

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JOHN F. HAMMOND,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Respondent.
 Case No. 83-0172-PC

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DECISION
 AND
 ORDER

A proposed decision and order was issued in the above matter on April 17, 1984. The respondent filed objections to the proposed decision and submitted written arguments in support of his objections.

Based upon a review of the record and after consulting with the hearing examiner, the Commission issues the following:

ORDER

The proposed decision and order is affirmed subject to the addition of two findings of fact which read:

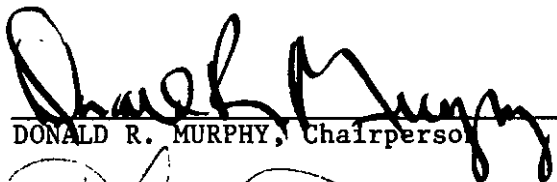
14. The appellant was authorized by the assistant supply room attendant (respondent's employe) to take the kit and sign out for it when the supply room manager returned the following Monday.

15. The appellant's responsibilities as a Real Estate Agent 2 are generally performed independently. In appraising property and negotiating with property owners, the appellant exercises substantial discretion. The trust placed in Mr. Hammond by property owners, his co-workers, his supervisors and the general public would be undermined if the appellant was shown to have acted dishonestly.

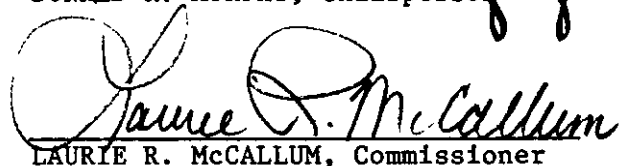
In addition, the following paragraph is added to the opinion section of the decision:

While the respondent established that trustworthiness was an integral part of the appellant's job in order for him to work effectively with his employer and with the members of the general public, the evidence fails to establish that, given the facts of this case, the trust in the appellant should be undermined. If appellant's conduct had been shown to involve dishonesty, the respondent's arguments about trustworthiness would have been entitled to significant weight. However, no dishonesty was established here. Testimony by appellant's supervisor that he had lost trust in the appellant was premised upon allegations that were not substantiated by the evidence offered at the hearing.

Dated: May 16, 1984 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson

DRM:jat


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

Parties:

John F. Hammond
3732 N. 100 Street
Milwaukee, WI 53222

Lowell Jackson
DOT, Secretary
Hill Farms State Office Building
4802 Sheboygan Avenue
Madison, WI 53702

4. The supply room is on the third floor of the District 2 office building. It contains office and engineering supplies. It is supervised by the manager of stores who has one assistant.

5. All district employees may obtain supplies from the supply room. Most of the supplies are available to the employees without asking for them. However, batteries and tapes are kept in a locked cabinet.

6. First aid kits are mainly issued to the district highway engineers. However, other employees could obtain kits by asking the supply room attendant and, if necessary, getting approval from the employee's supervisor.

7. On July 29, 1983, a Friday, the assistant supply room manager was operating the supply room. The appellant obtained the kit by advising the assistant manager that he wanted to keep the kit in his car for use during his trip to his cottage. The assistant manager told appellant to take the kit and sign out for it when the manager returned the following Monday at which point appellant would have been advised of the policy for obtaining first aid kits.

8. Later that same day, a co-employee observed the first aid kit on the appellant's desk. That afternoon, while appellant was absent from his desk, another employee opened the appellant's briefcase without appellant's permission and observed the first aid kit. The event was reported to the lead worker and, in turn, to the unit supervisor. The unit supervisor contacted the DOT central personnel officer for instructions on how to handle the appellant's actions.

9. After work, the unit supervisor and another employee confronted the appellant as he approached his car in the parking lot and asked the appellant to open his briefcase. The appellant complied with the request. Among other items, the briefcase contained the first aid kit.

10. The supervisor took the briefcase and locked it in an office file cabinet.

11. The appellant had planned to use the first aid kit at his private cottage and also planned to keep it in his car for use during field operations.

12. On August 3, 1983 the appellant was given written notice that he was being suspended without pay for thirty (30) days, effective August 4, 1983 for violating DOT work rules (Article III, Use of Property, Section 2), which prohibit "stealing or unauthorized possession of state ... property ..." The letter of suspension stated, in part:

On July 29, 1983, following receipt of information that you were possibly stealing State property, you were stopped outside your car in the State parking lot at 141 N.W. Barstow Street, Waukesha, and you were requested to open your briefcase for inspection. Inside your briefcase was a State first-aid kit which, upon questioning, you admitted you took from the supply room on 3rd floor and were going to take to your cottage for your personal use.

13. The appellant appealed the suspension to this Commission within thirty (30) days after he was notified of the disciplinary action by the respondent.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this appeal pursuant to §230.44(1)(c), Stats.

2. The respondent has the burden of persuasion to show to a reasonable certainty by the greater weight of credible evidence that there was just cause for imposing some disciplinary action upon the appellant and that the imposition upon the appellant of a thirty (30) day suspension without pay was not excessive.

3. The respondent met the burden of showing there was just cause for imposing some disciplinary action upon the appellant, but failed to show the particular discipline imposed was not excessive.

4. The imposition of thirty (30) days suspension without pay was excessive and should be modified to one (1) day suspension without pay.

5. Appellant is entitled to compensation as provided by §230.43(4), Stats., less the one (1) day suspension without pay.

OPINION

Few facts in this case are in dispute. On July 29, 1983 the appellant obtained a first aid kit from the DOT district office supply room. He informed the supply room attendant he wanted the kit to take with him on his trip to his cottage. There is, however, some dispute about what appellant said when confronted after work in the parking lot with the kit. The appellant testified his statements to his supervisor regarding the use of the kit were essentially the same as previously made to the supply room attendant. However, two witnesses for the respondent testified appellant stated to them he intended to use the kit at his cottage. While the precise statements of appellant regarding his intended use of the kit are in dispute, it is clear from the testimony that appellant intended to put the first aid kit to some personal use unconnected with his job responsibilities. It is also clear from the testimony that the appellant knew state property is not to be used for private purposes, notwithstanding the tentative permission given by the supply room attendant.

Respondent's letter of suspension cites appellant with violating Work Rule III, 2, which prohibits DOT employees from: "Stealing or unauthorized possession of state or private property, equipment, or materials." The appellant did not actually steal the first aid kit because he obtained the

kit from the supply room attendant after telling the attendant that he wanted to take it with him to his cottage over the weekend and then reaching an agreement with the attendant to get the supply room manager's approval on the following Monday. Appellant was at least temporarily authorized (by someone in a reasonable position to grant authorization) to use the kit over the weekend. Therefore, respondent has failed to make out a case for appellant having violated the precise terms of Work Rule III, 2.

Nevertheless, the appellant's intended use of the kit was still for his personal benefit rather than entirely in the course of his employment as a Real Estate Agent 2. His conduct violated §ER-Pers. 24.04(2)(a), Wis. Adm. Code, which provides:

No employe may use or attempt to use his or her public position or state property, including property leased by this state, or use the prestige or influence of a state position to influence or gain financial or other benefits, advantages or privileges for the private benefit of the employe, the employe's immediate family or an organization with which the employe is associated.

The fact that appellant sought to have the first aid kit for his weekend trip to his cottage was established to a "reasonable certainty, by the greater weight of the credible evidence." Reinke v. Personnel Board, 53 Wis. 2d 123 (1971). Absent the employer's action of removing the kit from the appellant's possession in the office parking lot on Friday afternoon, the appellant would have obtained a private benefit from state property. Therefore, the Commission concludes that there was just cause for imposing some disciplinary action upon the appellant.

The appellant argued that his "Civil Rights were violated by Invasion of Privacy when [a co-worker] took it upon himself to open and look into my briefcase." To the extent that the appellant is alleging a violation of the Fourth Amendment right against "unreasonable searches and seizures," the protections provided by the Fourth Amendment "do not extend to a search

or seizure made by a private individual, conducted without police participation." 68 Am. Jur. 2d, 670. The exclusionary rule preventing the introduction of evidence obtained by an unlawful search and seizure does not apply where the search was made "by a private individual acting on his own initiative," 29 Am. Jur. 2d, 476. There is nothing on this record to indicate that appellant's co-worker was acting on behalf of respondent agency when he opened appellant's briefcase.

Respondent correctly points out that if the appellant feels that his right of privacy was "unreasonably invaded," his remedy lies in an action for invasion of privacy as provided in §895.50, Stats., rather than in a personnel appeal to the Commission.

Appellant also argues that respondent entrapped him by its actions. While deception may be part of every attempt to catch a person believed to be violating the law, the type of entrapment the law forbids is one of inducing another to violate the law. The facts in this matter do not support the conclusion that respondent engaged in entrapment of the appellant.

The critical question before the Commission is whether the discipline imposed by respondent was excessive. Respondent's imposition of the particular degree of discipline appears to be based upon the belief that appellant took the first aid kit from the supply room either without the knowledge or permission of the supply room attendant with the intent to permanently deprive respondent of such property. This position is not supported by the evidence presented. The supply room attendant gave the appellant permission to take the kit and to sign out for it the following Monday, when the supply room manager returned. Before receiving the kit, the appellant had informed the supply room attendant that he wanted the kit

for his trip to his cottage. In addition, the appellant never attempted to hide the kit from view of his co-workers or to surreptitiously remove the kit from the district office. When confronted by his supervisor, appellant did not hesitate to open his briefcase which contained the first aid kit. The facts established that the appellant intended to both use the kit at his cottage and to have it available in his car for use during field operations.

The Commission cannot agree with the respondent's contention that appellant's conduct severely undermines the "trust necessarily placed in Mr. Hammond by private property owners with whom he deals, by his supervisor, by DOT, [and] by the general public." The appellant's conduct evidences bad judgment on the part of the appellant rather than a calculated attempt to misuse state property. The appellant's conduct in obtaining the kit and in giving it up when questioned about it is simply not the type of conduct that is going to significantly undermine the trust necessary to carry on his duties. The testimony offered by respondent's witnesses as to the consequence of the appellant's conduct assumes conduct other than that established by the evidence presented at hearing.

Respondent disciplined the appellant by suspending him for thirty days. The thirty-day suspension represented approximately 9% of appellant's annual salary, greatly exceeding the value of the first aid kit. Given the appellant's prior unblemished record, the one-time nature of the violation and the mitigating factors surrounding the first aid kit incident, the Commission finds that a thirty-day suspension is excessive in light of the facts of this case and a one-day suspension is a more appropriate level of discipline to be imposed against the appellant.

For the reasons outlined above, respondent's action must be modified.

ORDER

The action of respondent is disciplining appellant is modified to a one (1) day suspension without pay and this matter is remanded to respondent for action in accordance with this decision.

Dated: _____, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

DRM:jat

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

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