STATE OF WISCONSIN PERSONNEL COMMISSION

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ROBERT S. FAUBER

Appellant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 82-138-PC

DECISION
AND
ORDER

A proposed decision and order in the above matter was issued by the examiner on February 14, 1984. The appellant filed objections and a request for oral argument before the Commission. After several delays, the oral arguments were heard on May 23, 1984.

After considering the arguments by counsel and conferring with the examiner, the Commission adopts the proposed decision and order (a copy of which is attached) with the following addition after the last paragraph on page 31:

> In its decision in Barden v. UW-System, 82-237-PC (1/9/83), the Commission established that there were at least two factors to consider in determining whether the discipline imposed was excessive:
>
> > In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior work record with the respondent.
>
> In the present case, the appellant had worked for the respondent from approximately 1965 until his discharge 17 years later. While appellant's length of service is to be given weight, it must be balanced against the long period of

appellant's employment in which he was performing his responsibilities at a level below that established by his superiors. As reflected in the findings of fact, appellant was performing below his established goals during most of the six year period in which Mr. Danielski was his supervisor. In addition, Mr. Danielski testified that when he first assumed his position as supervisor, he reviewed each employe's personnel records. He stated that based on those records, he concluded that for the most recent years preceding that review, the appellant was not a productive employe.

Appellant's performance problems related directly to the goal of the appellant's employing unit, i.e. to insure that taxpayers located in the unit's geographical area were properly discharging their tax obligations. When appellant's performance problems are viewed over the extended time period involved in this case, the degree of his dereliction becomes quite significant.

Dated: August 21, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

KMS:jab
FORMS

LAURIE R. McCALLUM, Commissioner

DISSENT

This dissent does not take issue with the majority decision that respondent has established just cause for discipline of the appellant. However, under all the facts and circumstances noted below, discharge constituted excessive discipline. The action of the respondent should be modified by providing for a suspension of 30 days without pay.

The undersigned would substitute the following section entitled "Degree of Discipline" for its counterpart which begins on page 29 of the decision.

Degree of Discipline

In determining whether the degree of discipline imposed against the appellant was excessive, the Commission cannot second guess the employer and substitute its own independent judgment on the matter but can only determine whether the evidence in the record justified the action that was taken. Ruff v. Inv. Bd, 80-105, 160, 222-PC (8/6/82) affirmed, Ruff v. Personnel Commission, 81CV4455 (Dane County Circuit Court, 7/23/82).

In Alff v. DOR, 78-277, 243-PC, (10/1/81) affirmed, Alff v. Personnel Commission, 81 CV 5489 (Dane County Circuit Court, 1/3/84), in a case involving the discharge of the head of an audit bureau, the Commission discussed whether the amount of discipline imposed was excessive where the bureau head was charged with inadequate performance. Citing Hess v. DNR, 79-203-PC (8/19/80), the Commission stated the standard of review as whether under all the facts and circumstances of a particular case, the respondent's decision to discharge the appellant was not "marked by excess," nor did it exceed "the proper or reasonable limit or measure." Alff, supra at 43-44. The Commission went on to find that the extent of the problem and the recalcitrance of the appellant were significant factors supporting discharge and outweighed mitigating factors which were present including the length of the appellant's service, his generally favorable performance evaluations and the long-standing procedure that he followed. The Commission also noted that prior to determining to discharge the appellant, the respondent considered the alternative of demotion, but was unable to identify a suitable position for demotion and in addition felt that the problems with appellant's performance were so substantial that discharge was mandated. Id. at 13.

The Commission discussed further this "balancing test" approach in determining whether the discipline imposed was excessive in Barden v. UW-System, 82-237-PC (1/9/83). In that decision, the Commission established that there were at least two factors to consider in determining whether the discipline imposed was excessive:

> In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior work record with the respondent.

Applying the above standard to the instant case, the Commission finds, for the reasons listed below, that there was not just cause for the discharge of the appellant.

First, the Commission must consider the appellant's prior work record with the respondent. Barden, Id. In this regard the undersigned notes the appellant's length of service with the respondent--17 years--and the absence of prior discipline over this period of service (something which the majority opinion completely ignored).[FN] The majority stated "while appellant's length of service is to be given weight, it must be balanced against the long period of appellant's employment in which he was performing his responsibilities at a level below that established by his supervisors." This contention, however, is not supported by the record. For example, the majority rely on Mr. Danielski's testimony that the appellant was not a productive employe for the period of time immediately preceding Mr. Danielski assuming his position as supervisor. This testimony appears to be nothing more than subjective opinion. There is no persuasive

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[FN] There are a number of "facts" included in the dissent which are not found in the Findings of Fact contained in the decision but which are supported by the record and should be included in said Findings.

evidence in the record that appellant performed his responsibilities "at a level below that established by his superiors" (emphasis added) during this period of time. There also are no comparisons available, such as those found in Finding of Fact 19-26, showing appellant's performance relative to comparable employes alleged to be non-productive during the period of time in question.

The majority also notes that "appellant was performing below his established goals during most of the six year period in which Mr. Danielski was his supervisor." However, the record indicates that appellant's performance during the first two years of Mr. Danielski's supervision over him was not uniformly poor as suggested by the majority. In addition, contrary to the majority's assertion, appellant's work performance during two years of this period (1979 and 1980 - See Findings of Fact 30-33) was satisfactory.

In view of the above, the undersigned does not agree with the majority opinion's definition of what is meant by "the extended time period involved in this case" covering appellant's performance problems. Actually, the period of time involved is quite less--three or four years at most. When appellant's performance problems are viewed in this context, and balanced with appellant's lengthy service with respondent without prior discipline, the degree of his dereliction is not quite as significant as the majority would have one believe. Thus, applying the Barden test, the undersigned feels that discharge is too severe a discipline to impose in the instant case.

The undersigned also points out that unlike Alff, supra, there is nothing in the record to suggest appellant was recalcitrant when presented with criticism of his work performance. To the contrary, the record

indicates that appellant often responded favorably to clearly enunciated criticism. See Findings of Fact 27, 29-34 and 51.

Two other considerations that are important in determining the level of discipline imposed here according to the majority opinion are (1) the prior discipline imposed against the appellant and (2) the warning given the appellant that continued substandard performance could lead to discharge. In this case, the March reprimand was the only measure of discipline imposed against the appellant prior to his June discharge.

The Commission has previously ruled that there is no absolute requirement under the civil service code for progressive discipline. Alff, supra, at 47. In Alff the Commission refused to impose progressive discipline procedures where the applicable rules failed to explicitly require such a procedure. However, the Commission did not exclude the possibility that progressive discipline might be appropriate in some cases.

In the instant case, the respondent's policy on disciplinary action involved an emphasis on corrective or progressive discipline beginning with a verbal warning, written warning, suspension or other form of discipline leading to discharge. The primary purpose of this form of discipline was to help employes to correct a deficiency or other inappropriate behavior or action by being "fair, patient and tolerant" in its administration. The respondent generally followed progressive steps in disciplining an employe except where the severity of the offense warranted immediate discharge.

Having adopted a progressive discipline policy, that policy necessarily becomes part of the just cause standard. However, respondent failed to follow its own progressive discipline procedure. Nor did respondent offer any evidence as to why it made an exception to its normal discipline process in the instant case. This is not the type of extremely serious

offense which calls for summary discharge such as stealing, striking a foreman or persistent refusal to obey a legitimate order, etc. Rather, this is a less serious infraction of proper work conduct which calls, at least initially, for some milder penalty aimed at correction. Indeed, the respondent apparently started down the road on progressive discipline--a written warning in 1978 to appellant to "improve his performance or face the consequence." However, the respondent went no farther. There is no evidence in the record that respondent even considered a lesser form of discipline short of discharge.

Progressive or corrective discipline has as its primary purpose the imposition of a penalty to correct the employe's wrongdoing, rather than wreaking vengeance on the employe or attempting to deter others by making an example of the errant employe. Respondent is obligated to follow its own policy in this area unless it can show a very good reason for not doing so. This is particularly true where, as here, the appellant showed an ability to respond to criticism.

The other consideration discussed by the majority was the warning given the appellant in July of 1981 that continued substandard performance could lead to discharge. The record is clear that the appellant was put on notice at that time to improve his work performance, particularly in the area of completed referrals, or face discharge. The record is also clear that said warning, and all subsequent warnings prior to appellant's discharge, was not designed to give appellant a chance to improve his performance but to build a record upon which to sustain his discharge. This approach, of course, is inconsistent with the theory of progressive discipline. For example, the respondent in its December '81 job evaluation set, in the opinion of the undersigned, unrealistic goals for the appellant.

Nowhere in said evaluation did respondent indicate that substantial progress and/or effort in meeting those goals would be satisfactory. Again, in March of 1982 appellant was given a written reprimand which set a number of goals to be met in an impossibly short period of time--two months. Yet at a time when appellant was close to meeting some of those goals--his completions were just below the minimum standard of 40--he was discharged.

The majority also discussed the issue of whether employes with similar poor work records were disciplined or discharged. The majority reached no conclusion with respect to this issue because: "Nothing in the record indicates what discipline may have been imposed against other DOR employes charged with comparable conduct." The record, however, supports an opposite conclusion. At hearing, the appellant raised the issue of other employes with poor work records being treated differently (more leniently) than him. In particular, appellant cited the only other employe in Group G where performance statistics were in the same range as the appellant, William Ruskiewicz, who retired on February 16, 1983. Have established on the record that there was at least one other employe with a similar poor work record who apparently was not disciplined or discharged like appellant, the burden then shifted to respondent to justify why it did not treat the two employes in the same manner. Reinke v. Personnel Board, 53 Wis. 2d 123, 132 (1971). The record indicates that respondent did not meet this burden.

The record also indicates that appellant attempted at hearing to identify other employes with comparable work records to appellant for the purpose of showing that appellant was treated more harshly than other employes when he was discharged. Respondent objected on the basis that employe evaluations were confidential. The Hearing Examiner sustained the

objection. The undersigned is of the opinion that this ruling was incorrect and should be overturned. The appellant was entitled to attempt to find out whether other employes in appellant's group had problems with work performance i.e. old referrals and completions over the period of time in question and whether they were disciplined like the appellant regarding same. The undersigned is of the opinion that this could have been accomplished in such a way so as to maintain the confidentiality of the employes' records.

This is a close case. The respondent is entitled to a productive employe. However, involuntary termination of an employe's employment status by discharge is commonly referred to as the capital punishment of employer/employe relations. As such there are certain minimal elements of fairness that respondent must follow. This is particularly true where, as here, the statute requires just cause for the discharge of employes. §230.44(1)(c) Stats. One factor is that the discipline imposed may not be excessive. Another is that an agency must follow its own discipline procedures in discharging an employe. Thus, where an agency voluntarily adopts a progressive discipline procedure, the Commission should require that it be followed as part of the just cause standard. In the instant case, the respondent failed on both counts.

Based on all of the foregoing, the action of the respondent should be modified by providing for a suspension of 30 days without pay.

Dated: August 21, 1984 Dennis P. McGilligan
DENNIS P. McGILLIGAN, Commissioner

DPM:jab
FORMS

STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT S. FAUBER,

Appellant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 82-138-PC

PROPOSED DECISION AND ORDER

This matter is before the Commission as an appeal of a discharge decision. The parties agreed to the following issues for hearing:

1. Whether there was just cause for the discharge of the appellant.
2. Whether the discipline imposed was excessive.

After the hearing was completed, both parties filed briefs.

FINDINGS OF FACT

1. Respondent Department of Revenue (DOR) employs tax representatives to perform tax compliance work by assisting business and individual taxpayers in properly discharging their tax obligation under the income, sales and excise tax laws and by verifying state taxes paid by smaller organizations engaged in the manufacture, distributions or sale of taxable products.

2. Tax representatives in the field work out of district offices, but are assigned a specific geographic area, or CAN (Compliance Area Number).

3. Work is funneled to the tax representative in the field via "assigned referrals" from DOR's central compliance office in Madison. Assigned referrals include both "field referrals", which call for the

service of a document or the picking up of a return and "warrant referrals" which mean that a judgment or tax lien has been filed against a particular taxpayer and that the amount due should be collected.

4. Field referrals may be designated as a Guide 16, meaning that it is to be completed within three weeks, or a Guide 24 which is to be completed within two months. DOR does not consider a field referral to be excessively "old" until the time guidelines are exceeded by approximately two months.

5. The tax representative has a variety of methods to obtain a collection on warrant referral. If the taxpayer can be located, the tax representative will usually schedule an informal hearing with the taxpayer. If the taxpayer will not voluntarily pay the judgment amount in a lump sum or via an installment agreement, the tax representative may certify the taxpayer's wages in order to obtain payment from the taxpayers employer, garnish the taxpayer's bank accounts, seize cash or other assets via an execution, or schedule a supplemental hearing before a court commissioner. Another tool available in dealing with business taxpayers is the revocation of their seller's permit. A revocation can be used if the business is incurring additional unpaid tax liability on every sale.

6. As a general matter, it is desirable for tax representatives to complete a warrant referral within 90 days of receipt. Warrant referrals over one year old are considered highly inappropriate absent a specific justification.

7. Every four months, a list of "old referrals" is sent to the tax representative who may then point out any errors in the list to his/her supervisor. The old referral list includes both field referrals and warrant referrals.

8. In addition to assigned referrals, the individual tax representative may complete "self-initiated referrals," i.e. collections obtained from taxpayers for whom no referral has been received from Madison. The primary source of such referrals is a computerized listing of all delinquent taxpayers in a given CAN. These lists, referred to as delinquent CAN rolls, are provided every three months to the tax representative assigned to the CAN and are provided annually to the tax representative's supervisor.

9. A tax representative can request that an assigned referral be removed from his list of referrals as being uncollectable. The decision to remove a referral as "uncollectable" is made by the tax representative's supervisor after considering the efforts that have been made to complete the referral. The designation is also subject to approval from the central compliance office in Madison.

10. Tax representatives are also required to provide "taxpayer assistance" by serving at the income tax counter at their district office and responding to taxpayers questions.

11. The criteria for evaluating tax representatives were discussed in a memo dated May 20, 1981:

> There may be come misconception that an employe evaluation is based on dollars collected, liabilities established and referrals completed. To dispel any misunderstanding, the following areas are and will be given consideration in evaluations.
>
> 1. Manner and tactics employed in dealing with the public and fellow employes. Attitude toward and acceptance of supervision.
>
> 2. Knowledge of statutes, department policies and procedures. This includes keeping abreast with the latest court decisions.
>
> 3. Timeliness in which work is completed.
>
> 4. Interest and enthusiasm shown toward work, including participation in training programs.
>
> 5. Predetermined goals established and agreed upon with your immediate supervisor, adjusted by factors peculiar to this specific

area in which the employe works. (Dollars collected, liabilities established, completed assignments, degree of difficulty, etc.)

6. Time spent in taxpayer assistance.

7. Rate of learning.

8. Dependability.

9. Work habits.

10. Accuracy and completeness of reports.

The above enumerated areas are not listed in a particular order of importance and will be given different degrees of emphasis depending upon assignments, areas, workloads, etc. Compliance and achievement in these areas are expected of all employes.

Taxpayer assistance will generally be given more weight than its ratio to total time. This is due to the combination of relationship it has to other areas and the importance it has to audit adjustments and public relations.

Of primary importance among the criteria enumerated in the memo is the tax representative's productivity.

12. Tax representatives in the field are classified at any of three different levels; Tax Representative 1, 2 or 3. The TR 1 level is defined as the entry level for field representatives. Reclassification to the TR 2 level, which is the "full performance" level, requires one year of experience at the TR 1 level. A tax representative in the field must pass a series of written examinations and receive supervisors' recommendations in order to be reclassified from TR 2 to the TR 3 level which is defined as performing "advanced professional field tax compliance work." There is no appreciable difference in duties between the three levels.

13. The head of the compliance section of the Milwaukee District Office of DOR is Mr. Paul Gaieck. There are three Field Compliance Units in the Milwaukee office, each with approximately fourteen tax representatives and headed by a supervisor.

14. At all times relevant to this appeal and until his discharge on June 25, 1982, the appellant was a Tax Representative 3 in Unit G. His supervisor was Mr. Ronald Danielski.

15. The appellant began working as a tax representative in approximately 1965. Mr. Danielski became his supervisor in 1976.

16. The CAN system was instituted in 1971 or 1972. At that time, the CAN areas were assigned according to the preference of the most senior tax representatives. The appellant was assigned to his second choice, the CAN area covering the cities of Cudahy and South Milwaukee, Caledonia Township, Oak Creek, Waterford and Rochester. After his assignment, the appellant never requested a transfer to another CAN although there have been approximately twenty opportunities for such transfer since 1976.

17. The "core" area of Milwaukee is a much more difficult area for obtaining compliance than suburban areas.

18. The appellant's CAN was not in the "core" area.

19. For the twelve months ending June 30, 1978, there were eight tax representatives in Group G who were doing work similar to that done by the appellant. The referral statistics for that period are:

Referrals On Hand Beginning	Assigned Referrals	Completed Assigned Referrals	Completed Self-Initiated Referrals	Total Completion	Referrals On Hand End
Appellant					
67	269	282	102	384	54
Group Average					
69.6	419.6	389.9	146.5	536.4	79.9
Appellant's Rank					
5th	8th	8th	5th	8th	7th

20. For the twelve months ending June 30, 1979, there were nine experienced tax representatives in Group G who were doing work similar to that done by the appellant. Of those nine, one was on leave for three months and another was assigned to the core area. The referral statistics for that period are:

Referrals On Hand Beginning	Assigned Referrals	Completed Assigned Referrals	Completed Self-Initiated Referrals	Total Completion	Referrals On Hand End
Appellant					
54	398	324	134	458	120
Group Average					
82.8	401.3	373.2	145.7	518.9	78.7
Appellant's Rank					
1st	3rd	6th	6th	4th	1st

21. For the twelve months ending June 30, 1980, there were eleven experienced tax representatives in Group G who were doing work similar to that done by the appellant. Of those eleven, two were assigned to core areas. The referral statistics for that period are:

Referrals On Hand Beginning	Assigned Referrals	Completed Assigned Referrals	Completed Self-Initiated Referrals	Total Completion	Referrals On Hand End
Appellant					
120	524	410	107	517	180
Group Average					
78.5	419.5	386.5	128.1	504.6	84.9
Appellant's Rank					
1st	3rd	6th	6th	4th	1st

22. For the twelve months ending June 30, 1981, there were thirteen experienced tax representatives in Group G who were doing work similar to that done by the appellant. Of those thirteen, one was working in an area comparable to a core area, one was assigned to a core area and took 2½

months sick leave, and another was assigned to a core area and took two weeks sick leave. The referral statistics for that period are:

Referrals On Hand Beginning	Assigned Referrals	Completed Assigned Referrals	Completed Self-Initiated Referrals	Total Completion	Referrals On Hand End
Appellant					
180	280	276	72	348	99
Group Average					
94.1	351.6	344.5	130.6	475	87.3
Appellant's Rank					
1st	9th	13th	12th	13th	4th

23. For the twelve months ending June 30, 1982, there were twelve experienced tax representatives in Group G who were doing work similar to that done by the appellant. Of those twelve, one was working in an area comprable to a core area, two were assigned to core areas, and one took a maternity leave. The referral statistics for that period are:

Referrals On Hand Beginning	Assigned Referrals	Completed Assigned Referrals	Completed Self-Initiated Referrals	Total Completion	Referrals On Hand End
Appellant					
99	325	311	110	421	71
Group Average					
88.2	471.3	426.7	149.2	575.9	88.7
Appellant's Rank					
4th	11th	12th	9th	12th	9th

24. For the twelve months ending April 30, 1980, there were twelve experienced tax representatives in Group G who were doing work similar to that done by the appellant. The following statistics reflect actual performance during that period:

Total Completions	Assigned Completions	Certifications	Supplemental Hearings	Garnishment	Revocations
Group Average					
553.7	417.5	43.5	19.7	9.9	8.3
Group Mean					
---	---	41	19	6	7
Appellant's Total					
524	402	32	3	2	6
Appellant's Rank					
5 of 11	6 of 11	8 of 11	11 of 11	8 of 11 (tie)	7 of 11 (tie)
Ruskiewicz Totals					
484	391	18	6	0	6
Ruskiewicz Rank					
7 of 11	7 of 11	11 of 11	10 of 11	11 of 11	7 of 11 (tie)

25. For the twelve months ending April 30, 1981, there were thirteen experienced tax representatives in Group G who were doing work similar to that done by the appellant. The following statistics reflect actual performance during that period:

Total Completions	Assigned Completions	Certifications	Supplemental Hearings	Garnishment	Revocations
Group Average					
502.1	351.2	36.3	15.2	14.5	6.9
Group Mean					
---	---	35	16	13	6
Appellant's Total					
359	294	39	2	8	5
Appellant's Rank					
13 of 13	11 of 13	5 of 13	12 of 13 (tie)	9 of 13	8 of 13 (tie)
Ruskiewicz Totals					
390	284	19	5	3	7
Ruskiewicz Rank					
11 of 13	12 of 13	12 of 13	11 of 13	12 of 13	5 of 13

26. For the twelve months ending April 30, 1982, there were twelve experienced tax representatives in Group G who were doing work similar to that done by the appellant. The following statistics reflect actual performance during that period.

Total Completions	Assigned Completions	Certifications	Supplemental Hearings	Garnishment	Revocations
Group Average					
555.6	413.6	30	16.6	16.7	10.6
Group Mean					
---	---	28	16	12	7
Appellant's Total					
394	286	32	3	9	8
Appellant's Rank					
13 of 13	13 of 13	4 of 12	10 of 12 (tie)	10 of 12	4 of 12 (tie)
Ruskiewicz Totals					
422	309	13	3	8	4
Ruskiewicz Rank					
12 of 13	12 of 13	11 of 12 (tie)	10 of 12 (tie)	11 of 12	11 of 12

27. In an Employe Performance Summary for the year ending January 30, 1978, Mr. Danielski made the following general comments regarding the appellant's performance:

> It seems that we are back to square one, Bob. Two years ago you received a very poor evaluation. One year ago, you did show some improvement in production and I extended recognition for it even though you had not met the goals we discussed.
>
> During the last year, instead of improving to meet the minimum expectations, you regressed to the level that was unacceptable during 1976.
>
> Specifically, you have not cleared up your old referrals as I asked two years ago and one again you are near the bottom of the entire district on referral completions. Of the five people who completed less, two are on special projects, one was ill for six weeks and one is no longer with us.
>
> Your continued performance in this manner will not be without consequence.

The appellant was rated at or above average in the areas of knowledge of job, quality of work, judgment, punctuality and attendance, aptitude and ability to learn and interpersonal relations. The appellant's quantity of work was rated as "just enough to get by."

28. In a Discretion Performance Award (DPA) Report for the year ending in April of 1978, Mr. Danielski categorized the appellant as "needs improvement" due to appellant's low level of referral completions, the number of old referrals and his lack of aggressiveness and stated in part:

> I would seriously question whether continued performance at this level for another year would be sufficient to sustain a Tax Representative III classification.

29. In a memo from Mr. Gaieck on October 23, 1978, the appellant was informed as follows:

> On August 30, 1978, I had an inquiry from Madison in regard to 4 referrals assigned to your CAN that were outstanding over a year.
>
> On September 1, 1978 I issued a directive to you (copy attached) asking that you complete two of them in 15 days and the total group no later than September 29, 1978.
>
> You apparently chose to ignore that directive. On October 18, 1978 I issued another directive (copy attached) to you asking you to inform me as to the status of those referrals. Apparently you chose to ignore that directive as indicated by our conversation today.
>
> You stated that they were still outstanding and that as of 12:30 p.m. October 23, 1978 you had not begun to put in writing (as requested in my directive of October 18, 1978) anything in regard to why the referrals were not completed.
>
> You offered a number of excuses (which I cannot accept) as to why you did not complete the referrals.
>
> As I told you at our meeting, I will give you until noon Wednesday October 25, 1978 to get a report to me on your progress on the 4 referrals. I also gave you until November 3, 1978 to have <u>all</u> 4 completed.
>
> Your ignoring my directives and your failure to perform as directed can result in a re-assignment of your duties to conform more in line with your capabilities.

The October 1978 memo was not a letter of reprimand. The appellant had made no effort to contact the four taxpayers prior to Mr. Gaieck's correspondence. He completed all four referrals within one week of the October 23rd memo.

30. In the performance summary for twelve months ending January 31, 1979, the appellant was described as having made "progress in meeting the assigned goals." The following goals were established:

1. Keep at your old referrals. With few exceptions, everything over a year old should be eliminated -- this is an area which still needs improvement.

2. Work the large accounts on your delinquent tax roll and inactivate, transfer or take appropriate action on accounts which are no longer there. Do more officer liability transfers on the dead corporations on the roll.

3. Bring your referral completions up a bit more and concentrate on the assigned referrals as the most important priority. I would like to see you average 40 assigned referrals per month in addition to any self-initiated referrals you complete.

31. The appellant's performance was categorized as being "in the manner required" in his DPA report for the year ending June 30, 1979:

> Mr. Fauber has displayed improvement in nearly all areas of production during the past fiscal year with no loss in quality which has always been very good.
>
> Very few referrals are ever returned and all reports are complete and concise. Increased use has been made of the collection tools available to him.
>
> While the goals set forth in his last evaluation have not been entirely met, I believe that the progress shown has been sufficient to justify this rating <u>when given the benefit of the doubt</u>. (Emphasis in original)

32. The appellant's performance summary for the twelve months ending January 31, 1980 recognized that he had improved his referral production but failed to meet the other two goals established in the 1979 summary. A new set of goals was outlined in the 1980 summary:

1. Old referrals have been and continue to be an area which requires a great deal of improvement. In as much as you have not brought any specific problems to my attention in completing these, it appears therefore that the situation is so due to a lack of effort on your part. I suggest you review my memo to Unit G regarding the relationship that 1980 merit increases will have to the old referral list.

2. The previous goal of eliminating large delinquent accounts has not received any serious attention. I would like you to work on these and resolve an average of two per month.

3. Keep up the good referral completion average you have established. Concentrate on assigned referrals. You have a very large inventory which can be reduced by concentrating on assigned referrals.

4. Keep your missed installment list more current.

5. Make greater use of the collection tools available. I believe you will find goals 1 thru 3 easier to accomplish with greater use of these tools.

33. The appellant's 1980 DPA report again categorized the appellant as performing "in the manner required," and stated, in part:

> This is the second year in which Mr. Fauber has continued to display marked improvement over what had been substandard performance.

34. In a memo dated July 10, 1980 that was directed to all tax representatives of Unit G, Mr. Danielski summarized what he considered to be the important aspects and functions of the tax representative's job. A copy of the memo is attached hereto.

35. Forty completions per month is a reasonable minimum standard for evaluating the merit tax representative's performance. The forty completions includes both assigned and self-initiated referrals, and can be adjusted somewhat depending on the nature of the CAN area. The forty completions per month standard has never been formally adopted as a requirement by the department, but it represents a consensus among supervisors statewide.

36. A list of referrals in the appellant's CAN that had been outstanding in excess of 90 days was prepared on September 30, 1980. The list indicates that there was one field referral (a guide 16 or guide 24) that was more than one year old and nine warrant referrals that were more than one year old.

37. On October 16, 1980, Mr. Danielski advised the appellant that there were problems with his old referral list, installment agreements and his level of completions and indicated that improvement would be necessary in all areas in order to be considered for a July '81 merit increase.

38. Late in 1980 or early in 1981, the appellant's CAN was reduced in size. Oak Creek and half of the Cudahy areas were placed into another CAN. The reduction was made because the size of the appellant's inventory of referrals was very large and it was increasing.

39. The appellant's performance summary for the twelve months ending January 31, 1981 provides the following report as to accomplishing previously set goals:

> Goals have not been met -- if anything there appears to have been a significant regression. Last year for the period July '79 thru February '80, you recorded 92 hours of taxpayer assistance and completed 371 referrals. For the period July 1980 thru February '81, you recorded 83 hours of taxpayer assistance and completed 256 referrals. Your old referral list is still very long considering your small average inventory. The delinquent tax roll and missed agreement list need greater effort.

The goals set in the prior evaluation were retained.

40. On June 12, 1981, Mr. Danielski sent a lengthy memo to the appellant outlining problems with the quality of work being performed by the appellant.

41. The appellant's DPA report for 1981 termed his work "unsatisfactory" and stated:

> Mr. Fauber's production for this rating period has been very near the bottom of that of all tax representatives in the Milwaukee district in terms of total referrals completed.
>
> Only a couple of trainees and special project persons produced less.
>
> The quality of reports in those referrals which have been completed is very good, however the follow-up action required (missed installments) has been poor.
>
> For most of the year, Mr. Fauber's inventory was low, but in spite of that, the old referral list is still a problem.
>
> Since June 1980, I have communicated with Mr. Fauber on several occasions, both orally and in writing asking if I could assist him in being more productive and expressing my concern for the very low productivity he has displayed.
>
> In all, I believe that anyone with Mr. Fauber's technical knowledge and many years of experience is capable of far better performance than he has displayed.

42. During the month of June, 1981, the appellant completed just seventeen assigned referrals and approximately half of that number required little effort to complete.

43. On July 3, 1981, Mr. Danielski and Mr. Gaieck held a conference with the appellant and advised him that his performance, specifically in the area of completed referrals, was unacceptable. Mr. Danielski advised the appellant that continued performance at that level would cause him to recommend discharge.

44. In the employe performance summary for the eight months ending December 31, 1981, Mr. Danielski stated: "There does not appear to have been much progress toward previously set goals.... You are once again at the bottom of Unit G in terms of production." The following goal was set for the next four months:

> With the inventory you are carrying and the amount of referrals assigned each month, there is no reason why you should not be able to hold an average of 40 total completions per month.
>
> In as much as you have completed 264 through December 1981, that means you must find a way to complete 216 between now and April 30, 1982.

45. The appellant's old referral list issued in February 2, 1982 states that he had twenty warrant referrals over one year old including five that were over two years old. Not all of the 20 referrals belonged on the list. At least one of the taxpayers had moved out of the appellant's CAN much earlier. However, the appellant failed to notify Madison to remove the name from his list. The appellant had made efforts to complete at least some of the other old referrals on the list.

46. During February of 1982, the appellant completed just fifteen assigned referrals and seven self-initiated referrals. Of the twenty-two installment agreements he had in place, eleven were in default. The appellant averaged 32 completed referrals during the ten months prior to February. As of February 1982, there were 120 assigned referrals in the appellant's inventory.

47. Mr. Danielski issued a written reprimand to the appellant on March 5, 1982, for failing to meet previously established goals. The reprimand specified five separate goals that were not met; eliminating old referrals, eliminating large delinquent accounts on the tax roll, maintaining a 40 per month average of completed referrals, keeping missed installment agreements current, and making greater use of the available collection tools. The conclusion of the reprimand read:

> If you do not improve your performance for the period May 1981 thru April 1982, I will recommend that further disciplinary action be taken against you.

48. As of early May, 1982, the appellant had 14 referrals more than one year old and six referrals more than two years old. In addition, there were five Guide 16's and Guide 24's, issued between March 30, 1981 and December 17, 1981, which were well beyond the established guidelines for completing field referrals.

49. On May 10, 1982, Mr. Danielski had a meeting with the appellant as a follow-up to the March reprimand. Based upon the appellant's performance during the interim period, Mr. Danielski recommended that further disciplinary action be taken.

Mr. Danielski concluded that the appellant had failed to clean up his old referral list, had failed to show that he was working on the larger accounts on the delinquent tax roll, had completed 394 referrals instead of the minimum of 480 and had failed to make greater use of the available collection tools. He also concluded that the appellant had improved his handling of the installment agreements.

50. The appellant was not reprimanded on May 10, 1982.

51. The appellant completed 74 referrals during the two month period between the March reprimand and the May discussion.

52. By letter dated June 9, 1982, the appellant was terminated from his position, effective June 25, 1982. A copy of the letter is attached hereto.

53. The performance evaluations (i.e. both the discretionary performance award reports and the performance summaries) of all of the tax representatives in the field were reviewed centrally by the respondent to insure that the summary ratings were consistent with the available statistics regarding employe performance.

54. At all times relevant hereto, the appellant was provided adequate opportunity to obtain assistance or guidance from his superiors.

55. Early in 1982, the appellant became aware that his policy for taking completions for executions was different than the policy used by some other tax representatives. This difference in policy had an

insignificant effect on the number of completions obtained by the appellant during the period of his employment as a tax representative.

56. Throughout the period from 1978 until his termination, the appellant felt that he had the proper amount of work to do. He never requested any additional referrals even though he knew that he could obtain them and even though his supervisor asked whether he needed additional work.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44(10(c), Stats.

2. The respondent has the burden of proving that the discipline was for just cause, and not excessive.

3. The burden of proof is that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence.

4. The respondent has sustained his burden of proving that the suspension and discharge were for just cause, and not excessive.

OPINION

A. Notice

At the hearing in this matter, the appellant made a "motion to exclude" the letter of termination from the record, arguing, inter alia, that it failed to provide adequate notice of the basis for the discipline imposed. The examiner denied the motion because of the relatively specific nature of some of the eight grounds cited in the letter. The parties were advised that they could submit written arguments on the adequacy of notice issued in their post-hearing briefs. Neither party used that opportunity.

The first seven reasons for dismissal that are cited in the letter refer to letters or to merit ratings which were provided to the appellant in written form. The letters and merit rating documents were all placed into the record by the respondent. Although it would have been preferable for the respondent to have described these events more fully in the termination letter, the respondent did send each letter and merit ratings to the appellant when initially issued. The Commission is satisfied that this correspondence, as documented in the findings of fact, provided sufficient notice to the appellant of the bases for his discharge.

The eighth reason cited in the letter ("Your overall performance during the past year continues to be unsatisfactory") clearly would not in itself have provided sufficient notice. However, the Commission finds that, when viewed as a whole, the letter was reasonable calculated to apprise the appellant of the pendency of the action and afforded him the opportunity to present his objection. Anand v. DHSS, Case No. 82-136-PC (3/17/83); Huesmann v. State Historical Society, Case No. 81-348-PC (1/8/82).

B. Merits

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 as 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

Commn., 27 Wis. 2d 77, 98, 133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974).

The Safransky case contemplates a two-part analysis. The first question is whether the basic facts of the allegation are proven. The second question is whether the facts as determined tended to impair the duties of the appellant's position in terms of the efficiency of his work unit. The eight reasons for dismissal that were cited in the discharge letter are discussed separately below.

1. July, 1978 Merit Rating

Mr. Danielski categorized appellant's performance for the year ending in April of 1978 as "needs improvement," which was the category between "consistently meets job requirements" and "unsatisfactory." In the DPA report, Mr. Danielski "expressed dissatisfaction and concern with the low level of referral completions, the old referrals in [appellant's] inventory and his lack of aggressiveness in asking for immediate compliance from taxpayers." Statistics show that the appellant was last in his work unit in terms of completed assigned referrals and total completed referrals for the twelve month period ending in June of 1978. The appellant's production was just 71.6% of the average total completions for his group during this period.

The appellant argued that he was not receiving enough assigned referrals to meet the standards set by Mr. Danielski. However, this argument is inconsistent with the appellant's testimony that during the period from 1978 until his discharge, he had the appropriate amount of work to do. The appellant also testified that he knew he could request more assigned referrals but he never did so. The final reason for not accepting the appellant's argument that he lacked

sufficient assigned referrals is that his level of self-initiated completions was also approximately 70% of the group's average for the year. Testimony showed that the delinquent CAN list was always available for increasing self-initiated completions. If the appellant was not getting enough assigned referrals, he should have had more time to obtain self-initiated completions. However, no increase in his self-initiated referral production was established.

The other two points raised by Mr. Danielski in the 1978 rating were the appellant's old referrals and his lack of aggressiveness. There is nothing in the record that independently establishes the number of old referrals in the appellant's inventory in May of 1978 but the appellant did nothing to undermine Mr. Danielski's written conclusion regarding both the level of old referrals and a perceived lack of aggressiveness. Therefore, it is the Commission's opinion that the respondent properly relied on reason number one set out in the discharge letter as long as related conduct can be established for the period immediately prior to the discharge. In this case, the respondent's case is premised upon a course of conduct that continued, in a cyclical pattern, from 1978 until the appellant's discharge. As described below, the respondent was able to establish the long-standing nature of the appellant's performance problems as an important reason for imposing discipline.

All three areas of dissatisfaction enumerated in the 1978 report meet the Safransky test in terms of tending to impair the performance of the appellant and/or his work unit.

2. October, 1978 "Reprimand"

The second reason set out in the discharge letter is a failure to complete specified old referrals as directed by Mr. Gaieck. The letter, dated October 23, 1978, is set forth in Finding of Fact 29. It required the appellant to submit a report by October 25th and complete four specified old referrals by November 3rd. The referrals were between 20 and 38 months old. The letter also warned the appellant that failure to perform as directed "can result in a reassignment" of duties.

The October 23rd letter was a warning rather than a letter of reprimand. Testimony at the hearing established that the appellant completed the four old referrals within a week of the October 23rd memo. However, testimony also showed that prior to Mr. Gaieck's correspondence, the appellant had made no effort to contact the four taxpayers.

The respondent adequately established the accuracy of the information found within Mr. Gaieck's October 23rd memo. The appellant's failure to make any effort to complete these four referrals ranging up to over three years old meets the Safransky test for establishing just cause.

3. July, 1979 Merit Rating

The appellant's merit rating for the year ending June 30, 1979 was "in the manner required," which was the category between "above the manner required" and "needs improvement." The DPA report indicates that the appellant had made "improvement in nearly all areas of production ... with no loss in quality," even though "the goals set forth in his last evaluation have not been entirely met." In his testimony, Mr. Danielski was not entirely sure what goals were being

referred to, although he expected that they were to complete forty referrals per month and eliminate old referrals. It would appear that the referenced goals are those set in the 1978 performance summary as recited in Finding of Fact 30.

The statistics for the year ending June of 1979 show that the appellant completed 458 referrals. Although well below the group average, he was ranked fifth of nine that year. His total of assigned referrals for the year was almost exactly at the level of the average for the group.

Other than the fact that the appellant completed 458 referrals instead of the minimum standard of 480, (which is not apparent from the face of the DPA report) it is unclear which goals the appellant failed to achieve in his 1979 report. In light of the rating of "in the manner required," and the failure to specify which goals were not met, the Commission determines that there is no just cause for disciplining the appellant for his performance as described in the 1979 report.

4. April, 1981 Performance Evaluation Summary

The appellant's evaluation for the twelve months ending January 31, 1981, indicated he had regressed significantly from his prior performance. The evaluation specified five problem areas: taxpayer assistance hours (were decreasing), total completions (were decreasing), old referral list (was very large), delinquent tax roll (required greater effort), missed agreement list (required greater effort). The appellant failed to introduce any evidence that would contradict the information found on the performance summary. Therefore, the Commission concludes that the respondent was justified in relying on reason

number 4 and that it is an appropriate element of just cause under the Safransky test.

5. July, 1981 Merit Rating

The July, 1981 DPA report rated the appellant's performance as "unsatisfactory." The report indicates that the appellant's production in terms of total completions was "near the bottom" for all tax representatives in the Milwaukee district, that his number of missed installments was poor and that the old referral list was still a problem. Exhibits produced at hearing show that the appellant's production was at the bottom of Group G. (Finding of fact 22. The appellant only received 280 assigned referrals during that year, although he had 180 referrals on hand at the beginning of the year as an additional source of completion. Nevertheless, he completed just 80.1% of the group's average for assigned completions and 55% of the group's average for self-initiated referrals.

The appellant points to the substantial decrease in the number of assigned referrals from 1980 to 1981 as having a major impact on his low totals for 1981. Either late in 1980 or early in 1981, Mr. Danielski reassigned a portion of appellant's CAN to another tax representative. With a smaller CAN, it was clear that the appellant would receive fewer referrals than he had previously. However, Mr. Danielski testified that he made the move because the appellant's work was not getting done and his inventory of referrals was building. This observation is supported by Findings of Fact 21 and 22 which show that during the course of the 1980 evaluation period, the appellant's inventory of referrals increased from 120, which was highest in Group G, all the way to 180. At the beginning of the 1981 period, the

appellant's inventory was nearly double the group's average. By the end of June, 1981, and after the appellant's CAN had been reduced in size, the appellant's inventory had dropped to 99, which was still significantly above the group average. In the 1981 evaluation period, the appellant was 9th of 13 in the group in terms of the number of referrals received. Again, it is important to recall that the appellant felt he had the appropriate amount of work to do and that he never requested any additional referrals.

There is nothing in the record to undermine Mr. Danielski's statements in the July of 1981 report regarding problems in the areas of both missed installment agreements and old referrals. Therefore, the Commission finds that reason five on the letter of discharge was accurate and it meets the requirements of the Safransky test.

6. March, 1982 Reprimand

On March 5, 1982, Mr. Danielski issued a written reprimand to the appellant that specified five areas of performance that were lacking. The letter of reprimand listed five goals that had been established in the appellant's performance summary for the twelve months ending January 31, 1980 (Finding of Fact 32), and which was retained in the appellant's 1981 performance summary (Finding of Fact 39). The letter stated: 1) that the appellant had failed to eliminate old referrals because his current old referral list showed five referrals more than two years old, fifteen more than one year old and six warrant referrals "far in excess" of their time limits; 2) that there was no evidence that appellant had worked at eliminating the large accounts on his delinquent CAN roll; 3) that the appellant had failed to maintain a good completion average (of at least 40 per month) because

he had completed just 320 referrals during the first ten months of the rating year and only 22 referrals during the month of February despite an inventory of 120; 4) that the appellant's installment agreements were not being kept current because as of February 15th, 11 of 22 were in default and the appellant had failed to make any recommendations for further action; 5) there was room for additional improvement by the appellant in utilizing the available collection tools because of the number of old referrals and missed installment agreements.

Other than reciting the reasons for its issuance, the net effect of the reprimand was to put the appellant on notice that Mr. Danielski would recommend "further disciplinary action" if the appellant failed to improve his performance for the period from May of 1981 until April, 1982. The discharge letter states that the letter of reprimand placed the appellant on notice and then goes on to state that the appellant subsequently failed to follow the directions set forth in the reprimand.

The contention that the appellant did not follow the "directions" found in the letter of reprimand is not supported by anything found within reason for discharge number six. The contention is explained and supported, however, in discharge reason number seven which is addressed below. Because reason number six has no independent viability but only serves as a lead-in to discharge reason number seven, it is not properly considered a separate basis for imposing discipline against the appellant.

7. May, 1982 "Reprimand"

On May 10, 1982, Mr. Danielski held a discussion with the appellant which he followed up with a memo listing the appellant's

performance as it related to the five goals that had previously been established. The memo states that; 1) the appellant failed to clear up his old referrals because there were six referrals more than two years old, fourteen referrals more than one year old and five field referrals between four and fourteen months old, 2) there was no evidence that the appellant was working on the large accounts on his delinquent CAN roll; 3) despite sufficient work, the appellant had completed just 394 referrals during the past twelve months instead of the minimum goal of 480; 4) the appellant had improved his handling of missed installment agreements, and 5) he did not make greater use of the available collection tools.

There is nothing in the record to undermine Mr. Danielski's recitation of the appellant's old referrals. The appellant did, however, offer extensive testimony, as to the size of his delinquent CAN roll and the number of accounts that had been completed by him. The delinquent CAN list includes all of the delinquent taxpayers in a given CAN area. One of the goals acknowledged by the appellant was that he clear up the larger accounts on that list by at least twelve each year. The appellant estimated that there were 1000 names on his delinquent CAN roll issued in January, 1982, and that approximately half of those names had liabilities of more than $1000. The highest amount on the roll was $48,000. The CAN roll itself is not part of the record. After he was discharged, the appellant prepared a list of twenty accounts from among those with liabilities between $14,000 and $2,000 that did not belong on the roll because the accounts had been collected due to his own efforts.

The appellant testified that ten, fifteen, or even all of the twenty collections may have been completed prior to January 1, 1982.

The appellant's evidence regarding the delinquent CAN roll does not show that he was "actively pursuing" the large accounts on that roll at the time of his discharge. He did not know whether, during the period from January 1, 1982 until his discharge, any large accounts were closed. While the appellant established that a number of entries on his delinquent CAN list appeared there in error, and that prior to his reprimand he had made an effort to resolve them, he failed to undermine Mr. Danielski's conclusion that, during the period from March 5th, 1982 until his discharge, the appellant failed to actively pursue the accounts.

The third goal referred to in the May 10th letter was total completions. A comparison of the statistics found in the March 5th reprimand and the May 10th letter shows that the appellant had completed an additional 74 referrals during that period. Based on the minimum standard of 40 completions per month, the appellant should have completed at least 80 referrals during this period.

The fourth goal in the May 10th letter referred to installment agreements. The respondent acknowledged that the appellant had improved his handling of installment agreements. In light of this acknowledgement, the appellant's handling of installment agreements cannot be used as a basis for the discharge decision.

The final goal was for greater use of collection tools. The May 10th letter merely states that the appellant had not made greater use of the tools. The respondent's argument is that had the appellant made better use of collection tools, he would have had a higher completion

total and would have made greater inroads on his old referral list and the delinquent CAN list. Such an argument essentially penalizes the appellant twice for his low completion total. An analysis of those statistics that are part of the record suggests that in comparison to the other employes in Group G, the appellant was reasonably close to the average of his group in using three of the four tools for which statistics were kept.

A review of Findings of Fact 24 through 26 show that the appellant did not have unusually low totals for certifications, garnishments and revocations. The one collection tool that the appellant consistently used less frequently than his counterparts was the supplemental hearing, which is also referred to as a court commissioner hearing. The record indicates, however, that as of July, 1980, Mr. Danielski considered requests for such hearings as a "negative indicator of performance" (Respondent's Exhibit 12) and that he would only approve such requests when the tax representative could establish that all other methods had been exhausted. Mr. Danielski's opinion was based, at least in part, on the large costs associated with conducting a supplemental hearing.

The appellant argues that the appellant's low level of supplemental hearings was directly attributable to Mr. Danielski's statement in the July 10, 1980 memo. However, Finding of Fact 24 shows that in the year ending April 30, 1980, the appellant had made use of just three supplemental hearings compared to the group average of over nineteen of such proceedings. Early in the next reporting year, Mr. Danielski's memo was issued and the group average dropped to approximately fifteen. This decrease can be viewed as a response to

Mr. Danielski's concerns. In contrast, the appellant used just two and three supplemental hearings during 1981 and 1982, respectively. The appellant's extremely low usage of the supplemental hearing tool clearly predated Mr. Danielski's 1980 memo. It should be noted that the 1980 memo also referred to revocations as negative indicators of performance but the appellant's use of this tool appeared to be near the middle of the group.

Based upon the available statistical evidence, it appears that the appellant did in fact make appropriate use of the collection tools available to him, except for the supplemental hearing.

The respondent was entitled to rely upon the appellant's failure to meet goals 1), 2), 3) and (in part) 5). The appellant's conduct as set out in the May 10th letter also met the Safransky test in terms of the effectiveness of the appellant.

8. Unsatisfactory Overall Performance.

As noted above, the final reason cited in the discharge letter was not sufficiently specific in itself to provide notice to the appellant as to the basis for the discipline.

Based on the above analysis and in light of the long-standing nature of appellant's performance problems, the Commission concludes that it was appropriate to impose some degree of discipline in this matter.

Degree of Discipline

In determining whether the degree of discipline imposed against the appellant was excessive, the Commission cannot second guess the employer and substitute its own independent judgment on the matter but can only determine whether the evidence in the record justified the action that was

taken. Ruff v. Inv. Bd, 80-105, 160, 222-PC (8/6/82) affirmed, Ruff v. Personnel Commission, 81CV4455 (Dane County Circuit Court 7/23/82).

Very little evidence was offered by the respondent as to why they chose to discharge the appellant rather than to impose some lesser form of discipline. Testimony showed that there was little difference between the work actually performed by Tax Representatives 1, 2 and 3. Respondent suggests that this precludes demoting the appellant because if he was unable to perform Tax Representative 3 work, he would also be unable to perform Tax Representative 1 or 2 work. The appellant offered no evidence to the effect that there were other specific positions within DOR that would have been appropriate for the appellant.

Nothing in the record indicates what discipline may have been imposed against other DOR employes charged with comparable conduct. The only other employe in Group G whose performance statistics were in the same range as the appellant is William Ruskiewicz, who retired on February 16, 1983.

The other two considerations that are important in determining the level of discipline imposed here are 1) the prior discipline imposed against the appellant and 2) the warning given the appellant that continued substandard performance could lead to discharge. In this case, the March reprimand was the only measure of discipline imposed against the appellant prior to his June discharge. The appellant had just two months after the reprimand to improve his performance. He did raise his level of completions and improve his installment agreement list during the period. However, his completions were still somewhat below the minimum standard of 40, he still had a large old referral list, he was not using one of the available collection tools and he was not making inroads into his delinquent CAN list. It is clear that Mr. Danielski met periodically with the

appellant and informed him of his performance deficiencies. Even though these meetings were typically held in terms of discussing either a DPA report or Employe Performance Summary, they put the appellant on notice that he had to make improvements in his performance or he would be disciplined. It is also true that the appellant rarely, if ever, sought assistance from his supervisor and merely indicated that he would work harder to try to improve his performance.

The Commission has previously ruled that there is no absolute requirement under the civil service code for progressive discipline. Alff v. DOR 78-277, 243-PC (10/1/81) affirmed in Alff v. Personnel Commission, 81CV5489 (Dane County Circuit Court, 1/3/84). In this case, given the numerous warnings and evaluations provided to the appellant, the respondent did not have to suspend or demote him, prior to discharging him.

The other consideration is whether the appellant was notified that his performance, if continued, could lead to discharge. Mr. Danielski testified that during the July 3, 1981 conference with Mr. Gaieck, he advised the appellant that discharge could result. Mr. Gaieck was not asked to confirm this statement, but the Commission finds Mr. Danielski's testimony in this regard to be highly credible. In contrast, the appellant testified that he was never advised prior to his discharge that discharge was a possible consequence. After weighing the conflicting testimony, the Commission has determined that Mr. Danielski's specific recollection of the conversation is entitled to more weight. Therefore, the appellant was provided adequate notice of the potential for discharge.[FN]

[FN] Even if the appellant's testimony is accepted and Mr. Danielski's testimony ignored, the Commission has ruled that there is no requirement in the civil service code that the employe be notified that there is an imminent danger of discharge. Alff (supra)

Given the above circumstances, the Commission finds that there was just cause for the discharge of the appellant. This conclusion is based upon the appellant's long-standing performance problems and his failure to make any significant improvements.

ORDER

The respondent's action discharging the appellant is affirmed and this appeal is dismissed.

Dated: _____,1984 STATE PERSONNEL COMMISSION

_____
DONALD R. MURPHY, Chairperson

KMS:jmf
JPD05

_____
LAURIE R. McCALLUM, Commissioner

_____
DENNIS P. McGILLIGAN, Commissioner

Parties:

Robert S. Fauber
c/o Attorney Kenneth Murray
Suite 403
1840 N. Farwell
Milwaukee, WI 53202

Michael Ley, Secretary
DOR
P. O. Box 8933
Madison, WI 53707

CORRESPONDENCE/MEMORANDUM

Date: July 10, 1980 File Ref:

To: ALL MEMBERS -UNIT G

From: R. Danielski

Subject: WORK STANDARDS

After our last district meeting a short unit meeting was held at which time I indicated the main criteria I use when considering merit raise evaluations. Not everyone was able to attend the meeting so I am taking this opportunity to identify what I consider the important aspects and functions of our job.

None of these subjects is new, and most have been covered in the "District Meeting Notes" dated October 17, 1978 which I distributed to you as well as in numerous conversations.

The only new feature is that I intend to implement these criteria in a rigid fashion when considering merit pay rather than making constant reminders which are either ignored or forgotten.

I do not believe that anyone is working "in the manner required" unless <u>all</u> the following criteria are met!

Referrals one year or older should not appear on your list of old referrals unless we have had prior discussion and there is good reason for their uncompleted status. - I do not consider lack of time or other priorities as sufficient reason. If you do not physically have a referral which is on the list, it is your responsibility to see that it is transferred to the proper CAN or pulled by Madison as complete.

Installment agreements must be kept up to date. You are to update the list each time it is put out - through me. It is unacceptable when two or three payment periods have elapsed and no action taken on the account and no updating has occurred. If agreements are not kept and taxpayers have not communicated a reason for not keeping them, I expect it to be brought up to date or certification , garnishment, court commissioner etc.

Before accepting an installment agreement which will exceed the six month guidelines, you should know the weekly or monthly income of the taxpayer and spouse.

Referral notes should be kept either on the form provided or on the hearing letter. If more than one contact is necessary I would like to see times, dates and a short recap of results recorded.

The delinquent roll should be worked, and by this I do not simply mean sending hearing letters. Each of your delinquent rolls has some large accounts on it, I expect to see fewer than twelve per year resolved or inactivated if appropriate.

I regard Court Commissioner request, unable to locate referrals and revocations as negative indicators of performance. These should be used only as a last resort and after <u>every other</u> activity has been exhausted. It is essential that you keep good notes of your actions in these matters. In cases of UTL and CC I will not approve these actions unless you have that person's file (if any) in your possession.

None of you should continue to receive referral rejections for the same reoccurring reasons. I believe that if you continue to have to be reminded that installment agreements must indicate periods covered; the criteria for completing a Guide 16 or 24 have not been met; or have to be asked for a progress report on a priority referral etc. you are ignoring the procedures called for.

I will keep track of the referral rejections and unless you bring it to my attention that the rejection was incorrect, I will assume that you have not properly completed the referral

Our starting time is 7:45 a.m. Unless you have received some approved arrangement for some other time or have notified me that you will be in the field, I expect you to be at your desk by this time. Particularly important on those days you are assigned inside duty is to limit your breaks to 15 minutes and lunch to 45 minutes. Too often we have had complaints from one individual on duty that the other one is taking advantage of extended breaks.

When communicating with the office clerks, your co-workers or

individuals in Madison, please remember that everyone has priority workloads. It is possible to explain something controversial or disagree with someone without being rude or implying that they are incompetent or worse. I do not want any member of my group treated this way and will int ceed if it occurrs, by the same token no individual in my group should treat others in this manner.

The last, but most important item is quantity completion assign referrals. Last year the members of Unit G averag 35 assigned referrals completed each month in addition to self initiated work. The district average was slightly h

I expect all members to meet at least the average of our

If you are not already aware of it, the evaluation period not correspond to the fiscal year; this coming year it wi from May 1, 1980 thru April 30, 1981.

I will endeavor to remind you if you are not performing up to expectations throughout the coming year, however it is up to e you to insure that these goals are met in order to receive cor tion for a merit pay increase.

A reminder to all of you that the use of abusive, vulgar or ob language is in violation of Department Rule # 6.

RD:ea

...OMMISSION

State of Wisconsin \ DEPARTMENT OF REVENUE

EXHIBIT # 1

e Sherman Dreyfus
ivernor

Mark E Musolf
Secretary

125 SOUTH WEBSTER STREET
MADISON WISCONSIN 53702

June 9, 1982

Mr. Robert S. Fauber
4746 North 74th Street
Milwaukee, WI 53218

Dear Mr. Fauber:

This letter is notification to you that you are being terminated for just cause from employment with the Wisconsin Department of Revenue effective Friday, June 25, 1982. At that time, you are directed to give to your supervisor all tax files and Department material in your possession and your identification and authorization cards.

Your productivity as a tax representative has, since 1976, been cyclical in nature but generally below the acceptable standard. Counseling and discussion sessions with your supervisors concerning your productivity has brought no appreciable change. Beginning with the performance evaluation you received dated March 13, 1978, subsequent merit ratings and employee performance summary forms indicate that the agreed upon goals established have generally not been met.

Reasons for your dismissal are:

1. In July of 1978, you received a merit rating of "Needs Improvement" for which you were denied a merit increase. The reasons for that rating were discussed with you at that time.

2. On October 23, 1978, you were given a reprimand for failure to complete specified referrals as directed in a September 1, 1978 memorandum to you.

3. Although your July, 1979 merit rating was "In the Manner Required," it was a borderline decision.

4. Again in 1980, you received an "In the Manner Required" merit rating. However, the performance evaluation summary you received on April 10, 1981 for the twelve month period from February, 1980 through January, 1981 (which includes the last three months of the 1980 merit rating period), clearly indicated that your performance was far below the acceptable standard.

5. The July, 1981 merit rating was "Unsatisfactory" for reasons which were discussed with you at that time.

6. A written reprimand was given you on March 5, 1982 and placed you on notice for failure to follow instructions as a further follow-up to two previous e[illegible]tions. You had been directed to clear

up "old" referrals, actively pursue delinquent accounts on your CAN roll, increase your use of available collection tools and increase your quantity of completed referrals. These directions have not been followed.

7. On May 10, 1982, you were reprimanded for failure to meet the specific goals established in the March 5, 1982 letter. You were also informed of the Department's employee assistance program and the name of the person to contact if you felt that personal problems were affecting your work.

8. Your overall performance during the past year continues to be unsatisfactory.

If you feel this termination is not based on just cause, you must file a written appeal with the Personnel Commission, 131 West Wilson Street, Madison, Wisconsin 53702, within thirty (30) days of receipt of this notice or the effective date of the termination, whichever is later.

Sincerely,

James S. Haney
Deputy Secretary of Revenue

JSH:lsn

cc Daniel G. Smith
Jerome T. Pionkowski
Personnel File