STATE OF WISCONSIN PERSONNEL COMMISSION

JEFFREY STELLINGS,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0130-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a disciplinary suspension. A hearing was held on January 14, 1999, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on March 22, 1999.

FINDINGS OF FACT

1. During the time period relevant here, appellant was employed by respondent as a Supervising Officer 2 (Captain) at Taycheedah Correctional Institution (TCI). As a Captain, appellant was at times the ranking correctional officer present at the institution. Other correctional officers look to Captains for leadership and direction, and Captains' conduct establishes the standard of behavior for correctional staff. Prior to July of 1998, appellant had not been disciplined for any reason.

2. During the relevant time period, James Zanon served as the Security Director at TCI. It was the policy at TCI, which Mr. Zanon communicated to appellant several times prior to July 11, 1998, that, if practicable, Captains not be the first to use hands-on force during an incident with an inmate but to supervise subordinate officers in their handling of the incident.

3. Some time prior to July 11, 1998, appellant injured his arm which required it to be placed in a cast; and Mr. Zanon, in view of the injury and cast, instructed

appellant to exercise special caution regarding the use of hands-on force to avoid further injury to the arm. Appellant's arm was still in the cast on July 11, 1998.

4. It was the practice at TCI during the relevant time period for each officer involved in an incident in which hands-on force was used to write and file an incident report. It was the practice of Mr. Zanon to either create a separate incident report or to add comments to an incident report prepared by a subordinate officer when he was personally involved in an incident in which hands-on force was used.

5. There was a fight between inmates at TCI on July 11, 1998. During this incident, appellant personally handcuffed one of the inmates. This act qualifies as one involving the use of hands-on force. During this incident, appellant also "de-centralized" a different inmate. This act also qualifies as one involving the use of hands-on force.

6. In the report of the July 11, 1998, incident prepared by appellant, he did not mention his use of hands-on force.

7. Officer Heim, who was also involved in the July 11, 1998, incident, prepared an incident report and submitted it to appellant for review. In this report, Officer Heim mentioned appellant's use of hands-on force during the incident.

8. Appellant discussed with Officer Heim the incident report she had prepared regarding the July 11, 1998, incident. During this discussion, appellant gave Officer Heim instructions regarding how she should redraft the report. As a part of these instructions, appellant directed Officer Heim to delete from her report any mention of appellant's use of hands-on force. After this discussion, Officer Heim prepared a second draft of the incident report which did not mention appellant's use of hands-on force during the incident, and appellant approved this draft.

9. Appellant asserts that, during the discussion referenced in Finding 8, he simply advised Officer Heim that her report indicated that appellant had handcuffed two inmates when in fact he had handcuffed only one, and this was the only factual detail he instructed her to change.

10. An investigatory interview with appellant was conducted on July 15, 1998, by Mr. Zanon and Mary Jo Nelson from TCI's personnel unit. Appellant was not told the purpose of the interview when he was instructed to attend. At this interview, appellant answered the questions presented to him as follows, in pertinent part:

> Q. Your verbal statement [given at the beginning of the interview] included who took physical control of inmates and who placed handcuffs, your written statement [incident report] doesn't?
>
> A. I guess it doesn't.
>
> Q. Why not?
>
> A. No reason.
>
> Q. None of these reports [incident reports prepared by appellant and other officers] reflect who used physical control techniques on Van or who cuffed Morgan. Why not?
>
> A. None of them do. Not even mine.
>
> Q. You reviewed those, right?
>
> A. Yes, I did.
>
> Q. Is there a reason why that's not documented?
>
> A. It's got everything else.
>
> Q. Possible reason?
>
> A. I'm not supposed to do this with this (cast), get involved with a cast on. I overreacted.
>
> Q. I can understand overreaction. I can't understand why it is not written in these reports. Do you want to volunteer any more information?
>
> A. I probably thought I'd get into trouble. I reacted to a situation in a volatile area. I screwed up, Jim.
>
> Q. How?

A. They are not accurate, not detailed enough.

Q. Did you direct staff not to write this in reports?

A. I directed Heim to rewrite her report. It was just terrible. She had fighting and disruptive conduct. That's a lesser included offense. She disobeyed an order.

Q. We were told you directed staff not to write your involvement.

A. No. I told her the conduct report was fighting and disobeying orders, not disruptive.

Q. Did you tell any of the staff involved not to document your use of physical control and handcuffing in their incident reports?

A. I don't recall telling Seiber. I do remember telling Heim to re-write her incident report.

Q. What was wrong with her incident report?

A. She had me doing everything.

Q. Did you tell Heim not to document your use of hands-on in her incident report.

A. I guess I did, that's why I'm here. I screwed up, I'm going to tell you straight up, I screwed up.

11. Appellant was contacted on July 17, 1998, at 11:45 a.m. for the purpose of scheduling a pre-disciplinary hearing. Appellant agreed to the scheduling of the hearing for July 17, 1998, at 1:30 p.m. Prior to the hearing, appellant was provided a memo from Ms. Nelson with certain attachments, including the DOC work rules. One of these attachments was a two-page document with a heading entitled "Employee Disciplinary Investigation" and a form number of "1271." This document was signed by Mr. Zanon and stated as follows, in pertinent part:

> Captain Stellings supervised and participated in a use of force involving four subordinate officers. Captain Stellings did not accurately document his participation in this incident. Captain Stellings directed subordinate

> officer to change incident report (CO Heim) to less accurately reflect what had occurred.
>
> At an investigatory interview on 071598 Captain Stellings admitted that he decentralized Offender Van and that he then handcuffed Offender Morgan. No incident reports filed regarding this incident reflect Capt. Stellings involvement.
>
> At the investigatory Capt. Stellings stated
>
> > "I do remember telling Heim to rewrite her IR . . . she had me doing everything."
>
> Capt. Stellings report and the others IR #'s 479590, 433958, 407804, 479582, 479580, 479581 do not accurately describe altercation and response by Stellings on 071198. Capt. Stellings reviewed and approved all reports.

This document also indicated that work rules A1, A2, and A6 were possibly violated by appellant and that this would be considered a category B violation.

12. At the pre-disciplinary hearing, appellant read this Employee Disciplinary Investigation document (form 1271) prepared by Mr. Zanon. He was asked whether it was correct as written and replied:

> Yes. I take my job very seriously. I take discipline very seriously. I did not come into the investigatory and lie. I told you what happened. I do understand the severity of this situation.

13. One of appellant's responsibilities at TCI was to train other officers in the preparation of incident reports. As part of the training he provided, appellant instructed officers to write incident and conduct reports completely and accurately. Appellant acknowledges that it is wrong to omit material facts from incident reports, or to instruct subordinate officers to do so.

14. Mr. Zanon on occasion instructed subordinate officers to rewrite reports, typically by writing the word "rewrite" on the report. Mr. Zanon did not instruct subordinate officers to change the facts in a report to make it less complete or accurate.

15. On one occasion, Ms. Nelson made an inaccurate statement in her report of an investigatory or pre-disciplinary meeting. Once the inaccuracy was brought to her attention, it was changed.

16. At TCI, officers have been instructed by their superiors to change a rating on a performance evaluation. On one occasion, a probationary Captain was instructed by Ms. Nelson to delete certain critical remarks from the performance evaluation of a probationary officer.

17. In a letter dated July 24, 1998, from Kristine Krenke, TCI Warden, appellant was notified as follows, in relevant part:

> This letter will serve as official notification of your suspension for five (5) days without pay. The days of suspension will be July 30, 31, August 6, 13, 14, 1998. You are to return to work August 1, 1998.
>
> This action is taken because you are in violation of Department of Corrections Work Rules:
>
> A#1 Insubordination, disobedience, or failure to carry out assignments or instructions.
>
> A#2 Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy.
>
> A#6 Falsifying records, knowingly giving false information, or knowingly permitting, encouraging or directing others to do so. Failing to provide truthful, accurate and complete information when required.
>
> This action is being taken as a result of the following misconduct:
>
> - You failed to accurately record your involvement in a use of force incident on July 11, 1998 (Incident Report #479590).
>
> - You directed C.O. Heim to alter her Incident Report to less accurately describe the events of July 11, 1998 (Incident Report #479581).
>
> - You reviewed and approved all reports following the incident on July 11, 1998, on the recreation field that failed to accurately describe staff involved in controlling offenders after the alleged fight.

> (Incident Reports E's 479590, 433985, 407804, 479582, 479580, 479581, conduct Reports #'s 953674, 953675, 953676).
>
> At a Predisciplinary Meeting July 15, 1998, Mr. Zanon, Security, Ms. Nelson, Personnel Manager, and you were present. You declined having a representative present on your behalf. During the Predisciplinary Meeting you admitted the misconduct outlined above.
>
> Your behavior has seriously damaged your credibility as a Supervising Officer 2, as a person who may be placed in charge of a multi-million dollar state prison and as a person upon whose judgment subordinate staff can rely. Your conduct was a serious breach of trust. You deliberately falsified a report and then involved subordinate staff in like behavior. It is critical for the Department of Corrections and the Division of Adult Institutions to have accurate and complete records and reports. The accuracy of these documents is important in many areas of operating a prison, including responding to complaints and to litigation. When a person of your rank does not follow policy and in fact openly violates policy, the policy will be ignored, the employer's interests are frustrated, and the safety and security of the institution may be placed in jeopardy.

18. Warden Krinke did not impose appellant's suspension on consecutive days because she wanted to spread out the financial impact of the suspension. Warden Krinke did not consult with appellant before deciding to impose the suspension in this way.

19. On July 22, 1998, Mr. Zanon was involved in an incident in which hands-on force was used in dealing with an inmate. Mr. Zanon and Officer Renier were the only officers directly involved in the incident. Officer Renier and Officer Calvey, who had observed the incident, prepared incident reports. Mr. Zanon did not prepare an incident report but added his observations to the report prepared by Officer Renier. Although neither Officer Renier's report nor Mr. Zanon's observations specify the identity of those applying hands-on force, since only these two officers were directly involved, it was implicit. Mr. Zanon did not instruct Officer Renier or any other officer to omit mention of his use of hands-on force from their reports.

20. Appellant filed a timely appeal of this suspension with the Commission on August 3, 1998.

CONCLUSIONS OF LAW

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

2. Respondent has the burden to prove that there was just cause for the subject disciplinary suspension.

3. Respondent has sustained this burden.

OPINION

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

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

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

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

The question here then becomes one of determining whether appellant engaged in the conduct for which he was disciplined and, if so, whether such conduct merited discipline.

Appellant does not dispute that he used hands-on force during the incident of July 11, 1998, but he does dispute that Mr. Zanon cautioned him regarding the use of special care due to the cast on his arm and that he directed Officer Heim to change her report. Appellant's contentions in this regard are not persuasive, however, given the statements he made at the investigatory and pre-disciplinary meetings. (See Findings 10, 11, and 12, above) The partial transcript of the investigatory meeting reveals that appellant acknowledged that he was aware at the time of the incident that he wasn't supposed to get involved "with a cast on," and that he "screwed up" by telling Officer Heim not to document his use of hands-on force in her incident report. At the predisciplinary hearing, appellant confirmed that the disciplinary investigation report prepared by Mr. Zanon, which indicated that appellant had not accurately documented his participation in the incident and had directed a subordinate officer to change her incident report to less accurately reflect what had occurred, was correct as written. At hearing, when given the opportunity to present his version of events, appellant, when asked whether he had instructed Officer Heim not to document his use of force in her incident report, answered that he couldn't recall and indicated that the partial transcript of the investigatory interview did not refresh his recollection. Based on the evidence of record, it is concluded that appellant did engage in the conduct charged by respondent which is the subject of the discipline under consideration here.

The next question is whether this conduct merits discipline. Appellant's primary argument in this regard is that failing to document the use of force in an incident report or to attribute the use of force to a particular officer, and directing subordinate staff to change material facts in an institution report, were common practices at TCI at the time for which others were not disciplined.

As far as the failure to document the use of force, appellant points to three examples of incidents in which Mr. Zanon was personally involved. Two of these, however, did not involve the use of hands-on force and are not directly relevant here as a result. The third is described in Finding 19, above. Although Mr. Zanon did not prepare a separate incident report, he, as the Security Director, is not similarly situated

to other officers at TCI and the record shows that he followed his standard practice in regard to this incident when he added his observations to an incident report prepared by another officer which he was reviewing. The failure of either this incident report or his observations to specifically identify the officers involved in the use of hands-on force is of much less significance in regard to this incident than to the incident of July 11, 1998, because only two officers were directly involved in the Zanon incident and, as a result, it was obvious, from the facts as set out in the Reimer report, who had used force in the incident. This was not the case with the incident in which the appellant was involved.

In regard to instructing a subordinate to change facts in a report, appellant points to changes Ms. Nelson directed be made by a probationary Captain to comments he had made in a performance evaluation to the effect that reports prepared by a subordinate Officer had been incomplete, inaccurate, and untimely. It should first be noted that the role of an incident report in a correctional institution is far different than the role of a performance evaluation. In addition, one of the primary concerns relating to the direction given by appellant to Officer Heim involved appellant's attempt to protect himself from criticism for his role in the incident, whereas it has not been stated nor is it reasonably implied from the facts of record that Ms. Nelson had any reason to direct the change in the performance evaluation in order to protect herself. Finally, although there was testimony from the Captain who prepared the evaluation that Ms. Nelson would have had no reason to have observed the performance of the employee who was the subject of the evaluation, the possibility that Ms. Nelson, as the Personnel Manager, may have been privy to conflicting information regarding this probationary officer cannot be disregarded. Consequently, it is not clear from the evidence of record that Ms. Nelson's direction to the probationary Captain resulted in a report which was less accurate than the one he had originally drafted. As a result, it is concluded that the circumstances of these two situations are not sufficiently parallel to permit a finding that directing subordinates to change reports to make them less factually accurate was an accepted practice at TCI during the relevant time period or a practice engaged in by supervisors other than appellant without negative consequence. Furthermore, there is

no evidence in the record that any other supervising officer had directed a subordinate officer to change an incident report to make it less accurate factually. Based on this, as well as on the evidence that officers were trained to write complete and accurate reports and that it would be a serious violation of institution policy to direct a subordinate to do otherwise, it cannot be concluded from the record that appellant would have had a reasonable basis for concluding that directing a subordinate officer to omit material facts from an incident report was a common or accepted practice at TCI during the relevant time period.

Appellant also argues that Mr. Zanon approved the incident reports at issue and, essentially, that respondent should be estopped from arguing that they were deficient. However, Mr. Zanon had no reason to be aware of what actually occurred during the incident since he was not present. As a result, his approval of the incident reports could not have been a confirmation by him that the facts as presented were accurate or complete.

The evidence of record shows that appellant engaged in the conduct under consideration here and that such conduct violated the work rules cited by respondent in the letter of suspension. It is axiomatic that violation of an employer work rule, particularly by a supervisor with the leadership and training role assigned to appellant, tends to impair the performance of the duties of appellant's position or the efficiency of the group with which he works. *England v. DOC*, 97-0151-PC, 9/23/98. As a result, it is concluded that respondent has shown just cause for the imposition of discipline here.

The focus of the inquiry then shifts to the question of whether the discipline imposed was excessive. Some factors which enter into this determination include 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 operation; the employee's prior record (*Barden v. UW*, 82-2237-PC, 6/9/83); the discipline imposed by the employer in other cases (*Larsen v. DOC*, 90-0374-PC, 5/14/92); and the number of the incidents cited as the basis for discipline for

which the employer has successfully shown just cause (*Reimer v. DOC*, 92-0781-PC, 2/3/94).

Here, respondent proved that appellant had engaged in each of the incidents cited as the basis of discipline. The record does not contain examples of discipline imposed in similar cases. It is undisputed that appellant had not been disciplined prior to July 11, 1998. The record does show that the nature of the work rule violations was very serious, particularly given the special role that Captains play in correctional institutions, the high priority necessarily placed on trust and truthfulness in a correctional setting, appellant's clear intent to deceive, and the pressure placed by appellant on a subordinate employee to participate in the deception. In view of this, it is concluded that the imposition of a five-day suspension was not excessive.

Appellant argues that respondent should be required to apply progressive discipline in this case. However, progressive discipline under these circumstances provides a guideline, not a requirement, and it is not uncommon for an employer to skip directly to a higher level of discipline when, as here, a violation is very serious and has been carried out by a supervisory employee or one in which special trust has been invested.

Finally, appellant contends that he did not receive proper due process protections during the investigation of the alleged work rule violations and during the predisciplinary process. Appellant bases this argument on the fact that he was not told prior to the investigatory meeting what conduct of his was under investigation or even that he was under investigation at all. In the predisciplinary context, the issue of due process generally revolves around the question of the sufficiency of the predisciplinary hearing under the standard established in *Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) and its progeny.

In *Reimer v. DOC*, 92-0781-PC, 2/3/94, the Commission, in responding to the appellant's argument that the quality of the investigation was a factor in determining whether he had been accorded sufficient due process safeguards, ruled that:

> These matters are outside the lawful scope of this hearing. The Commission only considers whether there was just cause for the discipline and whether the predisciplinary hearing management provides the employe is adequate under the due process clause.

In *McReady & Paul v. DHSS*, 95-0216, 0217-PC, 5/28/87, the Commission indicated that, in general, an employee such as appellant is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story; and that the formality and procedural requisites of the predisciplinary hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. Here, appellant was provided written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (See Findings of Fact 11 and 12, above). The record shows that appellant was accorded proper due process protections through the predisciplinary procedures implemented by respondent.

Appellant further argues that the suspension is invalid because it did not accord with certain requirements of the federal Fair Labor Standards Act (FLSA). In particular, appellant cites to a federal court decision which essentially indicates that employees subject to suspensions of fewer than five days, measuring the five days as five consecutive work days, may no longer be considered exempt from the provisions of the FLSA. This, however, is not an action for violation of the FLSA and a discussion of its provisions as they apply to discipline of state employees is irrelevant to the just cause issue under consideration here.

Appellant argues that respondent failed to sustain its burden of proof because Officer Heim was not called to testify. In view of appellant's admissions at the investigative interview, and appellant's failure to demonstrate that the transcript of the investigative interview was inaccurate, it was not necessary for respondent to call Officer Heim to testify in order to sustain this burden of proof.

In his post-hearing brief, appellant cites his impression that an unusually large number of supervisors have chosen to leave TCI or have been forced to leave TCI as evidence that management practices at TCI were deficient. The record fails to show,

however, whether the number of supervisor departures from TCI was in fact unusual or what the basis for these departures actually was. It cannot be concluded from this record that the management practices at TCI were deficient and that such deficiency resulted in an unjust discipline of appellant.

Finally, at hearing, appellant indicated for the first time that he had a dispute with the answers respondent had provided to one of his discovery requests. In particular, appellant represented to the hearing examiner that he had asked through discovery for a copy of the notes taken by management at the investigatory meeting, and was provided only a copy of typewritten notes, not the handwritten notes he had observed being taken at the meeting. Counsel for respondent indicated that he had been unaware that such handwritten notes had existed when he answered appellant's discovery request but had brought these notes with him to the hearing. The hearing examiner permitted appellant to review these notes during a break and gave him as long a period of time as he needed to complete his review. Appellant argues now that the failure of respondent to have provided the handwritten notes as a part of its discovery response causes him to doubt the legitimacy of the typewritten copy. However, after his review of the handwritten notes, appellant did not point out any inconsistencies between the handwritten and typewritten versions. In addition, as discussed above, appellant did not during his hearing testimony indicate in what manner the notes of the investigatory meeting were inaccurate or incomplete. Although it would have been preferable for respondent to have provided the handwritten notes as a part of its original response to appellant's discovery request or to have updated its response once respondent's counsel became aware of the handwritten notes, appellant's failure to have brought this matter to the Commission's attention until the hearing and his failure to point out any inconsistencies between the handwritten and typewritten versions militate against a conclusion that justice would be better served by excluding the notes of the investigatory interview from the record of this matter.

ORDER

The action of respondent is affirmed and this appeal is dismissed.

Dated: June 21, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

LRM
980130Adec1

Parties:

Jeffrey Stellings
315 Sunnybrook Drive
Oshkosh WI 54904

Jon Litscher
Secretary, DOC
P.O. Box 7925
Madison, WI 53707-7925

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be

served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

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

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

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95