

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 MARTIN EFT, *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 HEALTH AND SOCIAL SERVICES, *
 *
 Respondent. *
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 Case No. 86-0146-PC *
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 * * * * *

DECISION
 AND
 ORDER

After considering the proposed decision and order issued in the above matter, the objections thereto, and the oral arguments of the parties and after consulting with the examiner, the Commission has added certain language to the proposed decision so that it more clearly reflects the basis for the Commission's decision, corrects typographical errors, and better conforms with the record.

This matter is before the Commission on appellant's claim that he was demoted by respondent in violation of the "just cause" requirement provided in Section 230.34(1)(a), Wis. Stats. The following findings, conclusions, decision and order are based upon a hearing on this matter, which included oral testimony, written exhibits and post-hearing briefs. To the extent that any of the findings of fact might constitute, opinion or conclusions of law, they are adopted as such. Conversely, to the extent any opinion or conclusions of law constitute findings of fact, they are adopted as such.

FINDINGS OF FACT

1. Appellant, Martin Eft, initially began working for respondent in 1960 as a rehabilitation counselor in the Division of Vocational Rehabilitation (DVR) at its offices in Milwaukee, Wisconsin.

2. In 1978, appellant became a Regional Administrator and was responsible for supervising the geographical area which included the cities of La Crosse, Eau Claire, and Ladysmith, Wisconsin. Later he was reassigned to the geographic area which had offices in Green Bay, Oshkosh, Sheboygan, and Fond du Lac, Wisconsin.

3. In 1982 appellant was laid off from his administrator position, but was offered a supervisor position, limited to his prior pay rate, which he accepted. In January, 1984 he was reassigned as a field office supervisor in Portage, Wisconsin. Appellant's duties included supervising eleven staff people, supervising and monitoring the field office Vocational Rehabilitation (VR) programs, managing the field office budgets, developing, planning and implementing area VR programs, and implementing public relations programs and interagency coordination and resolution of area problems.

4. At Portage, Mr. Rodney Van Deventer was appellant's regional administrator and supervisor until January 1986, when he was replaced by Mr. Olaf Brekke.

5. On July 2, 1986 respondent wrote the appellant, informing him that as of July 7, 1986, he was demoted from Supervisor 2 in the Portage office to a Program Analyst 4 in the division's central office in Madison, Wisconsin.

6. In the letter, respondent stated that appellant had violated work rules 1, 3, 5 and 7, while functioning as supervisor in the Portage office.

7. Respondent's work rules, which it was reported appellant violated, over the course of nine different incidents, are as follows:

1. Disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directives or instructions.
3. Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment, or supplies.
5. Disorderly or illegal conduct including but not limited to the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employee.
7. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.
8. In providing an explanation for its action, respondent, in the same letter, stated:

The just cause for this action is as follows:

In a meeting on 2-20-86 you were informed by Ole Brekke that no additional clerical staff would be added or requested for the Portage office until such time as an adequate accounting for the use of existing staff resources had been concluded. You were assured at that time an onsite management audit would be conducted in March with the results used to help determine necessary action in addressing alleged work load problems. Despite this instruction, you arranged to have a contract service provider, Green Valley Enterprises (GVE), "hire" one Beth Roth ostensibly to provide job coaching to three DVR clients. You arranged to have counselor Joel Smith provide three named clients Lehman, Wrucks and Slattery as the purported recipients of the job coaching, and secretary Pixie Foulkner to draft a purchase order to GVE with which money they would pay Ms. Roth. Ms. Roth did not provide job coaching but in fact performed clerical work in the Portage office for the \$408 which was channeled by means of the purchase order proceeds from DVR, to GVE to Ms. Roth.

When given an opportunity to provide Mr. Brekke with complete information about this incident on May 20 and May 22, you, although fully involved, initially pleaded ignorance, and were then evasive. Even to this date you have not voluntarily stated the details of how you accomplished the result you did, but have left it to management's investigation including the use of leading questions at the investigatory meeting to get you to admit what you did, how you did it, and that it was wrong and you knew it was wrong. Your "explanation" of this scheme in your memo of 5-22-86 is wholly inadequate.

The above conduct constitutes violations of work rules #1, 3, 5 and 7 in that it involves:

- a. insubordination, inattention and/or negligence in carrying out assigned duties;
- b. misuse of State property (service funds, state and federal monies);
- c. engaged in behavior unbecoming a state supervisory employee;
- d. failure to provide accurate, complete and/or timely information upon management request;
- e. involvement of counselor and clerical staff as well as an outside contract service provider in very serious misconduct.

You failed to offer helpful analysis or provide timely monitoring of staff case work. Review of performance appraisal reports filed on your staff in 3-86 reflected inflated performance levels for counselors and a sense of "sameness." For example, you rated Larry Hoskins as outstanding. The results of a quality assurance review of a random sample of his cases, brought about by his termination, reflects serious case management problems including:

- a. Tim Williams: Hoskins hired his own daughter to provide transportation services at \$10/hour plus 21¢ per mile reimbursement for transporting client for a job interview.
- b. B. Remelfanger: client received multiple services which were not identified in the IWRP; i.e., two pair of glasses @ \$242; dental restoration @ \$1,276; numerous car repairs totaling in excess of \$100; "emergency" maintenance transportation without filed documentation; receipt of \$1000 and a separate payment of \$75 to prepare a list of employers for potential clients to use in job searches; to date, neither you nor the client has been able to produce the list or acknowledge the complete list was even completed; the case was closed only days after the \$1000 was paid.
- c. M. Wilke: Client was provided with \$400 in emergency money, rationale being her clothes were lost in a fire. There was no documented evidence of eligibility or disability. The case was closed two months later: client not interested in working because her husband was employed.
- d. W. Podalak: several purchase orders including \$155 to job interview within 100 miles of home, contrary to division policy.

These are particularly troublesome in light of recent criticisms by the Legislative Audit Bureau in this area. You should be even more sensitive to these matters because you participated in the follow up training which resulted. The above conduct constitutes a violation of work rule #1, inattention and/or negligence in carrying out assigned supervisory duties.

You instructed homecraft teacher Karen Clumpner not to provide homecraft instruction to clients in Richland County until you felt a dispute with Madison Field Office supervisor Manual Lugo was resolved to your satisfaction. You deny this allegation. Management relies upon the information provided by Ms. Clumpner and Lynette Teppo to find you violated work rules 1 and 7 by this conduct. Such acts constitute insubordination, inattention and/or negligence in carrying out assigned supervisory duties as well as failure to provide accurate, complete and/or timely information to management.

You reassigned counselor caseloads in Juneau/Columbia and Sauk counties 2-86 because counselor Sandi Scrivener was having problems in a newly assigned area. She was then transferred back to an earlier caseload without the underlying problem ever being identified or acted upon, with resulting disruption in client services. This conduct constitutes a violation of work rule #1: inattention and/or negligence in carrying out assigned supervisory duties.

On another occasion, then LTE Beth Roth came to you concerning an incident with a sexual assault victim. In the presence of an uninvolved clerical worker, you directed Roth to prepare an "incident report" on this matter. The incident involved Ms. Roth, alleging concern about _____ victimization in a sexual assault, asking inappropriate and probing questions about her fiance. You asked the LTE, Roth, for the report without first informally inquiring of the victim what had occurred and without developing a basis upon which to determine whether action short of writing up incident reports would adequately address the issue. You initially denied giving the instruction to Ms. Roth, but this was later confirmed by her.

The above incident constitutes violations of work rules #1 and 7, that is inattention and/or negligence in carrying out assigned supervisory duties and a [sic] failure to provide accurate, complete and/or timely information to management.

As of 6-12-86 you had not met with either _____ or _____ both victims of either sexual assault or sexual harassment by a former counselor employee, to share your support as their supervisor and determine whether there was anything you could do at the workplace to accommodate their recent traumatic experiences. This conduct constitutes a violation of work rules #1 and 3 in that it is inattention and/or negligence in carrying out assigned supervisory duties and conduct unbecoming a state supervisory employee.

New staff assigned to the Portage office were given Larry Hoskins as their instructor for their orientation as VR Counselor/ Homecraft teacher. Five staff members, including Larry Hoskins, indicated to Mr. Brekke that you had failed to provide direction in addressing their case-related or general work-related problems. When asked what to do on certain case matters, you as an example would say, "You know what's best." This conduct is a violation of work rule #1 in that it constitutes inattention, and/or negligence in carrying out assigned duties.

You have failed to maintain good working relationships with community service providers. On 3-20-86 51.42 Bd. Director of Columbia County wrote an unsolicited letter indicating a lack of confidence in the management of the Portage VR office, outlining the failure on more than one occasion of you to meet scheduled appointments and stating that the board would go forward toward implementing certain matters even without local DVR cooperation or support. Your conduct here constitutes a violation of work rule #1, inattention and/or neglect in carrying out assigned duties.

You have demonstrated an inability to differentiate significant issues from trivia as follows:

a. Disproportionate amount of time devoted to attending PIC-related meetings as opposed to one-on-one sessions with staff and quality assurance review of the Portage office program as well as follow-up with area-wide referral and community service resources;

b. You confronted employee Karen Clumpner stating a poster on a wall depicting a grandfatherly man and young boy in a rural setting was inappropriate, while failing to compare a map of Jamaica with personal itinerary designations displayed next door in Larry Hoskins office, in the context of having displayed in your own office a double-billed cap on a bookcase clearly visible to the public which states, "I am their leader, which way did they go?"

c. You established a local Counselor Advisory Committee, a workplan mandate, using the recommendation of only one of seven counselors. The composition of the six member committee consisted of three Green Valley Enterprises employees, a significant contract service provider for clients in the Portage area, with three consumers, current or former clients, one of whom is a member of the PIC Council. Another is a live-in boyfriend of Counselor Judy Powell. At a minimum, this demonstrates an inability to understand possible conflicts of interest.

d. Performance appraisal reports done by you identified staff development needs of three employees to include such training activities as biofeedback and/or neutral-linguistic training (C. Bodway identified as trainer/resource person). This reflects a gross misunderstanding of Portage office and agency wide priorities regarding use of limited staff development monies. No consultation on this subject was requested by you of either Mr. Brekke or Staff Development Coordinator, Sue Kell.

Based on all of the above I have determined to impose discipline. As to what degree of discipline, I have considered your past work record and prior disciplines. In your 1984 performance review Mr. Van Deventer tried to encourage improvement in several areas of your performance with subtle, positive suggestions. These did not work. You were given a one day suspension without pay. You were not given discretionary pay increases and delayed pay increases and these have

not worked. Your 1985 performance review lists numerous deficiencies several of which are repetitions of earlier problem areas. None of this appears to have made an impression on you or resulted in improvement. Rather, your conduct, as demonstrated above, has seriously deteriorated.

9. On July 17, 1986, appellant, by his attorney, filed with this commission an appeal of respondent's decision to demote him.

10. As early as a year before the letter of demotion, respondent had concerns about appellant's work performance. In October, 1985, appellant was suspended for one day for violating work rule 1. Also, appellant was not given discretionary pay increases and other pay increases were delayed.

11. As a part of DVR regional realignment in January, 1986, Olaf Brekke was assigned to supervise the Portage field office.

12. Prior to being assigned as supervisor of the Portage office, Brekke met several times with Ken McClarnon, DVR Deputy Administrator, and Rodney Van Deventer, Regional Administrator, who at that time supervised the appellant. At one meeting Van Deventer gave Brekke appraisal reviews of the Portage office staff, which included the appellant. Van Deventer advised Brekke that, in his view, appellant needed close supervision.

13. After taking over as supervisor of the Portage field office, Mr. Brekke reviewed the Portage office staff performance contracts, evaluations and reviews. About the appellant, Brekke concluded that he failed to understand the needs of his staff and, like Van Deventer, believed he needed close supervision.

14. Mr. Brekke set a work plan for appellant, which focused upon issues noted by Van Deventer in his performance review of appellant's work.

15. During Brekke's assignment as supervisor of the Portage office, he had frequent contacts each month with appellant. These contacts were in

the form of telephone calls, written correspondence and personal office visits. Brekke made himself available to appellant.

16. Mr. Brekke's first face-to-face meeting with appellant was February 20, 1986. At that meeting Brekke covered the seven items outlined in his February 13, 1986 memo to appellant. The items covered in the meeting were:

1. Items previously shared via mail.
2. Work plan for Office Supervisor 1986.
3. Work performance and work plans of staff 1986.
4. Services purchased under contract 1986.
5. Budget 1986.
6. Dane/Columbia Project (Status Report).
7. Three (3) specific assignments due between 3/1/86 and 6/1/86.

17. Appellant was apprised by Mr. Brekke of the responsibilities and expectations of his job as field office supervisor.

18. Mr. Brekke provided close supervision of appellant.

19. The work plan assigned to the appellant by Mr. Brekke, styled to the needs of the Portage office, was similar to work plans assigned other field office supervisors under Brekke's supervision.

20. Mr. Brekke monitored and informed appellant of his evaluation of appellant's work performance. On April 4, 1986 he wrote: "My review of the past several months finds Portage office error rates exceeding the state average by a nontolerable margin." On May 9, 1986 he wrote: "I want you to develop what you would consider a responsive 30 day work plan.... This proposal is due May 19." On May 14, 1986 he wrote: "I have not seen evidence that you are responsive to supervision or understanding of Portage

staff needs." Again on May 28, 1986 he wrote: "I am not satisfied with your explanation regarding the arrangements you previously made to pay Elizabeth Roth.... For that reason, I am asking that we meet here in Madison on Monday, June 2, to discuss this subject and related concerns.... You are welcome to have legal counsel present at this investigatory meeting."

21. By letter dated June 6, 1986, respondent gave notice to appellant's attorney that a predisciplinary hearing had been scheduled for June 12, 1986. Appellant attended the hearing with his attorney.

22. On June 13, 1986 Mr. Brekke sent a memorandum entitled "Subject: Investigatory Findings Re: Martin J. Eft" to his supervisor, Ken McClarnon. In the memorandum Brekke said the investigation resulted in a determination that appellant had violated DHSS work rules 1, 3, 5 and 7. Brekke, aware of appellant's 25 years plus service with the agency, recommended a five-day suspension without pay and a demotion to a non-field supervisory staff position.

23. On July 7, 1988 appellant was demoted from Supervisor 2 to Program Analyst 4.

24. As to the Beth Roth hiring incident: In March, 1986, appellant, contrary to instructions of Mr. Brekke, his supervisor, hired Beth Roth to an LTE clerical position two weeks in advance of her authorized starting date. He arranged to have Green Valley Enterprises, a contract service provider, pay Roth through its payroll and be reimbursed by debiting job coaching services for three DVR clients. The total amount paid Green Valley for Beth Roth's salary was \$408.00. Appellant knew at the time he developed these payment transactions that it was improper to hire the LTE before the authorized date and to use client service funds for her salary.

In response to Brekke's May 20, 1986 inquiries about the Roth incident, appellant gave equivocal and incomplete information.

25. Appellant's supervisor, Mr. Brekke, gave extensive testimony about appellant's failures as Portage Field Office Supervisor. Pixie Foulkner and Karen Clumpner Griffith, two employees supervised by appellant, corroborated Brekke's testimony regarding appellant's failure to provide direction, monitor case work and perform as field office supervisor. Griffith also testified that she had been instructed by appellant to discontinue serving homecraft clients in Richland County until she was given contrary instructions.

26. As to the allegation that appellant did not exhibit sensitivity or concern for sexual harassment complainants, a female employee testified that three and one-half weeks after she began employment with respondent, she was sexually assaulted by a male co-worker while on work status. Prior to the assault, the female employee had complained to appellant about this co-worker's inappropriate comments and behavior and asked to be reassigned. Appellant told her that this co-worker was that way and not to take him seriously. Several months later, after an investigation, the co-worker was fired. Appellant, considered by some female employees to be a friend of the discharged male employee, failed to show support to subordinate female employees who had been sexually harassed and assaulted by the discharged male employee.

27. As to the allegation appellant failed to maintain good community relations: Mr. Brekke testified to claims that appellant had consistently failed to meet with a Columbia County Board coordinator. This testimony was corroborated by documentation from the county coordinator. However,

Mr. Hebblethwaite, Green Valley Enterprises, testified to a good working relationship with appellant.

28. The Commission finds:

a. Appellant failed to provide direction, offer helpful analysis or provide timely monitoring of management case work and address general work-related problems.

b. Appellant instructed homecraft teacher not to provide instruction to clients in Richland County until dispute with field office supervisor was resolved.

c. Appellant improperly reassigned counselor caseloads in Juneau/Columbia and Sauk counties.

d. Appellant failed to show concern and sensitivity to sexual assault and harassment victims.

e. Appellant failed to provide his supervisor with a complete and accurate report about a sexual assault victim.

29. The evidence was inconclusive in regards to the allegation that appellant failed to maintain good working relationships with community service providers and failed to differentiate significant issues from trivia.

30. Appellant's conduct is not comparable to the conduct of several other DVR employees, whose discipline, comparatively, was less severe. Three disciplinary actions of DVR, which are illustrative of DVR disciplinary cases offered by appellant on the issue of consistent and fair discipline, are set out below.

Case No. 1: A DVR supervisor was suspected of having a conflict of interest when she dated and became a member of the board of directors of a psychiatrist's service corporation. The psychiatrist

provided services for the supervisor's office. After an investigation, it was concluded that no improper billing of services occurred. The supervisor was given a written reprimand and directed to resign from the psychiatrist's board of directors.

Case No. 2: A DVR client, who was provided DVR finances to start-up his own business, used money designated to pay his workers for other purposes. After consultation with the case worker, the supervisor approved payment of worker's wages. Upon review, the supervisor's action was deemed by respondent to be appropriate and justifiable under the provisions of the client's individualized rehabilitation plan, which had been approved by appellant as the immediate supervisor. No one was disciplined.

Case No. 3: A person was hired as a homecraft teacher and told to begin work on a certain date. The newly hired person did begin work on the specified date. Two or three days after she began work, it was discovered that a certain personnel form implementing the hiring decision had not been executed. Later, when the hiring action form was executed, the teacher's first day of work was designated as being a week later than that when she actually began work. The DVR regional administrator gave the field office supervisor authority to allow the teacher to continue working for the remainder of the week, but not to start her on the payroll until the day designated on the hiring action form. The authorization included giving the teacher occasional paid days off to compensate for the unsalaried work week. This may have been a technical violation of state procedures, but no one was disciplined.

None of the cases offered by appellant offered in this connection evinced the depth of deception, deceit and inveiglement of other parties found in the instant matter before the Commission.

31. Appellant's conduct impaired his performance of his assigned duties as field office supervisor and reduced the efficiency of DVR.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over appellant's appeal of a personnel action by respondent under §230.44(1)(c), Wis. Stats.

2. Respondent has the burden of proving, by establishing to a reasonable certainty, by the greater weight or clear preponderance of the evidence, that the imposed discipline was for just cause, and not excessive.

3. Respondent has satisfied its burden.

DECISION

In Holt v. DOT, Case No. 79-86-PC (11/8/79) the Commission held that in disciplinary appeals under §230.44(1)(c), Wis. Stats., it must be determined whether there is just cause for discipline and whether the imposed discipline is excessive. The standard of "just cause" is defined in State ex rel Gudlin v. Civil Service Commn. 27 Wis. 2d 77, 98, 133 N.W. 2d 799 (1965) as:

... 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 ... also ... that conduct of a municipal employee ... in violation of important standards of good order ... so substantial, or repeated, flagrant or serious that his retention in service will undermine public confidence in the municipal service.

In Barden v. UW System, 82-237-PC (1/9/87) the Commission held that in addition to the just cause question, consideration must be given to the question if whether the imposed discipline was excessive. The Commission

determined that in answering the latter question, it is necessary to consider the enormity of this employe's offense and the employe's prior work record.

The appellant, as the Portage Field Office Supervisor, was responsible for developing, supervising and monitoring a vocational rehabilitation program for DVR in the area designated for his office. He also was responsible for implementing a public relations and interagency coordination program focused toward expanding resource opportunities. Respondent claims that appellant, while performing these duties, violated certain department work rules specifically enumerated in the disciplinary letter set out in the findings.

In summary, the appellant was charged with insubordination, inattention and/or negligence in carrying out assigned duties, misuse of case service funds (state and federal monies), behavior unbecoming a state employee and failure to provide accurate, complete and/or timely information to his supervisors.

The discovery and litigation in this case was extensive. Respondent presented nine witnesses and seventy-eight exhibits over a period of 4½ days in support of its claims. Appellant's supervisor, Mr. Olaf Brekke, gave detailed testimony on the allegations against appellant, which were expressed in his letter of discipline. Other witnesses, as indicated in the findings, corroborated various aspects of Brekke's testimony. The appellant, substantiated Brekke's testimony about the Beth Roth hiring. He testified that he knew his actions were contrary to Brekke's directive; that he did not disclose his hiring plan to Mr. Brekke prior to its execution and later discovery; that he knew the use of client services funds for Roth's salary was improper; that he knew he did not give Brekke

complete information on this subject as requested and that he knew he had violated a work rule by these actions.

In presenting his case, the appellant, Mr. Eft, testified and was his sole witness. He took issue with Brekke's interpretation of his actions as field supervisor. In most instances, he did not contradict Brekke, but instead explained why he took such actions. This is exemplified by the Beth Roth incident when he testified that he knew his actions were in violation of the work rules, but was guided by his view of the needs of the office.

The Commission is satisfied that the clear preponderance of evidence supports all of respondent's allegations against appellant with the exception of the allegations that appellant failed to maintain good community relations and failed to distinguish substance from trivia.

The Commission is also satisfied that the evidence on appellant's conduct, which was proven to be true, is sufficient to show there was just cause for the discipline imposed upon appellant. The conduct of appellant in the Beth Roth hiring incident alone was sufficient to warrant the discipline imposed.

It is the belief of this Commission that an exemplary work record, which was not the case here, would have been to no avail. Appellant knowingly violated work rules when he used client service monies to hire Roth. He also involved two subordinate staff employes and an independent, private sector, contract service provider in his scheme. Prior to the discovery of his hiring scheme, appellant failed to tell his supervisor of it. After the hiring scheme was uncovered by appellant's supervisor, appellant failed to give his supervisor accurate and complete information about it, as requested.

Regarding the admission of Respondent's Exhibit 109, respondent's current request that this rebuttal evidence be admitted is untimely. Appellant's motion to introduce additional exhibits is also denied for the reason of untimeliness.

ORDER

Respondent's decision to demote appellant is affirmed and this appeal is dismissed.

Dated: November 23, 1988 STATE PERSONNEL COMMISSION

DRM:rcr/jmf
JANE/6

Laurie R. McCallum
LAURIE R. McCALLUM, Chairperson

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