

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOUIS DEL FRATE, Appellant.

v.

Secretary, **DEPARTMENT OF CORRECTIONS**, Respondent

Case 4
No. 62764
PA(adv)-6

(Previously Case No. 02-0009-PC)

Decision No. 30795

DECISION AND ORDER

Appearances:

Louis Del Frate, 1658 Oregon Street, Oshkosh, WI 54902, appeared on his own behalf.

Kathryn Anderson, Attorney at Law, Department of Corrections, P.O. Box 7925, Madison, WI 53707-7925, appeared on behalf of the Department of Corrections.

INTRODUCTION

Louis Del Frate appeals the imposition of a 10-day disciplinary suspension without pay from his employment with the Wisconsin Department of Corrections (DOC) for violating Respondent's policy against fraternization and its work rule prohibiting the unauthorized or improper use of state property or services. This appeal was filed with the Personnel Commission on February 12, 2002. The parties agreed to the following statement of issue for hearing:

Whether respondent's decision to suspend the appellant for 10 days, as reflected in the letter of suspension dated January 25, 2002, was for just cause.

The matter was heard on December 3, 2002, before Anthony Theodore, Commissioner for the Wisconsin Personnel Commission. The testimony of the parties and their witnesses was tape recorded and the record and exhibits of the parties were received into evidence. After the parties submitted post-hearing briefs, but before a decision was issued, the Personnel Commission was abolished and the authority over this matter was transferred to the Wisconsin

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Employment Relations Commission. 2003 Wis. Act 33. Pursuant to sec. 227.46 (2) Wis. Stats., the record has been reviewed and considered by a majority of the Wisconsin Employment Relations Commissioners, and this decision shall be the final Decision and Order of the Commission.

FINDINGS OF FACT

1. At the time of the suspension that is the subject of this appeal, Louis Del Frate was employed by the Wisconsin DOC as a unit director at the Oshkosh Correctional Institution (OSCI). His duties included supervising other OSCI officer and sergeant staff assigned to the living center, supervising the daily activities of inmate workers in various parts of the institution such as the laundry and kitchen, supervising inmate movement, assisting inmates with various problems, approving activities for inmates and disciplining inmates and other staff over whom he had supervisory responsibility. He had served as the director of two different units at OSCI and had 20 years of experience with Respondent. Respondent first employed him as a corrections officer and later promoted him to sergeant, lieutenant, captain, training officer, assistant superintendent, unit director and program director while employed at several different correctional institutions. Ms. Judy Smith, the Warden at OSCI who imposed the 10 day suspension, has known Mr. Del Frate since the early 1990's, has been his direct supervisor, and has promoted him.

2. During the period from November 2001 through January 2002, Mr. Del Frate was the program director of the W building where he was in charge of the chapel area, religious activities, and supervising inmate treatment programs such as domestic violence and sex offender treatment.

3. Mr. Del Frate had not previously been disciplined by Respondent.

4. Some of the inmates work in the OSCI Maintenance Department. This is an activity separate and distinct from an OSCI educational department program entitled Building Maintenance and Care (BMC), which is discussed below. Mr. Howard Gintner supervises the Maintenance Department's inmate work crews. The Maintenance Department is part of Buildings and Grounds. Its Superintendent is Mr. Eric Hamersma and Assistant Superintendent is Mr. Tim Ikert. The inmates assigned to the department do woodworking, painting, cleaning, facility repairing and similar activities. Standard practice is that work performed by the Maintenance Department is initiated by written work order. Work orders are standard preprinted forms. They go to the Maintenance Department superintendent or assistant superintendent for approval and then to Mr. Gintner, who checks measurements and supplies and assigns the work to an inmate. Some authorized office furniture items have been made pursuant to this procedure. There is no policy, procedure or work rule which allows objects made by inmates in the Maintenance Department to be sold to the general public or to OSCI employees, or to be made for the personal use of staff outside of the institution.

5. Mr. Del Frate has used the work order process for the Maintenance Department and was familiar with it prior to the events concerned herein.

6. Certain inmate programs at OSCI produce items for sale to the general public or employees for personal use off grounds. The vocational education program, under the Education Director, Mr. Dave Haines, makes woodworking items including furniture. Prices are generally set by Mr. Haines at twice the cost of materials. Some items have been made for institutional and other governmental use, or for non-profit agencies with specific authorization of the department. Other Education Department programs that generate funds include food service, horticulture and BMC. There are also hobbies and crafts programs in which inmates produce items for sale to the general public. The prices of those items are set through the hobby program.

7. Educational and hobby-craft program items are displayed for sale in the OSCI visiting room. Purchasers put their money into special envelopes that list the prices and production codes. The envelopes are placed in a secure box and later retrieved by the business office staff. The envelope payments are processed using codes to post the funds to the appropriate inmate or program accounts.

8. OSCI has specific, written policies detailing how inmate produced items in the programs identified in Finding 6, above, can be displayed and sold in the visiting room. There is a cashier station in the visiting room for food service orders.

9. DOC has work rules that regulate conduct of its employees. If a work rule is violated, disciplinary action, up to and including discharge, may be taken. These work rules are in addition to policies and procedures in place at OSCI. Policies and procedures are referred to in the work rules.

10. DOC Work Rule 2 is prohibitive and states: "Failure to follow policy or procedure, including but not limited to DOC Fraternalization Policy and Arrest and Conviction Policy." In pertinent part, the DOC Fraternalization Policy states:

I. Background

This policy is designed to eliminate any potential conflict of interest or impairment of the supervision and rehabilitation provided by Department employees for inmates, adult and juvenile offenders in correctional settings.

II. Policy

A. Employees of the Department of Corrections may not have relationships with

- an inmate, adult or juvenile offender under the supervision or custody of the Department of Corrections or the Department of Health and Family Services.

III. Definitions

Relationship includes

6. providing or receiving goods and/or services with or without remuneration for or to inmates, adult or juvenile offenders

11. The policies and procedures referred to in Work Rule 2 include, among other things, a) the policies for production and sale of items made in the vocational education department, hobbycraft, arts and crafts, horticulture, food service, and b) a policy titled “entrance, exit, staff, allowable items.” The later policy states in pertinent part: “**Removal of state property requires approval of the warden or designee.**” (emphasis in the original).

12. There are “no contracting” provisions in both the hobby rules and procedures, No. 707.15, and the arts and crafts rules and procedures, No. 700.18. The no contracting provisions in the policies that address inmate sales are a form of the fraternization policy. This prohibits inmates from agreeing to make items for staff.

13. DOC Work Rule 28 prohibits:

Unauthorized or improper use of state or private property, services, or authorizations, including but not limited to vehicles, telephones, electronic communications, mail service, credit cards, computers, software, keys, passes, security codes and identification while in the course of one’s employment; or to knowingly permit, encourage or direct others to do so.

14. Mr. Del Frate had received copies of the work rules and policies prior to November of 2001.

15. Ms. Joy Nelson was an OSCI unit supervisor in promotional probationary status. In November of 2001 she was interested in getting a table for her kitchen at her personal residence and was not able to find a satisfactory table in the commercial market. During a conversation, Mr. Del Frate suggested she check with Mr. Dick Martens, a staff member of

the vocational education program. She then asked Mr. Martens if the inmate program in his department could make such a table. Mr. Martens discussed the request with his supervisor, Mr. Dave Haines, who turned down the request as too large a project and because the program only made things that generate revenue and teach skills to student inmates. Ms. Nelson was informed of this decision. Other staff requests of the vocational education department to make items have been denied because it is the policy and rule not to create specific products for individuals.

16. Ms. Nelson told Mr. Del Frate that the education department could not make the table. He then told her he knew a couple guys in maintenance that make some things and he would check with them. During this conversation he said to her that he “knew some guys and these inmates that make this stuff.”

17. In mid-December, Mr. Del Frate asked inmate Mr. Richard Reutell about making the table. Mr. Reutell works in the Maintenance Department and said he could do it. Mr. Del Frate then obtained written dimensions from Ms. Nelson and gave them to Mr. Reutell. The dimensions were about 50 inches long by 30 inches in width, with a height of about 36 inches. Mr. Reutell made a drawing of the proposed table, showed it to Mr. Del Frate, and proceeded to make the table in the Maintenance Department in December. Before it was completed Mr. Reutell asked Mr. Del Frate about the color of finish to use. Mr. Del Frate called Ms. Nelson and then told Mr. Reutell. The table was made of plywood using maintenance shop equipment and materials.

18. Mr. Del Frate received services from inmate Ruetell when Mr. Reutell constructed the table at Mr. Del Frate’s request. This relationship constitutes contracting with an inmate and fraternization.

19. Mr. Gintner was aware that Mr. Reutell was making the table at the request of Mr. Del Frate. Mr. Gintner was present during the conversation and phone call about the color, and he helped Mr. Reutell and another inmate take the finished table to a conference room near Mr. Del Frate’s office area.

20. Mr. Del Frate never submitted a work order to have the table made.

21. Although he knew that Mr. Gintner was aware of the table project, Mr. Del Frate did not ask for Mr. Gintner’s permission or approval. Mr. Gintner did not authorize building the table. Mr. Del Frate did not get authorization to have it made from Building and Grounds Superintendent Hamersma, Assistant Superintendent Ikert, or anyone else.

22. When the table was delivered to Mr. Del Frate’s office area, he asked how much was owed for it. Mr. Reutell said that it was made with scrap wood that he estimated had a value between \$35.00 and \$39.00. No Buildings and Grounds personnel or other authorized OSCI staff ever priced the table in an authorized or standard manner.

23. On or about December 26th Mr. Del Frate called Ms. Nelson to let her know the table was finished. She met him at a conference room near his office where the table had been placed. Captain Matt Jones, an OSCI corrections officer, was present when Ms. Nelson came to get it. Mr. Jones was told by Mr. Del Frate that maintenance made the table from scrap material. Mr. Del Frate, Mr. Jones and Ms. Nelson removed the table from OSCI at about 3:00 p.m. by wheeling it on a property cart through an entrance/exit tunnel, past two sets of security doors and three security checkpoints staffed by corrections officers. No one stopped them or questioned what they were doing as they moved the table out of OSCI. It was placed in Mr. Del Frate's truck and he delivered it to Ms. Nelson's residence.

24. Neither Mr. Del Frate, Mr. Nelson nor Ms. Jones obtained authorization to remove the table from OSCI. The table was removed without the approval of the warden or designee.

25. When Ms. Nelson came to get the table, she wanted to pay for it and discussed payment with Mr. Del Frate and Mr. Jones. Mr. Del Frate did not tell Ms. Nelson who made the table, but at some point did tell her it was made in the Maintenance Department from scrap wood. All three discussed the price. Mr. Del Frate and Mr. Jones suggested amounts between \$30.00 and \$35.00, which effectively set the price at \$35.00. Some time after that, Ms. Nelson made out a check payable to OSCI for \$35.00 dated 12/27/01. She then put it in a plain envelope rather than one designated to be used for purchasing inmate-made items. This envelope was placed in the lobby safe.

26. Ms. Jeanette Wenzel, business office staff, retrieved the envelope and noticed it did not list the item or code. She called Ms. Nelson and found out that it was for the table made by the Maintenance Department. Ms. Wenzel brought this to the attention of her supervisor, Ms. Colleen Janikowski, who called Mr. Ikert and Mr. Martens. Mr. Ikert did not know about the table. Mr. Martens told her the education program did not build the table. Ms. Janikowski called Ms. Nelson, who said maintenance had made it and referred her to Mr. Del Frate.

27. Ms. Janikowski talked to Mr. Del Frate about the table. She told him that the Maintenance Department did not build furniture for staff. He told her to "put the check under BMC as a plant stand," "it was scrap wood," "not to go there," and "it hadn't been a problem before and they wouldn't do it any more." Ms. Janikowski was not sure what that meant. Mr. Del Frate's suggestion about putting the check under BMC as a plant stand would not be following procedures or policies. She reported this to her supervisor, Ms. Carol Carpenter-Naslund, OSCI Business Director. The matter was then brought to the attention of Warden Judy Smith.

28. Warden Smith ordered an investigation. Director of Security James Schwochert and Ms. Carpenter-Nashlund conducted the investigation, interviewed the participants and witnesses and obtained statements and documents. Through this process the estimated value of the wood was ascertained and the general approach to valuations was noted as twice the cost of materials. They concluded that the table had a value of about \$70.00. Predisciplinary hearings were held for Mr. Del Frate, Ms. Nelson and Mr. Jones. Subsequently, Ms. Nelson agreed to return the table.

29. Warden Smith disciplined Ms. Nelson, Mr. Jones and Mr. Del Frate. The Warden concluded that Mr. Jones had violated Work Rules 2 and 28. She issued him a written reprimand in lieu of a 3-day suspension without pay after she determined she could not suspend him for 3 days in light of the Fair Labor Standards Act. The Warden concluded Ms. Nelson had violated OSCI policies when she had the Maintenance Department make a table for her home and when she paid for the table. The Warden terminated Ms. Nelson's promotional probation as a unit supervisor and returned her to her former position in the Division of Community Corrections as a probation and parole agent. Warden Smith imposed a 10-day suspension without pay on Mr. Del Frate for violation of Work Rules 2 and 28. The Warden took into consideration Mr. Del Frate's length of service, lack of prior discipline, supervisory position and responsibilities, expectations of his judgment, the seriousness of the incident and importance of the fraternization policy, the impact on the other policies concerning inmate item sales, and the discipline given to the other participants in the event. She reviewed the policies for inmate item sales, fraternization, disbursement requests, and entrance, exit staff, allowable items. Mr. Del Frate's discipline was based on his contracting with an inmate to have a table constructed in the Maintenance Department without approval. She considered that there is no provision in the rules to complete personal projects in the Maintenance Department, that the cost was set by him and other staff not authorized to set cost, and was not set near market value. Security and safety of staff and inmates was considered. She consulted with other high ranking DOC authorities to be consistent with discipline in similar work rule violations.

30. Warden Smith suspended Mr. Del Frate for 10 days without pay. The suspension letter, dated January 25, 2002, states in pertinent part:

This will serve as official notice of a ten (10) day suspension without pay, for violation of Department of Corrections Work Rule #A2, Category B which prohibits "Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy", Work Rule #28, which prohibits "Unauthorized or improper use of state or private property, services or authorizations, including but not limited to vehicles, telephones, electronic communications, mail service, credit cards, computers, software, keys, passes, security codes and identification while in the course of one's employment; or to knowingly permit, encourage or direct others to do so." . . .

This action is based on the employee report dated January 7, 2002. It was brought to management's attention that you contracted with an inmate to have a table constructed in the Maintenance Department. The construction of this table was never approved by the Superintendent of Buildings and Grounds, his Assistant, or the inmate worker's direct supervisor.

Contracting with inmates to complete projects is not allowed by procedure and is a violation of Executive Directive 16 (Fraternization Policy) #6 Providing or receiving goods and/or services with or without remuneration for or to inmates, adults or juvenile offenders.

The construction of furniture in the Maintenance Department is not allowed, there is no provision in [sic] rule to complete personal projects in the Maintenance Department. The cost of this project was set by you and other staff not authorized to set the cost, and was not set near fair market value, and below the cost of materials and inmate labor.

This type of behavior is unacceptable and unprofessional, and is a serious security and safety infraction that cannot be condoned. As a manager, you are expected to follow Department of Corrections and institution policies and procedures and your actions in this instance did not demonstrate this. As an experienced Supervisor you should have exercised better judgment in this situation.

Our records indicate this is your first violation of a Category B work rule in the last twelve months. This is a very serious Work Rule violation and your actions could seriously jeopardize the safety of staff and inmates.

31. Mr. Del Frate violated Work Rule 2 by his failing to follow policies and procedures and by violating the fraternization policy. He violated Work Rule 28 by engaging in unauthorized and improper use of state property and services and permitting and encouraging others to do so.

32. Mr. Del Frate's actions tended to impair the performance of the duties of his position, the efficiency of the group with which he works, and the operation and efficiency of OSCI as a whole.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to sec. 230.44(1)(c), Stats.
2. The Respondent has the burden of proof.
3. There is just cause for the 10-day suspension.
4. Respondent has sustained its burden.

ORDER

The 10-day suspension without pay is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate in this decision.

Department of Corrections

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

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.

We find that the greater weight of credible evidence shows that Mr. Del Frate engaged in the conduct described in the letter of discipline, that the greater weight of credible evidence shows such conduct constituted just cause for discipline, and that the 10-day suspension is not excessive in view of the SAFRANSKY/BARDEN considerations.

1. The Conduct Issue

As noted above, the first element of the just cause analysis is whether the appellant engaged in the conduct described in the letter of discipline. Evidence at the hearing established that Mr. Del Frate arranged with an inmate worker in the Maintenance Department to make a kitchen table for the home of Unit Supervisor Nelson. Mr. Del Frate failed to obtain approval for the project from either the inmate's direct supervisor or from the Superintendent or the Assistant Superintendent of Buildings and Grounds. He did not use the Respondent's work order procedure. After the inmate completed the project, Mr. Del Frate, Ms. Nelson and Mr. Jones effectively set the price of the table at \$30 to \$35. This price was below market value. The price was approximately equal to the cost of the materials for the table, it did not reflect any labor provided by the inmate and was only about half as much as the price would have been had it been set in the same manner used to price items made by inmates as part of OSCI's vocational education program.

2. The Just Cause Issue

Having determined that Mr. Del Frate engaged in the conduct described in the January 5, 2002 letter of discipline, the next step is to determine whether his conduct warranted the imposition of discipline. We find that the greater weight of the credible evidence establishes just cause to impose discipline.

A. Work Rule 2

Work Rule 2 requires all employees to follow OSCI policies and procedures. The letter of discipline alleges that Mr. Del Frate violated the following policies and procedures which can be summarized as: 1) the policy that projects carried out by the Maintenance Department receive prior approval from the Superintendent of Building and Grounds, his Assistant, or the inmate worker's direct supervisor; 2) the Fraternalization Policy's prohibition against providing or receiving goods and/or services with or without remuneration for or to inmates; 3) the absence of a rule permitting personal furniture items to be completed by the Maintenance Department; 4) the policies and procedures authorizing only certain persons, not including Mr. Del Frate, to establish the cost or price of an item to be sold; and 5) the policy or procedure requiring the price of items to be near fair market value and not below the cost of materials and inmate labor.

Mr. Del Frate did not follow policy or procedure when he arranged with an inmate in the Maintenance Department to build a table Del Frate knew was for personal use outside OSCI. Although he was familiar with the work order procedure and had used it in the past, Mr. Del Frate did not submit a work order or seek authorization to have the table made. Personal use of an item made in Maintenance is not contemplated by policy or procedure. The fact that the Supervisor of the Maintenance Department, Mr. Gintner, was aware of the table does not substitute for following procedures and obtaining authorization for the project. The work order procedure assures there is proper authorization of the project, that it is for a permitted purpose, that there is no contracting or fraternization with an inmate, and that there is proper use of OSCI materials and services. Repeated or even occasional unauthorized work by inmates in the Maintenance Department for the private benefit of OSCI employees would deplete state-owned supplies and services, interrupt maintenance projects, and potentially undermine those authorized to direct inmate work and set prices on items. The failure of Mr. Del Frate to follow policy and procedure has a negative impact on the operation of the Maintenance Department and impairs the operations of OSCI. Mr. Frate's failure to obtain a work order and authorization to have the table made is a violation of Work Rule 2.

Work Rule 2 also prohibits inmate fraternization. Contracting with an inmate is fraternization. Arranging for an inmate to make something or do something for the private benefit of an OSCI employee, with or without remuneration, is fraternization. Respondent's policy is designed to eliminate any potential conflict of interest or impairment of the supervision and rehabilitation provided by Department employees for inmates. The fraternization policy specifically prohibits "providing or receiving goods and/or services with

or without remuneration for or to inmates, adult or juvenile offenders.” Mr. Del Frate received the services from inmate Ruetell when Mr. Ruetell made the table at Mr. Del Frate’s request. Mr. Del Frate argues that because he did not provide the goods or services “**for or to inmates**” he did not actually violate the fraternization policy. (Emphasis supplied.) Mr. Del Frate reads the policy as if it only relates to those goods or services moving from the employee to the inmate. While that type of activity constitutes a violation of the fraternization policy, it is also a violation of the policy when goods or services are received by an employee from an inmate. The policy can and does work both ways in order to accomplish its purposes. This application of the fraternization policy is consistent with the “no contracting” prohibitions in the policies covering hobby items and educational program items.

Violations of fraternization policies are very serious and may directly affect the operation of a correctional institution. Violations undermine the correctional officer’s ability to manage and control inmates. They have implications for improper use of equipment and property inside the institution. Fraternization by one employee tends to undermine the authority of other staff who have supervisory responsibility over the same inmates. Violations have very serious security and safety implications. An inmate with knowledge that an officer, particularly a high ranking one, has violated an important work rule gains a certain amount of power and could seek to exert influence over the officer with the threat of making the violation known to higher authorities. Violations of the fraternization policy also undermine the policies and procedures requiring work orders as well as policies for inmate programs. Mr. Del Frate’s fraternization with an inmate was a violation of Work Rule 2.

Work Rule 2 also applies to procedures on how certain inmate-made items are valued or priced. At issue are both the valuation and who is authorized to make that valuation. Policies and procedures are very explicit with respect to items made for sale by inmates in the hobby program and the education department, including pricing. Respondent prices these items at twice the value of the materials. There is no comparable rule for items made by the Maintenance Department and it is most appropriately left to the Superintendent of that Department. There is no policy or procedure authorizing Mr. Del Frate, Mr. Jones or Ms. Nelson to set a price. Had the table construction been authorized, someone with the authority to establish the value would set the price. Mr. Del Frate, Mr. Jones and Ms. Nelson did not have that authority. Based on inmate Ruetell’s estimate of the material’s value between \$35.00 and \$39.00, Mr. Del Frate, Mr. Jones and Ms. Nelson set the price, effectively, at \$35.00. This would be less than market value in that no labor is included. Mr. Del Frate’s participation with Mr. Jones and Ms. Nelson in setting a price for OSCI property is a violation of the procedures of the institution and is a violation of Work Rule 2.

Mr. Del Frate’s discipline letter did not specifically mention the policies for the sale of inmate made items through the visitor lobby and he is not being disciplined for any violation of those policies.

Similarly, the discipline letter did not refer to the exit policy, and Mr. Del Frate is not being disciplined for violating that policy.

B. Work Rule 28

Work Rule 28 prohibits unauthorized or improper use of state property and services and prohibits permitting, encouraging or directing others to engage in that conduct. Mr. Del Frate violated Work Rule 28 when he contracted with an inmate to use state property, equipment and the inmate's time and expertise to make the table. Mr. Del Frate's conduct was not authorized. The plywood was the property of the state and had a value of about \$35.00. The materials and the equipment used to make the table are property of the state. The use of inmate services is highly regulated by the state. State property may not be used for the personal benefit of institution staff. Mr. Del Frate permitted, encouraged and directed other staff and inmate Ruetell to use state equipment, materials and inmate services to construct a table for Ms. Nelson's home. Mr. Del Frate acted without authorization. There is no policy that specifically allows these actions.

Work Rule 28 was also violated when Mr. Del Frate directed Mr. Jones and Ms. Nelson to remove the table without getting permission of the Warden or designee. This was improper use of state property because it was removed from the institution in an unauthorized manner. Mr. Del Frate's violations of Work Rule 28 impaired the efficiency of the institution by depleting assets and encouraging disregard of procedures.

Mr. Del Frate's conduct violated two Work Rules and various institution policies. The greater weight of the credible evidence is that there is just cause to discipline Mr. Del Frate. The Personnel Commission has stated in a similar case:

It is axiomatic that violation of an employer work rule, particularly one relating to a serious matter such as theft, particularly by a supervisor, and particularly in a correctional setting where employees are expected to model appropriate behavior for inmates, tends to impair the performance of the duties of appellant's position or the efficiency of the group with which he works. As a result, it is concluded that respondent has shown just cause for the imposition of discipline here.

ENGLAND V. DOC, 97-0151-PC, 9/23/98, p. 7. We recognize Mr. Del Frate was not charged with violating the work rule that prohibits theft. However, he did violate the rule against unauthorized or improper use of state property as well as violate the fraternization policy.

Mr. Del Frate consistently argues that there was no specific policy that prevented him from doing what he did, so there should be no violation. However, the law recognizes that not every single event is going to be covered by a specific work policy or rule. The employing agency cannot be required to anticipate every possible wrong turn that an employee might make and give the employee a set of directives that will cover every such eventuality. While an employee at a management level who frequently exercises discretion should not be

disciplined over a mere difference of opinion regarding such an exercise of discretion, management is not prevented from imposing discipline where the judgment exercised by the employee is egregious, simply because the employee has not been forewarned that disciplinary action would result. PAUL V. DHSS, 87-0147-PC, 4/1/90. Even if a situation is not covered by a specific rule or regulation, an employee, particularly a management employee, who exercises sufficiently poor judgment can be subject to discipline. KODE V. DHSS, 87-0160-PC, 11/23/88. As an experienced supervisor, Mr. Del Frate should have exercised better judgment in this situation. He very clearly violated two Work Rules. We find Mr. Del Frate's conduct egregious and an exercise of very poor judgment. There is just cause for discipline.

Mr. Del Frate introduced photographic evidence to establish that a few small items have been made in the Maintenance Department. However, he failed to establish that production of these items was not authorized, or that they were for the personal use of OSCI employees. These other items all stayed on OSCI grounds for use there. Even if they were made without proper authorization this is not a valid defense. An employee is not justified in thinking that his behavior was appropriate and would not subject him to discipline just because someone else was not disciplined for similar conduct. POWERS V. UW, 88-0029-PC, 5/10/90.

3. The Excessive Discipline Issue

The final step in the just cause analysis is to determine whether the level of discipline actually imposed by Respondent was excessive. The 10-day suspension without pay takes into consideration the minimum factors required by the SAFRANSKY/BARDEN test recited above.

In this case there are violations of two Work Rules and the violations tend to undermine the efficiency of the institution operations. We note Mr. De Frate's long years of service with respondent and lack of any prior discipline. He had been promoted numerous times within the agency. We consider the seriousness of the multiple offenses, the impressions that this could make on the others involved, the discipline imposed on the others, and the fact that Mr. Del Frate was a manager and an experienced supervisor. We recognize his actions jeopardized the safety of institution staff. Before the Warden imposed the suspension she consulted with other DOC authorities so as to be consistent with the level of discipline imposed on employees who engaged in comparable conduct. There is no evidence that Mr. Del Frate was treated inconsistently with other employees. Absent his status under the Fair Labor Standards Act, Captain Jones would have been suspended for 3 days for his role in delivering and pricing the table. Ms. Nelson was demoted from her unit supervisory position and was returned to her prior duties as a probation and parole officer.

The Personnel Commission has recognized that fraternization is regarded as one of the three most serious derelictions in a correctional setting, the other two being theft and inmate abuse. SEE, ENGLAND V. DOC, 97-0151-PC, 9/23/98 at p. 8. Mr. Del Frate asked inmate Ruetell to make a kitchen table for Ms. Nelson. Once he entered into that relationship with both Mr. Del Frate and Ms. Nelson, inmate Ruetell stood in a position to coerce both

employees. This relationship undermined the security of the institution. Mr. Del Frate took a very active role in arranging for someone at OSCI to build a table for Ms. Nelson's home. He first suggested the OSCI vocational education program as a source for the table. However, that request was rejected. He then ignored at least the implication that a kitchen table was not an appropriate inmate project, spoke directly with inmate Ruetell and made the arrangements. His conduct of encouraging and directing others to improperly use inmates to construct a table for the home use of a co-worker relates to both the suggestion that Ms. Nelson contact the vocational education program and his own contacts with inmate Ruetell. Mr. Del Frate's conduct indicated that it was alright for OSCI staff to use state equipment and resources for personal gain. His role as a high ranking employee of OSCI meant his conduct would have far-reaching adverse consequences in terms of OSCI operations. If other employees were to engage in similar conduct based on Mr. Del Frate's actions and example, the ramifications on institution security, efficiency and discipline could be enormous.

Mr. Del Frate suggests that a verbal or written reprimand would have sufficed. We observe that under Sec. 230.34(1)(b), Wis. Stats., no suspension without pay shall be effective for more than 30 days. Mr. Del Frate's suspension was less than that. Discipline does not have to be meted out in incremental steps. *SAFRANSKY V. PERSONNEL BOARD*, 62 WIS.2D 464, 215 N.W.2D 379 (1974); *PAUL V. DHSS*, 87-0147-PC, 4/19/90; *KODE V. DHSS*, 87-0160-PC, 11/23/88; *MILLER V. DOC*, 99-0108-PC, 5/8/02.

The 10-day suspension here is consistent with discipline in other cases considered by the Personnel Commission. A 5-day suspension was upheld where a supervisor in a correctional institution allowed two inmates to add a state-owned bedspread and a bathrobe to the list of the inmates' personal property in clear violation of the institution's policies and procedures and where the supervisor made personal use of a state typewriter on state time. His conduct failed to set a good example for subordinate employees and created a potential security problem. *HEBERT V. DHSS*, 89-0093-PC, 6/27/90. A 10-day suspension without pay and a demotion to a non-supervisory position was found appropriate in a corrections case where allegations of fraternization were not proven and there were no significant security implications, but there were deficiencies in the health care practice of a health care manager with no previous discipline. *KLEINSTEIBER V. DOC*, 97-0060-PC, 9/23/98. A 10-day suspension in Mr. Del Frate's case falls within the range identified in these two examples.

Mr. Del Frate makes the point that the table was for someone else, not him. This does not insulate him from a suspension. In *ENGLAND V. DOC*, 97-0150-PC, 9/23/98, a supervisory correctional officer, England, gave away several pairs of inmate-made gloves, mostly to DOC employees. He did not use or keep gloves for himself. England had been warned two years earlier not to give away gloves to individuals and had received a written reprimand for directing inmates to make personalized license plates, one of which Mr. England retained. He had been directed to treat any flawed gloves as waste or give them to non-profit organizations, not to individuals. England's employment was terminated for violating three

work rules relating to the gloves. In the present case Mr. Del Frate had not already been disciplined for using inmates to produce items for the personal benefit of staff. This distinction is reflected in the fact that Mr. Del Frate was suspended while Mr. England was discharged.

Given the nature of Mr. Del Frate's conduct, the potential effect on the operations of the institution, and the remainder of the SAFRANSKY analysis, a 10-day suspension without pay is not excessive.

CONCLUSION

Respondent DOC has met its burden of proof that Appellant Louis Del Frate committed acts which constitute just cause for a 10-day suspension without pay. The suspension is affirmed.

Dated at Madison, Wisconsin, this 27th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

Parties

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