STATE OF WISCONSIN PERSONNEL COMMISSION

**ROBERT RODGERS,**
***Appellant,***

**v.**

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

Case No. 98-0094-PC

FINAL DECISION AND ORDER

The proposed decision and order was mailed to the parties on December 13, 1999. Neither party filed written objections or requested oral argument by the established January 20, 2000, deadline. However, changes were made to the proposed decision after consultation with the examiner. These changes were made for purposes as explained and highlighted through use of alpha footnotes.

This matter involves an appeal of a disciplinary action under §230.44(1)(c), Wis. Stats. The issue for hearing was:

> Whether or not the allegations contained in the June 11, 1998 letter of discipline are true. If so, do they constitute just cause for the imposition of discipline. If so, was the degree of discipline imposed against the appellant excessive.

## FINDINGS OF FACT

1. Appellant Robert Rodgers has worked for respondent (DOC) since 1973 and as a Corrections Field Supervisor since approximately 1986. His position is not covered by a collective bargaining agreement and is exempt under the federal Fair labor Standards Act (FLSA).

2. From approximately 1992 to 1996 appellant supervised two officers in the Division of Intensive Sanctions at Eau Claire, Wisconsin, and two agents located at Rice Lake and Superior, Wisconsin. He was supervised by Ron Kalmus who was located at Oshkosh, Wisconsin.

3. Appellant's geographical area of responsibility included seventeen counties in northwest Wisconsin.

4. In 1996 respondent's Division of Intensive Sanctions and Division of Probation and Parole were merged into one unit, the Division of Community Corrections.

5. Under this reorganization, Sally Tess became appellant's supervisor. Appellant's geographic responsibilities were reduced to Eau Claire and Clark Counties. Tess' office was located in Eau Claire.

6. After Tess became appellant's supervisor, she began to receive complaints from Agent Karen Lindholm, one of appellant's subordinates, regarding his job performance as supervisor. These complaints included concerns about appellant's availability to staff, possible misuse of state funds, unnecessary travel expenses—use of state vehicle—and inappropriate approval of time sheets for male agents. These complaints to Tess by Lindholm continued from approximately February 1997 until June 1998, when Lindholm was transferred out of appellant's unit.

7. On March 10, 1997, Tess issued a memorandum to appellant which set forth a number of directives. These directives were the result of complaints from Lindholm, another staff person, and Tess' personal review of appellant's telephone and travel records. The March 10, 1997, memorandum provided as follows:

> The following directives are effective immediately:
>
> 1. You are to review the telephone bills provided to you and identify which of these calls were personal calls.
>
> 2. You are to reimburse the State of Wisconsin - Department of Corrections for the identified personal calls. Payment should be directed through me and paid by March 31, 1997.
>
> 3. The vehicle currently personally assigned to you will be reassigned to another unit. You will use a pool vehicle for any travel you must do.
>
> 4. Your travel will be limited to within Eau Claire and Clark Counties. Any travel outside of these county lines must be preapproved by me.

> 5. The cell phone currently assigned to you will be reassigned. You are to only have possession of a cell phone during the week you are on-call and calls are to be limited to work-related calls. Exceptions to this must be preapproved by me.
>
> 6. You are to thoroughly and accurately complete daily logs and Fax them to me the following morning.
>
> 7. You are not to call Toni Peterson using any state equipment unless prior permission is received from me.
>
> These directives will remain in effect until further notice. Failure to abide by these directives may result in disciplinary action.

8. On March 17, 1997, Regional Chief Tess held an investigatory interview with appellant. Also in attendance was the Assistant Regional Chief, Patricia Below. A second interview was conducted on May 8, 1997.

9. On July 2, 1997, Tess and Assistant Regional Chief Mike Lew held a pre-disciplinary hearing with appellant.

10. By letter dated August 13, 1997, appellant was issued a written reprimand for violating three work rules (Work Rules A-1, A-6, C-1) "[for] making frequent and excessive telephone calls to Supervisor Tori Peterson using both [his] office phone and assigned cellular phone." The letter also advised appellant that he, like all supervisors, was "expected" to follow the administration's policies, procedures and supervisory directives; and that he was directed to follow the administration's expectations from the date of the letter forward.

11.[A] Also the letter of reprimand modified appellant's prior March 10, 1997, directives as follows:

> It is the administration's expectation that supervisors will follow policies and procedures and supervisory directives. You are directed to follow these expectations from this day forward. Be advised that further work rule violations will result in more severe discipline, up to and including discharge.

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[A] This corrects the typographical omission of paragraph 11

> In addition, you will be required to continue submitting daily logs for purposes of accountability to the Regional Chief until further notice. Arrangements will be made to return a cell phone to you to be used for business purposes. Personal calls will need to be reimbursed. You are directed to send copies of your cell phone bills to the Regional Chief for monitoring.

12. Appellant, as directed on March 10, 1997, faxed daily activity logs to Tess. After a short time, at Tess' approval, appellant mailed them to her weekly.

13. At some point after the March 10, 1997, directives, appellant had requested the return of the cellular phone. Following the discipline, the phone was made available to appellant for business purposes.

14. Chief Tess initially carefully scrutinized appellant's daily activity logs. Later, after it appeared there were no problems, Tess "spot checked" appellant's daily logs.

15. On January 20, 1998, agents Karen Lindholm and Judy Cardona went to Chief Tess' office and complained about appellant's supervision of them.

16. In February 1998, agent Lindholm or agent Cheri Erdman informed Chief Tess that appellant had transported a suspected dangerous offender without assistance to Douglas County.

17. Since the reported action of appellant appeared to be in violation of the "client in custody" transport policy and appellant's March 10, 1997, directive limiting him to travel within Eau Claire and Clark Counties, Chief Tess decided to conduct an investigation to resolve her concerns.

18. Chief Tess also had received complaints from a female staff person and Sergeant Wayne Schwantes that appellant engaged in differential treatment of female staff and used offensive and demeaning language in the office. These complaints were included and addressed in the investigation.

19. Chief Tess' investigation included investigatory interviews of all staff in appellant's unit, except agent Gerard Gougé. He was not available during the investigation.

20. As a result of the interviews, Tess determined there was "a reasonable explanation" for the differential treatment, but that appellant had made comments in the office that certain female staff found inappropriate, offensive and made them uncomfortable.

21. An investigatory interview was conducted by Tess with appellant and his attorney on February 24, 1998. Appellant acknowledged that he had used the term "mental masturbation" in describing what he considered was useless paper work requested by management. Appellant also acknowledged that he had explained the concept of a minor's inability under Criminal Law to consent to sexual intercourse with an adult to Agent Kimberly Hankey, by personalizing the explanation and using her and himself in a scenario. Also, appellant acknowledged that in a conversation concerning a victim of domestic violence, he made some comment about the victim deserving it, something to the effect, "depends on if she had it coming," but he said it was done with sarcasm, "like the offender thought she had it coming."

22. By memorandum dated February 27, 1998, Tess provided the division Assistant Administrator Mary (Mickey) Thompson a summary of her investigation of appellant. The report in part provides:

> Regarding the allegation of subordination, there is room to argue that my directives were misinterpreted, although Bob was previously given them in writing. This matter can be corrected with better clarification.
>
> The other allegations of harassing, demeaning or abusive language often boils down to Bob's word against his staff's word. The agents and program assistant who reported the offensive comments were clear in their recollections. Bob was less clear or offered explanations for it, such as it was said only once or was said in a sarcastic, disbelieving way.
>
> The greater problem is the perception of differential treatment with the Eau Claire office. This has resulted in poor morale and resentment. During my interviews, there was much dissatisfaction with Bob's supervisory style and the effect it has on the office. Female staff found him inaccessible and, at times, unapproachable. Staff reported feeling frustrated with circumstances in the office and hopeless that things would ever change.

23. A pre-disciplinary hearing was conducted by Assistant Regional Chief John Werner on April 17, 1998, with Assistant Chief Patricia Below, appellant and appellant's attorney. Appellant was informed that a tentative conclusion had been reached that he had violated Department of Corrections (DOC) work rules 1 and 13. Appellant was also advised of several specific findings: that he was in violation of a written directive by his supervisor, requiring him to obtain approval from her for any travel outside Eau Claire and Clark Counties; that he was in violation of his supervisor's written directive to obtain approval before using or scheduling leave, or compensation time; that he had violated DOC Work Rule 13 by treating staff differentially based on sex; that he had violated DOC Work Rule 13 by using the term "mental masturbation"; that he had violated DOC Work Rule 13 by inappropriately defining consensual sex to a female agent; that he had made an inappropriate remark regarding a Hmong family; and that he had made an inappropriate remark about a victim of domestic abuse "deserving it."

24. By letter dated June 11, 1998, appellant issued a written reprimand for violating DOC Work Rules 1 and 13. These rules are as follows:

> Work Rule 1: Insubordination, disobedience, or failure to carry out assignments or instructions.
>
> Work Rule 13: Intimidating , interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others.

The letter also informed appellant that his work rule violations warranted a one day suspension, that the reprimand was equivalent—in respect to progressive discipline—to a one day suspension, but that his position was exempt under FLSA from suspensions of less than five days. Also, the letter in pertinent part informed appellant as follows:

> Specifically, you violated work rule #1 when you failed to follow directives previously given to you on March 10, 1997, by Regional Chief Sally Tess regarding travel outside of Eau Claire and Clark Counties. On February 11, 1998, you traveled to Douglas County on a transport and did not seek pre-approval from Regional Chief Tess. You

> violated work rule #13 by using offensive and demeaning language in the office, specifically using the term "mental masturbation: and commenting on a victim of domestic violence "deserving it." Both of these comments were made in front of staff, who found it offensive. In addition, you staffed a case with Agent Kim Hankey on 12/15/97 and discussed a sexual assault scenario using you and Agent Hankey as the involved parties, causing discomfort for Agent Hankey.

25. Appellant made five trips outside of Eau Claire and Clark Counties between March 1997 and February 1998. The trips occurred on October 2 and 17, 1997, November 12, 1998, January 1998 (date unknown, but signed by appellant on 1/20/98) and February 11, 1998. These trips were made without supervisory pre-approval, but were reported by appellant to his supervisor in his daily activity logs.

26. None of appellant's staff approached him and informed him that they found his use of the term "mental masturbation" to be offensive or demeaning. Agent Hankey never told appellant that his explanation of sexual assault involving a minor caused her discomfort.

27. Appellant made no requests to clarify his directives of November 4, 1996, and March 10, 1997, from Supervisor Tess or his August 13, 1997, written letter of reprimand from Thompson.

## CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction over this action pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof.

3. Respondent has sustained this burden of proof by establishing there was just cause for imposing discipline.

4. The disciplinary action of written reprimand equivalent to a one day suspension was not excessive.

## OPINION

The basic question in an appeal of a disciplinary action under §230.44(1)(c), Stats. is whether there was "just cause" for the discipline imposed. The particular questions to be addressed are: 1) Whether the greater weight of credible evidence shows appellant committed the conduct alleged by respondent in its letter of discipline; 2) Whether the greater weight of credible evidence shows such chargeable conduct, if true, constitutes cause for imposition of the discipline; and 3) Whether the discipline imposed was excessive. *Mitchell v. DNR*, 93-0228-PC, 8/3/84.

Respondent charged in the letter of discipline in issue that appellant violated DOC Work Rule 1 by failing to adhere to March 10, 1997 directives to seek pre-approval from his supervisor of any travel outside of Eau Claire and Clark Counties, when on February 11, 1998 he traveled to Douglas County (See ¶24 of Findings of Fact). Appellant does not dispute making the trip as charged, but contends in essence that, since respondent in the written reprimand of August 13, 1997, in addressing issues of accountability, failed to specifically indicate the need to submit daily logs or obtain prior approval for travel outside Eau Claire County, those prior directives were satisfied and no longer imposed. In support, appellant directs attention to the following facts in evidence: That he had reported making four trips outside the county, without any indication from his supervisor of a March 10, 1997 directives violation; and that his supervisor acknowledged in her investigation report to Administrator Thompson (¶22 of the Findings of Fact) that her directives could have been misinterpreted by appellant. Based on these facts, appellant argues that at the time of his February 11, 1998 trip—transporting an offender to Douglas County—it was unclear whether pre-approval for trips outside the county was required, and he believed pre-approval was no longer required.

Appellant's argument is unpersuasive for several reasons. With the exception of making a cell phone available to appellant for business purposes and mailing daily logs weekly rather than filing them daily, Chief Tess never rescinded any of her March 10,

1997 directives.[B] Also, the August 13, 1997 letter of reprimand from Thompson directs appellant to follow supervisory directives (See ¶¶10 and 11 of the Findings of Fact). Also, appellant's reports of travel outside the county provided in his daily activity logs to his supervisor did not *ipso facto* limit the scope of the March 10, 1997 directives. The daily logs lacked such force, and once appellant's violations became known to Tess they were included in her investigation of appellant. (See ¶¶17, 18, 19). Finally, appellant never requested clarification of the directives from Tess or of the letter of reprimand from Thompson. Therefore, the more credible evidence supports the conclusion that appellant violated DOC Work Rule 1 as charged.

With respect to the DOC Work Rule 13 charge, appellant admits that he used the term "mental masturbation," made a comment about a domestic abuse victim "deserving it," and explained the legal concept of consensual sex and sexual assault of a minor to a female agent by personalizing the illustration. However, appellant argues that Work Rule 13 is directed toward preventing harassment in the work place and no evidence was presented showing he harassed or attempted to demean any of his subordinates. Further, appellant maintains that none of the "offensive language" was directed at any of his subordinates and that he "picked up" the phrase "mental masturbation" in college from a professor.

Therefore, one issue is whether appellant's acknowledged comments and instruction to Agent Hankey violated Work Rule 13 which prohibits the following actions: "intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others." None of the witnesses testified to being intimidated, sexually or racially harassed, or otherwise interfered with by appellant's comments.[C] One witness, testifying against the appellant, acknowledged that she had sworn in the office and yelled at people under her supervision but had never been disciplined for such conduct. Another witness testified

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[B] The addition "and maintain daily logs weekly" was made to correctly reflect the record.
[C] The first sentence in this paragraph of the proposed decision "testimony by the witnesses establishes.. " was deleted to add clarity to discussion

to the use of "all sorts of language" by staff to the point where she requested appellant, as supervisor, to reaffirm to staff the policy prohibiting such conduct. One witness, a domestic abuse victim, testified to not being present when appellant commented about a domestic abuse victim, but of being informed of his comments by another staff member. Agent Hankey testified that she was not present when appellant's comments at issue regarding a domestic abuse victim were made, but she also learned of it through other agents. Regarding her incident with appellant (¶¶24, 26 of the Findings of Fact), it occurred shortly after she was employed by DOC, while working on her second pre-sentence investigation. Agent Hankey testified that during the discussion of the case, which involved sexual assault, she did not understand the concept of "consensual sex" and appellant's personalized scenario, in explanation, made her "uncomfortable." Hankey testified that she has never been the recipient of any overtures from appellant.

Considering the evidence presented, it is clear appellant's conduct was not beyond reproach. Appellant's comments were inappropriate, as both a supervisor and probation and parole agent. However, the question is whether the conduct violated DOC Work Rule 13. On page 3 of its brief, respondent acknowledges that appellant's conduct was not an "egregious example of harassing, inappropriate, or offensive language." We agree. The evidence does not support a conclusion that appellant's conduct constituted flagrant violation of Work Rule 13. Appellant, however, did violate that work rule, although in a marginal fashion.[D]

The question then becomes one of determining whether there was just cause for imposing discipline. In *Safransky v. Personnel Board*, 62 Wis. 2d 462, 474, 215 N.W.2d 379 (1974), the Court held (citing *State ex. Rel. Gudlin v. Civil Service Comm.*, 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965)) that "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." Here, appellant failed to obey the written directive of his

[D] The change here is made to clarify there was a violation of Work Rule 13.

supervisor. Also, he made arguably offensive and inappropriate comments in front of his staff. This conduct meets the "just cause" test as provided in *Safransky, id.*

The remaining question is whether the imposed discipline was excessive. In *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98, the Commission provided the following factors to consider in determining the answer to this question: 1) The weight or enormity of the employ's offense or dereliction, including the degree (under the Safransky test) it impaired or tended to impair the employer's operation, 2) the discipline imposed by the employer in other cases, and 3) the number of incidents the emlployer successfully established as just cause for the imposed discipline.

Based on the criteria for determining this question, as expressed in *Kleinsteiber, id.*, the evidence supports the imposition of a one day suspension. There was a marginal violation of Work Rule 13 and a clear violation of Work Rule 1 when appellant failed to adhere to the directive of his supervisor; and this was the second violation of Work Rule 1 in less than a year.[E] These facts are sufficient to substantiate the imposed discipline, particularly when considered in the context of appellant's role as a supervisor. The evidence of record substantiates respondent's disciplinary action against appellant.

[E] Changes made here are again to reflect violations of Work Rules 1 and 13.

ORDER

Respondent's decision on June 11, 1998, issuing a letter of reprimand equal to and carrying the weight of a one day suspension is affirmed.

Dated: February 11, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

DRM:rcr:980094Adec1

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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