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PATRICK BRECKON,
 Appellant,

v.

Secretary, DEPARTMENT OF
 REVENUE,
 Respondent.

Case No. 93-0199-PC

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DECISION
 AND
 ORDER

This matter is before the Commission pursuant to §230.44(1)(c), Wis. Stats., on an appeal of a decision by the Department of Revenue, respondent, to suspend Patrick Breckon, appellant, one day without pay from work. A hearing was held January 7, 1994, before Donald R. Murphy, Commissioner, on the issue: Whether there was just cause for the suspension of the appellant on September 29, 1993. At the conclusion of the hearing, a posthearing briefing schedule was established, which was completed March 24, 1994. The following is based on the record of the hearing. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. The appellant Patrick Breckon, a classified civil service employe, works as a Revenue Agent 2 in the Delinquent Tax Control Section, Madison offices of the respondent Department of Revenue (DOR).
2. The Delinquent Tax Control Section (DTCS) consists of 12 clericals, directly supervised by Cynthia Mael, and 8 professional staff -- 7 agents and 1 auditor -- directly supervised by Linda Busse. Busse is the DTCS supervisor.
3. Appellant's duties are to adjust all types of delinquent tax accounts, prepare adjustment worksheets and other required forms and to provide taxpayer assistance through correspondence or by telephone. Appellant works under the limited supervision of Busse.
4. About one-third of an agent's work time is spent answering telephone inquiries.
5. In early 1993, policy with respect to use of call forwarding and unplugging phones by agents in the course of their work varied.

6. By memorandum dated July 14, 1993, Busse advised the agents and Cynthia Mael of a new policy: later arrivals or early departures could use call forwarding, then take their phone off the hook. While at desk, no agent's phone should ring more than twice without being answered. During the day the unit was to rely on dialing 1-1-1 if the call-forwarding feature failed to work. Phones were not to be off the hook unless the agent was gone for the day.

7. Busse's memorandum resulted from an early directive from the bureau director that phones were not to be unhooked.

8. On July 27, 1993, DTCS was short-staffed, the receptionist had complained of being unable to transfer calls to the agents, so Mael, the clerical supervisor, periodically checked to determine why the transferred calls were not being answered.

9. That afternoon, of the same day, while the receptionist's phone had been switched to call waiting, Mael sought to determine why a call was not being answered by the agents.

10. Among other things, she found appellant at his desk with his telephone unplugged. In response to Mael's inquiry, appellant said that he was doing file maintenance and had forgotten to replug the telephone.

11. Cynthia Mael reported the unplugged telephone incident to Busse the same day, using electronic mail.

12. In August 1993, as a consequence of attempting to answer a taxpayer's question regarding a letter sent to him by appellant, Busse, in seeking the answer in appellant's desk, found more than two months of taxpayer correspondence and responses that appellant had not sent to central file as required.

13. Having previously discussed this matter with appellant when he began with DTCS, Busse sent appellant a brief memorandum on August 9, 1993, reminding him to route taxpayer correspondence and a copy of his reply to central files.

14. On August 17, 1993, Busse sent appellant an E-mail message, requesting him to meet with her August 20, to discuss a report that he had unplugged his phone to do file maintenance and advising him the meeting might be used to suggest disciplinary action.

15. In a return E-mail message, dated August 18, 1993, appellant informed Busse that he had observed a person in the unit working with the

phone unplugged. Busse asked appellant to reveal the name of the person he observed, but he refused, saying he did not want to be an informant, but wanted to point out the underlying issues.

16. During this same period, Busse, in checking to determine if appellant was complying with her August 9 memorandum, discovered that appellant had failed to forward approximately forty pieces of correspondence to central files as instructed.

17. On August 27, 1993, Busse met with appellant and John Klusinski, a union representative, to discuss appellant's failure to abide by instructions to file taxpayer correspondence and agent replies in central files. Appellant never denied that he failed to file the documents as instructed, but stated that he believed he had professional discretion to keep the documents for a short time.

18. Subsequently, Busse recommended to her supervisors, Ron Danielski and Vicki Siekert, the Bureau Director, that appellant be suspended without pay for one day. She also wrote Diane Hardt, the Division Administrator, recommending the same course of action.

19. By letter dated August 31, 1993, from Hardt, appellant was requested to attend a pre-disciplinary hearing on September 9, 1993. The letter did not mention the issue of filing correspondence, but at the hearing appellant had opportunity to address both the telephone and filing issues.

20. On September 21, 1993, Hardt advised appellant by letter that he was suspended one day without pay, effective September 29, 1993, for failing to carry out instructions in regard to unplugging telephones and filing taxpayer correspondence.

21. Prior to his discipline in September, appellant was given a written reprimand on April 26, 1993, when contrary to instructions, he hung up on a taxpayer and failed to make a written record of the incident. Appellant did not formally protest the reprimand.

22. On October 19, 1993, appellant filed an appeal of his suspension with the Personnel Commission.

CONCLUSIONS OF LAW

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

2. Respondent has the burden of showing to a reasonable certainty by the greater weight of credible evidence there was just cause for imposition of discipline upon appellant, and for imposition of the particular discipline.

3. Respondent has presented sufficient evidence to satisfy its burden of proof.

4. Respondent has established just cause for imposition of discipline upon appellant and for the particular discipline imposed.

DISCUSSION

The particular question presented is whether appellant committed the misconduct cited by respondent and whether this misconduct constitutes "just cause" for the imposed discipline. Just cause was defined by the court in State ex rel. Gudlin v. Civil Service Comm., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965) as the demonstration of some deficiency "which can be reasonably 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."

Here, respondent charged appellant with violating its Work Rule 2:

[R]efusing to carry out written or verbal assignments, directions, or instructions; insubordination, negligence, or inattentiveness.

The specific claims of misconduct were that on July 27, 1993, appellant had unplugged his telephone while working at his desk, contravening instructions of his supervisor; and on August 25, 1993, it was determined that appellant had failed to adhere to his supervisor's instructions not to keep taxpayer correspondence in his desk, but route it to central files.

Looking at the incident of July 27, 1993, the record shows that respondent's policy instructed revenue agents not to unplug their phones while performing work at their desks. On this point, appellant argues that the telephone policy was unclear and in support presented co-employee Brian Prystalski as a witness. However, just prior to Prystalski's testimony, appellant on direct and cross-examination acknowledged he knew his phone was to be plugged in and not off the hook while sitting at his work station. Also, appellant's supervisor, Linda Busse, testified that she advised appellant during a meeting with him in February 1993, not to unplug his phone or leave it unhooked while at his work station, and again by memorandum dated July 14, 1993 (Respondent's Exhibit 3); and that the policy prohibiting unplugged or

unhooked telephones while at the work station was consistent and had not changed.

Busse testified to policy changes only with respect to operating the "call-forward" telephone feature. This particular telephone feature had not been functioning correctly during this period and required technical manipulation to make it work.

In reference to the telephone incident, appellant's primary argument is that rules must be uniformly enforced and respondent did not treat him the same as another employee, Richard Maske, who appellant alleges committed the same offense.

The record shows that on July 27, 1993, Cynthia Mael had also asked agent Richard Maske, who was sitting next to or near appellant, why his phone was inoperative. Maske stated that he had placed his phone on call forwarding during break and upon his return had forgotten to reconnect his service. Clearly, Maske's conduct of forgetting to take his phone off call forwarding is different from appellant's action of intentionally unplugging his phone to perform other desk work; and while appellant argues that Maske's forgetfulness may have been more disruptive to office operations, this assertion was not supported with evidence.

In rebuttal of respondent's charge that he had not filed taxpayer correspondence as instructed, appellant writes:

"[T]he supervisor testified that she found 44 letters that had not gone to the central filing facility. Ten of those letters were dated August 24, and 18 of them were dated August 25. Since she conducted the search before the work day was over on August 25, she could not say whether the majority of those letters she testified she found would have been sent to the proper place by the appellant if they had not been taken from his desk."

This argument assumes a conclusion not supported by the record. No evidence was presented demonstrating appellant intended to clean his files that day. Appellant testified that soon after receiving Busse's E-mail message to file correspondence, he proceeded to clean out files and had cleared one month's files by August 25, but was trying to balance that work with his other duties. He testified that it was his habit to clean out files at the end of the month. Busse's instructions to appellant were to send taxpayer correspondence and his reply to files the same day the reply was sent. The evidence clearly establishes

appellant received Busse's instructions regarding filing correspondence and did not comply.

With respect to the question of "just cause" as defined in State ex rel. Gudlin (Supra.), Busse and Mael testified that DTCS received approximately four thousand telephone calls a month and agents, in performing their duties, must answer calls from taxpayers; that if one individual fails to answer the phone, the call must be answered by another in the work group. On the subject of filing taxpayer correspondence, Busse testified that centralize filing makes all taxpayer correspondence readily available to any agent. Accordingly, any agent in the unit is able to respond to any taxpayer call.


In conclusion, it is clear the unambiguous evidence establishes that appellant was aware of the instructions given him by his supervisor, that appellant decided not to comply, and that appellant's failure to comply had a tendency to adversely affect the efficiency of DTCS, thus satisfying the elements of the just cause prerequisite for imposing discipline.

Finally, regarding the severity of discipline issue, the Commission believes the discipline imposed on appellant by respondent is not excessive. In April 1993, appellant received a written reprimand for failing to follow verbal or written instructions in violation of Work Rules 2 and 18. Appellant's current discipline is for the same misconduct of failing to follow instructions. While the specific conduct in the two instances differs, the general conduct is the same and very disruptive to office efficiency.

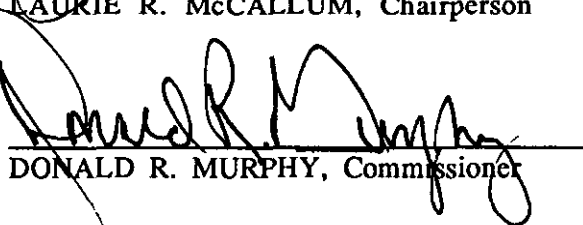
ORDER

The September 29, 1993, one-day suspension without pay disciplinary action imposed on appellant by respondent is affirmed and appellant's appeal is dismissed.

Dated: October 4, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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**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 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.)