup> shift as was the appellant. It was Lt. Parker's responsibility to make suggestions regarding shift assignments. Consistent with that responsibility, Lt. Parker pencilled-in the names of available staff into post assignments. (Resp. Exh. 109)

38. Officer Oaks was a Utility officer for the 3<sup>rd</sup> shift that day and appellant was the shift commander.

39. Lt. Parker slotted Officer Oaks into an assignment as Barracks officer. Lt. Parker slotted Officer Kelly Turner, who is male, to the Intake officer position.

40. When appellant reviewed Lt. Parker's assignments, appellant stated that he had brought in food so that Officer Oaks could make breakfast for him and that she would not be able to cook in the Barracks. Appellant then changed the suggested assignments so that Officer Turner was on Barracks duty and Officer Oaks had the Intake officer assignment.

41. The Intake officer's responsibilities include stopping in several times to different Housing Units during the course of the 3<sup>rd</sup> shift. Intake officers have sometimes used the grills in the Housing Units to cook.

42. After she had been switched to the Intake position by the appellant but before the start of the shift on February 19<sup>th</sup>, Officer Oaks was approached by Sgt. Scott Droste who had been assigned to the position of Housing Unit 1 Sergeant. Sgt. Droste asked Officer Oaks if she would be willing to switch assignments during the middle of the shift. The switch would allow Sgt. Droste to get some fresh air by as-



sisting with the task of picking up the garbage from the various housing units, a task assigned to the Intake Officer, Control Officer and the 6/7 Officer.

43. Sgt. Droste and Officer Oaks agreed to the mid-shift switch and appellant approved it. Sgt. Droste and Officer Oaks carried out the switch part way through the shift. Sgt. Droste ended the shift in the Intake position.

44. Officer Oaks ended the February 19<sup>th</sup> shift in Housing Unit 1 where she cooked a meal of eggs and potatoes. She ate the meal with the appellant. Sgt. Michael Mitchell, assigned to DS2 that shift, was invited to eat with appellant and Officer Oaks and accepted. Lt. Parker was also invited to eat with them but declined.

45. Approximately 60% of the time he worked 3<sup>rd</sup> shift with appellant as the shift commander, Sgt. Droste asked for a mid-shift switch in order to get some fresh air.

46. On or about February 25, 1998, Sec. Dir. Scheiter learned that appellant had made a 41 minute phone call to Officer Oaks from the telephone in the captain's office.

47. Respondent conducted an investigatory interview of the appellant on February 27, 1998. The following (App. Exh. 5) is an accurate summary of some of the statements made during the interview:

Mr. Schneider: Basically, it has been reported you spend a lot of time with Officer Oaks, more time with her than other employees generally. Would you say generally that's correct?

Appellant: Well . . . I make rounds at night and do the basic duties. This individual, we ride together and we are neighbors. We take turns bringing food in and it's the last place I stop to eat snacks. Or I spend time with Steiner or Brice. As a rule, I spend more time because I eat there.

Mr. Schneider: When you are making your rounds, let's say she's working a housing unit. Do you make that your last stop or go back?

Appellant: Generally. Sometimes I finish rounds and then go back there. . . . I made [Officer Oaks' unit] my last stop every night. I'd eat and then head up to leave. . . .

Mr. Schneider: Let's go to the breakfast that night. You came on shift that night, the 19<sup>th</sup>, Thursday night. Remember that?

Appellant: Yes

Mr. Schneider: Did you change the schedule upon your arrival? Parker was working with you. Did you change Officer Oaks' schedule that night?

Appellant: I think that's the only night she traded with Droste to do a garbage run. I remember that night she swapped. I think she traded with Droste. It was the only time I saw her do that.

Mr. Schneider: Wasn't she assigned to the barracks, and you switched her?

Appellant: No it wasn't me. I would have penciled her in. I can see some white-out so I probably did.

Mr. Schneider: Why would you pull Oaks out of the barracks?

Appellant: Maybe Turner requested it. I don't remember from a week ago.

Mr. Schneider: It was reported you changed the schedule so she could make you breakfast.

Appellant: She was Intake.

Mr. Schneider: Was that the reason you changed the schedule? So she could make you breakfast?

Appellant: Droste requested a trade. . . .

Mr. Schneider: Do you spend a lot of time on the phone with [Officer Oaks]? Do you have extended, long conversations with Officer Oaks?

Appellant: I don't feel I do. I see her on the unit.

Mr. Schneider: Have you called her at home?

Appellant: Once or twice. . . .

Mr. Schneider: You said a couple times. What if I told you in the last month you called her 11 times, through February 18-19. Three of those calls were over 10 minutes. Basically what the phone log is showing is the calls are going from 239 to her number every time that you worked and she was off, you called her. That's a little more than two times. Do you want to think about that?

(Captain Bergh and [his representative] left the room for consultation.)

Appellant: It was a few times she was spending at the hospital. She has a little nephew dying of cancer. She had me do wake-up calls for her kids.

48. Respondent convened a pre-disciplinary hearing for appellant on March 4, 1998. Appellant's statements during the pre-disciplinary hearing on March 4, 1998, were summarized in the minutes of that meeting (App..Exh. 10) as follows:

It was not out of the ordinary to bring food to work, and as mentioned earlier, Oaks brings the food into the institution in her bag as other staff do also. On this night, Oaks was assigned to the Barracks. With the problems we had been experiencing with female staff (catcalls, whistling, etc.) in the Barracks, I switched her with Turner for the rest of the shift. . . . At the time, we were walking one or two inmates a night from the Barracks. Sergeant Droste requested to trade with Oaks for the garbage run, as he does every night with the Intake Officer, whoever it might be. Being she ended up on the Unit which was none of my doing - it was Droste's request, so she was able to make a meal with what we brought. I couldn't remember who got switched where until I had time to review the schedules and think about it for a while. . . .

Sam Schneider asked Captain Bergh why he never mentioned the problems with females in the Barracks during the investigatory interview on Friday. Captain Bergh stated he did not remember that he even moved her. . . .

4. At the time [of the investigatory interview], I provided information to the best of my knowledge at the time. Since I've reviewed schedules etc., since then, I was able to remember more facts and things that happened.

49. Warden Endicott issued a demotion letter, dated March 10, 1998, to the appellant. The letter stated, in part:

You are hereby notified that pursuant to the authority vested in me by the Department of Corrections, you are being demoted from a Supervising Officer 2 (Captain) at Columbia Correctional Institution, to a Officer 3 (Sergeant) on second shift at Columbia Correctional Institution, effective March 15, 1998. You will report on March 17, 1998 at 2:00 p.m. to Columbia Correctional Institution. You will be assigned to Housing Unit 1, 4, 5 Relief, Second Shift, C Group.

This action is based on conclusions from our investigation that you knowingly disobeyed direction (Work Rule #A1) from Sam Schneider, Security Director. On January 14, 1998, your supervisor directed you not to spend large portions of time with Officer Christine Oaks during work hours, and to dispel the perceptions of favoritism towards Officer Oaks. However, you continued to spend large portions of time with Officer Oaks, and during the investigatory interview, you stated you do spend more time with Officer Oaks, and that you normally returned to her Housing Unit after making your rounds. On February 18, 1998, it was found in the housing unit sign-in logs, that you only went to Housing Unit 8 during your shift where Officer Oaks was assigned. During the investigatory interview, you also admitted to making an institution round with Officer Oaks. It was also found that you switched Officer Oaks on the schedule to arrange for her to cook you eggs and potatoes on February 19, 1998. You also violated the Warden's memo dated July 19, 1994, regarding signing in/out of housing units.<sup>1</sup> It was also found that you made eleven personal phone calls to Officer Oak's home residence from the institution phone, extension 239, since the directive from Sam Schneider on January 14, 1998.

You are also negligent in the performance of your duties (Work Rule #A4), by making thirty-five personal phone calls to Officer Oak's home, while on duty, which totaled to 337.2 minutes or 5 hours and 37.2 minutes of shift time. This time should have been better spent supervising your shift.

You violated Work Rule #A6 by failing to provide truthful and accurate information during the investigatory interview in which you were asked how many telephone calls you made to Officer Oaks. You responded by

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<sup>1</sup> The original demotion letter also contained the following sentence: "By your own admission, it was your understanding it was for only initial rounds to sign in, and you did not sign in upon return." Respondent subsequently withdrew this allegation.

stating one or two, when in fact you made a total of thirty-five phone calls to her residence. You also stated that you may have switched Officer Oaks on February 19, 1998, because of another Officer requested it. Then in you pre-disciplinary hearing, you stated you changed her schedule because of problems with female staff in the Barracks. Supervisors know that staff are not scheduled by gender, unless BFOQ'd.

You also violated Work Rule #C1 by using the state telephone for personal use. You made a total of thirty-five phone calls to Officer Oaks. Your response in your predisciplinary hearing was that you will pay for the calls.

It is clear that you completely disregarded directives given to you by your supervisors. Based on this, you have violated Work Rules A1, A4, A6 and C1, which are Category B violations, and state:

Work Rule #A1: Insubordination, disobedience, or failure to carry out assignments or instructions.

Work Rule #A4: Negligence in performance of assigned duties.

Work Rule #A6: Falsifying records, knowingly giving false information, or knowingly permitting, encouraging, or directing others to do so. Failure to provide truthful, accurate and complete information when required.

Work Rule #C1: Unauthorized or improper use of state or private property, services, or authorizations, including but not limited to, vehicles, telephones, electronic communications, mail service, credit cards, computers, software, keys, passes, security codes, and identification while in the course of one's employment, or to knowingly permit, encourage or direct others to do so.

Your past disciplinary record includes; on May 11, 1997, you were also given a ten-day suspension for Work Rules A2 and A13 for violation of Executive Directive #7 – Harassment.

As third shift commander, you were placed in charge of a multi-million dollar state prison facilities. Your continued insubordinate behavior and failure to provide accurate information have destroyed your credibility. As a Supervising Officer 2 you are responsible for staff supervision, enforcement of the Department of Corrections' work rules, and someone whose judgment must be relied upon by both management and line staff.

Your violations of department standards are substantial and have destroyed your ability to carry out the responsibilities of your supervisory position. Your actions lead me to conclude you cannot remain in a supervisory role at CCI. . . .

Also, restitution of \$22.62 for personal phone calls from November 18, 1997 thru February 17, 1998, must be paid to CCI's Business Office.

#### 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 that there was just cause for the discipline imposed.
4. Respondent has established that the discipline imposed was not excessive.

#### OPINION

In appeals of this nature, the employer has the burden of proof and must establish to "a reasonable certainty by the greater weight or clear preponderance of the evidence" the facts necessary to show just cause for the disciplinary action imposed. *Reinke v. Personnel Board*, 53 Wis. 2d 123, 137, 191 N.W.2d 833 (1971). The employer also has the burden of proof with respect to the related question of whether the discipline imposed was excessive under the circumstances. *Barden v. UW*, 82-0237-PC, 6/9/83.

In order to make it easier to analyze this case, the Commission has summarized the allegations in the demotion letter. The allegations have been numbered and are discussed separately, below.

1. *That despite the direction given at the January 14, 1998 meeting with Mr. Schneider, appellant continued to spend large portions of time with Officer Oaks and did*

*not dispel the perception of favoritism towards her, as reflected in his admission during an investigatory interview that he spent more time with Officer Oaks and his admission that he normally returned to her Housing Unit after making his rounds. (Work Rule A1)*

Appellant's slant on his January 14, 1998, meeting with Mr. Schneider was that Mr. Schneider spent relatively little time during the meeting discussing the Officer Oaks situation. According to the appellant, Mr. Schneider did not specifically advise him not to eat with Officer Oaks or to telephone her. Appellant also testified he understood from the meeting that Mr. Schneider wanted him to seek out the persons who had complained about him and to talk with them.

The appellant's perspective on the January 14<sup>th</sup> meeting is not reasonable. The Commission finds that Mr. Schneider's notes are the best description of what occurred at the meeting. Those notes indicate appellant was informed that the amount of time he was spending with Officer Oaks was a significant concern to management. Mr. Schneider did not know, as of January 14<sup>th</sup>, that appellant was also eating with Officer Oaks on 3<sup>rd</sup> shift on a regular basis or that he frequently called her from the captain's office when he was on duty and she was at home. The supervisor cannot be required to warn appellant not to continue certain conduct where the supervisor was unaware appellant was engaging in that conduct.

Appellant's last contention on the topic of the January 14<sup>th</sup> meeting is particularly revealing. It may be that the appellant came away from the meeting with an understanding that he was to find out who was complaining about him and to talk with them, but this understanding was clearly a mistaken one.<sup>2</sup> Mr. Schneider wanted appellant to change his conduct relative to Officer Oaks, in order to eliminate the basis for any perception of favoritism. He wanted appellant "NOT to spend more time with her

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<sup>2</sup> During his testimony, appellant stated he specifically asked Mr. Schneider who the people were who were complaining about possible favoritism with respect to Officer Oaks: "I think I suggested a couple of names but *he didn't want to give me the names*. I don't totally recall . . ." Mr. Schneider's refusal to provide appellant with any names would have been totally inconsistent with appellant's alleged perception that he was to seek out those people and talk to them.

or consistently have her relieved to type.” (Emphasis in original.) In other words, he did not want the appellant, when he was on duty, to treat Officer Oaks differently than the other correctional officers. The appellant chose to believe that he could continue to spend an inordinate amount of time with Officer Oaks and still convince other staff at CCI there was no sexual relationship between them. Even though the appellant was well aware there was a perception that he favored Officer Oaks on the job, he never realized it was necessary to dispel the perception. Instead, he chose to ignore it or to blame those who perceived the favoritism.

The record also indicates that appellant did spend substantially more time with Officer Oaks than he spent with other 3<sup>rd</sup> shift officers. A second captain was assigned to the 3<sup>rd</sup> shift about the same time as the January 14<sup>th</sup> meeting. This position had responsibility to type up the daily reports, a responsibility that appellant had, up to that point, assigned to Officer Oaks on a very regular basis. So while Officer Oaks no longer typed up the reports, appellant still admitted to spending more time with her than other officers. Appellant returned to her unit every night and they ate together on a regular basis. This conduct was contrary to the direction provided to appellant by Mr. Schneiter during the January 14<sup>th</sup> meeting. Therefore, appellant’s conduct constituted disobedience and a failure to carry out his supervisor’s direction, in violation of Work Rule 1.

2. *That despite the direction given at the January 14, 1998 meeting with Mr. Schneiter, appellant continued to spend large portions of time with Officer Oaks and did not dispel the perception of favoritism towards her, as reflected by the sign-in log for the February 18<sup>th</sup> shift which showed that on his rounds, appellant only went to Officer Oaks’ unit (HU8). (Work Rule A1)*

The parties stipulated that appellant was not listed on any housing unit sign-in log for the 3<sup>rd</sup> shift on February 18<sup>th</sup>, except for HU8. Officer Oaks was working on that unit for the 3<sup>rd</sup> shift. Lt. Schoeneberg, rather than the appellant, was responsible for completing the supervisor’s rounds of the housing units on February 18<sup>th</sup>. Appel-



lant's visit to HU8, and to no other Housing Units showed that he continued to spend more time with Officer Oaks than with the other 3<sup>rd</sup> shift officers on duty. This conduct was contrary to the Mr. Schneider's directive at the January 14<sup>th</sup> meeting. Appellant's conduct violates Work Rule A1.

3. *That despite the direction given at the January 14, 1998 meeting with Mr. Schneider, appellant continued to spend large portions of time with Officer Oaks and did not dispel the perception of favoritism towards her, as reflected by their joint institution round. (Work Rule A1)*

During the 3<sup>rd</sup> shift on February 11<sup>th</sup>, appellant accompanied Officer Oaks on an "institution round" or "fire round." It is the responsibility of the Intake officer to conduct the fire round and Officer Oaks was assigned to the Intake officer position on February 11<sup>th</sup>. The fire round takes the officer into remote areas of the institution. During much of the round, the officer conducting the round cannot be seen by other security personnel.

Despite Mr. Schneider's January 14<sup>th</sup> directive that appellant not spend more time with Officer Oaks, the appellant decided to conduct a fire round with her on February 11<sup>th</sup>. The round took more than an hour. It was appellant's first fire round in the 3½ years he had worked as 3<sup>rd</sup> shift supervisor. Because of the nature of the fire round, the appellant and Officer Oaks were out of the view of other security staff for extended periods.

Appellant's decision to conduct the fire round with Officer Oaks was contrary to the January 14<sup>th</sup> directive from Mr. Schneider. It tended to support a perception that the appellant favored Officer Oaks as compared to the other officers. Appellant's action violated Work Rule A1.

4. *That despite the direction given at the January 14, 1998 meeting with Mr. Schneider, appellant continued to spend large portions of time with Officer Oaks and did not dispel the perception of favoritism towards her, when appellant switched Officer*

*Oak's assignment on February 19<sup>th</sup> so that she could cook eggs and potatoes for him. (Work Rule A1)*

Lt. Parker proposed that Officer Oaks work in the Barracks officer position during the 3<sup>rd</sup> shift on February 19<sup>th</sup>. When appellant reviewed the shift assignments, he commented that he was switching Officer Oaks out of the Barracks so that she could prepare breakfast for him. That statement clearly suggests favoritism when the Barracks is considered to be among the worst few 3<sup>rd</sup> shift assignments and when the Intake officer is considered one of the best assignments.

Had she remained in the Barracks, Officer Oaks would not have had access to a grill for preparing the eggs and potatoes appellant and Officer Oaks had brought in to work. Officer Oaks ended up in Housing Unit 1 where she could (and did) use the grill on that unit to cook the food. The net result was that appellant and Officer Oaks did eat breakfast together on HU1. While Sgt. Mitchell also ate breakfast with them, the switch meant that appellant still spent more time with Officer Oaks than with the other officers. This conduct was contrary to the specific directive from Mr. Schneider at the January 14<sup>th</sup> meeting. It violated Work Rule A1.

5. *That despite the direction given at the January 14, 1998 meeting with Mr. Schneider, appellant continued to spend large portions of time with Officer Oaks and did not dispel the perception of favoritism towards her, when he made eleven personal phone calls from the institution, extension 239, to Officer Oak's residence. (These calls were made between January 14<sup>th</sup> and February 17<sup>th</sup>.) (Work Rule A1)*

Appellant made 11 phone calls to Officer Oaks' home during the 3<sup>rd</sup> shift from the captain's office (extension 239) during the period from January 14<sup>th</sup> to February 17, 1998. The calls ranged from 1 minute to 11 minutes in length.

Respondent charges that these telephone calls violated Mr. Schneider's directive on January 14<sup>th</sup> not to spend more time with Officer Oaks than with the other officers. Because appellant conceded that the January 14<sup>th</sup> directive did not apply to off-duty conduct, such as appellant's practice of carpooling with Officer Oaks, the directive

cannot be construed to apply to off-duty telephone calls between appellant and Officer Oaks. However, the 11 calls involved in this allegation were made by appellant while he was on duty. Mr. Schneider's January 14<sup>th</sup> directive should be construed as prohibiting calls made by appellant to Officer Oaks while the appellant was in work status. Therefore, the 11 calls made after the January 14<sup>th</sup> conference violated the directive and Work Rule A1.

Respondent also charges that the 11 phone calls violated Mr. Schneider's directive to dispel the perception of favoritism. Appellant contends that the calls could not constitute favoritism because they were not made in front of any other employees. Appellant appears to be arguing that as long as other staff were unaware of them, the calls could not serve as a basis for a perception of favoritism by appellant towards Officer Oaks. This argument was valid only to the point that the calls were undiscovered. Certain employees of CCI ultimately did learn of the calls. Once discovered, the calls could serve as the basis for a perception of favoritism. Even though it was management that learned of the calls by reviewing the telephone log, and, until then, no one other than appellant and Officer Oaks may have been aware that appellant made the calls, it is still correct to say that appellant did not dispel the perception of favoritism toward Officer Oaks, thereby violating Work Rule A1.

6. *That appellant was negligent in performing his assigned duties when he made 35 personal phone calls to Officer Oak's home during work time, totaling 5 hours and 37.2 minutes. (These calls were made between November 18<sup>th</sup> and February 17<sup>th</sup>.) (Work Rule A4)*

Appellant spent more than 5½ hours, over a 3 month period, on the phone with Officer Oaks when appellant was in work status. Respondent's telephone policy limited approved personal calls to a length of 2 minutes. By spending a substantial amount of time on the phone on personal matters during this period, appellant reduced his contacts with his subordinates who were on duty during the 3<sup>rd</sup> shift. Pursuant to his PPD (App. Exh. 2), appellant was required to supervise security staff, inspect their work, evaluate

their performance and “[i]nspect housing unit posts and all work areas to ensure proper operation and sanitation on a regular basis.” Appellant’s telephone calls to Officer Oaks reduced appellant’s ability to perform these responsibilities, in violation of Work Rule A4.

7. *That appellant did not provide truthful and accurate information when, during the investigatory interview, he was asked how many telephone calls he had made to Officer Oaks and appellant answered one or two. (Work Rule A6)*

Appellant argues that the summary of his investigatory interview was wrong in terms of his response to Mr. Schneider’s question about the calls to Officer Oaks at home. The interview summary indicates appellant called her “once or twice” at home, while appellant argued that he actually said “a few.” This distinction is hardly important to the bottom line of this allegation. The shift schedules (App. Exh. 15) indicate there were 11 instances between January 1, 1998 and February 18, 1998, when appellant worked the 3<sup>rd</sup> shift and Officer Oaks was not also working. It is reasonable to extrapolate that there were another 11 shifts between November 18, 1997, and January 1, 1998, when Officer Oaks did not work but the appellant did. Therefore, the 35 calls from Extension 239 to Officer Oaks’ home occurred on a total of 22 shifts. On each of 4 of those 11 shifts, appellant called her home 3 times.

The Commission believes the reference in the investigative summary to “once or twice” is an accurate description of appellant’s statement during the investigative interview. Even if it was not accurate and if the appellant actually referred to “a few” calls, he grossly mischaracterized the number of calls he made. Appellant’s response to Mr. Schneider’s question during the interview was false and appellant knew it was false. Appellant’s actions violated Work Rule A6.

8. *That appellant did not provide truthful and accurate information when, during the investigatory interview, he was asked why he switched Officer Oaks’ assignment on February 19<sup>th</sup> and appellant stated that another officer requested it. (Work Rule A6)*

This allegation is based on the following exchange during appellant's investigative interview on February 27<sup>th</sup>:

Mr. Schneider:           Why would you pull Oaks out of the barracks?

Appellant:       Maybe Turner requested it. I don't remember from a week ago.

The Commission will address this allegation in conjunction with the subsequent allegation.

9.     *That appellant did not provide truthful and accurate information when, during the pre-disciplinary interview, he was asked why he switched Officer Oaks' assignment on February 19<sup>th</sup> and appellant stated that it was because of problems with female staff in the Barracks, even though that assignment had no BFOQ. (Work Rule A6)*

This allegation is based on the appellant's statements during the pre-disciplinary hearing on March 4, 1998, which included the following:

*On this night, Oaks was assigned to the Barracks. With the problems we had been experiencing with female staff (catcalls, whistling, etc.) in the Barracks, I switched her with Turner for the rest of the shift. . . .*

Sam Schneider asked Captain Bergh why he never mentioned the problems with females in the Barracks during the investigatory interview on Friday. Captain Bergh stated he did not remember that he even moved her. . . . (Emphasis added.)

There are four conclusions implicit in allegations 8 and 9: 1) Appellant switched Officer Oaks out of the Barracks assignment for the 3<sup>rd</sup> shift on February 19<sup>th</sup>; 2) appellant made the switch so Officer Oaks could cook him breakfast; 3) at the time of his investigatory interview on February 27<sup>th</sup>, the appellant remembered both 1) and 2); and 4) at the time of his pre-disciplinary hearing on March 4<sup>th</sup>, the appellant remembered both 1) and 2). Respondent must establish the accuracy of all of these conclusions in order to meet its burden of proof as to these two allegations.

It is undisputed that the appellant was the person who rejected Lt. Parker's suggestion that Officer Oaks work the 3<sup>rd</sup> shift on February 19<sup>th</sup> in the Barracks. Appellant

has offered several reasons for the change but the Commission concludes that the decision was made in order to allow Officer Oaks to cook breakfast. This conclusion rests on testimony by both Captain Clements and Lt. Parker. At hearing, Capt. Clements confirmed that when appellant reviewed Lt. Parker's schedule prior to the beginning of the 3<sup>rd</sup> shift, appellant stated, "I brought in eggs and potatoes so she [Officer Oaks] could make me breakfast – she can't cook it in the barracks (SDU-1)." Lt. Parker testified that when appellant arrived that day, appellant said that they (appellant and Officer Oaks) had brought food in to make breakfast and she wouldn't be able to make the breakfast if she was working in the barracks. Appellant's contemporaneous comment, as reported by both Lt. Parker and Capt. Clements, is the best indication of his real reason for switching Officer Oaks from the Barracks assignment.

It took two steps for Officer Oaks to move from the Barracks assignment to Housing Unit 1. As noted above, the first step was when the appellant switched her from Barracks duty to the Intake officer for the 3<sup>rd</sup> shift. The second was the mid-shift trade between Officer Oaks and Sgt. Droste, the sergeant assigned to HU1. Appellant places substantial weight on this second step, because it was initiated by someone other than the appellant. Appellant's argument is misplaced for two reasons. First, the Intake officer has access to grills in the housing units. Capt. Clements testified that the Intake officer stopped in several times to different housing units during the course of the 3<sup>rd</sup> shift. Capt. Clements also testified that Intake officers have cooked in the past. Therefore, appellant's action of switching Officer Oaks from Barracks to Intake was enough to allow her to cook their breakfast. In addition, Sgt. Droste had a habit of requesting mid-shift trades with the Intake officer so Sgt. Droste could go on the garbage run and get some fresh air. Appellant was aware of this habit.<sup>3</sup> Therefore, by switching Officer Oaks into the Intake position, he knew she would end up switching again, mid-shift, with Sgt. Droste and end up in HU 1 where there was a grill.

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<sup>3</sup> The notes from the pre-disciplinary hearing on March 4, 1998, include the following description of a statement by appellant: "Sergeant Droste requested to trade with Oaks for the garbage run, as he does every night with the Intake Officer, whoever it might be."

Respondent's third conclusion, implicit in allegations 8 and 9, is that at the time of his February 27<sup>th</sup> investigatory interview, appellant remembered that he had switched Officer Oaks from the Barracks so she could cook him breakfast but knowingly provided false reasons for the switch. This is a more difficult conclusion for respondent to establish. However, respondent has met its burden because of the short time period of just one week between the February 19<sup>th</sup> shift and the investigatory interview, and because appellant's responses during the interview were evasive. The relevant portions of the interview are set forth in Finding 47. During the interview, appellant first acknowledged that he remembered the beginning of the shift on the 19<sup>th</sup>. When asked whether *the appellant* had changed Officer Oak's assignment, appellant honed in on the mid-shift change and suggested that she had traded with Sgt. Droste. When he was asked, more specifically, whether appellant had switched her from the Barracks assignment, appellant initially denied he had done so and then suggested he had "probably" switched her. When asked *why* appellant had switched Officer Oaks from the Barracks assignment, appellant (inaccurately) suggested that Officer Turner had requested a change. When asked whether the appellant had switched her so she could make him breakfast, he again ignored the initial switch out of the Barracks and referred to the mid-shift switch from Intake and said that Sgt. Droste had requested the trade. When these responses by appellant are viewed together, they show an evasive pattern and provide strong support for the conclusion that appellant was trying to mislead management during the investigatory interview rather than to respond accurately to the questions posed.

The appellant offered another rationale for his actions when he was questioned during his pre-disciplinary hearing on March 4<sup>th</sup>. (Finding of Fact 48). This time he suggested that he had moved Officer Oaks from the Barracks position and placed Officer Turner in that assignment because "we had been experiencing [problems] with female staff (catcalls, whistling, etc.) in the Barracks." Officer Oaks testified that appellant did not assign females to the Barracks early in 1998 because of catcalls and things thrown at female officers there. Officer Oaks testified that appellant felt that, on

a temporary basis, males should be assigned to that post until things settled down. Officer Turner testified that he was often “jammed” into the Barracks on 3<sup>rd</sup> shift. He stated that he was moved into the Barracks 3 times during January, on January 6<sup>th</sup> and 19<sup>th</sup> when the appellant was shift commander, and on January 10<sup>th</sup> when Lt. Parker was shift commander. A review of the 3<sup>rd</sup> shift daily schedules (App. Exh. 15) indicates that this also occurred 5 times during February of 1998, (February 4<sup>th</sup>, 6<sup>th</sup>, 19<sup>th</sup>, 21<sup>st</sup>, and 24<sup>th</sup>) and that the appellant was the shift commander on all 5 occasions. However, this record still does not support the conclusion that Officer Oaks’ gender was the reason she was reassigned on February 19<sup>th</sup>. As noted above, both Capt. Clements and Lt. Parker heard appellant give a different reason for the switch. One would have expected appellant to have referred to this reason during the investigatory interview if it had actually motivated his February 19<sup>th</sup> decision. When he recommended Officer Oaks for the assignment on February 19<sup>th</sup>, Lt. Parker was obviously unaware of the alleged policy of not assigning women to the Barracks position on 3<sup>rd</sup> shift. Mr. Schneider also testified that he was unaware of such a policy. Finally, such a policy would have been contrary to management’s requirement that male and female officers be treated the same in terms of post assignments unless the post has gone through an extensive BFOQ approval procedure.

For all of the above reasons, the Commission concludes that complainant knowingly provided false information during his investigatory interview on February 27<sup>th</sup> and the pre-disciplinary hearing on March 4<sup>th</sup> with respect to the reason Officer Oaks was switched from the Barracks Officer assignment on February 19<sup>th</sup>. Complainant’s conduct violated Work Rule A6.

*10. That appellant made 35 personal calls on the state telephone system to Officer Oaks in violation of the work rule prohibiting unauthorized or improper use of telephones. (Work Rule C1)*

Appellant’s personal calls from extension 239 to Officer Oaks at home exceeded the 2 minute limit established in the CCI telephone use policy (App. Exh. 1) and ap-



pellant failed to submit payment for those calls when they were made.<sup>4</sup> Appellant's conduct constituted the unauthorized or improper use of state telephones and violated Work Rule C1.

Just cause exists when "some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works." *Safransky v. Personnel Board*, 62 Wis. 2d 464, 474, 215 N.W.2d 379 (1974), citing *State ex rel. Gudlin v. Civil Service Commn.*, 27 Wis 2d 77, 87, 133 N.W.2d 799 (1965). Just cause clearly existed here. There were 10 substantiated allegations of misconduct violating four separate work rules, including the failure to carry out instructions and giving false information during an investigation. Appellant frequently served as the shift commander for the 3<sup>rd</sup> shift. The significant amount of time he spent with Officer Oaks caused a number of his subordinates to perceive favoritism. Appellant was aware of this perception. He had discussions with Officer Oaks about the perception. He also had a discussion about it with a 3<sup>rd</sup> shift sergeant as well as with appellant's supervisor on January 14<sup>th</sup>. Subordinate staff must feel confident that the institution's white shirts will be open minded when resolving disputes or concerns between staff. The correctional officers must trust the shift commander, who is in charge during security emergencies, to make decisions without regard to personal favorites. To the extent that subordinate staff believe that the supervisor is not out and about performing assigned duties, the subordinates feel they are less likely to get caught for their own misconduct and they are more likely to feel that, "If he can do it, I can do it." The shift commander sets the performance standard for the shift. Similarly, the warden and security director must have confidence in the performance and truthfulness of the shift commander.

Appellant's misconduct undermined his role as a shift commander, both in terms of how he was viewed by his subordinates and by his superiors. Appellant's false

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<sup>4</sup> Appellant first offered to reimburse respondent for the cost of the calls, approximately \$23, after respondent had commenced the investigation of his conduct

statements during the investigation of his conduct reasonably caused his superiors to distrust him, undermining his role as a supervisor and shift commander.

The appellant's witnesses testified that it was common for 1<sup>st</sup> and 2<sup>nd</sup> shift supervisors to eat together on one unit known for having more plentiful food. Appellant suggested that the supervisor's habit of eating together reflected favoritism towards the staff on that particular unit. This argument is unpersuasive. There is no contention that the 1<sup>st</sup> and 2<sup>nd</sup> shift supervisors have ever been advised to end this practice. There was no directive comparable to that given to appellant by Mr. Schreiter on January 14<sup>th</sup>. The Commission reaches a similar conclusion regarding the various circumstances where a supervisor was perceived by others as showing professional favoritism towards a specific subordinate. Appellant failed to identify such situations that were known to management and where the supervisor had been warned to discontinue the practice/perception.

The final question is whether the demotion was excessive. In *Barden v. UW*, 82-237-PC, 6/9/83, the Commission held:

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

The employee's prior disciplinary record and the discipline imposed by the employer in other cases can be considered, although the different circumstances involved in the other disciplinary matters often makes it difficult to draw useful comparisons. *Showsh v. DATCP*, 87-0201-PC, 11/28/88; reversed on other grounds, *Showsh v. Pers. Comm.*, Brown Co. Cir Ct., 89CV445, 6/29/90; *Showsh v. Wis. Pers. Comm.*, Ct. App. 90-1985, 4/2/91.

The appellant had already received major discipline, a 10 day suspension in May of 1997, before respondent investigated the allegations that served as the basis for the demotion decision.

Appellant suggests that the degree of discipline imposed was much greater than for other employees of respondent. However, this contention seeks to compare appellant to other employees whose misconduct was significantly different than that of the appellant. For example, JT received a written reprimand in January of 1998 after he admitted he made 2 telephone calls without the permission of his supervisor. However, JT was an officer, rather than a supervisor at the time, there were just two calls involved with no other allegations, and there is no indication he had been provided a directive comparable to the one given to appellant on January 14<sup>th</sup>. Similar distinctions exist with respect to the respondent's actions of merely requiring other employees to reimburse the respondent for personal phone calls made.

Appellant also noted that Officer Oaks was not disciplined for making misleading or false statements during her interview for the investigation of the appellant's conduct. The summary of that interview (Resp. Exh. 114) includes the following exchange:

Mr. Schneider: Have you been contacted at home when Captain Bergh is here at CCI?

Officer Oaks: Yes a few times with questions about work.

Mr. Schneider: Could you give me an estimate of how many times he's called you at home from here? I'm not asking for an exact number.

Officer Oaks: Maybe two times.

Mr. Schneider: How long would those phone calls have been? Have you ever had an extended call?

Officer Oaks: Not very long. No. They were work related.

Human Resources Director Schneider: Could you give me an example?

Officer Oaks: [Pause] I am trying to think of when he called. I can't remember.

Mr. Schneiter: Did he call you yesterday morning between 5:30 and 6.00?

Officer Oaks: Let me think. Yes he did. No, it was the day before. My sister is pregnant and I thought I might have to take her in. I asked him to call to be sure I was back and to make sure my kids were up. That particular call wasn't work related. No, that one wasn't.

Mr. Schneiter: Can you think of any other calls that weren't work related that were made in the middle of the night? Well, not really the middle of the night, it would be the middle of your work day.

Officer Oaks: I know he doesn't call that often because I have three kids at home.


During her testimony at hearing, Officer Oaks admitted that her answers at the investigatory interview were *untruthful*. Officer Oaks' *untruthful* answers are very comparable to those false statements made by the appellant during respondent's investigation leading to his demotion. Respondent's failure to discipline Officer Oaks is somewhat inconsistent with respondent's decision to discipline the appellant for being *untruthful*. However, appellant's status as shift supervisor, his previous discipline and the myriad of other allegations about the appellant are all important distinctions relative to respondent's decision not to discipline Officer Oaks for her *untruthful* statements during her investigatory interview.

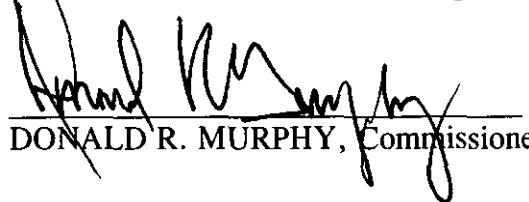
Respondent established that had appellant merely been demoted to the Supervising Officer 1 (Lieutenant) classification, he still would have been in a position to serve as shift commander. Respondent also established that appellant's supervisors had lost their trust in appellant and could no longer rely on the accuracy of his information. The loss of trust provides key support for the decision to demote the appellant to a non-supervisory position. It justifies appellant's demotion from the role of a shift commander.

ORDER

Respondent's decision demoting the appellant from Supervising Officer 2 (Captain) to Officer 3 (Sergeant), effective March 15, 1998, is affirmed and this appeal is dismissed.

Dated: Jan 27, 1999. STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

KMS:980018Adec1

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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 (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