

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SCOTT DILLMAN, Appellant,

vs.

STATE OF WISCONSIN,
DEPARTMENT OF CORRECTIONS, Respondent.

Case 45
No. 65092
PA(adv)-81

Decision No. 31545-B

Appearances:

Scott Dillman, appearing on his own behalf.

Debra Rychlowski, Attorney, Department of Corrections, appearing on behalf of the Respondent.

DECISION AND ORDER

This case is before the Wisconsin Employment Relations Commission on an appeal of a five-day suspension without pay issued to Scott Dillman by the Department of Corrections on August 1, 2005. In a pre-hearing conference conducted on September 27, 2005, the parties stipulated to the following formulation of the issues:

Was there just cause for the five-day suspension imposed on Scott Dillman by the letter of August 1, 2005? If not, what shall the remedy be?

A hearing was conducted at the Dodge Correctional Institution in Waupun on January 10, February 14, and February 28, 2006, before Examiner Marshall L. Gratz, a member of the Commission's staff. The hearing was tape-recorded. The parties summed up their cases orally at the conclusion of the testimony on February 28, 2006, whereupon the record was closed.

On March 8, 2006, Dillman e-mailed the Examiner requesting that the record be reopened for the purpose of receiving evidence regarding an incident allegedly occurring on March 6, 2006. DOC's principal representative responded in opposition to the request to reopen, and the Examiner advised the parties later on March 8, 2006, that the request would be ruled upon at a later date. That request is ruled on as a part of this decision.

On April 30, 2008, a provisional proposed decision and order was issued in this matter, along with a transmittal letter stating that as a prevailing party Dillman has the right to submit a request for costs and fees under Sec. 227.485, Stats. Dillman filed a timely request for costs and fees on May 2, 2008, and DOC filed a timely response to that request on May 17, 2008.

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Dillman thereafter requested and was granted additional time to reply to DOC's response. Dillman submitted his reply on May 19, 2008, which constituted the final submission of the parties on the issue of costs and fees. Dillman's request for costs and fees is ruled on as a part of this decision.¹ The examiner issued a proposed decision on May 29, 2008. No objections were filed by the due date of June 29, 2008.

The Commission has adopted the proposed decision with modest modifications. We have deleted the final conclusion of law and corresponding sections of both the order and the memorandum that addressed the question of whether this document should be excluded from public records disclosure, as this issue is not before us.² We have also altered the language of the order (and a portion of the memorandum) in the proposed decision to indicate that we are modifying, rather than either affirming or rejecting, the Respondent's action. These changes are designed to more clearly track the Commission's authority under Sec. 230.44(4)(c), Stats. Other revisions to the proposed decision are identified by footnotes.

On the basis of the record, the following Findings of Fact, Conclusions of Law and Order are issued.

FINDINGS OF FACT

1. Scott Dillman resides in Wisconsin. He began working for the Department of Corrections (DOC) in 1995. As of the close of the hearing in this matter on February 28, 2006, he remained employed by DOC as a Supervising Officer 1 at the Dodge Correctional Institution (DCI) in Waupun.

2. DCI provides initial intake/assessment for inmates in advance of their assignment for incarceration at one of several DOC correctional institutions. At all material times, the following individuals held the following managerial or supervisory positions at DCI: Cathy Jess, Warden; Mark Heise, Deputy Warden; Daniel Westfield, Security Director; Brian Tierney, Supervising Officer 2; and Herb Timm, Supervising Officer 2. Westfield was subsequently promoted to the position of DOC Security Chief. At all material times, Phil Briske was employed at DCI as a Correctional Sergeant.

¹ In addition to addressing Dillman's requests for costs and fees, Dillman's May 2, 2008, submission and DOC's response also included information and arguments on the questions of whether the remedies specified in the provisional proposed decision should be modified and as to what the precise dollar amount of any back pay due in this case should be. The Examiner advised the parties by e-mail on May 19 that submissions on those additional matters were outside the scope of Sec. 227.485, Stats., and therefore premature. The Examiner further advised the parties that disputes regarding the propriety and sufficiency of the relief ordered in the proposed decision are to be raised by the parties by way of objections to the proposed decision, after it is issued; and that any unresolved disputes regarding the dollar amount of any back pay due in this case are to be raised by motion after the Commission has issued its decision and order in the matter.

² We acknowledge that the version of this decision posted in an electronic format on the Commission's website may reflect various redactions. The Commission will consider the Wisconsin Public Records Law when deciding how copies of the decision may be disseminated. However, it is premature to decide those questions now because there is no pending request for a copy of the document and because the parties have not had an opportunity to offer their perspectives on the topic.

3. Dillman was praised by Westfield for the manner in which he conducted a planned use of force on inmate TT on April 11, 2005. On that occasion, inmate TT was periodically immersing his head in the toilet, splashing water on the floor of his cell and refusing staff commands that he put his hands outside the cell trap for handcuffing. On the videotape of Dillman's interaction with TT on that occasion, Dillman verbally warned TT that he would use OC [pepper spray, a chemical incapacitant also referred to as CN] unless TT put his hands outside the cell trap for handcuffing, and Dillman caused another officer to attempt to persuade TT to cooperate, before Dillman used OC on TT in that incident. Dillman used OC on that occasion without first having presented TT with a team suited up in protective gear. On that occasion, after Dillman used OC on TT, TT voluntarily put his hands out the cell trap to be handcuffed and was then moved to a different cell. In later praising Dillman for his handling of that use of force situation, Westfield did not tell Dillman that Westfield considered Dillman's failure to present TT with a suited up team before using OC to have been justified by the exigent circumstance that TT was likely to harm to himself by re-immersing his head in the cell toilet if the use of OC was delayed.

4. On August 1, 2005, Dillman was issued notice of a five-day suspension as follows:

This is to inform you that you are suspended without pay from your employment as a Supervising Officer 1 at DCI for a period of five workdays for violation of the following Department of Corrections work rules, which apply to all employees of the Agency and specifically prohibit:

#2 - Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy.

#4 - Negligence in performance of assigned duties

This suspension without pay will be in effect for your scheduled work shifts on August 23, 24, 25, 26, and 27, 2005. On these dates, you are prohibited from performing any work at DCI. You will be expected to report for your next scheduled work shift after August 27, 2005.

This action is based on the following facts:

On May 25, 2005, you responded to Unit 18 at the direction of Captain Brian Tierney and were informed that an inmate had covered his cell door window with paper. The inmate in this incident is your nephew. Prior to your arrival on the unit, Unit 18 staff had instructed this inmate to remove the paper covering the cell door window. Upon arriving on the unit, you made a decision that use of force was necessary to remove the inmate from his cell given the fact that his cell door window was covered, which prevented observation of the inmate by correctional officer staff. You called the Administrator on Call (AOC), Mark Heise, requesting to use force to move the inmate and further requested the use of OC [pepper spray] and the Ultron II Electronic Device [taser] if needed. You proceeded to the inmate's cell and instructed him to place his hands out his trap

to be handcuffed. When he refused to do so, you sprayed OC into his cell. The inmate then placed his hands out his trap to be handcuffed and was then removed from his cell and escorted by Officer staff to the Unit 18 shower.

You made a planned use of force decision. SIMP #22 [one of DOC's Security Internal Management Procedures] calls for a number of steps for planned use of force, including communicate with the inmate, ask one or more available people to communicate with the inmate such as an officer, a social worker, [etc.]; wait for a reasonable period of time, unless waiting would likely result in an immediate risk of harm to the inmate or to another person; make a show of force to the inmate. During the planned use of force, you failed to negotiate before or after issuing orders to the inmate. This is required in an attempt to gain voluntary compliance from the inmate. You further failed to allow other staff to attempt to engage the inmate in dialogue in an attempt to gain voluntary compliance. You failed to make a show of force. You failed to assign a minimum of four Officers to a cell extraction team, equip them in protective equipment and provide staff with instruction prior to the use of force. Having staff equipped in protective gear and present at the scene is another means to make a show of force. The failure to properly equip staff creates a risk to the safety of the inmate and those assigned to move the inmate. There was no evidence of an immediate risk of harm to the inmate or to another person, so waiting for a period of time was another option. A review of the videotape of the use of force incident shows that the inmate's cell window was no longer entirely obstructed when you proceeded with the use of force option. Although there was some residue of paper on the cell door window, there was adequate visibility into the cell.

Policy & Procedure #421.5. Videotaping Use of Force Incidents, provides for certain interaction at the incident site. First it states, "Negotiation/show of force (presence/dialogue): depiction of overall scene including the show of force and negotiation attempts by supervisor and other staff". This was not documented on the video tape. Second the policy states, "Order to comply (presence/dialogue): clearly issue an order to the inmate to comply and inform the inmate of what action will be taken if inmate fails to comply". Although you can be heard giving the order to comply, you did not complete your sentence in informing the inmate what action will be taken if he fails to comply. Third it states, "Final negotiation attempt: Security Supervisor attempts a final negotiation with the inmate". After giving the order to comply, you proceeded to spray CN [pepper spray also referred to in this decision as OC] into his cell without any final negotiation attempt. At the pre-disciplinary meeting you stated that the order to comply was your negotiation.

During the videotape of the incident, the inmate was heard to make numerous comments relative to his relationship to you, you exceeding your authority, and threatening you with bodily injury. These comments were first made prior to

your having used force. At this point, given your relationship to this inmate and that your presence may have been an escalating factor in this situation, you could have waited and called Captain Tierney to make a negotiation attempt. During the investigation you stated that you did not hear the inmate's comments as you were not listening to him and "tuned him out". Your statement suggests that you were not paying attention to potentially relevant information, and thereby preventing interaction which may have been appropriate or necessary in negotiation.

The inmate in this incident is your nephew. Prior to this incident, you informed your supervisor via email of this familial relationship, describing your nephew as an "ass". A special placement need was approved. You were previously verbally instructed by your supervisor, Security Director Dan Westfield, to limit your involvement in decisions and interactions regarding this inmate and defer to another supervisor when possible. Though Capt. Tierney was aware of the familial relationship on May 25, 2005, you did not raise the issue of this relationship or Mr. Westfield's direction to you with Capt. Tierney when asked to respond to the situation on unit 18, or later when you determined that a planned use of force was required. You also failed to bring this relationship or Mr. Westfield's direction to the attention of AOC Heise when requesting the use of incapacitating agents and electronic devices. The Department of Corrections Force Option Continuum was not followed in this situation. You had the opportunity to plan the use of force, review with your shift supervisor and the AOC whether your dealing with this inmate was appropriate given the familial relationship and direction from the security director, and follow established policies and procedures. It is also of concern that throughout this close review and questioning of your actions in the incident, that you did not come to realize any errors in your actions and maintain that you acted appropriately. It is further disturbing that during your interviews regarding this incident, you made remarks that if you had thought you did anything inappropriate that the videotape of the incident may not have been submitted to management.

Further violations of DOC work rules will result in progressively more severe discipline and could result in termination of your State employment. You may appeal this action through the Wisconsin Employment Relations Commission (WERC).

5. At all times prior to the issuance of the suspension notice set forth in Finding of Fact 4, above, Dillman's employment record was free of any disciplinary action, and his evaluations stated that Dillman uniformly met expectations on all evaluation criteria and received positive comments in several respects.

6. Dillman's duties as a Supervising Officer 1 - Line Lieutenant are summarized in his position description as follows:

POSITION SUMMARY

Under the direction of the Shift Captain (Supervising Officer 2) and general supervision of the Security Director, this position is responsible for security, discipline, custody, control and rehabilitation of inmates at Dodge Correctional Institution (DCI). DCI is a maximum-security correctional institution, housing adult male and female offenders. This facility is the central reception center and is responsible for other centralized functions such as the Infirmary, Central Transportation Unit, Central Records, and some County jail Contract Facilities. In addition, this position will have primary responsibility for the supervision and work assignments of Officers and Sergeants on the assigned shift.

7. JV is Dillman's nephew. JV had previously been incarcerated at DCI in July of 2003. At that time, after receiving an incident report from Dillman reporting that JV had recognized Dillman and said hello to him inside DCI, Westfield requested that JV be separated from DCI to a different institution, based on the relationship between JV and Dillman. JV was subsequently separated from DCI on that basis.

8. On Sunday, May 15, 2005, at 3:20 PM, Dillman e-mailed Westfield as follows:

JV has been revoked and returned to Wisconsin from absconding and other charges. He is currently on Unit 10 and seems to enjoy being known as my Nephew, he is an ass and I would appreciate it if he is removed from DCI ASAP before I have to deal with him.

. . .

9. On Tuesday, May 17, 2005, at 6:01 PM, Westfield e-mailed Captain Herbert Timm and Kathy Nagle of DOC as follows:

Captain Timm please initiate an SPN [a DOC form requesting Special Placement of an offender, e.g., at a physically separate facility from a DOC staff member] and see me on this inmate. Kathy please note Lt. Dillman's concerns with his nephew. Could you move him up the ladder as a priority to move due to staff conflicts.

Dillman was not copied on that e-mail. However, on or about May 19, 2005, Westfield spoke with Dillman, told him that Westfield was acting on his request for JV's separation and told him to limit his involvement in decisions and interactions regarding JV and defer to another supervisor when possible. Dillman responded that he would treat JV the way he would treat any other inmate. Westfield did not tell Dillman that Dillman's response was inconsistent with Westfield's expectations for Dillman as regards JV.

10. On May 18, 2005, Timm issued an investigation report and recommendation that JV be separated from DCI "at the soonest possible time" because "JV is the nephew of

Lt. Dillman and [it] appears there would be conflicts between the two." Westfield signed off on Timm's report and recommendation the same day. However, as of May 25, 2005, JV had not been separated from DCI because Westfield chose to allow JV to remain at DCI until an expedited re-entry assessment on him was completed.

11. On May 25, 2005, the following events occurred:

a. During the course of a check of inmate telephone usage, Dillman found that several inmates, including JV, had made calls in excess of applicable DCI policy limits. Dillman issued a written notices to various inmates, including a written notice to JV that JV was being placed on a 30 day loss of phone use restriction on account of JV's having made 10 calls in a 10 day period while he was in segregation status that limited him to one call per week.

b. JV was reported to have loudly threatened to kill Dillman upon JV's release from custody, on account of Dillman's having imposed a loss of phone use restriction on JV.

c. JV was observed cutting himself on the forearm with a blade from a broken razor, resulting in his being moved to Unit 18, the segregation unit.

d. Once in Unit 18, JV loudly protested that Dillman's imposition of a 30 day loss of phone use restriction for a first violation of the phone use policy was an abuse of authority by Dillman and that JV intended to kill Dillman when JV was released.

e. JV covered his cell window with paper, repeatedly refused requests by multiple Unit 18 staff to put his hands through the cell trap to permit him to be handcuffed and removed to a different cell, and loudly and repeatedly stated that incapacitating agents had no adverse effect on him and that the staff was going to have to suit up in protective garb and come in and physically remove him from his cell, and that when staff entered the cell JV was going to take off the staff's head.

f. Unit 18 Sgt. Phil Briske contacted the ranking line supervisor on duty, Capt. Brian Tierney by phone and informed him of the situation regarding JV described in Finding of Fact 11.e., above. Tierney replied that he would have Lt. Dillman attend to the problem, even after Briske reminded Tierney that JV was Dillman's nephew. Tierney then contacted Dillman and told Dillman that his nephew JV was refusing to remove paper from his cell window and that Dillman was to go to Unit 18 and deal with the problem because Tierney did not want to do so. Dillman responded that Dillman had had problems with JV in the past, but Tierney remained insistent that Dillman attend to the problem rather than Tierney. Finally, Dillman, who seemed to Tierney to be a little

upset, stated "fuck it I'll go." Dillman did not inform Tierney during that conversation that Westfield had told Dillman to limit his involvement in decisions and interactions regarding JV and defer to another supervisor when possible.

g. Upon arriving at Unit 18 and conferring with staff at that location, Dillman was apprised by Unit 18 staff of the situation regarding JV described in Finding of Fact 11.e, above. Dillman then contacted Tierney and asked Tierney to contact Heise for permission authorizing Dillman to use intermediate weapons to facilitate moving JV from the cell with the papered window. Tierney told Dillman to contact Heise for that purpose so that Heise would have the benefit of Dillman's answers to any questions about the situation that Heise might have. Dillman then contacted Heise and requested permission to use, if necessary, a chemical incapacitant pepper spray (referred to herein as CN or OC) and an electronic taser device, for the purpose of moving JV from the papered-window cell to a cell in which he could reliably be observed by staff. Heise granted Dillman permission to use those weapons for that purpose. Heise did so without knowledge that JV was Dillman's nephew and without knowledge that Westfield had told Dillman to limit his involvement in decisions and interactions regarding JV and defer to another supervisor when possible.

h. At Dillman's direction, Sgt. Briske began videotaping the actions taken by Dillman and the other officers as regards what was to be a planned use of force on JV.

i. At the outset of the videotape, Dillman stated that the planned use of force was necessary because JV had covered his cell window with paper, had been observed earlier in the day attempting to cut himself, and had threatened to take staff's heads off. Dillman stated on the tape that he had requested and obtained permission from Heise to use taser and OC weapons, if necessary, for the purposes having JV "take down his stuff" and of putting JV into control status. After a brief period of time when the videotape recorder was mistakenly turned off, the recording resumed. At the cell location, the videotape showed that approximately 80% of the vertical cell window was no longer covered by paper and that paper was therefore no longer preventing staff from viewing the inside of JV's cell. Dillman did not refer to the changed condition of the paper and window on the videotape. With the cell trap closed, Dillman ordered JV to put his hands out the cell trap so he could be handcuffed. JV did not comply. Dillman then opened the cell trap. JV responded by quickly moving to the end of his cell away from the door, covering himself with clothing and blankets and shouting that Dillman was abusing his authority. Dillman again ordered JV to put his hands out the cell trap and immediately sprayed two short bursts of OC into the cell. Dillman then directed that a different OC canister should be obtained due to difficulty Dillman was having in getting longer bursts of OC from the can he had. While Dillman was waiting to obtain the substitute canister, JV -- who was by that time coughing -- stated that he was now willing

to put his hands through the trap for handcuffing. Dillman thereupon directed his assisting officers to handcuff and move JV to the shower, which was done, and Dillman called Tierney and reported those developments.

j. Dillman did not cause a team to suit up in protective gear before he used OC on JV, and did not have a suited up team present when he used OC on JV.

k. Dillman did not clearly state to JV that Dillman intended to use OC on JV if JV did not put his hands out the trap to be handcuffed. However, JV's conduct in moving away from the door and covering his head and body with blankets and clothing indicate that JV was aware that Dillman intended to use OC if JV did not put his hands out the trap as directed.

l. Dillman did not use a team of suited-up officers as a show of force before he used OC on JV. Dillman's opening the trap with OC canister in hand constituted a show of force.

m. Dillman did not have another person attempt to negotiate with JV in Dillman's presence before he used OC on JV, and Dillman did not refer on the videotape to the fact that other officers had attempted to negotiate with JV prior to Dillman's arrival at Unit 18.

n. Dillman did not negotiate with JV before he used OC on JV.

o. Dillman did not wait a reasonable period of time as a means of encouraging voluntary compliance by JV with Dillman's order that JV put his hands outside the trap to be handcuffed, before he used OC on JV.

p. Once JV was placed in the shower cell, JV removed and gave his clothes to the officers, refused to take a shower, was examined by a nurse, and then refused to put his hands out the trap so he could be handcuffed and moved to another cell. During this time, JV shouted that Dillman had abused his authority, that JV intended to kill Dillman when he was released from incarceration, and various personal criticisms and insults directed at Dillman, including references to their familial relationship. After several minutes, Dillman again called Tierney, and told Tierney to personally come to Unit 18 to deal with JV because JV was refusing to voluntarily leave the shower cell and was making threats and taunts directed at Dillman and their relationship. At that point, Tierney decided to go to the site of the incident personally. Tierney arrived, engaged JV in conversation, directed that a team of staff officers suit up in protective gear and threatened JV with restraints if he did not cooperate. JV then agreed to be handcuffed and to be voluntarily moved to a different cell, which was done.

q. Because JV was confined in a segregation unit cell and because most of the paper had been removed from the window of that cell before

Dillman used OC on JV, none of the circumstances extant at the time Dillman used OC on JV made waiting a reasonable period of time or waiting for other steps to be taken before using OC on JV likely to result in an immediate risk of harm to JV or to any other person.

12. On May 26, 2005, Westfield forwarded a copy of Dillman's May 15, 2005, e-mail noted in Finding of Fact 8, above, to Jess and Heise, with the following message added:

I have initiated the process to expedite his movement. If there are issues between you and him we need to discuss and I will assign another Supervisor to handle.

Although that additional message also appears to have been intended as a response to Dillman's May 15, 2005 e-mail, Westfield's May 26 message shows no copy going to Dillman.

13. Also on May 26, 2005, Westfield approved the loss of phone use restriction imposed by Dillman on JV the previous day. However, on May 26 or 27, Westfield told Dillman that Dillman probably should not have involved himself in writing up JV for violating the phone use policy.

14. Also on May 26, 2005, JV was separated from DCI to another DOC facility. The normal time from intake at DCI through assessment, reassignment and separation from DCI to the assigned facility is at least six weeks. However, the assessment and reassignment processes can be expedited and completed within a substantially shorter period of time; and, in emergency circumstances, inmates can be separated from DCI immediately and temporarily reassigned elsewhere until the assessment and reassignment processes are completed. In one case, a relative of Westfield's was separated within three days after arrival at DCI for intake.

15. On May 27, 2005, Jess notified Dillman in writing that he was being placed on administrative leave with pay "pending the outcome of an investigation into a use of force incident that occurred on the evening of May 25, 2005." Dillman was returned to his normal duties effective on Wednesday, June 1, 2005.

16. On June 1, 2005, Westfield e-mailed Dillman as follows:

FW: Use of [Force] Policies and Procedure

. . .

Attachments: 4-5-15.doc; 421-5.doc

Per our conversation I am forwarding the attached policies and procedures to be reviewed by yourself to insure correct steps are taken during use of force situations. Pre-planned use of force requires you assign staff to a cell extraction team, have staff don protective equipment and brief the team on the situation prior to the incident. You should also utilize Psychological Services Staff, Correctional Officers or other staff, as available or appropriate, to attempt to establish dialogue with the inmate if attempts are failing to gain compliance unless circumstances would require immediate action be taken.

The following SIMPs establish DAI [Division of Adult Institutions] requirements for use of force situations and should also be reviewed

- SIMP #22 Use of Force
- SIMP #25 Videotaping Use of Force Incidents
- SIMP #40 Intermediate Weapons

If you have any questions or seek clarification surrounding these we should discuss.

. . .

17. SIMP #22 regarding "Use of Force," cited in the instant suspension notice as having been violated by Dillman, was a DOC policy in effect at all material times, which read in pertinent part as follows:

. . .

III. USE OF NON-DEADLY FORCE

Non-deadly force may be used by correctional staff only if the user of force reasonably believes it is immediately necessary to realize one of the following purposes:

. . .

- F. to change the location of an inmate;
- G. to control a disruptive inmate
- H. to enforce . . . an order of [a] staff member.

. . .

V. PROHIBITED ACTS

Excessive force, corporal punishment, verbal or any other form of abuse is prohibited.

VI. NON-EMERGENCY SITUATIONS

If the situation allows for a "planned use of force" . . . , the following steps shall be taken if feasible:

- A. Communicate with the inmate;
- B. Ask one or more available people to communicate with the inmate, such as a[n] officer, a social worker, a crisis intervention worker, a member of the clergy, or a psychologist or psychiatrist;
- C. Wait for a reasonable period of time, unless waiting would likely result in an immediate risk of harm to the inmate or to another person;

- D. Make a show of force to the inmate;
- E. Use empty hand control.

VII. FORCE OPTION CONTINUUM [defined in II.f. as "a systematic progression of force based on the perceived level of threat. This includes presence, dialogue, empty hand control, intermediate weapons, and deadly force." Sec. VII sets out a table specifying tactics and techniques for each of those five force modes, and concludes "Each individual incident will need to be evaluated as to what type of force is needed."]

18. DCI Procedure Number 421.5, regarding "Videotaping Use of Force Incidents, cited in the instant suspension notice as having been violated by Dillman, reads, in pertinent part, as follows:

...

B. Interaction: At Incident Site

1. Negotiation/show of force (presence/dialogue): Depiction of overall scene including the show of force and negotiation attempts by Supervisor and other staff.
2. Order to comply (presence/dialogue): Clearly issue an order to the inmate to comply and inform the inmate of what action will be taken if the inmate fails to comply.
3. Final negotiation attempt: Security Supervisor attempts a final negotiation with the inmate.
4. Take action (empty hand control, intermediate weapons): If inmate does not comply, direct staff to take action on video camera.
5. Action taken: Record use of force and restraint of inmate(s).

...

19. Also among DCI's policies and procedures in effect at all material times, but not cited in the instant suspension notice, is Procedure Number 405.14 regarding "Force, Use of (including Chemical Agents), which reads, in part, as follows:

...

POLICY: Effective immediately the following policy regarding use of force is established at the Dodge Correctional Institution.

As defined by Administrative Code DOC 306.06 -- Use of force, "Force" is the exercise of strength or power to overcome resistance or to compel another to act or refrain from acting in a particular way. It includes the use of chemical, mechanical and physical power or strength. Only so much force may be used as is reasonably necessary to achieve the objective for which it is used. The use of excessive force is forbidden.

...

PROCEDURE:

...

B. Protective Equipment - Use of Force

Whenever the use of force is required to control a situation, i.e., cell entry, use of protective equipment (helmets, jumpsuits, etc.) is mandatory. The supervisor in charge of the area is directly responsible to assure this mandate is followed. It is, of course, recognized that situations may arise that do not allow the time necessary to don this equipment; however, it is expected that these instances will be fully documented.

...

20. Tierney was not disciplined for having directed Dillman to deal with JV on May 25, 2005, or for having provided Dillman with the phone number at which to contact Heise for permission to use intermediate weapons on JV on that date.

21. The imposition of a five-day suspension without pay in this case has not been shown to constitute disparate treatment of Dillman as compared to DOC's treatment of other employees similarly situated.

22. The length of time taken between the May 25, 2005 incident and the August 1, 2005 suspension has not been shown to have resulted from an intentional DOC effort to disadvantage Dillman in his ability to defend his actions. Rather, it appears that management was giving detailed and careful consideration to the various aspects of this case before deciding how to respond to the incident.

23. Between the May 25, 2005 incident and the August 1, 2005 suspension action, Dillman filed both a grievance challenging the leave with pay imposed by DOC in the instant matter and a complaint to the Department of Workforce Development asserting that Dillman and other supervisors are entitled by law to premium pay for overtime worked. However, the record does not establish that any of the management personnel involved in the decision to discipline Dillman were in any way hostile to Dillman's filings, and neither the suspension nor its severity has been shown to have constituted retaliation by management for his having filed either of those documents.

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

CONCLUSIONS OF LAW

1. The Respondent has the burden to show, by a preponderance of the credible evidence, that there was just cause to impose discipline upon the Appellant and that the discipline imposed was not excessive.
2. The Respondent has met its burden to show, by a preponderance of the credible evidence, that there was just cause to impose discipline upon the Appellant.
3. The Respondent has not met its burden to show, by a preponderance of the credible evidence, that the discipline imposed was not excessive.
4. Just cause existed for imposing discipline upon the Appellant.
5. Just cause existed for imposing discipline in the form of a three-day suspension.
6. The five-day suspension imposed in this case was excessive.
7. The Appellant is a prevailing party in this matter.
8. Appellant is entitled to fees/costs incurred in connection with this case unless Respondent was substantially justified in taking its position or unless special circumstances exist that would make the award unjust.
9. Respondent has established that it was substantially justified in its decision to impose the five-day suspension that Respondent issued to Appellant in this case.
10. Appellant is not entitled to fees/costs under Sec. 227.485, Stats.

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

ORDER³

1. The five-day suspension is modified to a written reprimand in lieu of a three-day suspension and the matter is remanded for action in accordance with the decision.

³ The Commission has modified paragraph 1 from the proposed decision and deleted paragraph 2 so as to reflect the parties' agreement that a reduction in the duration of what had been a five-day suspension requires issuing it as a reprimand in lieu of a suspension. We are also keeping the case file open to insure there are no disputes relating to the scope of the remedy.

2. Dillman's March 8, 2006, request to reopen the record to adduce additional evidence is denied.

3. Dillman's request for costs/fees is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

DEPARTMENT OF CORRECTIONS (Dillman)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The Appellant's Appeal

The Appellant filed the following appeal:

August 9, 2005

Re: Discipline Received

To whom it may concern,

On 08/01/05 I received a 5 day suspension without pay beginning 8/23/05 ending 8/27/05. I allege that this discipline was without just cause, arbitrary, capricious, retaliatory and excessive. I have included the Disciplinary letter and will now summarize some of the reasons I believe the decision was wrongly imposed. Inmate JV should never have been at my worksite and should have been moved prior to my having to deal with him. The Department was negligent in allowing him to remain at DCI as he had 2 Separation by Institution placed on him to separate him from me, see enclosed. If the Department would have followed its policy this situation would have been avoided.

Mr. Westfield stated that I was to defer to another Supervisor when possible. As I was directed to handle the situation by a Supervising Officer 2 I followed the Departments own procedures see Supervisors handbook chapter 403 2 Reasonableness "When an employee thinks a rule or order is unreasonable, he or she generally must follow the "work now, grieve later" principle. Employees can question an order but unless they believe obeying it would endanger their health or safety or that of other employees, employees should obey the order and file a grievance afterward". Since I had no reason to believe that following the order of my lead worker would result in any injuries I carried out the directive of my superior officer.

The imposed discipline does not meet the definition of progressive discipline in that I have never received any discipline as an employee of the Department and my PPD's [performance evaluations] reflect above average work standards.

Mr. Westfield gave me counsel for the same incident see enclosed e-mail from Mr. Dan Westfield Security Director to me dated June 1, 2005. So I was effectively disciplined twice for the same incident.

The criteria for just cause.

Forewarning:

The discipline letter states that I did not follow the use of force policy SIMP 22 in part that I did not have staff in protective equipment but on 4/11/05 I was told by the Security Director that the use of force was excellent, the SD also stated during the investigatory that the "one I did prior was perfect and that he would use it for training". I used basically the same procedures for both incidents. I was given the impression by my supervisor that my actions were appropriate thus I had the expectation that what I had done was an expected performance.

Reasonableness; I allege that the rule violation was not reasonable, my support for that is the Department's own Draft of the changes being made to SIMP 22 see enclosed page 6 of 6 the use of Incapacitating agents used to overcome active resistance, or its threat. Offender made numerous threats to resist.

Consistency;

DCI has not disciplined other Supervisors who violated some of the same policies that I was found guilty of. Specifically they have not provided discipline to Supervisors who have violated the DCI policy 417.4 on restraints, use of to immobilize inmates. Specifically no Supervisor has had Staff don protective gear specifically to place an Inmate in Restraints. Most incidents where inmates are immobilized have occurred without the required videotaping.

Degree of Discipline;

Should not be more severe than what is necessary to influence the employee to correct the behavior. Since Mr. Westfield's Counsel I have had no further alleged incidents of policy violations or acts of negligence. Since the Counsel was over 2 months ago and I have had no further alleged violations it is safe to assume that once notified of the expected behavior I have altered my performance.

Timeliness; There were 66 days from the date of the alleged violation to the imposition of the 5 day suspension without pay.

Retaliatory; The disciplinary suspension was not administered until after I filed a grievance on being placed on Leave with pay, and after I filed a complaint with the Department of Workforce Development. I find the coincidence of the timeliness of the decision, severity, the fact I was disciplined twice for the same incident and the consistency of applying discipline for the same or similar violations to be disturbing.

Supervisors at DCI and throughout the Department have received Written Reprimands in-lieu of Suspensions without pay and I question why I was not afforded this opportunity.

I am requesting that the Suspension without pay and all references to the discipline be removed from my file and the cessation of the retaliatory action by the Department; or That the Suspension be after a hearing on the validity of the discipline imposed; or

That the Discipline to be changed to reinstatement to my former permanent position and appropriate pay;

. . .

That appeal was received by the Commission on August 10, 2005.

Applicable Legal Standards

This matter arises under Sec. 230.44(1)(c), Wis. Stats., which provides:

(c) *Demotion, layoff, suspension, or discharge.* 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.

On appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. This involves a three-part analysis wherein it must be shown by the greater weight (i.e., preponderance) of the credible evidence that 1) the employee committed the acts for which the discipline was imposed, 2) the acts, if proven, constitute just cause for the imposition of discipline and 3) the discipline was not excessive. *DEL FRATE V. DOC*, DEC. NO. 30795 (WERC, 2/04).

Just cause may be determined by “. . . whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair [the appellant's] performance of the duties of his position or the efficiency of the group with which [the appellant] works.” *SAFRANSKY V. PERSONNEL BOARD*, 62 WIS.2D 464 (1974), *BARDEN V. UW*, 82-237-PC, 6/9/83.

Where, as here, a correctional setting is involved, proof of a violation of a work rule is, per se, evidence of a tendency to impair performance of duties or efficiency of the work group. *DEL FRATE V. DOC*, supra, at 13, citing *ENGLAND V. DOC*, Case No. 97-0150-PC (Pers. Comm 9/23/98) (“It is axiomatic that violation of an employer work rule, particularly one relating to a serious matter such as theft, particularly by a supervisor, and particularly in a correctional setting where employees are expected to model appropriate behavior for inmates, tends to impair the performance of the duties of appellant’s position or the efficiency of the group with which he works.” Id. at 7.)

Did the Appellant engage in the conduct alleged in the suspension notice?

The following outline attempts to enumerate the alleged conduct for which Dillman was disciplined. The bracketed notation following each allegation indicates whether Respondent has established by a preponderance of the credible evidence in the record⁴ that Dillman engaged in that conduct. Explanatory comments regarding some of those notations are noted below the outline.

Outline of conduct for which Dillman was disciplined

1. Applied force by means of an intermediate weapon (OC) even though there was no immediate risk of harm to JV or to someone else because the window was no longer so covered with paper as to prevent visibility into the cell. [established by Respondent]
2. Failed to negotiate before or after issuing order to JV. [established by Respondent]
3. Failed to have other staff attempt to engage JV in a dialogue. [established by Respondent]
4. Failed to make a show of force. [NOT established by Respondent].
5. Failed to make a show of force in the form of a suited-up cell extraction team. [established by Respondent]
6. Failed to assign a minimum of 4 officers to a cell extraction team. [established by Respondent]
7. Failed to equip the team in protective equipment. [established by Respondent]
8. Failed to provide extraction team with instructions prior to the use of force. [established by Respondent]
9. Failed to wait a reasonable period of time before using OC even though there was no immediate risk of harm to JV or to someone else because the window was no longer so covered with paper as to prevent visibility into the cell. [established by Respondent]
10. Failed to document via videotape negotiation with JV. [established by Respondent]
11. Failed to document via videotape the show of force. [NOT established by Respondent]
12. Failed to document via videotape the overall scene. [NOT established by Respondent]
13. Failed to document via videotape clearly issuing an order for JV to

⁴ The record developed over the three days of hearing in this case included videotapes of several use of force incidents, some involving Dillman and some involving other supervisors. DOC presented testimony by Westfield, Hable, Heise and Jess. Dillman presented his own testimony and testimony of Briske, the latter being taken by telephone.

14. Failed to document via videotape informing JV what action would be taken if he failed to comply. [NOT established by Respondent]
15. Failed to document via videotape engaging in a final negotiation attempt. [established by Respondent]
16. Failed to listen to JV's statements during the incident by "tuning him out." [established by Respondent]
17. Failed to insist that Tierney go to Unit 18 rather than agreeing to go himself, given his family relationship, Tierney's directive (described in Finding of Fact 9, above,) and JV's agitation directed at Dillman personally. [established by Respondent]
18. Failed to request that Heise assign another supervisor to deal with JV rather than requesting permission to use intermediate weapons, given his family relationship, and Tierney's directive. [established by Respondent]
19. Failed to raise (to Tierney) the issue of his family relationship with JV when Tierney directed him to go to Unit 18 to deal with JV. [NOT established by Respondent]
20. Failed to raise (to Tierney) Westfield's directive when Tierney directed him to go to Unit 18 to deal with JV. [established by Respondent]
21. Failed to raise (to Tierney) the issue of his family relationship with JV once Dillman determined that a planned use of force was required. [NOT established by Respondent]
22. Failed to raise (to Tierney) Westfield's directive once Dillman determined that a planned use of force was required. [established by Respondent]
23. Failed to raise (to Heise) the issue of his family relationship with JV when getting permission from Heise to use intermediate weapons. [established by Respondent]
24. Failed to raise (to Heise) Westfield's directive when getting permission from Heise to use intermediate weapons. [established by Respondent]

Regarding allegation 1 and 9, above, although JV had earlier that day been found injuring himself with a weapon, and although JV had threatened to take the head off of any staff member who attempted to remove him from his cell, when Dillman first arrived at Unit 18, JV was in segregation where he would not have had a razor available to him, and there was no apparent immediate threat of harm to JV or others if JV remained in his cell with paper covering the window for an additional period of time.

By the time Dillman returned to JV's cell with the videotape running, most of the paper had been removed from the window restoring staff's ability to view JV. It is true that JV may have removed most of that paper in order to see what Dillman and the other staff were doing or about to do, and that JV could have reapplied paper to the entire window if he were not moved to control status in another cell. However, those considerations do not justify the use of

Regarding allegations 2, 10 and 15, the videotape of the May 25, 2005 incident, shows that Dillman's communications were limited to twice directing JV to put his hands outside the cell trap, and, spraying OC into the cell just as Dillman was concluding giving the second command. Dillman's contention that his commands constituted negotiation are not persuasive.

Regarding allegation 4 and 11, Dillman made a show of force in the forms both of his presence and his possession of the OC canister. For proof of conduct purposes, then, Respondent has not proven that Dillman failed to make a show of force. The question of whether the applicable DOC procedures required Dillman to make a show of force in the form of a suited up cell extraction team is discussed in some detail in the next section of this Discussion.

Regarding allegation 14, as noted in Finding 11.k., Dillman did not clearly state to JV that Dillman intended to use OC on JV if JV did not put his hands out the trap to be handcuffed. The allegation is therefore satisfactorily proven even though JV's conduct in moving and turning away from the door and covering his head and body with blankets and clothing indicate that JV was aware that Dillman intended to use OC if JV did not put his hands out the trap as directed.

Regarding allegation 17, the record amply supports this allegation in all respects, including the fact that JV was agitated (at Dillman personally) when Dillman arrived at Unit 18. However, the suspension notice over-broadly asserts what the videotape showed in that regard where it stated "These comments [by JV on the videotape relative to his relationship to Dillman and to Dillman exceeding his authority and threatening Dillman with bodily injury] were first made prior to your having used force." Prior to Dillman's use of OC on JV, JV made only one such comment on the videotape, which referred to Dillman exceeding his authority. That comment may have been a reference to Dillman's anticipated use of OC rather than to Dillman's earlier issuance of a phone use limitation against JV.

Regarding allegations 19 and 21, while Dillman did not affirmatively raise the issue of his relationship with JV with Tierney, there was clearly no occasion or need for him to do so since -- as confirmed in Westfield's interview of Tierney (Ex. 23, at p.1 para. 3) --Tierney told Dillman that he knew JV was Dillman's nephew when he directed Dillman to deal with JV on Unit 18.

Conclusion regarding proof of conduct alleged. As reflected in the bracketed comments, above, the Respondent has satisfactorily proven that Dillman engaged in most, but not all, of the alleged conduct for which he was disciplined.

Was some level of discipline warranted?

The next question is whether the proven conduct on Dillman's part noted above

warranted the imposition of discipline of any kind.

The record establishes that Dillman's proven conduct, above, violated (or did not violate) DOC work rules and procedures, as noted in the bracketed comments that follow references to each of the proven conduct elements listed below. Comments regarding some of the violation determinations and regarding various other related issues follow the list:

Outline of Dillman's proven conduct

1. Applied force by means of an intermediate weapon (OC) even though there was no immediate risk of harm to JV or to someone else because the window was no longer so covered with paper as to prevent visibility into the cell. [violated SIMP #22 V. prohibiting use of excessive force, and VII. Force Options Continuum and Work Rule 2]
2. Failed to negotiate before or after issuing order to JV. [violated SIMP #22 VI.A. and Work Rule 2]
3. Failed to have other staff attempt to engage JV in a dialogue. [violated SIMP #22 VI.B. and Work Rule 2]

...

5. Failed to make a show of force in the form of a suited-up cell extraction team. [no work rule or procedure violation established]
6. Failed to assign a minimum of 4 officers to a cell extraction team. [no work rule or procedure violation established]
7. Failed to equip the team in protective equipment. [no work rule or procedure violation established]
8. Failed to provide extraction team with instructions prior to the use of force. [no work rule or procedure violation established]
9. Failed to wait a reasonable period of time before using OC even though there was no immediate risk of harm to JV or to someone else because the window was no longer so covered with paper as to prevent visibility into the cell. [violated SIMP #22 VI.C. and Work Rule 2]
10. Failed to document via videotape negotiation with JV. [violated Procedure 421.5 I.B.1. and Work Rule 2]

...

15. Failed to document via videotape engaging in a final negotiation attempt. [violated Procedure 421.5 I.B.3. and Work Rule 2]
16. Failed to listen to JV's statements during the incident by "tuning him out." [violated SIMP 22 VI.A., Procedure 421.5 I.B.1. and 3 and Work Rule 2]
17. Failed to insist that Tierney go to Unit 18 rather than agreeing to go himself, given his family relationship, Tierney's directive, and JV's

agitation directed at Dillman personally. [violated Work Rule 4]

18. Failed to request that Heise assign another supervisor to deal with JV rather than requesting permission to use intermediate weapons, given his family relationship, and Tierney's directive. [violated Work Rule 4]
- . . .
20. Failed to raise (to Tierney) Westfield's directive when Tierney directed him to go to Unit 18 to deal with JV. [violated Work Rule 4]
22. Failed to raise (to Tierney) Westfield's directive once Dillman determined that a planned use of force was required. [violated Work Rule 4]
23. Failed to raise (to Heise) the issue of his family relationship with JV when getting permission from Heise to use intermediate weapons. [violated Work Rule 4]
24. Failed to raise (to Heise) Westfield's directive when getting permission from Heise to use intermediate weapons. [violated Work Rule 4]

Regarding proven conduct 1, above, as noted earlier, when Dillman first arrived at Unit 18, JV was in segregation where he would not have had a razor available to him, and there was no apparent immediate threat of harm to JV or others if JV remained in his cell with paper covering the window for a period of time. Therefore, all of the SIMP #22 VI. steps for "planned use of force" were "feasible" for Dillman to have taken as regards the incident in question.

The fact that by the time Dillman returned to the cell with the videotape running JV had removed most of the paper from the window before Dillman used OC on JV, in all of the circumstances, undercuts Dillman's claims that at the time he used OC on JV the circumstances were such that Dillman could have "reasonably believed" that his use of OC was "immediately necessary" within the meaning of SIMP #22. Accordingly, Dillman's use of OC at the time he used it on JV on May 25, 2005 constituted "excessive force" violative of SIMP #22 V. and the Force Options Continuum in SIMP #22 VII. While some of the paper remained on the window and while JV presumably had paper with which he could have again papered the window, the fact that the staff's ability to see JV was restored removed the urgency for obtaining immediate cooperation from JV. While Westfield acknowledged that, as a general principle, inmates do not have a right to determine whether and when they will cooperate with staff's commands, Dillman's use of OC when he used it on JV was inconsistent with both the letter and the spirit of those SIMP #22 provisions.

Regarding proven conduct 2, Dillman's efforts to communicate with JV were quite truncated and perfunctory. He twice ordered JV to put his hands outside the cell trap and sprayed OC into the cell just as he was completing the second order.

Regarding proven conduct 5 and the related 6-8, Westfield and Hable testified that the presence of a suited-up team is the particular form of show of force that DOC staff are trained to utilize in planned use of force situations. Hable specifically asserted that an officer showing an OC canister to an inmate does not meet the IV.D. show of force requirement. In her testimony, Warden Jess stressed the importance for staff and inmate safety of suiting up a team before incapacitating agents are used in a planned use of force absent exigent circumstances. Tierney also confirmed in his interview statement (Ex.23 at 2) that he would ordinarily suit up a cell entry team when he uses incapacitating agents. Also, that particular form of show of force was utilized in some but not all of the videotape exhibits submitted into evidence.

On the other hand, SIMP #22 neither specifically defines the term "show of force" nor specifies that the show of force required by IV.D. must be in the form of presenting a team suited up in protective gear. DCI Procedure No. 405.14, quoted in Finding of Fact 18, does define "Use of force," and defines it as including "use of chemical agents." ⁵ Consistent with that definition, multiple witnesses, including some of the Department's witnesses, testified that a show of force can include a variety of procedures, including the presence of the officer and the presence of an OC canister. Dillman testified that prior to Westfield's June 1, 2005 post-incident memorandum, he had never been instructed that the presence of a suited up team was a necessary step to comply with the IV.D. show of force requirement if no cell extraction is contemplated. Dillman also testified that Westfield had praised him regarding his April 11, 2005 use of force in which a suited up team was not present when Dillman used OC on TT, calling it "perfect" and a videotape example Westfield would consider using in future training. On that point, Westfield acknowledged that he praised Dillman for his April 11, 2005 use of force because the quality and sensitivity of Dillman's interpersonal communications with TT had been outstanding. Westfield testified that he considered the TT situation to be one in which exigent circumstances could have warranted the application of OC without waiting for a suited up team to be present, but Westfield acknowledged that he did not tell that to Dillman or qualify his praise of Dillman in that regard. It can also be noted that Hable testified that in his opinion the TT situation did not present exigent circumstances that would justify not having a team suited up and present before OC was applied.

In that context, the DOC has not met its burden of proving that Dillman's failure to present a suited up team constituted a failure on his part to meet the SIMP #22 IV.D. show of force requirement in the instant circumstances. Dillman presented himself and the OC canister to JV and caused JV to understand that Dillman intended to use OC if JV did not put his hands outside the trap for handcuffing. While Dillman did not verbally warn JV that OC would be used if JV did not put his hands through the trap for handcuffing, JV's movement away from

⁵ DCI Procedure No. 405.14, also unequivocally mandates "use of protective equipment (helmets, jumpsuits, etc.)" "[w]henver the use of force is required to control a situation, i.e., cell entry . . .". However, because Dillman was not cited in the suspension notice for a violation of 405.14, a violation of its protective equipment provision is not properly at issue in this case.

and turning away from the cell door and his covering his face and body with cloth items confirm JV's understanding that OC use was imminent if he did not cooperate. In the context of Westfield's unqualified praise of Dillman's use of OC on TT, Dillman's failure to have a suited-up team present when he used OC on JV has not persuasively been shown to have violated the show of force requirement in SIMP #22 IV.D.

Regarding proven conduct 10, 15 and 16, a preponderance of the credible evidence also establishes that Dillman violated DCI policy and procedure 412.5 I.B.1. and 3. The videotape produced by Dillman did not depict or even refer to any previous negotiation attempt by other staff. The negotiation attempts by Dillman depicted on the videotape amount only to two commands that JV put his hands out the cell trap for handcuffing, without a verbal warning that OC would be used if he failed to do so.

Regarding Dillman's appeal defense that management's failure to more promptly remove inmate JV from DCI caused the incident to occur, the record establishes that Dillman requested that his nephew be separated from DCI by sending the e-mail to Westfield quoted in Finding of Fact 8 on Sunday evening, May 15, 2005. Westfield, in turn, requested by e-mail dated May 17, 2005, that JV be separated from DCI "as soon as possible" on account of the relationship and Dillman's request. Timm promptly responded with his investigation report and recommendation for JV's separation on May 18, 2005, and Westfield promptly signed off on that recommendation later that same day. However, JV was not, in fact, removed from DCI until the day after the developments on May 25 giving rise to the instant suspension. In that regard, Westfield testified that he made a judgment that -- given Westfield's verbal direction to Dillman to limit his decision-making and interactions with JV and to defer to another supervisor when possible, the constant availability of another supervisor, and Dillman's long history of reliability -- it would be possible to keep JV at DCI long enough for an expedited assessment process to be completed, rather than necessary to move JV on an immediate emergency basis.

On that point, Dillman testified that Westfield did not tell him to avoid all contact with JV, and that Westfield did not object when Dillman responded that he intended to treat JV like he would any other inmate. Westfield testified that he took Dillman's overall response to mean that Dillman would not allow his relationship to JV to create problems prior to JV's separation from DCI, and that he did not take Dillman's statement -- that Dillman would treat JV the same as he would treat any other inmate -- as resistant in any way to Dillman's directive, even though Westfield acknowledged that, on its face and in retrospect, Dillman's response was somewhat inconsistent with the directive.

All things considered, management bears some responsibility for allowing JV to remain at the same facility with Dillman through May 25 and for allowing Dillman to have interactions of any kind with JV while the two were at the same facility; but Dillman also bears significant responsibility for allowing the incident to occur, as well.

Specifically, Dillman: issued a phone privilege restriction order against JV rather than deferring to another supervisor; went to Unit 18 to deal with JV without telling Tierney that Westfield had told Dillman to limit interactions and decision-making regarding JV and to defer to another supervisor when possible; failed to withdraw from dealing with JV despite clear indications that Dillman's familial relationship with JV and Dillman's issuance of the phone privilege restriction were central to JV's acting out; requested and obtained permission to use intermediate weapons on JV without telling Heise that JV was Dillman's nephew or that Westfield had directed Dillman to limit and defer as regards JV; and used OC on JV rather than deferring to another supervisor in circumstances where it was possible to do so.

Regarding Dillman's appeal defense that he was duty-bound to comply with Tierney's order that Dillman deal with JV's refusal to remove the paper from his cell window, the evidence establishes that Tierney technically outranked Dillman, so that Dillman had reason to believe that Dillman needed to comply with work directives given him by Tierney. However, Dillman also had reason to believe that he needed to comply with the work directive given him by Westfield to limit his decision-making and interactions with JV and to defer to other supervisors if possible. Thus faced with conflicting directives, it seems reasonable in the circumstances for management to fault Dillman for not informing Tierney of Westfield's verbal directive when Tierney told Dillman to deal with the situation.

There is, however, a degree of fault attributable to the Department that arises from Tierney's insistence that Dillman attend to the problem given Tierney's acknowledgement to Dillman at the time that he knew JV was Dillman's nephew and given Dillman's having informed Tierney that he had had problems with JV in the past and Dillman's having "seemed upset" to have to deal with JV when Tierney directed him to do so on May 25, 2005. Exhibit 23 confirms that Dillman only reluctantly agreed to perform the task, where Tierney states that "Dillman seemed a little upset and stated fuck it I'll go." In that regard, Dillman's and Westfield's testimony and Tierney's self-reference on the videotape to the fact that he had only a short period of time remaining before retiring, confirm that Tierney was close to retirement and that he was not inclined to take challenging work tasks on himself if there were others available to perform them. There is also a degree of fault attributable to the Department that arises from Tierney's failure to relieve Dillman of Tierney's direction to deal with JV when Dillman's request for Heise's phone number put Tierney on notice that Dillman was requesting permission to use intermediate weapons on JV.

Regarding Dillman's appeal defense that Westfield had already issued an e-mail counseling Dillman about the incident prior to the issuance of the suspension, making the suspension an impermissible second penalty for the same incident, the evidence shows that the June 1, 2005 e-mail Westfield sent Dillman upon his return from his leave with pay for purposes of investigation was not the equivalent of a disciplinary action that renders the five-day suspension a double penalty for the same conduct. It is true both that the e-mail memo was issued to Dillman by his general supervisor immediately after Dillman had served a leave with pay for purposes of investigation of the May 25, 2005 use of force incident, and that

Westfield testified that the e-mail was intended to prevent future violations by Dillman of the policies referred to in the message. Nevertheless, Westfield's message contains no "cc:" to Dillman's personnel file, it did not state that it was intended to be disciplinary in nature, and it did not contain a warning of possible further disciplinary action in the event of future violations of the policies referenced. For those reasons, on balance, the record does not persuasively support Dillman's contention that the five-day suspension constituted a second disciplinary penalty for the conduct at issue in this case.

Regarding Dillman's appeal defense that Westfield's approving comments regarding Dillman's use of force on April 11, 2005 led Dillman to reasonably conclude that he would be complying with management's expectations if he conducted himself similarly on May 25, 2005, for reasons noted above, Westfield's unqualified praise for Dillman's handling of the TT situation is a significant factor in determining whether Dillman's failure to have a suited-up team present before using OC on JV violated the rules and procedures cited in the suspension notice and whether the penalty imposed in this case was excessive.

However, it can also be noted that there were several respects in which the videotape of Dillman's use of OC on TT materially differed from his use of OC on JV. Specifically, Dillman verbally warned TT that he would use OC unless TT put his hands outside the cell trap for handcuffing, and Dillman caused another officer to attempt to persuade TT to cooperate in Dillman's presence and on the videotape before using OC on TT in that incident. Furthermore, while the water on the floor of TT's cell continued to require moving TT to abate that hazard, the JV incident differed because enough of the paper covering JV's window had been removed by the time Dillman approached JV's cell armed with OC, so that staff were no longer prevented from viewing the interior of JV's cell.

Regarding Dillman's appeal defense that Dillman's use of force was reasonable in response to JV's numerous threats of active resistance, given draft changes of SIMP 22 that would authorize the use of incapacitating agents "To overcome active resistance or its threat", an unadopted draft is simply not a persuasive defense to alleged violations of rules and procedures which have been duly issued and put into effect.

Regarding Dillman's appeal defense that the instant suspension was imposed an unreasonably long 66 days after the alleged violation, it is true that 66 days passed between the incident giving rise to the suspension and the issuance of the suspension notice. However, the record shows management's efforts at investigation were not intentionally slowed in an effort to disadvantage Dillman in his ability to defend his actions and did not adversely affect Dillman's ability to do so. Rather, it appears that management was giving detailed and careful consideration to the various aspects of this case before deciding how to respond to the incident.

Regarding Dillman's appeal defense that the suspension was impermissibly retaliatory because it was imposed only after Dillman had filed a grievance regarding being placed on leave with pay and a complaint with the Department of Workforce Development (DWD), it is

true that the suspension was issued later in time than Dillman's filing of a grievance about the leave with pay and a DWD complaint about whether Dillman and other supervisors are entitled to premium pay for overtime worked. However, there is no other evidence suggesting that management was in any way hostile to Dillman's grievance and complaint filing, and the record therefore does not support Dillman's contention that the suspension or its severity constituted retaliation by management for his having filed either of those actions.

Conclusion regarding just cause for discipline. Upon consideration of all of the foregoing, both on the basis of the per se principle made applicable to correctional settings by the DEL FRATE and ENGLAND cases, supra, and upon a case-specific consideration of the above violations of DOC work rules and procedures, it is clear that those violations are such as would tend to impair the performance of the duties of Appellant's position and the efficiency of the group with which he works. Accordingly, the record establishes that just cause exists for the imposition of some measure of discipline for Dillman's proven misconduct in this case.

Was the level of discipline imposed excessive?

In this case, after learning from DOC HR personnel in Madison that there has been no past case closely enough paralleling this one to provide guidance regarding penalty, Heise recommended a suspension longer than five days, and Warden Jess ultimately imposed a five-day suspension without pay for Dillman's misconduct. Discussed below are various appeal defenses and other factors bearing on the question of whether a five day suspension was excessive in the circumstances.

Regarding Dillman's appeal defense that DOC has failed to utilize progressive discipline in this case, it is undisputed that Dillman had a long and positive work history entirely free of prior disciplinary actions and characterized by evaluations that found that Dillman uniformly met expectations on all evaluation criteria and received positive comments in several respects. That is a significant factor suggesting that the penalty imposed may have been excessive, but it is only one of many factors to be considered.

Regarding Dillman's appeal defense that the Department's imposition of discipline was discriminatory because supervisors guilty of similar misconduct have not been disciplined and because supervisors have received written reprimands in lieu of suspensions without pay in other instances, the record does not reveal any other incident in which a supervisor engaged in a planned use of force in circumstances where the precipitating reason for doing so had abated by the time the force was utilized, or where a supervisor remained involved in a situation in which his familial relationship with the inmate could reasonably be understood as exacerbating the inmate's unwillingness to cooperate with Department personnel, or where a supervisor allowed himself to become involved in decision-making with regard to a relative after having been directed by a superior officer to avoid such situations if possible.

On the other hand, the record does establish that the Department took no disciplinary action at all against Tierney for his having directed Dillman to deal with JV whom he knew to be Dillman's nephew and with whom he knew Dillman had had problems in the past, or for his having provided Dillman with Heise's phone number to enable Dillman to request Heise's permission to use intermediate weapons on JV. While the degree of fault attributable to Tierney is substantially less than that attributable to Dillman, the fact that management took no action at all regarding Tierney and failed to acknowledge any fault on Tierney's part factors that suggest that the five day suspension imposed on Dillman may have been excessive.

Regarding Dillman's appeal defense that the absence of any subsequent failure by Dillman to conform to the standards of conduct specified in Westfield's June 1, 2005 counseling e-mail shows the imposition of a more severe penalty was not necessary to achieve Dillman's compliance with those standards, the absence of any repetition of conduct of the sort for which Dillman was suspended between the time of the May 25, 2005 incident and the time of the August 5, 2005 suspension notice does not persuasively establish that no disciplinary penalty is warranted in this case. In that regard, the evidence shows that incidents prompting use of chemical incapacitating agents incidents are few and far between at DCI, generally. In addition, the fact that Dillman has asserted throughout the investigation that his actions on May 25, 2005 were entirely appropriate raises valid doubts about whether Dillman would conform his conduct to the Department policies cited in the suspension notice if he were merely warned verbally or in writing, rather than being suspended.

There are several other factors suggesting that the penalty may have been excessive.

As discussed above, while most of the rule and procedure violations alleged in the suspension notice have been found to have constituted violations, some have not.

In addition, management in general and Westfield and Tierney in particular bear some responsibility for the incident giving rise to the suspension.

While management caused JV to be transferred away from DCI, it chose not to do so until JV had been assessed, albeit on an apparently expedited timetable. Westfield made a judgment that problems between JV and Dillman could be avoided by simply verbally telling Dillman to avoid decision-making judgments regarding JV. However, when Dillman responded that he would treat JV the same as he would treat any other inmate, Westfield should have but did not advise Dillman that Westfield was directing Dillman to be more circumspect than that as regards interactions with JV.

Tierney chose to send Dillman to deal with a problem concerning an inmate whom he knew (and told Dillman he knew) to be Dillman's nephew. Tierney made that choice despite Dillman's having told him that Dillman had had difficulties with JV before and despite the fact that Dillman "seemed a little upset," stating, "fuck it, I'll go." That evidence rather clearly indicates that Dillman was not looking for an opportunity to punish JV or to use intermediate

weapons on JV; quite the contrary, the record makes it clear that Dillman responded to the problem at JV's cell reluctantly and contrary to his stated preference. The record establishes that Tierney not only chose to have Dillman initially respond in the circumstances, but he also chose to allow Dillman to remain involved even when Tierney learned that Dillman was requesting permission to use intermediate weapons. The record suggests that Tierney did so, at least in part, because Tierney was close to retirement and preferred not to exert himself in hands-on interactions with inmates if he could avoid it. Tierney could have personally gone to Unit 18 to deal with JV while having Dillman remain in reserve away from the incident site to conform with the standard mode of supervisory response to a second shift situation of this kind.

A further factor suggesting that a five-day suspension may be excessive are that Heise's penalty recommendation and Jess' penalty decision were made: without any recognition or acknowledgement of fault on the part of Tierney or Westfield in the circumstances; and without knowledge of the facts that, when Westfield directed Dillman to limit and defer his involvement with JV when possible, Dillman responded that Dillman would treat JV the same as he treats any other inmate and Westfield did not tell Dillman that Dillman's response was inconsistent with Westfield's expectations for Dillman as regards JV.

On the other hand, there are also several factors which suggest that a five-day suspension was not excessive.

Dillman's actions in this case could expose DOC to a civil suit for use of force in a manner inconsistent with DOC's established rules and procedures. Dillman's testimony before the Examiner reflected in various respects that Dillman prefers to brandish and, if necessary, use OC to gain compliance from noncooperative inmates without going to the time and trouble of following some of the steps called for in the SIMP #22 and videotaping procedures. While Dillman's preferred approaches may be more efficient in terms of saving him and his staff officers time, that improved efficiency comes at the price of increased risks of legal liability and other possible adverse consequences that the DOC rules and DCI procedures at issue in this case are designed to minimize.

In addition, JV was Dillman's nephew, and Dillman had been told by Westfield to limit his decision-making and interactions with JV and to defer to another supervisor where possible. Dillman should have informed Tierney and Heise of Westfield's verbal directive and should have informed Heise of his relationship to JV so that Tierney and Heise could make more fully-informed decisions about who should respond to the problem with JV in Unit 18 and whether the use of taser and OC weapons by Dillman on JV should be authorized.

Dillman should also have advised Heise when the removal of most of the paper from the cell window restored the staff's ability to observe JV. In that way, Dillman would have allowed Heise to make an informed decision regarding the continued justification for use of intermediate weapons in the changed circumstances.

As a supervisor, Dillman could reasonably be expected to have exercised better judgment than to allow JV to draw him into a use of OC in a manner inconsistent with DOC and DCI policies.

Upon reflection on his having been manipulated in that way by JV, Dillman -- as an experienced and accomplished officer and supervisor -- could also reasonably have been expected to acknowledge the shortcomings of his responses during the incident in question, rather than to stubbornly argue that he acted appropriately in all respects. Dillman could have acknowledged some degree of fault on his part while, at the same time, asserting -- as he did -- that management was also at fault in various ways for the incident.

Had he done so, Dillman might also have avoided making the unnecessary and inappropriate investigative interview comment to the effect that he might have chosen not to comply with DOC's videotaping policy if he had thought he was not acting in compliance with use of force policies. Even in the context of Dillman's additional investigatory interview assertions that the videotaping policies are often not followed by other supervisors, Dillman's statement left the disturbing impression that he would have violated those policies if he had thought that the tape of his use of OC on JV showed Dillman doing anything wrong.

All things considered, the imposition of a suspension in the circumstances is warranted, but a suspension in excess of three days is excessive.

Dillman's Request to Reopen the Record

The evidentiary presentations and oral closing arguments were concluded in this case on February 28, 2006.

On March 8, 2006, Dillman e-mailed the Examiner requesting that the record be reopened so that further hearing could be conducted for the purpose of receiving evidence regarding an incident described by Dillman as follows:

I have been informed that on 3-6-05 [later corrected to "3-6-06" in response to an inquiry from the Examiner] Lt. Laus was authorized by Warden Jess to enter an Inmates cell on Unit 18 with Staff in nothing more than jump suits "No Protective Suits" The Lt. did not have to even video tape the incident but after the Sergeant said ["]didn't you learn anything from Dillman["] decided to at least video it. This is just one more example of how the rules are bent/broken at DCI. I believe this incident should be investigated as it has direct correlation to my discipline.

DOC's principal representative responded in opposition to the request to reopen, as follows:

I have no knowledge what may or may not have occurred at DCI on March 6, 2006. DOC objects to the record being reopened. The parties agreed that the record would be closed at the last day of hearing on February 28, 2006. There

is an interest in having cases concluded. DOC would also request that the unsubstantiated allegations by Mr. Dillman be completely disregarded by WERC. While Mr. Dillman makes the allegation that this is another example of how rules are bent and/or broken at DCI, DOC disputes that there are any such examples in the record of this case.

Dillman responded by suggesting that a conference call with either the DCI Warden or a lieutenant could establish the relevant information. The Examiner advised the parties later on March 8, 2006, that he would take the request to reopen under advisement and rule upon it at a later date.

Some guidance for the resolution of this matter can be found in the Sec. 227.49, Stats., standards for granting requests for rehearing following the issuance of a final decision and in the general Sec. 227.45, Stats., standards concerning admission of testimony evidence.

The propriety of a denial of Dillman's request to reopen could, following issuance of a final agency decision in this matter, turn on whether the evidence Dillman seeks to adduce meets the statutory rehearing standard in Sec. 227.49(3)(c), Stats, which reads,

"The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence."⁶

It follows that Dillman's request prior to issuance of a final agency decision ought not be denied if that request would meet that standard following the issuance of a final agency decision in this matter.

It seems clear that the evidence Dillman seeks to adduce is "new evidence . . . which could not have been previously discovered by due diligence" because the alleged incident occurred after the close of the hearing in this matter. However, the Examiner is not persuaded that the evidence Dillman seeks to adduce would be "sufficiently strong to reverse or modify the order" set forth in this decision. As discussed elsewhere in this Memorandum, Dillman's failure to have a suited up team present at the time that he used OC on JV has been rejected as a basis for disciplining Dillman in this case. Receiving evidence to provide additional reasons for rejecting that aspect of Dillman's conduct as a basis for discipline would therefore be appropriately excluded as "unduly repetitious testimony" within the meaning of Sec. 227.45(1), Stats.⁷ Furthermore, Dillman was not disciplined for failing to videotape his Use of OC on JV. Therefore, receiving evidence to the effect that another supervisor was authorized to perform a cell entry without videotaping would not be sufficiently strong to reverse or modify the order set forth in this decision, either. For those reasons, Dillman's

⁶ Section 227.49(3), Stats., provides that, "in contested cases . . . (3) Rehearing will be granted only on the basis of: (a) Some material error of law. (b) Some material error of fact. (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence."

⁷ Section 227.45, Stats., provides that, "In contested cases . . . (1) . . . The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05."

request to reopen the record has been denied.

Dillman's Request for Costs and Fees

As stated in FREDRICK V. DPI, Dec. No. 30879-A (WERC, 7/26/04),

The Commission's analysis of the Appellant's fee request is premised on Sec. 227.485(3),

In any contested case in which an individual . . . is the prevailing party and submits a motion for costs under this section, the hearing examiner [or agency conducting the hearing] shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The term "substantially justified" is defined in Sec. 227.485(2)(f), Stats., as "having a reasonable basis in law and fact." The amount of any costs awarded is to be determined based on the criteria specified in Sec. 814.245(5), Stats.

In this case, Respondent DOC has met its burden of establishing that it had a reasonable basis in law and fact for imposing a five-day suspension, even though the Commission has found "just cause" for a suspension of only three days.

As described in detail above, Respondent has shown that just cause existed both for the imposition of discipline and for the imposition of a three-day suspension. Only the length of the suspension was found to be excessive. Moreover, as shown above in the parentheticals following each of the enumerated "Conduct for which Dillman was disciplined," Respondent has established that Dillman engaged in the substantial majority of the conduct for which he was disciplined. Furthermore, as shown in the parentheticals following each of the enumerated "proven conduct," above, Respondent has established that the substantial majority of Dillman's proven conduct violated published work rules or procedures of DOC or DCI.

For those reasons, Respondent's decision imposing a five-day suspension had a reasonable basis in law and fact, the Respondent was substantially justified in taking the action it took, and Appellant Dillman is not entitled to fees and costs in this proceeding.

Dated at Madison, Wisconsin, this 18th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner