

STATE OF WISCONSIN

PERSONNEL COMMISSION

TODD L. FRASER,
Appellant,

v.

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

FINAL
DECISION
AND
ORDER

Case No. 99-0058-PC

This matter arises from respondent's action to impose discipline. The issue for hearing is as follows:

Whether there was just cause for the 30 day suspension without pay of appellant, effective May 20, 1999.

Sub-issue: Was the degree of discipline imposed excessive?

After hearing, the parties filed briefs.¹

FINDINGS OF FACT

1. As of the beginning of 1999, appellant had recently been promoted from a Youth Counselor 2 position at Ethan Allen School, a juvenile correctional facility, to a position as Supervising Youth Counselor (Lieutenant) at the Youth Leadership Training Center (YLTC). He was required to serve a probationary period at YLTC.

2. YLTC, Ethan Allen School and Lincoln Hills School are all within respondent's Division of Juvenile Corrections.

3. YLTC is for youths who have committed a variety of offenses or need structure and discipline in their lives. The program seeks to change the attitude of adjudicated youths and to provide them with a positive focus by showing them there are different ways to handle their problems.

¹ The Commission has only considered that evidence properly presented at hearing and has not relied on factual assertions that are found merely in a party's post-hearing brief.

4. Youths enrolled in the YLTC program are referred to as cadets.

5. The standard program at YLTC lasts nearly 5 months and combines basic military training with educational instruction and adventure-based instruction. At least some cadets in the program are recruited from the juvenile correctional facilities in the state such as Ethan Allen School. A cadet who behaves improperly during the program can be sent back to a correctional facility. Successful completion of the program may result in a reduced sentence.

6. A "smoke out" is an unannounced halt to an educational aspect of the YLTC curriculum. All cadets are removed from the classrooms, assembled outdoors and required to take part in physical exercises such as running, push-ups and completing an obstacle course.

7. Respondent requires its correctional staff to employ Principles of Subject Control (POSC) when maintaining control over inmates/cadets. Correctional staff are trained in these principles, which reflect a continuum of responses, both verbal and physical, in responding to inappropriate behavior.

8. The YLTC Staff Handbook includes the following policy regarding the use of force (Resp. Exh. 111):

I. POLICY:

Under no circumstances shall physical force be used with any juvenile, except in self defense, the protection of persons or property, or for the prevention of runaway. . . .

III. USE OF NON-DEADLY FORCE:

A. All staff members have a responsibility to prevent harm to staff and cadets. When an incident occurs with a cadet(s), it is expected that staff members in the area will take reasonable measures to bring the situation under control.

B. Reasonable force means, "the exercise of strength or power to overcome resistance or to compel another to act or to refrain from acting in a particular way." This includes the use of mechanical restraints and/or physical power and strength to bring the cadet(s) involved in an incident under control. The use of chemicals will be used [sic] only in extreme circumstances with approval of the Superintendent or designee.

Only so much force may be used as is reasonably necessary to achieve the objective for which it is used. The use of excessive force is forbidden.

c. Reasonable force may be used by staff against cadets only if the user of the force reasonably and logically believes it is immediately necessary to realize one of the following purposes:

1. To prevent death or bodily injury to oneself or another (this includes stopping an altercation between cadets, and staff assault).
2. To prevent unlawful damage to institution or private property and if such damage may result in death or great bodily injury to oneself or another.
3. To regain control of the institution or any part of it after the take-over of the institution by cadets.
4. To prevent the running away of a cadet(s) from YLTC custody.
5. To change the location of a non-compliant cadet(s) from one place to another or the transfer of a cadet(s) to another facility. (Emphasis in original).

9. Incident reports are written statements completed by YLTC staff to describe a cadet who has acted out inappropriately, an unusual incident (such as the discovery that cookies had been stolen from the mess hall) or whenever staff has to place hands on a cadet for reasons of discipline or control. The report describes the incident, protects staff and inmates and serves as the official record of what occurred. The same incident report form (last page of Resp. Exh. 111) is used throughout respondent's division of Juvenile Corrections. The form includes the following checklist to describe the type of incident: escape, assault, cell entry, self harm, death, offender placed in restraints, fire, use of force, disturbance, use of chemical agent, informational, and "other."

10. In addition to serving as a residential correctional facility for cadets, YLTC has entered into a program with the Sparta School District in an effort to prevent Sparta students from developing into offenders and inmates and to put DOC in a good

light. The "Right Step" program has academic, military and work aspects and includes taking Sparta students on a tour of the YLTC facility.

11. On January 27, 1999, YLTC staff accompanied approximately 15 to 20 Right Step students, both males and females, along with several teachers from Sparta, on a tour of YLTC.

12. Near the end of the tour, appellant walked over to a student who had exhibited disdain for the Right Step program and said: "You know, if you end up in an adult prison, the first thing they are going to do is knock your front teeth out. Do you know why they do that?" The student said, "No." Appellant replied, "So you can give better blowjobs."

13. Appellant's comment could be heard by many of those present for the tour, including female students and a female Sparta teacher. Appellant's comment prompted more senior staff present to end the Right Step tour.

14. YLTC management chose to conduct a cadet "smoke out" on February 26, 1999. Two cadets, including Cadet S, were already scheduled to be returned to Lincoln Hills School that day.

15. February 26th was unseasonably warm. Temperatures were in the 50° F. range.

16. Cadet S weighed 121 pounds.

17. When the smoke out was announced, Cadet S was placed in handcuffs while he was still inside the YLTC school buildings for transit to Lincoln Hills School. When he was outside and being moved toward the transit van, Cadet S swore at staff.

18. Drill Sergeant (DSgt.) Assid had Cadet S kneel. DSgt. Assid then shackled Cadet S by placing a leather belt around the cadet's waist, connecting his handcuffed wrists to the waist strap, and then restraining his legs with leg irons. The shackles allowed only about 10" of leg movement and only a few inches of wrist movement.

19. When Cadet S continued to be verbally abusive towards YLTC staff, DSgt. Assid sat him down on a snow bank to "cool off." As DSgt. Assid started to walk away, the appellant and Lt. Pressler both saw Cadet S try to kick DSgt. Assid.

20. Appellant then walked up to Cadet S and with appellant on the cadet's left side and DSgt. Assid on the right, they picked him up, reprimanded him for his actions and walked him towards a transit van. The 120-pound cadet in restraints was still verbally abusive but he was not a physical threat to himself, to YLTC staff or to other cadets.

21. Appellant then propelled Cadet S face-first into the side of the van. This action is referred to as a "vertical stun" in POSC parlance. Just before the cadet struck the van, DSgt. Assid placed his hand in front of the cadet's face to lessen the impact.

22. Appellant then spun Cadet S around 180 degrees and forced him against the side of the van several times by pushing him in the chest. The cadet continued to swear.

23. Appellant responded by telling the Cadet: "Be quiet. Shut your damn mouth."

24. When the cadet did not become quiet, appellant placed his right hand on the cadet's throat in a choke hold for at least several seconds. Appellant removed his hand when he saw that Lt. Pressler was able to see the hold. Appellant backed away.

25. At all relevant times, appellant (and not DSgt. Assid) was in the controlling position relative to Cadet S.

26. Lt. Pressler then took control of the cadet and escorted him, with DSgt. Assid, around and into the van. Cadet S complained that appellant had choked him, but declined medical attention.

27. Lt. Pressler told appellant to write an incident report about the incident involving the transfer of Cadet S from the snow bank to the van. Lt. Pressler also told DSgt. Assid to write an incident report about his contact with Cadet S in the van.

28. DSgt. Assid prepared an incident report as directed.

29. Appellant never prepared an incident report as directed.

30. Any use of force by staff is to be documented. This policy applies to all juvenile institutions, including both Ethan Allen School and YLTC. An incident report was the proper means for documenting the appellant's use of force with respect to Cadet S. The appellant was the person who should have prepared the incident report of his actions against Cadet S because he was the staff member who had taken the action.

31. It was unnecessary and inappropriate for appellant to force Cadet S, face first, into the side of the van, to push him repeatedly against the van and to swear at Cadet S.

32. Appellant was aware of YLTC's policies about the use of force and filing incident reports.

33. By letter dated May 17, 1999, respondent notified appellant that he had been removed from his probationary position and had been suspended without pay for 30 days. The letter of discipline included the following:

This letter is to inform you of your removal from the Supervising Youth Counselor position at the Youth Leadership Training Center (YLTC). In accordance with sec. ER-MRS 14.03, Wis. Adm. Code, you will be restored to your former Youth Counselor 2 position at Ethan Allen School (EAS). The decision to terminate your employment during your promotional probationary period is based on your actions as a Supervising Youth Counselor at YLTC. Based on these actions you will also receive a thirty (30) day disciplinary suspension without pay as a Supervising Youth Counselor prior to your removal from said position and your restoration to the Youth Counselor 2 position. . . .

The decision to terminate you from your Supervising Youth Counselor position during your promotional probationary period at YLTC and the disciplinary suspension are based on the following:

1. That on or about February 26, 1999, you used excessive force on former Cadet [S]. You physically lifted Cadet [S], who was shackled, off his feet and slammed him into the side of a YLTC van several times while using vulgar language. At one point during this episode you placed your thumb and forefinger around Cadet [S's] airway and appeared to be choking him. This was done in plain view of staff and other Cadets. These actions on your part violate DOC work rule #12, which states "*Threatening, attempting or inflicting bodily harm to another,*" as well as YLTC

Policy #1.01, Use of Force. As a certified POSC instructor you knew or should have known these were not proper POSC techniques.

2. You did not file an incident report concerning the details of the incident described in paragraph number 1 above. This violated DOC work rule #6, the last sentence whereof states: "*Failing to provide truthful, accurate, and complete information when required.*" YLTC Policy #1.13 requires that Incident Reports be filed in situations such as that set forth in paragraph number 1 above.

3. You used vulgar, profane language toward Cadet [S] during the incident described in paragraph number 1 above, which violates DOC work rule #13, which states "*Intimidating, interfering with harassing (including sexual or racial harassment), demeaning, or abusive language in dealing with others.*"

4. That on or about February [sic] 27, 1999, while speaking to a middle school student group touring YLTC during a "Right Step" tour, you told one student within the hearing of the rest of the students something to the effect that "he wasn't so tough, what happens to tough guys like him in prison is that they get their front teeth knocked out so that they can give better blow jobs to their cell-mates." This violates DOC work rule #13 as set forth above.

34. Respondent's "Guidelines for Employee Disciplinary Action" (Resp. Exh. 115) divide employee misconduct into three categories. The Guidelines characterize Category B and C violations as follows:

B. CATEGORY B - MISCONDUCT WORK RULE VIOLATIONS

1. Insubordination/Disobedience
(Reference Work Rules . . . A6. . .

Insubordination/Disobedience includes, but is not limited to, the failure or refusal of an employee to carry out a clearly stated verbal or written order. . . .

5. Disorderly/Improper Conduct
(Reference Work Rules . . . A13. . .

Disorderly/Improper Conduct includes, but is not limited to, the use of loud, profane, or abusive language; horseplay, harassment; hazing,

gambling, practical jokes; reporting for work or while at work manifesting any evidence of having consumed Alcoholic beverages or illegal drugs. . . .

C. CATEGORY C

The following violations are normally subject to severe discipline up to and including discharge as determined by the Appointing Authority. They are included in the guidelines to emphasize the seriousness of such violations. . . .

2. Abuse of Inmates, Residents, or Others (Reference Work Rules A12, A13)

Employees are prohibited from abusing, striking, threatening, harassing, or causing mental anguish or injury to inmates, residents, staff or others.

OPINION

As indicated by the Commission in *Mitchell v. DNR*, 83-229-PC, 8/20/84, its just cause analysis in this matter involves the following questions: 1) Whether the greater weight of credible evidence shows that appellant has committed the conduct alleged by respondent in the letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes cause for the imposition of discipline; and 3) whether the imposed discipline was excessive.

Respondent alleges that appellant violated work rules 6, 12 and 13:

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.

12. Threatening, attempting, or inflicting bodily harm to another person.

13. Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others.

Two incidents are the foundation of respondent's allegations: 1) Appellant's comments to a Sparta public school student during the Right Step tour on January 27, 1999; and 2)

appellant's actions toward Cadet S on February 26, 1999, his statement to Cadet S and the failure to produce an incident report describing those events.

I. Did the appellant commit the alleged misconduct?

A. Right Step incident

Appellant denied that he used the word "blowjob" during his conversation with the Right Step participants on January 27th. According to the appellant, he merely told the student, "You think you're pretty tough, don't you. You know what happens to tough guys like you in prison? The first thing you're going to get is your teeth knocked out. Do you know why? You can guess to why that is." Appellant denied that he was making a reference to oral sex.

The Commission finds that appellant's testimony regarding the Right Step incident was not credible. Both Capt. Murphy and Lt. Pressler testified they specifically recalled the appellant using the word "blowjob" with the Right Step student. Appellant's own version of events is inconsistent with his suggestion that he was not referencing oral sex. He has failed to advance an alternative meaning to the statements he acknowledges making on January 27th.

Appellant tries to mitigate the effect of his Right Step comments by saying he had made them because he had been told by Capt. Murphy that Right Step was a "scared straight" program like one appellant had seen described in a television documentary. However, Capt. Murphy denied that YLTC had a "scared straight" program and specifically denied telling appellant that Right Step was a "scared straight" program. The Commission has no reason to discredit Capt. Murphy's testimony. Appellant did not advance any reason why Capt. Murphy or any of the other staff at YLTC would be inclined to concoct inaccurate allegations about appellant's conduct as a lieutenant at YLTC.

The greater weight of the credible evidence supports the finding that appellant, without any information that the Right Step program was a "scared straight" program, told one of the students, so that many others could overhear, that "tough guys" got their

teeth knocked out in prison so they could "give blowjobs" to other inmates. Appellant's conduct was inappropriate and demeaning, and constituted "abusive language" in violation of Work Rule 13.

B. Cadet S incident

Appellant testified that it was Lt. Pressler who forced Cadet S into the van, that Cadet S hit the van only once, that appellant merely kept the cadet's head straight rather than choking him, that he did not swear at the cadet and that he was never ordered to write an incident report. Again, the Commission finds appellant's testimony is not credible. Three separate witnesses, DSgt. Assid, Lt. Pressler and Ms. Cuba, a YLTC teacher, testified they saw appellant (and not Lt. Pressler) force Cadet S against the side of the van multiple times. Both DSgt. Assid and Lt. Pressler testified that appellant swore at Cadet S and choked him. Lt. Pressler also reported the cadet's statement that appellant had choked him. Lt. Pressler and DSgt. Assid contradicted appellant's statement that he was never told to write an incident report about the events with Cadet S.

Appellant's testimony about his conduct relative to Cadet S is not credible in light of the contrary testimony by numerous witnesses regarding the events of that day. In addition, the incident report form indicates, on its face, that it is to be completed when there is a use of force by institution staff. The same form applies to the Ethan Allen School, where appellant had worked for some time before his recent promotion to YLTC.

The greater weight of the credible evidence supports the finding that appellant slammed Cadet S into the side of a van several times and swore at him, that appellant placed his thumb and forefinger around Cadet S's throat in a choke hold, and that appellant failed to file the requisite incident report regarding these events.

Capt. Lackey testified that a vertical stun was not an appropriate POSC response because the cadet was not physically threatening to anyone and because he was already in restraints. A compliance or compression hold would have been the appropriate re-

sponse. A choke hold is not part of the respondent's training regimen and was not an appropriate response.

Appellant's actions of forcing Cadet S, who was already in full restraints, into the side of the van face-first, spinning him around and repeatedly pushing him, back-first, into the side of the van, as well as choking Cadet S, constituted attempts to inflict bodily harm to Cadet S in violation of Work Rule 12.² Appellant's action of failing to file an incident report about his conduct relative to Cadet S, despite Lt. Pressler's directive, was contrary to respondent's Work Rule 6.

II. Was this conduct cause for the imposition of discipline?

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 et rel. Gudlin v. Civil Service Commn.*, 27 Wis. 2d 77, 87, 133 N.W.2d 799 (1965).

Other staff at YLTC testified that appellant was the only staff member at YLTC who has ever used force against a cadet who is in restraints.

The YLTC program seeks to change the attitude of cadets and to provide them with a positive focus by showing them there are better ways to handle their problems than through aggression. YLTC staff served as role models for the cadets.

Appellant's conduct had the effect of reinforcing inappropriate conduct rather than rehabilitating the cadets. It tended to cause a loss of respect and trust by the cadets and by appellant's co-workers at YLTC. It undermined appellant's credibility with all those associated with the YLTC program. Appellant violated three separate work rules and clear institution (and Division) policy. A decision *not* to discipline the appellant for

² The record does not support a finding that appellant actually lifted Cadet S off of his feet as stated in the letter of discipline. However, this distinction is not material to the Commission's just cause analysis.

his conduct would notify staff they could swear at cadets and ignore the institution's "Use of Force" and incident reporting policies with impunity.

III. Was the discipline imposed 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 employe's offense or dereliction, including the degree to which, under the *Safran-sky* test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior record.

As noted in finding 34, inmate abuse is a category C work rule violation and is "subject to severe discipline up to and including discharge." Appellant's misconduct included inmate abuse. Deputy Supt. Wolski recommended that appellant be discharged for his actions. Supt. Schick concurred with the recommendation as did Jo Winston, respondent's Director of Human Resources.

Eurial Jordan, Administrator of respondent's Division of Juvenile Corrections and the appointing authority in this matter, testified that his practice in imposing discipline for inmate abuse was to either terminate the employe or to suspend the employe for 30 days. His decision to go with the suspension was based on appellant's length of service, positive references arising from appellant's previous employment at Ethan Allen School and Mr. Jordan's view that the suspension, when coupled with the termination of appellant's probationary period as a lieutenant,³ was a pretty heavy penalty.

The weight of the appellant's misconduct, when viewed in light of the appellant's previous work record, supports the conclusion that the decision to suspend his employment for a period of 30 days was not excessive discipline, even considering that he was also demoted.⁴

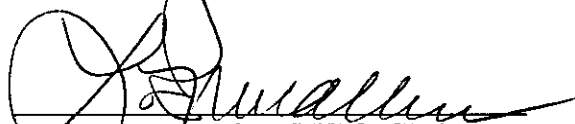
³ This is an unusual case because the appellant's probationary period was terminated and he was suspended for a period of 30 days. However, the sole issue before the Commission is whether there was just cause for the 30-day suspension.

⁴ This sentence of the proposed decision was modified to better reflect the conclusion reached.

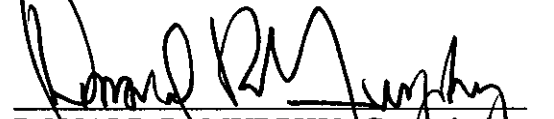
ORDER

Respondent's action of suspending the appellant for 30 days is affirmed and this appeal is dismissed.

Dated: April 7, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:990058Adec2


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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