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 *
 RONALD CLARK, *
 *
 Appellant, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF *
 REVENUE, *
 *
 Respondent. *
 *
 Case No. 80-97-PC *
 [80-98-PC] *
 * * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to s.230.44(1)(c), Wis. Stats., of a five-day suspension without pay. A hearing on this appeal was held by Commnr. Gordon H. Brehm in Milwaukee on September 22, 1980, and the parties submitted post-hearing briefs.

FINDINGS OF FACT

1. Appellant, Ronald Clark, was at all times relevant employed as an auditor by the Department of Revenue, (DOR).
2. Appellant was suspended for five days from April 7-11, 1980, for failure to timely file his 1978 Wisconsin income tax.
3. Appellant received a degree in accounting in 1977 from St. Norbert College and began employment with DOR on July 5, 1977. After finishing a training program, appellant served as an Office Auditor 1, auditing individual income tax returns until about January, 1979, when he became a Field Auditor, auditing corporate returns.
4. On January 7, 1980, Thomas Reid, an administrative assistant for DOR, sent a letter to appellant that respondent had no record of his filing a 1978 income tax return and asked Clark to telephone him by January 15, 1980. (Respondent's Exhibit 1).

5. On or about January 17, 1980, Reid telephoned appellant and discussed his failure to file a return. Appellant informed Reid that he had mailed his return that day.

6. By letter dated March 10, 1980, appellant was notified of his five-day suspension by Daniel Smith, administrator of the DOR Income, Sales, Inheritance and Excise Tax Division. By letter dated March 26, 1980, Smith delayed the date of appellant's suspension to April 7-11, 1980.

7. In a letter received March 31, 1980, appellant appealed his suspension to the Commission.

8. The DOR Employe Handbook, which appellant admitted receiving a copy of after beginning work for respondent, states in part:

"The Secretary of Revenue and his staff, management personnel of the department through the unit supervisor level, attorneys, auditors, and other employes in prominent positions have their tax returns audited annually. . ." (Emphasis supplied) (Respondent's Exhibit 4).

CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to s.230.44(1)(c), Wisconsin Statutes.

2. The burden of proof is on the respondent to show just cause for the discipline imposed.

3. Respondent has satisfied its burden.

4. There was just cause for the 5-day suspension without pay imposed in this case.

OPINION

The burden of proving just cause for employe discipline such as a suspension is on the employer (respondent). See Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971).

In the instant case, appellant proceeded to put in his case first, without objection. This does not alter the fact that the burden of proof is upon respondent and the Commission has used that standard in evaluating the evidence presented in this matter.

Appellant has admitted that he failed to timely file his personal Wisconsin income tax return for 1978. He also admitted that he was aware of the April 15, 1979, deadline for filing such return and that he failed to request an extension in time for filing his return although he was aware that he could do so.

Appellant raised a number of objections to the action by respondent in this case. The Commission will respond to each one of them.

1. That respondent violated the State of Wisconsin Guidelines for First Line Supervisors in Administering Corrective Discipline.

These guidelines state, in part, that "Suspensions are used when lesser discipline has failed to correct a problem or when a serious matter or persistent problem must be acted upon..." (Emphasis supplied).

There can be no question here that it is a serious matter when an employe, especially a professional employe such as an auditor, of the Department of Revenue fails to timely file his own income tax return. The State Personnel Board stated in Richard Hay v. Secretary, Department of Revenue, Case No. 77-92,

"The board has no difficulty in deciding that it is appropriate for the respondent to hold to a high degree of accountability a tax representative such as the appellant with respect to the handling of his own tax matters. Otherwise, public confidence in the department could be seriously impaired."

In the Hay case, the Personnel Board upheld the 5-day suspension of Hay, who was a DOR employe, for filing negligently prepared Wisconsin income tax returns.

The Supreme Court has pointed out:

". . .persons assume distinguishing obligations upon the assumption of specific government employment. Conduct that may not be deleterious to the performance of a specific governmental position, i.e. a department of agriculture employe may be extremely deleterious to the performance of another governmental occupation, i.e., teacher or houseparent in a mental ward." Sefransky v. Personnel Board, 63 Wis. 2d 464, 475, 215 NW 2d 379 (1974).

2. Appellant contends that s. 71.11(44), Wis. Stats., prohibits respondent from using confidential information concerning income tax returns for disciplinary actions. It is true that income tax returns are required by law to be kept confidential. However, s.71.11(c) 1 and 5 and 71.11(e) provide:

"(c) Subject to pars. (d) and (e) and to regulations of the department, any income tax or gift tax returns or any schedules, exhibits, writings or audit reports pertaining to the same on file with the department shall be open to examination by any of the following persons or the contents thereof divulged or used as provided in the following cases and only to the extent therein authorized.

(1) The secretary of revenue or any officer, agent or employe of the department,

(5) The person who filed or submitted such return, or to whom the same relates or by his authorized agent or attorney,

(e) The use of information obtained under par. (c) or (d) is restricted to the discharge of duties imposed upon the persons by law or by the duties of their office or by order of a court as provided under par. (c)6." (Emphasis supplied).

It seems to be reasonable that respondent would consider it a duty to require its employes to file timely individual income tax returns. These are the very same people who enforce the tax code on the rest of the citizens of Wisconsin. Appellant does not deny that he knew that all employes of respondent routinely had their income tax returns audited annually. This was, in effect, a requirement of the job. Since this is a fact, appellant cannot now fairly argue that information gained in those routine audit cannot be used against

him in a disciplinary action.

3. Appellant contends that he was denied due process because he did not know his actions would result in any discipline.

Appellant testified that he had never been told that there was any DOR work rules regarding department employe filing individual tax returns. He points out that the suspension letter makes no reference to any employe work rules.

Respondent's Exhibit 3, Inside DOR, (March, 1980), supports this contention that no such specific work rules existed at the time appellant was notified of his suspension or at least the existence of such rules had not been properly communicated to DOR employes.

This defense, however, does not stand up when judged against the standard of good common sense. Certainly, it is not asking to much that employes of the Department of Revenue would know without being specifically told that they must obey the income tax laws of the state or else they will harm the image of the department they work for. Common sense tells us that it is an implied responsibility of any DOR auditor not to engage in conduct which would jeopardize his or her job performance and the image of the department.

Appellant should have realized that failing to file his own return on time was an act which would make him subject to a disciplinary action by his employer in order to maintain the credibility of DOR with the public it serves.

4. Appellant maintains that the disciplinary action was not for just cause and that the violation does not justify the severity of the discipline.

Appellant had admitted that he did not file his personal income tax return on time. He offered no defense for not doing so.

Since there is no dispute that appellant did not file a timely income tax return, the questions that remain to be answered are whether respondent had a right to discipline appellant and, if so, whether the discipline imposed was proper.

As stated earlier in this decision, respondent has a legitimate concern in demanding that its employes file their individual income tax returns on time. Since respondent is charged by law with the responsibility of tax law enforcement, it is not unreasonable that it expect its own employes to remain in compliance with the laws that they enforce on the job. This is especially true in the case of auditors and other professional employes who are expected to know the law that they work with daily. Therefore, once respondent became aware of appellant's violation, it had the authority to impose some kind of discipline.

In the instant case, appellant had an excellent work record with no record of previous violations. Respondent's decision to impose a five-day suspension follows a pattern established in the previously mentioned Richard Hay v. Secretary, Department of Revenue case where a five-day suspension was imposed. Admittedly, it could be argued that this is a strong penalty for a first offense. This is a serious violation, however, which requires a strong disciplinary action to emphasize the seriousness of the violation.

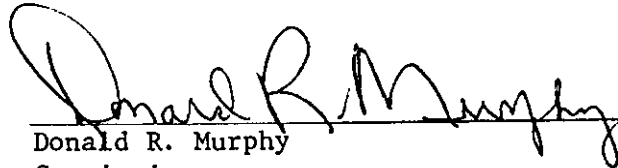
Clark v. DOR
Case No. 80-97-PC
Page 7

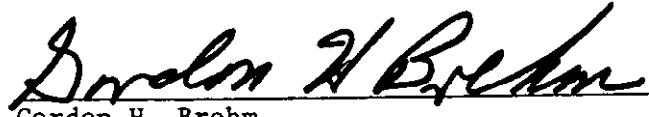
ORDER

Respondent's action imposing a five-day suspension without pay is
sustained and this appeal is dismissed.

Dated June 3, 1981

STATE PERSONNEL COMMISSION


Donald R. Murphy
Commissioner


Gordon H. Brehm
Chairperson

GHB:mgd

Parties

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