

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**KENNETH L'ESPERANCE**, Appellant,

vs.

**Secretary, WISCONSIN DEPARTMENT OF TRANSPORTATION**,  
Respondent.

Case 72  
No. 66926  
PA (adv)-118

**Decision No. 32406**

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**Appearances:**

**Mary Beth Gardner**, Attorney, 2411 North Hillcrest Parkway, Suite 9, Altoona, Wisconsin appearing on behalf of the Appellant.

**Michael Kernats**, Legal Counsel, Wisconsin Department of Transportation, P.O. Box 7910, Madison, Wisconsin 53707-7910, appearing on behalf of the Respondent.

**DECISION AND ORDER**

On April 25, 2007, Appellant Kenneth L'Esperance (herein Appellant) filed a timely appeal of the Department of Transportation's (herein DOT) decision to demote him thereby invoking the jurisdiction of the Wisconsin Employment Relations Commission (Commission) under Sec. 230.44(1)(c), Stats. The basis for the appeal was the allegation that the DOT acted without just cause when it demoted him from the position of Police Communications Supervisor, a first-line supervisory position, to Police Communications Operator, a non-supervisory position. The Commission designated Steve Morrison, a member of its staff, as Hearing Examiner. The Examiner held a hearing on September 26, 2007 at the office of the Commission. The parties agree that the issues before the Commission may be stated as follows:

1. Whether the Appellant committed the conduct alleged in the demotion letter dated 3/26/07;
2. Whether such conduct, if committed, constitutes just cause for the demotion;
3. Whether the discipline (demotion) was excessive.

Dec. No. 32406

The parties completed post hearing briefs on February 20, 2008. A proposed decision and order was issued on April 26, 2008. On May 12, DOT filed a request that an additional finding of fact be reflected in the Commission's final decision. No response was filed by the due date of May 22.

The Commission has adopted the proposed decision with modest modifications. We have made changes to the findings of fact, conclusions of law, and the memorandum to reflect our conclusion that the Appellant did not admit to all of the allegations set forth in the letter of demotion. He admitted to most of the allegations and substantially all of the underlying conduct was proven. We have made additional modifications to clarify that the Appellant's conduct for which he was issued a January 29, 2007 Letter of Reprimand (LOR) is not a part of the basis for his demotion. Appellant was disciplined on January 29 with an LOR for inappropriately using the word "hussies" in the workplace. Although this incident is a factor in our analysis of the appropriate level of discipline in light of prior discipline (see section 3), Appellant has not been disciplined twice for this same offense. Finally, we have deleted former Finding of Fact 18 to make clear that the Commission reviews disciplinary decisions de novo and does not consider whether the decision maker has relied on advice when imposing the discipline. Other revisions to the proposed decision are identified by footnotes.

Being fully advised in the premises, the Commission now makes the following

### FINDINGS OF FACT

1. The subject of this appeal is a letter of discipline issued by Respondent to the Appellant and dated March 26, 2007. The letter states, in part:

The Division of State Patrol has completed its investigation pertaining to your blatant disregard and disrespect for supervisory authority. The results of this investigation established that you have demonstrated a wanton disregard for Department and Division Work Rules including continuing acts of insubordination, your failure to perform the duties of a first line supervisor and attempts by you to intimidate and threaten others in the work place.

The investigation established the following:

**On January 29, 2007**, you were issued a letter of reprimand for violating a Department of Transportation Work Rule when you addressed the female members of your work unit at the Spooner Post as "**hussies.**" Your supervisor provided you with a copy of the LOR and directed you to follow along as the LOR was read to you. You indicated you didn't need to follow along or have it read to you. Your supervisor explained to you that the LOR was going to be read to you so there would be no misunderstanding as to what you were being reprimanded for. You then proceeded to push your copy of the LOR aside and refused to follow along as directed. After being issued the letter of reprimand,

directed. After being issued the letter of reprimand, you were given written work directives pertaining to your work schedule and supervisory duties at the Spooner Post. Upon hearing the directives that were read to you, you made the following statement to your supervisor, **“You guys are full of shit and this is bullshit.”** You then proceeded to throw the written work directives in the garbage. You confirmed during the investigation that you were referring to your supervisor and the Captain when you made this statement and further indicated you did not believe it was disrespectful to make a comment like this to your supervisor or about your Captain.

Subsequent to making this statement, you made an attempt to intimidate and threaten your supervisor by positioning yourself face to face and nose to nose with him in response to his advising you that the Captain was available to hear your concerns and comments. The Captain witnessed your actions and the investigation confirmed that you used the same threatening mannerism with Lt. Jeff Lorentz in July of 2005 who at the time had been temporarily assigned to a sergeant's position. During this incident, you used abusive language when you responded to his comments more than once with the statement **“fuck you Lieutenant!”**

In addition to your actions on January 29, 2007, you have made attempts to undermine supervisory authority and you have continually challenged and failed to follow supervisory directives given to you. These incidents are as follows:

**On October 16, 2006**, you were given the approval and directive to purchase and replace the fax machine in the Eau Claire Post Communication's Center. As of **January 5, 2007**, you had failed to follow the directive resulting in the fax machine not being replaced. On **January 5, 2007**, you were given another directive to purchase and replace the fax machine by the end of the month (January 31, 2007). Upon hearing the directive you laughed and indicated it will be more like February 10, 2007. You were again given the directive clarifying that it needed to be carried out by the end of January. As of **February 12, 2007**, you had failed to follow the directive and the directive was given to another employee who carried out the directive and replaced the fax machine on February 13, 2007.

**During December of 2006 and January of 2007**, you advised your supervisor that Major Huxtable had directed the Northwest Region and other Regions to provide assistance to the Northcentral Region by scheduling dispatchers to work at the Wausau Post. You advised your supervisor and subordinates that Major Huxtable had indicated this initiative was mandatory and they would be scheduled to work in Wausau even if they didn't want to. The investigation confirmed that the information you provided to your supervisor and subordinates was false. Major Huxtable and the meeting notes from the PCS Meeting that took place on November 29, 2006 confirm that the initiative to

assist the Wausau Post was not mandatory but could be done with employees on a that the initiative to assist the Wausau Post was not mandatory but could be done with employees on a voluntary basis. You failed to follow the directives given to you, which created dissension in your work units.

**On January 23, 2007**, you made an attempt to undermine supervisory authority by advising your subordinates at the Spooner Post that you take personal offense that your supervisor would speak to each of them one on one without you being present and further advised them that the Region has two Lieutenants with nothing better to do than micro-manage communications. You further indicated to your subordinates that your supervisor is just trying to create a job for himself.

**On January 23, 2007**, you were insubordinate when you failed to follow a supervisory directive to meet with your supervisor at the conclusion of a work unit meeting. The investigation confirmed that you were aware of the directive and you made the decision to leave and not meet with your supervisor.

**On January 25, 2007**, you were given a supervisory directive to advise members of the Eau Claire Post Communication's Center of specific guidelines pertaining to making duty supervisory notifications. The investigation confirmed that you were insubordinate for failing to carry out the directive.

**On February 7, 2007**, you were insubordinate when you failed to follow supervisory directives given to you on January 29, 2007 pertaining to requesting personal time off.

Your actions indicate that you failed to fulfill your supervisory responsibilities and violated the following Department and Division work rules:

I. WORK PERFORMANCE.

1. Insubordination, including disobedience, failure, or refusal to follow written or oral instructions of supervisory authority or to carry out work assignments.

II. PERSONAL ACTIONS AND APPEARANCE.

2. Threatening, intimidating, interfering with, or using abusive language towards others.

These are serious violations. Your actions threaten the personal safety of Department employees and they breach the core responsibilities you have as a manager in the Department of Transportation and the Division of State Patrol. Your actions also subject the department to potential liability. The investigation confirmed that your actions are a continuation of an extensive history pertaining to your blatant disregard and disrespect for first line supervision which cannot and will not be tolerated.

As a result of your actions, you will be removed from your position as Police Communication Supervisor and demoted without a reduction in pay for two (2) years to State Patrol Police Communication Operator. . . .

Your demotion to a staff level position will be effective April 1, 2007. . . .  
[Emphasis in original.]

2. At the time of the events which led to this action, Appellant was employed as a Police Communications Supervisor, Division of State Patrol, Department of Transportation. He was initially hired as a Police Communications Operator on January 5, 1987 and held that position until October 24, 1989 at which time he was promoted to Police Communications Supervisor (PCS). He held that position from October 24, 1989 until his demotion to Police Communications Operator (PCO) on April 1, 2007.

3. The Appellant's duties as a PCS included supervising six to ten Police Communications Operators, also known as Communications Officers or Dispatchers, in his Region. The PCS is a front line supervisor managing non-supervisory personnel and oversees the equipment and staffing required in the Region.

4. At the time of the events giving rise to this appeal the Appellant was subject to, and a part of, a command structure which included a chain of command. At all times material hereto his immediate supervisor was Lieutenant Nicholas Wanink, Spooner Post Lieutenant. Lt. Wanink's supervisor was Captain Douglas Notbohm, Commander of the Northwest Region. The Captain's supervisor was Major Sandra Huxtable, Bureau Director and her supervisor was Colonel Benjamin Mendez, the Deputy Superintendent of the Division of State Patrol and the overall second in command of the Division. Commanding the Division was Superintendent David Collins.

5. On January 29, 2007, the Appellant's supervisor, Lt. Wanink, provided him with a copy of a letter of reprimand and directed him to follow along as the letter was read to him. Appellant refused to do so. Following the receipt of the letter of reprimand he was given written work directives which: (1) temporarily relieved him of supervisory duties at the Spooner Post; and (2) required him to obtain supervisory approval through Lt. Wanink for schedule changes to his own work schedule.<sup>1</sup> The directives were read to him by Lt. Wanink. After hearing the directives the Appellant stated, with reference to Lt. Wanink and Cpt. Notbohm, "You guys are full of shit and this is bullshit." After making this statement he crumpled the document up and threw it in the garbage. These actions violated Department of Transportation Work Rule I. which proscribes insubordination, including disobedience, and failure or refusal to follow written or oral instructions of supervisory authority.

Following these events Appellant and Lt. Wanink proceeded to the office of Captain Notbohm so the Captain could hear Appellant's concerns and comments. Before entering the office of the Captain and just outside the Captain's office door, the Appellant turned to

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<sup>1</sup> The Commission has added to this sentence to reflect the contents of the written work directives given to Appellant on January 29, 2007.

Lt. Wanink and positioned himself “nose to nose” with the Lieutenant in an intimidating and threatening manner. These actions violated DOT Work Rule III, which proscribes threatening, intimidating, interfering with, or using abusive language towards others.

6. On October 16, 2006, the Appellant was given the directive to purchase and replace the fax machine in the Eau Claire Post Communications Center. As of January 5, 2007 he had failed to follow this directive. On January 5, 2007 he was given another directive to replace the fax machine by January 31, 2007 and he failed to comply with this directive. This task was then given to another employee who replaced the fax machine. These actions violated DOT Work Rule I.

7. On November 29, 2006, Appellant attended a PCS meeting chaired by Major Huxtable. During this meeting Major Huxtable informed the attendees of the meeting that the Wausau Post needed assistance due to low PCO staffing levels and asked that the PCS attendees provide assistance to the Wausau Post by providing PCOs on a non-mandatory (voluntary) basis to work at the Wausau Post. During December of 2006 and January of 2007 the Appellant advised his supervisor that Major Huxtable had directed the Northwest Region, as well as other Regions, to provide assistance to the Wausau Post on a mandatory basis. This advice was false because the Major had called for assistance on a non-mandatory basis. Some of the PCOs sent to Wausau by the Appellant consisted of volunteers and others were ordered to Wausau by the Appellant. The PCOs who had been ordered to Wausau by appellant complained to Lt. Wanink about having been so ordered and this created dissension amongst their ranks. The Appellant’s actions violated DOT Work Rule I.

8. On January 23, 2007, Appellant advised his subordinates at the Spooner Post that the Region had two Lieutenants with nothing better to do than micro-manage communications. This action violated DOT Work Rule III, which prohibits making false or malicious statements concerning other employees, supervisors, or the Department.<sup>2</sup>

9. On January 23, 2007, Appellant failed to follow a supervisory directive to meet with his supervisor at the conclusion of a work unit meeting. The Appellant was aware of the meeting and chose to leave the premises prior to the meeting in violation of DOT Work Rules I and II.

10. On January 25, 2007, the Appellant was given a supervisory directive to advise members of the Eau Claire Post Communication’s Center of specific guidelines pertaining to making duty supervisory notifications. Appellant failed to carry out this directive in violation of DOT Work Rule I.

11. On January 29, 2007, the Appellant was given supervisory directives pertaining to requesting time off. Appellant failed to follow these directives in violation of DOT Work Rule I.<sup>3</sup>

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<sup>2</sup> A portion of Appellant’s alleged comments during the January 23 meeting in Spooner that appear in the Letter of Demotion were not admitted by Appellant or otherwise established. Accordingly, this finding has been altered by the Commission to more accurately reflect the record.

<sup>3</sup> The date in this finding of fact has been corrected by the Commission to more accurately reflect the record.

12.<sup>4</sup> On April 14, 1999, Appellant received a letter of reprimand for violating Department of Transportation Work Rules IX. EMPLOYEE RESPONSIBILITIES AND PERSONAL CONDUCT. The basis for this discipline was his unauthorized use of the telephone system for personal use and he was disciplined under two separate sections of the Work Rule:

**WORK PERFORMANCE**

1. Insubordination, including disobedience, failure or refusal to follow written or oral instructions of supervisory authority...

**USE OF PROPERTY**

4. Unauthorized use of state property or equipment, including vehicles, telephones or mail service.

The letter of reprimand states:

This conduct, serious in and of itself, is not an isolated incident. You have been counseled in the past for unauthorized use of the STS telephone system.

It is hoped this reprimand will allow you to reflect on your duties as a Police Communications Supervisor and the importance of complying with all procedures and requirements of the Department of Transportation and the Division of State Patrol. (Exh. R-107)

13. On June 15, 1999, Appellant received a letter of suspension which states, in pertinent part:

This letter serves to inform you that you are hereby suspended without pay for 5 work days from your position as a Police Communications Supervisor with the Division of State Patrol. This suspension will commence on June 21 and end on June 26, 1999.

This disciplinary action is based on your conduct related to the unauthorized use of the State telephone system for personal calls. The blatant insubordination you displayed after receiving specific instruction concluded with your making additional unauthorized calls in the days following the receipt of a letter of reprimand on April 21, 1999, for insubordination and unauthorized use of the State telephone system.

14. On July 6, 2005, Lt. Jeff Lorentz had been temporarily assigned as the sergeant of the Dunn County troop and had moved his work station to the sergeant's office. He took vacation during the first week of July and upon his return found that the Appellant had emptied his desk items, files, work items and personal items into cardboard boxes in preparation for the

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<sup>4</sup>This and subsequent findings have been renumbered to correct erroneous numbering in the proposed decision.

move. Lt. Lorentz met with the Appellant and told him that, in the future, he (Lorentz) would move his things himself. Appellant made a discourteous<sup>5</sup> statement at which point Lt. Lorentz reminded him that, although temporarily assigned to a sergeant's position, he was still a Lieutenant and further that Appellant was not to touch anything in his (Lorentz's) work station. Appellant then came within inches of Lt. Lorentz's face and, in an intimidating manner, said, "What are you going to do about it Lieutenant, fuck you Lieutenant, fuck you, fuck you." Lorentz did not report this encounter to anyone at the time. He informed Lt. Wanink of the incident during the course of the investigation into the Appellant's more recent conduct.<sup>6</sup>

15. An investigation of a sergeant (name redacted) resulted in a suspension for thirty days without pay and demotion from sergeant, a supervisory position, to trooper, a non-supervisory position. The proven allegations in that case included threatening or intimidating co-workers, in this case recruits. He also shared confidential information and made false statements about some recruits concerning other recruits and directed abusive language toward members of the recruit class including referring to one recruit as a "piece of shit" and another recruit as a "fucking idiot." He called another recruit a "pussy" and suggested he (the recruit) would "fuck her" apparently referring to a female recruit. He engaged in other acts of sexual harassment and misused his cruiser by operating it while intoxicated.

16. An investigation of a trooper (name redacted) resulted in suspension without pay for thirty days. The proven allegations in that matter included a directive to the trooper to retrieve his Division issued mobile data computer in the course of an ongoing legal dispute between the trooper and the Department. He was directed not to do anything with the computer other than bring it out from his house and give it to his waiting sergeant. After a reasonable period of time the trooper failed to bring the computer to his sergeant and, upon the sergeant's investigation, admitted that he was attempting to remove personal information from the computer. He was again ordered to deliver the computer and, again, refused, saying he was still removing personal information. The sergeant then entered his home and observed him to be deleting information from the computer. These actions of insubordination and disobedience to follow an order and destruction of potential evidence violated DOT Work Rule I. and Division of State Patrol work rules relating to conduct and the treatment of equipment and supplies.<sup>7</sup>

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<sup>5</sup> The Commission has changed this word from "profane" to more accurately reflect the record.

<sup>6</sup> The Commission has supplemented this paragraph to clarify the chronology of events.

<sup>7</sup> The Commission supplements its finding set forth in the proposed decision by noting the additional circumstances surrounding the incident described here. The record of this event indicates that the computer contained data that was the subject of a dispute between the trooper and the State Patrol. The trooper had filed a court action claiming personal ownership of a program that the State Patrol maintained he wrote as part of his work duties. He was ordered to turn over the computer while the matter was being investigated. The Letter of Suspension issued to the trooper following this incident stated that the trooper's conduct included withholding or destroying evidence.

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

**CONCLUSIONS OF LAW**

1. The Commission has jurisdiction of this matter pursuant to Sec. 30.44(1)(c), Stats.
2. Appellant committed substantially all of the underlying conduct alleged in the demotion letter dated March 26, 2007.
3. Respondent has met its burden to prove that just cause existed for imposing discipline.
4. The degree of discipline imposed was not excessive.

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

**ORDER**<sup>8</sup>

This matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 15<sup>th</sup> day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>8</sup> 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 content of that letter are hereby incorporated by reference as a part of this Order.

**DEPARTMENT OF TRANSPORTATION (L'Esperance)**

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

In DEPARTMENT OF CORRECTIONS (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), the Commission set forth the standard it applies when analyzing an appeal of 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, Stats., requires . . . just cause. The Courts have equated this to proof to a reasonable certainty by the greater weight or clear preponderance of the evidence. REINKE V. PERSONNEL BOARD, 52 WIS.2D 123, (1971); HOGOBOOM V. WIS. PERS. COMM., DANE COUNTY CIRCUIT COURT, 81 CV5669; 4/23/81; 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, CSE NO. 82-237-PC (PERS. COMM. 6/9/83).

In the instant case the Appellant, by his attorney and on the record, affirmatively stated that the issue of whether there was just cause to impose some level of discipline is undisputed. Appellant has challenged some of the allegations in the Letter of Discipline and argued that the extent of discipline was excessive. We will therefore consider each of the three underlying questions of just cause outlined above.

**1. Whether the greater weight of credible evidence shows the Appellant committed the conduct alleged by Respondent in its letter of discipline.**

The Respondent carries the burden of proving, by a preponderance of the credible evidence, that there was just cause for the decision to demote Appellant. Respondent, in its demotion letter, set forth seven separate dates upon which Appellant allegedly engaged in misconduct worthy of discipline. Appellant has admitted nearly all the conduct alleged in the letter of discipline with the exception of some of the events comprising a small portion of the

allegations relating to the January 29, 2007 incident. In this allegation, when provided with a copy of a Letter of Reprimand (LOR) by his immediate supervisor, Lt. Wanink, Appellant refused to read the letter along with the Lieutenant as directed. He was then given a work directive pertaining to his work schedule and supervisory duties and, in response to those directives, stated “You guys are full of shit and this is bullshit”, referencing his direct supervisor, Lt. Wanink and the Captain in charge. Appellant admits these allegations. He then threw the directives in the garbage in front of the Lieutenant, which he also admitted. Following these events he and the Lieutenant walked to the Captain’s office and as they reached the Captain’s door the Appellant turned to the Lieutenant and, in a threatening and intimidating manner, “face to face and nose to nose”, told the Lieutenant that if he (Appellant) went in to speak to the Captain, he would be no better than his subordinates when they went to the Captain with their problems.<sup>9</sup> Appellant does not admit that this remark was disparaging or that he approached the Lieutenant in a threatening or intimidating manner. However the Lieutenant’s testimony and the testimony of the Captain, who witnessed the event (although he could not hear the exact words said) were credible and fully support the allegation. The January 29, 2007 entry also includes a reference to an incident Appellant allegedly had with another supervisor, Lieutenant Jeff Lorentz, in 2005, wherein Appellant confronted the Lieutenant and, using abusive language, said “fuck you, Lieutenant” more than once. Appellant testified that he could not recall this incident but did not dispute that it may have happened. Lt. Jeff Lorentz testified credibly about the event and there is no reason for the Examiner to question his veracity.

Appellant has admitted substantially all of the underlying conduct contained in the letter of demotion, although he does reject some of its characterizations and offers excuses for some of his behavior. For instance, On October 16, 2006, he was directed to replace the fax machine in the Eau Claire Post Communications Center. As of January 5, 2007 he had failed to do so. Appellant testified that he had “made inquiries” and was told that “there would be a delay in getting the machine”. He did not place the order until January 29, 2007. Shortly thereafter Lieutenant Wanink stepped in and assigned someone else to replace the machine. Appellant attempts to excuse his failure to follow the directive by explaining that he had changed the barrel of the machine sometime in April or May of 2006 because it was not working properly. In November the machine was having problems again, so he changed the barrel once more. He seems to argue that because the machine worked following the barrel changes, he need not have complied with the directive to replace the fax machine. This conclusion misses the point of a “directive”. He was not directed to use his own judgment regarding the fax machine replacement; he was directed to replace the machine and failed to do so in the time allotted for the task. Appellant contends that he did place an order for a new machine shortly before the deadline imposed by Lieutenant Wanink. Appellant had apparently decided to replace the machine with an upgraded model that would take longer to deliver, but he did not communicate any of this to his superiors. Other examples of Appellant’s excuses for not following the rules include, in the case of the December, 2006 and January, 2007 initiative to assist the Wausau post on a voluntary basis, Appellant says he misunderstood, or

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<sup>9</sup> The Commission has added to this sentence to include the content of the Appellant’s remark to the Lieutenant.

did not hear, the Major's instructions, but there is no indication that any other communication supervisors present at the meeting from other posts had a similar misunderstanding; regarding his failure to meet with his supervisor, Lieutenant Wanink, after work on January 23, 2007, as directed, he testified that he had to return another employee to the Eau Claire post in order to avoid overtime and that this was the reason he ignored the Lieutenant's directive and left the building without advising the Lieutenant. Appellant made no attempt to contact anyone in the building before leaving, including other superiors who may have been able to communicate legitimate concerns about overtime to Lieutenant Wanink. In each instance, Appellant's testimony was less credible than that of Respondent's witnesses.<sup>10</sup>

Respondent has shown to a reasonable certainty, by the greater weight of the credible evidence, that Appellant committed nearly all of the conduct alleged in the disciplinary letter. Respondent has met its burden with respect to each allegation therein.

**2. Whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline.**

Just cause for imposing some level of discipline, the second question in our analysis, is established when some deficiency has been demonstrated which can reasonably be said to have a tendency to impair the employee's performance of duties or the efficiency of the group where the employee works. *SAFRANSKY v. PERSONNEL BOARD*, 62 Wis. 2d 464, 474 N. W. 2d 379 (1974).

Appellant's blatant refusal to follow his supervisor's directive (finding 5) to follow along as the Letter of Reprimand was read to him and his actions in throwing the written directive in the garbage followed by telling his supervisor that he and the Captain were "full of shit" and that the Letter of Reprimand and the directive was "bullshit" demonstrate his lack of respect for authority (a trend which runs throughout the events here) and can reasonably be said to have impaired his ability to continue in a supervisory position. These actions can also be said to have a tendency to impair the efficiency of the workplace and to give his own subordinates the idea that, if he was able to demonstrate a lack of authority for superiors then why can't they. Appellant's threatening advances to Lt. Wanink following the events described above further demonstrate his lack of respect for authority and bolster the conclusion that he is unfit for supervisory status.

Appellant's failure to replace the office fax machine (finding 6) when ordered to do so and, instead, making the independent decision to take a different course of action shows a lack of respect for authority and leads us to the conclusion that future directives may be ignored. As such we conclude that this may reasonably be said to impair the efficiency of the work place. Further, it sets a negative example for his subordinates which may reasonably lead to further breakdowns in the chain of command.

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<sup>10</sup>The Commission has altered this paragraph for clarity, to more fully respond to the Appellant's arguments, and to more accurately reflect the record.

The Appellant's failure to implement Major Huxtable's voluntary assistance initiative (finding 7) to the Wausau Post, instead converting it to a mandatory initiative, shows a disregard for orders.<sup>11</sup> In addition, the conversion to a mandatory initiative caused dissension in the ranks. These actions may reasonably be said to have impaired his ability to continue in a supervisory position and to have impaired the efficiency of the workplace.

His conversation with his subordinates on January 23, 2007 (finding 8) wherein he advised them that the two Lieutenants, both of whom were senior officers and supervisory personnel, had nothing better to do than micro-manage, demonstrate his lack of respect for authority and may reasonably be said to transfer that lack of respect to his subordinates.<sup>12</sup> As such, his actions may reasonably be said to have impaired his ability to continue in a supervisory position and to have impaired the efficiency of the workplace.

Appellant's failure to meet with his supervisor as directed on January 23, 2007 (finding 9) shows a lack of respect for authority and may reasonably be said to impair the performance of his duties. Further, his failure to advise members of the Eau Claire Post Communications Center (finding 10) pertaining to making duty supervisory notifications may reasonably be said to impair the efficiency of the workplace operations. Finally, his failure to follow supervisory directives (finding 11) relating to requesting time off shows a disrespect for authority and may reasonably be said to have impaired the efficiency of the workplace.

We conclude that just cause for some degree of discipline has been established.

### **3. Whether the imposed discipline was excessive.**

Factors we consider when determining whether the discipline was excessive include: a) the 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; and d) the number of the incidents cited as the basis for discipline for which the employer has successfully shown just cause. See KLEINSTEIBER v. DOC, Case No. 97-0060-PC (Pers. Comm. 9/23/98).<sup>13</sup>

As to factor "a," we are convinced that the egregiousness of the Appellant's behavior renders him unfit to serve as a supervisor. There can be no question that the Appellant's actions could reasonably be said to impair the employer's operation. Appellant argues that there has been no evidence to support the conclusion that the incidents cited by the Respondent have actually affected the functioning of the Communications Center under his supervision. He

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<sup>11</sup> This sentence has been altered by the Commission for consistency with the Finding of Facts.

<sup>12</sup> This sentence has been altered to more accurately reflect the record, as discussed in footnote 3.

<sup>13</sup> The remainder of this section analyzing whether the discipline was excessive has been reorganized by the Commission to more closely follow the factors set forth in this test.

argues that there is no evidence that the incidents cited have impaired his ability to perform the duties of a Police Communications Supervisor and that there is no evidence that the efficiency of the work force he supervised was at all affected by the incidents cited. This contention is not supported by the record in this case. The Appellant's contention seems to be based on the false assumption that his job performance as Police Communications Supervisor can be separated from his ability to follow legitimate management directives and to refrain from aggressive and intimidating behavior toward others in the workplace.

Moreover, we note that this argument suggests a misunderstanding of Respondent's burden. It is not necessary to prove that the Appellant's actions actually impaired the performance of the duties of the position or of his ability to perform them or that the efficiency of the work force was actually affected adversely by them. Respondent need only show that the activity could be reasonably concluded to have a tendency to do so. (SAFRANSKY, *id.*, and PAUL v. DHSS, Case No. 87-01547-PC (Pers. Comm. 4/19/90). We conclude Respondent has met this burden.

As to factor "b," in addition to the January 2007 Letter of Reprimand for inappropriate language directed at his subordinates, Appellant's work record includes a five day suspension in 1999 for repeated misuse of the state telephone system for personal calls. The troubling aspect of this prior disciplinary action is that it involved insubordination and disobedience in failing to follow supervisory directives, the same issues involved in the instant case. The record also indicates that Appellant's superiors thought highly of his work ethic, but only when Appellant approved of his own assignments or directives. Finally, it is highly significant that DOT took actions prior to demoting Appellant that attempted to deal with his troubling behavior while still retaining him as a supervisor. Following his discipline for addressing Police Communications Officers at the Spooner post as "hussies," Respondent temporarily eliminated Appellant's supervisory responsibilities at the Spooner Post. Appellant's inflammatory and aggressive conduct upon learning of this change was one of the actions that precipitated his demotion.

As to factor "c" and the discipline of other DOT employees, the proven allegations set forth in the matter at finding 15 were arguably more serious than those alleged and proven here, but so was the discipline. In that case the sergeant was not only demoted but received a thirty day suspension without pay. The events proven in the case at finding 16 were no less serious than those proven here, but certainly much less numerous, and thus resulted in a less severe discipline, as it should have been. Respondent has further requested the Commission to add a finding of fact to the proposed decision regarding a Police Communications Supervisor demoted for aggressive sexual harassment of subordinates. We do not find it necessary to do so. Although we are satisfied that the employer has not treated similarly offending employees less severely than Appellant, we rely more heavily on the other factors to determine if the discipline was excessive. The Appellant's numerous and egregious actions are not readily

comparable to other cases. It is the large number and the nature of the instances of proven misconduct that support the extent of the discipline issued in this case.<sup>14</sup>

As to factor “d,” the number of proven offenses more than offset the factors mitigating in the Appellant’s favor. Appellant repeatedly flouted his superiors’ authority to supervise him and direct the workforce. He continues to evince a deeply held attitude that his supervisors should defer to him in terms of how he wants to carry out his responsibilities.

We are satisfied that the decision made herein was appropriate and that the Respondent acted with just cause. Accordingly, we conclude that the appeal filed herein is without merit and we have dismissed the appeal.

Dated at Madison, Wisconsin, this 15<sup>th</sup> day of August, 2008

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>14</sup> Appellant mentioned, during the course of the hearing and in his post-hearing brief, that he was of Native American heritage. He has not established that any person, regardless of heritage, was treated less harshly.