

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MICHAEL E. ROBINSON**, Appellant,

vs.

**President, UNIVERSITY OF WISCONSIN SYSTEM**, Respondent.

Case 10  
No. 3797  
PA(adv)-45

**Decision No. 30989-A**

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**Appearances:**

**Nola J. Hitchcock Cross**, Murray & Cross, Attorneys at Law., 845 North 11<sup>th</sup> Street, Milwaukee, Wisconsin 53233, appearing on behalf of Michael E. Robinson.

**Joely Urdan**, University Legal Counsel, Office of Legal Affairs, University of Wisconsin-Milwaukee, P.O. Box 413, Milwaukee, Wisconsin 53201-0413, appearing on behalf of the University of Wisconsin System.

**INTERIM DECISION AND ORDER**

Pursuant to Sec. 230.44(1)(c), Stats., Appellant Michael E. Robinson filed a timely appeal of his termination as a Custodial Services Supervisor 1/ for the Respondent, University of Wisconsin-Milwaukee. Commissioner Susan J. M. Bauman was designated as the hearing examiner and presided over the contested case hearing on August 19 and August 27, 2004 at the University of Wisconsin-Milwaukee. The hearing was transcribed, and a briefing schedule established. Respondent made closing arguments at the end of the hearing and filed a brief on September 30, 2004. Appellant's post-hearing brief was received on October 4, 2004 and the record was closed at that time. The examiner issued a proposed decision on October 13, 2004, that would have found the Appellant did not engage in the alleged misconduct. Respondent filed written objections and Appellant filed his response on November 22, 2005.

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*1/ Based upon the exhibits of record, Appellant's position was classified as a Custodial Services Supervisor at the time of the letter of discharge. The Commission has revised the proposed decision as necessary to be consistent on this point.*

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Dec. No. 30989-A

The Commission has consulted with the examiner. After carefully considering the record, the proposed decision and the subsequent arguments, the Commission rejects the proposed decision, rejects the Respondent's action and remands the matter to the Respondent. The Commission has concluded that the Appellant engaged in the alleged misconduct and some discipline is warranted, but that discharge was excessive.

The Commission has modified the Findings as set forth in the proposed decision by correcting those that were not supported by the record, supplementing them with additional relevant information and deleting language that was unnecessary to the resolution of the matter. This last category includes Findings 11, 14, 18, 19 and 20 of the proposed decision. The Commission has also revised the Conclusions of Law and the attached Memorandum to reflect its analysis of the evidence in light of the applicable law. Additional changes are noted below.

At a pre-hearing conference, the parties agreed that the issue to be decided in this matter is:

Did the Respondent have just cause to terminate the Appellant?

Having reviewed the record and being fully advised in the premises, the Commission now makes the following Findings of Fact, Conclusions of Law and Order.

### **FINDINGS OF FACT**

1. Since October 1991, except for a short period of time in 1993, Appellant Michael E. Robinson, hereinafter Appellant, was employed by the University of Wisconsin-Milwaukee, hereinafter Respondent, in the Division of Administrative Affairs – Physical Plant. Since June 12, 2000, he served as a Custodial Services Supervisor. In this capacity, he supervised up to 20 employees, and was the off-campus supervisor, with jurisdiction for four off-campus buildings as well as the four park-and-ride stations. Until the events giving rise to this case, Appellant had no prior discipline and had been commended 2/ for his hard work and diligence.

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2/ *The Commission has deleted the word "often" in order to more accurately reflect the record.*

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2. Appellant's office was located on the second floor of the library, near a shelving area. The door to the office was vented on the bottom. The office furnishings included a desk, two chairs, a microwave, small refrigerator, stereo, slop sink, metal bookshelf and pin

boards. All custodians and custodial supervisors had keys to this office and might 3/ enter at any time to clean up, empty trash, use the microwave or phone, check assignments and the like. At least one employee, Blanco, routinely entered the office with his key, without knocking.

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*3/ The Commission has replaced the word "would" with "might" to better reflect the record.*

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3. As a condition of his employment, Appellant wore a pager at all times when on duty and during his 30 minute unpaid lunch breaks.

4. At all material times, CD 4/ was a custodian employed by Respondent. Appellant was not CD's supervisor though, in the absence of CD's supervisor, Appellant was sometimes responsible for CD's work assignments. 5/ Appellant and CD met when CD worked as a mail sorter in one of the buildings for which Appellant was the responsible custodian. CD's aunt subsequently rented property from Appellant and, from time to time, communicated needs and concerns through CD to her landlord. For a time, CD bought Avon products from Appellant's wife.

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*4/ Although she was also disciplined as a result of this incident, CD's full name is not being used throughout this decision and has been modified in the written reports quoted in the findings of fact below.*

*5/ The Commission has revised the Finding to reflect testimony that Mr. Robinson had, in fact, stepped in for CD's supervisor on occasion.*

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5. From time to time, Appellant ate lunch with other custodians, including CD, in one-on-one situations, in his office, at the Union or at other locations. Rick Kazmierski, Superintendent of Buildings and Grounds, from time to time advised the supervisors, including Appellant, to maintain professional relationships with their subordinates. At the time that CD moved from her mail sorting job to her job as custodian in June 2003, the mail room supervisor informed Mr. Kazmierski that Mr. Robinson and CD had been spending so much time together that it was compromising CD's work performance. After receiving this report, Mr. Kazmierski spoke with Robinson about CD. 6/

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*6/ The Commission has added the last two sentences to this Finding in order to better reflect the record.*

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6. On June 2, 2004, a student library worker, Meredith Sterling, was shelving books outside of Appellant's office. She heard sounds that were sexual in nature, comparable to those heard in a pornographic film, including moaning and groaning and a male voice saying "Oh yeah, oh yeah, oh shit, oh shit." These sounds arose from sexual intercourse between Robinson and CD. 7/ Sterling also heard a "high-pitched whiny voice" talking and music. She heard noises building to a sexual climax, but did not hear climax. She heard these noises over a period of one to three minutes. Subsequently, she heard some keys and saw individuals later identified as CD and the Appellant leave the office. Sterling was upset by the sexual nature of the noises she heard and reported the matter to her supervisor, Giulia Caspri.

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*7/ The Commission has added language to this Finding to reflect the Commission's conclusion as to the origin of the sounds and to better describe them. The contrary finding from the proposed decision, Finding 21, has been deleted accordingly and is discussed further in the accompanying memorandum.*

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7. Sterling's supervisor reported the incident to her supervisor, Lisa Weikel, and to Kim Silbersack, Facilities Manager, UWM Libraries. The University Police were called and Officer Brian Switala responded to a report of "two people having sex" in the library. Switala took notes of his interview of Sterling. His conversation with Appellant was playful. Switala told Appellant that the investigation wasn't that big of a deal. Switala did not take notes of his conversation with Appellant, other than writing down the name of CD, the name provided to Switala by Appellant as the woman with whom he had lunch in his office. Switala returned to the police station and immediately completed a report that accurately reflected his interviews with Robinson and CD: 8/

On Wednesday, June 2, 2004 at approximately 12:29 p.m., I, Officer Switala, was dispatched to the UWM Library for a report of two people having sex. . . .

. . . STERLING stated that about 12:00 p.m., STERLING was "reshelving" books on the second floor. While she was performing her duties, she could clearly hear a male subject yelling "oh shit, oh shit." This was followed by loud "moaning and groaning." STERLING stated that she located the source of the noise coming from room W246. Room W246 is a custodial office for supervisor, MICHAEL E. ROBINSON. STERLING stated that the door was closed and the noise could be distinctly heard in that area of the library.

STERLING stated that she went to a different part of the library and continued on with her duties. STERLING observed ROBINSON walk out of his office with a female subject about 12:05 p.m. STERLING could hear ROBINSON say to the unidentified female, "you'll have to call me."

STERLING stated that the female subject is a black female and was wearing a zip up blue hooded sweatshirt, dark hair that was up in a bun. STERLING could not see the unidentified womans [sic] face. STERLING said that ROBINSON and the unidentified female walked to a stairwell and disappeared.

I asked STERLING if she wanted to make a [sic] official complaint. STERLING stated that she did. STERLING stated that she can not work around the area anymore because she was shaken up. SILBERSACK stated that STERLING would be going home for the rest of the day.

I went to room W246 with the intent to make contact with ROBINSON. I made contact with ROBINSON at around 2:10 p.m. at his office W246. I told ROBINSON the reason why I was there. I told ROBINSON that he was not under arrest at this time, but I was going to read him his Miranda Protection. ROBINSON stated that he understood and was willing to speak to me.

ROBINSON stated that about 11:30 a.m., a CD came to his office to visit. ROBINSON stated that CD "is my girl." I asked ROBINSON what CD and him [sic] were doing inside the room during her visit. ROBINSON stated that he had not seen CD for about 4 to 5 days and wanted to see her. According to ROBINSON, when CD arrived, they started to "kiss and hug and stuff" and "did it." I asked ROBINSON to be more specific as to their activities inside the room. ROBINSON stated "messaging around, fooling around." ROBINSON would not elaborate. ROBINSON stated "next time, I will turn the radio up."

I asked ROBINSON where he knew CD from. ROBINSON stated that CD works in Enderis and he knew her for years. I asked ROBINSON what CD was wearing today. ROBINSON stated that she was wearing blue jeans, a dark sweatshirt, and her hair was up in a bun. ROBINSON then took out two photographs of CD from his top right desk drawer and showed them to me.

I asked ROBINSON if there was a way that I could contact CD. ROBINSON proceeded to pick up his office phone and dialed a phone number. ROBINSON told CD to tell the truth. ROBINSON then turned the phone over to me. I identified myself to the female on the other end. She identified herself as CD. I asked CD if she was in the Library between 11:30 a.m. and 12 p.m. today. CD stated that she did not [sic]. I asked CD if she saw ROBINSON today. CD stated that she "sees him a lot." I asked CD if she was not in the library today, where did she go between 11:30 a.m. to 12 p.m. CD replied that she went to the Union for lunch. At that point the signal from the cell phone she was apparently on became bad. The conversation ended between CD and me.

No further action from the Police Dept. at this time.

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*8/ The last sentence has been modified to reflect when Officer Switala prepared his report and the Commission's conclusion as to its accuracy.*

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14. A picture of Appellant and a woman later identified as CD leaving the library at 12:02:09 p.m. on June 2, 2004 was obtained from the Library security system. Silbersack e-mailed a copy of it to Officer Switala that afternoon and also informed Andy Nelson, Director, Physical Plant Services, of the incident.

15. The following day, June 3, 2004, Sterling was called in by Silbersack. She was asked to write a memo describing the incident. With assistance from Silbersack, Sterling's memo reads as follows:

At 12:00 on June 2, 2004 [sic]

I Meredith Sterling was going past the office of Michael Robinson to collect a cart of books. As I was getting my cart ready when I heard music coming from the office. I then heard a male breathing very heavy and making moaning noises in a sexual manner. I heard a high-pitched winy [sic] noise that went along with the moaning and he was saying "Oh Yeah" "Oh Yeah" and Then [sic] "Oh Shit, Oh Shit." I decided at this point that I was going to take my cart to the N1 section and being my work shelving. I heard keys jiggling like they were being moved. I then heard the door open to the supervisor's office where I had heard the noise coming from. I saw the back of Mr. Robinson's head and an African American Women [sic] walking to leave the N section of the second floor. The women [sic] had black hair pulled up in a bun on the back of her head. She was wearing a dark blue hooded sweatshirt that zips in the front. She was also wearing a light blue shirt. I did not see her pants color. I heard Mr. Robinson tell the women to "Call Him."

I decided then to report the incident to my supervisor. I reported the incident to my supervisor Gulia Caspri and Lisa Weikel. Lisa immediately called Kim Silbersack. Kim then called the Police and I gave Officer Switala all the information.

16. Sterling was shown the picture referenced in Finding of Fact 8. She identified the woman as the one who she had seen leaving Appellant's office with him on June 2, even though she had only seen the back of the woman's head when she left Appellant's office.

17. Mr. Kazmierski supervised Appellant's supervisor, Lola Shaw. Kazmierski was familiar with the Appellant and his work performance. Director of Physical Plant Services Andy Nelson contacted Kazmierski at the end of the day on June 2, 2004 and advised that there was an incident involving Appellant that he would need to investigate the following day. On June 3, Kazmierski notified Appellant that he was on suspension with pay, pending investigation.

18. As part of his investigation, Kazmierski interviewed CD. She stated she had lunch at the student union on June 2<sup>nd</sup> and denied she was in Robinson's office. Robinson appeared at a pre-disciplinary hearing on June 4 where he admitted CD was his girlfriend and admitted that he kissed and hugged her when she came in to his office on June 2<sup>nd</sup>. However, he denied having sex with her in his office on that date. Robinson pleaded for his job and offered to break off his relationship with CD and not engage in similar conduct if he was allowed to remain in his job. Appellant suggested that the sounds Sterling reported were from some Marvin Gaye music he was playing at the time. 9/

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*9/ This Finding has been substantially revised to eliminate unnecessary information and to more accurately reflect statements made by both CD and Mr. Robinson during the investigation. The Commission has also deleted the proposed decision's Finding 13 relating to the phrase "That's my girl" because these were not the words attributed to Appellant by either Officer Switala or Mr. Kazmierski.*

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19. By letter dated June 10, 2004 from Steven Butzlaff, Assistant Superintendent Buildings and Grounds, and Andy Nelson, Director, Physical Plant Services, Appellant was advised that he was terminated from his employment. The letter, in pertinent part states:

Dear Mr. Robinson:

For the following reasons I must inform you that your employment at the University of Wisconsin-Milwaukee is being terminated effective June 11, 2004 at 2:30P.M.

At approximately 12:00P.M. on June 2, 2004 a student worker in the Golda Meir Library heard music coming from your office, room W246. She then heard a male breathing very heavily and making moaning noises in a sexual

manner and saying “Oh Yeah, Oh Yeah” and “Oh Shit, “Oh Shit.” A short time later while still working in the area she heard keys jiggling and the door to your office opened and she saw you and a female leave your office. She then reported this incident to her supervisor who notified University Police and they then filed an official complaint.

UWM Police Officer Brian Switala came to the Library to talk to you about the complaint at approximately 2:10 P.M that afternoon. You stated that at about 11:30A.M. that same day, UWM Custodian CD came to your office to visit you. You stated she “is my girl”. When Officer Switala asked what you were doing in your office, you stated that you had not seen her for about four or five days and wanted to see her. Then you told Officer Switala that when CD arrived, you started to “kiss and hug and stuff” and “did it”. When Officer Switala asked you to be more specific you stated that you were “messaging around, fooling around.” You then said, “Next time, I will turn the radio up”.

On June 3 the University suspended you with pay, pending the employer’s investigation into allegations that you engaged in misconduct on University property in violation of University work rules I-B and IV-J. An investigation/predisciplinary hearing was then conducted on June 4 with Rick Kazmierski and myself. During the meeting you stated you had not see CD for four or five days and missed her, so you bought her a sandwich for lunch and met her in your office. Because you were so happy to see her you then kissed and hugged her. When Rick asked you about the police report that stated you said that CD was “your girl” and that you were “messaging around” and “did it”, you said you were just talking “man to man” with the police officer and goofing around and that the officer did not write anything down except CD’s name. When asked about the witness hearing a male voice saying “Oh Yeah, Oh Yeah” and “Oh Shit, Oh Shit” and making moaning noises in a sexual manner, you said you were listening to Marvin Gaye’s music and his song sounds like that. You then stated nothing else happened except for hugs and kisses. When Rick asked if CD was your girlfriend, you said “yes”. You said you would end it and it would never happen again with CD or anyone else and that you need your job.

Your actions represent misconduct on University property in violation of University Classified Employees work rules I-B and IV-J.

I. Work Performance

B. Loafing, loitering, sleeping or engaging in unauthorized personal business.



IV. Personal Actions

- J. Failure to exercise good judgment or being discourteous, in dealing with fellow employees, students or the general public.

They also represent a violation of UWS 18.06 (30) of the Wisconsin Administrative Code, Disorderly Conduct.

**UWS 18.06(30) DISORDERLY CONDUCT.** No person may engage in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance, in university buildings or on university lands.

The University of Wisconsin-Milwaukee does not and will not tolerate misconduct of this nature in the workplace. The conduct of sexual relations in your assigned office in the Library during the work day is frankly shocking, and constitutes the worst kind of bad judgment, made all the worse because you hold the position of Custodial Supervisor with the Department. Your actions speak poorly for the entire Department of Physical Plant Services. Supervisors are responsible for using good judgment and conduct at the University and in some measure, serving as PPS representatives and models to the employees who work for you. Due to your failure in this responsibility and the severity of the infraction, you are hereby discharged from your position as a Custodial Services Supervisor.

. . .

20. Kazmierski did not attempt to determine whether there were other people on the second floor of the library on the date and time of the alleged incident to determine if the sounds heard by Sterling were heard by others.

21. There have been no other cases involving behavior of the type alleged herein in the Physical Plant Services Department at the University of Wisconsin-Milwaukee.

**CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to Sec. 230.44(1)(c), Stats.
2. The Respondent has the burden of proof to show that the termination of Appellant was for just cause.

3. Respondent has sustained its burden in terms of establishing just cause for disciplining Appellant for the misconduct described in the letter of discipline.
4. Discharge is excessive discipline for the misconduct.

**ORDER**

Respondent's disciplinary action set forth in its letter of discipline dated June 10, 2004, is modified to a demotion and a 30-day suspension without pay and this matter is remanded to Respondent for restoration of Appellant with compensation, less any mitigation, pursuant to Sec. 230.43(4), Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of February, 2005.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

I dissent.

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

University of Wisconsin (Robinson)

MEMORANDUM ACCOMPANYING INTERIM DECISION

On appeal of a disciplinary matter the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Sec. 230.34 and .44(1)(c), Stats. The courts have equated this requirement 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, 81CV5669, 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). SEE ALSO, DEPARTMENT OF CORRECTIONS (DEL FRATE), DEC. NO. 30795 (WERC, 2/04).

Respondent's initial burden is to show, by a preponderance of the credible evidence, that Mr. Robinson, a Custodian Services Supervisor at the University of Wisconsin – Milwaukee (UW-M), engaged in the conduct described in the letter of discipline, i.e. that he engaged in sexual activity (described as “sexual relations” in the letter of discipline) in his office at his place of work on June 2, 2003, with CD, a custodian at UW-M. Both Mr. Robinson and CD testified, and both denied engaging in the alleged misconduct. The case hinges on their credibility.

By the time the matter went to hearing, both Mr. Robinson and CD had acknowledged that CD had visited Robinson's library office (room W246) on June 2, 2003, over their lunch hour. They admit they are friends and acknowledge that when CD arrived in the office, Robinson hugged her. They contend CD was feeling ill, she sat down and put her head on the desk, they talked while Robinson ate and played a Marvin Gaye compact disk, and then they left around noon without any sexual activity.

The Commission concludes that both CD and Robinson lack credibility and the record as a whole does not support their version of events.

Ms. Sterling, a 32 year old work-study employee of the library, heard moans and other sounds “like a porno sound track” coming from Robinson’s library office over the course of 1 to 3 minutes at approximately noon on June 2<sup>nd</sup>. Just a few minutes later, she observed two people exit the office. The sounds upset her, she reported them to a supervisor who called the campus police and the police sent an officer to investigate. Ms. Sterling’s descriptions of the people leaving the office and of what she heard coming from inside the office have been consistent from June 2<sup>nd</sup> through her testimony at hearing. The accuracy of Sterling’s observations is supported by the security photo that confirmed her descriptions of the two people who exited the office.

When Officer Switala interviewed Robinson at the library just two hours later, Robinson admitted that CD arrived at his office around 11:30 and that she “is my girl.” He hadn’t seen her for several days and admitted they started to “kiss and hug and stuff” and “did it.” He pulled two photos of CD from his desk drawer to show to Switala and then dialed CD’s cell phone without having to look up her phone number. Immediately after Robinson told her to tell the truth, CD denied she had been in the library and said she had gone to the student union from 11:30 to noon to have lunch. 10/

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*10/ CD’s statements to Switala are contrary to her testimony at hearing, indicating that CD found it in her best interest to ignore Robinson’s request to be truthful. The examiner concluded that Robinson would not have admonished CD to “tell the truth” if he had actually engaged in the alleged misconduct. The Commission believes that a more reasonable explanation for Robinson’s course of action is that he knew he had already admitted the misconduct to Switala and was unaware it would be considered so significant.*

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Switala did not take notes during this interview but he wrote his report immediately after he returned to the police station. He had no reason to mischaracterize his interview with Robinson or his phone call with CD, and Appellant was unable to provide any evidence to support the contention that Switala’s written report was fabricated. 11/ Robinson testified that he did not even know the meaning of the phrase “did it” as it appeared in Switala’s report. The Commission finds this testimony to be so unlikely that it further reduces Robinson’s credibility.

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*11/ While the proposed decision emphasized the “playful” nature of Robinson’s interview, the Commission refuses to rely on this as a reason to ignore the interview results. Switala referred to his lighthearted approach as an interviewing technique and it may also reflect the difference between a criminal investigation and an investigation relating to possible work misconduct. A police officer*

*might well choose to treat the latter less formally. Having failed to have addressed Switala's credibility, the proposed decision left unanswered the question of whether it was Switala or Robinson who accurately characterized the interview, simply noting that "there was no independent means of corroborating who said what." No one disputes that the interview was not recorded, Appellant did not sign a written statement at its end and there was no second officer who witnessed the exchange. Given these circumstances, the Commission has looked to other information of record that might tend to support one version rather than the other and believes that consistency, form, timing, motivation and reasonableness all weigh on the side of adopting Switala's written report as accurate. The Commission fully recognizes that the hearing examiner was in a position to observe Appellant's demeanor while he testified, and that demeanor is an appropriate element when considering the credibility of a witness. However, the ultimate authority to determine credibility rests with the Commission, rather than the examiner. BRAUN V. INDUSTRIAL COMM., 36 WIS. 2D 48 , 153 N.W.2D 81 (1967). An opinion as to demeanor is often not the sole basis available on which to build a credibility finding. Anything with a legitimate tendency to throw light on accuracy, truthfulness, and sincerity of a witness may be considered in determining the credit to be accorded the testimony of that witness. STURDEVANT V. STATE, 49 WIS. 2D 142, 181 N.W.2D 523 (1970), CITING 98 C. J. S., WITNESSES, P. 323, SEC. 460. Here, the record includes a variety of information that tends to undercut Robinson's version of the interview. For example, he was immediately able to produce two photos and the phone number for CD but he failed to tell Switala anything about a Marvin Gaye recording, even though he spoke with Switala just two hours after Ms. Sterling reported the sexual sounds. Appellant also had a much stronger motivation than Switala to inaccurately describe the interview.*

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Appellant's theory of this case would also require the Commission to conclude that the Superintendent of Buildings and Grounds at UW-M, Mr. Kazmierski, lied when he described the interviews he had with both Robinson and CD as part of his investigation of their conduct. 12/ According to Kazmierski, CD initially told him she had not been in Robinson's office on June 2<sup>nd</sup>. When Kazmierski presented her with a copy of the security photo that showed her leaving the library shortly after noon that day, she changed her story, admitted she had been to the office but said the times on the surveillance camera were wrong. The Commission interprets this change in CD's version of events as proof that she was strongly motivated to deny she was in Robinson's office. The logical explanation for her motivation is that CD wished to conceal she was in a sexual relationship with Robinson. Appellant's comments to Kazmierski were similarly inconsistent with a non-sexual friendship with CD: Robinson told Kazmierski that CD was his "girlfriend" and he would end their relationship if he could remain in his job. Robinson did not present any evidence (or even a reasonable theory) as to why Kazmierski would have been motivated to lie about what Robinson said in order to impose discipline.

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*12/ The dissent suggests that because he had been privy to workplace references about a romantic relationship between Appellant and CD, Kazmierski drew inappropriate inferences from Switala's report. This information certainly did not disqualify Kazmierski from serving as an investigator of Appellant's conduct and while it may, at least conceivably, have had some bearing on the conclusions that Kazmierski reached, the Commission believes it would be inappropriate to automatically discredit Kazmierski's description of what he heard or otherwise observed.*

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In contrast, Robinson faced discipline and, ultimately, discharge. Maintaining employment serves as a very strong incentive for making inaccurate statements.

The proposed decision left unanswered the question of whether Robinson and CD were just friends or had a romantic relationship. Robinson's admissions to both Switala and Kazmierski, in conjunction with the other evidence of record, compels the conclusion that they were more to each other than just friends.

Once Respondent has established that CD and Robinson were engaged in a romantic relationship and that CD was in Robinson's office during their lunch break on June 2<sup>nd</sup>, the only remaining question of fact is whether they engaged in sexual activities at that time. Many people would presumably prefer a more discreet or comfortable location than an office such as Mr. Robinson's. Nevertheless, time and mobility constraints would be reasons to end up in room W246 in the library. Again, Robinson admitted to Switala that he hugged, kissed and "did it" with CD over the lunch hour. The proposed decision fails to offer any alternative explanation for what Ms. Sterling heard around noon when she was outside Robinson's office door, i.e. moaning and groaning "like a porno sound track." Robinson contends that Ms. Sterling heard a track from a Marvin Gaye disk he was playing. This argument collapses in light of Sterling's testimony that she is a Marvin Gaye fan and that she was sure the sexual noises she heard were not from a Marvin Gaye recording played for her during the hearing. The dissent acknowledges the hearing record is insufficient to support a finding that the sexual sounds were produced by a particular Marvin Gaye track, but then seems to suggest there might be some other recording of a song that could have served as the source for what Ms. Sterling heard. When Appellant has argued that a Marvin Gaye recording would serve to explain Ms. Sterling's description and plays a track that fails to support the contention, it is not incumbent on the Respondent to disprove the possibility that it could have been some other song.

Appellant points to the fact that Kazmierski completed his investigation without having searched for other people in the library who could have corroborated Ms. Sterling's description of the sounds emanating from Robinson's office. The question before the Commission is not whether Respondent conducted an adequate investigation before it disciplined Robinson. The issue instead is whether the evidence produced at the two-day hearing met Respondent's burden to establish that Robinson engaged in the alleged misconduct. Furthermore, there is nothing in the record to suggest it is likely there would have been anyone in addition to Robinson, CD, and Sterling in that part of the library at that time of day.

In reaching the conclusion that Respondent has satisfied its burden of persuasion that Robinson engaged in sexual activity with CD in his library office at approximately noon on June 2<sup>nd</sup>, it is unnecessary to follow the same path outlined in the proposed decision of trying to decide whether one of the participants reached orgasm. The analysis in the proposed decision is premised on the following phrase from the discharge letter: "The conduct of sexual relations in your assigned office in the Library during the work day is frankly shocking." The analysis notes that neither Switala's report nor Sterling used the term "sexual relations" to

describe what occurred in Appellant's office and notes further that that while one of Respondent's witnesses defined sexual relations as requiring an orgasm, there was no evidence that either Robinson or CD reached orgasm. 13/ In contrast to the proposed decision, the Commission has found that Officer Switala's report accurately described Appellant's comments made during the June 2<sup>nd</sup> interview. One such comment is Appellant's admission that he "did it" with CD after she arrived in his office at 11:30 that day. The Commission construes this statement as a declaration that Appellant and CD had sexual intercourse, which would be consistent with the sounds that came from the office at the time. Once there is a finding that the Appellant engaged in sexual intercourse, there can be little question that he engaged in "sexual relations."

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*13/ Presumably the most famous discussion of how one may interpret the term "sexual relations" is in JONES V. CLINTON, 36 F.SUPP.2D 118 (E.D. ARK. 1999).*

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The second element of the just cause analysis is whether the greater weight of credible evidence shows that Appellant's conduct serves as just cause for the imposition of some discipline. This element is described more fully in SAFRANSKY V. PERSONNEL BOARD, 62 WIS. 2D 464, 215 N.W.2D 379 (1974) as follows:

[O]ne appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. 62 Wis. 2d 464, 474 (citation omitted)

It should be clear that Appellant's conduct severely undermined his ability to continue in the capacity of a supervisor: he lost his credibility with subordinates and peers as well as with his superiors. The custodians he supervised would be likely to question any advice he might offer as well as any discipline he might seek to impose. Ms. Sterling was sufficiently upset by what she heard that she left work after reporting the matter to a supervisor. Keys issued to the custodians provided them with access to Appellant's office. One of those custodians is deaf and has the habit of entering the office without knocking. He or any of the other custodians might have happened upon the sexual activity. Similarly, any member of the public who was using the library in the vicinity of the office might have overheard the activity and generated an embarrassing and time-consuming public relations issue for UW-M.

Sexual activity on the worksite also violates University work rules I-B and IV-J. The first of these rules prohibits engaging in "unauthorized personal business" and the second allows for discipline upon failing "to exercise good judgment . . . in dealing with fellow employees, students or the general public." Appellant's conduct is contrary to the administrative code provision prohibiting disorderly conduct (including indecent conduct) in university buildings. Sec. UWS 18.06(30), Wis. Adm. Code. Even though Appellant engaged

in the activity during his lunch hour so that he was not in pay status, he was still in work status to the extent that he had to respond to his beeper or a knock on the door of his office. For all of these reasons, the Commission finds just cause for disciplining Appellant.

The final step in the analysis of this matter is determining whether Respondent's action of discharging the Appellant from his position as Custodial Services Supervisor 1 was excessive discipline. Factors to consider that are relevant to this matter include:

- a) [T]he weight or enormity of the employee's offense or dereliction, including the degree to which, under the SAFRANSKY test, it did or could reasonably be said to tend to impair the employer's operation;
- b) the employee's prior record;
- c) the discipline imposed by the employer in other cases. . . .

MILLER V. DOC, 99-0108-PC (PC, 5/8/02) (citations omitted).

The sole comparison of record that is sufficiently similar for assessing the consistency of discipline is Respondent's decision to discharge CD for her role in the same June 2<sup>nd</sup> incident. The Commission is reluctant to place significant weight on this comparison because CD's grievance relating to the discipline is pending. However, Appellant clearly has no basis for contending that Respondent has treated him more harshly than CD, despite his status as a supervisor.

The following language from the brief "Position Summary" portion of Appellant's position description provides a window on the relative importance of Robinson's conduct on UW-M's operation:

The University of Wisconsin-Milwaukee Physical Plant Services is committed to the highest standard of customer relations principles for its customers, fellow staff members and visitors. Staff will serve as role models by practicing exemplary behaviors when working with customers and fellow staff members.

Appellant's office is not just in a public building, it is in a library where quiet surroundings effectively amplified the potential consequences of his misconduct. The egregious nature of the conduct and its public location increased the probability that it would become a significant blot on the reputation of the institution.

Appellant's status as a supervisor is an appropriate element in the excessiveness analysis, because he failed to set a good example for his subordinate employees. See *HEBERT v. DHSS*, 89-0093-PC, 6/27/90. His conduct subjected Respondent to a possible sexual harassment claim, either by an observer of the misconduct or, conceivably, by CD. In addition, his misconduct needs to be viewed in light of Mr. Kazmierski's repeated efforts to have Appellant understand the importance of maintaining a professional relationship with his co-workers, and more specifically with his subordinates.



As explained in the proposed decision:

[I]t is not a difficult question to determine what the appropriate discipline should be if a supervisor engaged in the type of activity complained of here. Even given that the Appellant has an employment record with Respondent that is in excess of 20 years, were we to find that he had engaged in sexual relations in the workplace, even though it was during his duty free thirty minute lunch period, we would find discharge to be appropriate. A supervisor should set an example for his/her subordinates. Additionally, the nature of this activity could expose the Respondent to sexual harassment claims, either by creating or tolerating a hostile work environment for other employees, or for failing to prevent the sexual harassment of a subordinate by a supervisor.

On the other side of the equation is Appellant's lengthy work record reflecting an absence of previous discipline while employed at UW-M. There is a tremendous difference between discharge and demotion, and one question to be answered is whether the lesser discipline would have the desired effect of deterring comparable conduct by any UW-M employee. We believe the necessary effect will be obtained by suspending Mr. Robinson for 30 days and also demoting him to a position that has neither supervisory nor leadwork responsibility. In contrast, discharge was excessive discipline.

Dated at Madison, Wisconsin, this 18th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

**University of Wisconsin (Robinson)**

**Dissent of Commissioner Bauman**

I respectfully disagree with my colleagues in two very significant ways. First, I do not believe that Respondent has sustained its burden of proof; Respondent has not shown by a preponderance of credible evidence that the behavior complained of actually occurred. Second, as I wrote in the Proposed Decision, I believe that, despite Appellant's long history of employment with Respondent, had he engaged in the activity complained of, termination is the appropriate disciplinary action.

I had the opportunity to observe the Appellant through two days of hearing. I found him to be a very credible individual. The majority has removed Finding of Fact 18 of the Proposed Decision, a fact that is, in my opinion, a critical fact. It read:

Kazmierski "knew", prior to the reported incident, that CD and Appellant were a "sexual couple" because it was "common knowledge" within the department that they were a couple. This was in the background when he read Officer Switala's report and saw that Appellant had stated CD "is my girl" during his interview by the police officer.

This Finding should also have included the use of the phrases "did it", "kiss and hug and stuff", as well as "messaging around, fooling around." Kazmierski was predisposed to believing that Robinson and CD had engaged in sexual relations and was unwilling to believe any other explanation. In Kazmierski's own words: "I had no reason to believe that he had not had sexual relations with CD on the day in question." Even acknowledging that Officer Switala's report was written immediately after interviewing Robinson and returning to his office, the report is too replete with direct quotations, when Switala took no notes during the interview. Robinson testified credibly that many of the words were those of Switala and that the quotation regarding increasing the volume on the radio was only half of what he told the Officer. Kazmierski chose to discount anything Robinson said.

If the Appellant wanted to engage in sex with CD, he could have gone elsewhere. There is no logic in assuming, as did Kazmierski, that sexual intercourse took place in an office to which many others had keys, which others entered at any time, some without knocking, and where the furnishings are not conducive to such activity.

A lack of another explanation for the sounds heard by Sterling does not establish by a preponderance of the credible evidence that sexual relations took place. The burden is on the Respondent to prove that the complained of behavior occurred. The burden is not, as the

majority would have it, on the Appellant to provide another explanation. The majority states “[t]he proposed decision fails to offer any alternative explanation for what Ms. Sterling heard around noon when she was outside Robinson’s office door, i.e.. moaning and groaning “like a porno sound track.”” Appellant’s explanation of the sounds is that they must have come from a Marvin Gaye compact disk. The majority finds that “[t]his argument collapses in light of Sterling’s testimony that she is a Marvin Gaye fan and that she was sure the sexual noises she heard were not from a Marvin Gaye recording played for her during the hearing.” Only one cut from the disk was played during the hearing, leaving open the question of whether another cut may have been playing when Ms. Sterling was listening. Ms. Sterling’s knowledge of Gaye’s music is undercut by her own testimony:

Q. And you say you are sort of a Marvin Gay [sic] fan?

A. I am a Marvin Gay fan.

Q. Is that because it's of a sexual nature?

A. No, I like Marvin Gay because I liked the "Big Chill," and I also liked that because it was in there and also the "Platoon."

Q. And you wouldn't dispute the fact that Marvin Gay's music is of a sexual nature, would you?

A. No, not at all.

Q. And you wouldn't dispute that when -- At least in some of Marvin Gay's songs, there are sounds which are of a sexual nature, would you?

A. I had never heard sexual sounds of Marvin Gay's music until I heard that song today, actually.

Q. And you would agree that the song you heard today had noises of a sexual nature; right?

A. Yes. (Tr., p. 63)

As the Hearing Examiner, I was unable to make a definitive finding that the sounds came from a Marvin Gaye disk, as Ms. Sterling was clear that the cut played was not what she heard. The fact that she had never heard sexual sounds in Marvin Gaye’s music before undermines the conclusion that the sounds she heard were definitively not from the music being played.

The burden of proof lies with the Respondent. It has failed to sustain that burden. Accordingly, the Appellant should be reinstated to his position. Had the Respondent sustained its burden, however, the termination should be upheld.

Dated at Madison, Wisconsin this 18th day of February, 2005.

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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