

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RANDALL GERRITSON, Appellant,

vs.

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

Case 1
No. 62749
PA(adv)-1

(Previously Case No. 02-0040-PC)

Decision No. 31234-A

Appearances:

Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, 10 East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Appellant.

Kathryn R. Anderson, Assistant Legal Counsel, Department of Corrections, 3099 East Washington Avenue, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Respondent.

INTERIM DECISION AND ORDER

Randall Gerritson appeals from his demotion imposed by letter dated July 11, 2002. The appeal was filed with the Personnel Commission on August 5, 2002. While the case was pending, the Personnel Commission was abolished pursuant to 2003 Wis. Act 33, effective July 26, 2003, and the authority for processing this matter was transferred to the Wisconsin Employment Relations Commission.

By letter dated December 4, 2003, the Wisconsin Employment Relations Commission designated Dennis P. McGilligan as Hearing Examiner. Examiner McGilligan subsequently convened an administrative hearing that was held on April 19, 2004 at the offices of the Wisconsin Employment Relations Commission. Hearing was held on the following issue:

Whether Respondent's decision to demote Appellant from Supervising Officer 2 to Supervising Officer 1 was for just cause.

Sub-issue: Whether the discipline imposed was excessive.

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The parties completed their briefing schedule on June 25, 2004. The hearing examiner issued a proposed decision on February 7, 2005. Written objections were filed and the final date for submitting a written response was March 18, 2005. The Commission has consulted with the hearing examiner and has adopted the result reached in the proposed decision but has made various revisions as identified in footnotes.

For the reasons set forth below, it is the Commission's decision that there was just cause for discipline but the demotion was excessive.

The Commission makes the following

FINDINGS OF FACT

1. Dodge Correctional Institution (DCI) is a maximum security prison operated by Respondent Department of Corrections (DOC) to house approximately 1500 convicted felons. Inmates who are in DCI for the purpose of assessment and evaluation generally stay about 60 to 90 days at which time they are assigned to another prison. Approximately 1600 inmates are processed yearly through DCI for assessment and evaluation. DCI also maintains a 64 bed health services unit which provides services for the entire State prison system. Because the prison operates 24 hours daily, there are three standard shifts for correctional officers, specifically 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. At all times material herein, the warden of DCI and the security director of DCI were John Bett ("Bett") and Dan Westfield ("Westfield"), respectively.

2. Randall Gerritson, hereinafter "Gerritson" or "Appellant", began his employment with the Department of Corrections ("DOC") as an Officer 1 in June 1992. After two years, his position was reclassified to an Officer 2. Gerritson was subsequently promoted to Sergeant, Lieutenant (Supervising Officer 1) and finally, in September 2000, to a Captain (Supervising Officer 2) position at DCI.

3. Prior to the disciplinary action that serves as the basis for this appeal, Gerritson had an excellent work record and not been formally disciplined.

4. In his position as Captain at DCI, Gerritson was second shift commander. His immediate supervisor was Westfield. Gerritson was responsible for the operation of the entire prison during his shift, including supervising staff, conducting investigations as assigned by the security director, enforcing relevant policies and procedures of DCI and DOC, supervising inmates, and handling public contacts. Gerritson supervised two lieutenants as well as sergeants and correctional officers. He was the second level supervisor of Sergeant Jodi Mallas Schueneman ("Mallas").

5. No later than August of 2001, a romantic relationship developed between Gerritson and Mallas. At that time, Mallas was separated from her husband Doug Schueneman (“Schueneman”), who worked at DCI as a correctional officer on DCI’s first shift.

6. DOC and DCI do not have any policies or work rules prohibiting a supervising officer from engaging in a relationship with an employee under direct or indirect supervision. Supervisors are not required to disclose the existence of any such relationship. However, DCI management strongly prefers being informed of such relationships. If informed, management can respond to and take appropriate action if other staff raise concerns or situations arise in the work environment. DCI is a closed environment with lots of rumors and personal relationships can affect the institution climate as well as the health and safety of officers and prisoners. DCI does not want a romantic relationship between staff to negatively affect the workplace. Other security supervisory staff at DCI have informed the security director when they have begun to date a subordinate. It is reasonable to expect that dating a subordinate will generate rumors within the facility.¹

7. Both Gerritson and Mallas sent and received e-mails during work hours that were unrelated to their work. The e-mails included a photo of Gerritson and Mallas in a social setting, a photo of an inmate from another institution with feces smeared on his face, and numerous e-mails of an implicitly sexual nature that were linked to their relationship. These e-mails were exchanged between August 5, 2001 and February 18, 2002.

8. DOC Executive Directive #50 prohibits certain uses of the e-mail system, including:

Knowingly accessing, creating, sending, saving, viewing, printing or downloading defamatory, abusive, obscene, pornographic, profane, sexually oriented, racially offensive, or any biased, discriminatory, or illegal material not specifically related to an approved work activity.

9. DCI policy, in the form of an administrative directive, provides that “DOC computer equipment and programs are to be used for official State, DOC, and work related purposes only.” The policy also prohibits the unauthorized use of computers and warns that the “use of programs or equipment for personal or entertainment purposes represents a work rule violation for misuse of State property and may result in disciplinary action.”

10. DOC Executive Directive 7 provides: “[A]ny employee who engages in harassment of any other employee, client or inmate on the basis of age. . . or arrest or conviction record violates state and/or federal laws.” It also provides that any employee who allows the harassment of an inmate “without intervening or reporting the harassment is

¹ The Commission has added the last two sentences to the proposed decision so as to more completely reflect the record.

11. Sometime after Gerritson and Mallas had begun their relationship, Schueneman informed Warden Bett that he believed Gerritson was engaged in some type of a relationship with his wife. Bett then asked Westfield to determine if such a relationship existed and in November 2001 Westfield met with Gerritson and asked him if he was having a relationship with Mallas. Gerritson told Westfield, “No.” Westfield assumed Gerritson was being truthful. He reported to Bett that Gerritson was not involved with Mallas. Both Bett and Westfield’s interest in Gerritson’s response arose from their interest in the safe operation of DCI rather than out of a desire to provide information to Schueneman. Gerritson understood that Westfield posed the question for legitimate work-related reasons.²

12. Early in 2002, Lt. Menne and Lt. Wojahn informed Westfield that Gerritson had a relationship with Mallas that was interfering with their efforts to supervise her. They identified several specific instances where they believed that Gerritson had intervened inappropriately: a) by trying to influence an investigation into Mallas’ use of sick leave; b) by allowing her to take long breaks; and c) by allowing her to wear an eyebrow ring in violation of the dress code. Ultimately, Mallas received counseling over the eyebrow ring, and her use of sick leave was monitored. No action was taken regarding the length of her breaks.

13. In light of the complaints by Menne and Wojahn, Westfield met again with Gerritson in February of 2002. Westfield described the concerns raised by the two subordinate officers and again asked Gerritson whether he had a relationship with Mallas. Gerritson failed to acknowledge that a relationship existed.³ Gerritson testified he told Westfield that it was none of his business who he dated as long as it did not interfere with how he did his job. Westfield testified that Gerritson denied any such relationship.

14. Respondent’s Bureau of Technology Management (BTM) learned that an e-mail with sexual content had been circulated by a DCI correctional officer to other DCI staff and in February, 2002, Respondent commenced an investigation into the use of e-mail by all DCI staff. During this investigation, Respondent uncovered the e-mails exchanged between Gerritson and Mallas described in Finding of Fact 7.

15. In May 2002 Gerritson met again with Westfield. During the course of this meeting, Westfield indicated that the investigation into use of the e-mail system had uncovered multiple e-mails between Gerritson and Mallas which indicated they had a relationship, contrary to what Gerritson had said in the two previous meetings. Gerritson confirmed that he was having a relationship with Mallas and apologized for not being truthful when previously asked. Respondent’s primary concerns about Gerritson’s e-mail use were the supervisor’s highly suggestive language and the amount of work time that was taken up by the extensive e-mail exchanges while both Gerritson and Mallas were working the same shift.⁴

² The Commission has modified this finding in the proposed decision in order to clarify the motivation behind the questions that were posed to Gerritson and Gerritson’s understanding of Respondent’s motivation.

³ The Commission has added this sentence to the proposed decision to better clarify the factual conclusions.

⁴ The Commission has added this sentence to the proposed decision to more completely describe Respondent’s

16. The letter of demotion that is the subject of this appeal is dated July 11, 2002, and includes the following language:

This letter will serve as a formal notification of your involuntary demotion to a Supervising Officer 1 position effective Sunday, July 14, 2002. Please see attached appointment letter for further information regarding your new assignment. This action is being taken as a result of your having violated Department of Corrections work rules 2, 6, and 28. These work rules apply to all employees of the agency and specifically prohibit:

#2 “Failure to follow policy or procedure, including but not limited to the DOC Fraternalization Policy and Arrest and Conviction Policy.” Specific policies not followed are the DOC Harassment Policy, Executive Directive 7, the DOC Internet and Email Use Policy, Executive Directive 50, and DCI policy #03.33, Employee Use of Computer Hardware and Software.

#6, in part, “knowingly giving false information . . . failing to provide truthful, accurate and complete information when required.”

#28, in part, “Unauthorized or improper use of state property or services, including but not limited to electronic communications . . . computer, software . . . while in the course of one’s employment.”

This action is based on the following facts:

In November 2001, your supervisor received information suggesting you were romantically involved with a female staff member whom you supervised on your shift. You were asked directly by your supervisor if you had a personal relationship with this staff member and you denied any relationship with her. In early February 2002, your supervisor again asked you if you were in a relationship with this staff and you again denied it. Later, during the course of an investigation regarding staff misuse of e-mail, multiple e-mail correspondence from you was found in the account of the female staff member. The content of the e-mail correspondence found was not work-related and indicated you were romantically involved in a relationship with her and it included sexually suggestive content. Some of these e-mails dated back to August 2001. There were numerous e-mail exchanges of this type and many of the e-mail exchanges spanned 20-30 minutes at a time.

Bett contacted other correctional institutions operated by Respondent in an effort to locate a vacant Lieutenant position for Gerritson, on the theory that it would be less embarrassing for him if he did not have to return to work in the same institution where he had served as shift captain before the demotion. Due to pending layoff plans, no positions were available.⁵

17. Following the demotion, Gerritson was assigned to work the 6:00 a.m. to 2:00 p.m. shift, Monday through Friday, transporting prisoners. A few days later, Gerritson was informed that his assignment was being changed to a shift that began at 11:00 p.m. and ended at 9:00 a.m.

18. Approximately 60 DCI employees were formally disciplined as a consequence of the information discovered during BTM's investigation of e-mail usage. Gerritson was the only security supervisor who was found to have violated the e-mail policy. Management became concerned that large numbers of suspensions would have adverse consequences for staffing the facility so the discipline initially contemplated for many individuals was changed from suspension to a written reprimand that would have the same effect on any future discipline as a suspension.⁶ Discipline imposed ranged from counseling to a ten (10) day suspension. Among those disciplined:

a. Mallas was suspended without pay for one work day for forwarding inappropriate items including "video clips, pictures, jokes and e-mail exchanges with sexual connotations, some of which depicted nudity" using the State e-mail service and equipment to other employees. Mallas has grieved the suspension and the grievance was pending at the time of the hearing in this matter.

b. DCI word processing supervisor Julie Bassuener was given "a written reprimand equal to and carrying the weight of a three day suspension for violating Department of Corrections work rules numbers 2 and 28."⁷ This action was taken based on the following conclusions:

As the result of a lengthy investigation into the use of email [sic] by several employees at DCI, it was determined that you forwarded a number of inappropriate items, using state email

⁵ The Commission has added the preceding two sentences to the proposed decision to more completely describe the relevant facts.

⁶ The Commission has added the preceding two sentences to the proposed decision to more completely describe and explain the rationale for the discipline actually imposed on other employees.

⁷ The Commission has supplemented the sentence found in the proposed decision and the corresponding sentence in subparagraph c. to describe the employee's area of supervision.

service and equipment, to other employees. One of these

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employees is under your direct supervision. These items included jokes, pictures, video clips and conversational email messages with sexual connotations. One of these items was a picture, which, if in paper form, would be considered a “nude pin-up poster.” Another item was a video clip of an animated snow sculpture of male genitalia.

c. DCI contract monitoring unit supervisor Karen Parenteau received a written reprimand equivalent to a one-day suspension. This action was taken for the following reason:

As the result of a lengthy investigation into the use of email [sic] by several employees at DCI, it was determined that you forwarded two inappropriate items, using state email service and equipment, to another employee. You originally received these items from an employee under your direct supervision. These items were cartoons inappropriate for the workplace, one of which had sexual connotations.

19. Gerritson’s conduct set forth in the letter of discipline violated DOC work rules and policies and could impair the performance of the duties of his position, the efficiency of the second shift at DCI and the operation and efficiency of DCI as a whole.⁸

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to Sec. 230.44(1)(c), Stats.
2. The burden of proof is on the Respondent to demonstrate that there was just cause for the imposition of discipline and for the degree of discipline imposed.
3. The Respondent has established just cause for the imposition of some discipline but not for the demotion of the Appellant.

⁸ The Commission has deleted Findings 19, 20 and 21 from the proposed decision because the information, all of which relates to discipline imposed on employees of other correctional institutions, is more appropriately set forth in the accompanying Memorandum.

4. The demotion constituted excessive discipline and is modified to a twenty (20) day suspension without pay.

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Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's action of demoting the Appellant from his employment as a Captain at DCI is modified to a twenty (20) day suspension without pay.

This matter is remanded to Respondent for action in accordance with this decision. The Commission will retain jurisdiction for the purpose of resolving issues relating to remedy and so that the Appellant may seek fees/costs pursuant to Sec. 227.485, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate in the consideration of this matter.

Department of Corrections (Gerritson)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission as an appeal of the decision to demote the Appellant from his position as Captain at the Dodge Correctional Institution.

In its decision in DEPARTMENT OF CORRECTIONS (DEL FRATE), Decision No. 30795, (WERC, 2/04), the Commission explained the legal standard it applies when analyzing an appeal of a disciplinary action under Sec. 230.44(1)(c), Stats.:

On appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, Stats., requires that suspension of an employee with permanent status in class . . . be for just cause. The Courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. REINKE V. PERSONNEL BOARD, 52 WIS. 2D 123, (1971); HOGOBOOM V. WIS. PERS. COMM., DANE COUNTY CIRCUIT COURT, 81CV5669, 4/23/84; JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT, 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the Appellant committed the conduct alleged by Respondent in its letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and, 3) whether the imposed discipline was excessive. MITCHELL V. DNR, CASE NO. 83-0228-PC (PERS. COMM. 8/84). In considering the severity of the discipline to be imposed, the Commission must consider, at a minimum, the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with the Respondent. SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464 (1974); BARDEN V. UW, CASE NO. 82-237-PC (PERS. COMM. 6/83).

The three steps referenced in MITCHELL, *supra*, are addressed separately, below.

1. Did the Appellant engage in the alleged misconduct?

The relevant portions of the July 11th letter of demotion that is the subject of this appeal are set forth in Finding 16. This document identifies the following alleged misconduct by Captain Gerritson:

In November 2001, your supervisor received information suggesting you were romantically involved with a female staff member whom you supervised on your shift. You were asked directly by your supervisor if you had a personal relationship with this staff member and you denied any relationship with her. In early February 2002, your supervisor again asked you if you were in a

relationship with this staff and you again denied it. Later, during the course of an investigation regarding staff misuse of e-mail, multiple e-mail correspondence from you was found in the account of the female staff member. The content of the e-mail correspondence found was not work-related and indicated you were romantically involved in a relationship with her and it included sexually suggestive content. Some of these e-mails dated back to August 2001. There were numerous e-mail exchanges of this type and many of the e-mail exchanges spanned 20-30 minutes at a time.

Based on the above allegations, the question before us is whether the Appellant engaged in the following conduct: 1) starting in August of 2001 he exchanged numerous e-mails with a female subordinate on the same shift that were not work-related and included sexually suggestive content; 2) when asked in November of 2001 if he had a personal relationship with the female subordinate, he denied having any relationship with her; and 3) when asked again in early February of 2002 if he was in a relationship with the same woman he again failed to acknowledge the relationship.

It is undisputed that Appellant and Mallas exchanged numerous e-mails of a personal, romantic and intimate nature, containing sexually suggestive language, starting in August, 2001, and continuing at least until February 18, 2002. Many of these e-mail exchanges spanned 20-30 minutes or longer. Appellant concedes that this conduct occurred.

It is also undisputed that in his November 2001 conversation with Security Director Westfield, Appellant denied there was a relationship when, in fact, he was engaged in a relationship with Mallas at the time.

There is a dispute about what exactly was said during the second conversation between Westfield and Gerritson in February, 2002 in which Westfield again asked Gerritson whether he had a relationship with Mallas. Gerritson testified that he answered by saying it was none of Westfield's business.⁹ Westfield testified that Gerritson denied the existence of a

⁹ In his post-hearing brief, Gerritson contended that Marianne Cooke, Assistant Administrator of DOC's Division of Adult Institutions, "testified that it would have been appropriate for Gerritson to have told Westfield the matter was none of his business. This mischaracterizes Ms. Cooke's testimony. She was responding to a hypothetical question posed by the Appellant:

Q So if, out of my own idle curiosity, I want to know if you have ever had an affair with an employee with whom you work, I am free to ask that and expect to answer?

A You can ask me that and I can tell you that it's something that I don't have to disclose to you.

Q Oh, ok. So if he is not obligated to disclose . . .

A When . . . he didn't say he didn't disclose it.

Q What's

A He lied.

The questions asked of Gerritson during the November 2001 and February 2002 meetings were not generated by Westfield's "idle curiosity" about whether Gerritson was having an affair. Westfield sought the information for legitimate purposes relating to the smooth operation of the prison.

relationship and stated it was not Westfield's business what took place outside of the workplace. However, no matter which version is accepted, it is clear that Gerritson did not provide a truthful, accurate or complete response to the question and purposely left Westfield with the impression that he was not having a relationship with Mallas.

Finally, although the letter of discipline fails to specifically mention the e-mail that included a photo of an inmate in another institution, that e-mail is within the scope of the first allegation of misconduct relating to improper use of the e-mail system.

Based on the above, we find, contrary to Appellant's assertion, that Gerritson did commit all of the conduct alleged by Respondent as the basis for the demotion.

2. Was some level of discipline warranted?

Having determined that the Appellant committed the conduct described in the July 11, 2002, letter of demotion, the next step is to determine whether his conduct warranted the imposition of some degree of discipline. We find that the greater weight of the credible evidence establishes just cause to impose discipline.

Appellant violated three DOC work rules:

#2 "Failure to follow policy or procedure, including but not limited to the DOC Fraternalization Policy and Arrest and Conviction Policy." Specific policies not followed are the DOC Harassment Policy, Executive Directive 7, the DOC Internet and Email Use Policy, Executive Directive 50, and DCI policy #03.33, Employee Use of Computer Hardware and Software.

#6, in part, "knowingly giving false information. . . failing to provide truthful, accurate and complete information when required."

#28, in part, "Unauthorized or improper use of state property or services, including but not limited to electronic communications. . . computer, software. . .while in the course of one's employment."

Appellant violated work rule #6 when he failed to provide truthful and complete information to Westfield on two different occasions several months apart. On both occasions, his supervisor asked him whether he was engaged in a relationship with Ms. Mallas.

In the November, 2001 conversation, Appellant lied when he said there was no personal relationship with Ms. Mallas even though he was e-mailing love notes to her at the time. The Commission recognizes that an employee's untruthful answer to a supervisor's question that is completely unrelated to work may not provide just cause for the imposition of discipline. A supervisor's question regarding the details of a subordinate's sex life can even

rise to the level of illegal sexual harassment. However, the circumstances surrounding the November conversation are such that they justify discipline. Westfield had a legitimate work-related concern if Gerritson and Mallas were engaged in an affair and he was motivated by that concern when he raised the topic with Gerritson. When the husband, wife and paramour are all employed at same location, management has reason to be wary of problems in the workplace, even rising to the level of violence, especially when the husband has identified his concern that his wife was involved with a co-worker. When the three are all employed by a large prison, management legitimately has a heightened level of concern. Prisons must maintain physical control over a volatile inmate population. Rumors have a substantial effect on the overall prison climate and have even resulted in riots. Evidence established that romantic relationships between supervisors and subordinates are likely to be the subject of rumors and inmates may attempt to use information they obtain about prison staff as a means to control staff. Westfield also recognized the potential for liability in the event a romantic relationship between a supervisor and a subordinate turned sour and generated a sexual harassment complaint.

When Westfield asked Gerritson in November if he was having an affair with Mallas, the question came up during a meeting held in Westfield's office rather than in a casual conversation at a bar or in a locker room away from the prison. Westfield asked the question at the end of the meeting in which he, in his capacity as Security Director and as someone with years of training experience, had discussed Gerritson's new training responsibilities as the Field Commander of DCI's Emergency Response Unit. Westfield's question was a narrow one. He asked whether Gerritson had a relationship with a specific second shift subordinate employee, Ms. Mallas. As shift commander, Gerritson was responsible for her performance evaluation. In an effort to justify his fallacious response, Gerritson testified that he was "caught off guard" by the question. The Commission rejects this excuse and believes that given the circumstances of the meeting and Gerritson's status of the second-level supervisor for Mallas, Gerritson understood that Westfield had a work-related reason for asking if he had "a relationship" with her. The Commission also believes that Gerritson lied to Westfield in an effort to hide the relationship from Westfield rather than because he felt Westfield had no right to ask the question. If Gerritson felt the question was out-of-bounds, he could have said so to Westfield. Instead, he chose to lie by denying he had a relationship with her. Gerritson's true motivation is suggested by a comment he made in his last entry of an eleven-message e-mail exchange he had with Mallas over the course of three hours approximately two months earlier, on August 5, 2001: "I really have to stop now before I lose my freakin job!!!!!!!" Gerritson's comment showed he was already aware, well before Westfield initially posed the question, that his relationship with Mallas had actual consequences on his work.

In the February, 2002 conversation, Westfield referenced the concerns that had been raised by two lieutenants, Wojahn and Menne, about the appearance of favoritism exercised by Gerritson as Mallas' supervisor and again asked the Appellant whether he was having a personal relationship with Mallas. Whether you credit Appellant's or Westfield's

characterization of the conversation, the bottom line is still the same. Appellant failed to provide truthful, accurate and complete information about his ongoing relationship with Mallas when asked by Westfield. He intended to conceal that relationship from Westfield and he was successful until it was uncovered during an investigation into the personal use of the DOC e-mail system at DCI.¹⁰

Gerritson violated work rules #2 and 28 by using the e-mail system to exchange numerous communications with Mallas during work time while both were on duty. Executive Directive 50 prohibits certain uses of the e-mail system, including:

Knowingly accessing, saving, viewing, or printing any information containing defamatory, false, inaccurate, abusive, obscene, pornographic, profane, sexually oriented, racially offensive, or any biased, discriminatory, or illegal material not specifically related to an approved work activity.

The DCI has an administrative directive which also addresses the use of computers. The policy prohibits the unauthorized personal use of computers and warns that such use “represents a work rule violation for the misuse of State property and may result in disciplinary action.”

Appellant concedes that his aforesaid use of the e-mail system violated DCI policy and work rules, and therefore, could serve as a basis for disciplinary action.

Gerritson violated the department’s Executive Directive 7, which prohibits harassment and hazing conduct. The policy prohibits an employee from engaging in the “harassment of any other employee, client or inmate on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, religion or arrest or conviction record. . .” Respondent argues that the sharing of the e-mail of the inmate with his face covered with feces is harassing to inmates and not to be tolerated. We agree. Appellant had an obligation under DOC Executive Directive 7 to intervene, halt the dissemination of the image and turn the e-mail over to management.

Appellant argues that he only denied a relationship with Mallas on one occasion (November, 2001) and that instance is not grounds for any discipline, much less demotion. However, as noted above, Appellant failed to provide truthful, accurate and complete information on two separate occasions about that relationship and he improperly used the e-mail system. This conduct violated the aforesaid work rules and is grounds for discipline.

¹⁰ The Commission has expanded the analysis in the proposed decision to clarify Respondent’s motivation in questioning Gerritson, the circumstances surrounding the November 2001 and February 2002 meetings, and Gerritson’s motivation when he responded to the questions.

Based on the foregoing, there was just cause for imposing some level of discipline against the Appellant.

3. Was the level of discipline imposed excessive?¹¹

The final step in the just cause analysis is to determine whether the Respondent has sustained its burden to show that the decision to demote the Appellant from his Supervising Officer 2 position to a Supervising Officer 1 position was not excessive.

Some of the factors that enter into the excessiveness determination are 1) the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to tend to impair the employer's operation, 2) the employee's prior record and 3) discipline imposed by the employer in other cases. *JACOBS V. DOC, CASE NO. 94-0158-PC, (PERS. COMM. 5/15/95)*

When considering the degree to which Gerritson's conduct tended to impair DCI's operation, the Commission takes both components of the misconduct into account.

The lengthy e-mail exchanges with Mallas engaged at least some of Gerritson's attention while he was supposed to be carrying out his second shift work responsibilities. The e-mails had no work-related function, were laced with sexual innuendo and, had they fallen into the wrong hands, could have been used by an inmate to further his own interests which presumably are in direct conflict with the interests of the prison.

Respondent also based its demotion decision on the two incidents when Gerritson either lied to his immediate superior or did not provide accurate information on a work-related matter when asked. Gerritson's conduct had at least a moderate tendency to adversely affect DCI's operations. Both Westfield and Bett, as the security director and warden of a very large prison that houses dangerous inmates, must rely on Gerritson to abide by and enforce the institution's work rules and policies. They also need to be able to rely on the accuracy of any information that Gerritson provides to them. In some instances, the warden may have to assess information from a supervisor that conflicts with information received from a subordinate officer or an inmate. Decision-making will be difficult whenever there is a reason to doubt the accuracy of an employee's statements. Gerritson's co-workers similarly rely on his actions and words. The consequences on DCI of conduct such as that engaged in during Appellant's meetings with Westfield in November of 2001 and February of 2002 are especially significant given Gerritson's role as a supervisor and, more particularly, as the shift commander in charge of the entire institution. We are convinced that there are good reasons for the work rule requiring

¹¹ While the Commission reaches the same conclusion as the designated hearing examiner in terms of the excessiveness question, the Commission relies on somewhat different factors. For that reason, the Commission has substantially revised this section of the discussion.

the institution related to the health and safety of staff, inmates and the public when they do not. When Gerritson denied having a personal relationship with Mallas in November 2001, Westfield reasonably relied on Appellant's statement. Therefore, he had no reason to take steps available to DCI to minimize any impact of the relationship on other staff and inmates. Westfield could have avoided certain assignments that might lead to heightened rumors within the institution. In February, 2002, Gerritson's failure to accurately answer a work-related question prevented Westfield from adequately addressing the concerns of two lieutenants who believed that Appellant was granting preferential treatment to Mallas.

We reject Appellant's contention that he should receive the same level of discipline imposed on the other supervisors at DCI who were found to have improperly used the DCI e-mail system. The just cause analysis of the discipline imposed on the other supervisors who were ensnared by the e-mail investigation would be based solely on that misconduct. In contrast, Appellant also lied and/or failed to tell the truth on two separate occasions and the Commission's just cause review must be based on all of the misconduct listed in the letter of discipline and found to have occurred.

Appellant also argues that his conduct does not warrant demotion because of the circumstances under which he provided false information or failed to provide accurate information. He characterizes his conduct as comparable to the refusal to carry out an unreasonable order, the situation present in *LYONS V. DHSS, CASE NO. 79-81-PC (PERS. COMM. 7/23/80)* where the Personnel Commission held that a refusal to perform an unreasonable assignment was not insubordinate misconduct, and that discharge was excessive discipline when there was an "honestly held, principled belief that the assignment was improper," even though the assignment was not improper. Lyons, a physician who specialized in radiology, was assigned to make an on-site evaluation of a potential medical treatment problem and then decide if he was qualified to judge the appropriateness of the care that had been provided to a deceased "brittle diabetic" patient by another physician. If Lyons felt unqualified, he was to compile the relevant case facts so they could be presented to the State Board of Medical Examiners who would evaluate the treatment. Lyons spoke with nursing staff at the patient's facility but otherwise refused to perform the evaluation, was reprimanded, continued to refuse and was counseled, suspended and ultimately discharged. He contended it was solely within his professional expertise to determine whether he was qualified to perform the assignment and whether it would violate his medical judgment and professional ethics. In addition to noting that none of the individuals who participated in the disciplinary decisions were competent to assess, from a medical point of view, the propriety of Lyons' refusal to carry out the assignment, the Personnel Commission held:

The appellant sincerely but mistakenly believed it would have been unethical to carry out the assignment. . . . He also mistakenly argued that the assignment was outside the scope of his position description. . . . The appellant was disciplined and discharged for a single act. In the context of appellant's

that the single act did not impair the efficient performance of any of his other duties. . . . In the opinion of the Commission, the assignment was a reasonable one.

In light of all the facts and circumstances of the case, the five-day suspension was appropriate and was for just cause. Appellant did decline to carry out a duty within his position description. Any further discipline was, however, excessive. The appellant's prior good professional record and history, his honestly held, principled belief that the assignment was improper and his continued performance of all other assigned duties of his position for eight months, until his termination, [led] to the conclusion that the termination was excessive discipline and was without just cause.

As noted above, the Commission has concluded that Gerritson's responses were not based on a principled belief that Westfield's questions were improper and that Gerritson was aware that Westfield's questions were motivated by legitimate work concerns. As a consequence, Appellant's reliance on LYONS is inapposite.

Another factor in assessing whether Gerritson's demotion was excessive discipline is a comparison to the discipline that has been imposed against other employees. The record includes information relating to the level of discipline imposed on three other captains who were found to have engaged in misconduct at various correctional institutions throughout the state. In 1998, Douglas Bergh, a captain at Columbia Correctional Institution (CCI) was demoted to a position as a sergeant, in part because he failed "to provide truthful and accurate information" during an investigatory interview when he was asked how many telephone calls he had made to a female co-worker. However, the two-step demotion was also based on a variety of additional misconduct: 1) Knowingly disobeying a work directive not to spend lengthy periods of time with the same co-worker during work hours; 2) switching the same co-worker on the schedule to arrange for her to cook eggs and potatoes for him; 3) ignoring a memo from the warden regarding signing in/out of housing units; 4) making eleven personal phone calls to the same co-worker's residence from the institution phone, contrary to an express directive; 5) making thirty-five personal phone calls to the co-worker's home while on duty, totaling more than 5 hours; 6) lying about the reasons for changing the co-worker's schedule; and 7) and making personal calls on a state telephone for personal use.

In 1999, Respondent demoted Michele Miller from a position as captain at Oakhill Correctional Institution to a correctional officer position, reassigned her to another institution and suspended her for 10 days without pay for, in part, failing to provide "accurate and complete information" during an investigation. The discipline was also imposed for: 1) making nearly 200 unauthorized personal phone calls over an 18 month period to a subordinate officer; 2) performing her duties negligently by having spent more than 50 hours

engaged in personal long distance phone calls; 3) taking various inappropriate steps to further a personal relationship with a subordinate staff member while on duty; 4) discussing the investigation of her conduct with subordinate staff after being directed not to do so; 5) showing favoritism toward the same subordinate officer in assignment to a preferred position; and 6) threatening the officer after the relationship had become strained.

Phillip Brooks, another captain at CCI, was demoted to correctional officer, transferred to another institution and suspended for thirty days for having falsified his wife's timesheets, encompassing more than sixty hours and nearly \$1,000 of wages.

All three of these comparisons describe conduct that was more egregious than what serves as the basis for disciplining Gerritson. Captains Bergh and Miller ignored very specific directives from their superiors. They carried out numerous instances of favoritism toward a subordinate employee. Captain Brook's misconduct could have generated criminal charges. However, all three captains received more extensive discipline than Gerritson. Captain Bergh was demoted two steps, to sergeant. Captain Miller and Captain Brook were demoted three steps and suspended. Given the various distinctions with Gerritson, the comparables provide only moderate support for a single-step demotion.

While the Commission believes that the Appellant's misconduct justifies the imposition of significant discipline, there are several factors that argue against concluding that a demotion is a reasonable level of discipline.

1. In its post-hearing brief, the Respondent referenced Appellant's relative level of misuse of the e-mail system and concluded that "comparisons with the other supervisors suggest that he would have received a written letter of reprimand in lieu of three days suspension." In other words, absent his misconduct in November 2001 and February 2002, Gerritson would have neither been demoted nor lost any pay.

2. Instead of a backdrop of a complex web of prevarication covering numerous topics, the demotion is based on two instances of failing to comply with the work rule about telling the truth and both instances related to the same limited subject matter of whether he had a personal relationship with a particular employee. In other regards, Appellant has always displayed honesty and integrity.

3. The seriousness of Gerritson's misconduct is undermined by the fact that neither DCI nor DOC has a rule or policy prohibiting a supervisor from engaging in a personal relationship with a subordinate employee. Likewise, Respondent does not require its employees or supervisors to inform a superior of the existence of a relationship with another employee.

4. Gerritson is not being disciplined for engaging in a relationship with Mallas or for having granted special assignments to her or for otherwise favoring her over other

subordinates.

5. Appellant had an excellent work record. There is no evidence that he was counseled, verbally reprimanded or formally disciplined.

6. Even though it was technically not part of the Respondent's discipline, Gerritson had already suffered what amounted to a loss of salary. Respondent had awarded Appellant a "Discretionary Compensation Adjustment" (i.e. increase) by letter dated June 14, 2002, presumably to be reflected in his pay beginning on July 1, 2003. Just two weeks later, which was also two weeks before Respondent issued his letter of discipline, Warden Bett rescinded the compensation award "due to performance and disciplinary concerns that have recently come to light." Even though the rescission of the increase occurred in a document that was separate from the demotion, it preceded the demotion and was clearly imposed for the same reasons as the demotion. The Commission believes that under these circumstances, it is an appropriate factor to consider when weighing whether the demotion was excessive or reasonable.

The Commission finds that Respondent's decision to demote the Appellant was excessive discipline in light of the circumstances noted above and modifies the discipline to a twenty-day suspension.

Dated at Madison, Wisconsin, this 14th day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate in the consideration of this matter.

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