

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
LT. PHILLIP A. CLARK,  
Appellant,  
v.  
Secretary, DEPARTMENT OF  
TRANSPORTATION,  
Respondent.  
Case No. 79-117-PC  
\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal of the suspension of appellant without pay for one day.

FINDINGS OF FACT

1. Appellant, Lt. Phillip A. Clark, is and has been for at least five years a Lieutenant and the Executive Officer of District 2 (Waukesha), of the Wisconsin State Patrol, with permanent status in the classified service.

2. On April 5, 1979, a letter of suspension was issued to Lt. Clark, signed by Captain Jack Jorgensen, his superior officer and Commander of District 2, and by Major John N. Sterba, Director of the Bureau of Enforcement, suspending the appellant for one day without pay, for violation of Department of Transportation Work Rule I 1 and 2. (Ex. 1, 11).

3. The letter of suspension cited five areas in which appellant's performance was considered to be inadequate: 1) changing a sergeant's duty schedule on December 17-19, 1978, so that the sergeant was on vacation and on standby status for the night-time "W" shift assigned to District 2; 2) problems with submission of weekly time and activity reports and monthly vehicle expense reports, especially with respect to one sergeant in the

District; 3) unsatisfactory compliance from line supervisors and line personnel in filing required vehicle reports; 4) failure in January, 1979, in the "Trooper Walker Incident" to take appropriate action in investigating and disciplining a subordinate supervisor's handling of an incident of a trooper who had been drinking before reporting for duty; 5) problems with submission to state headquarters of improperly completed leave of absence forms. (Ex. 11).

4. Major Sterba has promulgated at least two unwritten policies with respect to the operation of the State Patrol Districts: a) once "W" shifts (night shifts) of duty have been assigned to a particular District, the duty sergeant's schedule cannot be change except for good reason; b) vacations will not be extended past the end of a calendar year, except for good reason.

5. Lt. Clark had scheduled a sergeant for vacation time off prior to December, 1978, but the vacation schedule was changed while Lt. Clark was on vacation where the duty sergeant was assigned to special duty during the originally scheduled vacation time. When the sergeant later requested a vacation schedule, Lt. Clark did not ask why the original vacation had not been taken, but informed the sergeant he could not carry over vacation to the following year, and therefore scheduled him for vacation on December 17-18, 1978, and placed him on stand by "W" shift duty.

6. Lt. Clark did not discuss the change in "W" shift duty with Major Sterba. Capt. Jorgensen was on vacation at the time the decision was made and Lt. Clark was in charge of operations of the District in his absence.

7. Capt. Jorgensen had spoken to Lt. Clark on occasions prior to December, 1978, about recurring problems with timely reporting of weekly

time sheets and monthly vehicle reports and instructed him to take steps to remedy the problems; Lt. Clark had also received telephone calls from State Patrol Headquarters in Madison about late reports.

8. Lt. Clark's personnel file contains information showing that in the past, certain assignments were not carried out as designated. (Ex. 6, 8, 9).

9. Lt. Clark was not personally responsible for filling out the time sheets and vehicle expense reports for his subordinates, but was administratively responsible for timely submission of these forms, properly filled out.

10. On February 6, 1979, Lt. Clark sent memos to Sgts. Lovas and Schreiber concerning late submissions of their January, 1979, vehicle expense reports. (Ex. 15).

11. On February 8, 1979, Lt. Clark had one of a series of periodic discussions with Clay Erickson, Administrative Assistant 1 with District 2, concerning submission of vehicle expense reports by District 2 personnel; Capt. Jorgensen was present at this conversation.

12. Sometime in February, 1979, Lt. Clark assigned one sergeant to District 2 headquarters one day a week for a month to review all weekly time sheets and vehicle expense reports, as a disciplinary measure; that sergeant had no further problems with late reports.

13. Since approximately January or February, 1979, there has been considerable improvement in the timely submission of forms by District 2 personnel.

14. Capt. Jorgensen felt that the action taken by Lt. Clark, in findings 10 and 12 "makes a big difference" because it shows that Lt. Clark had taken steps to remedy certain problems prior to his suspension; the Captain was not aware these steps had been taken when he recommended the suspension.

Capt. Jorgensen had inquired of Lt. Clark what steps he had taken to correct reporting problems.

15. Lt. Clark had not reported to Capt. Jorgensen the steps he had taken in February, 1979, to deal with reporting problems, and Capt. Jorgensen had not investigated the status of weekly time sheets and monthly vehicle reports before recommending the suspension of Lt. Clark. (Ex. 2, 11).

16. The Walker incident involved Trooper Walker reporting for duty on January 11, 1979, after having drunk several cans of beer, the subsequent discovery of his condition and the investigation and recommendation for discipline made by Sgt. Holt, Trooper Walker's line supervisor.

17. Colonel Goetsch, deputy administrator of the Division of Enforcement and Inspection, was the officer who first noticed Trooper Walker's condition and called it to the attention of Sgt. Holt and recommended certain tests be administered to Trooper Walker on the spot to determine his body alcohol levels on January 11, 1979.

18. On January 12, 1979, Sgt. Holt talked to Capt. Jorgensen and to Lt. Clark about the Trooper Walker incident and prepared a report on the incident which he submitted to Capt. Jorgensen, with a copy to Lt. Clark. (Ex. 13).

19. Colonel Goetsch also spoke to Capt. Jorgensen about the incident.

20. Captain Jorgensen approved Sgt. Holt's report describing the Walker incident, but did not pursue the investigation of Sgt. Holt's conduct in the matter; he discussed the situation with Lt. Clark, then waited to see how the appellant would pursue some of the questions raised in the discussion.

21. Captain Jorgensen waited a few days after the incident, and was concerned with Lt. Clark's failure to question the way in which Sgt. Holt

handled the investigation, particularly his early failure on the day of the incident to ask questions to satisfy his suspicions that Trooper Walker had been drinking.

22. On or about January 17, 1979, Capt. Jorgensen suggested to Lt. Clark some questions which could be asked of Sgt. Holt with respect to his handling of Trooper Walker on the day of the incident; Lt. Clark then wrote a memo to Sgt. Holt asking him to answer those questions, (Ex. 3); Sgt. Holt answered the memo on January 23, 1979. (Ex. 4).

23. On January 23, 1979, Lt. Clark submitted a memo to Capt. Jorgensen concerning the actions of Sgt. Holt, in which he neither made a specific recommendation to discipline Sgt. Holt or not to discipline him, and stated his reluctance to second-guess Sgt. Holt's handling of the incident.

24. No information was withheld from Lt. Clark by any person in the course of his investigation of the actions of Sgt. Holt.

25. Lt. Clark did not seek to interview Col. Goetsch during his investigation.

26. In late January, 1979, Capt. Jorgensen sent Lt. Clark a memo praising the progress made in correcting certain problems with line supervision not related to the incidents in the April, 1979, suspension, but also criticizing Lt. Clark's handling of the "Trooper Walker Incident," which was one of the bases of the suspension.

27. There is no written policy with respect to signing of hazardous leave request forms and the general practice for several years has been for either the sergeants, the Lieutenant or the Captain to sign the forms, depending on who was present to do so.

28. Sergeants are authorized to sign various forms, including reprimands,

step 1 grievances, expense vouchers, and other leave forms and are not forbidden to sign hazardous leave forms.

29. Captain Jorgensen was unaware of past practice of sergeants signing hazardous leave forms.

30. Captain Jorgensen originally recommended a two-day suspension for Lt. Clark, based not only on the items described in the suspension letter, but also on two prior reprimands issued to Lt. Clark with respect to his carrying out certain administrative functions; the reprimands were issued in July, 1975, and in January, 1977. (Ex. 8, 9).

31. Disciplinary action against Lt. Clark was discussed by Major Sterba, Col. Goetsch, William Harvey, Administrator of the Division of Enforcement and Inspection, and John Roslak, Director of Personnel Management for the Department of Transportation.

32. Factors taken into account in issuing the one-day suspension included oral discussions based on personal knowledge of appellant by his supervisors, written reports, previous disciplinary record, examples of reports from Lt. Clark, evaluation of appellant's performance based on the position description of his duties and based on expectations of his performance of certain management functions in District 2.

33. District 2 has the largest population of any State Patrol District in the state and has the largest volume of investigations of any District. Unlike Districts 1 and 3, there is no full-time administrative sergeant assigned to assist the Executive Officer in the daily administration of the District.

34. Lt. Clark's workload and "span of control" (number of people supervised), were considered and compared with workloads of other Districts in arriving at the decision to suspend him.

35. Lt. Clark did not violate Work Rule I 1, "'Insubordination, including disobedience, failure or refusal to follow written or oral instruction...or to carry out work assignments,' but did violate Work Rule I 2, 'Neglecting job duties or responsibilities.'"

36. Appellant erred in his decisions to reschedule the assigned sergeant from regular "W" shift to standby status and his error tended to impair the efficient performance of his duties and the operation of the district.

37. Lt. Clark was responsible for a recurrent administrative weakness of late filing of reports from his district to state headquarters, which weakness impaired the efficient performance of his duties and the operation of the district.

38. Lt. Clark failed to take proper initiative and failed to make a decisive recommendation in the matter of Sgt. Holts' conduct in the Trooper Walker incident; these failures tended to impair the operation of the district chain of command.

39. Lt. Clark did not improperly permit sergeants to sign hazardous leave forms.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the subject matter of this appeal pursuant to s.230.44(1)(c), Wis. Stats.

2. The burden of persuasion is on the respondent to show by the greater weight of credible evidence that there was just cause for disciplining the appellant.

3. The respondent has met its burden of persuasion and has shown just cause for discipline.

4. The discipline actually imposed was not excessive.

#### OPINION

The reasons given by management for the disciplinary action taken against appellant concern his failure to promptly follow through to correct administrative problems, errors of judgment in handling certain situations, and failure to do certain tasks within the scope of his responsibilities in the command of the State Patrol.

The standard of just cause is applied to determine the appropriateness of the discipline imposed upon an employe in the classified service. Safransky v. Personnel Board, 63 Wis. 2d 464 (1974). If it is determined that there was just cause for the imposition of discipline, the Commission must determine whether there was just cause for the amount of discipline actually imposed. Holt v. Dept. of Transportation, Case No. 79-86-PC, 11/79. In determining whether just cause exists in a given case, the Commission looks to see if the conduct proven is related to the performance of the position and whether the conduct has undermined the efficient performance of the employe's duties. Safransky, 62 Wis. 2d at 475.

The suspension was based on the total impact of five instances of alleged inadequate performance by appellant. The Commission will not decide whether any single instance justifies a one-day suspension. Rather, it will consider whether the combined weight of those instances which it finds inadequate justifies the imposition of discipline and of the amount of discipline actually imposed. Appellant is an executive officer with management level responsibilities which cannot be defined solely in terms of the performance of discrete assigned tasks. Part of the examination of Lt. Clark's performance involves evaluation of his judgment and initiative in certain situations.



Modification of the duty schedule of the assigned "W" shift sergeant for December 17-19, 1978, was an exercise of judgment by appellant. Since both the change of duty and the extension of vacation time were permitted for good reason, both alternatives were available to appellant. The "W" shift assignments are designated by the Bureau director, Major Sterba. The districts take turns on "W" shift duty. The policy is to schedule one sergeant to a particular shift, which makes that sergeant the duty sergeant for the entire state from 11 p.m. to 7:30 a.m., (Tr. 82-83). It is an important assignment with state-wide impact. Although there was no direct testimony that a consultation with Major Sterba was required before changing the duty schedule, the lack of it was a rational factor to consider in assessing the quality of appellant's decision, (Tr. 119-121). The positions of both Capt. Jorgensen and Lt. Clark require the exercise of managerial judgment and discretion. Capt. Jorgensen, as appellant's superior officer, was not "second-guessing" Lt. Clark, but was appropriately assessing the performance of a subordinate. Capt. Jorgensen concluded that appellant made the wrong decision, without benefit of discussion with the originator of the state-wide policy. The appointing authority and others in the chain of command concurred with the Captain. The Commission concludes that in rescheduling the December, 1979, "W" shift appellant tended to undermine the efficient performance of his duties and the operation of District 2.

Recurrent untimely filing of various required reports does reflect on Lt. Clark, the officer with administrative responsibility for the day to day operation of District 2. (Tr. 80). Appellant did not deny or contradict the testimony of Capt. Jorgensen that there have been such recurrent problems beginning at least in 1978. Such problems clearly affect the efficient

operation of the District. Isolated instances of late reporting are not necessarily significant. The disciplinary action imposed was not based on isolated instances. Lt. Clark pointed to two occasions in February, 1979, where he took steps to improve the reporting practices of the District. (Findings 10, 12). He did not respond, however, to the broader allegations of a pattern of poor reporting prior to February, 1979. Capt. Jorgensen admitted that the steps taken by Lt. Clark in February, made a difference to his conclusion that Lt. Clark had failed to take action to correct the problems. These actions by Lt. Clark did not, however, negate the fact that they were not taken promptly after the Lieutenant was instructed to correct the problems. Capt. Jorgensen testified that when he asked Lt. Clark what steps had been taken to correct the problems, he was not notified of the actions taken. Appellant then asked Capt. Jorgensen:

Did you investigate further and check with any of the Sergeants whether I had taken any action? (Tr. 112), emphasis added.

Having asked the appellant what steps he had taken, Capt. Jorgensen did not have reason to inquire further. If he did not get the information from Lt. Clark, he could properly assume that nothing had been done. Lt. Clark, under these circumstances cannot successfully place responsibility on Capt. Jorgensen for having failed to investigate before recommending discipline. With respect to administrative problems with timely reporting, respondent has shown that Lt. Clark failed to act promptly to correct a pattern of weak management in a particular area which directly affected the efficient performance of appellant's position.

The Trooper Walker incident was an isolated episode but a serious one. Because Col. Goetsch was the first person to act on his observation of

Trooper Walker's alcohol breath, the investigation of the entire series of events began above Lt. Clark's level in the chain of command. Lt. Clark's position at the hearing and in his post hearing brief was that his posture prevented him from properly handling his investigation of Sgt. Holt's conduct. The testimony of Col. Goetsch, Capt. Jorgensen and Sgt. Holt presented the story in great detail from three different perspectives. None of that testimony explains why Lt. Clark, after receiving Sgt. Holt's memo of January 12, 1979, (Ex. 13), and speaking with Capt. Jorgensen and Sgt. Holt, did not on his own initiative ask the relevant and incisive questions suggested by Capt. Jorgensen. (Ex. 3). Lt. Clark did not satisfactorily explain this failure. Nor did he make a convincing case that certain facts or conversations had been withheld from him during his investigation. Appellant expressed reservations about "second-guessing" Sgt. Holt's exercise of judgment. (Ex. 5). He also expressed his belief in the Sergeant's integrity. The Sergeant's integrity was not an issue in the investigation. The appellant's position as executive officer of District 2 includes evaluating the judgment exercised by subordinate officers. That drinking before coming on duty is a serious rule violation is a fact with which all parties agreed. It is therefore a serious matter not to pursue an admitted suspicion that such drinking has occurred. Sgt. Holt in his report the day after the incident (Ex. 13), admitted he was suspicious but did nothing until Col. Goetsch took charge of the situation. Lt. Clark was not kept from investigating and he should have, on his own initiative, asked the question why had Sgt. Holt not pursued his suspicions when they first arose. The appellant's inclination to let the situation go without formal discipline, (Ex. 7), weakened the effective working of the chain of command. After receiving the January 29, 1979, memo from Capt. Jorgensen

(Ex. 6), the appellant still could have corrected his handling of the situation but failed to do so. Taking all of these factors into account, the Commission concludes that the respondent properly considered this incident as part of its reasons for disciplining the appellant.

The last incident cited in the letter of suspension involves improper procedures in signing hazardous leave forms. The respondent argues that Lt. Clark should have known that no one below his rank was authorized to sign these forms because of the amounts of money potentially at stake in approving leave based on injuries sustained on duty. Capt. Jorgensen testified that sergeants are not forbidden to sign these forms. (Tr.151-2). He also testified that he assumed Lt. Clark would know who could sign the forms, "possibly through conversations with State headquarters about previous ones coming in." (Tr. 96). There was, however, uncontradicted testimony that there was a long-standing practice of sergeants signing the forms when superior officers were not available to do so. (Tr. 161-162). Capt. Jorgensen was unaware of this practice. It is not clear from the record whether there actually was a policy originating from State headquarters with respect to signatory authority for these forms. There is no written rule. The only supervisor above the appellant to testify to the question was Capt. Jorgensen, who was not from State headquarters. Even if there were such a policy, it was not clearly communicated to the field. It is difficult to believe that Lt. Clark would have successfully disregarded such a policy for four of five years. The record does not show that appellant was aware that his handling of hazardous leave request forms was in violation of a policy or rule of the State Patrol, and therefore rejects this ground for the imposition of discipline on appellant.

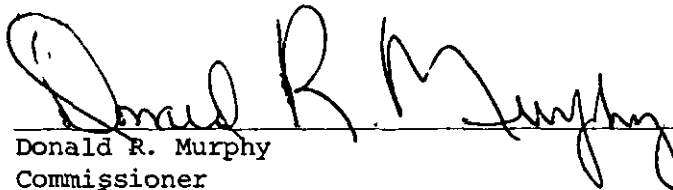
The first four incidents of inadequate performance cited in the suspension letter do constitute just cause for discipline. The appellant, since becoming Lieutenant, has had two prior reprimands based on other incidents of failure to properly perform certain administrative functions. Because appellant is in a management position, his inadequate job performance has wide-range effects. For the same reason, he may justifiably be subject to close scrutiny in those areas which are exclusively management responsibilities. Appellant's actions or inactions showed weaknesses in taking initiative and in the exercise of judgment which were not corrected after both verbal and written notice of the dissatisfaction of his superiors. Under all the facts and circumstances of the case, the Commission concludes there was just cause for discipline and that the discipline imposed was not excessive.

ORDER

The action of the respondent in suspending appellant for one day without pay is affirmed and this appeal is hereby dismissed.

Dated October 17, 1980

STATE PERSONNEL COMMISSION

  
Donald R. Murphy  
Commissioner

  
Gordon H. Brehm  
Commissioner

AR:mgd

Parties: Phillip Clark  
2111 Gray Fox Court  
Waukesha, WI 53186

Lowell Jackson  
DOT, Secretary  
4802 Sheboygan Avenue  
Madison, WI 53707