

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 JERROLD BENTS,
 Appellant,
 v.
 Commissioner, OFFICE OF THE
 COMMISSIONER OF BANKING,
 Respondent.
 Case No. 86-0193-PC
 * * * * *

FINAL
 DECISION
 AND
 ORDER

This §230.44(1)(c), Stats., discharge appeal is before the Commission following the issuance of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments with respect thereto and consulted with the examiner. The Commission now adopts as its final disposition of this matter the proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, with the following changes which are made for the reasons set forth, and the following additional discussion:

Finding No. 8.c. is deleted. Complainant has objected that there was insufficient notice of this charge. Presumably this charge is part of the reference in the notice of discharge dated November 5, 1986 (revised) to "Inaccuracies on ... 1985 and 1986 fiscal year end projections..." paragraph 3. However, this is too general to provide adequate notice under the standards discussed in the Commission's interim decision dated May 28, 1987. There is no more specific reference in the pretermination letter dated October 20, 1986. In the Commission's opinion, there is sufficient other evidence supporting the discharge that the deletion of this finding has no effect on the ultimate outcome of this appeal.

Appellant also objects that Finding 11.b. is unfair and misleading as presently worded, since it sets forth in detail his subordinate's charge of sexual harassment and makes it appear as if this charge were proven, when in fact appellant was not charged with sexual harassment but with insubordination for having disobeyed his superior's order to discuss only business with the subordinate after the latter had complained to Ms. McKenzie. Respondent's post-hearing brief filed with the examiner makes it clear that appellant was not charged with sexual harassment, but only with insubordination. Therefore, the second sentence of Finding 11.a. will be deleted and the next to the last sentence will be amended to read: "Thereafter, appellant made no comments of other than a business nature to Riedasch." While appellant also contends that the last sentence: "However, Riedasch left OCB shortly after this....," implies that this employe left the agency because of the uncharged sexual harassment, this is not a necessary implication and this part of the finding is not improper.

Appellant also objects to the proposed decision's failure to have addressed all the charges of misconduct. The decision recites at p. 12:

"... Having reached this conclusion [there was just cause] it is unnecessary to make any determinations regarding appellant's alleged sexual harassment of employes, misuse of the computer, failure to handle the 'no smoking' incident involving Gail Riedasch properly as well as other allegations not specifically discussed above...."

Given appellant's position on this point, the Commission will consider the charges not addressed in the proposed decision.

As to "alleged sexual harassment," as discussed above, respondent did not pursue this charge and appellant objected to its discussion, so the Commission will not address it further.

As to "misuse of the computer," this was not referred to in either the pretermination letter (October 20, 1986) or the notice of discharge

(November 5, 1986), so there is no reason to address the substance of this charge.

The alleged failure to handle the office smoking situation was referred to in the pretermination letter and in effect incorporated by reference by the discharge letter, and will be addressed by the Commission. The allegation concerning this matter as set forth in Respondent's October 20, 1986, letter, is as follows:

In June of 1986 one of your subordinates wrote a memo to the deputy regarding violations of state smoking policies of the agency. In discussions with that employe and as stated in her memo, she had complained to you several times about these violations. You indicated that you had reported it and had done every thing within your power. Yet, you did not report this situation to the deputy or the commissioner. The deputy wrote the smoking policy and had discussed its enforcement with all managers and smokers in the agency. This incident describes your inability to follow through at a level expected and demanded by your employes as well as upper management of this agency. You did not take action with the appropriate officials which led to further complications of a relatively simple complaint.

Appellant makes the following argument concerning this matter in his post-hearing brief:

As for the "smoking incident," McKenzie seems not so much upset that it happened, but that she was not informed immediately. That something in the little OCB fiefdom was not going right mandates, in her view, that she get an instant report on it. Bents in fact tried to correct the problem by talking both to the person causing the problem, Betsy Denen, and to the Office Manager, Genny Sanders, after receiving a letter from Riedasch dated 6/3/86. Exhibit 22. He tried to resolve the problem the same day. Exhibit 24. Nevertheless, the problem was reported to McKenzie anyway, who responded via memo to OCB staff dated 6/4/86. Again, Riedasch had no faith in her supervisor and went over his head without giving him a chance to personally attempt to solve the problem. (footnotes omitted)

In the Commission's view, appellant is distorting the situation by characterizing respondent's primary concern to be that appellant did not inform McKenzie immediately, and then trying to undermine the legitimacy of that concern. The significant point is that Riedasch had complained to appellant several times about the problem and appellant took no steps to

deal with it, despite having told her he had reported it and done everything within his power. When he finally took some action the day that Riedasch brought the matter to McKenzie's attention, one of his steps was to go to the office manager, a person who had no supervisory authority over the offending smoker. The Commission finds that respondent has sustained its burden with respect to this allegation.

The Commission is unable to discern any other charges which have not been addressed.

Finally, the Commission will address some of appellant's legal arguments. Appellant contends respondent failed to utilize reasonable objective or minimum standards of performance, and goes on to argue: "No finding of misconduct can be based upon errors for which there was no established criteria for measuring performance unless the conduct was so egregious as to shock one's sensibilities...." In the Commission's opinion, the proposed decision properly follows the just cause test for cases of this nature enunciated by the Wisconsin Supreme Court in Safransky v. Personnel Board, 62 Wis. 2d 664, 474, 215 N.W. 2d 379 (1979):

"... 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."

Appellant cites United Parcel Service et al., 70-1 Lab. Arb. Awards (CCH) ¶8141, a case involving the discharge of a delivery driver whose performance had not improved sufficiently in the employer's opinion during a 30 day trial period following a warning. In overturning the discharge, the arbitrator criticized the "absence of specifically understood minimum standards for the grievant to follow...." However, in that case the three people who observed the employe during the trial period produced varying and conflicting results. Two used a 40 item graded report that showed

substantially different scores on many of the same items, and the supervisor's graded reports actually showed an improvement during the period. A third observer used a narrative type report, and one of the things for which he downgraded the employe, failure to have completed paperwork while stopped at traffic lights, was considered by the supervisor to constitute a dangerous practice. The instant case contains no comparable circumstances.

The Commission also rejects appellant's contention that respondent had an obligation to have presented: "... comparative evidence as to the performance of other similarly situated Administrative Officers...." Such a requirement goes beyond anything suggested in Safransky, and is unsupported by any authority in this area of which this commission is aware. Appellant cites Baltimore Baseball Club v. Pickett, 78 Md. 375, 28 A. 279, 289 (1894). That case involved an interpretation of contract law, as a professional baseball player was released from a two-party contract for want of skill and ability. The Court held that since the contract provided for no higher degree of skill:

"... the standard of comparison or test of efficiency is that degree of skill, efficiency and knowledge which is possessed by those of ordinary skill, competency and standing in the particular trade or business for which they are employed...."

That case, involving a private contract of employment and a unilateral rescission of the contract based on general charges of inadequate performance is completely distinguishable from this case. In Wisconsin civil service, the standard or test for discharge from employment is "just cause," §230.34(1)(a), Stats., as illuminated by the Supreme Court in Safransky. Appellant was not charged with a generalized failure to have performed at the level expected of similarly situated state employes who practice a trade or profession, but with specific failures and omissions to have

performed the normal duties and responsibilities required of his position,
as well as with insubordination.

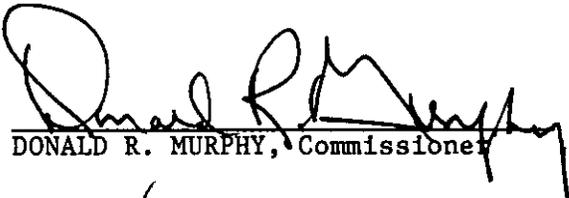
Finally, there is nothing in this record to support appellant's
contention or inference that he was held to unusually high standards of
performance.

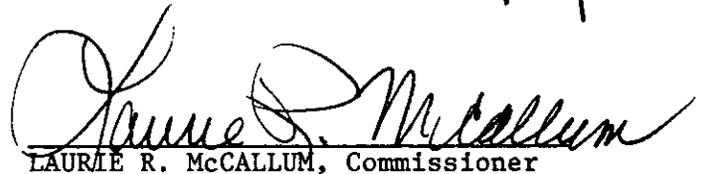
ORDER

The attached proposed decision and order is incorporated by reference
as if fully set forth, subject to the foregoing amendments, and adopted by
the Commission as its final disposition of this appeal. Respondent's
discharge of appellant is affirmed and this appeal is dismissed.

Dated: July 13, 1988 STATE PERSONNEL COMMISSION

AJT:rcr
DPM/3


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

Parties:

Jerrold Bents
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Richard Galecki
Commissioner, OCB
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STATE OF WISCONSIN

PERSONNEL COMMISSION

 JERROLD BENTS,¹
 Appellant,
 v.
 Commissioner, OFFICE OF THE
 COMMISSIONER OF BANKING,
 Respondent.
 Case No. 86-0193-PC

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This matter is before the Commission as an appeal of a discharge. At a prehearing conference held on December 22, 1986, before Dennis P. McGilligan, Chairperson, the parties agreed to the following issue for hearing:

Are the allegations contained in the letter of discharge true, and if so, do they constitute just cause for the discharge of the appellant?

Hearing in the matter before Chairperson McGilligan was completed on February 5, 1988. The parties completed their briefing schedule on April 4, 1988.

FINDINGS OF FACT

1. At all times material herein, appellant has been employed in the classified civil service with the Office of Commissioner of Banking as the Administrator of the Administrative Division.
2. Jennifer E. McKenzie, Deputy Commissioner, was appellant's immediate supervisor. Richard E. Galecki was McKenzie's immediate supervisor.

¹ Jerrold is spelled with both one "r" and two "r's" on his appeal letter although Jerrold with two "r's" is apparently the correct spelling.

3. On October 20, 1986, Banking Commissioner Richard E. Galecki and Deputy Commissioner Jennifer McKenzie presented appellant with a letter alleging that he was both deficient in performance and guilty of misconduct. The pretermination letter requested that appellant respond to the charges and warned: "Should your response not adequately address this letter, further action, up to and including termination of your employment with the Office of Commissioner of Banking may be taken." (emphasis supplied)

4. Appellant responded to the allegations by memo dated October 22, 1986.

5. Appellant was terminated from his employment with the Office of Commissioner of Banking by letter dated November 5, 1986.

6. Appellant filed a timely appeal from his discharge with the Commission. On January 16, 1987, appellant filed a "notice of motion and motion to strike portions of disciplinary letter." On May 28, 1987, the Commission issued an Interim Decision and Order permitting the respondent Office of Commissioner of Banking (OCB) to amend the October 20 pretermination and the November 5 discharge letters. A copy of the revised October 20th pretermination letter is attached hereto and incorporated by reference as if fully set forth as part of this finding.

7. A copy of the revised November 5, 1986 discharge letter is attached hereto and incorporated by reference as if fully set forth as part of this finding.

8. Appellant inadequately performed his duties as chief fiscal officer of the OCB:

- a. 1984 annual report data. The 1984 Annual Report for OCB contains a page entitled "Abstract of Earnings and their Distribution

of State and Mutual Savings Banks and Trust Companies at the close of Business..." which is stripped verbatim from the 1982 Annual Report. Appellant was the immediate supervisor over Gail Propsom who helped prepare these numbers and had responsibility for reviewing her work. He also helped put together the final report.

b. 1985 and 1986 fiscal year-end projections. Appellant estimated a \$60,091 cash balance at year-end FY 1985, and a \$419,325 balance at year-end FY 1986. The actual results were \$99,179 and \$585,170 respectively.

c. 1986 financial report listed Item 2114, "in-state training" estimated by appellant to be more than \$16,000 over budget and Item 3100, "printing" estimated to be more than \$8,000 over budget. Both expenditure items occurred early in the fiscal year on essentially a one-time basis, but appellant treated them as recurring and projected as if they occurred each month. As a result actual 1986 printing costs were slightly more than \$13,000, less than half of what appellant projected. A similar attempt to compare appellant's line 2114 projections with the actual yearly figures was impossible since there was no item which corresponds to line 2114.

d. 1985-1987 and 1987-1989 budget errors. The agency's budget analyst, Alison Poe listed a number of technical and substantive errors regarding the 1985-1987 budget which were made by appellant. They included, in part:

- (1) the wrong numbering system was used for rent and training decision items;
- (2) the rent request was arbitrary and should have been based on actual expenditures experienced in 83-84 and 84-85;
- (3) narratives required to justify budgetary requests were either inadequate or inappropriate;
- (4) and lack of proper justification and narratives.

Although these errors were somewhat minor and could be expected from small agencies, they were not expected from a senior budget person like appellant and forced DOA to subject OCB's budget to closer security in the future. Poe also felt appellant was trying to pull something over on her.

With respect to the 1987-1989 budget appellant's responsibilities were redefined to simply provide the numbers. Nevertheless, appellant made numerous errors as follows:

87-89 State Budget: (1) the Adjusted Base Year figure was inaccurate; (2) the opening balances for the 1st Year Estimate and 2nd Year Estimate were in error; (3) salary projections were in error; (4) Revenue projections were initially "plugged in" to balance with expenditures rather than estimated based on actual expected receipts; and (5) new position salaries and fringe benefits were estimated on a 12 month rather than 9 month basis as required by state budget procedures.

Deputy Commissioner McKenzie, in a letter dated October 9, 1986, apologized to the DOA budget Office and Legislative Fiscal Bureau for these errors. Deputy Commissioner McKenzie never forbade appellant from contacting Poe, or phoning her with his questions during the preparation of the 1987-98 budget.

e. \$16.515 Appropriation request. Inaccurate salary and fringe benefit projections were provided by appellant resulting in an error of \$21,200, out of a \$230,600 request. The error was discovered by the Legislative Fiscal Bureau to the embarrassment of OCB.

9. Appellant made some minor errors while performing his duties as fringe benefit and payroll officer:

a. Kenny Markhardt deferred compensation. When Markhardt transferred laterally from Supervisor 2 to Bank Examiner 6 a payroll error was made (by appellant causing a duplicate check to be issued) which caused Markhardt's deferred compensation account to be off by

\$100. It took two quarterly reports to the IRS to clear up the mistake. Markhardt is uncertain whether he was properly credited the interest on that \$100 deferred compensation.

b. Income continuation errors:

(1) Kenny Markhardt asked appellant about income continuation insurance after he returned from surgery. Appellant told him that he did not qualify, and that Markhardt would have to wait until the next January. The following January, Markhardt applied for income continuation insurance and appellant again told him he did not qualify. Markhardt later found out that he would have qualified the first time, appellant's advice to the contrary. Fortunately, Markhardt did not need income continuation insurance during the year he relied on appellant's bad advice.

(2) Deputy Commissioner McKenzie also asked appellant to sign her up for income continuation insurance. Appellant told her he would, then failed to do so. Consequently, McKenzie missed her "window of opportunity" to sign up for the insurance. Deputy Commissioner McKenzie is the sole support of her family but fortunately did not need the insurance at any time material herein.

(3) Due to appellant's error, Gary Orth paid income continuation insurance premiums but Orth was not formally under Income Continuation. (Appellant never sent the application to the Department of Employee Trust Funds.)

10. Appellant was ineffective in supervising his employees:

a. Despite requests for more work and responsibilities from Gail Riedasch, appellant did not assign her more work or duties.

b. Nancy Georgeson also complained unsuccessfully to appellant about her lack of work.

c. Despite complaints from Deputy Commissioner McKenzie that Mae Hoel was not doing enough work and spending too much time reading books and magazines, appellant failed to take any action to improve Hoel's productivity.

11. Appellant was insubordinate to his superiors:

a. Following an office meeting with appellant present at which the agency managers discussed the role of Genny Sanders as office manager, a major change in the way the office did business, appellant told one or more of his employes that they could ignore Sanders' directions and keep doing things as usual. (They just had to "play the game.") Appellant had voiced no objection to the plan at the meeting.

b. On June 6, 1986, Gail Riedasch complained to Deputy Commissioner McKenzie that appellant was making sexually offensive remarks to her and that she was uncomfortable being alone around him. Riedasch complained about appellant's habit of working sexually oriented words, such as "rape" into normal conversation, and about his stories repeated several times in her presence to the effect that he found a pair of women's underpants wrapped around the side mirror of his car, and that he had found a used condom in the same place. McKenzie told Riedasch that she would talk to appellant and protect her against those kind of comments. McKenzie also instructed Riedasch to tell McKenzie if appellant retaliated against her for making the

complaint. McKenzie spoke to appellant the same day, told him of Riedasch's allegations, said that these were serious issues and told him to discuss only business with Riedasch in the future. Later that same day appellant apologized to Riedasch for anything he may have said which offended Riedasch. Riedasch felt the apology was sincere. The next day, however, appellant became verbally abusive, complained that she had told on him and "got him in trouble" and would put him in the "poorhouse." He began to criticize her work, although he had never done so up to that point. Riedasch complained to McKenzie, this time about appellant's retaliation. McKenzie again called appellant in. She told him that his remarks to Riedasch were in direct violation of the order to discuss only business with Riedasch. Thereafter, appellant ceased making comments of a sexual nature to Riedasch. However, Riedasch left OCB shortly after this.

12. Appellant also engaged in conduct detrimental to carrying out his responsibilities as affirmative action officer.

a. During a telephone conversation with Alison Poe in which DER came up appellant commented "there's a nigger in the woodpile at DER." Poe took the statement to be a deliberate comment on an agency headed by a black Secretary, Howard Fuller, and complained to her immediate supervisor Ann Wiley. Wiley, in turn, brought the matter to the attention of Deputy Commissioner McKenzie. McKenzie then told appellant that this remark was inappropriate and that he should apologize to Poe. Appellant next called Poe up and apologized for the comment explaining that it was an old colloquialism from his Nebraska youth. Appellant had not used the expression for thirty years prior to this instance except maybe once.

b. Despite an Affirmative Action Award in 1982 issued to OCB (appellant as AA officer played an important role in this AA effort being recognized) by Governor Lee Sherman Dreyfus, appellant showed some hostility toward carrying out his duties as Affirmative Action Officer. For example, when asked to file an amended AA plan with DER, appellant told Deputy Commissioner McKenzie that having to refile the agency's affirmative action plan was "bullshit." When McKenzie reprimanded appellant for such inappropriate remarks, he told her it was still bullshit.

13. In April through June of 1986 Deputy Commissioner McKenzie met with appellant on several occasions regarding her dissatisfaction with his work performance. Subjects covered included his use of the computer (appellant was removed as security officer), his lack of cooperation and/or poor work performance (including providing the necessary financial information), his wasting of time, i.e., idle chit chat with the boys, his failure to enforce the agency's smoking policy, alleged sexual harassment and his failure to properly supervise employees under his supervision.

14. On June 24, 1986, Deputy Commissioner McKenzie conducted appellant's annual evaluation (unsatisfactory) a copy of which is attached hereto and incorporated by reference as if fully set forth as part of this finding.

15. By memo dated July 8, 1986 to file, appellant responded to the evaluation denying many of the charges and admitting others.

16. Prior to the instant dispute and discharge, appellant's work record with OCB (from 10-3-66) was good and without any prior discipline.

17. At the time of appellant's termination, Deputy Commissioner McKenzie considered a lesser form of discipline but rejected same because

of the small size of the agency (no position to demote into), the appellant's failure to respond positively to prior criticisms and suggestions for improving his work performance and a desire to move forward with the agency's business. She made the recommendation to terminate appellant which was approved by Commissioner Galecki.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44(1)(c), Stats.
2. The respondent has the burden of proving that the discipline was for just cause, and not excessive.
3. The burden of proof is that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence.
4. The respondent has sustained its burden of proving that the discharge was for just cause, and not excessive.

OPINION

A. Standard

In disciplinary appeals, the Commission is required to apply a two step analysis:

First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. Holt v. DOT, Case No. 79-86-PC (11/8/79).

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline as follows:

... one appropriate question is whether some deficiency has been demonstrated which can reasonable be said to have a tendency to impair his performance of the duties of his posi-

tion or the efficiency of the group with which he works.
State ex rel Gudlin v. Civil Service Commn., 27 Wis. 2d 77, 98,
133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 2d
464, 474, 215 N.W. 2d 379 (1974).

The Safransky case contemplates a two-part analysis. The first question is whether the basic facts of the allegation are proven. The second question is whether the facts as determined tended to impair the duties of the appellant's position in terms of the efficiency of his work unit.

In its decision in Barden v. UW-System, 82-237-PC (1/9/83), the Commission established that there were at least two factors to consider in determining whether the discipline imposed was excessive:

In considering the severity of the discipline imposed, the Commission must consider at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior work record with the respondent.

Applying the above standard to the instant dispute, the Commission must first determine whether there was just cause for the imposition of discipline; and secondly, if it is concluded there was just cause for discipline, whether under all the circumstances the discipline imposed was excessive.

B. Discharge

The appellant was terminated on November 5, 1986. In his November 5th termination letter, revised pursuant to a Personnel Commission Order dated May 28, 1987, the respondent gave the reasons for his discharge as follows:

The reasons for this discharge are your continued violation of Office of Commissioner of Banking Work Rules pertaining to work performance including failure to provide a level of performance that can reasonable be expected of an Administrative Officer 1, failure to follow direction of the supervisory authority, conduct unacceptable for employes of this department including one in an upper management position, and neglecting or failing to perform job duties and responsibilities.

Specifically, you have violated the Work Rules pertaining to work performance defined as "disobedience, failure or refusal to carry out work assignments" and "neglecting job duties" by failing to follow directions regarding your responsibilities to provide accurate payroll and benefits information and data, accurate and timely fiscal management information, personnel management and direction to employees subordinate to you, and you have neglected to provide assistance to upper level management in relation to Department of Employment Relations activities. Inaccuracies on annual report data, 1985 and 1986 fiscal year end projections, 1985-87 state budget requests, 1987-89 state budget revenue projections, 1987-89 base year and salary amounts, Markhardt's employment transfer, Orth's income continuation, McKenzie's income continuation information, employee evaluations, failure of your subordinates to work up to capacity, and other examples cited in the October 20, 1986, letter from Commissioner Galecki and Deputy Commissioner McKenzie exemplify the violation of this Work Rule.

Appellant admitted failing to give several employees under him more work to do although so requested; making the "nigger in the woodpile"² remark to his DOA budget person, Alison Poe; making the "bullshit" comment with respect to doing further work on the agency's affirmative action plan; making a number of errors with respect to the 1985-87 OCB budget request; failing to make accurate 1987-89 budget revenue projections, base year and salary amounts; failing to accurately project 1985 and 1986 fiscal year-end projections; and, in the transfer of Kenny Markhardt to Bank Examiner 6, misplacing a check tie breaker causing a duplicate check to be issued. Appellant did not deny at hearing telling people to ignore Office Manager Sander's directives and "play the game." Contrary to appellant's assertions, the record indicates that appellant inadequately performed his duties as chief fiscal officer of OCB as noted in Finding of

² The phrase may be slang or unconventional or "nearly a Standard English idiom" as alleged by appellant. However, the phrase is not complimentary (according to Exhibit 26 it means "a hitherto hidden factor, or person concealing something crucial") and is particularly inappropriate when referring to conducting business with an agency headed by a black person.

Fact 8. The record also indicates that appellant improperly handled income continuation requests from several employes. The record further indicates that appellant was ineffective in supervising various employes in regard to delegating responsibilities. Finally, the record indicates that appellant was insubordinate to his supervisor when told not to talk to Gail Riedasch but did and then retaliated against her verbally as noted in the Finding of Fact 11. Consequently, the Commission concludes that the basic facts of the allegation against appellant have been proven.

The next question is whether the appellant's poor work performance, insubordination, insensitivity to AA issues and other shortcomings tended to impair the respondent's operation. Appellant, as an Administrative Officer 1, was a fairly highly placed employe in OCB with a considerable fiscal and administrative responsibility. The negative consequence of appellant's inability to adequately perform his duties as chief fiscal officer of the OCB are noted in Findings of Fact 6, 7, 8, and 14. The record is simply replete with examples of how appellant's poor work performance in other areas such as fringe benefit and payroll officer, supervisor, and AA officer tended to impair his work performance as well as the performance of OCB.

Based on all of the above, the Commission finds it reasonable to conclude that there was just cause for the imposition of discipline. Having reached this conclusion it is unnecessary to make any determinations regarding appellant's alleged sexual harassment of employes, misuse of the computer, failure to handle the "no smoking" incident involving Gail Riedasch properly as well as other allegations not specifically discussed above. The question remains whether under all the circumstances the discipline imposed (discharge) was excessive.

First, the Commission must consider the appellant's prior work record with the respondent. The appellant had a good work record with the OCB up to the present dispute and no prior discipline. Bishop Lowell H. Mays of the Evangelical Lutheran Church of America in the South Central System of Wisconsin gave a deposition on March 24, 1988 wherein he provided an excellent character reference for appellant. However, appellant received numerous verbal warnings to improve his work performance from Deputy Commissioner McKenzie starting in April of 1986 without much success. Appellant also received an employe evaluation on June 24, 1986 which was unsatisfactory. Finally, the charges against appellant are serious and wide-ranging. There is nothing in the record to support a finding that appellant reacted positively to the many complaints regarding his performance and tried to improve it.

As noted above, appellant's performance problems tended to impair the respondent's operation. There is not enough in the appellant's prior work record to mitigate the imposition of discipline herein. Under the circumstances the Commission finds the discharge not to be excessive. This is particularly true where, as here, the appellant was warned and put on notice by the respondent that his performance and attitude was not acceptable.

Based on all of the above, the Commission finds that the answer to the issue as agreed to by the parties is YES, the allegations contained in the letter of discharge are basically true, and they constitute just cause for the discharge of the appellant.

ORDER

The respondent's action discharging the appellant is affirmed and this appeal is dismissed.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DPM:akw
JGF002/4

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

Parties:

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RECEIVED

A# 5

DEC 16 1987

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Personnel
Commission

Tommy G. Thompson
Governor

Richard E. Galecki
Commissioner

(608) 266-1621
November 5, 1986

REVISED PURSUANT TO
PERSONNEL COMMISSION
ORDER DATED MAY 28, 1987

Mr. Jerold Bents
4914 Tocora Lane
Madison, WI 53711

Dear Mr. Bents:

This letter is to inform you that you are discharged from your employment with the Office of Commissioner of Banking as of the close of business on November 5, 1986.

The reasons for this discharge are your continued violation of Office of Commissioner of Banking Work Rules pertaining to work performance including failure to provide a level of performance that can reasonably be expected of an Administrative Officer I, failure to follow direction of the supervisory authority, conduct unacceptable for employees of this department including one in an upper management position, and neglecting or failing to perform job duties and responsibilities.

Specifically, you have violated the Work Rules pertaining to work performance defined as "disobedience, failure or refusal to carry out work assignments" and "neglecting job duties" by failing to follow directions regarding your responsibilities to provide accurate payroll and benefits information and data, accurate and timely fiscal management information, personnel management and direction to employees subordinate to you, and you have neglected to provide assistance to upper level management in relation to Department of Employment Relations activities. Inaccuracies on annual report data, 1985 and 1986 fiscal year end projections, 1985-87 state budget requests, 1987-89 state budget revenue projections, 1987-89 base year and salary amounts, Markhardt's employment transfer, Orth's income continuation, McKenzie's income continuation information, employee evaluations, failure of your subordinates to work up to capacity, and other examples cited in the October 20, 1986, letter from Commissioner Galecki and Deputy Commissioner McKenzie exemplify the violation of this Work Rule.

You knew or should have known this was unacceptable performance because you have knowledge of this work rule, this performance has been discussed in many meetings between yourself and your supervisor, these issues were discussed in your performance evaluation dated June 26, 1986, and were cited as reasons for your unsatisfactory performance and lack of merit or performance salary awards in July 1986. Further, these issues were discussed in meetings with you on April 15, June 6, July 8, and October 22, 1986.

Your performance with respect to the 85-87 state budget, the 87-89 state budget, and the \$16.515 request submitted in August 1986 is in violation of budget instructions provided by the Department of Administration and does not meet the standards or requirements of that department. Specifically the performance defi-

instructions provided by the Department of Administration and does not meet the standards or requirements of that department. Specifically the performance deficiencies are:

1985-87 State Budget: (1) the wrong numbering system was used for rent and training decision items; (2) the rent request was arbitrary and should have been based on actual expenditures experienced in 83-84 and 84-85; and (3) narratives required to justify budgetary requests were either inadequate or inappropriate.

87-89 State Budget: (1) the Adjusted Base Year figure was inaccurate; (2) the opening balances for the 1st Year Estimate and 2nd Year Estimate were in error; (3) salary projections were in error; (4) Revenue projections were initially "plugged in" to balance with expenditures rather than estimated based on actual expected receipts; and (5) new position salaries and fringe benefits were estimated on a 12 month rather than 9 month basis as required by state budget procedures.

\$16.515 Appropriation Request: (1) Inaccurate salary and fringe benefit projections were provided by you resulting in an error of \$21,200, out of a \$230,600 request. The error was discovered by the Legislative Fiscal Bureau causing significant embarrassment to this agency and closer scrutiny of all future documents submitted by this agency.

These budget related errors and inaccuracies fail to meet the standards of this agency, the requirements and expectations of the Department of Administration or any other accounting standards. Further, this performance is below the standards expected of an Administrative Officer I in state government.

You knew or should have known that your performance was unacceptable and would lead to further disciplinary action based on repeated discussions and directives you have received from your supervisor regarding the requirements and expectations of your position with this agency. In the meeting on April 15, you were informed that further performance problems and failure to follow supervisory direction would result in disciplinary action. You were reprimanded again on June 6 and told your conduct and performance were unacceptable. Further, you were informed that additional disciplinary action would be taken. On June 26, in a meeting to discuss your performance evaluation, you were told that your performance had not improved and further disciplinary action may be taken.

Your conduct has been unacceptable and found to be in violation of the OCB Sexual Harassment Policy. That policy includes a definition of Sexual Harassment as: "any unwanted, deliberate, or repeated unsolicited verbal comments, gestures, or physical contact of a sexual nature." You have on regular occasions made unsolicited verbal comments of a sexual nature to Deputy Commissioner McKenzie.

For example, on your birthday, you said you could not wait to get home to see if your birthday wish came true. You said your wish was that your wife would "answer the door dressed in Saran Wrap. Also, when you observed Deputy McKenzie carrying water containers for the coffee maker you said, "look at the set of jugs on her." On June 4, 1986, your former subordinate, Gail Riedasch, brought a complaint containing similar allegations regarding numerous incidents of such sexual comments, directed to her, as well.

You were informed of Ms. Riedasch's complaint and specifically instructed by your supervisor, the Deputy Commissioner, to have no further contact or discussion on any nonjob-related issue with her. You deliberately defied that directive and told the employe that her reporting of the issue would "drive me to the poor house". Additionally, you made other comments to her regarding this incident which were reported by the employe as an attempt to make her feel guilty and responsible for any disciplinary action which you may be subjected to as a result of the incidents she reported. This action on your part was in direct violation of the directives you were given and such conduct constitutes insubordination.

Your conduct is further considered unacceptable in relation to comments you have made regarding affirmative action and the Secretary of the Department of Employment Relations. You stated to the OCB Budget Analyst that "there's a nigger in the woodpile over there" interpreted to be in reference to former Secretary Fuller. And, you stated to the Deputy Commissioner that "this whole thing is bullshit" in reference to the agency's affirmative action plan reporting requirements. When told that those comments were inappropriate for the agency's affirmative action officer, you stated to the Deputy, "it's still bullshit".

You knew or should have know that this conduct was inappropriate for an Administrative Officer I, based both on your position description and the standards and specifications for an Administrative Officer I in the civil service system. Further, based on your tenure as a professional employe, you should have known that this was unacceptable conduct by department or community standards.

An Administrative Officer I is comparable to a Division Administrator in this agency. The agency organizational chart shows that this position reports directly to the Commissioner and Deputy Commissioner. Your failure to perform your responsibilities and to conduct yourself in a manner which can reasonably be expected of a person in your position has created a situation which requires your work to be conducted by other personnel in the agency, or lacking reassignment opportunities, your work has been deemed to be unreliable.

Your position with this agency is one of substantial trust and responsibility. Your inability to perform with competency, reliability, and appropriate conduct

has severely hampered this agency's ability to perform its responsibilities in the areas cited above. You were provided with many opportunities to discuss the expectations of this agency regarding your position and responsibilities. Your position description clearly outlines those responsibilities and indicates the expectations regarding accuracy, independent decision making, good judgement and reliability expected of your position. Further, the specifications for an Administrative Officer I clearly outline the generally accepted degree of responsibility, performance, and complexity of positions classified at the Administrative Officer I level. You knew or should have known of these standards based on your 19 years of employment with this agency and state government and your work with and knowledge of the civil service system.

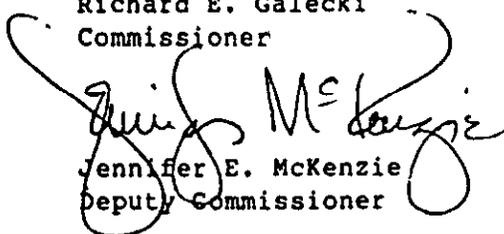
You were provided an opportunity to respond to the concerns stated in this letter and our letter of October 20, 1986. In a meeting on October 22, you provided a written response to these issues. Your response did not adequately account for your performance or conduct. Further, despite opportunities to improve your performance subsequent to meetings on April 15, June 6, and July 8, your conduct and performance have not improved, therefore, this termination notice is necessary.

You may appeal this action, if you desire, under 230.44, Wisconsin Statutes.

Sincerely,



Richard E. Galecki
Commissioner



Jennifer E. McKenzie
Deputy Commissioner

A#4

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State of Wisconsin
Office of Commissioner of Banking

123 West Washington Avenue
Madison, Wisconsin 53707

DEC 16 1987

Mailing Address
P.O. Box 7876
Madison, Wisconsin 53707-7876

Personnel
Commission

Tommy G. Thompson
Governor

Richard E. Galecki
Commissioner

(603) 266-1621
October 20, 1986

REVISED PURSUANT TO
PERSONNEL COMMISSION
ORDER DATED MAY 28, 1987

Mr. Jerold Bents
4914 Tocora Lane
Madison, WI 53711

RE: Employment with the Office of Commissioner of Banking

Dear Mr. Bents:

During the course of the last several months, there have been several discussions with you regarding your employment with this agency. On or about the first week of June, we reached a verbal agreement that you would seek immediate employment with another entity in lieu of disciplinary action against you. Four and one half months have now passed, during which time you have not maintained your part of the agreement. Additionally, you have not informed principals of this agency of your intent to do so despite requests for information. Further, your performance evaluation dated June 26, 1986, details great concern on our part regarding your performance of responsibilities as Administrative Officer for this agency. Since there has been no progress in your performance, we believe it is in the best interests of the department to move forward at this time.

The following charges have been brought against you by your supervisor, Jennifer McKenzie, Deputy Commissioner. These charges represent an extremely serious breach of trust and responsibility and question your ability to perform as Administrative Officer 1 for this agency. Since June, you have been relieved of major responsibilities which have caused this agency to function in a weakened capacity. Prior to that time, responsibilities listed under your position description and included in the Administrative Officer 1 civil service specifications have been assigned to other personnel in the agency.

1. Chief Fiscal Officer Responsibilities: Charged with incompetence and negligence. The specifications for the AO 1 position cite responsibilities for budgeting, fiscal management, and personnel management. The following incidents reflect the charges regarding your performance in this area.
 - a. 1984 Annual Report data --- Data used in the 1984 report was actually 1983 data. This error caused significant problems in trying to create a trend and comparisons of abstract information in the 1985 Annual Report. Responsibilities have been reassigned to other personnel as a result.
 - b. 1985, 1986 fiscal year end projections -- In both years cited, you were unable to accurately forecast year end balances. In FY 85, you projected a \$97M deficit for the agency, the agency ended in a \$90M sur-

plus. For FY 1986, you projected a \$137M surplus, the agency accrued a \$585M surplus. Since all fiscal operations, both revenue and expenditures, are the responsibility of the Administrative Officer, a person with such responsibility can and should be able to track and project with some degree of certainty the fiscal operation of the agency. All responsibilities in this area are now deemed to be totally unreliable. As a result of this performance, you have been required to report all expenditures and revenue on a monthly basis to the Deputy who can make judgements on year end projections then without the Administrative Officer's assistance.

- c. 1985-87 and 87-89 state budget requests -- this agency's budget analyst, Alison Poe, met with the Deputy prior to formation of the 87-89 state budget request. The analyst said that there had been technical and substantive errors on the 85-87 budget and requested that tighter controls be used in this biennial budget. Specifically the analyst said that: (1) the wrong numbering system was used for rent and training decision items; (2) the rent request was arbitrary and should have been based on actual expenditures experienced in 83-84 and 84-85; (3) and, narratives required to justify budgetary requests were either inadequate or inappropriate. The budget analyst suggested that there was an appearance that this agency was not being direct and open about its needs or was inaccurate in its expression of those needs. Therefore 87-89 budget requests would be scrutinized for accuracy and reliability. If lacking, requests would be denied. As a result of this meeting, the Deputy informed you that the 1987-89 state budget must be accurate, explicit and totally honest. Therefore, the Deputy did take a great deal of time from other responsibilities to be directly involved in the 87-89 budget request submission. Your role was to supply the appropriate figures required in the state budget process. However, you made numerous errors. For example, the Adjusted Based Year figure was inaccurate, the opening balances for the 1st Year Estimate and 2nd Year Estimate were in error, salary projections were in error, and new position salaries and fringe benefits were estimated on a 12 month rather than 9 month basis as required by state budget procedures. Results of these 87-89 budget errors are that again this agency is in an embarrassing position with DQA regarding budget accuracy. When you, as the Administrative Officer, were requested to provide assistance in correcting errors in calculations and year end projections, you said you could only guess at the numbers. Therefore, the responsibility for all budget adjustments and recalculations has been assumed by the Deputy.

- d. 87-89 state budget revenue projections -- You were requested to supply figures which would include the revenue expected over the next biennium. When asked how these numbers were arrived at, that is what fees and assessments you used to project these numbers, you responded that the numbers were "plugged in". This demonstrates that you have never considered actual revenue projections a part of the budget process but rather simply plug in the amounts that make the budget balance. An administrative officer should be able to fulfill such responsibilities in a way that includes thorough use of principles and practices of accounting and budgeting procedures.
2. Payroll and fringe benefits officer responsibilities: charged with incompetence and negligence. The following incidents describe your inability to perform this function of your position which is also considered typical work responsibilities for an Administrative Officer 1 under the civil service specifications.
 - a. Payroll errors -- In the transfer of employe Markhardt from Supervisor 2 to Bank Examiner 6, you failed to correctly handle the payroll changes. As a result, deferred compensation, salary checks and the Internal Revenue Service reports were in error.
 - b. Income Continuation -- two employes of this department have requested assistance in applying for income continuation insurance. In both cases, i.e. Deputy Commissioner McKenzie and employe Ken Markhardt, you did not act in a timely basis to assure coverage for this insurance. In the case of McKenzie, the window of opportunity for insurability has now passed for some time to come in the future. Further, according to a letter directed to Employee Trust Funds, you neglected to forward policy information on employe Gary Orth for a period of six years. During that time the employe paid for insurance coverage while the policy information was filed in his personnel file. Had a claim occurred, this agency would have been liable for Mr. Orth's income because of your failure to accurately transmit such information. This error constitutes negligence of your responsibilities and has contributed to the opinion that you are unable to fulfill the functions of your position as necessitated by your position description and the standards for Administrative Officer 1.
 - c. Payroll and benefits responsibilities continue to be assigned to you because there is no one in this agency to reassign these responsibilities to at the present time. However, because of the incidents mentioned above, and the fact that we have no internal checks and balances on your functions in this area we have no way of knowing if there are any other problems occurring. Since you did not bring the matter of

the Markhardt payroll and the Orth income continuation to the attention of your supervisor, we have reason to believe other situations may exist which you have also not reported.

3. **Personnel Related Functions: Charged with incompetence.** You, as part of your position description have responsibility for personnel functions. Yet, you have not performed in that capacity for some time. This agency recently initiated the process of raised minimum rates through the Department of Employment Relations. However, you were unable to provide any staff assistance in this process because of your admitted lack of knowledge in this area. Therefore, the information and structure of this important issue had to be handled by other department personnel. Despite the fact that Administrative Officer specifications indicate personnel and management areas of expertise, you are unable to perform those functions. Despite the fact that you have handled day to day personnel functions in relation with the DER, you were unfamiliar with raised minimum rates and the process for this request.

Further, as your position relates to two other employes who are directly supervised by you you have performed below expectations for an Administrative Officer 1. The employes are Mae Hoe, Program Assistant 3-Confidential, and Gail Riedasch, Program Assistant 3. As cited in your performance evaluation dated June 1986, those two employes have continued to fail to function at full performance level for Program Assistant 3 positions. Neither employe is delegated sufficient volume or responsibilities to justify their classifications or meet the specifications required of the civil service system for Program Assistant 3 levels. Your subordinate, Mae Hoel, spends a good share of her day reading a collection of magazines on her desk. Gail Riedasch, in part, because of lack of work and responsibility, resigned her position. You have continuously failed to provide direction assign work, and supervise Mae Hoel and Gail Riedasch. Both employes are underutilized and fail to be assigned sufficient work to fill an eight hour day. You have also neglected to complete performance evaluations on your employes, Mae Hoel and Gail Riedasch, despite the fact that all employes of this agency are to be evaluated in June of each year.

4. **Affirmative Action Officer responsibilities: charged with gross misconduct and negligence.** An employe at the level of Administrative Officer 1 is expected to conduct him or herself with professional demeanor at all times. The following incidents describe your conduct with regard to this responsibility which is included on your position description.
 - a. **Budget Analyst incident --** in a conversation regarding the Department of Employment Relations with this agency's DOA budget analyst, you commented that "there is a nigger in the woodpile over there." This

comment was considered outrageous and offensive behavior by the person to whom it was addressed. She demanded and received an apology from this agency and both the Commissioner and Deputy Commissioner agreed to discuss it with you. This incident is considered gross misconduct by a person who has such a high level of responsibility in this agency and further brings into question your dedication to your responsibilities as affirmative action officer.

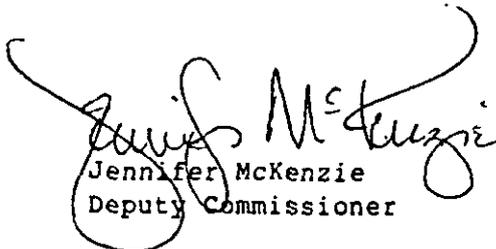
- b. Revised AA plan -- when you were requested by the DER to file an amended plan for affirmative action, you stated to the deputy that "this whole thing is bullshit". When reprimanded by her for inappropriate remarks considering your position as AA officer, you said "it's still bullshit." Again, this incident demonstrates your lack of dedication to the Affirmative Action Policy and efforts appropriate to all agencies of state government. An Administrative Officer 1 should be above such attitudes and demonstrate conduct appropriate to management of a state government agency.
5. Other duties as directed by the Commissioner and Deputy Commissioner: charged in misconduct and incompetence. The incidents described below demonstrate your inability to perform your duties and required by your position description and the standards for the Administrative Officer 1 specifications.
 - a. In June of 1986 one of your subordinates wrote a memo to the deputy regarding violations of state smoking policies of the agency. In discussions with that employe and as stated in her memo, she had complained to you several times about these violations. You indicated that you had reported it and had done every thing within your power. Yet, you did not report this situation to the deputy or the commissioner. The deputy wrote the smoking policy and had discussed its enforcement with all managers and smokers in the agency. This incident describes your inability to follow through at a level expected and demanded by your employes as well as upper management of this agency. You did not take action with the appropriate officials which led to further complications of a relatively simple complaint.
 - b. As a result of the incident described above, discussion arose regarding your comments and attitude toward female employes who are subordinate to you in the agency. It has been reported by several females that you have engaged in remarks and suggestions that have been deemed to be sexual harassment. This situation again demonstrates the level of your conduct and your propensity toward conduct beneath the expected level for an Administrative Officer 1.

In summary, you are expected to perform at a level which meets the attached position description and specifications for an Administrative Officer 1. Your performance, however, has brought forward substantial documentation which fails to meet any reasonable expectation for a position of substantial trust and responsibility. Your conduct as described in this document, as well as others, not limited to but including your June 1986 performance evaluation raises issues which must be addressed.

Therefore, you are requested to meet with Deputy Commissioner McKenzie on Wednesday, October 22 at 10:00 a.m. in her office to respond to the issues and charges raised in this letter. You are entitled to be represented at that meeting by any party of your choosing. Please be prepared to respond to the issues and charges cited above. Subsequent to that meeting, we will deliberate the responses and determine if and what further action should be taken.

Please be aware that these are very serious issues. Should your response not adequately address his letter, further action, up to and including termination of your employment with the Office of Commissioner of Banking may be taken.

Sincerely,


Jennifer McKenzie
Deputy Commissioner


Richard E. Galecki
Commissioner

Attachments

OFFICE OF COMMISSIONER OF BANKING
Employee Performance Evaluation Form



(x) Annual Review Name of Employee Jerrold H. Bents
() Interim Review Classification Administrative Officer 1
Date June 24, 1986 Division Administrative
Position Description Attached Yes x No _____
Provided copy of and discussed Performance Standards: Yes ___ No ___

1. DUTIES, PERFORMANCE INDICATORS AND RESULTS:

A. MAJOR ACHIEVEMENT AREAS (List areas in which employee has demonstrated major achievements in completing responsibilities and goals during the period under review).

The employe appears to complete fiscal responsibilities in a manner necessary to the ongoing functional requirements of the agency.

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B. OBJECTIVES/RESULTS (Identify the formally or informally established objectives of the position, stated in terms of products or outputs desired and timetables for achievement. Describe results in terms of products or outputs planned vs. actual accomplishments, noting reasons for unusual performance above or below expectations.) Add continuation sheets as needed.

All fiscal responsibilities attached to this position should be accomplished in a timely and accurate manner. The employe's p.d. includes responsibilities that are not actually performed by this employe, i.e., performance assessment officer, surety bond program administration, and office manager. The position description for this position should be revised to include changes that have occurred since 1981.

Results seem to be lacking in the area of organization, accuracy, attention to detail and utilization and management of clerical/support staff.

C. IMPROVEMENTS NEEDED (Indicate the major objectives which have not been reached).

According to the p.d., 10% of the employe's time should be devoted to "other duties as directed by the Commissioner or Deputy". The goals listed, however, are no longer the responsibility of this employe.

In lieu of those specific responsibilities, the employe should utilize and manage employees who report to him more fully and effectively. Neither employe appears have sufficient work or responsibility assigned to justify PA-3 classifications. Meanwhile, this employe has difficulty performing major responsibilities (i.e., fiscal officer duties and payroll responsibilities) in an effective, timely and accurate manner.

2. TRAINING/DEVELOPMENT: (Describe training programs, on-the-job experiences or other actions and activities planned to strengthen performance and enhance career development.)

Not applicable.

3. SUMMARY COMMENTS ON EMPLOYEE'S OVERALL PERFORMANCE: (Indicate whether the employee has demonstrated satisfactory or unsatisfactory performance of goals and worker activities.)

See ATTACHED PAGE 3 for continuation.

Employee's Overall Performance is Considered: Satisfactory _____
Unsatisfactory x

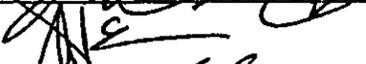
4. EMPLOYEE COMMENTS: (OPTIONAL)

SEE ATTACHED

- () I have reviewed and discussed the information in this form with my supervisor. (If you wish you may also comment in the Additional Comments space above.)
- () I request an appointment with the reviewing officer to discuss the results of this evaluation. (Indicate in the Additional Comments space above, the specific areas of concern you wish to discuss.)

Employee (signature) 

Date 7-14-84

Supervisor (signature) 

Date 7/21/86

Reviewed by (signature) 

Date 7/21/86

Reviewed by (signature) _____

Date _____

CONTINUATION from page 1, Subheading C:

C. IMPROVEMENTS NEEDED (continued)

The creation and maintenance of current fiscal data has been an assigned responsibility of this employe in keeping with his position. However, current, accurate data is most difficult to come by. Despite utilization of a WSRCC data base (at significant cost of the employe's time and other resources), there has been no effective, notable result achieved.

CONTINUATION from page 2, SUMMARY COMMENTS ON EMPLOYEE'S OVERALL PERFORMANCE.

The employe has performed in less than satisfactory manner. The utilization of verbal reprimands and verbal directives has failed to produce improvement in the employe's performance. The employe spends entirely too much time and energy on the office computer system, which beyond original acquisition and set up has not been the employe's responsibility. The employe should focus energy and effort in the maintenance of accurate and timely fiscal and payroll functions. Further, the employe should utilize the two PA3's assigned to Administrative Services functions more fully. Attention to management of these employes would alleviate detail responsibilities allowing this employe to function more effectively. This position is considered a middle management position. However, the employe has failed to provide direction to his employes and has failed to follow the directives of upper management.