

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LESLEY WINSLOW-STANLEY, Appellant,

vs.

Secretary, DEPARTMENT OF CORRECTIONS, Respondent.

Case 122
No. 69975
PA(adv)-186

(Letter of reprimand in lieu of three-day suspension)

Decision No. 33213-A

LESLEY WINSLOW-STANLEY, Appellant,

vs.

Secretary, DEPARTMENT OF CORRECTIONS, Respondent.

Case 123
No. 69976
PA(adv)-187

(Five-day suspension)

Decision No. 33214-A

Appearances:

Lesly Winslow-Stanley, appearing on her own behalf.

H. Elizabeth Kennebeck, Assistant Legal Counsel, Wisconsin Department of Corrections, P.O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of Respondent Department of Corrections.

FINAL DECISION AND ORDER

On June 28, 2010, Appellant Lesly Winslow-Stanley filed timely appeals invoking the jurisdiction of the Wisconsin Employment Relations Commission (Commission) under Sec. 230.44(1)(c), Stats., alleging that Respondent, Department of Corrections (DOC) disciplined her without just cause when it 1) issued her a letter of reprimand in lieu of a three-day suspension and 2) suspended her for five days without pay.¹ The Commission designated Matthew Greer, a member of its staff, to serve as hearing examiner in both appeals.

¹ Appellant properly filed separate letters of appeal related to each discipline. The appeals were processed in tandem during the pre-hearing, hearing, and post-hearing phases of litigation, including this decision.

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Dec. No. 33214-A

Hearing on the appeals was held at the Ethan Allen School in Wales, Wisconsin on January 26 and 27, February 28, and March 1, 2011. The Parties agreed to the following issues for hearing:

Regarding Case #122, No. 69975, PA(adv)-186 - Whether there was just cause for the action of issuing a letter of reprimand in lieu of a 3-day suspension of the Appellant that was imposed by letter dated June 1, 2010.

Regarding Case #123, No. 69976, PA(adv)-187 - Whether there was just cause for the action of suspending the Appellant for 5 days that was imposed by letter dated June 18, 2010.

The Parties submitted post-hearing briefs, the last of which was received on May 26, 2011, closing the record.

For the reasons set forth below, the Commission concludes that there was just cause for DOC's decisions to issue a letter of reprimand in lieu of a three-day suspension and to suspend Winslow-Stanley for five days.

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

FINDINGS OF FACT

Background Facts

1. Respondent Department of Corrections (DOC) is an agency of the State of Wisconsin that operates correctional institutions for the purpose of protecting the public and seeking to rehabilitate offenders and reintegrate them into society. DOC includes the Division of Juvenile Corrections that operates institutions for juvenile offenders (youth) and the Division of Adult Institutions that operates institutions for adult offenders. One institution in the Division of Juvenile Corrections is² the Ethan Allen School (Ethan Allen) which houses male youths.

2. Appellant Lesly Winslow-Stanley has been employed by DOC since July 1998 and has held supervisory positions at adult and juvenile DOC institutions since April 2004. Since December 2008 and at all times relevant to these appeals, she was employed at Ethan Allen as a Supervising Youth Counselor (SYC). Just before she started at Ethan Allen, DOC disciplined her with a letter of reprimand in December 2008 for making an inappropriate comment to an inmate while she was employed at Oakhill Correctional Institution, an adult institution.

3. There are three levels of counselor classifications at Ethan Allen: Youth Counselor, Youth Counselor-Advanced, and SYC. SYCs are "highly responsible" supervisors and act as representatives of management in dealings with subordinate employees. They directly supervise Youth Counselor-Advanced and Youth Counselor employees and serve as the

² On the final day of hearing, DOC announced to Ethan Allen staff that the institution would be closing later in 2011 and its operations would be transferred to another DOC institution.

supervise Youth Counselor-Advanced and Youth Counselor employees and serve as the institution's chief security officer in the evenings, on weekends, and at other times when the Security Director is absent. As part of these responsibilities, SYCs are expected to model professional and appropriate behavior to staff and youth, counsel subordinate staff regarding performance expectations, and "establish expectations that will not tolerate" harassment.

4. Ethan Allen consists of separate buildings in a secured campus. Among the buildings inside the campus are Martin Hall, the most secure unit at Ethan Allen, housing the most troubled youth, and Vilas Hall, another unit housing less troubled youth. A building that formerly served as the gatehouse houses the SYC office. The institution also includes a power plant building where maintenance operations are based.

5. Ethan Allen's Security Director at the times relevant to these appeals was believed by some employees to play favorites with certain employees and react punitively to non-favored employees. Winslow-Stanley was perceived by some employees as being one of the Security Director's favored employees.

6. DOC has promulgated various work rules to govern conduct of employees at its institutions. Violations of the rules may result in disciplinary action. Winslow-Stanley signed an acknowledgment that she had read the work rules. As is relevant to these appeals, the rules prohibit the following conduct:

- 2 Failure to follow policy or procedure, including but not limited to the DOC Fraternalization Policy and Arrest and Conviction Policy.
- 13 Intimidating, interfering with, harassing, (including sexual or racial harassment), demeaning, or using abusive language in dealing with others.
- 14 Horseplay, practical jokes, or other disruptive or unsafe behavior.

Facts Relevant to Letter of Reprimand in Lieu of Three-Day Suspension

7. Greg Hansen is a Youth Counselor-Advanced with approximately 20 years of service at Ethan Allen. Winslow-Stanley supervised Hansen on 2nd Shift when she first arrived at Ethan Allen. They initially had a good working relationship.

8. Hansen's wife is also employed at Ethan Allen as an SYC. Shortly after starting at Ethan Allen, Winslow-Stanley filed a complaint against Hansen's wife that was ultimately addressed through mediation. The relationship between Hansen and Winslow-Stanley soured as a result of the complaint.

9. Martin Hall is laid out in four wings with a control booth "bubble" in the center where the four wings are joined. Across a hall from the control booth is a small triangular counselors' office containing computers and desks. On each shift, counselors in Martin Hall are assigned to either staff the control booth or oversee operations on the floor by roaming the building. Roaming counselors use the counselors' office as a work station.

10. On a day in which Winslow-Stanley was on duty and Hansen was working on the floor of Martin Hall, a youth was brought to Martin Hall for processing after he kissed a female DOC employee on the cheek.

11. Hansen asked Winslow-Stanley what the youth had done to be admitted to Martin Hall. While explaining the conduct, Winslow-Stanley leaned over and kissed Hansen on the cheek. The kiss was uninvited and unwelcomed by Hansen and caused him considerable embarrassment.

12. Employees at Ethan Allen engage in banter that is sometimes off-color and sexual in nature. However, off-color banter does not normally occur between supervisors and subordinate employees.

13. Winslow-Stanley and Hansen engaged in mutual banter that sometimes became “saucy” or racy in nature. Hansen was the only subordinate employee with whom Winslow-Stanley engaged in such banter. Winslow-Stanley felt that she could engage in such banter with Hansen because his wife was a supervisor and that, as a result, he felt more comfortable around supervisors.

14. Winslow-Stanley made comments to subordinate staff, including Hansen, that she loved them.

15. Winslow-Stanley made comments of a sexual nature to Hansen including a comment to the effect that “if you aren’t good for a roll in the hay, what the fuck good are you?”

16. Hansen did not immediately report the kiss or inappropriate banter.

17. In December 2009, Hansen was transferred to 1st shift and was no longer supervised by Winslow-Stanley. On January 2, 2010, Winslow-Stanley sent an e-mail to Hansen that Hansen felt contained inappropriate sexual innuendo. The e-mail was the culminating event that caused Hansen to file his complaint. DOC management later acknowledged that there was a reasonable non-sexual interpretation of the e-mail.

18. In a complaint dated January 13, 2010 and received by Ethan Allen management on January 25, 2010, Hansen formally complained of the kiss, the January 2, 2010 e-mail, and Winslow-Stanley’s inappropriate banter. Hansen filed the complaint to “get rid of” Winslow-Stanley.

19. DOC initiated an investigation into Hansen’s complaint and conducted a fact finding interview, an investigatory meeting and a pre-disciplinary meeting with Winslow-Stanley. At each interview and meeting, DOC presented the factual allegations against Winslow-Stanley and provided her an opportunity to respond to the allegations.

20. DOC concluded that Winslow-Stanley engaged in conduct that violated work rules 2 and 13 and decided to discipline Winslow-Stanley by issuing a letter of reprimand in lieu of a three-day suspension. The decision was communicated to Winslow-Stanley in a letter dated June 1, 2010 from Paul Ninneman, Ethan Allen Superintendent. The specific factual conclusions that led to the decision are outlined in the letter as follows:

On January 25, 2010 Management received an Employee Discrimination Complaint. Based on our investigation you were asked numerous questions during an investigatory meeting conducted on April 7th 2010, in which your answers were not consistent with witness statements. Specifically, you were asked, "At anytime did you kiss YC Greg Hansen on the cheek?" You responded, "No." Two EAS staff members in addition to Mr. Hansen provided statements, that in fact you did kiss Greg Hansen on the cheek while he was working his shift in Martin Hall.

You were asked if you ever engaged in banter, either off-color or sexual in nature with Greg Hansen? You stated, "I would not categorize the banter as sexual or off-color. It is banter and he is sarcastic." Your response is not consistent with a witness statement by another supervisor, who acknowledges that there is a fine line between joking and that your banter witnessed by this Supervisor could be perceived as sexual.

Facts Relevant to Five-Day Suspension

21. At all relevant times, Shane Megonigle served as a Power Plant Operator at Ethan Allen, working out of the power plant building. In that position, he maintained the institution's grounds and buildings. He held that position for 10 years and previously worked at Ethan Allen as a Youth Counselor. Power Plant Operators do not have direct contact with youth and are not allowed to enter youths' rooms alone while youth are present.

22. Normally, Megonigle only had incidental contact with Winslow-Stanley, including Winslow-Stanley questioning him regarding his presence in certain areas of the institution and ordering him to "move along."

23. In June 2009, Megonigle was speaking with Winslow-Stanley and another SYC, Robert Gauthier, in the SYC office. During the conversation, Winslow-Stanley called Megonigle a "troll" several times, and told him to go back to his "hole."

24. On September 21, 2009, Megonigle was in Vilas Hall pursuant to a work order to fix a chair. While there, Winslow-Stanley asked one of the Youth Counselors on duty to close a window in a youth's room. The Youth Counselor did not close the window and Winslow-Stanley ordered Megonigle to close the window. Megonigle protested the order because it was not the Power Plant Operator's job to close windows in youths' rooms. Winslow-Stanley again

ordered Megonigle to close the window and informed him that she would write him up for insubordination if he refused to close the window. Megonigle complied, but because a youth was in the room with the open window, a Youth Counselor had to remove the youth from the room before Megonigle could close the window. Closing windows in youths' rooms is the duty of the Youth Counselors.

25. On March 4, 2010, while Megonigle was standing in the doorway to the SYC office speaking to SYC Amanda Nickel, Winslow-Stanley came into the office and, without any indication to Megonigle, grabbed him by his sweatshirt at chest level with both hands causing Megonigle to step back and hit his back.

26. On March 10, 2010, Megonigle filed a formal complaint regarding Winslow-Stanley's treatment of him.

27. DOC initiated an investigation into Megonigle's complaint and conducted an investigatory meeting and a pre-disciplinary meeting with Winslow-Stanley. At each interview and meeting, DOC presented the factual allegations against Winslow-Stanley and provided her an opportunity to deny or explain her version of the allegations.

28. After conducting the investigation, DOC concluded that Winslow-Stanley engaged in conduct that violated work rules 2, 13, and 14 and decided to discipline Winslow-Stanley by issuing a five-day suspension which was served by Winslow-Stanley on June 21 through June 25, 2010. The decision was communicated to Winslow-Stanley in a letter dated June 18, 2010 from Ninneman.

The specific factual conclusions cited to support violations of work rules 2 and 13 are outlined in the letter as follows:

Specifically, on June 21, 2009, when speaking to a co-worker, Shane Megonigle, you referred to him as a "troll" and told him to "go back to your hole."

On September 21, 2009, there was another incident in which you violated work rules #2 and #13. You ordered Mr. Megonigle to close a window in a youth's room in Vilas Hall and told him he would be written up for insubordination if he did not close the window. Mr. Megonigle is a Power Plant Operator and there was no emergency situation that necessitated not waiting for a Youth Counselor to close the window. Having Mr. Megonigle alone in the room with a youth is a violation of policies and procedures.

The factual conclusions cited to support the work rule 14 violation of work are:

Specifically, on March 4, 2010, while Mr. Megonigle was standing in the doorway to the Supervising YC Office, and you grabbed him by the front of his sweatshirt, near the collar. As a result, he hit the shelf that sticks out of the door. You stated that it was "an action made in jest." This action was a violation of work rule #14.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these appeals pursuant to Sec. 230.44(1)(c), Stats.
2. Respondent Department of Corrections has the burden to demonstrate that Appellant engaged in the conduct alleged in the letters of discipline and that there was just cause for the imposition of some level of discipline and that the degree of discipline imposed was not excessive.
3. Respondent has demonstrated that Appellant engaged in the conduct as alleged in the letters of discipline, there is just cause for the imposition of some level of discipline, and that the degree of discipline imposed by the letters are not excessive.

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

ORDER³

Respondent's actions of issuing Appellant a letter of reprimand in lieu of a three-day suspension and suspending Appellant for five days are affirmed and the appeals are dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of November, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

³ 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 Corrections (Winslow-Stanley)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Winslow-Stanley appeals DOC's decision to 1) issue a letter of reprimand in lieu of a three-day suspension to Appellant⁴ and 2) suspend Appellant for five days without pay. The Commission has jurisdiction over these appeals pursuant to Sec. 230.44(1)(c), Stats., which provides, in relevant part, that employees who have attained "permanent status in class . . . may appeal a . . . suspension . . . to the commission, if the appeal alleges that the decision was not based on just cause."

Preliminary Matters

I. Bias

Winslow-Stanley argues that the two complaining employees are biased against her and filed their complaints as part of a campaign to get rid of her because she was seen as one of the Security Director's favored employees and because she had filed a complaint against Hansen's wife. She claims that the investigators' failure to delve into that bias tainted the entire investigation. Winslow-Stanley presented no evidence of bias on the part of any of the investigators and only argues that they were biased because they did not delve further into her underlying theory that the complaints were filed as part of a campaign to get rid of her. As such, her bias allegations are complaints regarding the sufficiency of the investigation. As will be discussed below, DOC is not required to conduct an investigation that meets the expectations of the employee being investigated.

II. Due Process

Winslow-Stanley argues that she was not afforded due process during the investigations because of: 1) the untimely reporting of the alleged misconduct by the complaining employees; 2) DOC's delay in providing dates and times of the alleged misconduct; 3) DOC's prohibiting Winslow-Stanley from making internal contacts at DOC during the investigation and while she was on administrative leave; and 4) the length of time it took DOC to conduct the investigations.⁵ Pre-discipline due process is satisfied when the employee receives "oral or written notice of the charges against [her], an explanation of the employer's evidence, and an opportunity to present [her] side of the story." CLEVELAND BD. OF ED. V. LOUDERMILL, 470

⁴ The Commission exercises jurisdiction over appeals of letters in lieu of suspension that do not result in loss of pay, i.e., constructive suspensions. RODGERS V. DOC, CASE NO. 98-0094-PC (PERS. COMM., 1/27/99).

⁵ The four due process theories listed here are a distillation of the theories that Winslow-Stanley identified during hearing.

U.S. 532, 546 (1985).⁶ As we noted recently, “failure to conduct the investigation in a manner deemed adequate by the person whose conduct is being investigated does not equate to a due process violation.” DOC (ALLEN), DEC. NO. 32557 (WERC, 5/09). Further, the Commission evaluates the imposition of discipline based on evidence presented at the Commission’s hearing, not the evidence produced by the DOC investigation. UW (BRISTER-COOPER), DEC. NO. 32290 (WERC, 3/08).

Winslow-Stanley addresses her due process concerns briefly, if at all, in her written arguments and cites no authority that would establish that these actions violate due process.⁷ During the investigations that preceded the issuance of both letters of discipline at issue here, Winslow-Stanley was confronted with the allegations against her during fact-finding and investigatory interviews as well as during the pre-disciplinary meetings. At each, she was provided the opportunity to respond to the allegations by denying the allegations or explaining her version of events.⁸ We therefore conclude that the pre-disciplinary actions taken by DOC satisfy any due process requirements.

Just Cause

In DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04), the Commission outlined the three-part legal analysis applied to determine whether disciplinary action was taken with just cause:

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, 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

⁶ The LOUDERMILL due process standard was developed to protect the property interest of an employee whose employment has been terminated. In these appeals, the property interest at issue, i.e., five days of lost pay, is considerably less significant.

⁷ Regarding Winslow-Stanley’s allegation that the employee complaints were improperly delayed, we decline “to create a statute of limitations on imposing discipline for an employee’s misconduct.” DOC (ALLEN), DEC. NO. 32557 (WERC, 5/09).

⁸ We also note that Winslow-Stanley was not prejudiced in her ability to present her case at hearing by any of the alleged flaws in the investigation. She had notice of the conduct for which she was disciplined prior to hearing and she made use of the opportunity to compel individuals to testify at the hearing.

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)*.

We find that the greater weight of the credible evidence establishes that Winslow-Stanley engaged in the conduct alleged by DOC in both of the letters of discipline at issue here, that the conduct in both warrants the imposition of discipline and that the level of discipline imposed in each is not excessive.

I. The Alleged Misconduct

Hansen's testimony is tainted by his overt hostility towards Winslow-Stanley and motivation to have her removed from Ethan Allen. Winslow-Stanley's testimony was inconsistent and directly contradicted other credible evidence in self-serving ways.⁹ Therefore, as described below, we have relied upon other credible evidence when making conclusions regarding contested facts.

A. Letter in Lieu of Three-Day Suspension

The conduct DOC alleges support its decision to issue a letter of reprimand in lieu of a three-day suspension to Appellant is described in Finding of Fact 20 and includes Winslow-Stanley kissing Hansen and engaging in off-color or sexual banter.¹⁰

1. Kiss Allegation

Amanda Lynch and Robert Evans,¹¹ two Youth Counselors on duty at the time, witnessed the incident and credibly testified that the kiss occurred. Lynch directly observed the conduct. Although Evans did not have a direct view, he was seated next to Hansen at the time and his testimony regarding contemporaneous comments and body language of Hansen and Winslow-

⁹ For example, regarding the kissing allegation, she first denied the allegation then she testified that she did not recall the kiss before finally stating that she didn't know if she had kissed Hansen. She also initially testified that she had seen DOC employees kiss while on duty, but then, when pressed, denied ever seeing DOC employees kiss. She denies calling Megonigle a "troll" but Megonigle and two other witnesses credibly testified that she did make such comments directly to Megonigle.

¹⁰ Winslow-Stanley points out that the letter of reprimand incorrectly cites a statement made by SYC Amanda Ayala as referring to Winslow-Stanley's banter being sexual. Ayala's statement was made during a fact finding interview in response to a question about whether there was "Any banter or sexual innuendo between line staff" and not in reference specifically to Winslow-Stanley. However, even removing this quote from the letter of reprimand, it is clear that the letter and investigation relate to Winslow-Stanley's inappropriate banter with Hansen.

¹¹ Winslow-Stanley argues that Evans' testimony must be discredited because he is a social friend of Hansen. The evidence establishes that any such social relationship is limited in nature and does not call into question his credibility or motive regarding his testimony. Further, there is no reason to doubt the credibility of Lynch's testimony.

Stanley convince us that the kiss occurred as described in the letter of reprimand.

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2. Banter Allegation

Winslow-Stanley admits becoming “one of the guys” with subordinates and engaging in “saucy,” “jocular,” and “teasing” banter with them. She also admits that the banter with Hansen went over the line on one occasion and does not deny that it at times became sexual. An example of this type of banter can be found in her comment to Hansen to the effect that “if you aren’t good for a roll in the hay, what the fuck good are you?” At hearing, she denied making the statement, but allowed that a statement that she did make could have been misinterpreted. She did not offer an example of a statement that she did make that could have been misinterpreted into the “roll in the hay” comment. We are therefore convinced that Winslow-Stanley made the statement or one substantially similar to it and that such a comment is clearly sexual in nature.

Winslow-Stanley also admits making comments to staff, including Hansen, that she “loves” them but denies making such comment to Hansen individually. Lynch testified that she heard Winslow-Stanley make such comments in a joking manner, but could not recall whether the comments were directed towards individual employees. We conclude that Winslow-Stanley did make comments that she loved them to subordinate staff, including Hansen. We also conclude that such comments are off-color, particularly when directed to subordinate employees in a workplace.

Based on the foregoing, we find, by a clear preponderance of the credible evidence, that Winslow-Stanley engaged in off-color or sexual banter as alleged in the letter of reprimand in lieu of a three-day suspension.

B. Five-Day Suspension

The conduct DOC alleges support its decision to issue a five-day suspension to Appellant is described in Finding of Fact 28 and includes Winslow-Stanley referring to Megonigle as a “troll” and telling him to “go back to your hole” on June 21, 2009,¹² threatening Megonigle with insubordination if he did not close a window in a youth’s room on September 21, 2009, and grabbing Megonigle by his sweatshirt causing him to step back and hit his back on March 4, 2010. Winslow-Stanley admits using the term “troll” to refer to power plant employees as a group and also to grabbing Megonigle in a playful manner, but denies the remainder of the allegations.

¹² Investigators attempted to identify the specific date of the incident by examining work and time records and concluded that June 21, 2009 was the most likely date of the incident. However, during the investigation the date was identified to Winslow-Stanley as June 12, 2009. Given Winslow-Stanley’s defense that she did not ever call any individual a troll and her denial that the incident occurred at all, we find that the specific date is inconsequential and did not prevent her from defending against the accusation.

The evidence establishes that Winslow-Stanley directly referred to Megonigle as a “troll” and told him to go back to his “hole” in June 2009.¹³ Megonigle testified that he was in the SYCs’ office having a conversation with SYC Gauthier and Winslow-Stanley when Winslow-Stanley called him a “troll” and told him to “go back to your hole.” Gauthier testified that Winslow-Stanley made the comments to Megonigle and that, at first, he thought the conversation was kidding in nature but determined by the look on Megonigle’s face that he was upset at the comments.

We also find that Winslow-Stanley threatened to write up Megonigle with insubordination if he did not close a window in a youth’s room in Vilas Hall on September 21, 2009. After a youth counselor did not close the window in a youth’s room, Winslow-Stanley asked Megonigle to close the window. Megonigle responded that closing windows in youth’s room was not part of his job. Winslow-Stanley then ordered him to close the window and that if he did not, she would write him up (i.e., discipline him) for insubordination. Because Power Plant Operators are “unprotected” employees and not permitted to have direct contact with youth, Torres, a Youth Counselor on duty at the time, had to secure the youth in the room while Megonigle closed the window. Torres didn’t recall any emergency situation that would have required the window to be closed. Based on this factual background, we conclude that Megonigle was ordered by Winslow-Stanley to close a window in a youth’s room and that Torres assisted him in doing so. We also credit Megonigle’s account that Winslow-Stanley informed him that he would be written up for insubordination if he did not close the window because it is consistent with her overall supervisory style.

Finally, we conclude that Winslow-Stanley grabbed Megonigle by his sweatshirt, causing him to step back and hit his back. Winslow-Stanley’s admits grabbing Megonigle by his sweatshirt and Nickel and Megonigle testified that the action caused Megonigle to step back and hit his back.¹⁴ Nickel was seated at a desk in the supervisors’ office facing Megonigle who was standing in the doorway to the office, about 20 feet from Nickel. Nickel saw Winslow-Stanley place her hands on Megonigle and push him into the wall. The action was unprovoked and uninvited by Megonigle.

¹³ Megonigle also complained that Winslow-Stanley called him a troll on two other occasions: 1) during the window closing incident described below and 2) during a conversation with Youth Counselor Pam Lagalbo. These two incidents were not cited in the letter of discipline as conduct for which Winslow-Stanley was being disciplined. DOC presented evidence at hearing that sufficiently establishes that the Lagalbo incident occurred and although we do not use this finding as a basis for upholding the five-day suspension, that incident lends additional credence that the incident cited in the letter of discipline did occur. We do not make any finding on whether Winslow-Stanley made “troll” comments to Megonigle during the window closing incident.

¹⁴ There was conflicting testimony on this fact. Megonigle testified that he hit his back on a shelf that protruded from the door. Nickel testified that Megonigle hit his back on the wall. We find that Megonigle did step back as a result of Winslow-Stanley grabbing him and that the distinction regarding whether he fell into the door or wall is without significance and can most likely be explained by the different vantage points of the witnesses.

Based on the foregoing, we find by a clear preponderance of the credible evidence that Winslow-Stanley engaged in the conduct alleged in the letter of discipline imposing the five-day suspension.

II. Just Cause for the Imposition of Some Level of Discipline

Given our conclusion that Winslow-Stanley engaged in the conduct alleged in both letters of discipline, we must next determine whether the conduct warrants the imposition of some level of discipline. The Commission applies the test set forth by the Wisconsin Supreme Court to determine whether there is just cause to impose some degree of discipline:

. . . whether some deficiency has been demonstrated which can reasonably be said to impair his performance of the duties of his position or the efficiency of the group with which he works. *SAFRANSKY V. PERSONNEL BOARD*, 62 WIS.2D 464 (1974) (*quoting* *STATE EX REL. GUDLIN V. CIVIL SERVICE COMM.* 27 WIS. 2D 77 (1965)).

There can be little doubt that performance and efficiency are impaired in workplaces where harassment and verbally and physically abusive conduct occurs. This is particularly true in a juvenile corrections setting where DOC is charged with protecting the public and rehabilitating youth to reenter society. To guard against these impairments, DOC has promulgated various rules, policies, and procedures governing employee conduct. Conduct that violates these regulations impair the performance of the employee engaging in such conduct as well as that of other employees who are subject to or witness such behavior. Additionally, such conduct that is witnessed by youth can only serve to impair DOC's ability to rehabilitate those youth.

Work Rule 2 requires employees to follow DOC policies and procedures including those that prohibit workplace harassment, Work Rule 13 makes it a violation to intimidate, interfere, harass, or use demeaning or abusive language when dealing with other employees, and Work Rule 14 prohibits horseplay and disruptive or unsafe behavior.¹⁵ DOC Executive Directive #7 (ED 7) also prohibits harassment and hazing and defines harassment, as is relevant to this matter, as “[o]ffensive verbal, physical or graphic conduct . . . when this conduct . . . has the purpose or effect of creating a hostile, intimidating or offensive working environment. . . .” ED 7 further provides that sexual harassment includes “unwelcome physical contact . . . of a sexual nature.” Ethan Allen Procedure 5.18 requires employees to “create and maintain a positive institution environment for everyone – youth as well as staff – by modeling professional behaviors and conduct.” Among the examples of prohibited unprofessional behavior are “[v]erbal or written harassment and offensive or intimidating behavior towards a youth or a fellow staff member” and “personally insulting language, voice tone, or body gestures when interacting with another staff member.”

We conclude that Winslow-Stanley's conduct of kissing Hansen violated Hansen's “presumptive zone of sexual privacy” where any “intentional and unwelcome touching in those areas would fall ipso facto within the directive's [ED 7] prohibition of ‘physical contact of a

¹⁵ The full text of these rules can be found in Finding of Fact 6.

sexual nature.’” DOC (ALLEN), DEC. NO. 32557 (WERC, 5/09). In ALLEN, we found that the “brief but intentional” and unwelcome touching of a co-worker’s buttocks violated the co-worker’s “presumptive zone of sexual privacy.” We further conclude that if such conduct is found to be intentional and unwelcome, “it is not necessary to delve further into the states of mind of either the person being touched or the person doing the touching in order to establish a violation of the directive.” Here, Winslow-Stanley’s lips came into contact with the side of Hansen’s face. Kissing is an intimate act and contact with another person’s lips is limited to those people with whom we share intimate or affectionate relationships. Therefore, we find that Winslow-Stanley violated Work Rules #2 and #13 and ED 7 when she kissed Hansen.¹⁶

Winslow-Stanley’s off-color and sexual banter with Hansen is verbal conduct that has the effect of creating an offensive work environment in violation of ED 7. Similarly, calling Megonigle a “troll” and telling him to go back to his “hole” are comments that have the effect of creating an intimidating work environment in violation of ED 7, and further, are demeaning language in violation of Work Rule #13.

Winslow-Stanley’s conduct of grabbing Megonigle by the front of his sweatshirt causing him to step back and hit his back is clearly an example of conduct that DOC would reasonably attempt to discourage and prohibit in an effort to maintain a safe workplace.

In sum, we conclude that Winslow-Stanley impaired her performance and the efficiency of her work group by violating Work Rules 2, 13, and 14 and that DOC had just cause to impose some level of discipline against Winslow-Stanley for those violations.

III. Excessive Discipline

In evaluating whether the discipline imposed was excessive, we consider “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, CASE NO. 82-237-PC (PERS. COMM. 6/9/83). Factors we also consider as part of this evaluation include disciplines imposed in other cases and the number of incidents for which the employer has successfully shown just cause. KLEINSTEIBER V. DOC, CASE NO. 97-0060-PC (PERS. COMM., 9/26/98) (citations omitted).

Winslow-Stanley’s status as a supervisor adds weight to the seriousness of her conduct. DOC is justified in holding its supervisors to higher standards than non-supervisory employees. DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04). Winslow-Stanley is responsible for modeling appropriate and professional conduct to both subordinate employees and youth in the

¹⁶ We acknowledged in ALLEN that this presumption could be rebutted by evidence that the “zone of sexual privacy has lost that status, or when the conduct has some legitimate exculpatory explanation.” The only explanation for the kiss is that Winslow-Stanley was demonstrating the misconduct committed by the youth being admitted to Martin Hall. We find that this is not a satisfactory explanation for the conduct. Winslow-Stanley could have simply described the contact in question or asked permission to demonstrate the contact on Hansen prior to kissing him.

institution. Her acts of misconduct occurred in areas where youth and staff were present demonstrating a disregard for that duty. As acknowledged by Winslow-Stanley, there needs to be a line between supervisors and subordinate employees. Her inappropriate banter with Hansen, use of derogatory names to refer to Megonigle, and inappropriate physical contact blurred that line. Such actions carry heightened significance when committed by a supervisor who has authority to influence disciplinary decisions.

Other elements adding weight to the seriousness of her conduct are that each discipline addresses multiple acts of misconduct of both a physical and verbal nature and the fact that DOC had issued a letter of reprimand to Winslow-Stanley just before her arrival at Ethan Allen for engaging in similar conduct by making an inappropriate comment to an adult inmate.

DOC jumped one level of discipline when it issued the letter or reprimand in lieu of a three-day suspension instead of a letter of reprimand in lieu of a one-day suspension. The jump was justified based on the nature of the conduct, including the kiss constituting quasi-sexual contact with a subordinate employee and the fact that DOC holds its supervisors to a heightened standard of behavior and expects them to model respectful behavior. DOC also reviewed four disciplines issued in other circumstances when deciding on the level of discipline to issue Winslow-Stanley. Although Winslow-Stanley contests the relevancy of two of the disciplines, she does not address the cited discipline where a supervisor was issued a 10-day suspension that was “not based on previous discipline” for engaging in a confrontation with a union steward that included physical contact and being loud and disruptive. The letter in lieu of a three-day suspension issued to Winslow-Stanley for kissing Hansen and engaging in disruptive banter is not excessive when compared with this discipline. Further, it is not uncommon for the Commission to uphold or impose discipline that jumps progressive disciplinary steps where the facts support such action. *See, e.g.*, DOC (FEDERLIN), DEC. NO. 30194-A (WERC, 11/04) and DOC (DILLMAN), DEC. NO. 31545-B (WERC, 8/08).

Finally, the disciplines here are distinguishable from those imposed in DOC (FASSBENDER), DEC. NO. 31270-A (WERC, 2/06), a case cited by Winslow-Stanley in support of her argument that the Commission should impose lesser disciplines for her misconduct. In FASSBENDER, the appellant had not been disciplined at all in her 16 years of employment with DOC and the two disciplines being reviewed were issued for unrelated misconduct.¹⁷ In this case, Winslow-Stanley had relatively recently been disciplined for similar misconduct and each of the disciplines were supported by multiple acts of similar misconduct.

In short, the record establishes that Winslow-Stanley violated her duties as a supervisor and employee by engaging in misconduct that had the effect of exacerbating an already tense workplace, failing to model professional conduct to subordinate employees, and impairing

¹⁷ The disciplines imposed by DOC that were reviewed in FASSBENDER were 1) a letter of reprimand in lieu of a three-day suspension for misusing a state vehicle and 2) a five-day suspension for simulating a backhanded slap to the side of two inmates' shoulders to demonstrate conduct the appellant witnessed. The Commission reduced the disciplines to a written reprimand and a letter of reprimand in lieu of a one-day suspension.

DOC's ability to maintain an efficient workplace in which to rehabilitate youth. For those reasons, the disciplines imposed were not excessive.

We conclude that DOC had just cause to issue Winslow-Stanley the letter of reprimand in lieu of a three-day suspension and, separately, the five-day suspension.

Dated at Madison, Wisconsin, this 4th day of November, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner