OFFICIAL

STATE OF WISCONSIN PERSONNEL BOARD

ALVIN J. KARETSKI,

Appellant,

v.

CHARLES M. HILL, Secretary, DEPARTMENT OF LOCAL AFFAIRS AND DEVELOPMENT,

Respondent.

OPINION AND ORDER

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Before: AHRENS, Chairman, SERPE, JULIAN, and STEININGER, Board Members.

JULIAN, writing for himself and Board members AHRENS, SERPE, and STEININGER.

Appellant has moved for reinstatement to his former position as a Local and Regional Planner 4 with the respondent department pending a hearing. Appellant alleges that he was demoted from that position to a Local and Regional Planner 2 without a prior hearing embodying the minimum elements of due process.1/ He

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1/ Those minimum elements of due process are: (1) a written statement of the charges adequately in advance of a hearing to enable the employee to prepare; (2) the right to inspect in advance of the hearing any affidavits or exhibits which management intends to submit at the hearing; (3) the opportunity to have counsel present at the hearing to advise the employee; (4) the right to hear the evidence presented against him or at least to be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies; (5) the right to question at the hearing any witness who gives evidence against him; (6) the right to have those who hear the case determine the facts of each case solely on the evidence presented at the hearing; (7) the right to have the results and findings of the hearing presented in writing and open to the employee's inspection; (8) the right to have made, at the expense of the employee, a record (transcript) of the events at the hearing.

further alleges that due process itself requires such a hearing.[2/]

Appellant's central contention is that he is entitled to a hearing before, rather than after disciplinary sanctions have been imposed upon him. Such a hearing, he contends, is required by the due process clause of the Fourteenth Amendment to the United States Constitution. Simply stated, his argument proceeds as follows:

1. Due process of law is a required ingredient of governmental action.
2. The right to be heard before property is taken or rights or privileges, which previously have been legally awarded, are withdrawn is the essence of due process. Morgan v. United States, 304 U.S. 18, 19 (1938).
3. No hearing was held prior to the implementation of his demotion.
4. Reinstatement pending a hearing is, therefore, required.

The response of counsel for the respondent is to admit that due process is a required ingredient of governmental action but to argue that the right to be heard before property is taken or rights or privileges are withdrawn does not mean that government employees have the right to a hearing before action can be taken against them. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1943), is cited as purported authority for this assertion. Counsel for the respondent seeks to draw a distinction between a demotion and a termination. He also refers us to language in Reinke v.

2/ In the same motion appellant challenges, on due process grounds, the sufficiency of the notice of his demotion and alleges that because of the vagueness of the notice, it fails to afford him fair notice of the reasons for his demotion. This contention will be dealt with in a separate opinion.

Personnel Board, 53 Wis.2d 123, 132, 191 N.W.2d 833 (1971), which he claims supports his position.3/

The issue raised by appellant is one of first impression in Wisconsin. The ultimate resolution of this issue is complex and critical for the future of personnel administration in this state and elsewhere.

The immediate question for decision here is limited to granting or denying the request of the appellant for interim relief. However, the consequences of granting such relief obviously are of significance not only to the named parties to these proceedings, but to others in both public and private life. The effect of such action upon the civil service system of Wisconsin would be substantial. In some respects such action would revolutionize the operation of the disciplinary machinery of that system as we presently know it.

The time seems to have come for a discussion of the matters which underlie the request of the appellant. In the hope that this will serve to effect a better understanding of not only the competing values at stake but also the nature of the problems which must be resolved, we shall endeavor to

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3/ The precise language in Reinke is:

> "There is no requirement for a hearing prior to a discharge; speedy appeal by the employee to the board is provided to insure against the appointing authority acting arbitrarily, capriciously, or without just cause. Absent an appeal by the employee the discharge would stand. Otherwise the power of dismissal would be taken from the employer and vested in the Board of Personnel, a result not contemplated by the statutory procedure, * * *" 53 Wis.2d at 132.

It is clear that this language from Reinke was not necessary to the holding of that case. In addition, the issue of whether a hearing is required prior to a demotion or discharge was not litigated in the Reinke case.

summarize certain contentions and append a brief comment or two to each. Neither the substance nor the phraseology of each contention is necessarily attributable to counsel for either of the parties. Some of the contentions spring from thoughts advanced by counsel for the parties, by courts upon whose decisions they rely, and by other commentators, including members of this Board.

Contention: The Personnel Board as it presently is constituted is a creature of statute and has only those powers which are given to it by the Legislature. The Board has no power to declare, in effect, the present scheme of employer prerogatives invalid even if it does affront the Constitution of the United States. That is what the Board would be doing were it to grant the relief requested by the appellant.

Comment: When the Legislature created the Personnel Board and the present statutes which accompany it and provide power for it to operate, a portion of the motivation and rationale for the actions of the Legislature lay in a desire to implement the guarantees of the due process clause of the Fourteenth Amendment to the United States Constitution as well as the fair play guarantees of the Wisconsin Constitution. It would be quite an anomaly to provide a route for the implementation of due process guarantees and at the same time bar their effectiveness.

Upon taking office, the members of this Board took an oath to uphold the Constitutions of both the United States and the state of Wisconsin. We regard that oath as meaningful and important. Does the "force of our commissions" require

us to give effect to the Constitutions of the United States and the state of Wisconsin notwithstanding any statutory scheme the Legislature may enact that inadvertently conflicts with them? Or are we impotent except when commanded by the Legislature?

Contention: The modern state as an employer is so large, various, and complex in its affairs, that it is not amenable to a scheme of regulation that requires a hearing to take place before management may act to maintain good order in its own house. In critical times within the State Service, both economically as well as in terms of mission, this difficulty is enhanced. Various groups, whatever their motives, are engaged in a campaign to exploit the difficulties of management, and requiring a hearing before management can act will only aid their destructive efforts.

Comment: It is difficult to compare the modern state as an employer and private industry, both in terms of size, complexity, and purpose. Certainly the difficulties of formulating regulations designed to achieve due process at the federal level, whether those regulations are formulated by Commissions, the Courts, or Congress, may well match or exceed the difficulties encountered at the State level.

Contention: The ability of the various departments of the State to carry out their program functions requires that the heads of those departments be able to quickly and effectively implement the decisions that they make, particularly in the policy areas. The department head must, therefore, be free to terminate or demote an employee

who stands in the way of the policy and program objectives of the department and refuses to accede to directives of the director of that department. Management must be free to manage. Require, if it must be, that reasonably fair play be used in termination or demotion (notice of hearing, hearing, etc.). However, implement those requirements at a level outside the agency and at a level that does not immediately interfere with the ability of a department head to control and manage effectively his personnel and his department. Those who serve in positions as heads of departments in this state have a proud history of devotion to the constitutional principles of fair play, and can be trusted to instill that devotion to the rest of their managerial team. Let well enough alone. Let the Board be the place where the hearing occurs, after not before, management acts.

Comment: A powerful argument, perhaps ultimately dispositive of the issues raised by appellant. But is it not underpinned by several assumptions which are undergoing some of the most searching challenges and re-examination of our times. Is the government of a state which employs more than 33,000 employees fairly to be compared to private corporate industry? If so, to which industry? If the corporate conglomerate remains the management model is the model applicable to all of the departments in the state service? In the relationship of employer to employee, supervisor to supervised, is the authority of the employer or supervisor to remain undifferentiated among various levels of employees (management as opposed to labor), various phases of conduct, and among various functions of the departments?

If federal constitutional requirements with respect to the timing of the hearing are not to distrub the management functions of the departments, are they also to be denied applicability to the lowest level employee (one who does not fall within the level of management)? The question is not, of course, whether this evolution of employee rights within the State Service is to be commended or cursed. The question is whether a department in a modern state and an enlightened age is to be spared applicability of federal and state constitutional guarantees at the threshhold of its management level. Traditionally managers have been free to manage. The trend, however, has been to apply constitutional guarantees in some measure to managerial authority. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1943); Kennedy v. Sanchez, 349 F. Supp. 863 (1972); appeal docketed, O.T. 1972, No. 72-1118 (February 12, 1973); Murray v. Kunzig, 462 F.2d 871, (C.A.D.C. 1972), probable jurisdiction noted, O.T. 1972, No. 72-403 (March 29, 1973). The precise dimensions of that tendency with respect to this case and the state of Wisconsin are yet to be determined.

Contention: There is presently no machinery available to implement a precedent-setting decision such as the appellant seeks, and the cost of implementation of such a proposal would seriously burden the taxpayers.

Comment: We must always remember that our system of government was designed for people of fundamentally differing views, and the lack of immediate instrumentalities for the implementation of novel, even bold, decisions, ought not to conclude our judgment upon the ultimate question of whether

such decisions are required by the Constitution of this state or the United States. It may well be that the present statutory machinery, allowing the Personnel Board to act as the hearing agent, is adequate to meet the requirements of any due process rights the appellant might gain should he prevail. The only difference might well be that until the hearing and determination by the Personnel Board, the actual status of the employee would not be affected, unless the employer could show some compelling need for an immediate implementation of his decision to terminate, suspend, or demote. Such a procedure might well result in a savings to the taxpayers, especially if the employee were to be vindicated, because the taxpayers, in the interim between the decision of management and review by the Personnel Board, would have received some labor for the money they would otherwise be forced to deliver in back pay.

Contention: There is a significant difference between termination of an employee and the imposition of other kinds of discipline for the improvement of the civil service, such as suspensions, demotions, and layoffs. The appellant in the present case faces only a demotion. These differences affect the application of the principles of due process. The principle of due process which the appellant seeks to vindicate, if it exists at all, applies only to discharges and not to demotions, suspensions, or layoffs.

Comment: The precise nature and constitutional significance of any differences among terminations, suspensions, demotions, and layoffs have not yet been explored. Such differences, assuming their existence, may

well prove to be substantial and occur in such diverse circumstances as to require differing formulations and applications of the principles of due process.

Having set forth these contentions and comments we now focus on the narrow issue presented for decision here. This is whether, temporarily and pending the full hearing in this case, we should reinstate the appellant to his position. In view of what we have said above, we need not add that we consider the matters raised by this motion for reinstatement substantial. Presently, however, we must balance the competing interests at stake and determine whether the appellant has shown the requisite degree of probability of success and necessary irreparable injury to justify the interim relief sought.

In light of our comments above, and on the basis of the entire record herein, we conclude that the appellant has not made a sufficient showing of probability of success on the merits of his contentions respecting due process and has not shown that irreparable injury necessary to justify temporary reinstatement.

The motion to temporarily reinstate appellant pending the full hearing before the Board is denied.

Dated at Madison, Wisconsin, this 15th day of May, 1973.

BY THE PERSONNEL BOARD,

Percy L. Julian, Jr.
Board Member

Board member BRECHER took no part in this decision.