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RALPH O'CONNOR,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 94-0339-PC
 94-0497-PC

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DECISION
AND
ORDER

A combined hearing was held in the above-noted cases on January 13, 1995. Neither party wished to present written or oral closing arguments. The hearing issues were agreed to by the parties at a prehearing conference held on November 9, 1994, as shown below:

Case No. 94-0339-PC: Whether there was just cause for the suspension of the appellant dated July 19, 1994. Subissue: Was the degree of discipline imposed excessive?

Case No. 94-0497-PC: Whether there was just cause for the suspension of the appellant dated August 23, 24 & 25, 1994. Subissue: Was the degree of discipline imposed excessive?

FINDINGS OF FACT

1. At all times relevant to these cases, Mr. O'Connor worked for the Department of Health and Social Services (DHSS) in the Division of Care and Treatment Facilities at Northern Wisconsin Center (NWC). He worked in Employer Services as a Personnel Assistant 3, until he retired with his last day of work on January 13, 1995. His immediate supervisor was Carolyn Thompson, Director of Employee Services.
2. On December 13, 1993, at 2:00 p.m., Ms. Thompson observed Mr. O'Connor asleep in his office chair. He was breathing deeply, had his chin on his chest with his head down and hands in his lap. She observed that he did not wake when she dropped an envelop on the floor near his office

making a loud noise. She returned to his office at 2:10 p.m. and saw he was still asleep and in the same position as before. Later the same day she gave him a written statement of the incident with notice of a pre-disciplinary meeting scheduled for the following day.

3. The pre-disciplinary meeting was held as scheduled on December 14, 1993, at which time Mr. O'Connor did not deny that he had been asleep the prior afternoon. He indicated he had a sinus infection for which he had been taking medication. He further stated he had run out of the medication the prior day and, accordingly, took a Contact pill at noon which had made him drowsy. Ms. Thompson told him she had made arrangements for Mr. O'Connor to meet with Ms. Foris of NWC's Employee Assistance Program (EAP). Ms. Thompson expressed concern that his sleeping may be health related and encouraged him to get a medical exam. He received a letter of reprimand for the incident as a violation of work rule #1 relating to inattentiveness on the job. He was warned that repeat occurrences would lead to further discipline, including suspension or discharge. Mr. O'Connor did not keep or reschedule the appointment with EAP.
4. NWC is an institution which provides care and treatment for disabled individuals. *Inattentiveness on the job is viewed by management as a serious work violation due to the nature of the institution and its client population, as well as to potential citations for state and/or federal law violations which could result if staff were found inattentive to the clients' needs.* Accordingly, it is NWC's reasonable policy to issue a written reprimand for the first incident of inattentiveness rather than an oral warning. While Mr. O'Connor was a personnel assistant who did not provide direct care to NWC clients, NWC desired to hold all staff to the same standards of conduct.
5. On Friday, July 8, 1994 at about 1:45 p.m., Ms. Thompson again observed Mr. O'Connor asleep in his office chair. He was breathing deeply. His chin was resting on his chest and his feet were flat on the floor. A pre-disciplinary conference was held at 4:15 p.m. the same day (with Mr. O'Connor's consent). Mr. O'Connor denied being asleep. He indicated he had gotten coffee at 2 p.m. and could not recall being asleep just before then. Ms. Thompson, however, was persuaded he had been asleep

- because she had observed him sleeping for a few minutes and during the entire time he did not move. She again encouraged Mr. O'Connor to get a medical exam.
6. On the following Monday morning (July 11, 1994), Mr. O'Connor went to Ms. Thompson saying he wanted to further explain the circumstances of the prior Friday. He indicated his wife had been ill on Thursday evening and he had been up during the night leaving him tired on Friday. He did not admit to sleeping on Friday, however. Ms. Thompson discussed strategies with him to avoid falling asleep at work. She encouraged him to get up and move around at work if he felt sleepy.
 7. Mr. O'Connor was suspended one day without pay for the second incident of being found asleep at his desk. The suspension date was July 19, 1994. His appeal of this suspension is the subject of case No. 94-0339-PC.
 8. On August 16, 1994, at about 4:01 p.m., Mr. O'Connor was observed asleep in his chair by Darrell E. Arndt, NWC's Director of Management Services. Mr. Arndt observed Mr. O'Connor sleeping in his chair, breathing heavy with his head slumped on his chest, his eyes closed, hands relaxed and papers in his lap. Mr. Arndt entered Mr. O'Connor's office, touched his shoulder and said "Ralph". Mr. O'Connor's head jerked up in a startled fashion. Mr. Arndt asked if Mr. O'Connor was awake and said they would talk later.
 9. A pre-disciplinary meeting was held on August 16, 1994, at which time Mr. O'Connor indicated he was unsure if he was awake or not when observed by Mr. Arndt the previous day. Mr. O'Connor indicated he had been experiencing stomach problems and suspected he had an ulcer. He said these problems had been interfering with his sleep and had resulted in a weight loss of 20 pounds. Ms. Thompson previously had noticed the weight loss which contributed to her concern for his health. Mr. O'Connor indicated he had a medical exam scheduled for August 25, 1994. Ms. Thompson emphasized that inattentiveness at work was unacceptable and directed Mr. O'Connor to use sick leave for illness.
 10. Mr. O'Connor's union representative requested at the third pre-disciplinary meeting that Mr. O'Connor's health problems be considered as a mitigating circumstance and that any decision on discipline be delayed until after his medical exam. Ms. Thompson rejected this

request because Mr. O'Connor had failed to heed her prior suggestions to obtain a medical exam and to seek assistance through the EAP program. She imposed a 3-day suspension without pay for this third incident and warned that repeated incidents could result in management requiring Mr. O'Connor to undergo a physical to determine if he was able to perform his job. The three suspension days were August 23, 24 and 25, 1994. Mr. O'Connor's appeal of this suspension is the subject of case number 94-0497-PC.

11. Appellant was asleep on all three occasions as recited above.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these cases pursuant to s. 230.44(1)(c), Stats.
2. DHSS has the burden to show by a preponderance of the evidence that just cause existed for the suspensions and that the discipline imposed was not excessive.
3. DHSS met its burden.

DISCUSSION

The Supreme court held in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 NW2d 379 (1974), that just cause for discipline of an employe exists when: "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." Mr. O'Connor's repeated acts of sleeping on the job meet this standard. Accordingly, just cause existed for discipline.

The remaining question for consideration is whether the imposed discipline was excessive. The Commission finds it was not excessive. DHSS' policy of providing a written reprimand for the first violation of inattentiveness for NWC employes is reasonable due to the nature of the facility and was applied the same to Mr. O'Connor as all other NWC employes. The imposition of a 1-day and then a 3-day suspension as progressive discipline for the repeated second and third instance of sleeping at work was reasonable and was not excessive.

Mr. O'Connor felt the discipline for the third violation should have been less considering the mitigating circumstance of his pending medical exam. His argument might be persuasive in some circumstances but not here where

management showed genuine concern over his health after each of the first two violations and suggested he obtain a medical exam. Mr. O'Connor chose to disregard the suggestion for a medical exam after the first two incidents even though Ms. Thompson clearly stated that management viewed sleeping on the job as a serious offense and clearly warned that discipline would result for repeated violations.

Credibility Observations

Mr. O'Connor suggested at hearing that he was not asleep for the second and third violations, but was meditating. The examiner considered this possibility and questioned Mr. O'Connor about it. The substance of his responses and his demeanor lead the examiner to reject the possibility that he was meditating instead of sleeping.

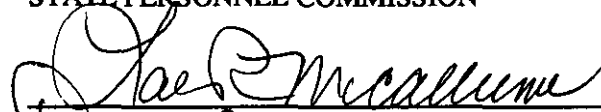
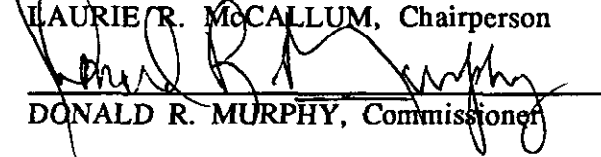
There was suggestion through Mr. O'Connor's appeal letter and some of the hearing testimony that he felt the suspensions for sleeping were an extension of a past episode of being unfairly monitored too closely at work. The examiner specifically asked Mr. O'Connor questions about this at hearing. Mr. O'Connor indicated the past episode was under prior management and he had no reason to believe Ms. Thompson was unfair with him. In fact, he gave high praise for her as a manager and the impact she has had at NWC.

ORDER

That the suspensions imposed be affirmed and the cases dismissed.

Dated March 31, 1995.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

Parties:

Ralph O'Connor
19595 E. Allendale Drive
Chippewa Falls, WI 54729

Richard W. Lorang
Acting Secretary, DHSS
1 W. Wilson St. - Rm. 650J
P.O. Box 7850
Madison, WI 53707-7850

**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95