STATE OF WISCONSIN COUNTY OF DANE CITY OF MADISON

MADISON POLICE AND FIRE COMMISSION

EDWARD D. DURKIN,

Complainant,

v.

JAMES L. GILBERT,

Respondent.

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The City of Madison Board of Police and Fire Commissioners having heard the statement of charges of Edward D. Durkin, Fire Chief of the City of Madison, against Lt. James L. Gilbert, said statement of charges having been heard on January 20, 21 and 22, 1982, Chief Durkin appearing in person and by Assistant City Attorney William Jansen, and Lt. Gilbert appearing in person and by Attorney Walter Harvey,

And the Board having fully considered the testimony and evidence offered at the hearing and the arguments of counsel and having further deliberated the decision in closed sessions, we hereby issue the following Decision, Findings of Fact and Conclusions of Law.

DECISION

This case involves charges by Fire Chief Edward Durkin against Lt. James L. Gilbert which allege that Lt. Gilbert failed to follow certain written and verbal orders of Chief Durkin and an Administrative Memorandum of Mayor Skornicka relating to harassment of city employees on the basis

of sex, race, religion, color, age, handicap or national origin. Specifically, Lt. Gilbert is charged with failing to heed the Administrative Memorandum's directive to all city department and divison heads, as well as others charged with supervision of city employees, "to take affirmative steps to insure a harassment-free environment for all city employees."

Lt. Gilbert is also charged with violations of Rules 18, 24 and 39 of the Madison Fire Department, all of which relate to prompt obedience of orders of superior officers, and all laws, rules, ordinances and regulations issued by lawful authority.

The specific facts giving rise to the charges occurred on October 7, 1981 in a conversation at No. 8 Fire Station between Lt. Gilbert, Chief of Training Tom Moore, and Capt. Douglas Bailey. Although there was some dispute on the facts regarding the precise language in the conversation between Lt. Gilbert, Chief Moore and Capt. Bailey, on the basis of the testimony we believe the facts are that Lt. Gilbert did say "cunt do not belong in the Fire Department" and that then both Chief Moore and Capt. Bailey immediately warned Lt. Gilbert that there was a female firefighter on duty in the adjoining watch room, which had a thin non-soundproof wall separating it from the room in which the conversation took place, and that expressions such as made by Lt. Gilbert were contrary to official department policy and could cause both him and the department a lot of trouble. We are satisfied that Lt. Gilbert's defiant response was "Who gives a shit."

A report of this incident reached Chief Durkin, who made his own investigation, which included, among other things, a recorded interview

with Lt. Gilbert. Subsequent to his investigation, he brought the charges which are the subject of this proceeding.

During the hearing, there was considerable testimony about a verbal directive from Chief Durkin to all employees in the department that in line with the Affirmative Action Policy of the department, the use of the terms "cunt" and "nigger" by Fire Department personnel on duty would not be tolerated. This order was never put in writing but was given to senior officers of the department with the express directive that it be disseminated throughout the entire force. The transmission of this verbal order to personnel in the field depended upon accurate hearsay. Unfortunately, there is no such thing as accurate hearsay. In this particular instance, this Commission has no assurance that Lt. Gilbert ever heard a clear direction that the term "cunt" should never be used, although Lt. Gilbert did acknowledge that he knew Chief Durkin was reported to be "on a crusade" to clean up language of this sort, and he most certainly knew the official policy of the Department and the City with respect to Affirmative Action in hiring female firefighters. He also knew official Department policy on sexual harassment generally, and discussed it with Chief Durkin in his interview.

The specific charges relied upon by Chief Durkin are that Lt. Gilbert failed "to take affirmative steps to insure a harassment-free environment" for firefighters. The Commission wishes that the meaning of this phrase contained in the Mayor's Administrative Procedural Memorandum No. 3-29 were more clear, particularly as it applies to the conduct of Lt. Gilbert in this instance. However, despite the difficulties in

applying this language, we feel compelled to find that the conduct of Lt. Gilbert in the particular incident in question does not comport with "taking affirmative steps to assure a harassment-free environment for firefighters", but in fact indicates a step toward encouraging an environment in which sexual harassment is more likely to occur.

Lt. Gilbert's conduct also violated Rules 18, 24 and 39 of the Fire Department, in that he clearly did not promptly and unequivocally obey the orders of superior officers, nor the Mayor's memorandum incorporated in Chief Durkin's written order of April 28, 1981.

We note in passing that the disquieting testimony of several supervisory officers during the hearing openly expressing disagreement with the official policy of the City of Madison in hiring female firefighters is evidence that much work needs to be done in the effort "to assure a harassment-free environment for firefighters". We hope that our decision in this case makes accomplishment of that work easier.

Respondent Gilbert has proposed or implied certain constitutional objections to these proceedings and to the charges brought against him. He argues that the rules and order alleged to be violated are unconstitutionally overbroad and ambiguous. We find the memoranda of the Mayor and the Chief to be reasonably clear general policy directives and the language of Fire Department rules to be reasonably specific. We construe this language not to restrict protected speech. (Compare Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1634, 40 L.Ed. 2d 15 (1974).) Despite any ambiguities in the language of the memoranda or the rules and despite any difficulty in applying this language to some hypothetical conduct,

there is no doubt that the conduct found by the Board in this case clearly violates the memoranda and rules. Therefore, we do not believe that the memoranda and rules whose violation is charged against Gilbert are unconstitutionally overbroad, ambiguous or vague as applied in this case (see Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 930 (1973), cited in Aiello v. City of Wilmington, 623 F.2d 845, 850 (3rd Cir. 1980).

The second constitutional argument raised by Gilbert is the suggestion that his conduct constituted protected free speech. We note that the conduct complained of in this case is not merely speech, but demeanor, attitude and actions including speech and as evidenced by speech. The conduct and speech in question occurred on duty in the place of employment and was not public speech nor was it a part of relevant constructive policy debate or criticism. The City has shown that it has a major interest in affirmative action generally, in enforcement of the memoranda of the Chief and Mayor, and in the rules of the department, both as expressions of policy and with respect to potential liability of the City for acts of its employees. The policy and rules of the City are essentially unenforceable if they are subject to conduct on duty such as that found in this case on the part of employees especially supervisory employees, who do not personally condone or agree with the policy and rules. Discipline generally and especially the thorough and wholehearted execution of policy by officers are especially important and literally vital in the fire service. In balancing the interest of the City and its Fire Department as expressed through the memoranda of the Mayor and

Chief and the rules of the Fire Department against the interests of Gilbert in the conduct and speech found in this case, as directed by the court in Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed. 2d 811 (1968), cited in Givhan v. Western Line Consolidated School District, 439 U.S. 410, 414, 99 S.Ct. 693, 696, 58 L.Ed. 2d 619 (1979), we find no question that the interests of the City must prevail and that Gilbert's conduct and speech are not constitutionally protected.

With respect to the penalty to be assessed, the Commission bears in mind Lt. Gilbert's 25 years of service without any adverse facts in his record. We believe Chief Durkin's proposed reduction in rank is excessive as a penalty, particularly in view of Lt. Gilbert's acknowledgment under oath, that while he had earlier believed female firefighters could not do the job and ought not be hired, he now has changed his mind and knows they can do the job, and he believes that he can work well with them. It should be noted in connection with the penalty that Commissioner Richards specifically dissents from the imposition of any suspension or other penalty except a reprimand. In all other respects this decision is unanimous.

FINDINGS OF FACT

1. The Commission therefore finds that the statement of charges against Lt. Gilbert dated October 23, 1981, have all been sustained by the evidence.

2. We further find that the verbal order of Chief Durkin forbidding

the use of the word "cunt" on the job does not unconstitutionally abridge First Amendment rights of Lt. Gilbert nor do restrictions on expressions of disagreement with official Fire Department Affirmative Action hiring policy by officers who have firefighters under their command.

CONCLUSIONS OF LAW

Accordingly, the Commission therefore orders as follows:

1. The motion of Lt. Gilbert to dismiss the charges is hereby denied.

2. Because the charges against Lt. Gilbert have been sustained, he is hereby reprimanded and suspended for one week, without pay.

Dated January 26, 1982.

BY THE BOARD OF POLICE
AND FIRE COMMISSIONERS:

James Baugh, President

Virginia B. Hart, Vice President

Norman C. Anderson, Secretary

Ann J. Haney

Gordon Richards

FROM THE OFFICE OF THE MAYOR

ADMINISTRATIVE PROCEDURE
MEMORANDUM NO. 3-5

SUBJECT: HARASSMENT ON THE BASIS OF RACE, SEX, RELIGION, COLOR, AGE, DISABILITY, NATIONAL ORIGIN OR SEXUAL ORIENTATION

Policy: The City's Affirmative Action Plan commits all departments of City government to ensuring a harassment-free work environment for all persons, regardless of their race, sex, religion, color, age, disability, national origin or sexual orientation. Our diverse City employee base must be supported in a harassment-free work environment.

The constitutions of the United States and the State of Wisconsin protect the right of all citizens, including public employees, to speak freely on matters of public concern. We all recognize and value those rights. Citizens are not deprived of fundamental rights by virtue of working for the government.[1]

The constitutionality of the policy set forth in this Administrative Procedure Memorandum was upheld by the Wisconsin Court of Appeals in James L. Gilbert v. Board of Police and Fire Commissioners of the City of Madison and Edward D. Durkin, Case No. 84-769, Court of Appeals, Dist. IV, January 14, 1986. The court's opinion stated:

> "... The free speech rights of public employees are not absolute. Pickering v. Board of Education, 391 U.S. 563, 568 (1968) We must balance the interests of the public employee, as a citizen, in commenting upon matters of public concern and the interests of the government employer in promoting the efficiency of the public services it performs through its employees ..." (slip op. p.8).

Rule: Any employee who shall engage in harassment[2] on the basis of race, sex,[3] religion, color, age, disability, national origin or sexual orientation; who permits employees under his/her supervision to engage in such harassment; or who retaliates or permits retaliation against an employee who reports such harassment is guilty of misconduct and shall be subject to remedial action, which may include the imposition of discipline up to and including discharge.

Employees are not permitted to retaliate against witnesses or persons who participate in the investigation of harassment. Such retaliation is also misconduct and may be subject to discipline, up to and including discharge.

Employee Complaints: All employees are urged to report instances of harassment to their department or division director. City employees may also make such complaints directly to the City Affirmative Action Director.

Obligations of Every Supervisor:

1. Supervisors Shall Respond to Employee Complaints

   A supervisor is obligated to notify the department head or division head at any time that an employee complains of harassment or of conduct which could constitute harassment.

2. Supervisors Shall Take Responsibility for Assuring a Harassment-Free Work Environment

Supervisors should demonstrate by their own conduct that they are committed to providing a work environment free of harassment. Supervisors shall, at all times, refrain from harassment and retaliation and should counsel and instruct subordinates in defining and preventing harassment.

3. Supervisors Shall Respond to Harassment by Persons Who Are Not City Employees

When employees report harassment by citizens, supervisors shall use all appropriate means to stop the harassing conduct. The supervisor shall promptly inform the department head or division head about the report and what was done to resolve it.

Obligations of Department and Division Heads: It is the duty of the City department and division directors, as well as others charged with the supervision of City employees, to take affirmative steps to ensure a harassment-free environment for all City employees. While such affirmative management will take many forms, the following steps are required of all department and division directors.

1. Accept and announce responsibility for maintaining a harassment-free work environment in his/her department, division or work unit.

2. Circulate this memorandum to all employees, at least once each year.

3. Cooperate with the Affirmative Action Department and the Human Resources Department in the development and implementation of necessary orientation, training, and education programs aimed at defining and preventing harassment.

4. Announce that all reported incidents of harassment will be fully investigated and that proven violations will be met with appropriate sanctions, including, if indicated, disciplinary actions.

5. Require in writing that supervisors report to department/division directors all instances of reported harassment. The department/division director shall notify the City Affirmative Action Director immediately of the existence of reported instances of harassment.

6. Department/division heads are responsible for complaint investigation and resolution, including discipline, if indicated. They shall cooperate with the Affirmative Action Department in the conduct of investigations, but department/division heads bear final responsibility for disciplinary decisions.

7. The department or division head shall consult with the Affirmative Action Director to advise and assist in the investigation. The City Attorney, Labor Relations Manager, Human Resources Director and any other appropriate City official also may be called upon by the department head and the Affirmative Action Director to assist in the investigation.

Obligations of Affirmative Action Director: Whenever the Affirmative Action Director receives notification that an employee has complained of workplace harassment, or of conduct which could amount to harassment, the Affirmative Action Director shall inform the employee's department/division head.

The Affirmative Action Director shall develop and carry out training and education programs for all employees, including specialized training for supervisors, to help employees define and prevent workplace harassment.

The Affirmative Action Director shall assist the department/division head as necessary in investigating the complaint.

Confidentiality: All employees shall cooperate in investigating complaints of harassment. The nature of harassment violations, particularly those involving sexual harassment, requires a high degree of confidentiality and flexibility in approaches to investigation and resolution.

All employees shall keep their communications in such an investigation confidential and shall disclose them only to City officials and employees who need the disclosure in order to perform their duties.

Required Training: Any new or temporary Supervisor, Department, Division or Unit Head shall receive training regarding the application of this policy and regarding their responsibilities under this policy. The appointing authority shall notify the Affirmative Action Director and make arrangements for such training at the time of hire or assignment to supervisory responsibilities. Said training shall be provided by the Affirmative Action Director or her/his designee. This training shall be provided within 30 days of the effective date of the hire, promotion, transfer or temporary assignment to supervisory responsibilities. The appointing authority shall also ensure that, at the earliest date that training is available, arrangements are made for new or temporary supervisors to attend the City of Madison training module on How to Conduct the Employee Misconduct Investigative Interview.

Formal Complaints:

1. When harassment is reported, the Affirmative Action Director, or her/his designee, shall inform the Complainant of all appropriate agencies where formal complaints may be filed and inform the person of any time limit requirements to file a formal complaint with those agencies.

2. In the event that the employee files a grievance, or a formal complaint or lawsuit with an outside agency, the Affirmative Action Department, City Attorney's Office, Human Resources Department, Labor Relations Unit and the department involved will work cooperatively to conclude the investigation.

Paul R. Soglin
Mayor

APM No. 3-5
August 30, 1996