STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VIRGINIA ALLEN, Appellant,

vs.

WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 65
No. 66968
PA(adv)-122

Decision No. 32557

Appearances:

Lawrence Bensky, Attorney, Law Office of Lawrence Bensky, LLC, 10 East Doty Street, Suite 800, Madison, Wisconsin 53703, appearing on behalf of Virginia Allen.

Kathryn R. Anderson, Chief Legal Counsel, Department of Corrections, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department.

FINAL DECISION AND ORDER

This matter is before the Wisconsin Employment Relations as an appeal from a disciplinary action. The parties stipulated to the following statement of the issue for hearing:

> Whether Respondent's action as reflected in the letter of discipline dated April 13, 2007, of suspending the Appellant for five days and transferring her from Beaver Dam to Milwaukee was for just cause.

A hearing was conducted on February 20 and 21, 2008, before Kurt M. Stege, a member of the Commission's staff serving as the designated Hearing Examiner. The parties filed post-hearing briefs, the last of which was received on July 14, 2008. The examiner issued a proposed decision on September 11, 2008. Appellant filed written objections and the last submission was received on October 24, 2008. The Commission has adopted the proposed decision but has added a section in the Memorandum entitled "Involuntary transfer to Milwaukee" and has made a corresponding change to the first and fourth Conclusions of Law and the Order. The Commission has also simplified and rearranged the Memorandum, especially that portion describing the Appellant's conduct and how it violated departmental rules, and eliminated certain footnotes that were not germane to the outcome. Other changes of significance are identified by footnotes.

For the reasons that are explained below, the Commission affirms the Respondent's decision.

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Appellant began working for the State of Wisconsin in 1983. In approximately 1987, she moved to the Beaver Dam office of the Division of Community Corrections as a Typist. She was promoted to act as supervisor for the Beaver Dam support staff in approximately 1998. Her duties included serving as the "office manager." By 2006, her position was classified as a Program Support Supervisor. She supervised two Office Assistants, Jean Walsh and Sarah Greiger. Appellant and Ms. Walsh were friends. Appellant's supervisor was Elmer Karl, who also supervised the Probation and Parole Agents (numbering approximately nine) who were assigned to the Beaver Dam office.

2. During the relevant time period, there was substantial hostility between office management (i.e., Karl and Appellant) and most of the remainder of the staff in the office.

3. (Prior discipline #1). By letter dated October 17, 2002, DOC issued a written reprimand to the Appellant for the following conduct:

> [F]or failure to follow a written directive given to you by Corrections Field Supervisor Elmer Karl on May 14, 2001. In this memo it states that you are to process all invoices as soon as practical, review for accuracy and submit the invoices to him before they are forwarded to the Business Office for payment. In August the Business Office contacted Supervisor Karl and informed him that you had not processed sixteen monthly cellular phone bills dating back to April 3, 1999. You never informed Supervisor Karl that these invoices had not been paid and you continued to submit the budget sheets to the regional office deducting the cellular phone amounts from the Unit Budget to indicate that they had been paid.
>
> On August 6, 2002, Supervisor Karl attempted to talk to you regarding the phone bills. You informed him that you were ill and leaving for a doctor's appointment. Supervisor Karl attempted to work on the bills himself, but was unable to find the office copies of the bills. When he was unable to find the bills, he attempted to contact you at home on August 6th and 7th. He was finally able to contact you on August 8, 2002. You informed Supervisor Karl that you had some of the bills at your residence. When he asked if he could stop by your residence to pick up the files, you informed him that he could not come to your residence. You stated that you would send the cell phone files to him with another staff member and he would get the files the next morning. Supervisor Karl directed you to return all of the files that you had at your residence as soon as possible. You responded with profanity and alluded that if you did send the files back he would mess them up, before hanging up the phone.

The written reprimand cited the following DOC work rules:

> 1 – "Insubordination, disobedience, or failure to carry out assignments or instructions."
> 4 – "Negligence in performance of assigned duties."
> 13 – "Intimidating, interfering with, harassing, (including sexual or racial harassment), demeaning, or using abusive language in dealing with others."

4. (Prior discipline #2). By letter dated February 7, 2006, Appellant received notice that she had been suspended for ten days for allegedly violating work rules 2 ("Failure to follow policy and procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy" and 13. The letter described Appellant's conduct as follows:

> On August 18, 2005, an e-mail was sent by Probation and Parole Agent Paul[1] reporting that you have been inappropriately touching him on the buttocks for four or five years. Agent Paul later described the touching as "grabbing my ass" and pinching, patting, and squeezing his buttocks. On several occasions Agent Paul told you to stop touching him, but you continued with your conduct. In his e-mail Agent Paul described this conduct as "offensive."
>
> Witnesses were interviewed and supported Agent Paul's report . . .
>
> When you first received the notice for investigation OOA Grieger overheard you state that Agents Miller, Paul, and Rehrauer would be "sorry they were ever born."

5. Appellant filed an appeal of the suspension with the Commission.[2]

6. In October 2006, the parties to that appeal reached a settlement agreement that included the following provisions:

> WHEREAS, Ms. Allen denies and continues to deny all of the allegations of the February 7, 2006 disciplinary letter referred to above; and
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> WHEREAS, the Department acknowledges that there might be insufficient evidence for the Department to meet its burden of proof in the appeal of inappropriate touching, of sexual harassment, or of any sexually motivated improper behavior by Ms. Allen; and

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[1] In our decision, the Commission uses this person's first name, only.

[2] DOC (ALLEN), Case 50, No. 65664, PA(adv)-96.

WHEREAS, Ms. Allen acknowledges that, with the existence of witnesses claiming to have seen inappropriate touching, a fact finder may find sufficient evidence for the Department to meet its burden of proof in the appeal; and

WHEREAS, Ms. Allen and the Department are mutually interested in avoiding the further expense and delay connected with continuing the litigation of the above captioned appeal and are mutually interested in amicably resolving any and all disputes remaining between them;

NOW, THEREFORE, the parties agree as follows:

1. The Department agrees to rescind the February 7, 2006 disciplinary letter imposing a 10 day suspension without pay.

2. The Department will issue to Ms. Allen a revised letter of discipline which will be dated February 7, 2006 and which will impose a written reprimand in lieu of a 5 day suspension without pay. The written reprimand in lieu of a 5 day suspension without pay will carry the same weight for progressive discipline purposes as a letter of suspension for 5 days without pay. A copy of the revised letter of discipline is attached as Exhibit A.

Exhibit A, the revised letter of discipline, provides, in part:

This letter of reprimand is issued in lieu of a five day suspension without pay and carries the weight of a five day suspension without pay for progressive discipline purposes.

You have been found to have violated the following Department of Corrections Work Rules:

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

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

During 2005 you violated Department rules and policies by making inappropriate statements and by other inappropriate conduct. For example, you called a probation and parole agent a sow, which violated Work Rule 13. Regardless of whether such statements and conduct were intended as joking or were not intended to be malevolent, they are inappropriate and inconsistent with Department policy, particularly when they are made by management personnel regarding represented employees.

7. On Friday, August 25, 2006,[3] Agent Jeff[4] was conferring with Jean Walsh about a client. Walsh was at her desk, looking at her computer. Appellant was standing nearby. Immediately after Jeff made a joke, Appellant brought her right hand across her body and briefly, but intentionally, touched the back of her right hand to Jeff's right buttocks and on his wallet which was in his right back pocket. Jeff did not invite the contact and it was unwelcome.[5]

8. Jeff did not report the August 25, 2006 incident to DOC management until January 4, 2007, when he informed Quala Champagne, Administrator of the Division of Community Corrections. Respondent commenced an investigation based on the allegation.

9. Barbara Hanson, an assistant regional chief in the division, headed the investigation. A second person assisted her. The scope of the investigation was expanded to include whether Appellant had obtained prior approval for the use of sick leave on January 4 and 5, 2007. The investigators interviewed Jeff, who noted that Jean Walsh was also present during the incident on August 25, but also indicated he did not know if she had seen what had occurred and that she would probably not admit to it anyway. The investigators next spoke with Walsh. They asked a number of questions regarding the use of sick leave but only one question relating to the touching incident:

> Question: "Have you observed at any time within the last 6-7 months any kind of incident in which Virginia touched another staff member?"
>
> Answer: "Absolutely not."

The investigators also interviewed Sarah Greiger who confirmed that, several months earlier, Jeff told her that Appellant had touched his buttocks. After interviewing Appellant, the investigators prepared a written investigative summary with conclusions.

10. By letter dated April 13, 2007, Respondent imposed the five-day suspension that is the subject of this appeal. The letter alleged violation of Department Work Rules 2 and 13. The letter described the conduct as follows: "On 1/4/07, management became aware of the fact that on 8/25/06, you intentionally touched co-worker Jeff on the buttocks, which was unwelcome and uninvited." The letter also informed Appellant that she was being transferred,

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[3] The proposed decision had inadvertently stated the date of the incident as August 25, 2007.

[4] In this decision, the Commission uses this person's first name, only.

[5] The Commission has amended this finding to more specifically describe the nature of the physical contact and to delete an unnecessary reference to Appellant's motivation for the contact.

effective April 22, to a Program Support Supervisor position in Milwaukee. The letter included the following statement:

> On February 7, 2006, you received a written reprimand in-lieu-of a five day suspension for making inappropriate comments and engaging in inappropriate conduct. Some of the conduct upon which the earlier discipline was based was similar to the conduct described above. Based on the fact that these behaviors persist, I feel the move to Milwaukee is warranted, in addition to the disciplinary suspension.

11. At all relevant times, Appellant has been subject to Respondent's Executive Directive 7, relating to "Harassment and Hazing":

> II. Definitions
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> A. Harassment: Offensive verbal, physical or graphic conduct constitutes harassment when this conduct: 1) has the purpose or effect of creating a hostile, intimidating or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual's work performance; or 3) otherwise adversely affects an individual's employment opportunities. Harassment is such offensive behavior when linked to protected status (race, sex, age, etc., for example.)
>
> "Sexual harassment" includes unwelcome sexual advances, unwelcome physical contact, or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes, but is not limited to, the deliberate, repeated making of unsolicited gestures or comments, or the deliberate display of offensive sexually graphic materials which is not necessary for business purposes. Sexual harassment also includes general derogatory comments about either females or males.
>
> . . .
>
> III. Guidelines
>
> Any employee who engages in harassment of any other employee . . . on the basis of age, race, creed, color handicap, marital status, sex[,] national origin, ancestry, sexual orientation, religion or arrest or conviction record violates state and/or federal laws. . . .

> Behaviors which will be considered forms of harassment under this policy include, but are not limited to: derogatory jokes, comments or name-calling related to race, ethnicity, religion, sex or sexual orientation, imitating other ethnic groups' accents or behaviors; and the display of nude "pin-up" posters by employees. . . .
>
> In addition, the Department will not condone any form of conduct that might be considered abusive, disorderly or disruptive, regardless of whether the form of conduct violates state and federal laws. The Department believes that harassment of any kind, including hazing, has no place in the workplace. . . .
>
> The Department's goal is to provide equal employment opportunity, including a harassment- and hazing-free work environment of [sic] all employees. . . .

12. Respondent has disciplined other employees for related misconduct:

- Letter of reprimand in lieu of a three-day suspension without pay issued for "the touching of three employee buttocks" over the course of a month. The employee was also required to complete the "Supervisory Development Program." There is no indication of any prior discipline.

- Five-day suspension imposed for having "walked behind a male subordinate officer and tugged in a downward motion on the shorts he was wearing." The employee was also required to undergo additional training, was removed from a particular work responsibility and temporarily removed from a second.

- Thirty-day suspension imposed for slapping a co-worker on the buttocks. The employee, a sergeant at a correctional institution, had no record of prior discipline.

- Reprimand issued for grabbing an officer's buttocks. The employee, who had no record of prior discipline, was also reassigned to a different facility and required to undergo two weeks of on the job training.

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

CONCLUSIONS OF LAW

1. The Commission has the authority to review the April 13, 2007 suspension pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent has the burden to establish there was just cause for the disciplinary action imposed.

3. Respondent has sustained the burden.

4. There was just cause for suspending the Appellant as reflected in the letter of discipline dated April 13, 2007.

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

ORDER[6]

Respondent's action of suspending the Appellant for five days is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of May, 2009.

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

[6] Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference.

Wisconsin Department of Corrections (Allen)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission as an appeal of the decision to suspend the Appellant from her employment for five days and to involuntarily transfer her from the Beaver Dam office to an office in Milwaukee. On August 25, 2006, according to the letter of discipline, Appellant "intentionally touched co-worker Jeff on the buttocks, which was unwelcome and uninvited."

Involuntary transfer to Milwaukee

The Appellant contends there was no just cause for the letter of discipline dated April 13, 2007 suspending her for five days *and* transferring her from Beaver Dam to Milwaukee. The Commission's jurisdiction to undertake a just cause review of certain disciplinary actions is based on Sec. 230.44(1)(c), Stats., which provides:

> 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.

Suspensions are one of the types of discipline enumerated in paragraph (c), but the Commission lacks subject matter jurisdiction to determine whether an involuntary transfer was for just cause. KELLEY V. DILHR, CASE NO. 93-0208-PC (Pers. Comm. 2/23/1994). Therefore, the Commission reaches no conclusion as to whether there was just cause for the transfer of Ms. Allen.[7]

Suspension

In its decision in DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), the Commission described the legal standard it applies when considering the appeal of a disciplinary action under Section 230.44(1)(c), Stats., as follows:

> 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, Wis. Stats., requires that suspension of an employee with permanent status in class, such as Mr. Del Frate, 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. The underlying questions are 1) whether the greater weight of credible evidence shows the appellant committed the

[7] The Commission has raised the jurisdictional question sua sponte, despite the fact that the issue for hearing referenced both the suspension and the transfer. Mere agreement of the parties cannot confer jurisdiction. See STEBER V. DHSS & DER, CASE NO. 96-0002-PC (Pers. Comm. 6/25/1996).

> 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. 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. (Citations omitted.)

The Commission finds that the Respondent has established just cause for the Appellant's discipline.

As explained in the quotation from the DOC (DEL FRATE) decision, the initial step in the Commission's analysis is to determine whether, as alleged, the Appellant intentionally touched a co-worker's buttocks. Respondent's case hinges on the testimony (and credibility) of the co-worker, Jeff. He very carefully and believably described the setting and the touching. Appellant denied having intentionally engaged in the alleged conduct and denied recalling even inadvertently touching Jeff.

There are a number of reasons why we find Jeff to be a credible witness and adopt his version of events. Even though the record showed that some of the employees at the Beaver Dam office were embroiled in a conflict between the two supervisors (Appellant and Elmer Karl) and several of their subordinates, Jeff was a relatively recent addition to the office and he had managed to stay above the fray. Still, he was not oblivious to the conflict and he had a reasonable interest in self-preservation. He had been advised by some of his co-workers that Appellant and Karl were not trustworthy. As a consequence, he was careful to follow the rules that applied to Probation and Parole Agents, was careful not to cross either Karl or the Appellant, and maintained a log of any events that he believed might result in conflict with either of them. Jeff's demeanor during the hearing also supports the conclusion that he was testifying truthfully.

Under the circumstances of this case, the delay between the August 25 incident and January 4, when Jeff formally broached the touching episode in a letter to Division Administrator Champagne, does not undermine Jeff's testimony. He explained that he was worried about retaliation if he reported the matter, and he also explained that the incident was embarrassing to him. Jeff testified that he was reluctant to tell even his wife about the incident and delayed until Saturday August 26 to do so. We also believe that a delay is consistent with Jeff's careful nature and his desire to remain in the background rather than to appear in the spotlight.[8]

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[8] The Commission has deleted a portion of this paragraph as found in the proposed decision because it was unnecessary to the resolution of the matter.

Any potential deterioration in Jeff's memory that may have been caused by the delay is mitigated by the fact that, on Sunday, August 27, 2006, he made an entry in his log to reduce his memory of the incident to writing: "During the conversations, Ginnie, with the back of her hand, patted me on my right butt cheek. . . . about 4 [inches] down and away from my pepper spray." In addition, on Monday, he informed a trusted co-worker of the incident but declined, for reasons of fear and embarrassment, to formally complain to management. The co-worker told some other employees about the incident, but did so without identifying Jeff. Nevertheless, by a process of elimination, the employees concluded that Jeff must have been the recipient of the Appellant's touch. It was not until several months later that Jeff became aware other persons in his office were both talking about the August 25 incident and connecting him with it. At that point, he became convinced he should inform the division administrator.

In contrast to the relative accuracy of Jeff's testimony stemming from his contemporaneous recording and conversations, the Appellant, while denying generally that she would have engaged in the alleged physical contact, had no memory of the incident in question. Her lack of memory is understandable, since no contemporaneous complaint was registered and she had no particular reason to remember the event. While we do not hold her lack of memory against her, we are still persuaded that Jeff's account is accurate and credible.

Regarding the incident on August 25, 2006, Jeff credibly testified that the Appellant had to reach across her own body in order to reach Jeff's right buttocks with the back of her right hand. He testified that "the way she was positioned, the way she moved her arm across her, it couldn't have been accidental." It is reasonable to expect that if she had intended to touch Jeff in a different part of his body, she would have explained it to him or apologized at the time. Similarly, we might reach a different conclusion if, immediately after the touch, Appellant had explained that she was brushing away an insect that had been crawling on Jeff's clothing or if something in the circumstances indicated that Appellant may have been reaching for something on a counter and misjudged the distance.[9] The Appellant suggests that Jeff may have misconstrued the Appellant's action because, as of August 25, Jeff was aware that Appellant had previously been alleged to have touched another male co-worker's buttocks. Jeff indeed testified that this knowledge made it "more believable that [her August 25 conduct] was intentional" rather than accidental. However, independent of Jeff's subjective conclusion, we find the circumstances surrounding the incident to lead most reasonably to the conclusion that the Appellant intentionally reached around to pat or slap Jeff briefly on the buttocks, albeit it may have been a playful gesture in her mind. In addition, given Jeff's specific recollection of the incident, we believe he would have recalled any statement or action by Appellant that would suggest the contact was only accidental. Accordingly, we conclude that the Appellant did intentionally, although briefly and perhaps even playfully, pat or touch Jeff on the buttocks on August 25, 2006. There is no dispute that Jeff neither welcomed nor invited the physical contact by the Appellant.[10]

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[9] The touching here is not comparable to the "nebulous realm" of invading someone's personal space. Compare OFFICE OF JUSTICE ASSISTANCE (GROHMANN), DEC. NO. 31021 (WERC 3/2005).

[10] The Commission has modified this paragraph to more accurately reflect our reasoning.

A subpart of the first question in the DEL FRATE analysis is whether the Appellant's conduct violated a departmental rule. We conclude that it did.

Respondent has based the disciplinary action on two work rules. The first, Work Rule 2, refers to a "failure to follow policy or procedure." According to Respondent's post-hearing brief, the policy in question is the DOC Harassment Policy, Executive Directive 7. The directive's definition of "harassment" includes "Offensive . . . physical conduct" linked to a protected status such as sex, that has either the purpose or the effect of creating a "hostile, intimidating or offensive working environment," "interfering with an individual's work performance", or "adversely affect[ing] an individual's employment opportunities." The directive states that "sexual harassment" includes "unwelcome physical contact" and "unwelcome . . . physical conduct of a sexual nature." Under the heading "Guidelines," the policy states:

> In addition, the Department will not condone any form of conduct that might be considered abusive, disorderly or disruptive, regardless of whether the form of conduct violates state and federal laws. The Department believes that harassment of any kind . . . has no place in the workplace.

Thus, it is clear that the directive is not limited to conduct that violates either state or federal law.

The second basis for discipline was Work Rule 13, which prohibits, among other things, conduct that is "intimidating" or "harassing (including sexual or racial harassment)."

We conclude that the Appellant's conduct on August 25, 2006 violated these work rules as alleged. We have already determined that Appellant intentionally touched Jeff on the buttocks, which was unwelcome and uninvited physical contact. Much of the dispute in this case has focused upon whether Appellant's conduct was intended to be sexual or intimidating and/or whether Jeff reasonably viewed it as such.[11] In this connection, the Appellant has emphasized that her conduct falls far short of what would be actionable under state or federal sex discrimination law. Although both Work Rule 2 and Work Rule 13 refer to "harassment," we do not construe them as coterminous with conduct that would violate state and federal law. As indicated above, the Respondent's Executive Directive 7, which elucidates the Respondent's view of prohibited "harassment and hazing," specifically embraces more than what the law may prohibit. The Directive (and the work rules that prohibit harassment) are intended (prudently, we think) to deter conduct that might generate a claim of unlawful activity, even if such claim is ultimately unsubstantiated. As we see it, certain areas of the anatomy, including the buttocks, are presumptive zones of sexual privacy. Intentional and unwelcome touching in those areas would fall ipso facto within the directive's prohibition of "physical contact of a sexual nature." Accordingly, generally speaking, we construe the work rules to prohibit

[11] The proposed document had also relied to some extent upon an analysis of the Appellant's and/or Jeff's specific frame of mind in terms of the sexual or intimidating connotations of the event.

physical contact in such recognized zones of privacy, if, as here, the contact is both unwelcome and intentional.[12] It is not necessary to delve further into the states of mind of either the person being touched or the person doing the touching in order to establish a violation of the directive. The Appellant herself acknowledged this common sense application of the work rules, i.e., that a supervisor's intentional touching of an employee's buttocks would be inappropriate.

The second aspect of the just cause analysis is whether the chargeable conduct, as established, provides an adequate basis for the imposition of *some* discipline. As provided in SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464, 474, 215 N.W.2D 379 (1974):

> [O]ne appropriate question is whether some deficiency has been demonstrated which can reasonably [be] said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works.

Actual impairment of performance or efficiency is not a necessary finding under SAFRANSKY.

The Beaver Dam probation and parole office was already in substantial turmoil early in 2007 when Respondent was deciding whether or not to discipline Appellant for her conduct several months earlier. Appellant, along with the other supervisor, Mr. Karl, were not trusted by many of the other employees in the office. There had already been significant litigation that was tied to the office schism. Jeff was already maintaining a log of actions by either Karl or the Appellant that he felt to be of questionable propriety and that related specifically to him. Early in 2007 Jeff had asked a co-worker to come to work a little early to insure that Jeff would never be in the office alone with the Appellant. All of this turmoil had interfered with work performance in the office.

Appellant's touch to Jeff's buttocks added fuel to the existing conflict and was likely to further interfere with office work performance. There was just cause for imposing some level of discipline for the August 2006 incident.

In the final part of our analysis, we consider the "enormity of the offense" (including the degree to which it has a tendency to impair the employer's operation), the employee's prior record, and the employer's track record of imposing discipline for comparable misconduct. See KLEINSTEIBER V. DOC, CASE NO. 97-0060-PC (Pers. Comm. 9/23/1998).[13] The present case arises from a five-day suspension.

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[12] We leave open the possibility that the presumption set forth in this paragraph could be rebutted by evidence in unusual situations showing that what is normally a zone of sexual privacy has lost that status, or when the conduct has some legitimate exculpatory explanation. Such is not the case here.

[13] A fourth factor referenced in KLEINSTEIBER, the number of incidents cited in the disciplinary letter for which the employer established just cause, is not relevant here. The Respondent has established Appellant engaged in the August 2006 misconduct, the sole incident relied upon for imposing some level of discipline.

Respondent's action must be viewed in the context of earlier discipline that had been dispensed to the Appellant. She had received a written reprimand in 2002 for violating three work rules, including work rule 13. Effective February 2006, she was reprimanded in lieu of a five-day suspension for violating work rules 2 and 13 "by making inappropriate statements and by other inappropriate conduct."[14] Respondent found that only six months later, she violated the same two work rules by improperly touching a co-worker. The most recent misconduct clearly justified something more than a reprimand in lieu of a five-day suspension, the discipline imposed in February 2006.

Ms. Quala Champagne, Administrator of the Division of Community Corrections, made it clear she considered the February 2006 discipline to have been based on conduct that included touching Agent Paul's buttocks. While the initial letter of discipline, dated February 6, 2006, made a specific reference to "pinching, patting, and squeezing [Paul's] buttocks," the settlement agreement reached in the resulting appeal to the Commission replaced the original letter with something quite different. The substitute document provided a much more general description of Appellant's actions:

> During 2005 you violated Department rules and policies by making inappropriate statements and by other inappropriate conduct. For example, you called a probation and parole agent a sow. . . .

Whether or not the discipline imposed in the April, 2007 letter assumes that the Appellant's prior misconduct had specifically included touching Paul's buttocks or was simply "inappropriate conduct" that violated work rules 2 and 13, there was just cause for the Respondent's action of suspending her for five days. There had been long-running and ongoing divisiveness within the Beaver Dam office that was reflected in part by Appellant's repeated and inappropriate conduct towards others.

The Respondent has imposed relatively comparable discipline for other employees who have engaged in similar misconduct. The best comparison is to the employee who was found to have grabbed an officer's buttocks. The employee, who had no record of prior discipline, received a reprimand for the misconduct but was also required to undergo two weeks of on-the-job training and was reassigned to another correctional facility. Given the fact that the Appellant had already been reprimanded in 2002 and then reprimanded again in lieu of a five-day suspension in 2006, the discipline was very similar.

Respondent's action of suspending the Appellant for five days was not excessive discipline.

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[14] The revised letter of discipline also provided: "Regardless of whether such statements and conduct was intended as joking or were not intended to be malevolent, they are inappropriate and inconsistent with Department policy, particularly when they are made by management personnel regarding represented employees." This language is highly consistent with the Commission's "zone of privacy" analysis and with the fact that Appellant's action was again directed at a represented employee.

Due Process Argument

Appellant has made three specific contentions in support of a more general theory that the imposition of discipline violated Appellant's right to due process. She initially argues that the person who conducted the pre-disciplinary investigation, Barbara Hanson who served as the assistant probation and parole chief for Region 2, "did not keep an open mind." Appellant supports this argument by suggesting the investigation should have been more extensive[15] and should have placed more weight on circumstances that favored the Appellant.

The Appellant has not identified any authority for the proposition that the investigator must maintain an "open mind" throughout the course of an investigation that later leads to the imposition of discipline. She cites the case of BUKALIS V. GOLEMBESKI, 35 F.3d 318 (7th Cir. 1994), but that matter related to the adequacy of a hearing rather than of an investigation: "Thus, according to Supreme Court and Court of Appeals precedent, due process requires a hearing by an impartial tribunal." 35 F.3D 318, 326. It goes without saying that an investigator can always conduct a more thorough investigation and can always ask additional questions. But the failure to conduct the investigation in a manner deemed adequate by the person whose conduct is being investigated does not equate to a due process violation.

Appellant's second due process argument is that there was an impermissible delay in the initial report of the alleged misconduct that compromised her ability to defend the charge. It is difficult to argue against the claim that it might have been easier for Appellant to mount a defense to Jeff's allegation if Respondent had commenced its investigation on August 25 rather than roughly four months later. However, the Appellant has not cited any legal authority specifically supporting her contention that this delay constitutes a due process violation. We decline to create a statute of limitations on imposing discipline for an employee's misconduct.

Finally, Appellant contends that it was improper for Respondent to "accept as fact" the prior allegations of improperly touching Paul without having provided notice to her that the earlier conduct would be considered. She argues that she "was entitled to rely on the settlement agreement [reached in her appeal of a ten-day suspension imposed for conduct in 2005] as a basis to assume that those prior allegations of improper touching would not be considered in the disciplinary process in this case." She points to the following language in the letter of discipline that is the subject of the current appeal:

> Some of the conduct upon which the earlier discipline was based was similar to the conduct described above [regarding touching Jeff]. Based on the fact that these behaviors persist, I feel the move to Milwaukee is warranted, in addition to the disciplinary suspension.

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[15] Appellant was particularly dissatisfied that the investigators only asked one question of Ms. Welsh that was relevant to the August 2006 incident. They asked other questions that related to another area of inquiry. Ms. Welsh was present with Jeff and Appellant at the time of the incident, although Jeff testified she was facing away from them.

The decision to impose some level of discipline on Appellant, as reflected in the letter of April 13, 2007, was based solely on Appellant's August 25, 2006 conduct. The reference to earlier misconduct by Appellant related only to the question of the degree of discipline to impose in April. In other words, we are not addressing the question of whether there was just cause to discipline Appellant for inappropriately touching Agent Paul during the five-year period ending in August of 2005. Therefore, we do not consider the Appellant's argument in the present matter to be a due process question and have addressed the substance of Appellant's argument, relating to the effect of the October 2006 settlement agreement, in our discussion of whether the level of discipline was excessive.

There was just cause for Appellant's discipline imposed by letter dated April 13, 2007.

Dated at Madison, Wisconsin, this 6th day of May, 2009.

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

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