STATE OF WISCONSIN PERSONNEL COMMISSION

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SCOTT BAXTER, *
Appellant, *
v. *
Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, *
Respondent. *
Case No. 82-85-PC *
* * * * * * * * * * * * * * * *

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a suspension.

FINDINGS OF FACT

1. The appellant at all material times has been employed by the respondent in the classified civil service in a position at Kettle Moraine Correctional Institution (KMCI), classified as Industries Technician 1 and subsequently as Industries Supervisor 1,[1] with permanent status in class.

2. The primary function of this position has been to supervise the Graphic Products Industry program at KMCI, which includes the supervision of civilian and inmate employes in a graphics products, primarily printing, production operation.

3. During the summer of 1981, the appellant purchased from the wife of an inmate then working in Graphic Products Industry a radio for the sum of $50.00, while knowing that this transaction was forbidden by Division of Corrections policy, as set forth below.

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1. The addition of Industries Supervisor 1 is made to conform the finding to the record and with the assent of both parties. The Commission also consulted with the examiner.

4. The aforesaid action was in violation of Division of Corrections administrative policy §1.001, Respondent's Exhibit 2, which provides as follows:

> Staff shall act professionally at all times in their relationship with probationers, institution residents, or parolees. Except in line of duty, staff shall not extend, promise, or offer any special consideration or treatment and shall not discuss agency or personal matters with any person under the control or supervision of the Division. Further, except in line of duty, staff shall not employ, work for, provide a home for, or form a close personal social or physical relationship with a probationer, institution resident or parolee.

5. The aforesaid action carried with it a substantial risk of compromising the appellant's effectiveness in supervising inmates, as there was the potential that an inmate could use his knowledge of such a transaction to exert pressure, such as might result in favors, relaxation of discipline, etc.

6. The appellant's regular work hours were 7:00 a.m. to 3:00 p.m. He worked what was known as a "straight eight" shift, with the expectation that he would be on duty at all times and would take his lunch at his post.

7. On a continuing basis prior to March 31, 1982, the appellant was absent from his assigned duties in an excessive manner for coffee breaks, lunches, and other activities which did not constitute legitimate work-related matters.

8. The aforesaid absences and the resultant lack of supervision could and did contribute to improper activities between a civilian employe/subordinate and inmates, and other unauthorized activity on the part of inmates.

9. The aforesaid absences were in violation of DHSS Work Rule 1, Respondent's Exhibit 11, which prohibits:

> Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.

10. The aforesaid transaction and absences can reasonably be said to have a tendency to impair the appellant's performance of the duties of his position or the efficiency of the group with which he works.

11. Upon being interviewed by management on March 25, 1982, the appellant admitted to absences from the shop for less than an hour a day but denied more extensive absences.

12. The aforesaid conduct by the appellant was not in violation of DHSS Work Rule 7, Respondent's Exhibit 11, which prohibits:

> Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

13. The aforesaid conduct by the appellant cannot reasonably be said to have a tendency to impair the appellant's performance of the duties of his position or the efficiency of the group with which he works.

14. By letter dated March 31, 1982, Respondent's Exhibit 1, the respondent suspended the appellant for 30 days without pay, from April 5, 1982, through May 14, 1982.

15. The discipline imposed was similar to that imposed in a number of other cases within the Division of Corrections involving financial transactions between staff and inmates.

16. The appellant's work record at KMCI commenced in May, 1978, and his employment record, with the exception of the aforesaid matters, can be summarized as above average.

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 supervision for 30 days 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 30 days without pay, and the suspension was not an excessive disciplinary action.

OPINION

The Supreme Court decision in Reinke v. Personnel Board, 53 Wis. 2d 123, 132, 137, 191 N.W. 2d 833 (1971), set forth the analysis to be followed in an appeal of a disciplinary action:

> ... [T]he appointing officer must present evidence to sustain the discharge and has the burden of proving that the discharge was for just cause.
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> * * *
>
> The function of the board [now Commission] is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence.

The test for determining whether "just cause" exists has been set forth 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 Comm., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 464, 474, 215 N.W. 2d 379 (1974)

The facts surrounding the appellant's purchase of a radio from the wife of an inmate are relatively straightforward and essentially admitted by the appellant. See Respondent's Exhibit 9. The respondent presented testimony to the effect that such transactions created a substantial

security problem because of the threat of compromise of the staff members. This matter clearly fits within the just cause definition as set forth in the Safransky case.

With respect to unauthorized absences from the shop, the appellant admitted being absent for substantial periods, but denied that it was as much as an hour a day. However, there was considerable evidence that the appellant was absent from the shop three or more hours per day on a regular basis. This included the testimony and statement (Respondent's Exhibit 8) of Mr. Le Sage, who supervised the KMCI Fabrics shop, which was adjacent to the Graphics Production shop. There was evidence that on frequent occasions, people tried to contact the appellant at the Graphic Industries shop only to be told he was absent. There were written complaints from the appellant's civilian subordinate, who at the time of the hearing was out of the state and unavailable for direct testimony, concerning his excessive absenteeism. There was a preponderance of evidence that supports a finding that the appellant's absences from the shop were substantially in excess of anything that might be justified by legitimate, work-related reasons, and had a detrimental effect on the security and efficiency of the graphics operation.

The Commission cannot accept the respondent's contention that the appellant "failed to provide accurate and complete information when requested to do so by your superiors" with respect to the March 25, 1982, interview. See Respondent's Exhibit 1. As set forth in that document, the appellant was charged as follows:

> On March 25, 1982, during an interview with Donn Gurney and Lawrence Euler, you failed, when asked, to either acknowledge or explain your extensive, virtually daily, absences of one to three hours from the work site.

There are two aspects to this charge -- failing to acknowledge and failing to explain his absences.

As set forth in the appellant's statement, given on March 25th, Respondent's Exhibit 10, he failed to "explain" his absences, from the perspective of management, because there really was no explanation satisfactory to management. See, e.g., p. 10 of Respondent's Exhibit 10:

Q. O.K., I want to go back to the absences. You have been taking a coffee break twice a day. Why?

A. I can relax there, I can get away from the phone. I can find out what's happening around the institution.

Q. Why do you feel you should get away when your job is supervising inmates?

A. I don't know -- I just think it's good for me.

To make such a response is not to fail "to provide accurate and incomplete information" -- rather, it is to provide information that is unacceptable to management.

As to the alleged failure to "acknowledge" or admit "your extensive, virtually daily, absences of one to three hours from the work site," the appellant did admit to relatively extensive absences, of close to but less than one hour daily, on an approximate basis. Based on the wording of the aforesaid allegation, if he had admitted to absences of one hour, management would not have considered him derelict as to this work rule. Also, much of the colloquy set forth in the transcript of the March 25, 1982, interview, Respondent's Exhibit 10, was somewhat vague. The appellant was not asked if he denied being absent 1 to 3 hours per day. For example:

Q. You weren't absent 3 hours per day?

A. No, Nothing like that.

* * *

Q. So, you deny those charges of excessive absenteeism?

A. I can't deny being absent but not to that extent.
Respondent's Exhibit 10, pp. 2,3.

Under these circumstances, the Commission is unable to conclude that the appellant is guilty of the infraction alleged by management.

In addition to considering whether there was just cause for the discipline imposed, the Commission must also consider whether the amount or degree of disciplinary action was excessive, and should be modified pursuant to §230.44(4)(d), Stats. See Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79); Barden v. UW, Wis. Pers. Comm. No. 82-237-PC (6/9/83).

In Barden, the Commission's opinion contained the following discussion:

> 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 impair the employe's operation, and the employe's prior work record with the respondent. p. 6.

In the instant case, the work site is a correctional institution or prison. There was ample testimony about the paramountcy of security concerns, and the specific dangers of staff engaging in financial transactions with inmates or leaving their posts for extended periods.

As to the appellant's performance record, his performance evaluations can be characterized generally as "good" -- and the appellant enjoys generally good rapport with his colleagues and management at KMCI.

Another factor that can be considered with respect to the question of severity of discipline is comparable discipline in other cases. There was evidence presented on this. Such evidence is usually difficult to weight

because of the fact that there frequently are wide differences between the facts of particular cases and the employment records of the employes involved.

The respondent presented the testimony of an employment relations specialist that 30 day suspensions had been given to two other employes for having had financial dealings with inmates. These transactions involved larger sums than in the instant case. However, the appellant also was disciplined for excessive absenteeism from his post. In the opinion of the Commission, on this record it can be said that the 30 days suspension here imposed was at least generally comparable to the respondent's approach to similar cases.

Therefore, the Commission concludes that the 30 day suspension here imposed was not excessive and should be sustained.

ORDER

The action of the respondent suspending the appellant for 30 days without pay is sustained and this appeal is dismissed.

Dated: August 31, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf

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