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CHAROL K. PLASTERER,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 TRANSPORTATION
 Respondent.
 Case No. 83-0007-PC

* * * * *

INTERIM
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Wis. Stats., of a suspension. At a hearing held on July 22, 1983, appellant moved for an order by the Commission holding null, void and illegal respondent's suspension of appellant due to the fact that the action to suspend appellant was not taken by the appointing authority as required by §230.34(1)(b), Wis. Stats. This decision and order relates solely to such motion.

FINDINGS OF FACT

1. At all times material to this matter, appellant was employed in the classified civil service within respondent's Division of Transportation Assistance.

2. In a memorandum to appellant dated December 20, 1982, Paul Heitmann, appellant's immediate supervisor, advised appellant that he would be suspended for one day on December 30, 1982, and detailed the reasons for the suspension.

3. In a memo to John Roslak, the director of respondent's Bureau of Personnel Management, Douglas Haist, the administrator of respondent's Division of Transportation Assistance, confirmed their discussion regarding

appellant's supervisor's recommendation and their consensus that appellant should be suspended for one day. This memo was placed in appellant's personnel file but was not sent to appellant.

4. At all times relevant to this matter, Douglas Haist was an appointing authority who had the authority to suspend appellant.

5. At all times relevant to this matter, Paul Heitmann was not an appointing authority.

6. At a prehearing conference held in relation to the subject appeal on February 10, 1983, respondent filed with the Commission and with appellant copies of exhibits respondent intended to utilize at a future hearing, including copies of the two December 20, 1982, memos. Respondent filed additional copies of these two memos with the Commission and with the appellant on July 21, 1983. At the hearing on the motion held on July 22, 1983, appellant offered the December 20, 1982, memo from Douglas Haist to John Roslak (Respondent's Exhibit #2) for introduction as part of his case. Respondent did not object to the introduction of such exhibit and it was received as part of the hearing record. Appellant had not included such memo as one of the hearing exhibits he had filed with the Commission. In his posthearing brief, appellant requested that the Commission exclude such memo and any testimony relating to such memo from the hearing record on the basis that it was not submitted more than two working days prior to the hearing as required by §PC 2.01, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. This appeal is appropriately before the Commission pursuant to §230.44(1)(c), Wis. Stats.

2. As the moving party, appellant has the burden of proving that the appointing authority did not, at the time of appellant's suspension, furnish to appellant in writing the reasons for the suspension, as required by §230.34(1)(b), Wis. Stats.

3., Appellant has not sustained his burden of proof.

OPINION

Section 230.34(1)(b), Wis. Stats., states:

No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action.

An "appointing authority" is defined by §230.34(4), Wis. Stats., as follows:

"Appointing authority" means the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes.

In Schmid v. UW, 78-19 (9/5/79), the appellant's January 23, 1978, termination letter was signed by her immediate supervisor, who was not an appointing authority. Eight days later, the appointing authority sent appellant a letter of concurrence. The Personnel Commission decided that:

"...the fact that the appointing authority's concurrence was contained in a separate document from the first letter of termination ... does not negate the required statutory participation in the transaction by the appointing authority.

* * *

In the instant case, the letter of concurrence by the appointing authority was dated January 31, 1978, which was prior to the effective date of termination of February 3, 1978 ... In the opinion of the Commission it had the same effect as if it had been part of the January 23, 1978 letter."

In Tealey v. Lehrmann, 75-12 and 75-116 (10/1/76), the appellant was notified of his suspension by a letter signed by his immediate supervisor who was not the appointing authority. Prior to signing the suspension letter, appellant's supervisor had conferred with a superior who was, an appointing authority. The Personnel Board decided that:

"When the authority is actually exercised after consultation between the supervisor and the appointing authority ... it would be an inappropriate elevation of form over function to require that the appointing authority personally sign the suspension letter.

* * *

While it might have been preferable to have included (the appointing authority's) name in place of or along with (the supervisor's) name on the suspension letter, we conclude that its omission does not render the suspension defective."

The Personnel Board relied upon its rationale in Tealey in its Chayka v. UW, 75-118 (2/20/78) decision which involved a very similar fact situation.

In the instant appeal, the appointing authority not only engaged in prior discussions regarding the recommendation to suspend appellant but also issued a memo of concurrence prior to the effective date of the suspension. Applying the rationale of the above-cited decisions, the Commission concludes that, although it would have removed any doubt if the appointing authority had issued or joined in issuing the suspension memo to appellant, the procedure followed by respondent satisfied the statutory requirement for participation by the appointing authority and did not render the suspension defective.

Appellant argues that respondent should have provided appellant with a copy of the memo of concurrence. The Commission concludes that, although this would have been preferable, it was not necessary in order

to satisfy the statutory requirement for participation by the appointing authority.

Finally, appellant, in his posthearing brief, moved for the exclusion of Respondent's Exhibit #2 because respondent's filing of the exhibit, with the Commission and with the appellant on July 21, 1983, was not timely. Section PC 2.01, Wis. Adm. Code, provides in pertinent part that:

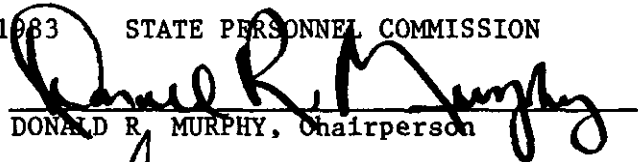
With the exception of rebuttal matter, names of witnesses and copies of exhibits must be submitted more than 2 working days before the commencement of the hearing or will be subject to exclusion, unless good cause for the failure to comply is shown.

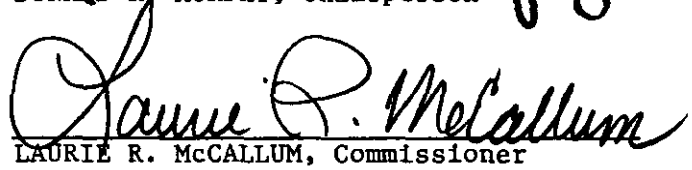
Respondent did file a copy of Respondent's Exhibit #2 with the Commission and with appellant on July 21, 1983, which was less than two working days before the commencement of the hearing on July 22, 1983. However, respondent had also filed a copy of this exhibit with the Commission and with appellant at the prehearing conference held on February 10, 1983, which was obviously more than two working days prior to July 22, 1983. Moreover, Respondent's Exhibit #2 was offered for introduction into the hearing record by appellant, not by respondent. What appellant is now requesting is the exclusion of an exhibit he offered as part of his case. By no stretch of the imagination would it be appropriate for the Commission, after the close of a proceeding, to grant a party's request to exclude evidence he had introduced at the proceeding.

ORDER

Appellant's motion that the Commission hold null, void, and illegal
the suspension of appellant is denied.

Dated: September 28, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

LRM:ers

Parties:

Charol Plasterer
c/o Richard Graylow
110 E. Main St.
Madison, WI 53707

Lowell Jackson
Secretary, DOT
P.O. Box 7910
Madison, WI 53707