STATE OF IOWA

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

LEONARD WESSLING, Appellant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Appellee.	)))))))))	87-MA-10 ADJUDICATOR'S DECISION

Appearances

For Leonard Wessling

Thomas A. Vakulskas, Attorney
Jim Holmes, Witness
Gene Belknapp, Witness

For the Department of Transportation

Mark Hunacek, Attorney
Barbara Ettleson, Witness
Elaine Lundstrom, Witness
James Bump, Witness
Cecil Sutliff, Witness

I. JURISDICTION

On or about June 2, 1986, Leonard Wessling's employment with the Iowa Department of Transportation (Department or DOT) was terminated. Wessling filed a timely appeal of the DOT's decision to terminate his employment, and the case is properly before the Public Employment Relations Board. A hearing on the matter was held before me on November 18, 1986.

II. ISSUE

The issue in this case is whether the DOT had just cause to terminate Leonard Wessling's employment. 581 IOWA ADMIN. CODE §11.1 (1986).

III. FACTS[1/]

At the time of his termination, Leonard Wessling had been employed by the DOT for about 26 years. On May 5 and 6, 1986, Wessling attended a course conducted by the Iowa Merit Training System in Sioux City, Iowa. Barbara Ettleson and Elaine Lundstrom were the instructors of the course, entitled "Supervisor's Problem Solving." On the first day of the course, Wessling inquired where Ettleson and Lundstrom were staying. When they told him, Wessling responded that their hotel was in a bad part of town and was known to be an area frequented by prostitutes. Wessling told Ettleson and Lundstrom that he did not want to see them out in the area. This comment was apparently intended and was taken by Ettleson and Lundstrom to be informational.

The following morning, May 6, Wessling made comments to Lundstrom and Ettleson that they found offensive. The first occurred early in the day. Wessling observed Lundstrom yawning, and made a remark to the effect that she must be tired because she had been out late working on Fourth Street. Lundstrom took this comment to be an inference that she had been engaged in prostitution. Wessling testified that he did not intend any offense towards Lundstrom.

Later in the day, Ettleson was setting up a projector to show a film. Wessling asked whether it was a movie where "the nigger doesn't get the job." Wessling testified that he had intended to say "minority," but said "nigger" because his dentures slipped. I find this excuse both unlikely and irrelevant.

1/ The testimony of the Appellant's neighbor, wife and co-worker's wife is not relevant to this case and was not considered in making the findings of fact or conclusions of law in this decision.

After the course, Ettleson and Lundstrom wrote a memorandum to Thomas Donahue, the Director of the Department of Personnel. The Memorandum describes the incidents occurring at the course and states that Ettleson and Lundstrom were "especially concerned that such remarks are coming from a person with supervisor stature," and that they found "Wessling's behavior inappropriate and frankly verges on harassment and clearly indicates attitudes toward minorities which I doubt the agency wants to support." After an investigation by the DOT, Wessling was fired.

At the time of his discharge, Wessling was a maintenance supervisor, and he had worked in a supervisory capacity for about twenty years. Wessling's supervisor, Cecil Sutliff, testified that Wessling had been counselled several times regarding his language, and had been sent to merit training courses to try to improve in this area. Sutliff testified that Wessling's language was frequently inappropriate toward both male and female co-workers; that he used terms such as "cocksucker" and "cunt". Some of the employees Wessling supervises had complained about Wessling's language. This concern is reflected on Wessling's job evaluations, which list one of his major job responsibilities as "refrain from using derogatory remarks concerning your crew."

One of the employees filed a sexual harassment complaint, which complained about sexually explicit photographs in the shop, as well as comments the employee found offensive. Mr. Wessling was implicated in this matter through the cover memorandum attached to the summary of the investigation initiated by the sexual harassment complaint. The memorandum states that "it is advised that Lenoard Wessling be made aware that his past behavior was inappropriate and any further behavior of this nature will result in the application of progressive discipline consistent with the DOT policies."

There is no mention of any specific allegations against Wessling in the memorandum or summary of the investigation, and these matters were not clarified through testimony. It is therefore impossible to assess the seriousness of the allegations. Wessling and one other employee were then sent to a training session on preventing sexual harassment before he otherwise would have received such training. Sutliff testified that Wessling had expressed the opinion that such training is a joke and a waste of time. In light of his behavior, it is clear that he did not take is seriously.

In addition to the above, which did not result in discipline, but rather corrective action, Wessling was disciplined several times:

> On August 31, 1981, Wessling received a written reprimand for personal use of a state vehicle.
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> On February 4, 1983, Wessling received a letter of concern because the DOT had been unable to contact Wessling during non-duty hours. Because of the nature of the work performed by the DOT, it is important that they be able to contact employees in emergency situations.
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> On March 14, 1984, Wessling received a one day suspension for failure to utilize safety equipment (hardhat).
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> On November 2, 1984, Wessling was suspended for one week because he closed the shop for one day without authorization so that he could attend a funeral.
>
> On January 2, 1985, Wessling was suspended for two weeks for failure to perform duties of his position. This suspension was appealed, and his discipline was subsequently reduced.

Wessling had excuses or explanations for all of these incidents. However, none but the January 2, 1985 incident were appealed, so for the purposes of this case will be considered to be both factually correct and justified.

There were also allegations raised at hearing that Wessling had applied for overtime that he had not worked, and that this overtime pay had been

denied. Wessling testified that he did not recall such occurrences, but allowed that might have happened. Because of the lack of documentation, and the fact that no disciplinary action was taken against Wessling for these alleged infractions, this evidence was not considered in reaching the decision in this case.

Aside from the above, Wessling was considered a satisfactory employee.

IV. POSITIONS OF THE PARTIES

The DOT argues that it had just cause to terminate Wessling's employment. It maintains that its obligation to promote efficiency of services cannot be met if DOT employees behave as Wessling did. Further, the DOT argues that the public has an interest in seeing that the employees of public agencies conduct themselves in a manner befitting the public trust. The DOT also argues that retaining Wessling could subject the DOT to liability for a sexual or racial discrimination charge in the future. The DOT also argues that deference should be given its decision, and that the decision to terminate Wessling should be affirmed if supported by substantial evidence in the record.

Wessling argues that termination was too severe a punishment for his actions. Further, Wessling argues that his age and the fact that he had recently recovered from surgery meant that he could not harass anyone.

V. DISCUSSION

Section 19A.14(1) of the Iowa Code states that the Board's review of disciplinary actions

> ...shall be based upon a standard of just cause. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age or any other reasons not constituting just cause, the employee may be reinstated without loss of pay

> or benefits for the elapsed period or the public employment relations board may fashion other appropriate remedies.[2/]

This section of the law clearly gives the Board the authority to make a de novo determination of whether just cause existed for the discipline imposed.

In determining whether just cause exists for discipline rendered, arbitrators have looked at such factors as:

1. Whether there was a full and fair investigation before the decision to discipline the employee was made.

2. Whether the reasons for the discipline were adequately communicated to the grievant.

3. The grievant's employment record, including years of service, performance, and disciplinary record.

4. Whether progressive discipline was followed, or not applicable under the circumstances.

5. Mitigating circumstances which would justify a lesser penalty.[3/]

The first two factors can be dealt with quickly. The DOT an investigated the incidents which occurred at the merit training session. Wessling's supervisors discussed the occurrences with the other employees present discipline was imposed. Further, there is no dispute as to whether Wessling made the statements. In addition, Wessling testified that he was fired for his comments at the training session, so there can be no question that Wessling was fired for these incidents, and not for other reasons.

Wessling was considered a satisfactory employee, and had worked for the DOT for twenty-six years. Aside from the incidents for which Wessling was

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2/ Senate File 2175, 71st General Assembly, 1986 Regular Session, as amended by House File 2066. See also, Section 20.1(3) IOWA CODE (1985).

3/ See Hyatt Hotels Palo Alto, 85 LA 11, 15 (Oestreich, 1985).

disciplined, no testimony or evidence was presented that Wessling performed his job in an unsatisfactory manner.

Wessling has been disciplined on several occasions, for various offenses. The previous disciplines range from an oral reprimand to a suspension of at least one week. He had not been reprimanded or suspended for any incidents concerning his language.

One factor which weighs in favor of the discipline imposed is Wessling's past disciplinary record. He has been disciplined several times for behaving in a manner unbecoming a supervisory employee. He closed the shop without permission, was disciplined for failing to perform the duties of his position, and he used unacceptable language. Further, the DOT had tried several ways to change Wessling's language. Wessling had been counseled by his supervisors regarding his language, and he had been sent to a merit training program specifically to improve in this area. The topic had been added to his job evaluation form, making one of his major job responsibilities to "refrain from using derogatory remarks concerning your crew."

Factors which favor a lesser penalty include Wessling's length of service with the DOT and the context of the comments, and the fact that Wessling has not been disciplined for this type of behavior in the past. Wessling had been employed by the DOT for twenty-six years and aside from the disciplines detailed above was considered a satisfactory employee.

In addition, I cannot find that the comment made to Lundstrom regarding walking along Fourth Street constitutes sexual harassment. Although the Supreme Court recently recognized that a sexually harassing environment can constitute sexual harassment, Meritor Savings Bank v. Vinson, 54 U.S.L.W. 4703 (1986), Wessling's comment to Lundstrom was not made in a work context and was not part of a pattern of behavior. Although the comment was of

questionable taste, it cannot be considered sexual harassment.

The question whether the film to be shown was the one "where the nigger gets the job" is one that Wessling knew or should have known would be offensive, especially given the context in which it was made. However, the comment was not made in the work setting. Had Wessling referred to a co-worker as a "nigger", this would be a much different case.

Because of Wessling's long service to the DOT, and the context in which he made the comment, I find the penalty of discharge too severe. However, Wessling should be aware that such conduct is not condoned by the DOT, and the discipline should be severe enough to have a rehabilitative effect. I therefore determine that a lengthy suspension is the most appropriate discipline.

Based on the foregoing, I issue the following:

IV. AWARD

Leonard Wessling shall receive a three month, unpaid suspension, and shall receive full back pay and benefits for the remaining time he has been out of work.

DATED at Des Moines, Iowa this 24th day of March, 1987.

Amy J. Mills

AMY J. MILLS, ADJUDICATOR