

STATE OF WISCONSIN

PERSONNEL COMMISSION

DAN MALESEVICH,
Appellant,

v.

**Secretary, DEPARTMENT OF HEALTH
& SOCIAL SERVICES [DHFS]¹,**
Respondent.

DECISION AND ORDER

Case No. 96-0087-PC

A proposed decision and order was mailed to the parties on February 14, 1997. Respondent filed objections requesting minor corrections. Appellant did not file objections. The minor corrections requested by respondent have been made, with the exception of ¶17 of the Findings of Fact. The finding therein is correct based on the appellant's testimony and, accordingly, was not changed.

The parties agreed to the following statement of the issue for hearing as noted in the Conference Report for the prehearing held on August 26, 1996:

Whether there was just cause for the five-day suspension of appellant imposed in July of 1996.

A hearing was held in the above-noted case on January 13, 14 and 16, 1997. The parties presented oral arguments on the final hearing date.

FINDINGS OF FACT

1. Mr. Malesevich began employment with respondent in September 1972 , when he was hired as a Social Worker 1 at the Winnebago Mental Health Institute (WMHI). Over the years, he functioned in various positions with an emphasis in the treatment of alcohol and drug abuse. At the time relevant to this case, his position was classified as an Institution Program Supervisor 2, with responsibility for managing WMHI's Anchorage Program.

2. Mr. Malesevich's duties as program director of the Anchorage Program involve program development, program scheduling, overseeing patient treatment plans, chairing meetings and, to a lesser extent, providing direct services to patients. His

¹ Pursuant to the provisions of 1995 Wisconsin Act 27 (s. 9126(19)) the name of the Department of Health and Social Services (DHSS) was renamed the Department of Health and Family Services (DHFS), effective July 1, 1996.

responsibility as program director includes ensuring that program procedures are followed.

3. WMHI is one of two state operated mental health institutions. The patient population is considered highly vulnerable and dangerous. A prerequisite to admission is a court finding that the patient is a danger to him/herself or to others.

4. The Anchorage Program at WMHI is an intense treatment program for adolescent patients who, typically, have failed in other programs. Each patient has a primary diagnosis of alcohol or drug abuse in addition to a mental health problem.

5. WMHI has a policy regarding patient and employee relationships (Exh. R-102), a copy of which Mr. Malesevich received on July 31, 1990 (Exh. R-101). The staff conduct prohibited under the policy as well as related instructions are shown below in relevant part (Exh. R-102, pp. 4-7).

A. Employees of (WMHI) are prohibited from:

1. Having a nontherapeutic relationship with a patient, including, but not limited to:
 - a. having planned personal contacts through verbal or written means.
 - b. being in a social . . . relationship with a patient.
 - c. Planned personal contacts that are usually one on one, including . . . knowingly forming close friendships . . . This does not prohibit:
 - i. One-on-one contacts required to perform the employee's job.
 - ii. Incidental and unplanned personal contacts.
3. Giving home addresses & phone numbers to patients . . .
5. Sharing intimate personal information about themselves with patients, which is not only unprofessional, but also a violation of professional code of ethics and/or could compromise the security of the institute. . . .
8. Exchange of personal items between employees of DCTF & patients . . . including, but not limited to, giving, lending, selling, or exchanging gifts, money, letters, clothing . . . food, . . . or other item of value. . . .
10. The above are for purposes of illustration only and do not necessarily include all prohibitive acts. If a staff member is uncertain whether an act is prohibitive or not, they shall see their supervisor.

B. Each employee is required to:

1. Inform the immediate supervisor in brief, written form of any relationship that he/she is having with a patient, or is considering having with a patient . . . that has a potential of violating this policy. . . .

- C. Supervisors shall report to the institute director the specifics of any relationship or contact reported to them pursuant to the above.

EXCEPTION PROCEDURE:

- A. Employees may request an exception to this policy. Such requests shall be made through the employee's immediate supervisor in writing.
- B. Supervisors shall submit the specifics of any requested exceptions and their recommendation to the institute director. The director shall review all recommendations, and either approve or deny the request in writing. A copy of that decision will be placed in the personnel file for institute use only.

SANCTIONS:

Violations of this policy shall be considered in violation of the (DHSS) work rules and shall be just cause for disciplinary action up to and including discharge. . . .

6. DHSS' Employee Handbook contains a 3-page section on work rules (pp. G-1 through G-3, Exh. R-105) pertinent portions of which are shown below.² Mr. Malesevich received his copy of the employee handbook on 4/21/80, as well as the subsequent amendments on March 4, 1987, and on January 2, 1996. (Exh. R-104)

Work Rules of DHSS: All employees of the Department are prohibited from committing any of the following acts:

1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
2. [C]ausing mental anguish or injury to patients, . . .

Disciplinary action may result from the violation of the work rules, from the failure to carry out job instructions and assignments properly, or from the violation of any law.

Except for serious or repeated offenses, disciplinary action taken shall be for the purpose of correcting conduct. Positive prevention of misconduct is the goal, not punishment. It must be recognized, however, that since each case is different it is impossible to prescribe a specific penalty for a particular offense. There are certain situations which must result immediately in outright dismissal; others may warrant penalties of lesser severity. . . .

7. Mr. Malesevich's first-line supervisor is Constance Murray, the Associate Director of Child and Adolescent Services at WMHI. On May 22, 1996,

² This sentence was changed to clarify the source of the recited information.

Ms. Murray attended patient reviews at the Anchorage Program and learned for the first time that the Anchorage interdisciplinary team previously had approved a discharge plan which specified that "G", an Anchorage patient, be discharged to live with Mr. and Mrs. Malesevich. Ms. Murray asked Mr. Malesevich if he had reviewed WMHI's policy regarding patient and employee relationships (§5 above). He indicated he had not checked the policy. Ms. Murray directed him to do so and to report back to her. He responded by memo on (or around) May 28, 1996, as shown below in relevant part.

I have reviewed WMHI policy . . . about staff/patient relationships. Last week you attended the Anchorage, weekly, patient review meeting. In that meeting I outlined the fact that my wife and I would take, a soon-to-be discharged, Anchorage patient for the summer. ("G") is a 17 year-old Hispanic female who has been at Anchorage since December 5, 1995. ("G") would live in our residence under the auspices of Kenosha County, from which she was admitted, in an independent living status.

After reviewing the policy I do not see where this arrangement is in conflict with the policy but I thought it best to outline the arrangement in writing to see if you concur with my opinion.

8. Ms. Murray acknowledged at hearing that the planned discharge placement arguably could be considered as a therapeutic placement (a therapeutic placement is exempt under the staff/patient policy) because the discharge plan included work in a part-time job as well as participation in a remedial math class. However, Ms. Murray believed the planned discharge conflicted with WMHI's policy on staff/patient relationships. She informed Mr. Malesevich of her opinion and said she wanted him to request an exception under the policy.

9. Mr. Malesevich, on or about May 30, 1996, sent Ms. Murray a memo requesting an exception under the staff/patient relationships policy to enable "G's" discharge to his home. (Exh. R-108) He included in the memo good reasons why he felt the placement would be beneficial for "G". Good reasons existed to support the placement but the same were deemed insufficient by Ms. Murray to justify her recommendation of the placement.

10. Ms. Murray spoke with Mr. Malesevich after she reviewed his request for an exemption. The conversation occurred in the nursing station at Anchorage. She told him that her recommendation to the WMHI Director would be against granting the exception, but that she wanted to check with the county yet. Her reason for not

recommending the placement was her suspicion³ that other appropriate discharge alternatives existed which had not been explored fully by the Anchorage interdisciplinary team and such alternative placements would not involve discharge to an employee's home. Ms. Murray learned for the first time during this conversation that "G" already had made at least one weekend visit to Mr. Malesevich's home. She felt the visit probably raised "G's" expectation of discharge to Mr. Malesevich's home, which had not been approved yet. She told staff that she did not feel she had a choice in light of this new information but to recommend the exception out of concern for the patient. Mr. Malesevich understood from this meeting that the discharge placement remained unresolved and that Ms. Murray did not want the discharge plan implemented without first obtaining approval from the WMHI Director.

11. Ms. Murray never questioned Mr. Malesevich's clinical judgment that "G" would benefit from a placement outside of WMHI because "G" had been at WMHI an unusual length of time to the point where "G" "was deteriorating." Ms. Murray's concern was that "G" now was looking forward to the placement and that "G's" condition would deteriorate further if the placement were not approved by the Director of WMHI. Ms. Murray felt the situation could have been avoided if Mr. Malesevich had sought the proper approvals before offering the placement to "G."

12. On Friday, June 7, 1996, Ms. Murray received a voice mail message from Mr. Malesevich informing her that "G" had been placed in his home on a 30 day extended pass.⁴ Ms. Murray felt such placement amounted to insubordination on Mr. Malesevich's part. The following Monday a meeting was held with Ms. Murray, her supervisor (Wayne Winistorfer), WMHI's personnel director (Kathy Karkula), and WMHI Director (Stanley York), at which time the decision was made to pursue the potential of disciplining Mr. Malesevich for placing "G" in his home without prior approval.

13. A predisciplinary meeting was held on June 13, 1996, "regarding alleged violation of DH&SS Work Rules #1 and #2 to get an exception from the Patient/Staff Relationship policy" before taking "G" home. (Exh. R-113) As noted in

³ The record is insufficient to determine if Ms. Murray's suspicion was well founded. It is clear that the Anchorage interdisciplinary team had contacted the county to inquire about the availability of alternative placements but that the team felt the alternative options were less desirable from a treatment standpoint than discharge to Mr. Malesevich's home.

⁴ There is some ambiguity in the record regarding the length of the pass. A 10-day pass is mentioned in Exh. R-106, whereas a 30-day pass is mentioned in Exh. R-109. The examiner determined that a 30-day pass was correct as supported by hearing testimony.

¶6 above, work rule #1 pertains to insubordination and work rule #2 pertains to causing mental anguish or injury to a patient.

14. The same individuals noted in paragraph 12 above, conferred after the predisciplinary meeting to determine if discipline should be imposed. Ms. Murray recommended that some form of discipline be imposed. Mr. Winistorfer recommended termination. Ultimately, Director York made the decision to impose a 5-day suspension without pay.

15. Director York provided official notice of the 5-day suspension to Mr. Malesevich by letter dated June 25, 1996 (Exh. R-115). Relevant portions of the letter are shown below.

This is official notification of a disciplinary suspension of five days without pay for violation of the (DHSS) Work Rule No. 1, which states . . .

Your days of suspension without pay will be July 8, 9, 10, 11, and 12, 1996. You should not report to work on those days. You will be expected to report to work at the start of your regularly scheduled shift on all other days.

This action is being taken based on the fact that you took a patient to your residence. You informed Constance Murray, Associate Director, by telephone on June 7, 1996 that you were taking this action.

A pre-disciplinary meeting was held on June 13, 1996. . . . At that meeting you were asked to explain your actions of June 7, 1996. You stated, "I was the staff person involved in the discharge planning for the patient. This patient has been very difficult to place. A number of options were explored and didn't work out. After reviewing the case with the team, I indicated I would be willing to try a placement at my residence. I talked to Kenosha County about an independent living arrangement for the patient. They concurred. After discussion with Constance, I asked for an exception to the policy in a memo dated May 30, 1996. I had not received an answer to my request by June 7. I felt I couldn't wait for Administration to make a determination on the policy. I felt it was in the best interest of the patient to begin the placement as there was an opportunity for her to begin school and obtain a job as soon as possible. I, therefore, made my decision to take the patient to my residence."

A review of the facts does substantiate that you knowingly and with intent failed to follow the directions as given to you by Constance Murray. As part of the management team at (WMHI) it is extremely important that you retain your objectivity and function as a role model for your staff. Your act of insubordination has greatly compromised your position on the management team.

16. The reasons of WMHI management for imposing a five-day suspension included management's perception that: a) Mr. Malesevich knowingly and blatantly took the action of placing "G" into his home without first receiving the approval he knew was required,⁵ b) Mr. Malesevich was the manager of the Anchorage program with responsibility to be a role model to his staff regarding WMHI policies and procedures, c) the 5-day suspension was consistent with discipline imposed on other employees, and d) it was desirable to impose a level of discipline which would convey the message to staff that all staff, including managers, are expected to follow the rules and failure to do so will result in discipline.

17. An additional reason why WMHI management⁶ imposed the five-day suspension had to do with Mr. Malesevich's then-current status as a supervisor and the federal prohibition under the Fair Labor Standards Act (FLSA) of reducing a supervisor's pay for a suspension of less than five days. Management believed a reduction in pay was necessary to ensure the problem would not reoccur. A degree of uncertainty exists over the applicability of the FLSA because Mr. Malesevich's position had changed to the extent that he no longer had direct supervisory responsibilities, a change not yet reflected by a different classification for his position. The five-day suspension, however, was appropriate even if the FLSA should not have been considered as applicable to Mr. Malesevich's position.

18. Another reason why WMHI management imposed the five-day suspension was Ms. Murray's recollection that Mr. Malesevich, in his voice-mail message of June 7th (see ¶12 above), included a statement to the effect that he waited until late Friday to inform Ms. Murray so she would not have an opportunity to stop the placement. Mr. Malesevich denied making the statement and appeared sincere in his denial. The 5-day suspension, however, was appropriate even if he did not make the statement because it remains true that he intentionally violated an important WMHI policy.

19. Mr. Malesevich had no prior disciplinary action at WMHI. In fact, he has made valuable professional contributions to WMHI including development of

⁵ This is an undisputed fact. Mr. Malesevich conceded in his hearing testimony that Ms. Murray had told him to wait with the placement until the exemption was approved and that he "just went ahead with it" because he thought the week he waited for the decision had been long enough. He further testified that he knew the unauthorized placement of "G" in his home would "force a decision" from management.

⁶ An introductory clause was added to this and the following paragraph to clarify that the reasons discussed were advanced by respondent at hearing.

WMHI's program for addressing alcohol and drug abuse problems for adolescents. It is a unique program in Wisconsin.

20. On June 11, 1996, WMHI management returned "G" to WMHI prior to the end of the 30-day extended visit to Mr. Malesevich's home pending Director York's review of the exemption request. WMHI management was concerned about potential liability issues if "G" were allowed to remain at Mr. Malesevich's home without first obtaining approval. Ultimately, WMHI granted the exemption request out of concern that "G" would deteriorate further if "G's" expectations of placement in Mr. Malesevich's home were not fulfilled. The placement ended in November 1996, when "G" violated for the third time the Malesevich's "house rule" prohibiting smoking and drinking. Thereafter, "G" was placed in an alternative setting in her county of residence; an option considered previously by the interdisciplinary team but rejected as not being in "G's" best interests.

21. The first six months of 1996 was stressful for the Anchorage team. One member of the team was ill and her medical condition required her to work just in the mornings, but WMHI management made the decision that such an accommodation was not possible which resulted in the termination of this employe. Then a long-term valued member of the team died and his expertise was sorely missed. Also, WMHI management made a decision to replace some positions, which previously had provided professional expertise in treating alcohol and drug abuse problems, with Resident Care Technicians who lacked such professional expertise. The remaining staff at Anchorage strongly disagreed with the decision.

22. Mr. Malesevich presented evidence (Exh. A-1 and testimony from various witnesses) attempting to show that WMHI had been more lenient in the past regarding staff requests to discharge patients to their home. Although he successfully showed that different procedures may have been used, such differences were due to the dissimilar context in which they arose; for example, in the context of an employe's request for a leave of absence in order to care for the discharged patient. Where the context appeared to be more similar to his own, he established that the paper trail required under WMHI's staff/patient policy was not followed in every detail; but failed to establish that the situation was similar to his own in that the other employe did not take the patient home without first providing an opportunity for management to approve the placement and receiving such approval.

23. Mr. Malesevich also argued that he was not insubordinate because he did not receive a direct order from Ms. Murray prohibiting his taking "G" home prior to

obtaining approval. He based this argument on language found in CHSS manual, Ch. 264 (Exh. A-2), which (on p. 10) couches the act of insubordination as the “willful refusal or failure of an employe to carry out a direct order or instruction.” The remainder of the discussion in the manual, however, clarifies that a direct order is not required in each instance. Mr. Malesevich knew what Ms. Murray’s expectations were in regard to the proposed discharge of “G” to his home, yet decided to disregard the same. Such action meets the manual requirements for characterizing his actions as insubordination.

CONCLUSIONS OF LAW

1. Respondent has the burden to show by a preponderance of credible evidence that there was just cause for imposing discipline and that the discipline imposed was not excessive.
2. Respondent has met its burden as stated in the prior paragraph.
3. Just cause existed for imposing discipline for Mr. Malesevich’s actions and the resulting 5-day suspension was not excessive.

OPINION

This is an appeal under §230.44(1)(c), Stats., over which the Commission has jurisdiction pursuant to §230.45, Stats. The text of §230.44(1)(c), Stats., is shown below in relevant part:

(c) Demotion, layoff, suspension or discharge. If an employe has permanent status in class . . . the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause. (Emphasis added.)

The Commission has recognized that the review of a disciplinary action involves a two-step analysis. In *Holt v. DOT*, 79-86-PC, 11/8/79, the Commission stated 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.

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 (citation omitted.):

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

The determinative facts regarding Mr. Malesevich's case are few. First, he knew from his supervisor that he should not take "G" home without first obtaining approval from the WMHI Director, yet he willfully disregarded the supervisor's instruction. Second, his action of taking "G" home without prior approval created liability exposure for WMHI especially if "G" suffered harm while in his care. Third, his decision to willfully disobey his supervisor set a poor example for other staff in the Anchorage program over which he had management responsibilities.

The Commission concludes from the foregoing facts that the *Safransky* test for just cause has been established. A serious argument could not be made that Mr. Malesevich's willful actions which exposed WMHI to serious liability claims do not have the potential to affect the efficiency of the group with which he works. If such liability had come to fruition (by, for example, "G" being injured in an automobile accident on the way to Mr. Malesevich's home), the respondent's reputation and financial resources would be at risk thereby creating the potential to affect the efficiency of the entire institution. Furthermore, Mr. Malesevich's willful disregard of management policies compromises (or at least has the potential to compromise) his ability to insist that other Anchorage staff follow the same (or different) work rules. His actions certainly created the potential for discontent by the lower-classified Anchorage staff who wondered why they must follow work rules when their manager did not.

The next question is whether the 5-day suspension was excessive as discipline for Mr. Malesevich's actions. The Commission concludes the suspension was not excessive. Mr. Malesevich's decision to place "G" in his home without prior approval was based on concern for "G's" welfare and, to a greater extent, his feeling that management was taking too long to make a decision. "G's" life would not have been

jeopardized if he had allowed management more time to review his request for an exemption. Nor did he express concern to management before taking "G" home that he felt the delay was unacceptable. The serious potential of WMHI's exposure to liability created by Mr. Malesevich's actions necessitated management's disciplinary goal of assuring that similar conduct would not reoccur. The length of the suspension was not unreasonable as a means of achieving this goal.

Mr. Malesevich is a valuable employe of WMHI and has been for a long time. The examiner was impressed by his professionalism and sincere interest in the welfare of WMHI patients. The fact remains, however, that he showed poor judgment in taking "G" home without approval. The stressful factors recited in ¶21 of the Findings of Fact most likely contributed to his exercise of poor judgment in connection with "G", but do not excuse creating the resulting serious potential liability for WMHI. Even from just a common sense viewpoint (without being specifically told by management), he should have known that WMHI would not condone any employe's removal of a patient without first obtaining approval.

ORDER

That respondent's actions are affirmed and this appeal is dismissed.

Dated: March 26, 1997.

STATE PERSONNEL COMMISSION


LARRIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95