

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHILLIP A. KOENIG, Appellant,

vs.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION, Respondent.

Case 3
No. 65530
PA(adv)-93

Decision No. 32145

Appearances:

Lester Pines, Esq., Cullen Weston Pines & Bach, 122 W. Washington Avenue, Suite 900, Madison, Wisconsin 53703, on behalf of Phillip A. Koenig.

Sheri Pollock, Esq., Staff Attorney, Department of Public Instruction, P.O. Box 7841, Madison, Wisconsin 53707-7841, on behalf of Respondent.

FINAL DECISION AND ORDER

Phillip A. Koenig appeals his January 6, 2006 discharge from his employment with Wisconsin Department of Public Instruction (DPI) which he alleged was without just cause. The appeal was filed with Wisconsin Employment Relations Commission on January 24, 2006. At a pre-hearing conference held on April 20, 2006, the parties agreed that the sole issue for hearing before the Wisconsin Employment Relations Commission is as follows:

Whether there was just cause for the discharge of Appellant by DPI.

The matter was heard on August 9, 2006 before Hearing Examiner Sharon A. Gallagher of the Commission's staff. The parties submitted their briefs by October 20, 2006. The examiner issued a proposed decision on November 16, 2007. Any objections were due by December 17, 2007, but none were filed.

While reaching the same conclusion as the proposed decision on the issue of just cause, the Commission has modified the analysis relied upon in reaching that conclusion. Consequently, the Commission has replaced the Memorandum portion of the proposed decision for the reasons explained below. We have also made revisions to the Findings of Fact as indicated by individual footnotes.

Dec. No. 32145

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. From his hire on November 16, 2003 until the time of the discharge that is the subject of this appeal, Phillip A. Koenig was employed by Wisconsin DPI as an Information Systems Supervisor 2 (working title of position, Technical Services Section Chief) on the Agency's Technology Services Team at its Webster Street facility in Madison, Wisconsin. Koenig's pre-set work hours were 8:00 a.m. to 11:30 a.m. and noon to 4:30 p.m.¹ His duties included formulation of agency technical direction; plans and standards; management of the Technical Services Section, including keeping the agency servers functioning and maintaining all agency hardware, software and equipment; supervision, training and development of three Technical Services Section staff members; and special assignments and projects work.

2. Since 1992 and continuing during his employment by DPI, Koenig was also employed by a public high school as a technical director for productions presented by the school's drama club.

3. Koenig's immediate supervisor at DPI was Brian Wilmot, Director of Information Technology; DPI's Human Resources Director at all times relevant was Katherine Knudson.² Prior to his discharge, Koenig had received good performance evaluations and he had not been disciplined by DPI during his tenure. Koenig completed his two year probationary period in one year. Prior to December 1, 2005, no complaints were lodged regarding Koenig's work.

4. At the time of his hire, Koenig attended and completed a new employee orientation in which DPI Work Rules, Code of Ethics and its E-mail Policies were reviewed with him. As an Information Systems Supervisor, Koenig was responsible to know and apply the Rules, the Code and all departmental policies, including the e-mail policy.

5. The Wisconsin Code of Ethics, Ch. ER-MRS 24 Wis. Admin. Code, provides in part:

(2)(a) No employee may use or attempt to use his or her public position or state property, including property leased by this state, or use the prestige or influence of a state position to influence or gain financial or other benefits, advantages or

¹ The Commission has revised the finding in the proposed decision to reflect the work hours that are printed on Koenig's bi-weekly time reports that are of record.

² The Commission has deleted an unnecessary sentence, relating to Ms. Knudson's role as a witness, from the proposed decision.

privileges for the private benefit of the employee, the employee's immediate family or an organization with which the employee is associated. . . .

2. Use of state telephones for essential personal local calls does not constitute "benefit" as the term is used in this rule. other benefits, advantages or privileges for the private benefit of the employee, the employee's immediate family or an organization with which the employee is associated. . . .

6. DPI policy bulletin, Section 4.135 has been in effect since 1998³ and reads in relevant part as follows:

The department electronic mail (e-mail) system and services are provided to assist staff in the daily work routine and are the sole property of the state. Staff who use electronic mail services are expected to do so responsibly, to comply with state and federal laws, with this and other departmental policies, and with normal standards of professional and personal courtesy and conduct.

. . .

A. Appropriate Use of E-Mail

Work rules covering such areas as recordkeeping, use of state property, and communications with others also apply to e-mail. Failure to adhere to such general work rules when using e-mail can be grounds for disciplinary action. Staff must not use e-mail for illegal, disruptive, unethical, or unprofessional activities, for personal gain, or for any purpose that would jeopardize the legitimate interests of the department. In general, employees are expected to use reasonable judgment in the performance of their duties. This is especially important when using e-mail, as it is easy to be overly casual in e-mail messages. Department electronic mail services may be used for incidental purposes provided that, in addition to the foregoing constraints and conditions, such use does not directly or indirectly interfere with the department's operation of the computing facility or electronic mail messaging service; burden the department with noticeable incremental costs; interfere with the e-mail user's employment or other obligations to the department; or cause unwarranted interference with the use of e-mail or the e-mail system by others.

. . .

B. E-Mail Records

E-mail messages are public records like any other record. That is, they are public records if they are made or received by any state employee in connection with the transaction of public business.

. . .

³ The Commission has modified the effective date to reflect information found in the exhibit.

Guide for E-Mail Management

What can I use electronic mail for at my workstation?

E-mail is on your computer for conducting official state business. It is permissible to use e-mail for incidental purposes, just as you do your telephone. Incidental purposes may include announcing work-related social events, extending a luncheon invitation, or contacting family or others about work-related transportation, work hours, or family emergencies, and so on.

But isn't my e-mail system private?

No. The state owns both the computer and e-mail system. Normally, only you and your correspondent will see a message. Your correspondent, though, may share your message with others without your knowledge. As a result, e-mail you thought was private could become public. It may also be the subject of an Open Records request by the media.

How do I avoid having my private communications become public?

Use good judgment when communicating via e-mail. A good rule of thumb is not to send any message you wouldn't want printed in the front page of the morning paper. After reading, you should delete personal messages as well as routine agency communications and correspondence. You also should review the messages in your mailbox periodically, preferably at the end of each business day. Be sure to review your sent mail as well as your received messages. . . .

Final Tips on Using E-Mail

. . .

- Don't make remarks about someone that you wouldn't want that person to see. Avoid abusive, offensive, or inappropriate language. Remember that a "private" e-mail message can easily "go public." . . .

7. On December 1, 2005, a Waukesha County Sheriff's Deputy served a search warrant on DPI management demanding to search Koenig's work space and seeking certain e-mails on Koenig's DPI laptop computer. As a consequence, DPI initiated an investigation of Koenig's e-mail use. The warrant included an affidavit from a detective in the Sheriff's Department indicating that Koenig had "some type of inappropriate contact" with three individuals who, at the time of that contact, were Kettle Moraine High School students. The affidavit went on to more specifically describe the nature of the contact.⁴

⁴ The Commission has supplemented this finding by adding the final two sentences to the version found in the proposed decision and order in order to more clearly explain the genesis of Respondent's investigation.

8. On December 2, 2005, an article regarding Koenig was posted on the internet and on December 3rd the same article appeared in the “Milwaukee Journal – Sentinel” newspaper. It identified Koenig as a DPI employee and reported the initiation of Waukesha County investigation into Koenig’s conduct.

9. On January 6, 2006, Deputy Superintendent Anthony Evers sent Koenig a discharge letter that read, in part:⁵

The department has completed its investigation into the violation of the department work rules and has determined you have violated the following:

Work Rule 3 (formerly work rule 1). Failure to exercise reasonable judgment and prudence, or disregarding departmental policies and procedures, in carrying out normal work assignments and activities.

Work Rule 19 (formerly work rule 13). Inappropriate use, personal use or abuse of state-owned or-leased equipment including, but not limited to photocopy machines, long-distance telephone lines, cellular phones, facsimile machines, and personal computers without prior management approval.

Work Rule 21 (refers to departmental policy bulletins 4.130 and 4.135 which were in effect in 2004). Inappropriate use of department internet or e-mail services.

Work Rule 28 (formerly work rules 17 and 18). Discourtesy in dealing with fellow employees, representatives of other agencies or the general public that interferes with the proper conduct of business or adversely affects the image of the employer.

Work Rule 29 (formerly work rule 19). Engaging in disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; making false or malicious statements concerning other employees, students, representatives of other agencies, or the general public; or other behavior unbecoming a state employee.

Work Rule 37 (formerly work rule 28). Engaging in immoral conduct or behavior that is contrary to commonly accepted moral or ethical standards or that endangers the health, safety, welfare, or that interferes with the education of any student.

. . . . It is clear that you have used a department e-mail account in your name to correspond with a large number of people with no business relationship to the department. The volume of non-work related e-mails is enormous. Department policy does allow employees to use e-mail for incidental purposes provided it

⁵ The Commission has modified this finding to indicate that the quoted language only reflects the relevant portion of the letter, and has deleted additional paragraphs that are not material to our decision.

does not interfere with employee's employment or other obligations to the department. It is undisputed that agency staff use e-mail for occasional personal use. A close review of your sent e-mail history in your archived Outlook files shows much more than incidental use of the department e-mail system. It also shows that you used the e-mail system for non-work related correspondence at various times of the work day during core work hours of the department. Of the 5,555 sent e-mail items in the archived files, well over half were sent to persons with no business connection to the department. Of those, the majority were sent on week days between the hours of 8:00 a.m. and 5:00 p.m. You contended that you have no set start or stop times for your work day, however, the paper leave accounting system that you discussed shows your pre-set start and stop times of 8:30 a.m. and 4:30 p.m. It is not reasonable to suggest or believe that each time you sent these non-work related messages you were not on duty or in pay status.

The department policy on e-mail also states that the e-mail system may not be used for illegal, disruptive, unethical, or unprofessional activities, for personal gain, or for any purpose that would jeopardize the legitimate interests of the department. The inappropriate sexual content of e-mails sent by you from your department e-mail account clearly is unprofessional and unethical and jeopardizes the interests of the department. The electronic mail system and services are the sole property of the state. In addition, electronic messages are subject to open records requests and must be provided to individuals and entities requesting such records. Release of the inappropriate e-mails you have sent from a department e-mail account would not only cause embarrassment to the recipients, it would also severely impact the image and credibility of the department. Work rule 21 refers to departmental policy bulletins 4.130 (Internet Use and Management) and 4.135 (Electronic Mail). The content of these policy bulletins is developed and implemented by department's information services teams. Your actions have repeatedly violated work rules 19 and 21. In addition, these actions violate work rules 28 and 29.

Because you refused to answer questions regarding your interactions with a minor public school student identified in search warrant 205WK011482 as Kari M.F., specific allegations of sexual contact with a child are unresolved. However, it is apparent from the sent e-mail items found in your archived mail that you have sent e-mails to students under the age of 18 that contained sexual innuendo and sexually explicit content. This clearly is a violation of work rule 37.

Your actions show an alarming and unacceptable lack of judgment in violation of work rule 3. You have repeatedly broken work rules that have been reviewed with you during your orientation to the department. In addition, it is a supervisor's responsibility to be fully conversant with department work rules and policies as a part of his or her job. You have willfully disregarded these

rules. Your actions are especially egregious given that the department policies on internet use and electronic mail are under your purview as the department's supervisor of information technology services. The sexual content of e-mails you sent from a department e-mail account in your name is not only unprofessional, it could lead to serious damage to the department's image and reputation.

The department has no tolerance for this type of behavior on the part of any employee, and most especially on the part of an agency supervisor. You have demonstrated poor judgment in your actions and ignored the impact your actions can have on agency employees and the agency itself. In addition, you have jeopardized the reputation of the department with the sexual content of the messages you sent on a department e-mail account.

After reviewing the information gathered throughout the course of our investigation, considering the comments you provided at both the investigatory interview and pre-disciplinary meeting, and carefully considering the appropriate disciplinary response to your actions, we have determined that it is necessary to terminate your employment as an Information Systems Supervisor 2 with the Department of Public Instruction effective 4:30 PM January 6, 2006. You are not to return to the DPI offices.

10. From December, 2003 to March, 2004, Koenig sent seven e-mails to a female high school student, CG or "Claire" containing offers to "corrupt" her and descriptions of the ways in which he had corrupted others in the past. In one of the e-mails Koenig requested CG send him a picture of another high school female who CG had described (in detail) in an e-mail as provocatively dressed.

11. Between December, 2003 and June, 2005 Koenig sent DS (an adult woman and an employee of a Wisconsin school district) approximately 300 e-mails. Koenig sent approximately 200 during his normal work hours. These e-mails contained sexual innuendo, a description of two sexual fantasies or dreams, discussion of an extra-marital affair between them and invitations to meet at hotels for massages. None of the e-mails were business-related.⁶

12. On January 29 and 31, 2004, Koenig e-mailed someone known as "little ashley" four times and asked her questions concerning threesomes and favorite sexual positions, asked her sexually explicit questions and invited her to get drunk with him.

⁶ The Commission has carefully reviewed the exhibits of record and made changes to generate more accurate tallies of the e-mails that are referenced in findings 11 through 18. The changes arise from taking into account the exhibit that shows various dates on which Koenig was on leave from work and also reflect a correction to Koenig's "pre-set work hours." We have also eliminated some unnecessary identifying information in finding 10 and have revised the number of e-mails that were sent to SR (in finding 18) because the number listed in the proposed decision included e-mails sent to another person.

13. Between June, 2004 and June, 2005, Koenig used his DPI e-mail account to send PP (an adult female employee of a different state agency) approximately 123 e-mails. Koenig sent approximately 100 of the e-mails during his pre-set work hours. One of the e-mails contained sexual innuendo and one contained an invitation for a massage in which PP would be disrobed. PP had no known business relationship with DPI but appeared to be interested in available IT work at DPI.

14. Between November 28, 2004 and June 7, 2005 Koenig exchanged approximately 21 e-mails (a total of 32 pages when printed) with student CC. The messages included sexually explicit questions and answers, a discussion of CC's breast size and invitations to call Koenig if CC wanted "to be bad," to have "naughty fun," to have lunch, drinks "or some-thing more wild and dangerous," to get a room somewhere and have a bottle of wine together, and one invitation to give CC a massage.

15. From February, 2004 through June, 2005, Koenig sent an adult married female, TS (at her personal e-mail account or to her State agency employee account) approximately 1330 e-mails using his DPI e-mail account. Approximately 1100 e-mails were sent during Koenig's pre-set DPI hours and they ranged in length from a partial page, to in excess of 1 page (10 e-mails), to in excess of 2 pages (5 e-mails), to one e-mail in excess of 3 pages. The content of these e-mails included offers for massages by Koenig of TS (who would be disrobed), invitations for dinner dates and to motel rooms to have sex, discussions of the extra-marital affair Koenig then had with TS and four erotic fantasies/dreams written by Koenig about himself and TS.

16. In their responsive e-mails both TS and PP expressed their beliefs that Koenig's invitations to have affairs, go to motels for massages, etc., were inappropriate given that Koenig was married.⁷

17. Between February, 2004 and June 2005, Koenig sent approximately 50 e-mails to GN at either of two addresses, one of which used the name "Varsity 714." GN was a high school student until the Fall of 2004. The messages, which exceeded 30 printed pages, included multiple invitations to get drunk, to go to a motel room and to give her massages. It included a statement that he was "horny."⁸

18. Between March and June of 2005, Koenig sent 3 e-mails to SR, a 16 year old female. One e-mail posed sexual questions to SR including asking what was the "strangest erotic thing" SR had thought of.

⁷ This Commission has modified the language in this finding to more clearly indicate Koenig's marital status.

⁸ The Commission has combined two findings and made additional changes to clarify that "Varsity 714" and GN are the same person.

19. Koenig sent each e-mail using his DPI e-mail account. He never sent or received any photos from his DPI e-mail account, although he asked one high school girl, CG, to send him a picture of another high school girl's provocative dress. Koenig never made any attempt to conceal the e-mails he sent these women -- he never deleted them and he saved them in his DPI archive. Koenig's e-mailing never overburdened DPI's e-mail system. Although Koenig never encrypted or restricted his e-mails, none of the e-mails in question were forwarded to others and no open records requests have been made for Koenig's e-mails. None of the recipients of Koenig's e-mails ever complained to DPI about the e-mails and none of the recipients were DPI employees.

20. A former DPI employee, EM, had made disparaging remarks in her DPI e-mails about agency employees (including the agency head) and policies. EM had been on a disciplinary track at DPI but she resigned before DPI disciplined her. DPI was contemplating discharge.⁹

21. A represented employee of another state agency had sent excessive and sexually suggestive e-mails using the State's e-mail system. On review, an arbitrator upheld the discipline.

22. The e-mails described in Findings of Fact 10 through 19 all identified Koenig as a DPI employee. Koenig's conduct of sending numerous e-mails with sexual content to students and adults was unreasonable and showed very poor judgment on his part and a total disregard for the goals, mission, credibility and reputation of the agency.¹⁰

23. Koenig's actions in sending sexually explicit e-mails to students and to adult females constituted behavior contrary to commonly accepted moral or ethical standards (WR 37). Koenig's actions constituted discourtesy in dealing with representatives of other agencies and the general public that negatively impacted DPI's image (WR 28); the use of profane language (WR 29); and behavior unbecoming a state employee (WR 29).¹¹

⁹ The Commission has modified Finding 21 in the proposed decision by: a) removing language suggesting that our focus is on what the agency actually considered in the way of comparable discipline; b) assigning a separate paragraph number to each comparison; and c) removing an unnecessary and somewhat misleading reference to the number of e-mails that were sent by employee EM.

¹⁰ For the reasons set forth in the Memorandum, the Commission has modified this finding to delete that language relating to the volume and timing of personal e-mail correspondence from the Appellant.

¹¹ For the reasons set forth in the Memorandum, the Commission has modified this finding as it relates to the volume and timing of personal e-mail correspondence from the Appellant and has modified the language to more closely track the language of the work rules that relate to the sexual content of the e-mails.

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

CONCLUSIONS OF LAW

1. Respondent has the burden of proof to demonstrate there was just cause for the imposition of discipline and for the degree of discipline imposed.
2. Respondent sustained its burden. The degree of discipline was not excessive.
3. Respondent has There was just cause for the discharge.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and enters the following

ORDER¹²

Respondent's decision to discharge the Appellant is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 6^h day of March, 2008.

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

¹² Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Public Instruction (Koenig)

MEMORANDUM ACCOMPANYING FINAL DECISION AND ORDER

This matter is before the Commission as an appeal of the decision to discharge Phillip Koenig from his position as Supervisor of DPI's technology services team.

In its decision in DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), the Commission described the legal standard it applies when considering the appeal of a disciplinary action under Section 230.44(1)(c), Stats., as follows:

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. Stat., 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. 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. 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. (Citations omitted.)

We find that the greater weight of credible evidence shows that Koenig engaged in some of the conduct described in the letter of discipline, that his misconduct justified the imposition of some level of discipline, and that discharge was not excessive discipline for the established misconduct.¹³

In our analysis, we have divided the allegations in the January 6, 2006 discharge letter into two categories: 1) allegations relating to the number of personal e-mails sent by Mr. Koenig via the Department's e-mail system; and 2) allegations that some of those e-mails had inappropriate sexual content. Because we believe that the focus of the case is more properly on the content of the messages, we will begin our review with the second category of allegations.

¹³ In reaching a decision in this matter, the Commission has not considered the two attachments to DPI's reply brief because the documents were not part of the hearing record.

Content of E-mails¹⁴

According to the discharge letter, an unspecified number of Appellant's e-mails had sexual content,¹⁵ and some of these inappropriate e-mails were sent to students under the age of 8.¹⁶ The initial question in the just cause analysis is whether the employing agency established that Mr. Koenig engaged in this alleged misconduct.

The hearing record contains copies of approximately 120 e-mail messages that emanated from Mr. Koenig's departmental e-mail address of phillip.koenig@dpi.state.wi.us. Although Mr. Koenig did not testify and none of the e-mail recipients testified, he admits that he sent each one of these messages.¹⁷

A careful analysis shows that the e-mails were sent to a total of eight women. A careful reading of the messages indicates that three of the women were adults, one was 20, and the remaining four were in high school at the time of at least some of Koenig's e-mails.

The e-mail messages between Koenig and TS, another state employee who worked for the Office of the State Public Defender, indicated that they carried on an extended affair. In a message in September of 2004, Koenig wrote TS:

What do you think the chances of meeting on Friday at 1 are? Would you want to grab a drink or find a park or get a room?

Koenig was quite willing to use departmental e-mail to describe his trysts with TS, such as this example from March 2004:

Never been a guy who liked really overly enlarged women – real or surgically enhanced. I am into feel, responsiveness, sensitivity, reaction. You let me touch . . . it was heavenly. We've talked about some of this . . . eyes, neck, legs, responses . . . interaction . . . all of you is very enticing and arousing. On at least four occasions, Koenig used his DPI e-mail address to send explicitly erotic dreams or fantasies to TS.¹⁸ He sent her one message that included a lengthy and explicit erotic fantasy at 1:24 p.m. on Wednesday, March 10, 2004.

¹⁴ The Commission has substantially modified the analysis, as presented in the proposed decision, of the sexual content of the e-mails. We have added specific examples of the content, eliminated unnecessary language and reorganized and expanded the analysis to better follow the steps identified in DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/2004).

¹⁵ "The inappropriate sexual content of e-mails sent by you from your department e-mail account clearly is unprofessional and unethical and jeopardizes the interests of the department."

¹⁶ "[Y]ou have sent e-mails to students under the age of 18 that contained sexual innuendo and sexually explicit content."

¹⁷ His initial post-hearing brief includes the following admission: "The e-mails produced by the Department were sent by Koenig. He does not dispute that fact."

¹⁸ Each dream or fantasy ran at least two single-spaced pages.

Just three hours later, Koenig mailed the identical fantasy to DS, who was employed as a teacher and drama director in a southeastern Wisconsin public school district. In another e-mail during February 2004, Koenig made one of many offers to rendezvous with DS for sex:

I know that some of the schools out that way have a short day Wednesday. Wanna meet me at the Baymont Hotel about noon? I'm sure we can figure out something to talk about and do until you have to be back for rehearsal. ;)

In December of 2004, Koenig suggested a clandestine meeting with a third woman, PP:

What are you up to Sunday? Maybe lunch or a drink then? I'll be checking email. My cell is 220-5480. (Hehehe . . . I suppose I could find a nice quiet room someplace too . . . how many hours can you spare? . . .P)

In January of 2004, Koenig was pursuing a 20-year-old woman identified as "little ashley" and asked her a series of 20 questions, including the following:

3. Have you ever participated in a 3-some? (It is a good question)
 . . .
9. Do you want to find some time to head out to my house, get really drunk and fool around?
 . . .
19. What is your favorite sex position?
20. Is there some positions or actions that you will NEVER want to try?

The exhibits show that Koenig used his position as the technical director for the drama club at Kettle Moraine High School as his entrée for pursuing students at that school. Many of his victims were either stage managers or worked on a stage crew for one of the high school productions.

In a message to CG in February 2004, Koenig wrote:

You look at life very straight forward and normal. But I can corrupt that and get you to look at everything in very different – strange – ways.

Later, Koenig wrote: "Some people like to be corrupted." In response, CG asked Koenig to "name one, other than [female student A]." Koenig responded by writing:

Oh? [Female student A] likes being corrupted? Uh . . . [GN, male B, female C, male D, male E, male F, male G] (all 3 of them) . . . how many years back do you want me to go. I seem to have found ways to corrupt oh so many fine people.

In April of 2005, Koenig wrote SR who described herself as “Sixteen-year-old, depressed, fatherless, . . . student, . . . and now techie.” In his e-mail, Koenig wrote:

So what is the strangest erotic thing you’ve ever thought of?

Rules: (Phil’s rules of email conversation . . .)

- all answers are just between us
- anything is fair game for questions
- be honest with the answers and the more detail the better
- strangeness is encouraged
- be creative

In November of 2004, Koenig was working on CC, another female member of the Kettle Moraine High School stage crew. He wrote:

Hey . . . You are not allowed to get into trouble . . . unless I get a good story or am part of it!!!

Be good. Unless you want to be bad . . . then call me. : . .)

Over the next months, he continued his pursuit. In December he wrote CC: “You be good and stay out of trouble. How am I going to corrupt you and suggest all kinds of fun things if you can’t come out and play? :)” Koenig decided to try a full-court press in the new year:

[January 2]

But, yes dear . . . it would be great to see you. I’m sure we could find some kind of trouble to get into. :)

[January 4]

As I said already, it would be great to see you. So . . . what do you want to do? Lunch, drinks, something more wild or dangerous...?????

[January 19]

What should we do to get into some naughty fun??????? :P

[January 25]

Sometime (even Monday) we could:

. . . .

- I could get a good bottle of wine, a room someplace and we could drink and talk...heck, I’d even give you a massage :P

. . . .

hehehe...let me know.

[January 30]

However, if you are looking to do something wild, of questionable social acceptance and adventurous...if you want some wine and that massage...you have to let me know so that things can be arranged... :) For me... “live life like you need stories...but the best stories are those you can’t tell anyone else...”

[February 2]

So...what happened Monday night? Just too much homework and stuff to do, or did you get into trouble?

Or was it they just don't want you going out that late on a weeknight. We'll have to try again some other time. I'm sure I can think of some fun, adventurous and exciting things to do. Hmmmm...oops...sorry...naughty thought. :P

[February 4]

Oh....I have lots of ideas....but I think you'd turn down or slap me for most of them. Then again...uh...hmmmmmm...you up for some fun????

. . .

Later, kiddo. Be good or call me if you want something different. : . .)

[February 11]

[In response to the question: Have you ever cheated on your wife?]

That would be interesting to talk about sometime. Nothing too bad...

Now...as for right now....might be interesting. Hmmmm....so....wanna find a time and do a few things that we can blame off on a "mid-life crisis" for me and your "need to grow"???? any thoughts....you up to some adventure with me?

[March 27]

All my previous offers still stand. :

[April 15]

You wouldn't happen to be in Madison tomorrow night would you?

[May 9]

I've got a few trips over that way soon. You up for coffee or anything else?

He used two different e-mail addresses for contacting GN who was still a student at KMHS when in January 2004 he sent her a series of questions (some of the same he used in his correspondence with DS) including: "Do you masturbate?" He also invited GN to ask him a series of questions, including "2 very personal and private questions." Two months later and in response to GN's message that included the words "make me happy," Koenig wrote: "An offer you must be careful making hehehe." In the same message, Koenig wrote:

My life is pretty boring right now. I need to do something crazy and wild . . .
I haven't had a drink in over a week and haven't had anything more than a glass of wine in several. Wanna get stupid drunk and laugh?

By January of 2005, GN had graduated from KMHS and was living in Madison. Koenig wrote her the following:

Hey, what are you doing Friday afternoon? I'll get a good bottle of wine or something, we can get a room and I'll give you a long massage while we talk and catch up on life and finish off the bottle. . . . So, should I pick you up: Where?

He reiterated the suggestion a few weeks later in an e-mail with the subject line of “Here is an idea”:

Friday . . .

I get a nice hotel room. Meet mid morning

At some point, we’ll switch to wine. I’ve got a couple bottles of a nice Shiraz.

Noonish, I’ll give you that massage. I promise to not remove MY clothing – other than shoes . . . outside that . . . your call or desire could be just massage and that is great. . . .

While we have not attempted to list all of the sexual language in all of the e-mails of record from Appellant’s DPI address, the above examples establish that Respondent has satisfied its burden of showing that Koenig sent numerous e-mails with sexual content to eight different women. The information in the messages is also sufficient to establish that four of the women were high school students at the time the messages were transmitted. The discharge letter alleges that these students were also under the age of 18. The e-mails to SR show that she was only 16. We were unable to conclude whether the other three students were also under the age of 18 at the time they received the sexually charged e-mails from Koenig.¹⁹

As has already been noted, the Appellant admitted he sent every one of the e-mails that are paraphrased in the paragraphs above. The next question that the Commission must address is whether this conduct justifies the imposition of discipline. In the discharge letter, the Respondent posits that the e-mails with sexual content violated two work rules:

Work Rule 28: “Discourtesy in dealing with fellow employees, representatives of other agencies or the general public that interferes with the proper conduct of business or adversely affects the image of the employer.”

Work Rule 29: “Engaging in disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; making false or malicious statements concerning other employees, students, representatives of other agencies, or the general public; or other behavior unbecoming a state employee.” [Emphasis added.]

As to the allegation relating to the e-mails with sexual content that were sent to the students, Respondent contends the messages also violated Work Rule 27:

Work Rule 37: “Engaging in immoral conduct or behavior that is contrary to commonly accepted moral or ethical standards or that endangers the health, safety, welfare, or that interferes with the education of any student.” [Emphasis added.]

¹⁹ The proposed decision correctly noted that the Commission does not rely on the content of the search warrant and accompanying affidavit for determining the ages of the students. The warrant served to trigger the agency’s investigation of Koenig’s conduct as a DPI employee but it does not establish any misconduct. Whether or not criminal proceedings may have been initiated against Koenig subsequent to the imposition of discipline is not relevant to the questions before the Commission, even though the discharge letter stated that “specific allegations of sexual contact with a child are unresolved.” The discharge action was not based on an allegation of criminal misconduct.

As explained in *STATE EX REL. GUDLIN V. CIVIL SERVICE COMM.*, 27 WIS.2D 77, 133 N.W.2D 799 (1965), different questions can be posed when determining whether an employee's conduct justifies the imposition of discipline:

[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. The record here provides no basis for finding that the irregularities in appellant's conduct have any such tendency. It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service. 27 WIS.2D 77, 87.

In *PAUL V. DHSS*, CASE NO. 87-0147-PC (PERS. COMM. 4/19/1990), the Commission was reviewing a decision to discharge a captain at a medium security prison who had fired a dummy round from a handgun at a correctional officer and then handed the gun to a lieutenant who fired two dummy rounds at a second officer. The Commission held that the conduct had a tendency to impair performance or efficiency and went on to address the public impact factor as follows:

In the discussion of the public impact issue in the proposed decision and order, emphasis was placed on the question of whether it was likely anyone in the public would have heard the sound of gunfire and what effect that would have had. This discussion should have considered whether, if appellant's actions had become known to the public, it would have had a tendency to have undermined the public image of the institution. See *VOIGT V. STATE PERSONNEL BOARD*, DANE CO. CIRCUIT COURT NO. 142-120 (5/6/1974):

The [Personnel Board] opinion seems to express . . . that in order for a finding that the conduct undermined the public confidence in D.N.R., there must be a positive showing by witnesses that somehow the image of D.N.R. was damaged in the eyes of the beholder. We do not think such proof was necessary. In *STATE EX REL. GUDLIN V. C.S.*, 27 WIS.2D 77, there was no proof that the municipality's reputation did in fact suffer from the employee's acts. . . . We are of the opinion that respondent could have found good cause for discipline from the fact that a D.N.R. employee was found guilty of violating a simple game law, even though there was no positive proof of witnesses that as a result D.N.R.'s image was tarnished. That fact can be determined from the offense . . . The fact that it may, up to now, have been covered up so that it is not known is not as important as what effect it may probably have as it cannot be concealed forever. . . .

Therefore, the Commission finds that if appellant's conduct in connection with the sallyport incident were known to the public, it would have a tendency to impair the public confidence in the institution based on the serious lack of judgment and safety hazards involved in this incident. [Footnote omitted.]

Respondent's witnesses testified that because of the sexual nature of the e-mails and because they were totally unrelated to DPI work, they reflected adversely on the agency and could tarnish its image which would, in turn, interfere with the agency's ability to function at a high level. Testimony showed that the mission of the agency is to ensure quality education by providing leadership and technical assistance to school districts and by advocating best practices. The ability of the agency to work with school districts is tied directly to the credibility of DPI's employees. Testimony of DPI's witnesses was that even though there was no evidence Koenig had actually worked directly with any school districts in his role as Technical Services Section Chief, if Appellant's e-mails with sexual content reached the general public: 1) The effect on the agency would be devastating, even if the employee was not in a management position; 2) the agency would be unable to accomplish anything if school districts mistrusted DPI employees, and 3) if DPI employees are held in disregard, legislators would hold the department in disregard and the agency's ability to secure adequate funds for the department operations would be undermined and state schools would be harmed. We believe that through this testimony, the Respondent has very clearly established that Koenig's misconduct supports the imposition of discipline.

The final question before the Commission is whether the level of discipline that was actually imposed, i.e., discharge, was excessive. Factors to consider include the employee's work record and whether the employee has been previously disciplined, how other employees who engaged in similar misconduct have been treated, and the degree to which the conduct had a tendency to impair performance or efficiency or the public image of the employer.

DPI had never disciplined Koenig before the January 6, 2006 discharge letter, and his work had been evaluated positively by the agency, even to the extent that the normal two-year probationary period was reduced to one year. On the other hand, Koenig had only begun working at DPI in November of 2003, a little more than two years before the disciplinary action. The employer had no experience imposing discipline against agency employees for having sent numerous e-mails with varying levels of sexual content to other persons, including several students in the school systems that are overseen by the agency. As a consequence, there is no evidence that DPI treated Koenig more harshly than other employees. Finally, we are satisfied that the adverse public reaction to the disclosure of the Appellant's e-mails would have a devastating impact on the agency's ability to carry out its basic mission. Discharge is not an excessive level of discipline for a DPI section chief who used agency e-mails in an effort to seduce a public school teacher as well as a number of high school students and to carry out a long-term affair with another State employee, and in doing so, peppered his e-mails with sexual content. The fact that once the warrant had been served, the Milwaukee Journal-Sentinel included an article about the criminal investigation into allegations that Koenig had sexual relations with a Kettle Moraine High School student provides strong evidence that the state's newspapers would find the sexually-charged e-mails to be newsworthy as well.

In his post-hearing brief, Koenig argued that the Commission's decision in DOC (GERRITSON), DEC. NO. 31234-A (WERC, 6/2004), supports the conclusion that discharge is excessive discipline. Mr. Gerritson was a 10-year employee serving as a captain in a maximum security prison who was demoted for exchanging numerous e-mails with a female subordinate. The e-mails were not work-related and included sexually suggestive content.²⁰ In addition, Gerritson had twice denied having a personal relationship with the subordinate even though he was engaged in the relationship at the time. Gerritson was only one of approximately 60 employees at the prison who were formally disciplined as a consequence of a wide-ranging investigation conducted by the employer into e-mail use. The agency was concerned that imposing significant discipline on all the employees would compromise the ability to staff the institution. As a consequence, the Department of Corrections concluded that based on comparison to the other employees, Gerritson would have received a written letter of reprimand in lieu of three days suspension if he had been disciplined solely because of his misuse of the e-mail system. The Commission relied on this fact as well as extenuating circumstances relating to Gerritson's other misconduct in reducing the level of discipline to a 20-day suspension.

There are some important distinctions to draw between Gerritson's situation and Koenig's conduct. As already noted, Gerritson's e-mail use has to be viewed in the context of the number of prison staff found to have violated the agency's e-mail policy and the highly disruptive consequences that the agency avoided by reducing the level of its discipline. There is no evidence in the present case that Koenig's e-mail practices can be mitigated by being part of a much wider pattern within the agency. Furthermore, Koenig's e-mail net extends way beyond exchanges between two employees of the same agency. He was trolling for sex through extensive e-mail relationships with an employee in another state agency, with a school district employee and with a number of high school students in a public high school. He was using his agency's e-mail system in a voracious attempt to prey on women, including at least one girl under the age of 18. Both teachers and students are recipients of DPI's programs. Finally, Gerritson had a much longer tenure at his employing agency. While the facts in GERRITSON bear some resemblance to certain of the facts in the present case, these major distinctions cannot be ignored. Thus, the Commission's GERRITSON decision does not compel a reduction in Koenig's discipline.

Number of E-mails

In reaching the conclusion that the Respondent has established just cause to discharge the Appellant, the Commission has relied entirely on the sexual content of Koenig's messages, rather than on the second category of allegations set forth in the discharge letter which reference the number of e-mails that he sent. There is no need for us to go through a separate just cause analysis of this second category.

²⁰ The Gerritson e-mails were described in the Commission's decision as numerous, having a romantic and intimate nature with sexually suggestive language and as having been sent over a 7-month period. Many of the e-mail exchanges between Gerritson and his subordinate spanned 20 to 30 minutes or ran even longer.

At some point, the Commission may have to decide an appeal under Sec. 230.44(1)(c), Stats., that rests entirely on the number of personal e-mails that were sent by an employee. Because of the sexual content of Koenig's e-mails, this is not that case.

Dated at Madison, Wisconsin, this 6th day of March, 2008.

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