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JOHN GIFFORD,

Appellant,

v.

Secretary, DEPARTMENT OF  
TRANSPORTATION,

Respondent.

Case No. 94-0034-PC

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DECISION  
AND  
ORDER

This matter is before the Commission on a claim, pursuant to §230.44(1)(c) Wis. Stats., of unlawful suspension. The following findings of fact, conclusions of law, opinion, and order are based on hearing conducted October 13, 1994. To the extent any of the opinion constitutes a finding of fact, it is adopted as such.

FINDING OF FACT

1. Appellant, John Gifford, has been employed by respondent, Department of Transportation, in its Division of State Patrol as a Program and Planning Analyst since January 1989. He has been an employe of the state twelve years.

2. During the time at issue, Gifford, a Program and Planning Analyst 3, was the Division's data processing coordinator. His general duties included responsibility for coordinating the design, development, and implementation of the data processing systems, providing support to the use of data processing hardware and providing assistance in the acquisition of such equipment. In addition, Gifford was responsible for ordering data processing equipment, providing assistance in instructions in data processing inventories, and for compiling and submitting the Crime Report to the Wisconsin Office of Justice Assistance, monthly.

3. Gifford was involved in a business called TRAC TIME, which provided automatic timing, consulting and result processing for Track & Field and Cross Country events. Gifford was the accountant and developed the data processing schemes.

4. Gifford stored TRAC TIME files on his state office computer. He had not obtained permission to do so.

5. Gifford had gained permission from his employer for maintaining an outside business, but had not been given permission to work on this business during state time.

6. On June 29, 1993 Gifford suffered an emergency medical problem at his home. This resulted in his immediate hospitalization and initiated a series of medical leaves caused by his continuing medical problems of diverticulitis and colon disease.

7. Gifford remained on medical leave until he returned to work on January 3, 1994.

8. Appellant never asked his supervisors for accommodation for any of his medical problems, and he did not believe respondent could do anything to accommodate his particular ailment.

9. In the summer of 1992, appellant noticed certain symptoms and feared he had colon cancer.

10. Appellant began not to fulfill certain obligations at work and at home.

12. Appellant failed to complete "Fast Tracks" forms for purchasing twenty-six pieces of data processing equipment.

13. Appellant lied to his co-workers and supervisors about ordering this equipment.

14. Some of this equipment appellant failed to order was for the Chemical Test Unit, which did not have any data processing equipment.

15. Prior to appellant's medical leave in June, 1993, the department announced a data processing inventory audit with the Legislative Audit Bureau. Appellant was responsible for providing inventory lists and instructions to the Division's district offices.

16. Appellant failed to provide inventory lists and instructions to the Division's district offices, with the exception of District 6, in Eau Claire, Wisconsin. The Eau Claire Office received the inventory list on the morning of the meeting, but no instructions.

17. While searching for answers to questions involving appellant's work, when he was on medical leave, a co-worker reviewing appellant's computer found 200 personal jobs - 7 megabytes of memory - stored there.

18. By memorandum dated January 3, 1994, Daniel McGuire, appellant's supervisor requested appellant to answer questions about projects

he had not completed before his medical leave and personal use of his own office computer.

19. In written reply, appellant stated he had accomplished nothing regarding obtaining 5 PC's, 8 printers and 8 modems for the Chemical Test Unit. Also appellant stated he maintained an archive of all PC programs he had developed in the last five years on his work station computer, including personal programs.

20. On January 7, 1994, McGuire wrote appellant informing him that his response to the January 3, McGuire memorandum had prompted the scheduling of an investigatory interview to be held January 19, 1994, which might result in disciplinary action against him and that he was entitled to attend with representation.

21. Appellant's bureau director, Michael Moschkau and Daniel McGuire conducted the investigatory interview and asked appellant questions about his responses to the McGuire memorandum. The meeting was recorded.

22. On February 18, 1994, appellant had a pre-disciplinary meeting with Moschkau and McGuire, where they discussed appellant's failure to perform assigned duties and his possible misuse of state property and provided him opportunity to respond. Also, appellant was informed that based on their review he may have committed some work rule violations and that his actions and explanations would be submitted to the administrative review board to answer this question.

23. On February 25, 1994, William Singletary, Administrator, Division of State Patrol, as delegated appointing authority, after reviewing the recommendation by supervisors, authorized a 5 day suspension of appellant for violating work rules.

24. On March 2, 1994, appellant received a memorandum from his supervisor, signed by the bureau director, Michael Moschkau informing him that he was suspended from work without pay for 5 days, from March 7 through March 11, 1994 for violating the following work rules:

- I. Work Performance: 2. Neglecting job duties or responsibilities.
- II. Use of Property: 4. Unauthorized use of state property or equipment...

25. Appellant served his suspension and filed an appeal of the suspension with the Commission on March 22, 1994.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.44(1)(c) Wis. Stats.
2. Respondent has the burden of proving to a reasonable certainty by the greater weight of credible evidence that there was just cause for appellant's 5-day suspension dated March 2, 1994.
3. Respondent has sustained the burden of establishing just cause for appellant's 5-day suspension.
4. Respondent had just cause for imposing a 5-day suspension on appellant.

### OPINION

In disciplinary cases respondent has the burden of proving the disciplinary action imposed was for just cause. To sustain this burden of proof, respondent must prove to a reasonable certainty, by the greater weight of credible evidence that (1) appellant committed the conduct alleged by respondent in its disciplinary letter, (2) that the charged conduct, if true, constitutes just cause for discipline, and (3) that the imposed discipline is not excessive.

Here respondent claims appellant was given a five day suspension for failing to order 26 items of computer equipment, failing to provide inventory instructions for a data processing equipment inventory, and for improperly using state owned equipment by storing 200 personal computer files, including files concerned with his outside business, occupying 7 megabytes of memory on his computer,

In his brief, appellant argues that his failure to "Fast Track" order computer equipment, "was not a significant neglect of his duties and was mitigated by his illness". Appellant also argues that he did not misuse his state owned computer, or fail to prepare inventory instructions, and that his failure to prepare the Uniform Crime Report was not a neglect of his duties since that was not part of the responsibilities of his position.

At the hearing, appellant testified that, as stated in his suspension letter, he failed to order the computer equipment, he failed to provide inventory instructions and sheets to the District 2 staff before the scheduled

date for its inventory on June 29, 1994, and he failed to submit several monthly crime reports to the Wisconsin Office of Justice Assistance.

Appellant also testified that he stored approximately 200 files in his state owned computer, occupying about 7 megabytes of disc space, not memory as stated in the suspension letter, and that some of these files related to his outside business.

While appellant admits he was given responsibility for preparing the crime report, after a Program Assistant left the office, he argues that since this duty was not on his position description or his performance evaluation report (PPD) he could not be disciplined for failure to fulfill this responsibility. In support he cites Lyon v. DHSS, 79-81-PC (7/23/90).

"Just cause exists in this case if there is misconduct by the appellant which undermined the efficient performance of his position (citing Safransky). The refusal to carry out a written assignment may constitute just cause only where the assignment was within the duties of the employe's position" Lyons at 6.

Clearly the evidence shows that appellant committed the conduct alleged in the suspension letter. Also, appellant's argument, citing Lyons, that he can not be disciplined for failing to carry out an assignment not in his position description fails. The evidence shows that appellant was given the Uniform Crime Report assignment by his bureau director and that appellant never objected or claimed the assignment inappropriate. Appellant's only excuse for not carrying out the assignment was that it was "a pain in the [butt] and he decided "[he] just wasn't going to do it." These facts do not comport with the criteria in Lyons, which would excuse appellant from failing to carry out job responsibilities.

The next question is whether just cause exists for suspension. In Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974), the court reaffirmed the test for "just cause" for termination quoting State et rel. Gudlin v. Civil Service Comm. 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965):

"...one appropriate question is 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 groups with which he works."

Here, the evidence shows that appellant's misconduct resulted in work not being completed when needed, discontentment and disruption in the unit, and a lapse of funds for equipment. Moschkau, the bureau director, testified that appellant's delinquent Crime Report assignment had to be reassigned to

another employe, that district staff were not ready to confer with Legislative Audit Bureau personnel because appellant had failed to provide inventory lists and instruction, and that appellant's act of storing personal files on his office computer was a work rule violation. This testimony was corroborated by appellant's immediate supervisor, Daniel McGuire, the section head. In addition, McGuire testified that appellant's failure to order the computer equipment resulted in a lapse of about sixty-six thousand dollars budgeted for such equipment and a delay of equipment implementation schedules for staff, district and field work sites. The Commission believes this evidence satisfies the Safransky "just cause" test.

On the question of the appropriateness of the discipline imposed, respondent maintains the 5 day suspension was appropriate because appellant's conduct impaired the operations of the Division of State Patrol and Office of Justice Assistance. Respondent argues that appellant intentionally ignored supervisory orders to prepare Uniform Crime Reports, that appellant intentionally deceived his supervisors and co-workers about ordering computer equipment, and that appellant's failure to order the computer equipment resulted in a lapse of over \$60,000.


Appellant argues that (1) he's had no prior discipline in twelve years of state service, (2) that not all of the allegations in the letter of suspension were proven, but even if they were true, the five day suspension would still be excessive, and (3) that Respondent Exhibit 21, a summary of his division's disciplinary actions, to which he objected, was flawed and should not be considered.

As stated above, the evidence presented establishes that appellant committed the conduct alleged. Even if appellant's argument regarding Respondent's Exhibit 21 is accepted, no evidence was presented indicating appellant was treated differently than others in similar circumstances. Appellant's acts of misconduct included deception, prevarication and insubordination, all of which had a deleterious effect on his work unit. Based on the evidence presented, appellant's misconduct constituted just cause for a 5-day suspension.

ORDER

The action of respondent is affirmed and this appeal is dismissed.

Dated: July 24, 1995 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:bjn

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

John Gifford  
DOT  
4802 Sheboygan Avenue  
Madison, WI 53707-7910

Charles Thompson  
Secretary, DOT  
P.O. Box 7910  
Madison, WI 53707-7910

**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