

MICHELE M. MILLER (PRIEGEL),
Appellant,

v.

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

**FINAL
DECISION
AND ORDER**

Case No. 99-0108-PC

A hearing was held in the above-noted case on December 4,¹ 5, 6 and 8, 2000, and continued on March 19, 20, 22 and 23, 2001. A briefing schedule was established and later extended as agreed to by the parties. The final brief was filed on September 14, 2001.

The parties agreed to the following statement of the issue for hearing (see Conference Report dated July 5, 2000):

Whether there was just cause for the appellant's suspension and demotion as described in the letter of discipline dated November 17, 1999.

After the designated hearing examiner issued a proposed decision and order, the appellant filed written objections and requested oral arguments. Oral arguments were held and the Commission conferred with the hearing examiner. The Commission adopts the proposed decision and order with various modifications as indicated in the alphabetical footnotes.

FINDINGS OF FACT

1. The subject of this appeal is a letter of discipline issued by respondent to the appellant and dated November 17, 1999. The letter stated, in part[^].

This letter is official notification of following disciplinary action: disciplinary suspension of ten (10) days without pay; demotion from a Supervising Officer 2 to a Correctional Officer 2 effective Sunday, December 5, 1999, reassignment

¹ No testimony was taken on December 4, 2000. Instead, both parties took the time to more adequately mark the numerous exhibits each had tendered for hearing.

[^] Relevant portions of the letter of discipline have been added so that the entire decision can be more easily understood.

to Columbia Correctional Institution effective Sunday, December 5, 1999; and payment of restitution to Oakhill Correctional Institution in the sum of One Hundred Forty Five Dollars and eighty eight cents (\$145.88). These actions are the result of your violations of Department of Corrections Work Rules A.1, A.3, A.4, A.6, A.13, and C.1, which prohibit:

A.1 Insubordination, disobedience, or failure to carry out assignments or instructions.

A.3 Inattentiveness, sleeping or engaging in unauthorized personal activities.

A.4 Negligence in performance of assigned duties.

A.6 Falsifying records, knowingly giving false information, or knowingly permitting, encouraging and directing others to do so. Failing to provide truthful, accurate and complete information when required.

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

C.1 Unauthorized or improper use of state or private property, services or authorizations, including but not limited to vehicles, telephones, electronic communications, mail service, credit cards, computers, software, keys, passes, security codes and identification while in the course of one's employment; or knowingly permit, encourage or direct others to do so.

With regard to your misconduct, the investigators concluded that:

- You made unauthorized long distance personal telephone calls from OCI to Officer Thomas Cheney's home and Door County. Records indicate that you have made 198 unauthorized personal phone calls between January 1997 and August 15, 1999 for a minimum of 54.38 hours and at a cost to Oakhill of \$145.88 in phone charges. A list of the phone calls, their length and cost is attached.
- You were negligent in the performance of your duties for a minimum of 54.38 hours when you were engaged in unauthorized and excessive personal long distance phone calls. During these times, you could have been engaged in appropriate Supervising Officer 2 activities. You also marked on your time sheets the ½ hour of pre-shift preparation compensatory time on days when you spent excessive amounts of time involved in unauthorized personal activities.

- While one or both of you were on duty at OCI, you as a Supervising Officer 2, engaged in activities to further a personal relationship with a subordinate staff member, Officer Thomas Cheney. These activities spanned several years. Examples of the on-duty behaviors which constitute misconduct include: exchanging personal letters, cards, notes and gifts; spending an excessive amount of work time involved in personal telephone calls with Officer Cheney; spending an excessive amount of work time meeting Officer Cheney either at your office, in a State vehicle, or on institution grounds for personal reasons; permitting Officer Cheney to engage in like behaviors while on duty including the misuse of State property; and spending excessive amounts of work time talking to other staff members, such as Mary Kay Knoll and Chris Fritz, either in person or on the phone about your personal issues regarding Officer Cheney.
- You failed to provide accurate and complete information during the course of the investigation. You were reminded of this requirement during each of the investigatory interviews. Specifically, you initially denied that Officer Cheney was a friend of yours or that you were personally involved with him. Later, during a subsequent investigatory interview, you admitted that you were involved in a sexual relationship with him. Initially, you claimed that you did not know where you had received the personal cards, letters, notes, and gifts from Officer Cheney. Later, you admitted to receiving many of these items while at work. You initially stated that you did not think you discussed personal issues with Mary Kay Knoll while at work. However, we have concluded that you spent excessive work time discussing with Mary Kay Knoll your relationship with Officer Cheney.
- You discussed the investigation with staff Chris Fritaz, Marni Paulson, Sue Hansen and Carol Caldwell after being directed not to discuss any aspect of the investigation with staff other than those conducting the investigation or your representative. This directive was given to you by the investigators after each one of your investigatory interviews. When you discussed the investigation with subordinate staff members Chris Fritz and Sue Hansen, you asked them to relay to Officer Cheney that you had not discussed anything "personal" when you were interviewed by the investigators.
- While the relationship with Officer Cheney was amicable, during late winter or spring of 1998 you openly advocated that Officer Cheney be appointed as trainer, which is a preferential position at OCI.
- During the May 1999 Supervisor's meetings, you were openly adamant about your right to walk staff off grounds for being insubordinate and complained specifically and repeatedly about Officer Cheney. This occurred when your personal relationship with Officer Cheney had become strained. In addition, I have concluded that you stated to Officer Cheney at least once,

"They'll believe me, I'm the Supervisor," or words to that effect. Your threatened to send to Officer Cheney's wife the cards, letters, and notes, which you had received from him.

2. Michele Miller entered respondent's officer training academy in January 1989 and completed the eight-week program. She then worked at Taycheedah Correctional Institution as a Correctional Officer 1 (CO1) and later as a CO2. She was promoted in a CO3 position at Racine Correctional Institution. In the spring of 1993, she transferred back to Taycheedah. In the fall of 1993, she transferred to the Wisconsin Resource Center. She began working at Oakhill Correctional Institution (Oakhill) in February 1996, as a promotion to a Lieutenant position (classified as a Supervising Officer 1 (SO1)). In July 1997 she was promoted to Captain (classified as a SO2). The issues in this case arose during her employment at Oakhill.

3. Miller's duties as a Lieutenant at Oakhill included functioning as second in command to the Captain on duty. Her duties included supervision of staff and inmates.

4. Miller's duties when she initially was promoted to Captain included functioning as the second shift line supervisor/commander. She scheduled staff to specific shifts, scheduled overtime and evaluated subordinate staff.

5. In early 1998, Miller's supervisor, Dave Lemke, Security Director, asked if she wanted the position of Training Captain and she accepted. In this position she was in charge of staff training, including new employee orientation. She worked from 7:45 a.m. to 4:30 p.m. She also was expected to work one weekend a month as the Captain in Charge of Oakhill. As Training Captain, she had no direct supervisory authority over subordinate staff but was considered a supervisor of all employees of subordinate rank.

6. Appellant had a private office with a door ^B

7. Miller met CO Tom Cheney at Oakhill. In late 1996 to early 1997, they began a personal (sexual) relationship. The nature of the relationship fluctuated from good to stormy. There were numerous break ups throughout the relationship. Prior to August 6,

^B The Commission has added this finding because it is relevant to the analysis of the discipline imposed.

1999, few staff at Oakhill knew for certain that Miller and Cheney were in a relationship; some staff suspected they were and others did not even suspect. Cheney's wife was unaware of the relationship until February 8, 1999.

8. In late 1998, Miller recommended to her supervisor, Lemke, that Cheney be assigned as a trainer. This recommendation was made during a good period in Miller and Cheney's relationship. Lemke was unaware of the personal relationship at this time. Training was a preferred assignment. Lemke had reservations about the recommendation because he felt Cheney would not be a good representative of the Department. Cheney had a significant number of inmate complaints filed against him and was known throughout the institution as a hot head. He had a negative attitude towards all supervisors except Miller. Lemke expressed his concerns to Miller and delayed making the decision until he talked to her about it one or two more times. Ultimately, he approved her recommendation because he trusted Miller and thought maybe she saw something in Cheney that he did not. Cheney was removed as a trainer after a short period of time due to inappropriate comments he made as a trainer. In this instance Miller inappropriately used her position to show favoritism to Cheney due to their personal relationship, thereby violating work rule A.4 which prohibits negligent performance of assigned duties. (Exhs. R-101, R-103, R-318)

9. Sometime between December 14-21, 1998, Miller broke off the relationship with Cheney even though she still loved him (Exh. R-127). The breakup did not last long.

10. On February 8, 1999, Cheney informed Miller that he had told his wife about their relationship and had left his wife. He stayed the night with Miller. The next day Cheney told Miller he was stopping at his house after work to talk with his wife. He reassured Miller that he was not going to change his mind. He telephoned Miller at 6:00 p.m. saying he loved his wife and wanted to work out the marriage. Initially Miller rejected Cheney's suggestion that they remain friends (Exh. R-317) but this did not last long as they continued seeing each other starting later in February or March 1999 and this continued into mid-July 1999 on an on-again/off-again basis (Exh. R-163, p. 15 & Exh. R-251, p. 24-25).

11. A shift supervisor's meeting was held on May 5, 1999, which was attended by Lemke, Miller and others. During this time Miller and Cheney's relationship was not good.

One topic discussed was that supervisors felt officers were being more disrespectful than previously and that supervisors needed strong tools to handle these situations, such as specific authority to walk the offending subordinate off grounds. Several people participated in this discussion and more than one person mentioned Cheney's name. More than one person was emotional during the discussion. Lemke was "taken aback" by how emotional Miller was in her criticism of Cheney. This prompted Lemke to ask Miller the next day whether she had a personal relationship with Cheney. Miller denied a personal relationship. Miller's criticism of Cheney at the supervisor's meeting was based, at least in part, on her dissatisfaction with the status of their personal relationship and thereby violated work rule A.13, which prohibits interfering with, demeaning and harassing others. (Exhs. R-103, R-318)

12. Effective August 7, 1999, Cheney was posted for temporary assignment at a different location. (Exh. R-240). On Friday, August 6, 1999, he went to Miller's office to talk about their relationship.² He was unaware at this time that since July 1999, Miller started a personal (sexual) relationship with CO Brent Priegel, whom she later married (Exhs. R-164, p. 16 & R-165, p. 34). Miller did not wish to talk to Cheney and he reacted angrily. After Cheney left her office, she wrote him up for insubordination but without revealing the personal nature of the confrontation (Exh. R-179). The incident report Miller wrote is noted below (Cheney disputed some of the allegations, see Exh. R-179, pp. 1-2).

At 2:50 p.m., while in my office I received a phone call. Right after I answered the phone, there was a knock on my office door. I said, "Come In." Officer Cheney came through the door and slammed it. I looked at him in a way to let him know that I was on the phone, and to see what he wanted. Before I said anything, he said, "I'm not leaving" and proceeded to sit down in the chair in front of my desk. I said, "Tom, what is it, I'm on the phone?" He said, "I

² Cheney contends he went to Miller's office on August 6, 1999, to discuss training and a ripped uniform (i.e., see R-249, pp. 1-2 and hearing testimony). Ultimately, his statements were not believed and the hearing examiner concluded he went to her office to talk about their relationship. It is highly unlikely that he would want to discuss training and a ripped uniform when he was leaving for another post the next day. Also, see Exhs. R-190 (7/21/99 note from Cheney to Miller saying he wanted to sit down and have a "heart to heart talk") and R-162 (Miller's first investigative interview where she notes that Cheney first said he had business to talk about (p. 2) and when she was unreceptive he said something like he needed to talk to her (p. 4), which logically appeared to be a reference to the "heart to heart" talk mentioned in his note) and R-216, pp. 4-5 (Hanson interview).

need to talk to you," I said, "Can you step outside for a minute while I finish with this call?" He said, "Nope, I knocked, you said come in, now I'm not leaving." I told the caller that I would call them back. I told Cheney that I had work to do. I collected my paperwork that I needed to make copies of and asked Cheney to leave. I left the office into the hall thinking that he would follow and he didn't. I went back into my office where Officer Cheney had picked up an incident report I had left on my desk and he was reading it. I said, "Cheney, you can't read that, that's confidential." He said, "Why not?" I said, "Because it's none of your business and its very confidential, now please give it to me." He wouldn't. I went to the phone, started to pick it up stating, "Give it (the Incident Report) to me or I'm calling Lib [Thomas Laliberte, Administrative Captain]." He said, "Go ahead, I'll break the fucking phone right out of your hands." Again, I said, "Tom give it to me." He said, "No, you make that call, I'll bust the phone right out of your hands." I repeated this again, to hand me the incident report, and he threw it on the floor. I went to pick up the report and asked Cheney to leave. He said, "I have business to talk to you about," I said, "then talk." He said, "Go sit down in your chair, let's talk." I said, Tom, I'm right here, if you need to talk, talk to me here, I have to go make copies." The phone rang and it was Mary Kay, she asked if I was ok, and if she should call security. I told her I'd be ok. When I hung up Cheney said, "Why doesn't she call Lib?" I didn't respond. Cheney left my office.

Follow up-Officer Cheney called at 3:40 p.m. and said, "Mic, I'm sorry." I didn't respond. He said, "Mic, I'm really sorry, I had a bad day." I said, "I have to go" and hung up. That was the end of this incident.

13. On Monday, August 10, 1999, Cheney received a telephone call from Chris Fritz, a Social Worker at Oakhill. Fritz said she was passing a message to him from Miller to inform him that Miller had filed an incident report against him and that Miller had been interviewed. Fritz explained that Miller wanted him to know that Miller did not disclose their personal relationship during the interview. Miller passed on this information even though she had been told by management not to discuss it (Exh. R-163, pp. 10-11). Miller's disobedience constituted a violation of respondent's work rule A.1 which prohibits disobedience and failure to carry out instructions. (Exhs. R-101, R-103, R-318)

14. Respondent asked Thomas Laliberte, Administrative Captain, and Jim Boorman, Social Services Supervisor, to conduct a formal investigation of the incident report filed by Miller on August 6, 1999. Marilyn Paulson, secretary, was assigned to take notes during the

investigatory interviews. The first formal investigative interview was held on August 11, 1999 (Exh. R-217).

15. Miller's first formal investigative interview was on August 17, 1999. She was asked to describe the August 6th incident. She also was asked if she had a relationship with Cheney, which she denied. The following questions were asked and answers given (Exh. R-162, p. 5, first question as amended by Miller's testimony):

Q: Do you know Officer Cheney on a social basis away from work?

A. Not necessarily, but I don't know how this applies to this.

Q: When you answered "not necessarily," what did you mean?

A. Well I mean, I've gone to softball games, like last year

Q: He was also attending the softball game?

A. He was playing.

Q: Were you playing?

A. No.

Q: Do you consider Tom Cheney a friend away from the institution?

A. Not really. I mean, I don't know. It's hard to answer. No. Not away from the institution.

Q: Does he consider you a friend?

A. I think we've considered each other as friends here at work. We could talk.

16. Miller's untruthfulness about her relationship with Cheney during her first formal investigative interview was a violation of respondent's work rule A.6 which prohibits knowingly giving false information and failing to provide truthful and complete information when required. (Exhs. R-101, R-103, R-318)

17 It was standard operating procedure for respondent to advise each person interviewed during an investigation that the investigation was a confidential matter and to direct each person not to discuss it with anyone other than the investigators. This procedure was followed with every interview pertinent to this case. The prohibition was broader than restricting employees from telling others about the questions and answers given during the employee's interview. The prohibition also extended to discussing matters related to the interview with other employees. The purpose of the instruction was to prevent rumors and to

keep each person's testimony untainted (fresh). Miller knew this was standard procedure and of the importance of adhering to the instruction because she previously had conducted disciplinary investigations of other staff. (Laliberte and Farrey testimony)

18. Miller disobeyed the directive not to discuss the investigation or related issues during two conversations with CO Sue Hanson. Hanson served as Cheney's union representative in some of the investigative interviews. Sometime prior to August 26, 1999, Hanson was in Miller's office. Miller said that the investigation had started and she wanted to keep everything personal out of it. Miller further stated that it looked like Cheney was going to reveal their personal relationship. (Exh. R-216, p. 5) Another discussion at around the same time occurred in a parking lot with Miller asking Hanson to tell Cheney that respondent did not need to know about their personal relationship (Hanson testimony). Miller disobeyed in these discussions the directive not to discuss the investigation or related matters and thereby violated work rule A.1, which prohibits disobedience and failure to carry out instructions. (Exhs. R-101, R-103, R-318)

19. Cheney's first formal interview was on August 26, 1999 (Exh. R-249). He disclosed that he had been in a personal relationship with Miller for three years (R-249, p. 8). One motive he had for disclosing the relationship was to get Miller in trouble. He alleged that when Miller was angry with him about their personal relationship, she harassed him by using her supervisory authority to threaten to get him in trouble. Some time prior to March 1999, Miller told Cheney she was going to send Cheney's wife the love correspondence that Cheney had sent to Miller throughout their relationship. He replied that he would go to management about Miller using work phones to make long-distance calls to his home. Miller retorted with words to the effect that management would believe her because she was a supervisor and Cheney was not. (Cheney testimony)

20. On or about August 8, 1999 (around the date of the Henderson retirement party), Miller spoke to friend and co-worker, Sergeant David Opdahl. Miller was mad and said if Cheney "kicked up a bunch of stuff" she would send Cheney's wife the love correspondence she received from Cheney during the relationship (Exh. R-225, p. 3). Opdahl

informed Cheney of her statement on August 30, 1999 and Cheney wrote an incident report about it (Exh. R-179, pp. 9-10.)

21. Respondent reasonably viewed as serious, Miller's threat to Cheney that she would be believed over him as a supervisor (see ¶19 above) as an inappropriate attempt to dissuade Cheney from raising harassment allegations based on their personal relationship. (Boatwright testimony) Miller's actions in this regard violated work rule A.13 which prohibits intimidating, interfering with and harassing others. (Exhs. R-101, R-103, R-318)

22. During his first interview, Cheney alleged that Miller used work phones to call him long-distance at home for personal reasons. He described the arrangement Miller and he had for ensuring that such calls occurred only at a certain time of day and only when his wife was not at home. He encouraged the investigators to look at the phone records to verify his statement (R-249, p. 9). (Also see Exh. R-163, p. 7.)

23. Respondent realized after Cheney's interview that the investigation would be more complex than initially believed due to Cheney's allegation of harassment. Ana Boatwright, the Deputy Warden at Oakhill, had extensive past experience in complex investigations, including harassment charges, and was assigned to lead the investigation.

24. Respondent checked telephone records as Cheney suggested (see ¶22 above). The institution at that time had no method of tracking which calls were made from any specific employee's telephone. Respondent identified the calls Miller made from work to Cheney's home from telephone logs and compared them to the pre-arranged pattern between Miller and Cheney for the calls to occur. Respondent only counted as unauthorized long-distance calls those fitting within the stated pattern and lasting at least 10 minutes. Unauthorized long-distance calls of less than 10 minutes were counted only if there was more than one call made to Cheney's home on the same day. Respondent concluded that Miller made 198 unauthorized long-distance calls.³ A few were made to her parents in Door County and the rest were made to Cheney at home.

³ Cheney testified that staff other than Miller also called him at home on occasion but not as frequently as Miller. The possibility therefore exists that other employees made some of the calls respondent attributed to Miller. However, that other staff would have made the calls within the parameters of the

25. A summary of Miller's unauthorized long-distance calls is noted below:

- 1997: 19 calls ranging from 2 to 35 minutes, totaling 5 hours and \$13.665. Three calls exceeded 30 minutes (35, 34 and 31 minutes long). (Exhs. R-169 & R-173)
- 1998: 110 calls ranging from 1 to 86 minutes, totaling 25½ hours and \$66.370. Eighteen calls exceeded 30 minutes (37, 59, 35, 32, 33, 48, 36, 29, 65, 86, 59, 34, 31, 40, 44, 41, 57 and 43 minutes long). (Exhs. R-169 & R-174)
- 1999: 69 calls ranging from 1 to 118 minutes, totaling 23¾ hours and \$65.845. Fifteen calls exceeded 30 minutes (35, 118, 66, 64, 39, 57, 44, 52, 40, 33, 43, 50, 85, 58, 89 and 61 minutes long). (Exhs. R-169 & R-175)

26. Miller's unauthorized calls violated respondent's work rule C.1 that prohibits unauthorized or improper use of state property including telephones. Although respondent had no specific written policy on supervisory use of work phones to make personal long-distance calls, Miller was aware that this was improper. (Exhs. R-101, R-103 & R-318) Correctional officers covered by the union contract were subject to a rule which limited the nature of their personal calls and required prior supervisory approval. Supervisory and management staff had a duty to report observed abuses by completing an incident report.^c

27 Miller was not performing work when she was making the unauthorized personal phone calls. This was a violation of respondent's work rule A.4 that prohibits negligence in performing assigned duties. (Exhs. R-101, R-103 & R-318)

28. Due to the structure of Miller's work hours, she was entitled to claim pay for 8 hours plus a half hour of overtime pay each day. Each pay period she submitted time sheets showing the number of hours worked each day. For days where the unauthorized calls meant that she was not entitled to full pay, she also violated respondent's work rule A.6 that prohibits

arrangement between Cheney and Miller is so speculative as to warrant little or no weight for purposes of this decision.

^c The Commission has added the last two sentences to this finding to set forth information referenced in the Opinion section of this decision.

falsifying records, knowingly giving false information and failing to provide truthful and accurate information when required.⁴

29. Respondent held an investigatory interview on September 23, 1999, with Marilyn Paulson, Secretary I - Confidential, who had been taking notes at the investigative interviews. During the interview it became apparent that she had talked about the interviews with other employees (Exh. R-316, pp. 3-4.) On September 23rd, respondent placed her in a temporary re-assignment and no longer allowed her to take notes at the interviews (Exh. R-316, p. 4). Respondent found that her unauthorized release of confidential investigatory information violated work rules A.1, A.5 and A.6. Ms. Poulson received a written reprimand for this as her first work rule violation of this nature.

30. Miller continued to talk to others about matters related to the investigation thereby trying to get people to rally to her side or feel sorry for her. This conduct had the potential for tainting other employee's views and thereby their statements during the investigation. Such conversations also had the potential to add fuel to the rumor mill, which respondent was attempting to control due, at least in part, to Miller's own complaints about the rumor mill (e.g., Exhs. R-161 & R-179, pp. 21-22). On October 1, 1999, Miller went to Paulson's work location. Paulson made a comment about being reassigned and being in the same boat as Miller. In the ensuing conversation, Miller made a statement about suing Oakhill, to which Paulson replied that she would help if Miller went to court. (See Exhs. R-316, p. 8 & 19 and R-167, pp. 5-7.) Also, as overheard and reported by Judy Packard, Security Program Assistant (Exh. R-227, p. 4), Miller had two conversations with Captain Carol Caldwell. During these conversations Miller told Caldwell that Miller had made poor choices in her personal but not professional life, that she had never even been late for work, that she was going to hire an attorney and that she was being railroaded (or other words used to suggest she was being treated unfairly in the investigation). (See Exhs. R-167, pp. 3-4, Miller's investigation and R-211, Caldwell's investigation.) Miller disobeyed in these discussions the directive not to discuss the investigation or related matters and thereby violated

⁴ Miller suggested that some of the calls were made on her breaks. (Exh. R-167, p. 29). Miller did not meet her burden of persuasion on this issue.

work rule A.1, which prohibits disobedience and failure to carry out instructions. (Exhs. R-101, R-103, R-318)

31. Miller indicated during the investigation that other supervisory staff also used work phones to make long-distance personal calls. Respondent widened the scope of its investigation to explore her claim. The telephone logs were reviewed for long-distance calls made by other supervisors, which were of ten or more minutes in length. Questions arose about seven or eight other supervisory employees and these employees were interviewed (e.g., see Exhs. R-212, R-219, R-221, R-223, R-228, R-230, R-232, R-233, R-235, R-239). Where respondent concluded that unauthorized calls were made, the employees involved were required to reimburse the state and, in some instances, discipline was imposed. The degree of Miller's unauthorized use of the phones was excessive whether viewed standing alone or as compared to violations by other staff. (Lemke testimony)

32. Cheney and Miller spent an excessive amount of time at work engaged in activities relating to their relationship. In addition to the phone calls discussed in prior paragraphs they also exchanged personal letters, cards, notes and gifts while at work. Once Cheney involved a third employee to make arrangements to have flowers delivered to Miller at work. They furthered their relationship at work by visiting with each other either in Cheney's work vehicle (including driving around the perimeter of the institution just to be together) or visiting in Miller's office. Each also had select co-workers to whom they had disclosed the existence of their relationship and with whom they discussed the relationship on work time (testimony of Frank, Opdahl, Fritz, Knoll, Miller & Cheney). For example, Miller and Knoll had daily personal visits at work lasting up to 30 minutes each (Frank testimony). Cheney and Miller's furtherance of their relationship on work time caused some co-workers to suspect that a relationship existed (testimony of Fritz, Showers, Lemke & Hanson). At least one co-worker warned them to curtail their behaviors because other employees were suspicious and talking about them (Hanson testimony). Miller was not the first person to be disciplined for excessive socializing (Hanson testimony).

33. Some level of personal discourse was tolerated at Oakhill. Other employees talked about collecting beanie babies. Some used the e-mail for personal messages. Gifts were

arranged and exchanged for retiring employees. Miller and Cheney's conduct noted in the prior paragraph, however, was over an extended period of time (about 3 years) and was excessive to a degree not engaged in by others in the work place. Miller's conduct in this regard violated work rule A.3, which prohibits engaging in unauthorized activities. Her conduct also violated work rule A.4, which prohibits negligence in the performance of assigned duties because she also encouraged Cheney and other subordinate employees to further the relationship or to discuss it on work time. (Exhs. R-101, R-103, R-318)

34. The first time Miller was asked if she discussed her relationship with Cheney with employees at work was at her interview on September 1, 1999 (Exh. R-164, p. 11). Miller said she did not think she did so, but may have. She also indicated that if the discussion were for any length of time, it would have occurred outside of work. These responses were untrue and violated work rule A.6 which requires employees to provide truthful, accurate and complete information when required. (Exh. R-101, R-103, R-318)

35. Miller did not lie to investigators by initially saying that she did not know whether she received Cheney's love correspondence at work and by later changing her statement (Exh. R-318, p. 3).⁵

36. Miller did not refer to Cheney as her boy toy.⁶

37. Respondent imposed discipline on Miller by letter dated November 17, 1999 (Exh. R-101). The work rule violations included those proven at hearing (see ¶¶8, 11, 13, 16, 18, 21, 26, 27, 28, 30, 33 and 34 above), as well as those not proven at hearing (see ¶¶35 and 36 above).

38. The level of discipline imposed for Miller's conduct included the following:

⁵ The first time Miller was asked about receipt of love correspondence was at her interview on September 1, 1999 (Exh. R-164), wherein she indicated that she received some at work but could not recall whether each item addressed was received at work. Respondent failed to establish that Miller's response was untruthful or that she later changed her statement.

⁶ Respondent contended that Miller lied during the investigation when she denied ever referring to Cheney as her "boy toy." Respondent's summary of the work rule violations (Exh. R-318, p. 3) indicates that Barbara Stanford overheard Miller say this at a social gathering in 1999. There was no supporting statement or testimony from Ms. Stanford however. Miller admitted to other pet names she and Cheney had for each other, making it unlikely that she would deny just this one. Further, respondent failed to explain how this pet name affected anyone at work.

- 10 day suspension without pay;
- demotion from a SO2 to a CO2, effective Sunday December 5, 1999;
- reassignment to Columbia Correction Institution, effective December 5, 1999 and
- restitution of \$145.88 for unauthorized phone calls

39. Deputy Warden Boatwright, the person who led the investigation, recommended that Miller be disciplined. Boatwright strongly felt termination would be the appropriate discipline and so told Warden Catherine Farrey when the Warden asked for Boatwright's opinion. (Boatwright testimony.) Conferences were held regarding the level of discipline to impose. These conferences were numerous and included the respondent's Division of Adult Institutions, respondent's Office of Legal counsel and DOC's Secretary. All endorsed termination until one of respondent's attorneys advised that it might be difficult to justify (in terms of prevailing in litigation) Miller's termination in light of lesser discipline imposed in March 1998, which was upheld in *Bergh v. DOC*, 98-0018-PC, 1/27/99. Ultimately, those consulted agreed that something less than termination should be imposed due to the *Bergh* case. (Testimony of Farrey, Boatwright and Lemke)

40. Mr. Bergh (in the *Bergh* case) worked at respondent's Columbia Correctional Institution. He was demoted from a Supervising Officer 2 (Captain) to a non-supervisory position as an Officer 3 (Sergeant). Concern about the appearance of favoritism arose because he carpooled to work with Oaks, a female subordinate officer. Rumors of favoritism started when he gave her more favorable assignments and ate his lunch breaks with her at work. He was directed on January 14, 1998, to avoid the appearance of favoritism by not spending so much time with Oaks at work and not giving her preferential assignments. A later investigation showed that Bergh disobeyed the January 14th directive; that he made 35 personal calls (for about 5½ hours) from work to Oaks at home (totaling \$22.62) and that he was untruthful during the investigation about the number of calls he had made to Oaks. Respondent found that his actions violated work rules A.4, A.6 and C.1. His prior disciplinary record was a 10-day suspension for harassing comments. For these new violations he was demoted and was ordered to pay restitution for the unauthorized phone calls.

41. Miller's work rule violations demonstrated that she exercised poor judgment at work by, for example, involving Cheney and other staff during work time in excessive discussions of her personal relationship with Cheney. The level of trust necessary for a supervisor was gone due to her excessive unauthorized use of telephones, her untruthfulness during the investigation and her repeated failures to comply with the directive not to discuss the investigation or related topics with others. All violations demonstrated that she was not a good role model for subordinate staff. Due to these concerns respondent demoted Miller to a non-supervisory position. Similar reasons existed for respondent's decision to demote Bergh to a non-supervisory position and to require restitution for unauthorized calls. (Testimony of Farrey, Boatwright and Lemke)

42. Miller's work rule violations were more severe in number and in scope than existed in the *Bergh* case. This was one reason why Miller was demoted one further classification step than Bergh. Respondent also considered that the egregiousness of Miller's actions were similar to those of another Oakhill employee, Peter Noyce, who was involved in an incident referred to by Warden Farrey as "Deergate." Noyce also was demoted from a Sergeant to an officer position. (Farrey testimony)

43. Respondent's decision to reassign Miller from Oakhill to a different institution was based on the polarization of staff over the Miller investigation and the related disruption in the work place. Respondent also was concerned that inmates knew about Miller's relationship with Cheney (see Exh. R-166, p, 14) and may have known about the resulting investigation. Both of these concerns raised security issues and justified the decision to remove Miller from Oakhill. (Farrey testimony)

44. Respondent imposed discipline on Cheney by letter dated November 22, 1999 (Exh. R-259). His discipline was comprised of a 3-day suspension without pay and payment of \$15.19 as reimbursement for phone calls. Respondent concluded that he had violated work rules A.1, A.3, A.4, A.14 and C.1. The conduct underlying the work rule violations is noted in the letter as shown below (alphabetical references added for reference) along with the letter's summary of additional unacceptable conduct for which discipline was not imposed (Exh. R-259, pp. 2-3):

- a. You made unauthorized personal phone calls from OCI to your home. Records indicate and you admitted that you have made sixteen (16) unauthorized long distance phone calls between March 1996 and March 15, 1999 for a minimum of 356 minutes and at a cost to Oakhill of \$15.19 in phone charges. A list of the phone calls, their length and cost is attached.
- b. You were negligent in the performance of your duties for a minimum of 356 minutes when you were engaged in making sixteen unauthorized (16) personal long distance phone calls to your home. During these times you should have been engaged in appropriate [CO2] activities.
- c. On August 6, 1999 you went into Captain Miller's office and became loud to the point of being heard in the office next door disrupting Captain Miller and staff in the Personnel Office from their assigned duties.
- d. You spent valuable work time meeting with other staff members, Mary Kay Knoll, Chris Fritz and Sgt. Opdahl talking about your personal relationship with Captain Miller.
- e. You were given a written directive on August 27, 1999 to report any contact with Captain Miller, including casual contact. You failed to file Incident Reports on two occasions, August 30, 1999 and September 15, 1999 when you had contact with Captain Miller.
- f. You discussed the investigation with Officer Christopher Wileman after being directed not to discuss any aspect of the investigation with staff other than those conducting the investigation.

The investigators also concluded that you gave Captain Miller, while at work and during work time 22 items such as cards, photos, notes and letters of personal nature. You wrote this while on duty, in the State vehicle and misused State paper, envelopes and documents to do so. In addition, you spent valuable work time meeting with Captain Miller in her office, State vehicle and Uniform room to discuss your personal relationship. I have given consideration to the fact that these infractions described were known about by or involved an OCI Supervisor who failed to take reasonable action on a timely manner, and, therefore, disciplinary action is not being imposed for these actions.

However, I want to make it clear that such egregious misconduct is totally unacceptable and is never acceptable whether it involves an administrative employee or not. Similar misconduct in the future would be viewed very seriously.

45. Respondent's investigation spanned several months, starting in August 1999. The last interview/disciplinary hearing was held on November 15, 1999 (Exh. R-257). Despite its knowledge of Cheney and Miller, respondent found it difficult to determine who was telling the truth. Ultimately, respondent concluded that neither was telling the truth about

all issues. Respondent attempted to resolve disputed facts by interviewing employees identified either by Miller or Cheney as having corroborating testimony and by viewing telephone records of long distance calls. The total time for Cheney's interviews alone was 60 hours. Respondent conducted as thorough an investigation as possible.^D

46. One CO who worked at Oakhill was fired for stealing \$5.00 worth of materials. (Lemke testimony)

47 Miller had no prior disciplinary record (with one minor exception prior to working at Oakhill).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §§230.44(1)(c) & 230.45(1)(a), Stats.

2. Respondent met its burden to prove that just cause existed for imposing discipline.

3. The degree of discipline imposed was not excessive.

OPINION

I. Credibility Note

The hearing examiner had difficulty with Miller's credibility at hearing. For example, Miller said that some of her calls to Cheney's house could have been for business reasons such as training and overtime. Only upon follow-up questions did she admit that she had no specific recollection of calling him at home for business reasons. The examiner found her first answer evasive and this was not an isolated instance.

Another example is Miller was asked whether she gave truthful answers to the questions in her first formal interview about knowing Cheney on a social basis (see ¶15, Findings of Fact). She testified that her answers were truthful when it is clear they were not. She was given several opportunities to clarify how the answers could be considered truthful and her basic arguments were threefold. First, she said the answers were truthful because in

^D The inclusion of this finding does not mean that the adequacy of respondent's investigation of

her opinion her relationship with Cheney was not relevant to the inquiry. Second, she said the answers were truthful because in her later interview she ended up revealing the relationship (but only after Cheney had done so in his interview). Third, she said the interviewers did not use the magic words, such as whether she was in a personal relationship with Cheney, which she claims would have triggered in her mind the need to reveal the relationship. These are excuses for lying and are insufficient to transform false responses into the truth. That Miller thinks this way made the examiner scrutinize her credibility in all matters.

The examiner's credibility concerns about Miller's testimony increased when she overheard a comment made by Miller's attorney during a break. Specifically, the examiner entered the ladies' restroom not knowing that Miller and her attorney were in separate restroom stalls. Upon entering the restroom the examiner heard Miller's attorney say words to the effect that "when you are trying to avoid that you sound evasive." The examiner then exited the restroom to avoid hearing any further conversation. After the break, the examiner disclosed this information on the record. The examiner described what she thought she overheard and stated that when Miller's own attorney thought Miller sounded less than credible, this reinforced the examiner's credibility concerns about Miller's testimony. The examiner explained she felt a duty to disclose the information and indicated that Miller's attorney might wish to address the conversation in the restroom when she had an opportunity to conduct examination of Miller. Complainant's attorney never addressed this credibility concern in her questioning of Miller

Immediately after the examiner disclosed what she had overheard in the restroom, Miller and her attorney, at the examiner's suggestion, each went to separate rooms to make a written statement of what was said in the restroom. Kurt M. Stege, an attorney employed by the Commission, notarized these statements. Miller's attorney retained possession of the statements and was not required to share copies with the Commission or the opposing party due to concerns that such statements might contain information protected under the attorney-client privilege.

Cheney's credibility also was suspect on certain matters. For example, he indicated that he *had* to write love correspondence and give it to Miller at work or Miller would get mad at him. Cheney came across as a person who acted as he pleased in this and other matters. He would not have written love correspondence to Miller unless this is what he wanted to do.

Cheney's perception of himself also impacted on his credibility. He indicated at hearing, for example, that he used to have anger control issues but that he resolved them. Yet as he testified it was clear that he continues to have trouble controlling his anger. Cheney's aggressive behaviors as described by complainant in her incident report (see ¶12, Findings of Fact) were believed over Cheney's denials due to the examiner's perception that Cheney lacks insight on how his actions are viewed by others.

It also was evident at hearing that Miller and Cheney each have their own axes to grind. For example, Miller insisted that she made the final break in the relationship while Cheney insisted that he had. The relationship was so rocky that at some point in time they each had "ended" the relationship. Indeed the breakups were so frequent that it is probable that even though a break up occurred, the other believed the relationship would continue. Whenever such issues existed and were unnecessary to disposition of the case, the examiner did not resolve them.

II. Analytical Framework

Miller contends the discipline imposed was without just cause under §230.44(1)(c), Stats., the pertinent text of which is shown below:

If an employee has permanent status in class the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

Miller's allegation that just cause did not exist for the discipline imposed requires the Commission to resolve three questions. The first question is whether respondent has shown to a reasonable certainty, by the greater weight of the credible evidence that Miller committed the conduct alleged in the disciplinary letter. The second question is whether respondent has shown to a reasonable certainty, by the greater weight of the credible evidence, that the

conduct proven under the first question constituted just cause for imposing discipline. The third question is whether the imposed discipline was excessive. *Reinke v. Personnel Board*, 53 Wis.2d 123, 137-8, 191 N.W.2d 833 (1971), *Hogoboom v. Wis. Pers. Comm.*, Dane County Circuit Court, 81-CV-5669, 4/23/84; *Jackson v. State Personnel Board*, Dane County Cir. Court, 164-086, 2/26/79 and *Mitchell v. DNR*, 83-0228-PC, 8/3/84.

Just cause for imposing discipline (the second question noted above) is established when some deficiency has been demonstrated which can reasonably be said to have a tendency to impair the employee's performance of duties or the efficiency of the group where the employee works. *Safransky v. Personnel Board*, 62 Wis. 2d 462, 474 N.W.2d 379 (1974). Factors to consider when determining whether the discipline was excessive (the third question noted in the prior paragraph) include: a) 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; b) the employee's prior record; c) the discipline imposed by the employer in other cases; and d) the number of the incidents cited as the basis for discipline for which the employer has successfully shown just cause. See, for example, *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98. Where the employer fails to establish some of the allegations for which discipline was imposed, the Commission will assess whether the proven conduct supported the degree of discipline imposed. For example, *Eft v. DHSS*, 86-0146-PC, 11/23/88; *Hintz v. DOC*, 87-0079-PC, 8/2/99, affirmed *Hintz v. Pers. Comm.*, 99-CV-000340 (Dane County Cir. Ct., 11/16/00); and *Lane v. DOC*, 99-0070-PC-ER, 95-0097-PC, pp. 31-36, 6/7/01.

III. Analysis Applied to Miller's Case

Respondent has shown to a reasonable certainty, by the greater weight of the credible evidence that Miller committed the most serious and the majority of the conduct alleged in the disciplinary letter. Respondent has met this burden with respect to all but two incidents, as noted in ¶37, Findings of Fact.

Respondent has shown to a reasonable certainty, by the greater weight of the credible evidence, that the conduct proven under the first question constituted just cause for imposing

discipline. Miller's misuse of her supervisory position to treat Cheney either favorably (see ¶8, Findings of Fact) or unfavorably (see ¶¶11 and 21, Findings of Fact), depending on the status of their relationship, can reasonably be said to have a tendency to impair the performance of her duties and the efficiency of the workplace. Her supervisors relied upon her representations due to her own status as a supervisor and she abused this bond of trust with her supervisors and used it as a tool against a subordinate. By these actions she impaired her own ability to continue performing in a supervisory position. Further, giving preferential treatment to Cheney based solely on their personal relationship raised an appearance of favoritism that could create a negative impact on other subordinates as occurred in the *Bergh* case (see ¶40, Findings of Fact).

Miller's blatant and repeated disregard of the directive not to discuss the investigation or matters related thereto (see ¶¶13, 17, 18 and 30, Findings of Fact) demonstrated her lack of respect for authority and can reasonably be said to have impaired her ability to continue not only in a supervisory position, but in any correctional officer position. These actions also can reasonably be said to have a tendency to impair the efficiency of the workplace in that if she, as a supervisor, felt "above-the-law," subordinates and other supervisors could feel justified in following suit whenever in their own opinion they felt it was in their best interest to fail to obey orders. Such potential perception could be devastating in the daily directives involved with operating a correctional institution.

Miller's unauthorized calls and related work rule violations (see ¶¶26-28, Findings of Fact) are another example of her attitude that she was "above the law," an attitude which can reasonably be said to have impaired her ability to continue not only in a supervisory position, but also in a correctional officer position (see ¶46, Findings of Fact). These actions also can reasonably be said to have a tendency to impair the efficiency of the workplace in that if she as a supervisor felt "above-the-law," subordinates and other supervisors could feel justified in engaging in similar behavior.

Miller's untruthfulness during the investigation (see ¶¶11 & 34, Findings of Fact) can reasonably be said, at a minimum, to have impaired her ability to continue in a supervisory position. This is another example of Miller's disregard for authority and her perception that

she was “above the law.” For reasons previously discussed, this type of behavior also can reasonably be said to have a tendency to impair the efficiency of the workplace.

The excessive socializing at work over Miller’s relationship with Cheney (see ¶¶32-33) is a multi-edged offense. Not only did Miller engage in such conduct herself but she also involved others in talking about the relationship (most notably Knoll) and further encouraged Cheney, a subordinate, to pursue the relationship during work time. These actions can reasonably be said to have impaired her ability to continue in a supervisory position due to the poor role model she provided to others. These actions also can reasonably be said to have a tendency to impair the efficiency of the workplace in that the involved employees were engaged in these excessive unauthorized activities and, at those times, were not performing their work.

The final question for resolution is whether the imposed discipline was excessive. Factors in Miller’s favor are that she had no significant prior disciplinary record (see ¶47, Findings of Fact) and she was highly regarded as evidenced by her promotions. However, the number and enormity of Miller’s proven offenses under the *Safransky* test are not merely offset by the factors mitigating in her favor but, in fact, overwhelm them (as discussed in the prior paragraphs).

There is no question that Miller can no longer serve as a supervisor and, accordingly, that demotion was warranted. It is true that Miller was demoted further than Bergh (see ¶40, Findings of Fact) but her offenses were more numerous and of greater enormity than Bergh’s. Respondent has shown that Miller’s demotion to a CO2 was not excessive and was consistent with the discipline imposed in the *Bergh* case. The Commission notes in this regard that Oakhill’s record of discipline imposed in another case (see ¶46, Findings of Facts) would have supported the more severe action of terminating Miller’s employment.

The requirement that Miller pay restitution^E for the costs involved with her personal long-distance calls was appropriate and consistent with the discipline imposed in the *Bergh*

^E This paragraph is included in the final decision for informational purposes only. The question of whether there was just cause for this component of the discipline imposed against the appellant was not part of the stipulated issue for hearing, nor does it fall within the scope of the Commission’s jurisdiction under §230.44(1)(c), Stats.

case. Again, the Commission notes that Oakhill's record of discipline imposed in another case (see ¶46, Findings of Facts) would have supported the more severe action of terminating Miller's employment.

Miller's reassignment^F to a different institution was justified by security concerns and a desire to end the disruption at Oakhill caused by the Miller-Cheney affair (see ¶43, Findings of Facts). These reasonable concerns were unique to the situation here (no comparable disciplinary cases) and were the outgrowth of Miller's work rule violations (and of Cheney's). Accordingly, the reassignment cannot be said to have been excessive under the *Safransky* test.

The 10-day suspension without pay was not excessive under the *Safransky* test. As previously discussed, several violations stemmed from Miller's blatant disregard of authority/directives and her attitude that she was "above the law," factors which will cause her further problems if carried over into her CO2 position. Most troubling is that during the investigation (and even at hearing) Miller showed no recognition of the seriousness of these failings. No disciplinary cases in the record presented similar concerns.

IV. Specific Arguments Raised in Miller's Post-Hearing Brief

Many of Miller's arguments are based upon her contention that she is credible and that she never lied during the investigation and, accordingly, should be believed. Her credibility as viewed by the hearing examiner already has been discussed in this decision and will not be repeated here. All of her arguments were considered. Only her main arguments that have not been addressed yet are discussed below.

A. Unauthorized Telephone Calls

Miller contends she should not have received discipline for her use of work phones for long distances calls. (Miller's post-hearing brief, pp. 5-10) She first contends that even if the allegations were true, the cost to Oakhill was "approximately \$4.63 per month" which she

^F This paragraph is included in the final decision for informational purposes only. The question of whether there was just cause for this component of the discipline imposed against the appellant was not part of the stipulated issue for hearing, nor does it fall within the scope of the Commission's jurisdiction under §230.44(1)(c), Stats.

characterizes as "relatively small" (brief, p. 5). This argument ignores the fact that Oakhill terminated a CO for theft of \$5.00 in total, not per month (see ¶46, Findings of Fact).

Miller argues that respondent failed to prove that she made all the calls respondent attributed to her (brief, pp. 6-7). This argument is based on the fact that Oakhill's then-existing telephone system did not track the extension from which a long-distance call was made. Miller inappropriately contends (brief, p. 7) that the only evidence supporting respondent's approach to identifying which unauthorized calls were made by Miller was Cheney's bald assertions that Miller made the calls and for personal reasons. Her contention is inappropriate because it is unsupported by the record.

Miller admitted during her investigative interviews that she used her work phone to make personal long-distance calls to Cheney based upon a pre-arranged timeframe (e.g., Exhs. R-163, p.7 and R-165, p. 18) and she confirmed this in her hearing testimony. At hearing, while she indicated that she did not have a specific recollection of any of the alleged 198 unauthorized calls, she admitted to making unauthorized personal calls in 1997 ranging from 2 to 35 minutes in length, in 1998 ranging from 1 to 86 minutes and in 1999 ranging from 1 to 118 minutes. (Refer to ¶25, Findings of Fact.) Under these circumstances, Miller's general denials were insufficient to undermine respondent's method of identifying the unauthorized calls attributed to her.

Miller continues to maintain that her unauthorized use of work telephones was no different than many others (brief, pp. 8-9). Some employees provided testimony tending to support Miller's claim but such testimony was unpersuasive to show that management knew of widespread unauthorized long-distance use of the telephones yet failed to do anything about it until Miller was disciplined. For example, Fritz testified that she overheard some employees make long-distance personal calls but she did not know if the employees had prior permission from a supervisor and she did not report it to management. Leavitt testified that he has made personal local calls from work but there is no indication that other managers were aware of this. Leavitt further indicated he has seen and reported staff that made unauthorized personal long-distance calls and has conducted investigations into such charges. The one stated exception was when he saw his supervisor, Miller, use her phone to call her parents long-

distance. Priegel testified that he complained to Captain Zurbuchen that too many personal calls were coming through the switchboard but he did not tell Zurbuchen that such calls were unauthorized or long-distance. Captain Carol Caldwell testified that she observed excessive personal calls made at work and spoke to Lemke about it and felt he was unconcerned. Caldwell did not tell Lemke that some of the calls were long distance or that some lasted for hours. Nor did she file incident reports when she saw staff making unauthorized calls.

Miller also suggests that because Oakhill trusted employees to use phones appropriately rather than require them to make a written record of each call or to otherwise monitor calls that this somehow shows respondent did not care about telephone abuse (brief, pp. 7-9). The Commission disagrees. It makes no sense to unnecessarily expend resources for such monitoring when no widespread abuse is suspected and where safeguards are in place to detect the occasional abuser. The safeguards in place included the rule applicable to CO's covered by the union contract, which limited the nature of personal calls and required prior supervisory approval. The other safeguard in place was the duty of supervisory and management staff to report specific observed abuses by completing an incident report.

B. Negligence In Performance of Duties

Miller contests that respondent established that her personal calls to Cheney resulted in her being negligent in the performance of her duties. This contention is based on the fact that no one ever told her she was not meeting performance goals and, in fact, she received good performance evaluations (brief, pp. 10-13). Miller's contention is absurd. She received pay to perform work duties which she obviously was not performing when she made the personal calls to Cheney. She may have been able to keep up with her assigned work even though she did not work the entire day. However, as noted in the record, there always is work to be done in a correctional setting that she could have performed. She never informed management that her workload was so light that she had time to undertake additional assignments.

C. Excessive Socializing at Work

Miller contends that respondent failed to establish that she socialized excessively at work (brief, pp. 13-19). One of her arguments is that her supervisor, Lemke, would have

been aware of the relationship if socializing had been excessive. This argument is unpersuasive. Some employees noticed a level of contact between Cheney and Miller, which led them to suspect that a relationship existed (see ¶¶32-33, Findings of Fact). Information gathered during the investigation, while conflicting in some aspects, is sufficient to support respondent's allegation of excessive socializing here. The facts that Lemke trusted Miller and that he did not monitor her daily movements is insufficient evidence to rebut respondent's evidence that such behaviors occurred and were excessive. The same is true regarding other employees who did not observe the activities.

D. Miller's Allegations about Cheney's Credibility and Motives

Miller alleges that respondent failed to consider or appreciate Cheney's motive for disclosing the personal relationship and raising harassment charges. Miller contends that Cheney's motivation for such actions was to retaliate against Miller for filing the report regarding the incident on August 6, 1999, and that respondent's failure to take this into consideration resulted in inaccurate credibility assessments and an inadequate investigation (brief, pp. 28-35).^G

The investigation conducted by respondent was adequate by any measure. Extensive interviews were held with Miller and Cheney and credibility issues were identified appropriately. Respondent attempted to resolve as many credibility issues as possible by interviewing witnesses identified by Miller and Cheney and upon objective evidence, such as telephone records. That respondent had problems with Miller and Cheney's credibility is unsurprising based on a repeat of similar issues during the hearing.

Furthermore, the most serious of Miller's offenses regarding her ability to remain in a supervisory position were unrelated to Cheney's credibility during the investigation. Her repeated defiance of the order not to talk with others about matters relating to the investigation was of her own doing (see ¶¶13, 17-18 & 30). Her lying about the existence of a personal relationship between herself and Cheney during her first formal investigative interview was of

^G The adequacy of the investigation is not part of the "just cause" analysis that is to be applied by the Commission in this case.

her own doing (see ¶¶15-16, Findings of Fact), as was her lying about whether she discussed the relationship with other employees at work (see ¶34, Findings of Fact). Through these actions solely attributable to Miller, it is not surprising that respondent questioned Miller's credibility as well as Cheney's credibility.

E. Miller's Contention that the Discipline Imposed was Excessive

Miller contends that the level of discipline imposed was excessive (brief, pp. 35-38). She argues that even if the Commission finds that Miller engaged in the alleged activities, that "there is absolutely no proof that it impaired Respondent's operations," or of a "single project or job function that Ms. Miller did not perform," or of "any evidence that its operations were hindered in any way by her alleged acts" (brief, p. 36). This argument suggests a misunderstanding of respondent's burden. It is unnecessary for the respondent to show that the charged activity *actually* impaired the performance of the duties of the appellant's position or the group with which she works. Respondent needs only show that the activity could be reasonably concluded to have had a tendency to do so (*Safransky, Id.* and *Paul v. DHSS*, 87-01547-PC, 4/19/90) and respondent met this burden.

Miller's final argument, which has not been addressed elsewhere in this decision, is that Lemke and Leavitt testified that Miller was always concerned about what others thought of her and she would be hurt if she knew someone disapproved of anything she had done. She concludes from this that less severe measures would have been sufficient to correct her work rule violations.^H

Leavitt testified that Miller is sensitive, hard on herself and somewhat of a perfectionist. He indicated that she is sensitive to what others think about her. He stated his belief that if someone brought performance concerns to her attention that she would change her behaviors. His next line of testimony contradicted this testimony. Specifically, he said that he

^H The language in this and subsequent paragraphs should not be interpreted to indicate that the Commission has adopted a subjective test for the question of whether the discipline imposed was excessive. However, the Commission agrees with the conclusion that the degree of discipline was not excessive as set forth in the proposed decision and order.

felt Miller would have told him it was none of his business if he would have questioned her about the long-distance call he observed her making to her parents.

Lemke testified that Miller is concerned with what others think about her. He indicated that he had made suggestions to Miller on behavior changes and she changed those behaviors.

The above arguments would be more persuasive if Miller's discipline involved incidents where it was clear that she was uncertain what the rules were and thereby unknowingly violated the rules. Such was not the situation here. For example, she knew it was a work rule violation to disobey a direct order yet she did so repeatedly (see ¶¶13, 17-18 & 30). She knew it was a work rule violation to provide incomplete or untruthful information during an investigation yet she did so on more than one occasion (see ¶¶15-16 & 34, Findings of Fact). She knew it was a work rule violation to use work phones to make long-distance calls for personal reasons without obtaining prior permission, yet she did so on 198 occasions (see ¶¶24-26, Findings of Fact).

ORDER


Respondent's action is affirmed and this case is dismissed.

Dated: May 8, 2002

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

JMR/KMS:990108Adec1.2


KELLI S. THOMPSON, 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