

- d. Stopped at Rhine Auto, Inc. in Plymouth to inquire about the availability of automobiles suitable for use at a demolition derby;
 - e. Stopped at the home of Robert and Esther Hermann in Manitowoc to pick up payment for a car which appellant had sold to Mr. Hermann;
 - f. Stopped at Cleveland Auto Sales in Manitowoc to pick up payment for a car which appellant had sold to Robert Hermann;
 - g. Stopped at Joe Van Horn Chevrolet in Plymouth to purchase an automobile on their lot.
3. Respondent's work rules at all times relevant to this matter.

included the following:

- a. Work Rules, Department of Transportation, Article I, Section 3: Employees of the Department of Transportation are prohibited from . . . engaging in unauthorized personal business. . . .
- b. Work Rules, Department of Transportation, Article III, Section 1: Employees of the Department of Transportation are prohibited from . . . abuse or misuse of state or private property, equipment, or materials.
- c. Work Rules, Division of State Patrol, Article I, Section 1: Employees shall conduct themselves both on and off duty, in such a manner as not to reflect unfavorably on the Division. Unbecoming conduct shall include that which tends to bring the Division into disrepute or reflects discredit upon the employe as a member of the Division, or that which tends to impair the operation and efficiency of the Division or employe.

Prior to engaging in the subject actions, appellant had received a copy of these work rules.

4. Although the record indicates that these work rules were not consistently enforced in other State Patrol Districts, it is also clear from the record that these work rules were consistently enforced in District 3 and that it was the policy of Captain DeGuire, the Commander of District 3 since 1973, that the conduct of any personal business while on duty and in uniform

would be regarded as a violation of these work rules and would subject the violator to possible disciplinary action.

5. On December 20, 1976, and March 13, 1978, appellant received letters of reprimand from Captain DeGuire for conducting personal business while on duty and in uniform. These letters advised appellant that future violations of respondent's work rules could result in more severe disciplinary actions.

6. In a memo dated April 1, 1982, appellant was advised by Lieutenant Ronald Kuhn, Deputy Commander of District 3, that he was being suspended for one day without pay. This memo also stated in part that:

Over a time frame of at least three years you have, while on duty in uniform and with a State Patrol cruiser, conducted personal business on state time. This personal business consisted of occasional contacts with auto dealers and salvage yards in Sheboygan and Manitowoc Counties. The contacts related to inquiries on the availability and price of old vehicles, the purchase of some automobile parts, and compensation for the sale of previously sold automobiles. In addition, you have transported some of these purchases with your State Patrol cruiser.

A concurrence memo was signed by John Roslak, Director of respondent's Bureau of Personnel Management, and William A. Harvey, administrator of respondent's Division of State Patrol, on April 1, 1982.

7. The record does not show that appellant was charged a reduced price for the subject automobiles or automobile parts.

8. Automobile dealers and automobile salvage dealers are regulated by respondent pursuant to §§218.01 and 218.20, Stats..

9. In an interim decision dated July 26, 1982, the Commission ruled that appellant filed a timely appeal of his suspension.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. The respondent has the burden of proving, by a preponderance of the evidence, that there was just cause for the appellant's suspension for one day without pay, and that it was not an excessive disciplinary action.

3. The respondent has sustained its burden of proof.

4. There was just cause for the appellant's suspension for one day without pay, and the suspension was not an excessive disciplinary action.

OPINION

In disciplinary appeals, the Commission is required to apply a two step analysis:

First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. Holt v. DOT, Case No. 79-86-PC (11-8-79).

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline follows:

". . . one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works." State ex rel Gudlin v. Civil Service Comm., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974).

Appellant acknowledges that he conducted personal business while on duty and in uniform and using his assigned state car for transportation. This is a clear violation of respondent's work rules. Appellant alleges as a justification for his actions that other members of the State Patrol were not disciplined for engaging in similar actions and that it had become an accepted and acceptable practice. However, the instances appellant cites in support of his justification occurred in districts other than District 3.

The record clearly shows that Captain DeGuire, the Commander of District 3, regarded such conduct as unacceptable and as a violation of the work rules which would subject the violator to possible disciplinary action. The record also shows that the members of the State Patrol under Captain DeGuire's command clearly understood that this was his policy. There is no basis in the record from which to conclude, therefore, that appellant would be justified in believing that his actions in violation of the work rules were acceptable actions in District 3 and would not subject him to possible disciplinary actions. This is particularly true in view of the fact that appellant had been reprimanded in 1976 and 1977 for conducting personal business while on duty and in uniform. ^{FN}

^{FN} The Commission deems it appropriate to add the following as a footnote to the proposed decision:

The record indicates that the following discipline has been imposed in District 3. The following were offered as examples only and were not intended to constitute an exhaustive listing.

- (1) a member of the State Patrol was suspended for 5 days for meeting with a district attorney for the purpose of discussing charges filed against her some while she was on duty and in uniform and using her assigned state car for transportation; and
- (2) a member of the State Patrol was disciplined for giving his son a ride to a school bus stop in his trooper's assigned state car and while on duty and in uniform.

The record does not indicate that there were instances in District 3 in which the commander or deputy commander were aware of the fact that members of the State Patrol had engaged in personal business while on duty and in uniform but took no disciplinary action against such employe.

Would appellant's actions have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works? It should be noted that, as a supervisor, appellant's duties include providing a positive example for those under his supervision. Violating a work rule certainly does not provide such a positive example. The time appellant devoted to these personal errands, although not substantial, was nonetheless time taken away from the performance of his official duties. In addition, a citizen/taxpayer's regard for and confidence in the State Patrol would hardly be enhanced by observing appellant conducting personal business while on duty and in uniform. Finally, respondent cites as further justification for the discipline imposed the fact that the personal business the appellant engaged in involved contact with business regulated by respondent. There is merit to respondent's contention that appearing in the uniform of the State Patrol could be interpreted by some business persons to signal that this customer expected special treatment because of the authority he wielded vis a vis their businesses. The record does not show, however, that the appellant ever requested or received such special treatment from any of the businesses in question. It is clear from the foregoing that the actions of the appellant under consideration here did have a tendency to impair the performance of the duties of his position and the efficiency of the group with which he works.

In view of the fact that appellant's actions constituted clear violations of respondent's work rules and that appellant had been warned in 1976 and 1978 that future violations of these work rules could result in disciplinary action more severe than a reprimand, appellant's one-day suspension was not excessive.

Finally, it should be noted that, aside from the actions which were the subject of the reprimands and suspension, respondent agrees with appellant's co-workers that appellant is a conscientious and valued employe.

ORDER

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

DATED: Nov. 30, 1983 STATE PERSONNEL COMMISSION

LRM:jab


LAURIE R. McCALLUM, Commissioner


DENNIS P. McGILLIGAN, Commissioner

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