STATE OF WISCONSIN PERSONNEL COMMISSION

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WILLIAM J. MITCHELL,

Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 83-0228-PC

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DECISION
AND
ORDER

This matter is before the Commission on consideration of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and written arguments and consulted with the hearing examiner. The Commission will adopt the proposed decision and order as its final disposition of this matter, with the following changes:

1. Finding #26 is deleted because direct proof about the public's perception of an employe's behavior is not required as part of the respondent's case. The Commission can infer from the facts of the misconduct its tendency to impair public confidence. See Voigt v. State Personnel Board, Dane County Circuit Court 142-120 (May 6, 1974).

2. The last sentence of finding #18 is amended as follows to conform to the record:

> The following day he was placed on leave with pay and later the appellant was advised that he could elect to resign or be terminated effective November 11, 1983.

3. In place of the "Conclusions of Law" and "Opinion" set forth in the proposed decision and order, the Commission makes the following amended Conclusions of Law and Opinion. The reasons for these changes are to more

accurately reflect the Commission's analysis of this type of case as set forth in Barden v. UW-System, 82-237-PC (6/9/83), to delete reference to matter contained in finding #26, and to correct certain typographical errors.

CONCLUSIONS OF LAW

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

2. The burden of proof is on the respondent to demonstrate to a reasonable certainty by the greater weight of the credible evidence that there was just cause for the imposition of discipline and for the amount of discipline imposed.

3. The respondent has established just cause for the imposition of some discipline but not for the discharge of appellant.

4. The discharge constituted excessive discipline and should be modified to 30 days suspension without pay.

OPINION

At the prehearing conference held on December 8, 1983, the parties agreed that the following issue was presented for hearing:

> Whether there was just cause for the discharge.
>
> Sub-issue: Whether the discipline imposed was excessive (Prehearing Conference Report dated December 9, 1983).

The underlying questions within the stated issues to be answered by this appeal are:

1. Whether the greater weight of credible evidence shows that appellant has committed the conduct alleged by respondent in its letter of discharge,

2. Whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes cause for the imposition of discipline, and

3. Whether the imposed discipline was excessive. Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79)

The respondent in its discharge letter to appellant, alleged that appellant had violated two work rules:

> Manual Code 9121.063.a. Stealing, including unauthorized removal of Department or private property, equipment, or supplies, and Manual Code 9121.1 G. Refrain from any acts or relations which violate their public trust and reflect discredit on themselves or the Department. 7. Refrain from using their official position to secure special privileges for themselves or others. And 9. Conduct their relationships with individuals and companies licensed, regulated or supervised by the Department so that there can be no question of their judgment in enforcing state laws or Natural Resources Board regulations.

The essence of respondent's allegations in respect to the work rules is that appellant stole property from them, used his position to gain special privileges for himself and others, violated public trust and engaged in inappropriate conduct with individuals and companies that were licensed, regulated or supervised by respondent. The basis of respondent's allegations were two incidents: In November of 1981, the appellant allegedly had a car-killed deer contractor place fictitious deer on a monthly deer disposal report. The respondent paid the contractor $200.00 for removing eight deer and the contractor returned the money collected to the appellant to purchase 2 flashlights. In the second incident, the appellant allegedly suggested to a warden under his supervision that the warden use car-killed deer funds to purchase a scanner from him; and appellant knew the warden

subsequently purchased the scanner with money obtained by placing fictitious deer on a monthly disposal report.

Contrary to respondent's allegations about the first incident, appellant testified that he had been asked by the car-killed deer contractor to remove deer for him while he was on vacation and that he actually disposed of four deer for the contractor during this period. In corroboration, the contractor testified that appellant gave him a list of four deer, their location and the dates he picked them up during his vacation, information then placed on the monthly deer disposal report. The contractor also testified that later he gave another warden $200.00, $100.00 for the deer removed by the appellant and $100.00 as a donation, to purchase two flashlights. He also testified he had donated many hours of work assisting the wardens.

In rebuttal, the respondent argued that the deer contract did not provide for deer disposal by anyone other than the contractor and that appellant knowingly acted in breach of that contract. Respondent failed to recite or specify any language in the contract in support of its argument. In addition, the respondent failed to show any misappropriation or loss of money or services caused by the actions of appellant in securing the two flashlights for wardens under his supervision. The contractor testified that he had disposed of in excess of the deer paid for at $25.00 each under the contract. The net result was that respondent acquired two flashlights without loss of deer removal funds or services.

Concerning the second incident involving the scanner, the respondent attempted to show a pattern of illegal conduct by the appellant. Mr. Wolf, the warden who bought the scanner from appellant, was respondent's principal witness. He testified that appellant suggested that he add deer to the

monthly deer disposal report to obtain the $150.00 purchase price for the scanner. On October 19, 1983, after being advised by Mr. Wood, appellant's supervisor, that he would not lose his job if "honesty prevailed" he submitted a written statement to respondent. (Respondent's Exhibit #5). The statement provides, in part:

> Mention was made to Bill Mitchell November 1982, of a need for a radio scanner for my DNR office. Bill stated he could get me one for $150 and made a suggestion that deer contract money could possibly be used for this purpose.

During his testimony, the warden verified his written statement, stating that the appellant did not direct him to add deer to the monthly report or instruct him to place fictitious deer on the report. Two months after appellant made the offer of sale the warden purchased the scanner. The warden testified that he did not disclose the source of the purchase money to the appellant, but believed (without giving any reason under specific questioning) the appellant knew the source of such funds. While in some respects the warden's testimony was vague, it was clear that his acts were voluntary and not based upon directives, coercion or fear of reprisal.

In regard to the flashlight incident, respondent failed to show that appellant violated Manual Code 9121.06, 3.a. (stealing, including unauthorized removal of Department or provide property, equipment, or supplies) as charged. Also there is insufficient evidence to sustain the charge that appellant violated Manual Code 9121.1, 6. (Refrain from any acts or relations which violate their public trust and reflect discredit on themselves or the Department.) However, while there was no testimony that Mr. Peeso was obliged to donate funds to purchase two flashlights for respondent, the evidence does support the charge that appellant used his position to secure funds from Mr. Peeso, in violation of respondent's Manual Code 9121.1, 7. Also it can be said, based on the evidence that appellant's

agreement with Mr. Peeso to pick up car-killed deer during the contractor's vacation, while not proven to be a breach of contract, was questionable conduct and in violation of respondent's Manual Code 9121.1,9.

Regarding the radio scanner incident, the evidence is clear that appellant's suggestion to Mr. Wolf that car-killed deer funds could possibly, be used to purchase his scanner (however intended) had some causal relationship to Mr. Wolf's illegal conduct. This conduct of appellant was in violation of respondent's Manual Code 9121.1,7 and 9.

Having determined that respondent failed to present sufficient evidence to support its charge of stealing against appellant but did so with respect to two sections in its Code of Ethics (9121.1, 7 and 9), the next question is whether such conduct constitutes "just cause" for the imposition of discipline. It is the Commission's belief that appellant's misconduct as found has a tendency to impair his performance of the duties of his position and is just cause for the imposition of discipline.

In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity or the employe's offense or dereliction, including the degree to which, it did or could reasonably be said to tend to impair the employer's operation [a test enunciated in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974)] and the employe's prior work record with the respondent. Barden v. UW, supra.

The respondent argued that appellant lost credibility with his co-workers and the general public. In support, respondent called Mr. Buenning (a subordinate), Mr. Wood (appellant's immediate supervisor), Mr. Tills (Asst. District Director), and Mr. Christensen (Chief Warden). Each person testified that appellant's credibility had been irreparably destroyed with

them and the public. The basis of these witnesses' beliefs rest mainly upon reported conduct of appellant not established by the evidence presented.

While there was no direct evidence presented concerning the appellant's loss of credibility with the public, it can be inferred from the misconduct found, see Voigt v. State Personnel Board, Dane County Circuit Court 142-120 (May 6, 1974), that such misconduct would tend to impair the public confidence. However, given the attenuated nature of the misconduct actually found, such impairment would not be sufficiently deleterious to warrant discharge.

Respondent also argued that appellant's prior written reprimand is a factor to be considered. Appellant's written reprimand resulted from a breach of an alleged agreement between the appellant and his supervisors (Mr. Wood and Mr. Winnie) on the processing of his wife's citation from respondent. Mr. Wood testified that appellant violated the agreement by failing to advise his supervisors that his wife had written a letter to the circuit court judge about her citation. Mr. Winnie (Mr. Woods' supervisor) testified that appellant did not violate any agreement between them. The evidence presented does not support respondent's allegation of an agreement. The testimony was that respondent processed appellant's wife's citation in the same manner as other citations. No concessions were given appellant or his wife by respondent. There was no basis for any such agreement. The written reprimand was not warranted.[FN]

[FN] By offering testimony and argument on the question of whether the reprimand should have been issued and therefore was an appropriate consideration in setting the proper amount of discipline to be imposed in this case, the parties have apparently conceded that the Commission has jurisdiction to consider that issue.

The appellant's general employment record with the respondent was excellent, as set forth in Finding #15, above.

In cases where it is possible to compare discipline meted out in somewhat similar cases, this is also an appropriate factor to consider in assessing whether the degree of discipline imposed was excessive. See, e.g., Baxter v. DHSS, 82-85-PC (August 31, 1983). Mr. Wolf received a ten day suspension. While he was not a supervisor, he added fictitious deer to a deer disposal report, while it was never shown that the appellant added fictitious deer to a deer disposal report or had knowledge thereof. The appellant's discharge appears quite excessive in comparison to Mr. Wolf's ten day suspension.

The Commission also notes that a portion of the alleged misconduct which the respondent relied on in discharging the appellant were not proven at the hearing.

In light of all the circumstances, the respondent's action in discharging the appellant should be modified to 30 days suspension without pay.

ORDER

The action of respondent in disciplining appellant is modified to thirty days suspension without pay and this matter is remanded to respondent for action in accordance with this decision.

Dated: August 30, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

DRM:AJT:jmf

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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