

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JON P. RYSKOSKI, Appellant,

vs.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES, Respondent.

Case 4
No. 63006
PA(adv)-21

(Previously Case No. 03-0024-PC)

Decision No. 31191

Appearances:

Richard L. Bolton, Attorney, Boardman Law Firm, Fourth Floor, 1 South Pinckney Street, P.O. Box 927, Madison, Wisconsin 53701-0927, appearing on behalf of the Appellant.

Paul Harris, Assistant Legal Counsel, Department of Health and Family Services, Office of Legal Counsel, 1 West Wilson Street, P.O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Respondent.

FINAL DECISION AND ORDER

Jon P. Ryskoski appeals from his termination imposed by letter dated May 22, 2003. The appeal was filed with the Personnel Commission on June 17, 2003. While the case was pending, the Personnel Commission was abolished pursuant to 2003 Wis. Act 33, effective July 26, 2003, and the authority for processing this matter was transferred to the Wisconsin Employment Relations Commission.

By letter dated November 24, 2003, the Wisconsin Employment Relations Commission designated Dennis P. McGilligan as Hearing Examiner. Examiner McGilligan subsequently convened an administrative hearing that was held over the course of three days. Hearing was held on the following issue:

Whether there was just cause for the termination of the Appellant, Jon P. Ryskoski?

If not, what is the appropriate remedy?

The parties completed their briefing schedule on June 10, 2004. The hearing examiner issued a proposed decision on December 20, 2004. No objections were filed by the requisite due date of January 20, 2005. For the reasons set forth below, it is the Commission's decision that there was just cause for the termination.

The Commission issues the following

FINDINGS OF FACT

1. Jon P. Ryskoski, hereinafter "Captain Ryskoski" or "Appellant," was employed by Respondent, Department of Health and Family Services (DHFS) at the Mendota Mental Health Institute (MMHI), from December, 1998 until May 23, 2002. During his tenure at MMHI, Captain Ryskoski first served as relief captain for one and one-half years and then as captain for the second shift (also known as the PM shift) until his termination.

2. MMHI provides "innovative, compassionate mental health treatment and patient care" for the State's most challenging, complex and diverse patient populations. These are patients who generally have engaged in criminal conduct and who have been committed to MMHI by a judge. They are often dangerous and mentally unstable. A goal of MMHI is to bring stability back to these individuals and return them, if possible, to the community from which they came. MMHI is a 24/7 operation.

3. At the time of his termination, Captain Ryskoski's position was assigned to the Supervising Officer 2 classification and he had supervisory responsibilities.

4. The letter of termination that is the subject of this appeal is dated May 22, 2003, and includes the following language:

This is formal notice of termination of your employment with Mendota Mental Health Institute, effective May 23, 2003, for violations of DHFS Work Rules #1 and #5, prohibiting:

1. "Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions."
5. "Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employee."

This action is due to your pattern of inappropriate behavior that has occurred over several years, up to the present. You have repeatedly made derogatory, unwelcome, and unsolicited comments about a person(s) concerning their race, sex, sexual preference, etc. It has recently been reported by many staff who

work the P.M. shift that you have engaged in a series of acts over an extended period of time which were verbally demeaning, and inappropriate regarding patients, staff and visitors while you were on duty. Some staff maintained that they feared reporting their observations of your unwelcome statements at the time they occurred, because as their Captain and supervisor you were in a position to effectively retaliate. They believed you would do so. On May 13, 2003 two employees went to Captain Thomas to report how you had been making racial comments such as “the monkey” or “porch monkey” behind his back.

You used these terms over the past several years, the last time being on Thursday, January 9, 2003, when you and Captain Thomas worked together. However you continued to make other discriminatory statements about other staff, patients and visitors. Eight of the ten officers that were interviewed reported that you have made the following statements:

- “Captain Thomas’ children are zebras”
- “Maybe I should leave a banana on the monkey’s desk.”
- “All black people are like apes.”
- “Some women are cunts” (referring to a nurse on the Management Treatment Unit)
- Called a former IT staff member a “sand nigger”
- A specific African-American visitor’s children were “chimpanzees”
- “Black people are Jungle Bunnies.”
- “Some female staff in Goodland Hall are sluts.”
- “Some patients are retards.”
- Staff members J.H. and D.A. are “faggots”

These acts on your part are unacceptable for any employee to engage in, and in particular a Supervising Officer 2 (Captain) who is in charge of Security and expected to be a role model and provide leadership. In addition these acts are contrary to MMHI and Department policies and may violate State and Federal Equal Rights Laws. In November 2002 you were orally counseled with regard to MMHI’s Harassment Policy and in April 2003 you were issued a written directive to be courteous and respectful to others in the workplace.

You were placed on administrative leave with pay while an investigation was conducted into these matters. An investigatory/pre-disciplinary meeting was conducted with you on May 22, 2003. Present for management was Larry Metsala, Human Resources Director and Administrative Captain Richard Schaller – your supervisor. At that time you were made aware of each allegation and given an opportunity to respond. You stated, “It’s a bunch of bull. I never said anything about Cameron. It’s about me being strict. This is ridiculous.”

...

5. The MMHI policy on “Discriminatory Statements and/or Behavior” requires supervisors to provide “an environment free from discriminatory statements and behavior concerning race, religion, age, sex, sexual orientation, criminal record and disabilities.” It prohibits behavior and speech that “indicates prejudice or bias toward another person on the basis of sex, religion, race, age, sexual orientation, criminal record and/or disability (physical or mental).” It also requires supervisors to “closely supervise and/or discipline” staff who engage in such activity.

6. The MMHI “Vision, Mission and Values Statements” policy provides that all “staff deserve to be treated with respect and dignity.”

7. The MMHI Harassment policy notes that harassment in the workplace is illegal and violates both the state’s Fair Employment Act and the federal Civil Rights Act. The policy states that harassment “infringes upon equal respect in working relationships and causes serious harm to the productivity, efficiency and stability of our operation.” It defines harassment as “any unwanted, deliberate or repeated unsolicited comments . . . when . . . such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.” The policy also provides that MMHI “will not condone any form of conduct that might be considered avoidably abusive, disorderly, or disruptive, regardless of whether the form of conduct violates state and federal statutes.” It further provides that it is the role of the supervisor in preventing harassment to “set a positive example in terms of language and behavior.” Finally, it provides that each allegation of harassment will be investigated and “all proven incidents will be met with counseling or an appropriate form of discipline.”

8. Captain Ryskoski’s Position Description confirms that he is required to enforce these policies.

9. On November 13, 2002, Administrative Captain Richard Schaller and Human Resources Director Larry M. Metsala met with Captain Ryskoski to discuss a harassment complaint filed by Officer Jason Blake who alleged that Captain Ryskoski had called him a “pinhead.” They reviewed MMHI’s harassment policy with Captain Ryskoski and noted that harassment is illegal and causes serious harm to productivity. They emphasized that a supervisor’s role was “to prevent harassment and [to] set a positive example.” Captain Ryskoski admitted that he used the term “pinhead” at least once and said it was Officer Blake’s nickname. He was directed to not use derogatory terms like “pinhead.” He acknowledged the term was inappropriate and agreed not to use it again. Captain Ryskoski never again referred to Officer Blake as a “pinhead.”

10. On May 14, 2003, Administrative Captain Schaller informed Human Resources Director Metsala that Captain Cameron Thomas, a black male, had complained that Captain Ryskoski referred to him by using racially derogatory language. On the same date, Administrative Captain Schaller and Human Resources Director Metsala commenced an investigation into the complaint.

11. Captain Ryskoski made the following comments described in the letter of termination:

“Banana on the monkey’s desk” Officer James Johnson heard, more than once, Captain Ryskoski refer to some bananas on a food tray, and say “Guess I should leave one for the third shift Captain [Thomas].”

Officer Johnson also heard Captain Ryskoski refer to Captain Thomas as a “monkey” on five different occasions.

Officer Gene Larson heard Captain Ryskoski refer to Captain Thomas as a “monkey.” This occurred “quite a bit,” but not on a regular basis.

Officer Mike Kersten once heard Captain Ryskoski refer to Captain Thomas as a “monkey.”

Officer Brian Linde heard Captain Ryskoski refer to Captain Thomas once, or possibly twice, as a “monkey.”

Officer Derek MacLeod heard Captain Ryskoski refer to Captain Thomas as a “porch monkey” a couple of times.

Black people are “apes” Officer Lori Kikkert heard Captain Ryskoski refer to Captain Thomas as an “ape” once, about three months prior to the investigatory interviews conducted in May, 2003.

Women are “cunts” In approximately March of 2003, Officer Kikkert heard Captain Ryskoski refer to MTU nurse “D” as a “cunt.”

Called a staff member a “sand nigger” Officer MacLeod heard Captain Ryskoski refer to an employee who had a dark complexion as a “sand nigger.” When Officer MacLeod told Captain Ryskoski

that he was uncomfortable with the use of that word and he would rather Captain Ryskoski not use it again, Captain Ryskoski complied.

Officer Dire Wolf heard Captain Ryskoski refer to Arabs as “camel jockeys.”

*African-American visitor’s
Children were “chimpanzees”*

Officer MacLeod once heard Captain Ryskoski refer to a visitor’s black children as “chimpanzees.”

*Black people are
“jungle bunnies”*

Officer Benjamin Panske once heard Captain Ryskoski use the term “jungle bunny” when he was referring to a new African-American patient.

Some female staff are “sluts”

Officer Panske heard Captain Ryskoski use derogatory terms, including the word “slut,” when he referred to female staff.

Patients as “retards”

Officer Wolf heard Captain Ryskoski use the words “monkeys, morons, assholes, dipshits” and “retards” in reference to patients.

12. This conduct violated the aforesaid MMHI work rules and tended to impair the performance of the duties of his position, the efficiency of the security unit with which Captain Ryskoski worked, and the operation and efficiency of MMHI as a whole.

13. Following Captain Ryskoski’s termination effective May 23rd, Captain Thomas called Human Resources Director Metsala and expressed “fear” of Captain Ryskoski and mentioned his fascination with guns.

14. On June 3, 2003, Captain Ryskoski sent the following e-mail to Officer Jeffrey Diehlmann: “Thanks for being an honorable person. Setups are hard to get out of but I am fighting it.” When interviewed as part of the investigation, Officer Diehlmann had stated he had not heard Captain Ryskoski make any racially derogatory comments.

15. On June 4, 2003, Captain Ryskoski sent the following e-mail to Captain Thomas: “Do you still have an e-mail you sent called ‘Observations’? Put yourself in a bad place. Pearce wants his 80’s CD’s back, too. You know which ones. See you soon.” This message referenced an e-mail sent by Captain Thomas to Administrative Captain Schaller on April 4, 2003, in which Captain Thomas alleged that Captain Ryskoski had made negative comments about management in the presence of a subordinate.

16. Human Resources Director Metsala perceived Captain Ryskoski’s June 4th e-mail as a threat to Captain Thomas. However, Captain Ryskoski had no intent to threaten him. He only sought to challenge the truthfulness of the claims made by Captain Thomas in the “Observations” e-mail and to ask, on behalf of someone else, for the return of some CDs. It also put Captain Thomas on notice that he would see him at the upcoming administrative hearing over Captain Ryskoski’s termination.

17. Captain Ryskoski had received no formal discipline at MMHI prior to his termination. He was also not disciplined during his employment with the Department of Corrections from July 1990 until the date he began his employment at MMHI. He received uniformly good performance evaluations throughout his career with MMHI and the Department of Corrections.

18. Captain Ryskoski had an excellent record of properly handling the security aspects of his job. He interacted with the MMHI patient population effectively. He was particularly effective in handling difficult and tense situations with patients by talking to them and calming them down. Non-security staff felt secure when Captain Ryskoski intervened in patient situations. He interacted directly with patients in a professional manner.

19. A female staff member at MMHI received a three-day suspension without pay for calling a patient a “bastard” after the patient had called her a “bitch.”

20. Another employee, Malik Sterling, was demoted when he responded to a request to get help for a patient by saying, “You can just suck my dick.”

21. Captain Dolsey was directed to attend sensitivity classes after it was alleged that he made racially hostile comments in approximately 1993.

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

CONCLUSIONS OF LAW

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

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

3. The Respondent has sustained this burden.
4. The degree of discipline imposed was not excessive.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's action of discharging the Appellant from his employment as a Captain at MMHI is sustained and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 24th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Parties:

Jon P. Ryskoski
4741 Hayes Road #3
Madison, WI 53704

Helene Nelson
Secretary, DHFS
PO Box 7850
Madison, WI 53707-7850

Department Of Health And Family Services (Ryskoski)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter is before the Commission as an appeal of the decision to discharge the Appellant from his position as Captain at the Mendota Mental Health Institute.

In its recent decision in DEPARTMENT OF CORRECTIONS (DEL FRATE), Decision No. 30795, (2/04), the Commission explained the legal standard it applies when analyzing an appeal of a disciplinary action 1/ under Sec. 230.44(1)(c), Stats.:

On appeal of a disciplinary matter, the Respondent must show by a preponderance of credible evidence that there was just cause for the discipline. Section 230.34, Stats., requires that suspension of an employee with permanent status in class . . . 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 COUTY 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, CASE No. 83-0228-PC, (PERS. COMM. 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, 6/83.

1/ A different standard applies to an appeal from a layoff decision. WEAVER V. WIS. PERS. BOARD, 71 WIS. 2D 46, 62, 237 N.W.2D 197 (1976)

The three steps referenced in MITCHELL, *supra*, are addressed separately, below.

1. Did the Appellant engage in the alleged misconduct?

The relevant portions of the May 22nd letter of termination are set forth in Finding 4. This document identifies the following alleged misconduct by Captain Ryskoski:

You have repeatedly made derogatory, unwelcome and unsolicited comments about a person(s) concerning their race, sex, sexual preference, etc. . . .

You used these terms over the past several years, the last time being on Thursday, January 9, 2003 when you and Captain Thomas worked together. However, you continued to make other discriminatory statements about other staff, patients and visitors. Eight of the ten officers that were interviewed reported that you have made the following statements:

- “Captain Thomas’ children are zebras”
- “Maybe I should leave a banana on the monkey’s desk.”
- “All black people are like apes.”
- “Some women are cunts” (referring to a nurse on the Management Treatment Unit)
- Called a former IT staff member a “sand nigger”
- A specific African-American visitor’s children were “chimpanzees”
- “Black people are Jungle Bunnies.”
- “Some female staff in Goodland Hall are sluts.”
- “Some patients are retards.”
- Staff members J.H. and D.A. are “faggots”

The testimony of the numerous witnesses and the information found in the various exhibits place Captain Ryskoski’s conduct into a context that establishes, without question, the harassing, demeaning and inappropriate nature of the statements and actions listed above that were directed at staff, patients and their families. Eight officers who worked with Captain Ryskoski testified credibly that he used all of the derogatory terms listed on the letter of discipline except for “zebra” and “faggot.” The credibility of Respondent’s witnesses was established at the hearing by their lack of equivocation and the consistency of their testimony under cross-examination.

In light of the overwhelming testimony from officers that Captain Ryskoski made all of the alleged comments except for referring to Captain Thomas’ children as “zebras” and two employees as “faggots,” the Commission rejects Captain Ryskoski’s contentions to the contrary. For example, Captain Ryskoski attempted to shift blame to Officer Larson for making some of the comments in question. He testified that it was Officer Larson who had told him to leave a banana on Captain Thomas’ desk and said he had admonished Officer Larson for the comment. He also testified that Officer Larson had referred to various children with dark complexions as “chocolate drops.” However, Captain Ryskoski’s allegations are not persuasive in light of his admitted antipathy toward Officer Larson as well as the lack of any corroborative evidence.

In addition, Captain Ryskoski admitted under oath that he had used the same or very similar terms in certain other situations. He admitted to using the term “towel head” after 9/11. He acknowledged that Officer MacLeod had a problem when he used the term “sand nigger” in reference to someone with a dark complexion around the time of the U.S.-led invasion of Iraq in the spring of 2003. He admitted having earlier called Officer Blake a “pinhead.” Captain Ryskoski’s use of these other comparable terms on other occasions undercuts his denials that he used the various terms listed in the discharge letter.

Appellant argues that the circumstances of the accusations against him raise questions about the authenticity of the complaints. In particular, Appellant argues that 1) motives existed to accuse him; 2) opportunity existed to coordinate accusations; 3) there were inconsistent details in the accusations; and 4) the accusations were solicited by Captain Thomas. However, it doesn’t matter what circumstances led to the accusations against Captain Ryskoski as long as the record supports a finding that he made the statements in question.

Based on all of the above, the Commission finds that, with the exception of “zebra children” and “faggots,” Appellant made all the statements attributed to him in the letter of discipline.

2. Was some level of discipline warranted?

Having determined that Captain Ryskoski made all but two of the comments described in the May 22, 2003, letter of termination, the next step is to determine whether his conduct warranted the imposition of some degree of discipline. We find that the greater weight of the credible evidence establishes just cause to impose discipline.

Captain Ryskoski violated DHFS Work Rules #1 and #5, prohibiting:

1. “Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.”

...

5. “Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employee.”

He was insubordinate when he failed to carry out the oral instructions received in November of 2002 not to violate MMHI’s Harassment policy and not to direct derogatory language at others. Notwithstanding this directive, Captain Ryskoski used many of the aforesaid terms in the six-month period prior to his termination, a period that commenced just one month after the November of 2002 directive. (Testimony of Officers Johnson, Larson, Kikkert, Kersten and Linde). His comments were offensive to MMHI officers, and were clearly unwanted. (Testimony of Officers Linde, Kikkert and Wolf). Not only does MMHI’s

Harassment policy prohibit unwanted comments that create an offensive working environment for its employees, it requires supervisors like Captain Ryskoski to “set a positive example in terms of language and behavior.” (Emphasis added) Those who violate this policy are subject to discipline.

DHFS Work Rule #5 prohibits behavior unbecoming a state employee. The MMHI policies on discriminatory statements and harassment prohibited Captain Ryskoski’s use of the terms in question. The MMHI mission statement provides that all “staff deserve to be treated with respect and dignity.” Chief Executive Officer Van Rybroek testified that the MMHI motto is, “How can I help?” He added that Captain Ryskoski’s comments were contrary to MMHI’s culture of helping people and building respect and trust. The Commission agrees, and finds his use of the disputed terms constitutes behavior unbecoming a state employee.

Based on the foregoing, there was just cause for imposing some level of discipline against the Appellant.

3. Was the level of discipline imposed excessive?

The final step in the just cause analysis is to determine whether the level of discipline actually imposed by Respondent was excessive. There are certain mitigating factors present in this case.

The first, and most important, is that Captain Ryskoski had no formal discipline of any kind prior to his termination. He had been employed for almost three and one-half years at MMHI, with an additional eight years with the Department of Corrections, all without any discipline. In addition, Captain Ryskoski had uniformly satisfactory work evaluations during his tenure at MMHI, satisfactory or better work evaluations prior to transferring to MMHI, and a number of positive work commendations. (Appellant Exhibit Nos. 1-50.) The manner in which he carried out his security duties was held in high regard by his co-workers. The evidence also indicates that he was particularly effective in providing security services in emergency situations involving patients that required de-escalation and in crisis situations.

However, there are a number of factors supporting termination.

Contrary to Appellant’s assertions, Captain Ryskoski’s offensive comments were pervasive. Three officers testified that Captain Ryskoski made the disputed comments over a two-year period. One, Officer Johnson, testified that Captain Ryskoski used the term “monkey” in reference to Captain Thomas over a year’s period of time, and “possibly” had used it over a two-year period. Another, Officer MacLeod, testified that he heard Captain Ryskoski refer to the black children of a visitor as “chimpanzees” as far back as the summer of 2001. A third, Officer Larson, testified that Captain Ryskoski started making inappropriate comments behind staffs’ backs six months into his stint as second shift supervisor, i.e., early in 2001.

He used derogatory comments on many occasions rather than just once. Officer MacLeod heard him use improper language about five times, and Officer Johnson heard him use the term “monkey” in reference to Captain Thomas five times. Two officers, Wolf and Larson, testified they heard Captain Ryskoski use inappropriate terms frequently. 2/

2/ This is not a situation where the Appellant had shown that his derogatory comments were consistent with longstanding and accepted behavior in the workplace. BRENON V. UW, CASE NO. 96-0016-PC (PERS. COMM., 2/12/98).

Appellant challenged the truthfulness of these claims, alleging that some of the officers had a motive to lie about what Appellant said. However, we credit their testimony and find that the Appellant made the comments set forth in the letter of termination (except for the terms “zebra children” and “faggots”) many times over a two-year period of time.

It is clear that these comments had a tendency to impair MMHI’s operation. Officer Kikkert was shocked to hear Captain Ryskoski (coming from a supervisor) refer to Captain Thomas as an “ape” and a nurse as a “cunt.” She felt the work environment was negative. 3/ Officer MacLeod was uncomfortable with Captain Ryskoski’s use of the term “sand nigger.” Officer Wolf testified that Captain Ryskoski’s use of derogatory terms about patients was particularly offensive because he had a daughter with Down’s Syndrome.

3/ In her exit interview, Officer Kikkert indicated she had experienced and observed harassment/discrimination toward patients and staff when Captain Ryskoski was serving in the capacity of PM shift captain. (Respondent Exhibit 19). When she came back from vacation after Captain Ryskoski was no longer working at the facility, the atmosphere in the workplace had changed for the better. (Officer Kikkert testimony).

The Commission also considers the nature of the agency or institution when determining the effect on the workplace. MMHI is a place of confinement for the most dangerous mental health patients. It has a disproportionate number of Black and Hispanic patients. The mission of MMHI is the care, custodian, and treatment of patients, and the motto is “How can I help?” Captain Ryskoski’s use of inappropriate language was contrary to the culture of helping people, building trust and bringing stability to individuals. (Testimony of Chief Executive Officer Van Rybroek).

The Commission agrees with the comments of Administrative Captain Schaller in which he identified very significant negative impacts on the workplace. He testified that he was

to work together as a team. He indicated that officers are supposed to be a team and work together. Instead, he felt that Captain Ryskoski's comments created a hostile work environment. He was concerned about possible negative repercussions on security; namely, the impact on a work environment where all employees are supposed to look out for each other. He asked, rhetorically: "How can you rely on each other when you hate each other?" He stated that Captain Ryskoski's conduct could affect our responsibility to prevent escape, provide security and handle patients. He added that supervisors need to be held to a higher standard than officers and are supposed to set the tone for their subordinates.

Based on the foregoing, and the record as a whole, we reject Appellant's contention that Captain Ryskoski's use of inappropriate language did not affect MMHI's operation and find that it had a very strong tendency to impair the functioning of the institution.

We also reject Appellant's contention that termination was not commensurate with other cases. Appellant references Captain Dolsey who, according to Appellant's argument, had to attend a sensitivity class and received a suspension for making racial comments. However, the record merely indicates that Captain Dolsey was "called up" on charges of making racially hostile comments and that he attended sensitivity training. The record does not support a conclusion that Respondent determined Captain Dolsey actually made such comments, the number of those comments or that he was suspended.

Another employee, Malik Sterling, made just one inappropriate comment about a patient and was demoted. A second employee used an improper term in only one instance and received a three-day suspension. The discipline imposed in these cases does not support a lenient penalty for Captain Ryskoski. Each of the other employees committed a single transgression and still received very significant discipline. Captain Ryskoski repeatedly used inappropriate language, including some instances after he had been specifically directed by his superiors not to make such comments. Under these circumstances, Respondent is warranted in imposing harsher discipline than a suspension or demotion.

Appellant also argues that the degree of discipline imposed on Captain Ryskoski should be no more severe than what is necessary to influence him to correct his behavior. It is true that Captain Ryskoski stopped using the terms "pinhead" and "sand nigger" when asked to do so. However, Captain Ryskoski used a number of inappropriate terms prior to his termination after being warned in November of 2002 to stop using derogatory terms. The Commission does not believe that a lesser degree of discipline would cause Captain Ryskoski to change his behavior and refrain from using derogatory language in the workplace.

An employer is not required to follow progressive discipline when a supervisor commits serious misconduct. *ASCHE v. DOC, CASE NO. 90-0159-PC (PERS. COMM., 5/2197)*. We find that Appellant has committed serious misconduct. Respondent acted appropriately by removing a supervisor from the workplace where he not only failed to correct but actually

played a large

role in creating an unacceptable work environment. No one should have to work in an environment where both employees and patients are subject to frequent and demeaning comments.

Consistent with the above conclusions, we find that there is just cause for Respondent's action of terminating Captain Ryskoski's employment.

Dated at Madison, Wisconsin, this 24th day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

