STATE OF WISCONSIN PERSONNEL COMMISSION

BRUCE POWERS,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM-MADISON,

Respondent.

Case No. 88-0029-PC

INTERIM* DECISION AND ORDER

Following the issuance of a proposed decision and order in this case on December 22, 1989, the parties filed objections to the decision and respondent requested the opportunity to present oral argument. The oral argument was heard on March 7, 1990. The Commission has considered the objections and arguments and has consulted with the hearing examiner, and makes the following determinations relative to these objections. Those objections not addressed here are rejected by the Commission.

FINDINGS OF FACT

The following finding of fact is added after Finding #18 to further clarify the appellant's knowledge of the work rules.

18a) The work rules identified in Finding #18 were included in the work rules respondent issued in March, 1974. Appellant was aware of the existence of the work rules.

DISCUSSION

Finding that Appellant Tripped or Pushed Mr. Dunn During the February 26, 1988 Incident.

* This decision is issued as an interim decision and order to provide the appellant an opportunity to file a motion for costs under §227.485, Stats.

The proposed decision and order, concludes at page 15: "appellant did not trip or push Mr. Dunn, but that in passing appellant, Mr. Dunn lost his balance and fell into the cabinet." The proposed decision places emphasis on the fact that Mr. Dunn tried to pass the appellant and was the aggressor.

Respondent argues that the Commission should find the appellant tripped or tried to trip Mr. Dunn. This argument is based upon Mr. Dunn's excited utterance (You son of a bitch, you tripped me!), the force with which Mr. Dunn hit the wall and filing cabinet (Mr. Zimba testified that it sounded like someone was moving a file cabinet), and the testimony of appellant that he might have put his foot out when he was bumped by Mr. Dunn.

Appellant argues, on the other hand, that once Mr. Dunn has been determined to be the aggressor, the case is closed and he should be exonerated. In additional support of this argument, appellant states that there was no intentional act on his part to trip or push Mr. Dunn. In his testimony, appellant even indicates that he really wasn't aware of what happened until he was pushed into the wall and heard the noise when Mr. Dunn hit the filing cabinet.

The Commission concludes that appellant was well aware that Mr. Dunn was behind him in the hall. This is based not only on the fact that appellant knew Mr. Dunn was trying to pass him as he initially entered the hallway, but also on Mr. Cutsforth's testimony that he heard loud voices in the hallway prior to Mr. Dunn hitting the file cabinet.

It is also well established that appellant and Mr. Dunn do not get along. Neither the appellant or Mr. Dunn are very credible when they portray the February 26, 1988, incident in such polite (Dunn) and indifferent (Powers) terms. However, it is the respondent who must establish by a preponderance

of the evidence that the actions they accused appellant of occurred. Appellant's letter of discipline states that he "either pushed or tripped Mr. Dunn." The record does not support a finding that appellant "pushed or tripped Mr. Dunn." The letter does not say appellant "attempted" to push or trip Mr. Dunn.

The proposed decision goes on to state at pp. 15-16:

> However, appellant's action in not letting Mr. Dunn pass initially when he entered the hall and then proceeding to walk in front of Mr. Dunn almost oblivious to the fact that Mr. Dunn was behind him (appellant's testimony) is indicative of at least a lack of courtesy as a minimum and perhaps even some attempt to aggravate Mr. Dunn as he was carrying a hot burrito. The Commission concludes that these acts constitute a violation of Work Rule IV. J., and that while the specific conduct alleged by respondent was not proven, appellant must bear a degree of fault and culpability for what occurred.

However, appellant was not charged with this misconduct ("proceeding to walk in front of Mr. Dunn almost oblivious to the fact that Mr. Dunn was behind him...is indicative of at least a lack of courtesy as a minimum and perhaps even some attempt to aggravate Mr. Dunn as he was carrying a hot burrito"). Therefore, this misconduct cannot serve as the basis for discipline.

The proposed decision and order at the top of page 18 makes reference to: "The issue (whether the chargeable conduct, if true, constitutes just cause for discipline) is resolved not so much in terms of credibility but in terms of who was the aggressor." (Material in parenthesis added). The incident on February 26, 1988, was identified as a violation of Work Rules IV A and IV J. The Commission finds that appellant's actions did not violate Work Rule IV A and IV J because the notice contained in appellant's letter of suspension refers only to tripping or pushing Mr. Dunn, and while there may have been some involvement of appellant in the incident it was not tripping or pushing and that is all he is charged with. The discussion in the proposed decision

contained in the next to the last paragraph on page 15 and the paragraph beginning on the bottom of page 15 and ending on the top of page 16 is deleted.

The Commission also makes the following changes to the proposed decision to make it consistent with the record and the findings of fact. The discussion under "February 26, 1988, Incident" on pages 17 and 18 is deleted. The discussion of excessiveness of the discipline on pages 19 and 20 is deleted.

Finding of Fact #12 - Photocopying of Mr. Dunn's Calendar by Appellant

Appellant argues that he was afraid of Mr. Dunn and that the calendar would have shown this fear to be justified. The Commission finds that the photocopying of Mr. Dunn's calendar was included as a finding only for purposes of showing that appellant and Mr. Dunn did not get along. The proposed decision and order contains a reference to other instances dating back to 1984 which show that these two employes had a very acrimonious relationship (Finding #5 and page 16 of the Discussion section).

While the appellant argued that Mr. Dunn was the instigator of the incidents and the reason for all the problems, the record reflects that appellant also exhibited unacceptable behavior by asking Mr. Dunn on at least one occasion to "step outside." The Commission does not find it necessary to determine who was the "worst actor" in addressing credibility. It is clear from the record that appellant and Mr. Dunn did not get along. This fact in and of itself has an impact on credibility. Appellant argues Mr. Dunn changed his story to fit the occasion. On the other hand, appellant played down his role in the February 26, 1988, incident by testifying that he really wasn't sure who was behind him or what actually happened until he was forced into the wall and he heard Mr. Dunn hit the cabinet.

The Commission concludes that Finding #12 is relevant only in terms of the interaction, and relationship of appellant to Mr. Dunn. The issue of credibility does not hinge on this finding.

Excessiveness of the Discipline

In addition to the discussion in the proposed decision under this heading on the bottom of page 18, the Commission adds the following:

> The respondent argues that even if the "pushing or tripping" of Mr. Dunn is not considered, the 30-day suspension would be justified because of the fact that appellant is a professional employe and the behavior was so egregious. Conversely, appellant argues that Mr. Dunn was the aggressor, and since he didn't intentionally trip or push Mr. Dunn, he shouldn't be subject to any discipline.
>
> Respondent failed to establish the alleged misconduct of February 26, 1988, involving pushing or tripping Mr. Dunn. This was by far the more serious of the two matters. The misconduct of February 19, 1988, while certainly not trivial, was far less serious and, as a first offense, should result in no more than a written reprimand.

ORDER

The attached proposed decision is adopted and incorporated by reference as if fully set forth herein with those additions and modifications set forth above, and with the modification of Conclusion of Law #4 to read as follows:

> 4. The thirty (30) calendar day suspension without pay constitutes excessive discipline for the only alleged misconduct for which just cause was shown (that which occurred on February 19, 1988) and should be modified to a written reprimand.

The following is substituted for the proposed order as the final disposition of this matter:

> Respondent's action to suspend appellant without pay for 30 days is modified to a written letter of reprimand and remanded for action in accordance with this decision.

Dated: May 10, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

GFH/AJT:baj

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

BRUCE POWERS,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 88-0029-PC

PROPOSED DECISION AND ORDER

This case involves an appeal of a decision by the University of Wisconsin System Administration, respondent, to suspend for thirty (30) calendar days without pay, Mr. Bruce Powers, appellant, from his position as an Auditor 3 with Internal Audit.

FINDINGS OF FACT

1. Appellant began employment with the Internal Audit unit of the University of Wisconsin System Administration (UWSA) in 1981. At all times relevant to the matters under review in this case, the appellant was classified as an Auditor 3 in Internal Audit. Appellant's office is located at 1920 Monroe Street.

2. The appellant reports to an audit supervisor (Mr. Fred Strand) who in turn reports to the Director of Internal Audit (Mr. William Brunkow). Mr. Brunkow reports to the UWSA Vice-President for Business and Finance (Mr. Ray Marnocha was the acting Vice-President at the time). Mr. Strand's office is located at 1920 Monroe Street. Mr. Brunkow and Mr. Marnocha had their offices in another location, i.e. Van Hise Hall, although Mr. Brunkow also had office space set aside for him at 1920 Monroe Street.

3. Among the co-workers of appellant at the time of the February 26, 1988 incident were Mr. David Cutsforth, Ms. Amy Calvillo, Mr. Ron Wiedemann, Mr. Zach Simba, Mr. George Briggs, and Mr. Leo Dunn. All of these employes had their offices at 1920 Monroe Street.

4. Prior to the imposition of discipline by respondent for his role in the February 26, 1988 incident, Mr. Dunn was at all relevant times classified as an Auditor 4. As an Auditor 4, Mr. Dunn had leadwork responsibilities in Internal Audit, which included directing the work of other staff auditors on specific projects as well as serving as a senior auditor.

5. Appellant and Mr. Dunn did not get along and had clashed on occasions in the past. For example, in September, 1984, the appellant grabbed Mr. Dunn's shirt and twisted it around Mr. Dunn's neck and shoulders. Mr. Dunn wore a neck brace for a period of time and received worker's compensation. The incident resulted from appellant's concern with how much work Mr. Dunn was doing on a joint audit. Respondent took no formal disciplinary action.

6. Subsequent to the 1984 incident, respondent talked to both Mr. Dunn and the appellant and encouraged them to get along. Additionally, respondent took steps to physically separate appellant and Mr. Dunn, who shared an office at that time, by putting them in separate offices (cubicles) and not assigning them to work together on audits. There was, however, one occasion in 1986 when appellant and Mr. Dunn worked together on a federal financial aid audit of Madison campus.

7. On February 19, 1988, Mr. Dunn sent a note to Mr. George Briggs (Appellant's Exhibit #13) which referred to not using the "B" parking sticker for personal use and to "cease or else." Mr. Briggs does not sit in the same area as Mr. Dunn. Mr. Briggs confronted Mr. Dunn in the area

in which his (Dunn's) and Mr. Cutsforth's offices are located. Mr. Briggs had a heated discussion with Mr. Dunn (witnessed by Mr. Cutsforth) concerning the parking sticker note and eventually told Mr. Dunn to "kiss his ass."

8. Immediately after this incident, Mr. Powers' came into the cubicle area and noticed a handwritten sign on the outside wall of Mr. Cutsforth's office concerning the work hours of Ron Wiedemann. (Appellant's Exhibit #12). The sign was put up by Mr. Dunn and it stated that all staff could come in at 8:30 a.m. and have a reduced work week like Ron (Wiedemann). Appellant took down the sign and engaged in angry conversation with Mr. Dunn. Mr. Dunn asked him to leave that alone and appellant replied "Why don't you try to stop me?" or words to that affect. Mr. Dunn said "Why don't you just leave?" to which appellant responded "Why don't you make me?" Appellant then moved to within inches of Mr. Dunn's face and asked twice if he wanted to "step outside." Mr. Dunn did not reply and appellant left the area. (Respondent's Exhibit #7 and testimony of Mr. Cutsforth.)

9. On the afternoon of February 19, 1988, the appellant talked to Mr. Strand about Mr. Dunn and that this issue had to be dealt with. No specific incidents of that day were discussed.

10. Mr. Dunn had on occasions displayed a knife and brass knuckles to co-workers, and both Mr. Strand and Mr. Brunkow had seen, on separate occasions, the brass knuckles.

11. On February 20, 1988 (Saturday), appellant called Mr. Strand at home and said Mr. Dunn had called his house and made what he felt were threats. Respondent took no action because the incident had occurred over the weekend.

12. Sometime after February 17, 1988, appellant went into Mr. Dunn's cubicle and made copies of almost all of Mr. Dunn's calendar which contained various notations he had made.

13. On the morning of February 26, 1988, appellant and Mr. Strand were working on a project, and Mr. Dunn engaged in some disruptive behavior (teasing), which appellant was not happy with.

14. About 11:00 a.m. on February 26, 1988, appellant was in a common hallway outside of the individual cubicles refiling a reference book on some book shelves located in the hallway. Mr. Dunn had just finished heating a burrito and entered the hallway in which appellant was standing. The hallway was not wide enough for two people to pass shoulder to shoulder. Mr. Dunn asked appellant "to get out of the way," and appellant told him "to wait a minute." Appellant replaced the reference book and proceeded down the hall in front of Mr. Dunn. Mr. Dunn attempted to pass the appellant, lost his balance, and ended up falling against a low wood cabinet dropping his burrito. The filing cabinet is located at the corner where the hallway makes a 90-degree angle and continues on to the right. Until Mr. Dunn hit the filing cabinet, there were no witnesses as to what was said or what happened.

15. When Mr. Dunn hit the filing cabinet, he turned and said, "You son of a bitch, you tripped me." Mr. Dunn then grabbed appellant around the neck from behind knocking off and breaking appellant's glasses. Mr. Dunn lifted appellant off the ground by putting him over his hip. Mr. Cutsforth came from his office having witnessed this and said, "Leo, Leo (Dunn) let him go." Mr. Cutsforth separated Mr. Dunn and the appellant, and physically escorted Mr. Dunn further down the hall and eventually let him go. Mr. Cutsforth reported the incident to Mr. Strand.

16. The appellant subsequently went to Mr. Strand's office to tell him about the incident. Appellant also called Mr. Brunkow.

17. Mr. Brunkow informed Mr. Marnocha of the incident and began his investigation including discussing the matter with personnel and legal staff. Mr. Brunkow asked the University of Wisconsin Protection and Security unit to also investigate the incident. Detective Flad of Protection and Security conducted the investigation and issued a report. The report was referred to the District Attorney's office. Respondent wanted this additional investigation in case either of the parties might bring an action against the other.

18. In memoranda dated February 26, 1988, (Respondent's Exhibits #3 and #5) Mr. Strand separately notified both appellant and Mr. Dunn that a pre-disciplinary hearing would be held on Monday, February 29, 1988, to obtain information relevant to the physical altercation which had occurred earlier in the day. In addition to information about the place and time of the meeting, their right to representation, and the fact that disciplinary action might be taken, the memorandum identified the following work rule alleged to have been violated.

IV. PERSONAL ACTIONS AND APPEARANCE

A. Threatening, attempting, or doing bodily harm to another person.

B. Threatening, intimidating, interfering with, or using abusive language towards others.

J. Failure to exercise good judgement, or being discourteous in dealing with fellow employes, students, or the general public.

19. At the conclusion of the pre-disciplinary hearing, Mr. Brunkow discussed the matter with Mr. Marnocha and they decided on the following disciplinary action, which Mr. Marnocha conveyed to appellant and Mr. Dunn

in separate letters dated March 7, 1988. (Respondent's Exhibits #2 and #4, respectively). The appellant was suspended without pay for thirty (30) calendar days. Mr. Dunn was suspended without pay for thirty (30) calendar days, demoted from an Auditor 4 to an Auditor 3, and reduced in pay from $15.659/hour to $14.570/hour.

20. The appellant's letter of suspension referenced the work rule in Finding #18, and indicated that his actions on February 26, 1988, were a violation of Work Rule IV.A. and IV.J. In addition, reference was made to an incident on February 19, 1988 (Finding #8) as being a violation of Work Rule IV. B. and IV. J., as a basis for taking disciplinary action. Specifically, the letter of suspension stated, in pertinent part, the following:

* * *

> On Friday, February, 26, 1988, you engaged in a physical confrontation with Mr. Leo Dunn which resulted in injury and disruption of office operations. This incident occurred at approximately 10:45 a.m. in the hallway of the 1920 Monroe Street offices.
>
> Evidence reveals that while in the hallway, you either pushed or tripped Mr. Dunn, causing him to hit both the wall and a small wood cabinet which is located in the corner turnway of the hall. This provocation on your part resulted in Mr. Dunn then turning towards you and saying "You son of a bitch, you tripped me," whereupon he lunged toward you and from behind grabbed you around the neck with his right arm in a choke hold.
>
> Mr. Dave Cutsforth then interceded and attempted to physically move you and Mr. Dunn apart. During this incident your eye glasses were found broken after having been knocked off your face. Your involvement and actions during the above incident constitute a violation of work rules IV. A. and IV. J.
>
> Further, on the morning of Friday, February 19, 1988, you entered the office area of Mr. Dunn and proceeded to take down a makeshift notice authored by him against his repeated protests. You then proceeded to taunt and challenge Mr. Dunn in an apparent attempt to provoke a physical confrontation.
>
> The above actions on your part constitute a violation of work rules IV. B. and IV. J.

* * *

21. Mr. Dunn's letter of suspension, demotion and reduction in pay referenced the work rule in Finding #18, and indicated that his actions on February 26, 1988, were a violation of Work Rule IV. A., IV. B., and IV. J. In addition, reference is made to the telephone call he made to appellant's home (Finding #11) concerning the verbal confrontation of February 19, 1988 (Finding #8), as being a violation of Work Rule IV. B. and IV. J., as a basis for taking disciplinary action.

22. Respondent stated that the amount of discipline given was necessary because of the seriousness of the incident in terms of it being a breach of professional conduct and work rules, and setting a bad example for younger employes. Mr. Dunn's discipline was more severe because of his leadwork and senior auditor status in the unit. Respondent did not use the information in the police report or refer to it in arriving at its disciplinary decision.

23. Mr. Dunn has been placed in a first offender program and is obtaining the professional assistance referenced in his disciplinary letter.

24. Mr. Dunn did not file an appeal of his discipline with the Commission.

25. Appellant filed a timely appeal with the Commission on March 9, 1988.

CONCLUSIONS OF LAW

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

2. The burden of proof is on the respondent to demonstrate to a reasonable certainty by the greater weight of credible evidence that there was just cause for the imposition of discipline and for the amount of discipline imposed.

3. The respondent has established just cause for the imposition of same discipline but not for the thirty (30) calendar day suspension without pay.

4. The thirty (30) calendar day suspension without pay constituted excessive discipline and should be modified to a ten (10) calendar day suspension without pay.

DISCUSSION

The issue set for hearing in this case was:

1. Whether the allegations contained in the letter of suspension are true?

2. If so, do they constitute just cause for the action taken?

In Mitchell v. DNR, Case No. 83-228-PC (8/30/84), the following three questions were identified by the Commission as a guide to be used in reaching a determination on the issue of just cause in disciplinary cases.

"1. Whether the greater weight of credible evidence shows that appellant has committed the conduct alleged by respondent in its letter of suspension.

2. Whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes (just) cause[1] for the imposition of discipline, and

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[1] The definition of just cause was set forth by the Wisconsin Supreme Court in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379(1974), as follows:

> ... one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to impair his performance of the duties of his position or the efficiency of the group with which he works. ...State ex rel. Gudlin v. Civil Service Comm. (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 799.

3. Whether the imposed discipline was excessive. Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79)"[2]

In the instant case, the action of appellant during the incidents of February 19, 1988, and February 26, 1988, are the basis for the disciplinary action taken by the respondent. Prior to imposing any disciplinary action, respondent gave the appellant notice that it was considering disciplinary action (Respondent's #3), what work rule was alleged to be violated and gave the appellant an opportunity to be heard on February 29, 1988. The notice of the pre-disciplinary hearing identified only the February 26, 1988 incident.

Subsequently, the letter of suspension (Respondent's #2) identified both the February 19 and 26, 1988, incidents. The respondent learned of the February 19th incident during the course of its investigation and, in part, from the pre-disciplinary hearing held on February 29, 1988 by Mr. Brunkow. There is no indication on the record that either Mr. Brunkow or Mr. Strand (the first-line supervisor) had been notified or were even aware of the February 19, 1988 incident prior to sending out the notice of the pre-disciplinary hearing. In a footnote in his post-hearing brief, the appellant simply poses the question: "Did appellant have a reasonable

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[2] In Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79), the Commission discussed these concepts as follows:

> In the opinion of the Commission, the current statute clearly requires a two-step analysis of a disciplinary action or appeal. First the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded that there is just cause for the imposition of discipline, the Commission must determine whether under *all* the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. See, e.g., State ex rel. Iowa Merit Employment Commission, 231 N.W. 2d 854, 857 (1975).... p.6.

pre-disciplinary [sic] to contest this charge?" The Commission has previously held that a week's salary, lost as a consequence of a suspension, is a property interest that is protected by the due process clause. Showsh v. DATCP, 87-0201-PC, 11/28/88; rehearing denied, 3/14/89 (appeal pending). However, in Showsh, the Commission concluded that the limited nature of the property interest and the availability of a postdisciplinary trial-type hearing meant that it was unnecessary for the predisciplinary hearing to be at all extensive. The predisciplinary procedure was sustained in that case where the appellant was given an opportunity to meet with and explain to his supervisor what he knew about the matters in controversy, after having been advised that disciplinary action might result. At the time of the predisciplinary hearing began in the present case, the respondent's management was unaware of the incident on February 19th. There is no indication (nor any allegation) that the appellant was not provided a full opportunity to explain his side of the February 19th events during the predisciplinary hearing with his superiors. Therefore, given these circumstances, the Commission concludes that the appellant's due process rights were not violated even though he was not provided a written notice of the predisciplinary hearing which referred to the February 19th incident.

Appellant also raised the point that neither Mr. Marnocha, Mr. Brunkow, nor Mr. Strand provided him copies of the work rules and were not aware of whether he had ever gotten them. The specific work rules were a part of Respondent's Exhibits #3 and #5 which indicate that the work rules, including the one involved in this case, had been in existence since March, 1974. While the record does not contain any information on whether appellant actually did receive the work rules, Mr. Strand testified that he assumed appellant got them when he began employment as part of some overall

orientation that all new employes receive. (Appellant began employment in 1981 in the University of Wisconsin System Administration (UWSA) Internal Audit unit.) It is difficult for the Commission to assume that the appellant, as a professional employe, would consider actions such as those of February 19 and 26, 1988, to be appropriate because no one told him that there was a specific work rule prohibiting that type of behavior. For purposes of this decision, the Commission will conclude that appellant knew or should have known about the work rule and/or that such behavior was inappropriate.

The first question to be addressed in this case is whether appellant has committed the conduct alleged in respondent's letter of suspension.

February 19, 1988 Incident

There is no dispute over what occurred between appellant and Mr. Dunn on February 19, 1988. (Finding 8) Appellant was angry and threatening in his behavior regardless of how justified he may have felt.

February 26, 1988 Incident

The incident of February 26, 1988 and what actually happened are, at least in part, disputed by the parties. Before getting to the disputed facts, the following facts related to the incident are either not in dispute or have been corroborated by other witnesses.

1. Mr. Dunn entered the hallway in which appellant is putting back a reference book. Mr. Dunn could not get through and asked appellant to move. Appellant said "wait a minute," put back the book, and proceeded down the hall in front of Mr. Dunn. (Finding #14)

2. At the other end of the hallway Mr. Cutsforth observed Mr. Dunn fall into a small, wood filing cabinet, say "you son of a bitch,

you tripped me," right himself, and attack appellant from behind by putting his arms around appellant's neck. (Finding #15)

What is in dispute is what happened in the hallway to cause Mr. Dunn to fall into the filing cabinet. The only testimony on what occurred is from appellant and Mr. Dunn. The issue of credibility of either person's testimony is in considerable doubt. First, appellant and Mr. Dunn had a very acrimonious relationship. They had a history of not getting along, and to place a high level of credibility on either testimony about what the other employe did would require some indication of motive or intent. While the record does not contain information from which to derive any information about motive or intent, the record does contain information as to appellant's and Mr. Dunn's interactions and general state of mind.

The specific testimony of appellant and Mr. Dunn about what occurred in the hallway is quite different. Mr. Dunn states that he tried to pass appellant, and appellant stuck his leg out. Mr. Dunn says he jumped over the leg and tells appellant that he shouldn't do that. Mr. Dunn states he was then pushed in the back, and ended up falling into the filing cabinet.

The appellant states that he was proceeding down the hall and knew someone was behind him, but since he couldn't see who it was, he wasn't even sure it was Mr. Dunn. Appellant stated that he was suddenly bumped into, pushed against the hallway wall, and lost his balance. The next thing he knew was that Mr. Dunn had his arm around his neck. Appellant indicates that he wasn't even aware that Mr. Dunn had fallen, except that he heard some noise.

Both of these accounts leave a great deal to be desired in terms of credibility. The only conclusions consistent with both accounts are that Mr. Dunn was the one who tried to pass in a hallway that was too small for

two people to pass side by side, and that appellant's leg(s) never touched Mr. Dunn.

Mr. Dunn claims that he was just trying to get down the hallway. When he passed appellant, it was his second attempt to get by. (The first was when he entered the hallway.) Appellant stated that his leg might accidentally have gone away from his body as he was trying to catch his balance, but he did not intentionally try to trip Mr. Dunn. Mr. Dunn states that he then stated the appellant shouldn't do that. Considering the animosity between these two employes, it is difficult to believe that a second exchange over the same topic would be harmonious. In addition, Mr. Dunn's recounting of how he grabbed appellant, i.e. they were facing each other and he grabbed appellant from the side, is refuted by Mr. Cutsforth who testified that Mr. Dunn jumped on appellant from behind.

The appellant's testimony on what occurred in the hallway indicated that he wasn't sure it was Mr. Dunn. While that is possible, it seems highly unlikely since he did know that Mr. Dunn wanted to get by him at the entrance to the hallway. The appellant had earlier that day been the brunt of Mr. Dunn's teasing. At the hearing, he indicated that the incident had been resolved. While the specific teasing was stopped by Mr. Strand, it was doubtful, based on the past relationship of Mr. Dunn and appellant, that anything had been resolved. Appellant certainly could have initially allowed Mr. Dunn to pass him at the entrance to the hallway, but instead decided to walk in front of Mr. Dunn.

The record does not contain any information on what the appellant's motive was for this action (walking down the hall in front of Mr. Dunn instead of letting him pass). However, looking at the relationship of the employes, the Commission concludes that Mr. Dunn had a tendency to keep

track of co-workers, i.e. time of arrival at work and use of parking stickers, and then to publicize it to all the staff apparently in an attempt to chide or embarrass the staff member. This type of activity upset some staff, but apparently appellant more than others. Therefore, for either appellant or Mr. Dunn to say the incident in the hall was only the fault of the other is just not credible. How much fault should be attached to each of their actions is a question to be answered later, but both had culpability for what occurred.

Appellant's letter of suspension indicated that he had "...either pushed or tripped Mr. Dunn,".... This act was characterized in the letter as "...provocation on your part".... The only conclusion that can be drawn from the record is that Mr. Dunn thought appellant had tried to trip him, and the appellant claims that if his foot did go out (as in a trip attempt) it was only accidently and a part of his effort to regain his balance. This, however, does not answer the question of how Mr. Dunn hit the low wood filing cabinet so hard that other staff members in the area said it sounded like someone was moving the wood filing cabinet.

Mr. Dunn was definitely the moving party in attempting to pass appellant and in the actual attack on appellant witnessed by Mr. Cutsforth. However, when Mr. Dunn bumped appellant, respondent contends that appellant put out his foot to trip Mr. Dunn or subsequently pushed him after he (Mr. Dunn) got by him. Appellant contends he didn't even know what was going on until he was attacked. It is hard to reconcile such complacency in appellant when it comes to Mr. Dunn. However, it is Mr. Dunn who bumped into appellant attempting to get by and certainly any action on appellant's part would have to be of a reflex nature and not a planned action to trip Mr. Dunn. Therefore, for purposes of deciding what occurred, the Commission

concludes that appellant did not trip or push Mr. Dunn, but that in passing appellant, Mr. Dunn lost his balance and fell into the cabinet.

This is also more consistent with appellant's testimony that the incident occurred close to the file cabinet and explains why his back was to Mr. Dunn so quickly after he hit the file cabinet. (The hall continues on at a right angle from the file cabinet at the end of that portion of the hallway where the incident occurred.) Additionally, this is supported by Mr. Cutsforth's testimony that he heard raised voices (louder than normal) and about 2 seconds later saw Mr. Dunn hit the cabinet. Mr. Cutsforth also testified that immediately after that, appellant passed by Mr. Dunn and glanced over his shoulder just before Mr. Dunn attacked appellant from behind. Mr. Dunn's assertion that he attacked appellant from the front or side is just not supported by other testimony, particularly Mr. Cutsforth's.

While respondent has not proven to a reasonable certainty that appellant tried to trip or pushed Mr. Dunn, they identified appellant's actions as violating Work Rule IV. A. (Threatening, attempting, or doing bodily harm to another person.), and Work Rule IV. J. (Failure to exercise good judgment, or being discourteous in dealing with fellow employes, students, or the general public.) The tripping or pushing allegation relates primarily to Work Rule IV. A., and since these actions haven't been proven the Commission concludes there was no violation of Work Rule IV. A.

However, appellant's action in not letting Mr. Dunn pass initially when he entered the hall and then proceeding to walk in front of Mr. Dunn almost oblivious to the fact that Mr. Dunn was behind him (appellant's testimony) is indicative of at least a lack of courtesy as a minimum and perhaps even some attempt to aggravate Mr. Dunn as he was carrying a hot burrito. The Commission concludes that these acts constitute a violation

of Work Rule IV. J., and that while the specific conduct alleged by respondent was not proven, appellant must bear a degree of fault and culpability for what occurred.

The second question is whether the chargeable conduct, if true, constitutes just cause for discipline.

February 19, 1988 Incident

The February 19, 1988, conduct has been proven, and based on respondent's reasons for taking disciplinary action (Finding #22) constitutes just cause for the imposition of some discipline. Appellant argues that Mr. Briggs should also have been disciplined for his comment (Finding #7) to Mr. Dunn on February 19, 1988. Obviously, it is the conduct of appellant which is the subject of this case and not Mr. Briggs. However, to the extent the appellant is attempting to show a non-uniform pattern of treatment of employes for purposes of taking disciplinary action, the argument is insufficient to preclude the imposition of discipline against the appellant given the circumstances of this suspension. The evidence on the record related to the respondent's history of discipline in similar situations is limited to the 1984 incident (Finding #5), and the comments of Mr. Briggs to Mr. Dunn (Finding #7). In the case of the 1984 incident the record reflects only that the appellant was counseled and told to get along with Mr. Dunn. Mr. Brunkow also testified that in 1985 when he returned from a conference he learned that appellant and Mr. Dunn had been involved in a pushing match. Since he was not there, he decided not to take formal disciplinary action. Instead, he talked to both employes and provided new office space which physically separated them. In the incident involving Mr. Briggs there is no indication on the record that any counseling or disciplinary action was taken. The fact that nothing was

done does not, however, preclude respondent from taking action against appellant and Mr. Dunn for their actions. While Mr. Briggs' conduct could certainly be considered unprofessional, it is clear from the record that respondent felt appellant's and Mr. Dunn's actions were much more egregious and needed to be dealt with. While argument has been made that it was unfair to discipline appellant and not Briggs, it is clear that this is not the first incident between appellant and Mr. Dunn. There is no evidence, on the other hand, that Mr. Briggs had ever before been involved in an incident such as the one on February 19, 1988. Considering the leniency shown to appellant and Mr. Dunn in the past, respondent's lack of action in regard to Mr. Briggs seems consistent with their past practice in handling such matters. Whether it can be argued that the actions taken or not taken by respondent were appropriate, it is clear respondent showed considerable tolerance in the past. Appellant cannot, therefore, be justified in thinking that his behavior was appropriate and would not subject him to discipline just because someone else was not disciplined.

February 26, 1988 Incident

Since respondent has not proven to a reasonable certainty that appellant actually tripped or pushed Mr. Dunn, that part of the charged conduct used by the respondent in disciplining appellant does not constitute just cause. The Commission notes that while the specific conduct (tripping or pushing Mr. Dunn) was not proven to a reasonable certainty, appellant's involvement and actions during the February 26, 1988, incident do not absolve him of all culpability. Appellant could have allowed Mr. Dunn to pass. While it was Mr. Dunn's aggressive move to pass that precipitated the incident, the record just does not explain why the appellant seemed not to be aware of what was happening and why he had no response to being

bumped by Mr. Dunn. The issue is resolved not so much in terms of credibility but in terms of who was the aggressor. Under the Safransky test, the Commission also looks at whether the actions "tend to impair the employer's operation." Certainly the type of behavior and conduct involved in this case would do just that. Specifically, there is the disruptive nature of these actions on other staff members both in terms of loss of productivity, time spent discussing the incident, and the overall impact (unfavorable) on the work environment. The impact on the operation and professionalism of the unit would be even more severe if the general public or persons (or organizations) which the unit audits were to observe or learn of the incident. There is testimony on the record that the inability of appellant and Mr. Dunn to get along was known to others besides those in the immediate work unit. Lastly, the time and effort needed to address and deal with these issues by management has at a minimum a disruptive impact and takes the focus of the operation off its program goals.

The third question is whether the discipline imposed was excessive.

In making this determination, the Commission considers the weight or enormity of the employe's offense, including the degree to which, under the Safransky test, it impairs the employer's operation, and the employe's prior work record with the employer. Barden v. UW-System, Case No. 82-237-PC (6/9/83).

It is clear from the record, that appellant's work record with employer is good, and reflects no previous disciplinary actions. Certainly this type of record and a thirty (30) calendar day suspension as the first formal discipline imposed on the appellant are not reconcilable on the surface. There would, of course, have to be consideration of the severity of the act, but to go from counseling to a 30 calendar day suspension bypasses a number of considerations in a progressive disciplinary scheme.

In determining whether the discipline of appellant was excessive, a comparison of both what was done (or not done) in similar situations, and the discipline actually imposed on appellant and Mr. Dunn must be made. While the Commission agrees that the February 19 and 26, 1988, incidents are serious and need to be addressed, respondent's lack of action in the past or with other employes raises questions about their imposition of a 30 calendar day suspension as their first disciplinary act. This does not preclude respondent from taking some disciplinary action, but that must be related both to the specific acts committed in this case and what has been done previously in similar situations.

As it relates to the discipline actually imposed on the appellant and Mr. Dunn, respondent indicated that Mr. Dunn received more severe discipline because of his leadwork and senior auditor status. Since both appellant and Mr. Dunn received a thirty (30) calendar day suspension, the more severe discipline must refer to Mr. Dunn's demotion and reduction in pay. The suspension of both employes for the conduct alleged in their respective suspension letters is then a common ground to evaluate respondent's actions and determine if appellant's suspension was excessive.

Elimination of the specifically charged conduct and some of the work rule violations related to the February 26, 1988, incident and having only the February 19, 1988, incident on which to base appellant's discipline, would certainly seem to militate against imposing as much discipline on appellant as was imposed on Mr. Dunn. However, even if appellant had tripped or pushed Mr. Dunn on February 26, 1988, the Commission cannot conclude that appellant and Mr. Dunn should receive identical suspensions.

Mr. Dunn was the aggressor in trying to pass appellant in the hall, and it was Mr. Dunn who physically attacked appellant. While appellant

(under this scenario) is certainly not blameless, the physical attack by Mr. Dunn would seem a more severe breach of professional conduct and of the work rules. Additionally, attempting to trip someone is one thing, but actually attacking a person is another. While neither act is to be condoned, there is clearly a distinction in the severity of the acts, which should properly be reflected in the amount of discipline imposed.

The Commission has not concluded that appellant had no role in the February 26, 1988, incident or that Mr. Dunn had sole responsibility (or fault) for what occurred. However, in light of the fact that the specifically charged conduct (tripping or pushing Mr. Dunn) has not been proven; the February 19, 1988, is the only charged conduct that has been proven, the appellant had no previous discipline, and the discipline imposed on appellant and Mr. Dunn as it relates to the suspension should not have been comparable, the Commission concludes that appellant's suspension, while appropriate, should be reduced from thirty to ten calendar days.

ORDER

The action of respondent in disciplining appellant is modified to a ten (10) calendar day suspension without pay and this matter is remanded to respondent for action in accordance with this decision.

Dated: _____, 1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

GFH:gdt
JMF10/2

DONALD R. MURPHY, Commissioner

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