STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHILLIP JOHNSON, Appellant,

vs.

SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case 82
No. 67937
PA(adv)-137

Decision No. 32784-A

Appearances:

Gloria Thomas, Assistant Legal Counsel, Wisconsin Department of Corrections at the hearing and on the primary brief, Post Office Box 7925, Madison, Wisconsin 53707-7925, joined by **Andrea Olmanson**, Assistant Legal Counsel, Department of Corrections, on the argument concerning fees and costs, appearing on behalf of the Respondent.

Thomas Kieffer, Attorney at Law, Hale, Skemp, Hansen, Skemp & Sleik, Post Office Box 1927, LaCrosse, Wisconsin 54602, appearing on behalf of the Appellant.

DECISION AND ORDER

On April 14, 2008, Phillip Johnson filed an appeal with the Wisconsin Employment Relations Commission, alleging that the Department of Corrections had demoted him without just cause, in violation of Sec. 230.44(1)(c), Wis. Stats. Daniel Nielsen, an examiner on the Commission's staff, was designated to conduct a hearing and to prepare a proposed decision for the Commission's consideration.

A pre-hearing conference call was conducted on May 27, 2008, in the course of which the parties stipulated to the issues to be decided:

1. Whether there was just cause for discipline as alleged in the April 2, 2008 notice of demotion?

2. If there was just cause for discipline, was the penalty of demotion appropriate to the conduct proved?

3. If there was no just cause for discipline, or if there was just cause for discipline, but the penalty of demotion was not appropriate to the conduct proved, what is the appropriate remedy?

A hearing was conducted on October 14 and 15, 2008 at the Jackson Correctional Institution (Jackson) in Black River Falls.

After the conclusion of the hearing, the parties submitted written argument, the last of which was received on January 14, 2009. A Provisional Proposed Decision and Order was sent to the parties on July 9, 2009. The Appellant submitted a timely petition for costs and fees and the Department responded on August 18, 2009.

The Examiner issued a Proposed Decision and Order on February 4, 2010, which would have held that that the Respondent had not established just cause for demoting the Appellant, would have modified the demotion to a five-day suspension, and would have granted the Appellant's petition for costs and fees. Neither party filed objections to the Proposed Decision and Order, although, by letter filed on March 9, 2010, the Respondent stated that it "reserves the right to pursue the issue of attorney fees."

On July 20, 2010, the Commission consulted with the Examiner regarding his factual conclusions, including the demeanor and credibility of witnesses. The Examiner stated that none of his credibility determinations depended upon an evaluation of demeanor.[1]

As reflected below, the Commission has concluded that the Respondent's action should be affirmed in all regards, thereby making the Appellant ineligible for costs and fees. We have substantially revised and reconfigured the Findings of Fact, Conclusions of Law, and the Memorandum to eliminate unnecessary information and to reflect our view of the evidence. The reasons for our revisions are set forth in the decision. We have also revised the proposed decision by referring to "the inmate" rather than using his initials and by consistently using one term (pepper spray) to reference Appellant's can of pepper spray.

Now, having considered the testimony, exhibits, and arguments of the parties, and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. On April 2, 2008, Appellant Phillip Johnson was notified by Randall Hepp, Warden of the Jackson Correctional Institution (Jackson), that he was being demoted from Supervising Officer (Lieutenant) at Jackson to Correctional Sergeant. The stated basis for the demotion was the violation of DOC Work Rules 6, 12 and 13:

> Rule 6: … Failing to provide truthful, accurate and complete information when required…

[1]Some of the delay in issuing the decision in this matter may be attributed to a change in the composition of the Commission. After former Commissioner Gordon left his position, Governor Doyle nominated Terrence L. Craney in September 2010. The nomination was subject to confirmation by the Wisconsin Senate but no action was taken prior to the conclusion of the legislative session. Governor Walker withdrew Mr. Craney's nomination on January 19, 2011.

> Rule 12: … Threatening, attempting, or inflicting bodily harm to another person.
>
> Rule 13: Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning or abusive language in dealing with others.

The demotion letter provided, in part:

> [T]he following narrative represents an accurate portrayal of events:
>
> On January 28, 2008 at approximately 6:00 p.m. you placed two inmates into Temporary Lockup Placement (TLU) based on their conduct in a housing unit during the handling of medical emergency. While one inmate was being processed for placement into a segregation cell, the subject inmate was placed into a holding cell with handcuffs properly applied behind his back. At some point within 5-10 minutes of being placed in the cell the inmate manipulated the handcuffs from behind his back to the front of his body prior to you entering the cell. When you asked to have the door to the holding cell opened, and upon realizing the door was being opened, the subject inmate attempted to return the handcuffs to a position behind his back. At that point you made statements to the effect of, "what the fuck are you doing; do you want your head bashed in; do you want to be pepper sprayed or your head smashed in the wall?"
>
> . . . On two occasions [during the investigation process] specific questions were asked regarding whether you had made any statements to the effect of, "do you want your fucking head bashed in?" Your response to each of those questions was "Never." However, earlier in the interview you indicated that you had said something to the effect of, "Are you trying to get your head kicked in? You need to stop."
>
> Much of the information developed by review of staff written reports and staff interviews contradicts the version of events that you portrayed. . . . Specifically, two staff members report that the subject inmate had already moved the handcuffs fully in front of him prior to you entering the cell, and that the inmate was attempting to return the cuffs to the proper location behind his back, not trying to manipulate them to the front as you had suggested during the investigatory interview.
>
> You stated during the investigatory interview that the subject inmate was agitated and belligerent. According to staff witnesses, the inmate was not behaving in a belligerent manner and was actually in a compromised position with one leg through the hand cuffs, and he did not pose a significant threat in their opinion upon their entry into the holding cell. You also denied making any statements of the sort attributed to you by staff and detailed earlier in this letter.

> A pre-disciplinary meeting was held on February 22, 2008. . . . During the meeting you supplied a written statement wherein you wrote, "Sir, I admit that the wording I used during the incident was inappropriate but please consider the fact that I was only reacting to what [the inmate] did." This concession, after your initial denial is less than credible since it was presented only after you had been made aware of the staff reports and statements related to this incident. Prior to such knowledge you denied having made such statements.
>
> This behavior represents a serious violation of the DOC Mission and work rules and demonstrates a lack of respect for others. Specifically, all employees and offenders have a right to a non-violent, non-threatening environment. This means free of derogatory or threatening comments. You have previously been made aware of this expectation by the administration at New Lisbon Correctional Institution when it was determined that your actions were contrary to acceptable standards while employed as a Supervising Officer 2 at that facility. An aggravating factor is your lack of willingness to accept responsibility for the behaviors that you engaged in. You instead choose to assign blame to the inmate for your actions. This is contrary to information developed during the investigative process. As a Lieutenant, you are a role model for subordinate staff and inmates. By your actions both at the initial event and then through the investigatory process you have demonstrated poor judgment and compromised your credibility as a supervisor. As such it is not possible to retain you in a supervisory role. Demotion is not only appropriate and reasonable but regrettably also necessary.
>
> This is your first Category C work rule violation in the last twelve months. You are aware of these work rules and have acknowledged receiving a copy of the Work Rules and Disciplinary Guidelines. . . .

2. The Appellant has been employed in the State's correctional system for approximately 15 years. He reached the rank of Lieutenant in approximately 2001. In May 2005, he promoted from a Supervising Officer 1 (Lieutenant) position at Jackson to a Supervising Officer 2 (Captain) vacancy at New Lisbon Correctional Institution (New Lisbon).

3. The Appellant's promotional probationary period as a Captain at New Lisbon was terminated by letter dated May 10, 2006, and he was returned to a Lieutenant position at Jackson. The stated reason for the probationary termination was "failure to meet probationary standards." The letter included the following information:

> You continue to exercise poor judgment in dealing with TLU [temporary lock up] placements. On 04/27/06 you used profanity "for effect" while dealing with an inmate. You were directed by the Security Director to apologize to the inmate for using profanity. When you met with the inmate on 04/27/06, he did not want to talk to you. You exercised poor judgment by not letting the situation go, but instead escalated the incident which ended up with you placing

> hands on the inmate. You have failed to role model appropriate de-escalation behaviors to new staff when dealing with inmates. You have eroded staff's authority by not allowing the unit staff the opportunity to address/resolve minor issues at the lowest possible level, before taking over the situation.
>
> Your lack of good communication when dealing with inmates is evident by your inability to de-escalate situations and has had a negative effect on inmate climate. Inmate Complaints have been written regarding your interactions with inmates.
>
> . . .
>
> Your credibility came into question when you were less [than] truthful when discussing an issue with the Deputy Warden regarding copies of incident reports.

4. Jackson is a medium-security prison for adult males.

5. Both before he took the promotional position at New Lisbon and after he returned from that facility, Appellant's duties as a Lieutenant at Jackson have included supervising Correctional Officers and Correctional Sergeants on an assigned shift, handling crisis calls within the institution, training correctional staff, taking charge of the institution when a Captain is not available for a shift, and leading a squad in the event of a disturbance within the facility. Twenty per cent of the Appellant's time was allocated to "handling of individual problems and/or counseling with inmates."

6. Prior to the 2008 incident that is the subject of this appeal, the only formal disciplinary action taken against the Appellant was a written reprimand issued in approximately 2001.[2] The circumstances of that reprimand are not relevant to this appeal.

7. On January 28, 2008, two inmates at Jackson refused to obey a directive to return to their cells while officers responded to a medical emergency on their unit.[3] Both inmates were ordered to segregation. Several officers, including the Appellant, escorted the two inmates to a nearby building where the segregation cells were located. The inmates' hands were handcuffed behind them. While the other prisoner was being processed, the inmate in question was placed by himself in an eight foot by 10 foot holding cell, having a solid metal door with a small window and a bench at the back of the cell.[4] His hands were still cuffed behind him when he was placed in the cell.

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[2] For purposes of this finding, the Commission is not treating the termination of Appellant's probationary period at New Lisbon as a formal disciplinary incident.

[3] The proposed decision has been modified to clarify the nature of the inmates' behavior.

[4] The Commission has modified the proposed decision to better describe the cell.

8. While in the holding cell and without any correctional staff noticing, the inmate manipulated his cuffs from the back to the front by slipping them under both of his feet.

9. After the passage of about 10 minutes, the Appellant and Officer Petkovsek approached the cell. Petkovsek had the key. The Appellant asked the inmate to move to the back of the cell and asked Petkovsek to open the cell door. When the inmate realized he was about to be discovered with his hands in the wrong position, he began to return his cuffed hands behind him, maneuvering them past one foot at a time.

10. The Appellant looked through the window on the door and, at approximately the same time as the door was opened, observed the inmate as he was moving the cuffs past his first foot. Although the inmate was in motion, he was not a threat to the Appellant because he was trying to make himself more, rather than less, secure. Petkovsek observed the same thing.

11. When both Appellant and Petkovsek entered the cell, the inmate was bent over and straddling the handcuffs in an obviously compromised position. Appellant removed the pepper spray from his holster and yelled, "What the fuck are you doing? Do you want to get your fucking head bashed in?" Appellant again yelled at the inmate, "Do you want to be pepper sprayed?" During this period, the inmate was not noticeably agitated. There was no physical contact between the Appellant and the inmate and no further conversation between them.

12. Captain Casey Jensen was close enough to the holding cell to hear the Appellant yelling. Later that evening, Jensen spoke with Appellant and cautioned him that his language was inappropriate. At the end of the shift, Jensen informed the Deputy Warden.[5]

13. Respondent initiated an investigation of the incident and obtained written statements from several witnesses, including the inmate.

14. Appellant was aware that the incident was being investigated and was concerned that his conduct could result in discipline.

15. By January 30, Appellant had reviewed the inmate's written statement, which included the following:

> I was put into a holding cell with cuffs on. I put my legs through them because I was in there for a while. When Lt. Johnson came into the cell he said "Do you want your fucking head bashed in." I don't think that's appropriate language for him. Then he threatened me with [pepper] spray and said he would "smash my skull into the wall" because he could do that if he wanted [to].

[5] The Commission has corrected proposed finding 6 to indicate that Appellant did not report the incident to Captain Jensen, but rather Jensen himself was in a position to witness those portions of the incident that occurred outside the cell and also to hear the Appellant's shouted remarks inside the cell.

16. Respondent conducted an investigative interview of the Appellant on February 1. During the interview, Appellant read a typed statement that he had prepared in advance. The statement read, in part:

> As I entered the room, I observed [the inmate] standing in the corner and suddenly step through his handcuffs in an attempt to get his hands in front of him. *He appeared very agitated.* I pulled my [pepper spray] from the holster and said, "What are you doing, you need to stop". He looked directly at the [pepper spray], but continued moving his foot to get his hands in front of him. He already had one leg through the cuffs but his other foot was stuck on the handcuff chain. [The inmate] turned and sat back on the chair. He was still trying to get his foot unstuck from the handcuff chain and get his hands in front of him. I again said, "You need to stop or I will use the [pepper spray]". He gave me a strange look, looked at the [pepper spray] and then laughed. *He still appeared very agitated.* I said, "[Inmate], are you trying to get your head kicked in? You need to stop this now". He looked at the officers coming in to the room and stopped what he was doing. [The inmate] then slid his foot forward causing him to have one leg on each side of the cuffs. This all took place in a very short amount of time. I stepped back and instructed the officers to escort him to the strip cell. Photos were also taken. Captain Jensen was in the hallway. I told him what happened. He said, "No way, that's bullshit, place him on restrictions and put him in cell 001". (Emphasis added.)

17. During the interview, the Appellant called the inmate's written statement "totally inaccurate" and specifically denied making either of the two statements attributed to him by the inmate:

> Q7 [Security Director Schulz] - Did you ever say "do you want your fucking head bashed in?"
>
> Q7A [Appellant] - Never
>
> Q8 [Schulz] - Did you ever say to [the inmate] something to the effect - "We(I) could smash your skull into the wall?"
>
> Q8A [Appellant] - Never

18. During the course of the investigation, Appellant did not accurately describe what he had witnessed. The Appellant was motivated to present an inaccurate account by his desire to avoid discipline entirely or mitigate the degree of discipline.

19. The Department of Corrections maintains a Supervisor's Manual to provide guidance to its management staff. Chapter 403 of the Manual addresses "Employee Discipline," Section V sets forth the Department's "Guidelines for Handling Common

Disciplinary Problems," and Subsection B is entitled "Actual or Threatened Violence." That subsection reads in part:

> Altercations between an employee and a supervisor, between an employee and a co-worker, or between an employee and an inmate or client, may be just cause for discipline. . . . In determining the seriousness of actual or threatened physical violence, management must consider whether a threat was made in front of other employees, inmates or clients; whether the employee intended to carry out the threat; and whether the employee was provoked.

20. The Department of Corrections also issues "Guidelines for Employee Disciplinary Action" to provide guidance to its management staff. The guidelines break offenses into three categories – A, B and C. Category A includes certain attendance-related problems and follows a schedule of discipline in accordance with the employee's record over the preceding twelve months. Category B includes misconduct subject to progressive discipline, and generally reflects a progression from a written reprimand to a one-day suspension and then a three-day suspension. For a fourth offense, a range of discipline from a five-day suspension to discharge may be imposed at the discretion of the appointing authority. Category C violations are considered serious and are subject to more substantial discipline for a first offense. Category C violations include theft, illegal conduct, and abuse of inmates. The latter offense is described as "abusing, threatening, harassing, or causing mental anguish or injury to inmates, residents, staff or others."

21. The incidental use of profanity at Jackson is inappropriate but is not a rare occurrence at the institution, and it does not uniformly or even usually lead to the imposition of discipline.

22. The standard approach of security staff to inmate misconduct includes offering inmates choices by posing questions and making clear the potentially undesirable consequence of their choices. Recalcitrant inmates may also be influenced through an escalating show of force by guards.

23. Chapter 403, Section III, of the Supervisor's Manual speaks to the Department's disciplinary philosophy, and advises supervisors that, among other things, discipline must be imposed for just cause, must be applied consistently, and that "the degree of discipline must be related to the seriousness of the offense and to the employee's record and not be more severe than what is necessary to influence the employee to correct the problem. Minor offenses generally result in lesser discipline. Stronger discipline should be reserved for serious offenses or cases of continued problems where progressive discipline has been followed and has failed to correct the situation."

24. Other Jackson employees have been disciplined for misconduct.[6]

a. A captain received a written reprimand in lieu of a 3-day suspension for two instances of loudly using vulgar language in front of inmates. (Violation of Work Rule 13)

b. An officer was suspended for five days after the behavior of an inmate got the better of him. At meal time, the officer shoved a food tray into the cell, spilling it, and inaccurately completed an inmate conduct report. (Work Rules 6, 13, 14)

c. An officer received a written reprimand for vulgar language directed at kitchen staff, and for inaccurately describing his language during the subsequent investigation. (Work Rules 6, 13)

d. A sergeant received a written reprimand for moving inmates to different rooms without permission and against a directive, for providing inaccurate information to his supervisor, and for creating a hostile work environment for co-workers and inmates. (Work Rules 1, 2, 6 and 14)

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

CONCLUSIONS OF LAW

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

2. The burden of proof is on the Respondent to demonstrate that there was just cause for discipline and for the degree of discipline imposed.

3. The Respondent has satisfied its burden.

4. There is just cause for Respondent's action of demoting Appellant from Lieutenant to Sergeant.

5. The Appellant, Phillip Johnson, is not a prevailing party within the meaning Sec. 227.485, Stats.

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[6] This paragraph replaces two paragraphs in the proposed decision that sought to summarize evidence relating to comparable discipline. The language used in the proposed decision incorrectly suggested there were "47 prior cases involving violations of Rules 6, 12 and 13" even though those investigations only involved a minimum of one of those work rules and none were of all three work rules. The paragraphs also described investigations of some conduct that was sufficiently distinct from the present appeal so that the reference has been deleted. The Commission's decision reflects only the most relevant comparable investigations.

Based on the above and forgoing Findings of Fact and Conclusions of Law, the Commission makes and enters the following

ORDER

It is ORDERED that:

The demotion of the Appellant, Phillip Johnson, is affirmed, Appellant's request for attorney's fees and costs is denied, and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of February, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Department of Corrections (Phillip Johnson)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Appellant's due process arguments[7]

Appellant contends there was a lack of due process accorded him because "the investigation … was neither fair or objective nor afforded him proper time for representation in his pre-disciplinary interview." The Appellant did not supply any case law supporting his argument.

The seminal due process case relating to the property interests of public employees in their continued employment is CLEVELAND BD. OF EDUC. V. LOUDERMILL, 470 U.S. 532, 105 S. CT. 1487, 1493, 84 L. ED. 2D 494 (1985). In that case, the Court balanced the following competing interests relating to the *discharge* of public employees: "[1] the private interests in retaining employment, [2] the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and [3] the risk of an erroneous termination." The weight accorded the final interest varies depending on the severity of the disciplinary action taken.

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. . . .
>
> We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. [Citations omitted.]

470 U.S. 532, 545-548.

Subsequent cases have confirmed that a neutral pre-termination adjudicator is *not* required where there is also a post-termination administrative procedure. LOCURTO V. SAFIR, 264 F.3D 154 (2D CIR. 2001); SCHACHT V. WISCONSIN DEPT. OF CORR., 175 F.3D 497 (7TH CIR. 1999). We have previously observed there is no due process requirement that the person conducting the pre-disciplinary investigation keep an open mind. DOC (ALLEN), DEC. NO. 32557 (WERC, 5/2009); affirmed ALLEN V. WERC, 09CV523, DODGE COUNTY CIRCUIT COURT, 3/16/2010 (Appeal pending). In the present case, a hearing before this Commission serves as the post-disciplinary administrative procedure and satisfies due process requirements under LOUDERMILL and its offspring.

[7] The Commission has added this section to the proposed decision in order to more directly address an argument raised by the Appellant.

Appellant also complained that he only had two hours to review the investigative materials and prepare a response prior to his pre-disciplinary hearing. The Commission is not persuaded that an employee in the Appellant's situation is entitled to more than two hours of notice prior to the conduct of a pre-disciplinary hearing, and is unaware of any case law so suggesting. Therefore, we reject the Appellant's due process argument.

Merits

Introduction

Immediately prior to the demotion that is the subject of this appeal, Appellant was serving as a Lieutenant for the Department of Corrections at Jackson. He was disciplined because of an incident involving an inmate on January 28, 2008. That inmate and another prisoner were being processed into the segregation unit because they had refused to obey a directive to return to their cells during a medical emergency on their housing unit. While the other prisoner was being searched, the inmate in question was placed in a holding cell. There is no dispute that the Appellant entered the holding cell, that the Appellant shouted at the inmate, and that the inmate had, at some point, contorted himself to move his cuffed hands from behind his back and under at least one leg in an effort to get his hands in front of him. There is also no dispute that Appellant removed his pepper spray from his belt. The case revolves around what Appellant shouted, whether his response was reasonable given any danger the Appellant was facing, and whether, during the subsequent investigation, the Appellant accurately recounted his own conduct and the conduct of the inmate.

Respondent's specific allegations of misconduct are that Appellant: (1) responded to the inmate by making statements to the effect of, "What the fuck are you doing; do you want your head bashed in; do you want to be pepper sprayed or your head smashed in the wall?"; and (2) provided inaccurate descriptions of the incident during the subsequent investigation when he (a) described the inmate as agitated and belligerent; (b) described having seen the inmate manipulating his cuffed hands from behind to in front; and (c) denied, on two occasions, having made statements to the effect of, "Do you want your fucking head bashed in?"[8]

[8] In his proposed decision, the examiner reached the following factual conclusions:

1) When the Appellant entered the cell, he saw that the inmate had the handcuffs between his legs and appeared to be stepping through them and bringing his hands in front of him. Proposed finding 5.

2) At that point, Appellant said words to the effect of "What the fuck are you doing, are you trying to get pepper sprayed, or do you want your head kicked in?" Proposed finding 5.

3) During the investigation, the Appellant had not denied making certain statements attributed to him. Proposed finding 13.

4) Appellant's statements that he saw the inmate moving the handcuffs from behind him to in front of him, rather than vice versa, and that he consequently perceived a threat, "were consistent with events that occurred, and were not demonstrably untruthful." Proposed finding 14.

5) Appellant's statement that the inmate was agitated and belligerent "was consistent with the events prior to and at the time of his entering into the cell, and was not demonstrably untruthful." Proposed finding 15.

6) Appellant's "question" of "What the fuck are you doing" was not an obscenity directed at the inmate and was not embarrassing, degrading or ridiculing to the inmate. Proposed finding 20.

In DEPARTMENT OF CORRECTIONS (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), the Commission set forth the standard it applies when analyzing an appeal of disciplinary action under Section 230.44(1)(c), Stats.:

> On appeal of a disciplinary matter the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, 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. REINKE V. PERSONNEL BOARD, 52 WIS. 2D 123 (1971); HOGOBOOM V. WIS. PERS. COMM, DANE COUNTY CIRCUIT COURT, 81-CV 5669, 4/23/84; JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT, 164-086, 2/26/79. The underlying questions are: 1) whether the greater weight of credible evidence shows the appellant committed the conduct alleged by respondent in its letter of discipline; 2) whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline; and, 3) whether the imposed discipline was excessive. MITCHELL V. DNR, 83-0228-PC, 8/30/84. In considering the severity of the discipline to be imposed, the Commission must consider, at a minimum, the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to have a tendency to impair the employer's operation, and the employee's prior work record with the respondent. SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464 (1974), BARDEN V. UW, 82-237-PC, 6/9/83.

Discussion

The parties fundamentally disagree as to how to characterize the interaction of the inmate and the Appellant. The Appellant contends that the inmate's actions, including how he was manipulating the handcuffs, were a significant threat of physical harm and that he responded appropriately to that threat. The Respondent contends that, while Appellant's action of removing his pepper spray from his holster was not inappropriate, the Appellant "lost it,"

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7) Appellant's "question" to the effect of "Do you want your fucking head (bashed/kicked/smashed) in?" was not an obscenity directed at the inmate and was not embarrassing, degrading or ridiculing to the inmate. Proposed finding 22.

8) Appellant's "question" about bashing heads was an inappropriate "threat of physical consequences for any actions the inmate might take given the use of his hands and arms after he had manipulated his cuffs in front of him" and would be "reasonably understood to constitute a threat of violence", even though the inmate had provoked the threat by moving his hands to the front which posed an "immediate, substantial and unexpected threat of injury to the Appellant." Proposed findings 23 and 24.

In the memorandum portion of the proposed decision, the examiner also noted that the inmate was "completing" the process of moving his cuffed hands from back to front when the Appellant entered the cell, and that the "Appellant asked [the inmate] if he wanted to be maced, or get his head kicked in."

and his verbal reaction to the inmate, already in a compromised position, was completely out of line. It is undisputed that the desired practice in the correctional setting is not to threaten a non-compliant inmate[9] or use profanity, but rather to give the inmate options and identify consequences. For example: "We need to get compliance from you and if you don't comply, we may have to use pepper spray."[10]

One of the fundamental disagreements between the parties is whether, as the Appellant contends, his outburst occurred because he actually observed the Appellant moving into a more threatening posture, or whether the inmate had already reached a compromised position when the Appellant entered the holding cell. The proposed decision was unclear on this point. It suggested that the Appellant "appeared" to be stepping through the cuffs and also noted that the inmate was completing the motion of moving his hands to the front as the Appellant entered the cell. The parties also dispute whether, during the relevant time period, the inmate was belligerent. Again, the proposed decision did not reach a clear conclusion on this issue, which we believe is crucial to evaluating the merits of the case.

The differing viewpoints are drawn into sharp relief by comparing two early written descriptions of the incident. According to the inmate's January 28 written statement:

> I was put into a holding cell with cuffs on. I put my legs through them because I was in there for a while. When Lt. Johnson came into the cell he said "Do you want your fucking head bashed in." . . . . Then he threatened me with [pepper] spray and said he would "smash my skull into the wall" because he could do that if he wanted [to].

The Appellant had reviewed the inmate's written description before he prepared his own version. Appellant's statement, presented to the investigator during Appellant's February 1 interview, included the following sentence: "As I entered the room, I observed [the inmate] standing in the corner and suddenly step through his handcuffs in an attempt to get his hands in front of him." In his written statement, the Appellant described a lengthy series of actions, questions, and observations that suggested his conduct was thoughtful, measured and, appropriate, with the sole exception that one of his admitted statements to the inmate ("Are you trying to get your head kicked in? You need to stop this now.") was "not the best choice

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[9] "Non-compliant" is used here to include an inmate whose handcuffs are not positioned fully behind his back.

[10] Security Director Schulz summarizes the steps he would have gone through to enter the holding cell. It included telling the inmate to step away from the door and watching him through the window in the steel door to see the location of his hands. An inmate with cuffed hands in front rather than behind is not a security risk if he is alone and behind a closed and locked steel door. If a problem had occurred in the cell, Schulz would have directed the inmate to lie face down on the floor and then spoken to him about the situation. Schulz also testified that it would be the supervisor's role to supervise the situation and that a group of officers in protective gear would go into the cell in front of the supervisor, should entering the cell prove necessary.

of words" although it "was only 8 seconds." The relevant elements of the Appellant's version of events, as reflected in his written statements are as follows:

- As I entered the room, I observed [the inmate] standing in the corner and suddenly step through his handcuffs in an attempt to get his hands in front of him. He appeared very agitated.

- I pulled my [pepper spray] from the holster and said, "What are you doing, you need to stop." (Alleged comment #1)

- [s]He looked directly at the [pepper spray], but continued moving his foot to get his hands in front of him.

- He already had one leg through the cuffs but his other foot was stuck on the handcuff chain.

- [The inmate] turned and sat back on the chair.

- He was still trying to get his foot unstuck from the handcuff chain and get his hands in front of him.

- I again said, "You need to stop or I will use the [pepper spray]". (Alleged comment #2)

- He gave me a strange look, looked at the [pepper spray] and then laughed. He still appeared very agitated.

- I said, "[Inmate], are you trying to get your head kicked in? You need to stop this now". (Alleged comment #3)

- He looked at the officers coming in to the room and stopped what he was doing. [The inmate] then slid his foot forward causing him to have one leg on each side of the cuffs.

Six witnesses (Dalbec, Garavalia, Jensen, Appellant, Petkovsek, Ratsch) testified as to the relevant events on January 28, 2008. The record also included their written reports of the incident and summaries of their interviews during the investigation. The inmate did not testify, but the inmate's two written statements and two interview summaries were admitted into the record without objection as attachments to Deputy Director Schulz's investigative report. Respondent referenced the inmate's observations in the initial post-hearing brief and the Appellant then objected to the inmate's prior statements as hearsay, noting that Respondent had elected not to have the inmate testify.

As provided in Sec. PC 5.03(5), Wis. Adm. Code, the "commission is not bound by common law or statutory rules of evidence" at hearings conducted pursuant to Sec. 230.45(1),

Stats. The same subsection goes on to provide that "Hearsay evidence may be admitted into

the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances." However, the Commission may not make a finding of fact premised solely on uncorroborated hearsay.

> The rule that uncorroborated hearsay alone does not constitute substantial evidence allows an agency to utilize hearsay evidence while not nullifying the relaxed rules of evidence in administrative hearings. The rule prohibits an administrative agency from relying *solely* on uncorroborated hearsay in reaching its decision.

GEHIN V. WISCONSIN GROUP INS. BD., 2005 WI 16, 278 WIS. 2D 111, 136, 692 N.W.2D 572, 584. Because the inmate's four prior out of court statements were consistent with each other and also corroborate the credible hearing testimony of other witnesses, we overrule the Appellant's objection and will rely to a limited extent upon the inmate's statements consistent with the constraints set forth in GEHIN. Compare GROHMANN V. OFFICE OF JUSTICE ASSISTANCE, DEC. NO. 31021 (WERC, 3/2005), as well as STATE V. MCFARREN, 62 WIS. 2D 492, 215 N.W.2D 459 (1973).

We reject the Appellant's version of events largely because we find the foregoing elements of his carefully prepared (and never disavowed) written description of what occurred during the January 28 incident to be simply untenable. While we do not fault an employee for putting him/herself in the best possible light during an investigation, the Appellant's description clearly crosses the line between advancing a reasonably accurate if self-serving perspective on events, which may be permissible, and intentionally rearranging reality in order to absolve himself of misconduct, which is not.

The January 28 incident covered a period of perhaps eight seconds. Appellant contends that, during this brief time, the inmate, who was initially standing, was able to "step through" the handcuffs with one foot, move his second foot so that the cuffs became hung up underneath that foot, turn, sit down, continue to try to "step through" with the second foot, give the Appellant "a strange look" followed by a laugh, and finally look to see incoming officers entering the cell. According to the Appellant, all of this occurred before the inmate reversed directions with the second foot so that he ended up straddling the cuffs. One doesn't simply "step through" cuffs to move them from back to front.[11] The cuffs must traverse, in sequence, the buttocks, thigh, knee, calf and finally the sole of one foot before they could have become hung up on the inmate's second foot. During the period after the inmate allegedly "stepped through" the cuffs with his first foot, the Appellant posits that he had the time and presence of mind to pull out his pepper spray and give the inmate three separate directives to "stop" his movements before any other officers entered the cell: "What are you doing, you need to stop. You need to stop or I will use the [pepper spray]. [Inmate], are you trying to get your head kicked in? You need to stop this now." According to the Appellant's description of events, he never uttered any profanity during his statements to the inmate.

[11] Appellant's use of the words "stepping through" would be consistent with the inmate moving his hands from the front to the back, not back to front.

No one else confirmed the Appellant's assertion that he made a series of measured statements to the inmate, all of which avoided the use of profanity, and told him three times that he needed to stop what he was doing. Officer Dalbec reported that the Appellant said, "What the fuck are you doing? Do you want to get maced? Better yet, do you want me to smack your fucking head against the wall?!" Officer Garavalia stated that Appellant "said something to the effect of, "What are you doing?? and something like you want to get pep[p]er sprayed or your head smacked into the wall." Captain Jensen wrote that Appellant "stated something to the effect of 'What the fuck are you doing.' . . . . [And] something to the effect of . . . 'Do you want your fucking head bashed in' . . . [and] something along the lines of 'Do you want to be pepper sprayed.'" Officer Petkovsek wrote that Appellant "said something to the effect of what the fuck are you doing, you want a shot of pepper spray, or your head bashed into the wall." All of these descriptions run counter to the Appellant's claim that he told the inmate to "stop" three separate times, that he used no profanity, and that with the exception of posing the inmate a single question, "Are you trying to get your head kicked in?", his conduct was appropriate.

The Appellant had written his statement in preparation for an investigative interview on February 1. At the beginning of the interview, he described the inmate's written statement as "totally inaccurate." He read his own prepared statement and gave Respondent a copy. Then, he responded to a series of questions posed by the investigator:

> Q Did you ever say "do you want your fucking head bashed in?"
>
> A Never.
>
> Q Did you ever say to [the inmate] *something to the effect* – "We (I) could smash your skull into the wall."?
>
> A Never.
>
> . . .
>
> Q I have received other information and statements that differ from yours. I want you to think about it a while – Do you still stand by the statement you have submitted?
>
> A Yeah – absolutely. [Emphasis added.]

During his February 22 pre-disciplinary interview, the Appellant reaffirmed the accuracy of his prior statements:

> Q [Regarding] Work Rule #6 [providing truthful information when required] – What statement do you have?
>
> A I gave a truthful and accurate statement to the best of my memory and from my position in the incident. . . . According to the investigatory notes –

> not one of the witnesses could tell you exactly what I said. All of them stated, "something to the effect of' or "something like" – nothing exact – I provided specifics to what I said.

The proposed decision included the observation that Respondent's claim that Appellant was untruthful when he responded "never" to two questions during his February 1 investigative interview, was "based entirely on semantic differences in the versions offered by various witnesses, rather than any proof that the Appellant sought to mislead investigators or did mislead them." We would characterize the situation somewhat differently. While the Appellant's effort to *defend* this claim of misconduct was "based entirely on semantic differences" and there is no *direct* proof that the Appellant sought to mislead the investigators, the clear preponderance of the evidence indicates Appellant had precisely that goal.

By the time he attended the February 1 investigative interview, the Appellant had already reviewed the inmate's written statement and prepared his own written statement. He knew the inmate had written that Appellant "said 'Do you want your fucking head bashed in.' . . . Then he . . . said he would "smash my skull into the wall' . . . ." These are the two phrases that Appellant specifically denied during the interview. Instead, the Appellant "absolutely" stood by his written statement that he said the following before any other officers entered the cell: "What are you doing, you need to stop. You need to stop or I will use the [pepper spray]. [Inmate], are you trying to get your head kicked in? You need to stop this now." Appellant was asking the investigator to reject the inmate's description of a rant and to replace it with his own description of a measured response. As already noted, there were several disinterested witnesses who disagreed with the Appellant's version and confirmed the inmate's.

First-hand evidence is more limited when determining the positioning of the inmate's hands at the point the Appellant first entered the holding cell. Even though quite a few people witnessed some aspects of the incident, the Appellant and the inmate were the ones in the best positions to describe the inmate's hand movements. The inmate's written statements, in concert with supporting testimony from Officer Petkovsek, cause us to conclude that the inmate was moving into a more compromised position (straddling his cuffed hands) when the Appellant entered the cell, and that the inmate did not pose – nor did he appear to pose – a significant risk of harm to the Appellant under the circumstances.

Officer Petkovsek, a disinterested witness, was in the best position after Appellant and the inmate to testify on this point. He testified that he entered the cell only a "half-step" before or after the Appellant. During his February 12 investigative interview, Petkovsek stated that when he entered the cell he saw that the inmate was bent over, with a leg on either side of the handcuffs and was trying to move his hands toward his back. Petkovsek stated that the inmate was not a threat at that point.

Q When did you see that [the inmate] had his hand in front of him?

A At first I didn't see his hands but then when I opened the door, Lt. Johnson went in and I saw [the inmate] had his leg through the cuff and was trying to get them back behind his back. As I walked in I could see that he had completed getting one leg back through. I could tell by the motion that he was putting his leg back through.

Q Was he trying to get his hands in front or back behind?

A (demonstration) He was trying to get them back behind. I could see he had completed one foot through. He was bent over.

. . .

Q Was he belligerent?

A . . . . Not that I recall.

This evidence supports the inmate's written statements. It contradicts the Appellant's self-serving recitations that he saw the inmate bring the handcuffs from behind his back past one foot and then saw him get the cuffs hung up for some time as he was moving them past his second foot before finally reversing direction and straddling the cuffs. We do not believe that the inmate could have completed all of those contortions within the "half-step" moment between Appellant's and Petkovsek's entry to the cell. Because we believe the inmate was actually straddling the handcuffs and trying to move them toward his back when Appellant entered the cell, we also believe the inmate was effectively incapacitated and not a threat – or an apparent threat – to the Appellant.

The letter of discipline further alleges that the Appellant had untruthfully described the inmate as "agitated and belligerent," whereas in fact the inmate "was not behaving in a belligerent manner and was actually in a compromised position with one leg through the handcuffs." In his written statement prepared for his February 1 investigatory interview, Appellant twice described the inmate as "agitated." Webster's New Collegiate Dictionary defines "belligerent" to mean "1: waging war . . . . 2: inclined to or exhibiting assertiveness, hostility, or combativeness." The term is consistent with the description Appellant provided in his written statement. He saw the inmate "standing in the corner and suddenly step through his handcuffs *in an attempt to get his hands in front of him*." According to the Appellant, the inmate continued his effort to move his hands to the front even after he looked directly at the pepper spray, turned, sat down on a chair, and then laughed after looking at the pepper spray a second time. No one verified any aspect of Appellant's description.[12] The inmate's statement contradicts it. Officer Petkovsek also contradicted it both in his investigative statements and in his testimony. The inmate, in fact, had been quiet for five to 10 minutes, ever since he had

[12] The Appellant argues that the inmate's conduct *before* Appellant entered the holding cell shows that he was agitated and belligerent. However, the inmate had been in the holding cell without incident for up to ten minutes. The question before the Commission is whether the Appellant accurately described the inmate's actions during the very brief period after Appellant entered the cell.

been placed into the holding cell. He was already in a vulnerable position when Appellant first saw him and did not lash out at the Appellant either physically or verbally. We reject the Appellant's characterization of events and conclude that the inmate was not belligerent.

To summarize, we agree with the Respondent that:

1. Appellant responded to the inmate by making statements to the effect of, "What the fuck are you doing; do you want your head bashed in; do you want to be pepper sprayed or your head smashed in the wall?"

2. During the investigation, Appellant inaccurately described the inmate as belligerent.

3. During the investigation, Appellant inaccurately described having seen the inmate manipulating his cuffed hands from behind to in front.

4. During the investigation, Appellant twice denied, inaccurately, having made statements to the inmate to the effect of "Do you want your fucking head bashed in?"

The final three conclusions constitute violations of Work Rule 6, because the Appellant failed "to provide truthful, accurate and complete information when required."

The proposed decision correctly concluded that, when the Appellant yelled words to the effect of "Do you want your head bashed in?," the Appellant violated Work Rule 12, because he was threatening the inmate with bodily harm. It is quite possible that the Appellant never formed a specific intent to carry out his threat, but it is also conceivable that he had "lost it" to the extent that, absent other correctional staff in the cell, he would have followed through in the heat of the moment. In any event, it is clear he had lost control of his own emotions when the target of his anger was already in a vulnerable position.[13]

Respondent also contends that Appellant's language during the incident was demeaning and abusive, so that he also violated Work Rule 13. According to Respondent's brief,

> Using the words "fuck," and "fucking" is derogatory and demeaning and is far beyond the boundaries of appropriateness. Using the word "bash" is abusive in dealing with the inmate. Using of "bashed" is far beyond the boundaries of appropriateness. Johnson's use of the terms shows a total disregard or respect for the inmate. . . . Warden Hepp stated, "all employees and offenders have a right to a non-violent, non-threatening environment. This means free of derogatory . . . comments."

Post-hearing brief at 22.

[13] In his post-hearing brief, the Appellant contended that "his inquiries were excited utterances on his part in order to gain compliance by an inmate who had placed Johnson [in] a serious safety risk." The proposed decision agreed with this characterization. For the reasons noted, we do not.

The standards for language to be used in State prisons are not going to be the same as those that apply in a grade school classroom. However, the record shows that the Appellant's language fell below the standard applied to interactions with inmates. The Appellant admitted as much when, after being confronted by Captain Jensen at the end of the shift, he commented that he could not believe he had said what he did. Two disinterested witnesses stated that the Appellant used the phrase "your fucking head" during his outburst. Captain Jensen specifically recalled that Appellant used the word "fucking." Even if Appellant did not use these three words in that precise sequence, his verbal barrage was loud and hostile and we conclude it was intimidating and demeaning to an inmate in an already compromised position and therefore violated work rule 13 as well as 12.[14]

Because we find that the Appellant engaged in all of the alleged misconduct, in violation of three separate work rules, we conclude that there was just cause for the imposition of some level of discipline.

Was demotion excessive discipline?

As explained in DOC (GERRITSON), DEC. NO. 31234-A (WERC 6/2005); citing JACOBS V. DOC, CASE NO. 94-0158-PC (PERS. COMM. 5/15/1995):

> Some of the factors that enter into the excessiveness determination are 1) the weight or enormity of the employee's offense or dereliction, including the degree to which it did or could reasonably be said to tend to impair the employer's operation, 2) the employee's prior record and 3) discipline imposed by the employer in other cases.

Actual impairment of the employer's operation is not required. DOC (FEDERLIN), DEC. NO. 31094-A (WERC, 11/2004).

The discipline in the present case must be premised on the Appellant's conduct inside the holding cell as well as on the Appellant's subsequent untruthfulness while accounting for his conduct.

Internal Department of Corrections policy statements assist us by identifying, in at least general terms, some factors to keep in mind when determining the level of discipline. For example, the Supervisor's Manual notes that in "determining the seriousness of actual or threatened physical violence, management must consider whether a threat was made in front of other employees, inmates or clients; whether the employee intended to carry out the threat; and whether the employee was provoked." Appellant's threat was directed towards an inmate and was made in front of several other employees. However, we do not believe that the Appellant actually intended to carry out the threat and believe the Appellant would not have reacted the way he did if the inmate had kept his cuffed hands behind his back.

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[14] Appellant's counsel was able to side-track a number of the Respondent's witnesses, so that their testimony seemed to become inordinately focused on semantic rather than substantive distinctions.

The same manual notes that the "use of profane or abusive language by an employee is not necessarily just cause for discipline" and that "[c]ommon use of such language at a particular work site . . . may be a mitigating factor in judging the seriousness of the offense." While the record does not show that profane and abusive language at Jackson was common, profanity directed at an inmate sometimes did, but sometimes did not, generate discipline.

Appellant had a 15-year history of employment with the Department of Corrections and, at the time of the discipline, had served approximately seven years as a supervisor. His only previous discipline was a written reprimand that is unrelated to this appeal. Respondent, in a post-hearing brief, acknowledged that the termination of the Appellant's promotional probationary period at New Lisbon in mid-2006 is not to be considered as discipline. The Appellant did not have the opportunity for administrative review of the action.[15] Nevertheless, the May 2006 probationary termination letter served as a very clear job instruction to Appellant as well as a clarification of what his employer considered inappropriate conduct. He was put on notice that "us[ing] profanity 'for effect' while dealing with an inmate" and escalating the incident by placing hands on the inmate would not be tolerated. Respondent also reinforced the importance of the Appellant's credibility by alleging that he had been "less [than] truthful when discussing an issue with the Deputy Warden regarding copies of incident reports."

Although the record includes a great deal of information about the results of investigations conducted of other allegations of misconduct at Jackson, none of those investigations are closely related to the Appellant's misconduct. Appellant, a supervisor, over-reacted to non-threatening conduct of an inmate by swearing and shouting at the inmate and threatening to physically harm him. During the subsequent investigation, the Appellant described the interaction inaccurately in an effort to avoid discipline. Nearly all of the investigations of record at Jackson involved correctional officers rather than supervisors, and few instances encompassed inmate-directed misconduct about which the employee subsequently was untruthful. As already indicated in the findings of fact, one sergeant received a written reprimand for moving inmates between cells without permission and against a directive, and for providing inaccurate information to his supervisor. Another officer was suspended for five days for shoving a food tray into an inmate's cell and inaccurately completing a related inmate conduct report. In both instances, the level of discipline was much lower than Appellant's demotion. The difference is substantially explained by the higher standard of conduct imposed

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[15] If, instead, the Respondent had chosen in 2006 to terminate Appellant's probation and to suspend him, the suspension would have required just cause and would have been subject to review pursuant to Sec. 230.44(1)(c), Stats. Section ER-MRS 14.03(1), Wis. Adm. Code, describes the status and rights of persons who are promoted within the same agency:

> At any time during this [probationary] period the appointing authority may remove the employee from the position to which the employee was promoted without the right of appeal and shall restore the employee to the employee's former position or a similar position and former rate of pay . . . . Any other removal, suspension without pay, or discharge during the probationary period shall be subject to s. 230.44(1)(), Stats.

Also see ARNESON V. UW, CASE NO. 90-0184-PC (PERS. COMM. 2/6/1992).

on supervisors. DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/2004). In addition, in contrast to the other situations, the Appellant had received specific notice in May 2006 warning him not to engage in the type of conduct described in the letter of discipline at issue here.

Prior decisions of this Commission also provide some guidance but, once again, that guidance is limited by the specific facts before us. The employee in DOC (GERRITSON), DEC. NO. 31234-A (WERC 6/2005) was a captain and served as the second shift commander. He became involved in a romantic relationship with a subordinate sergeant and the relationship was brought to the attention of the security director by other employees. Gerritson denied or failed to acknowledge the existence of the romantic relationship when asked by the security director on two different occasions. Respondent later obtained proof of the relationship as a consequence of an institution-wide investigation into email usage. The extensive set of emails between the two included some that were implicitly sexual as well as an inappropriate photo of an inmate. Respondent demoted Gerritson from captain to lieutenant for improperly using the email system and for knowingly providing false information. On review, the Commission concluded that demotion was excessive discipline and modified it to a 20-day suspension. The Commission acknowledged that the email exchanges undermined Gerritson's attention to his second shift duties and, if they had fallen into an inmate's hands, could have been used as leverage. The Commission also agreed that by denying any romantic relationship, Gerritson had undermined his credibility with his co-workers. After concluding that comparisons to discipline of record imposed on other employees provided "only moderate support for a single-step demotion", the Commission identified six separate factors that argued for a reduction in discipline and modified the demotion to a 20-day suspension. One of the six factors was that Gerritson had already suffered what amounted to a loss of salary as a consequence of the same misconduct. Two weeks prior to the imposition of the demotion, the Respondent had rescinded a previously announced pay increase "due to performance and disciplinary concerns that have recently come to light."

The relevant facts in DOC (GERRITSON) serve as a reasonable comparison for purposes of determining whether the decision to demote the Appellant in the present appeal was excessive discipline. Like Gerritson, the Appellant is a supervising officer who engaged in misconduct arising from his interactions with others, and then misrepresented his role when questioned by his superiors. Both individuals lost credibility with their superiors and co-workers. In contrast to Gerritson, however, Appellant's inappropriate treatment of an inmate is more directly related to the core function of the institution.

The circumstances in the instant case clearly do not reach the level of those present in FRASER V. DOC, CASE NO. 99-0058-PC (PERS. COMM, 4/7/2000), where the employee physically abused an inmate. Fraser was serving his promotional probation as a lieutenant at a boot camp for youths. In an initial incident, Fraser was providing a tour of the facility to local students and teachers when he explained that some prisoners in adult institutions have their front teeth knocked out to "give better blowjobs." One month later, Fraser 1) propelled a youth cadet (who was in restraints but verbally abusive) into the side of a van; 2) spun the cadet around and pushed him in the chest several times to force him against the van, 3) told the cadet to "Shut your damn mouth", and 4) finally placed one hand on the cadet's throat in a

choke hold for at least several seconds. Fraser was directed to prepare an incident report but did not do so. The employer imposed a 30-day suspension, *and* terminated his promotional probation, so that he returned to the equivalent of a sergeant position.[16] The discipline, based on violations of Work Rules 6, 12 and 13, was affirmed on appeal. While FRASER presents more egregious misconduct than the present appeal, Fraser's penalty was also more significant, in that it included not only the loss of the supervisory promotion (in effect, a demotion), but also a 30-day suspension. The penalty also removed Fraser from the boot camp program and returned him to a traditional institution within the Division of Juvenile Corrections, a setting in which he had performed well. The Commission concluded that the Department's penalty, which, as here, returned the employee to a non-supervisory position, was not excessive.

Both FRASER and the discipline imposed in the instant case underscore the high expectations the Department is entitled to place upon Lieutenants in the prison system. Lieutenants are to act as role models for lower level correctional staff and can take charge of security at the institution when higher level supervisors are not available. Respondent reasonably concluded that the Appellant lacked the level of self-control necessary to carry out those responsibilities. Appellant's conduct was inconsistent with Respondent's philosophy of treatment of inmates by staff. Other staff could be expected to lose confidence in Appellant's ability to make appropriate decisions in the future about custody and safety issues.

Appellant's misconduct during the aftermath of the incident is also highly relevant to the responsibilities of a supervisor. Appellant sought to manipulate the facts in order to minimize any discipline, thereby placing his veracity in question as to all aspects of his job.

In light of these comparisons and the facts of the present appeal, we conclude that demotion of the Appellant was not excessive discipline.[17]

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[16] The Superintendent, Deputy Superintendent, and the Director of Human Resources all recommended discharge, but the Division Administrator relied on Fraser's length of service, positive references and the combined effect of the suspension and probationary termination.

[17] We have also modified the proposed decision by eliminating the sentence, "His [the Appellant's] claimed post traumatic stress disorder is a factor in determining his degree of culpability for his excited utterances on January 28, 2008." The record is not sufficient to conclude that the Appellant actually suffered from an ongoing, medically-verifiable stress condition at the time of the incident in question. The record also is not sufficient to conclude that the State had been requested to accommodate such a condition, or that either Security Director Schulz or Warden Hepp understood or had been told that Appellant's condition was ongoing. Both testified that they believed it had been resolved at or near the time of Johnson's return to Jackson. Further, we are not persuaded that a condition that undermines a correctional supervisor's ability to respond appropriately to a situation like the instant one, a response that is witnessed by several lower-ranked officers, would properly be deemed a mitigating factor in deciding whether the supervisor should be demoted to a less responsible position.

Request for costs under Sec. 227.485, Stats.

The Appellant requested costs pursuant to that portion of Wisconsin's Equal Access to Justice Act (EAJA) found in Sec. 227.485, Stats. The criteria for applying the EAJA are set forth in subsection (3), which provides in part:

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

The Appellant is not a "prevailing party," so his request must be denied.

Dated at Madison, Wisconsin, this 10th day of February, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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