STATE OF WISCONSIN PERSONNEL COMMISSION

GARY HERRING,
Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 01-0077-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to sec. 230.44(1)(c), stats., of a demotion.

FINDINGS OF FACT

1. At all relevant times appellant has been an employee of DHFS (Department of Health and Family Services) with permanent status in the classified service.

2. Appellant began his employment at WRC (Wisconsin Resource Center) in August 1987 In 1995 he was promoted to a supervisory position as a PCS (Psychiatric Care Supervisor).

3. The WRC is a medium security treatment facility which provides psychiatric services to DOC and houses sexually violent persons committed pursuant to ch. 980, Stats.

4. Up until the incident which occurred on July 15, 2001, and which precipitated the demotion here in question, complainant had no disciplinary record with respondent. All of his performance evaluations had been satisfactory or better.

5. Appellant had lived with a woman ("Barbara," also employed by DHFS) for approximately 11 years at the time of the incident in question. This woman had a son ("Tony") with whom appellant had an essentially paternal relationship. Appellant had been his legal guardian when Tony was under 18. At the time of the incident, Tony was incarcerated at CCI (Columbia Correctional Institution), an adult maximum

security institution in DOC (Department of Corrections). Appellant and Barbara were on Tony's approved visitor list.

6. While at CCI, Tony was penalized with confinement for 180 days in the segregation program as a result of possession of "hootch" (homemade alcohol), following a report apparently made to prison staff by another inmate ("Tim"). As of July 15, 2001, Tim had been transferred to WRC.

7. On July 15, 2001, which was a Sunday, appellant and Barbara were involved in a family gathering at home, when Barbara received a phone call from Tony. At that time, appellant had been drinking. Appellant was off-duty and not in work status.

8. This telephone conversation was recorded pursuant to CCI policy. The recording was accurately transcribed and is in the record as Respondent's Exhibit R-106.

9. While Barbara was on the phone with Tony, appellant, in the background, made some comments intended for Tony, which included the following:

> Tell him I saw his buddy [Tim], he ran the other way . If he wants me to smoke[1] somebody, all he's gotta do is give me some names and I'll get 'em . You want me to lock some people up, give me some names To talk with him, give me some names, I'll lock their ass up.[2]

Respondent's Exhibit R-106.

10. Appellant did not make the statements in the preceding finding in a serious manner with the intent of carrying out the threats therein.

11. Appellant never engaged in any improper act or omission regarding Tim.

12. Security staff at CCI came across the foregoing conversation in connection with routine monitoring of call tapes about a week after the call and reported it to management at WRC.

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[1] This is slang which means to hurt or kill someone.

[2] Appellant had the authority as a PCS to have a resident placed in TLU (temporary lock up). A rank and file PCT does not have this authority.

13. After suspending appellant with pay, respondent conducted an investigation and a pre-disciplinary process. During this process, appellant submitted a statement dated August 2, 2001, to management which included the following:

> In reality, I embarrassed WRC and myself. The comments I made gave the impression that I would be abusive towards inmates and would misuse my authority. CCI had every right to pursue the matter. At no time have I misused my position or been nefarious in my duties as a PCS or as an employee of WRC.
>
> The arrest and conviction of my stepson has been a difficult ordeal for me. I have known him for ten years. I have assumed a parental role during this time. I have strong feelings regarding this matter. This night I believe the alcohol I consumed before the conversation, desensitized my better judgment. This fact is not intended to minimize my actions.
>
> I did not understand until now that our relationship has changed. This change centers on the fact that I work in the environment he now lives in. I breached the line of professionalism when I made comments about work in his presence. I regret that.
>
> I have worked at WRC for almost 14 years. My critics can fault me for many things. I have always worked hard, regardless of the task. I am prone to running my mouth.[3] I am working on that.

Respondent's Exhibit R-108, p. 2.

14. WRC management demoted appellant to PCT via a September 6, 2001, letter which included the following:

> This letter constitutes official notice of your involuntary demotion to the position of Psychiatric Care Technician 1 .
>
> This action has been taken due to your failure to meet the requirements of your supervisory duties, violation of WRC Policies and Procedures regarding the Fraternization Policy, 1.3.8, Duty to Provide Information 1.3.9, Professional and Ethical Conduct 1.3.18, Violence and Threats in the Workplace 1.3.19, Use of Force 3.1.8-I and DHFS Work Rules #1 and #5. The DHFS Work Rules provide as follows:

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[3] In the Commission's opinion, the transcript of the telephone conversation in question (Respondent's Exhibit R-106) demonstrates that this is an understatement.

> "All employes of the Department are prohibited from committing any of the following acts:
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> 1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
>
> 5. Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employe."
>
> * * *
>
> The statements you made are unacceptable for any employee of a prison/secure treatment center. As a supervisor, you would have the authority to carry out the actions. This not only discredits you as a Psychiatric Care Supervisor, but potentially discredits the WRC and creates great liability for the State of Wisconsin.
>
> Your actions have compromised your ability to perform your duties as a Psychiatric Care Supervisor, and cannot be condoned.

Respondent's Exhibit R-101.

15. The WRC policy on use of force (Respondent's Exhibit R-111) explains what constitutes the use of force, and when and how force is to be used. The policy does not address comments or threats of the use of force. The WRC director felt appellant's actions violated the policy when considered in the context of the intent of the policy.

16. The WRC policy on violence and threats in the workplace (Respondent's Exhibit R-112) includes in the definition of workplace violence "any direct, conditional or implied threat which reasonably arouses fear, hostility, intimidation or the apprehension of harm in its target or witnesses. This includes any situation that causes a reasonable individual to fear for his or her personal safety [or] the safety of clients." The policy states the policy applies "during working hours or at any other time, on or through the employer's property or with other employees, and when it affects the business interests of the employer." The policy further states "[a]ll threats will be taken

seriously, not dismissed as harmless joking . . do not engage in violence and threats, even in jest."

17 The WRC policy on professional and ethical conduct (Respondent's Exhibit R-113) requires employees to treat inmates "respectfully, impartially and fairly [and] not engage in unprofessional, offensive or abusive conversation with or about residents."

18. The WRC policy on the duty to provide information (Exhibit R-114) requires employees to provide information regarding any security or ethical breaches in which they have themselves engaged [including] violation of the fraternization policy."

19. The WRC fraternization policy (Respondent's Exhibit R-116) provides that "[e]mployees are forbidden to provide special favors or services for any inmate."

20. Respondent's supervisor's manual includes the following information on progressive discipline:

> When management finds it necessary to take disciplinary action against an employee, the [DOC] operates under a system of progressive discipline: applying progressively more severe penalties for repeated infractions of Department work rules and providing appropriate assistance to help an employee correct the unacceptable conduct. Sometimes a work rule violation is so flagrant that progressive discipline would be inappropriate and discharge is the only option.
>
> A progressive disciplinary system typically involves the following three steps before discharge:
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> Verbal warning . . .
> Written reprimand .
> Suspension without pay
> Discharge
>
> Progressive discipline is built on the principle of employee awareness, thereby eliminating any element of surprise which would violate the standards for just cause. As employees move through each step in progressive discipline, they receive actual notice that their behavior is in violation os specific rules. However, management is not required to apply progressive discipline in cases of offenses regarded as so serious that no specific warning or prior disciplinary action need precede discharge (e. g., serious physical assault, major theft). In addition, an of-

> fense that by itself would justify no more than a written reprimand may call for suspension or even discharge if the employee has a recent history of similar offenses and has not responded to progressive discipline involving lesser penalties (e. g., repeated tardiness).

Appellant's Exhibits A-113, A-114)

21. Respondent's supervisor's manual also includes the following:

> Degree of discipline: The degree of discipline must be related to the seriousness of the offense and to the employee's record and should not be more severe than what is necessary to influence the employee to correct his/her behavior.

Appellant's Exhibit A-113.

22. The respondent gave two examples of supervisors at WRC who were demoted--a unit manager who gave erroneous information that resulted in the mistreatment of an inmate, and a PCS who followed an employee home and behaved in a threatening manner.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to secs. 230.44(1)(c), 230.45(1)(b), Stats.

2. Respondent has the burden of proving that there is just cause for discipline and the discipline imposed was not excessive.

3. Respondent has satisfied its burden of proving there was just cause for the imposition of discipline.

4. Respondent has not satisfied its burden of proving that the discipline imposed was not excessive.

5. The demotion of complainant should be modified to a suspension without pay of 30 calendar days.

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).

The test of just cause has been characterized as "whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works." *Safransky v. Personnel Board,* 62 Wis. 2d 462, 474, 215 N. W 2d 379 (1974), citing *State ex rel. Gudlin v. Civil Service Commission,* 27 Wis. 2d 77, 87, 133 N. W. 2d 799 (1965). In the instant case, there can be little dispute that there was just cause for discipline.

Appellant's comments can only be interpreted as threatening to harm the inmate in question and/or have him locked up: "Tell him I saw his buddy if he wants me to smoke somebody, all he's gotta do is give me some names and I'll get them I'll lock their ass up." While appellant argued that he was not serious and that he intended the comments as a joke, that was by no means obvious, and management was justified in taking his threats seriously.[4] The fact that appellant was off duty at the time he made these comments does not affect the conclusion that there was just cause for discipline.[5] At the time appellant made this statement, the inmate against whom the comments were

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[4] The employee's subjective intent is usually irrelevant to the issue of just cause in a case of this nature. That is, regardless of whether the employee spoke with the actual intent to act on his threats, there is just cause for discipline if a reasonable employee would have known his or her statement was improper. However, as discussed below under the second issue (whether the discipline imposed was excessive), an employee's intent should be figured into the equation in evaluating the weight or enormity of the misconduct, and its potential effect on the employer's operation.

[5] As discussed below, this context does figure into the issue of whether the discipline imposed was excessive.

directed (Tim) was incarcerated at WRC, where complainant was a supervisor, while the other inmate (Tony) was incarcerated at CCI, where the conversation was being recorded in accordance with standard operating procedure. Thus, appellant's statement concerned his work, and it was not made in a vacuum.

Appellant argues that his conduct did not violate the policies and work rules respondent cited in the letter imposing the demotion (Respondent's Exhibit R-101). The Commission agrees that one of the cited policies and rules was not violated.

The WRC policy on the use of force addresses the circumstances under which force can be used, and the type of force that is appropriate under various circumstances. It does not address threats of force. The WRC director, Byran Bartow, admitted this, but contended, in essence, that appellant's comments were inconsistent with the intent or spirit of the policy. While this may be the case, respondent has not sustained its burden of showing that this policy was violated.

However, the policy on violence and threats in the workplace was definitely violated. This policy (Respondent's Exhibit R-112) runs to any threat which "reasonably arouses fear, hostility, intimidation or the apprehension of harm in its target or witnesses." This includes fear for the safety of "clients." It explicitly covers actions which occur outside work hours when the action "affects the business interests of the employer." The policy is not limited to threats made to the intended target of the threat. Appellant's comments transcend a strictly familial context because Tony was serving a 20 year sentence at CCI, and CCI inmates are subject to assignment to WRC, as happened in this case to Tim. There was a possibility of the threats being communicated to Tim through the grapevine.

Also violated was the policy on professional and ethical conduct (Respondent's Exhibit R-113). Among other things, this policy provides that "[a]n employee will not engage in unprofessional, offensive or abusive conversation with or about residents." This description definitely applies to appellant's comments regarding Tim.

The policy on the duty to provide information (R-114) requires employees "to provide information regarding any security or ethical breaches in which they have

themselves engaged." Since appellant was involved in a security and/or ethical breach when he made the comments in question, he should have made a report. This policy must have an implied provision of reasonableness to be used for formal discipline. That is, if an employee did not have a reasonable basis to have known his or her actions involved an ethical or security breach, there would be no just cause for discipline. A reasonable employee should have known the remarks in question, made to an inmate at a maximum security correctional institution, involved an ethical or security breach, albeit one of which appellant probably was not aware until the proverbial "morning after." This is illustrated by the statement dated August 2, 2001, (Respondent's Exhibit R-108, p. 2) appellant submitted as part of the investigative process, in which he admits the "comments I made gave the impression I would be abusive towards inmates and would misuse my authority. CCI had every right to pursue the matter. I breached the line of professionalism when I made comments about work in his presence."

The fraternization policy (Respondent's Exhibit R-116) prohibits "[e]xtending, promising, or offering any special consideration or treatment to an inmate." Appellant's comments clearly violated this policy. Also, this policy provides that it does not allow for blanket exceptions for relationships between an employee and a member of the immediate family who is in custody.

With regard to the alleged violations of Work Rules, Rule 1 was violated because appellant's behavior was negligent. Work rule 5 was violated because appellant used abusive language.

The next question is whether respondent's demotion of appellant was excessive. As noted above, respondent has the burden of proof on this issue. *Barden v. UW,* 82-0237-PC, 6/9/83. In *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98 (p. 12), the Commission addressed factors to consider in determining whether the discipline imposed was excessive as follows:

> If just cause is shown, the focus of the inquiry 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 em-

> ployee'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, 6/9/983); 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).

In the instant case, respondent has shown just cause for discipline with regard to the underlying conduct, but did not establish that the misconduct violated one of the policies cited. Appellant's performance record has been satisfactory or better, and he had never been disciplined, for 14 years.

With regard to comparisons, respondent provided information about two other disciplinary demotions at WRC. The limited information about those demotions indicates they involved less serious misconduct than appellant's here—onesupervisor gave erroneous information that resulted in an inmate being mistreated, and another followed an employee home and engaged in threatening behavior. At the same time, the Commission does not attach a great deal of weight to this factor, because, hopefully, cases of serious supervisory misconduct are few and far between, and neither party came forward with any other relevant cases.

Respondent also cites another Commission case, *Kode v. DHSS,* 87-0160-PC, 11/23/88. In that case, a lieutenant was demoted and given a 15 day suspension[6] after having disobeyed a direct order not to get involved in an investigation, and arranging for a gang member to enter temporary lockup and have the opportunity to influence another gang member's statement with regard to a pending investigation. In the Commission's opinion, that was far more serious misconduct than appellant's offhand, off-duty comments.

With regard to the weight or enormity of the offense, this must be considered in the context in which the comments were made. Appellant was off-duty, involved in a

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[6] The Commission upheld the demotion but rejected the suspension after it found that respondent had not established a separate allegation of misconduct.

family gathering, and had been drinking when he made these comments, and he was not on the phone, but was directing his comments to Tony through Barbara, who was.

Appellant denied he was speaking with serious intent. Intent can be inferred from the circumstances surrounding a statement as well as from the statement itself. Given the context in which his statements were made, and considering respondent has the burden of proof to establish all the material facts, the Commission cannot make the finding that appellant's statements were made with serious intent.

The Commission agrees with respondent's observation in its post-hearing brief that some comments are made at one's peril, regardless of a person's subjective intent. In a similar vein, a person indulges in alcohol at the risk of being held responsible for actions or statements made under the influence of alcohol.[7] *Cf. Bender v. DHSS,* 81-0382-PC, 3/19/82 (Where employees decided to extend their lunch and to take leave to facilitate an afternoon drinking session off the grounds of the institution, their suspensions were upheld when they were under the influence of alcohol when they returned to the institution to pick up their cars and lock their desks, notwithstanding they intended to use leave time that afternoon). Respondent certainly was justified in taking the comments seriously and disciplining appellant. But the circumstances surrounding the comments enter into an evaluation of the seriousness of the misconduct, and the degree of discipline imposed. The Commission does not see how the weight or enormity of the misconduct can be evaluated without considering the attendant circumstances, including the fact that appellant had been drinking. These circumstances relate directly to the level of threat posed by the comments. Similarly, these circumstances are related to another factor which must be considered in evaluating the degree of discipline—the degree to which, under the *Safransky* test, it did or could reasonably be said to tend to impair the employer's operation." *Barden v. UW,* 82-0237-PC, 6/9/83.

There are a number of ways appellant's comments could have had a tendency to impair the employer's operation. One way, that seemed to be most important to the appointing authority, Mr. Bartow, was that if appellant were linked to anything unto-

[7] There is a Russian saying that "Vodka and good sense never get along."

ward happening to Tim after respondent had notice of appellant's statements, the state could be exposed to liability. This was certainly a legitimate concern. However, one factor that presumably would enter into an evaluation of respondent's potential culpability in this regard would be an assessment of how realistic the threat was, and this in turn would require consideration of the circumstances surrounding the comments.

Another factor the Commission considers with respect to this issue is respondent's progressive discipline policy, see Findings 20-21. The use of progressive discipline is not mandated in all circumstances by either respondent's policy or the civil service code, *see, e. g., Zehner v. Personnel Bd.,* Dane Co. Cir. Ct. 156-399, 2/20/78 (Progressive discipline not required by civil service code, although there may be cases where discharge would be inappropriate and too harsh a penalty). However, respondent's policy provides that the "degree of discipline must be related to the seriousness of the offense and to the employee's record and should not be more severe than necessary to correct his/her behavior." Again, this policy does not impose an absolute barrier to imposing a penalty more severe than actually needed to correct the employee's behavior, but the Commission does take into consideration the conclusion that on this record, the demotion went beyond anything needed to correct appellant's behavior, or, for that matter, to send a message to anyone who might be privy to what happened in this case.

In conclusion on this issue, while it is a close question, to remove an employee from a position which it had taken him eight years to obtain, and in which he had done a good job for six years, because of a momentary lapse in judgment while he was at home at a family gathering on a Sunday afternoon drinking beer, is excessive. A substantial suspension without pay would have made the point to him, as well as to others, that a serious mistake had been made that would not be tolerated and must not be repeated.

ORDER

Appellant's demotion is modified to a 30 calendar day suspension without pay, and this matter is remanded to respondent for further action consistent with this decision.

Dated: Sept. 25, 2002.

STATE PERSONNEL COMMISSION

AJT:010077Adec

ANTHONY J. THEODORE, Commissioner

KELLI S. THOMPSON, Commissioner

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