

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JERRY H. JENSEN,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES

Respondent.

Case No. 88-0128-PC

* * * * *

DECISION
AND
ORDER


This matter is before the Commission after the issuance of a proposed decision and order and the receipt of objections from the respondent. After consideration of those objections, the Commission adopts the proposed decision, a copy of which is attached hereto, with the following modifications.

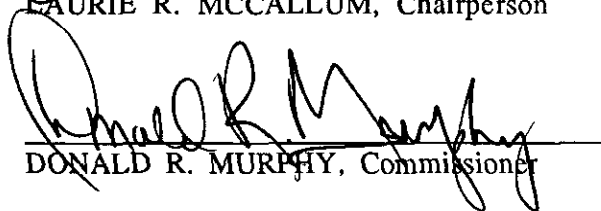
That portion of the proposed decision addressing the respondent's motion to dismiss for lack of prosecution is excised, because the Commission agrees with the just cause analysis set forth in the rest of the proposed decision. In light of the conclusion that there was just cause for the demotion of the appellant, there is no need for the Commission to reach the respondent's motion to dismiss.

The first sentence of the order is also excised, so that the order is modified to read: "The action of the respondent in demoting the appellant to the BMA 4 level is affirmed and this appeal is dismissed."

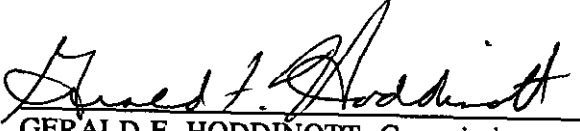
Dated: June 29, 1989

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

KMS:kms


GERALD F. HODDINOTT, Commissioner

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STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

JERRY H. JENSEN,
 Appellant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES
 Respondent.

Case No. 88-0128-PC

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

This appeal arises from a decision to demote the appellant from his position within the respondent's Division of Health. At a prehearing conference held on January 13, 1989, the parties agreed to the following issue for hearing:

Whether respondent's decision, involuntarily demoting appellant from Administrative Assistant 5 to Budget Management Analyst 4 was for just cause.

The appellant failed to appear at the commencement of the scheduled hearing and the respondent moved to dismiss for lack of prosecution. The respondent also presented limited testimony in support of its position regarding the merits of the dispute. The following facts appear to be undisputed.

FINDINGS OF FACT

1. On January 13, 1989, the appellant attended a prehearing conference at which time the parties agreed to an issue for hearing and scheduled a hearing for May 2, 1989 at 9:00 a.m. in the Commission's offices. The conference report reads, in part:

The parties agreed to a hearing on May 2, 1989 at 9:00 a.m., at the Personnel Commission's office on the 2nd Floor, 121 E. Wilson Street, Madison, WI 53702.

This report will serve as the sole and statutory notice of hearing. This will be a class 3 proceeding with jurisdiction pursuant to

§230.44(1)(c), Wis. Stats. The matters asserted are as set forth under the statement of issue, above.

A copy of the conference report was mailed to the appellant on or about January 17, 1989.

2. On April 25 and April 28, 1989, the hearing examiner designated by the Commission to preside at the May 2nd hearing telephoned the appellant at his place of work. On both dates, the appellant did not answer so the hearing examiner left a message for the appellant to return the call. The appellant did not call back.

3. The appellant did not submit any exhibits in advance of the scheduled hearing pursuant to §PC 4.02, Wis. Adm. Code.

4. On May 2, 1989, the appellant did not appear for the hearing. At 9:20 a.m., the hearing examiner called the appellant at his place of work. The appellant did not answer so the hearing examiner left a message for the appellant to return the call. The appellant did not call back.

5. At approximately 9:30 a.m. on May 2nd, the examiner convened the hearing. The respondent moved to dismiss the matter for lack of prosecution. The respondent then went ahead and called two witnesses, one of whom offered testimony relating to the merits of the case. The second witness testified that she had passed by the appellant in a stairwell in the appellant's place of employment at approximately 9:15 or 9:20 a.m. that morning.

6. The appellant had not appeared at the hearing by the time it concluded at approximately 10:15 a.m.

7. The appellant chose not to appear at the scheduled hearing.

8. In June of 1983, the appellant was appointed to the position of Health Facilities Specialist in the respondent's Division of Health, Bureau of Quality Compliance. The position was classified at the Administrative Assistant 5 (AA5) level which is assigned to pay range 15. Duties included on-site visits to nursing homes: 1) to determine compliance/non-compliance with federal and state standards, rules and regulations; 2) to investigate violations and 3) to conduct informal conferences. The position description for the position established as a "special requirement" that the incumbent "[m]ust possess, or be able to obtain by time of appointment to this position, a valid Wisconsin driver's license."

9. Not all of the nursing homes within the state are accessible by public transportation.

10. In approximately October of 1987, the appellant advised his superiors that he was about to lose his driver's license.

11. Because of the duties of the appellant's position, the respondent concluded that the appellant was unable to perform his responsibilities and assigned the appellant to in-office work. Respondent also prepared a list of all vacancies between pay ranges 11 through 16 in the Division of Health for the purpose of reviewing possible transfer/reassignment options. All of these vacancies were inappropriate placements for the appellant.

12. Respondent subsequently identified a prospective position doing budget work for an AIDS/HIV grant. Creation of the position, which was expected to be at the AA5 level was contingent upon obtaining a federal grant. The grant was obtained but the classification request, submitted at the AA5 level, was not accepted. The classification specialist in respondent's Bureau of Personnel and Employment Relations ultimately agreed to classify the position at the Budget and Management Analyst 4 (BMA4) level which is assigned to pay range 14.

13. Although the appellant initially expressed an interest in transferring to the AIDS/HIV position, he changed his view when he learned that the classification of the position would be at the BMA4 level. Appellant's objection was based on his perception that a reduction in federal funding could ultimately result in his lay-off from the position.

14. In approximately August of 1988, while the appellant was still performing temporary assignments which did not require him to drive, the respondent learned that the appellant had an extensive record of driver license suspensions and revocations commencing in February of 1983. During the period of more than 4 years between the date he began work in the Bureau of Quality Compliance and October of 1987 when he first advised his employer that his license had been revoked, the appellant had a valid driver's license for only approximately 16 months.

15. By letter dated October 7, 1988, the respondent notified the appellant of the decision to demote him from Administrative Assistant 5 to Budget and Management Analyst 4, effective October 10, 1988. The letter stated, in part:

Since the duties and responsibilities of the Health Facilities Specialist position require travelling to locations where there is no reasonable public transportation, a valid driver's license is a requirement. The revocation of your license makes it impossible for you to perform your duties. Your demotion is a direct result of the revocation.

Your failure to perform your duties and responsibilities because of the revocation of your driver's license is in violation of Work Rule #1 which prohibits acts of ". . . insubordination, . . . refusal to carry out written or verbal assignments, directions or instructions." In addition, your failure to notify your supervisor of the earlier revocations and your continuing to drive on state business during the revocation periods is a violation of Work Rule #1 and Work Rule #5. The latter work rule prohibits acts of ". . . illegal conduct . . . or other behavior unbecoming to a State employe."

16. The responsibilities of the BMA4 position do not require the incumbent to have a valid driver's license.

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 proof to demonstrate 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 the appellant's demotion.

OPINION

Motion to Dismiss for Lack of Prosecution

The Commission's rules establish the following sanctions for failure to appear at a hearing:

Unless good cause can be shown, any party who fails to appear at a hearing after due notice is deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made. If the absent party has the burden of proof, the commission shall consider a motion to dismiss by the parties present without requiring presentation of any evidence. §PC 5.03(8)(a), Wis. Adm. Code.

The existence of this provision raises the question of whether it provides the sole means of dealing with a failure to appear or whether the respondent's motion to dismiss for lack of prosecution is an alternative, given the fact that the respondent has the burden of proof in this appeal of a disciplinary action. Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971).

The appellant, as the party who filed the instant appeal, must be viewed as retaining a right of withdrawing that appeal at any time, subject to the approval of the Commission as indicated in §PC 1.11, Wis. Adm. Code. However, because the appeal arises from a disciplinary action and the burden of proof rests with the respondent, the respondent is not in a position to move to dismiss the appeal for lack of prosecution upon the failure of the appellant to appear at the hearing. If the appellant fails to appear at the hearing but there is no indication that the appellant wishes to withdraw his appeal, the Commission's rule clearly indicates that the respondent is, nevertheless, obligated to present a case sufficient to sustain its burden of proof. The existence of the very specific language of §PC 5.03(8)(a), Wis. Adm. Code, indicates that the only sanction for failure to appear under these circumstances is for the respondent to proceed with its case.

In the present case, the initial question then is whether by deciding not to appear at the hearing and by not returning the telephone calls of the examiner, the appellant evidenced a desire to withdraw his appeal. The Commission concludes that there is no evidence on which to base a conclusion that the appellant wishes to withdraw his appeal. Because of this conclusion, the Commission must next consider whether the hearing record supports the conclusion that the appellant was demoted for just cause.

Just Cause Analysis

The facts set out above clearly indicate that the respondent demoted the appellant because the revocation of his driver's license made it impossible for him to perform the duties previously assigned to him. The respondent considered other alternatives before the demotion decision was reached. During the period in which a reassignment was being considered, the respondent learned that the appellant had been driving a vehicle without a valid driver's license for most of the four year period he worked as an AA5 in the Bureau of Quality Compliance.

The respondent has satisfactorily established the truth of the allegations contained in the letter of discipline and has also established that the appellant's conduct and status of being without a valid driver's license would "impair his performance of the duties of his position or the efficiency of the group with which he works." Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). Finally, due in part to the absence of alternatives available to the respondent, the long-standing nature of the problem and the weight of the appellant's offense, the discipline imposed was not excessive. In reaching this conclusion, the Commission has considered the absence of any indication that the appellant had been disciplined previously. Barden v. UW-System, 82-237-PC, 6/9/83.

ORDER

The respondent's motion to dismiss for lack of prosecution is denied. The action of the respondent in demoting the appellant to the BMA 4 level is affirmed and this appeal is dismissed.

Dated: _____, 1989 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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