

STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#132-258

WILLIAM A. BERKAN,

*

Petitioner,

-vs-

*

MEMORANDUM

STATE BOARD OF PERSONNEL,

*

OPINION

Respondent.

Petitioner, William Berkan, has invoked this Court's jurisdiction under §227.16, Wis. Stats., which provides for judicial review of administrative decisions. Mr. Berkan was discharged from his position as Director of the Adams County Department of Social Services on May 13, 1970. He appealed that dismissal to the respondent State Board of Personnel. That body, after an extensive hearing, found as fact the following:

"* * *

- (2) That it was and is (Berkan's) position that the Adams County Board of Social Services had policy control only over general relief and had no policy control over the categorical aids;
- (3) That (Berkan) informed the Adams County Board of Social Services, which was constituted in April, 1970, that the categorical aids were none of its business and that he did not propose to discuss the matters with the board or permit it to have anything to say about them.

* * * ."

The following Conclusions of Law were made by the Board of Personnel:

- "(1) That Adams County has a fiscal interest in the administration of the categorical aids;
- "(2) That the laws of this state have made the Adams County Board of Social Services a component of the Adams County Department of Social Services.
- "(3) That by virtue of such laws the Adams County Board of Social Services has a duty to supervise the working of the Adams County Department of Social Services, and has certain functions in the area of the categorical aids;
- "(4) That the Adams County Board of Social Services had every right to know what appellant was doing with the categorical aids;
- "(5) That appellant's attitude that the Adams County Board of Social Services has no concern with the categorical aids and his efforts to bar said board from involvement therein constitutes such misconduct on his part as to constitute cause for his discharge under the County Merit System Rules."

Mr. Berkan contends that these Findings of Fact and Conclusions of Law are not supported by substantial evidence in view of the entire record, and asks this Court to reverse the Board of Personnel decision pursuant to §227.20(1), Wis. Stats.

Concerning first the Board of Personnel's Findings of Fact, this Court can reverse such Findings only if there is not substantial evidence, in view of the record as a whole, to support them. The Court need not determine that the Findings are supported by a preponderance of evidence. Robertson Transportation Co. v. Public Service Comm. (1968) 39 Wis. 2d 653, 159 NW 2d 636. The Court's specific duty is to examine the record in its entirety to find that the evidence is of such sufficiency that reasonable men acting reasonably might have reached the same decision the administrative agency did. Stacy v. Ashland County Dept. of Public Welfare (1968) 39 Wis. 2d 595, 159 NW 2d 630. The fact that

the Court might have reached contrary findings is irrelevant, as it is not the reviewing Court's function to make an independent determination of the facts. Hixon v. Public Service Comm. (1966) 32 Wis. 2d 608, 146 NW 2d 577. This Court is further instructed by statute to accord "due weight" to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." §227.20(2), Wis. Stats.

In looking to the record of the prior proceedings, the Court notes that this case originated amongst significant political turmoil in Adams County. The manner in which Mr. Berkan was functioning as Director of the Adams County Department of Social Services caused considerable citizen discontent, all of which received widespread publicity in the media. The result of this dissatisfaction on the part of the voters in Adams County was that 3 (out of 5) new members of the Board of Social Services were elected in April, 1970, and shortly thereafter Mr. Berkan was discharged from his duties.

A list of thirteen charges were set forth against Mr. Berkan by the new Board of Social Services (hereinafter referred to as "the new Board"). The Board of Personnel found many of these charges either frivolous or unsubstantiated by evidence, as pointed out in their memorandum opinion. One charge, however, that one relating to the Personnel Board's Findings of Fact (2) and (3), was determined as significant and supportable by competent evidence. And it was with regard to this charge that the Personnel Board concentrated its Findings of Facts and its Conclusions of Law. This Court will do likewise.

Before examining the testimony before the Board of Personnel, it should be mentioned that this Court has only the record before it. All questions of credibility of witnesses and offered testimony have already been decided by the Personnel Board conducting the hearing. It would be improper for the Court to pass upon credibility or comment thereon. Therefore, if in reading the entire record, this Court determines that the Personnel Board's Findings are supported by substantial evidence such that reasonable men might find similarly, those Findings must be upheld.

Two members of the new Board, Mr. King and Mrs. Hardin, testified that Mr. Berkan definitively told the new Board that he alone had the power and authority over the administration of state and federally funded categorical and supplemental aids, and that the new Board had authority only over the county funded general relief. (Tr. pp. 40, 123-124, 126, 128). Further testimony by these new Board members expressed a general attitude of uncooperativeness and, at times, antagonism toward the new Board on the part of Mr. Berkan. (Tr. pp. 41, 132, 134). It was also stated by Mr. King that Mr. Berkan never attempted to explain to the new Board the role that Board was to play in regard to categorical aids, nor did he request the new Board's advice (Tr. p. 43), nor did he ever ask the Board to make a decision whether a particular applicant was entitled to aid. (Tr. p. 45).

"This Board believes Mr. King and Mrs. Hardin. Corroboration is found in the testimony of the Appellant, and that he said it and believes it is confirmed by his attitude and demeanor as a witness." (P. 6, Memo. Decision, Personnel Board).

Mr. Berkan testified on p. 293:

"Q Just one question. Didn't you assume all responsibility for grants?

"A Yes, I was the granting authority."

The Personnel Board further stated at p. 6 of its Memorandum Opinion:

"His (Berkan's) statement to the new board that was constituted in April 1970 certainly meant that the categorical aids were none of its business and that he did not propose to discuss the matters with the board or permit it to have anything to say about them."

In view of these pertinent portions of the hearing testimony, and the record as a whole, this Court must hold that the Board of Personnel Findings are supported by substantial evidence. This does not mean that another body might not have found opposite findings. What evidence is to be believed and what weight each witness is to be accorded is totally within the discretion of the body which hears the testimony. This Court feels, however, that it is significant to note in regard to credibility that the Personnel Board specifically mentioned in their opinion that "(the members of the new Board who testified) have our presumption that they are good citizens and would not

do anything that would be contrary to law, rule or regulation, or good conscience." And referring to Mr. Berkan's attitude, the opinion further stated that "(i)f the County Welfare Board was out to 'get' (Mr. Berkan), it is very apparent that (Mr. Berkan) was not reluctant to carry the fight to them."

The State Board of Personnel concluded that Mr. Berkan's conduct constituted such misconduct (i.e. "gross misconduct") so as to permit his discharge under the state regulation. PW-PA 10.12(2), County Merit System Rules. Concerning this Conclusion of Law, this Court is under the same duty as above to accord deference to the administrative agency's experience and expertise in this area. The Court may, however, exercise independent judgment. (See Baez v. ILHR Dept. 40 Wis. 2d 581 and Milwaukee Transformer Co. v. Ind. Comm. 22 Wis. 2d 502 in which it has been distinctly held that determinations of "misconduct" by a state agency are conclusions of law, independently determinable by the reviewing court.)

Pursuant to §49.50(2), Wis. Stats., the Department of Health and Social Services adopted the Merit System Rule for County Agencies Administering Social Security Aids. The pertinent portion of those rules, a part of the Wisconsin Administrative Code, read at the time Mr. Berkan was dismissed, as follows:

"PW-PA 10.12 (2) Dismissals:

"The appointing authority * * * may dismiss any employee who is negligent or inefficient in his duties, or unfit to perform his duties; who is found to be guilty of gross misconduct; or who is convicted of a felony."

Mr. Berkan's dismissal was sustained on the grounds of "gross misconduct." There are no Wisconsin cases expressly interpreting this phrase within the meaning of this regulation. Rather, interpretations of statutes containing similar language must be relied on.

State employees under the Civil Service provisions may only be removed for "just cause." §16.26 Wis. Stats. Although the Wisconsin Supreme Court has not expressly defined this term,

choosing instead to apply the term to each individual case situation, 15 Am. Jur. 2d, Civil Service, §36, 497, defines "just cause" as follows:

"* * * cause sufficient in law, or any cause which is detrimental to the public service. Legal cause for disciplinary action exists if the facts found by the commission disclose that the employee's conduct impairs the efficiency of the public service, but there must be a real and substantial relation between the employee's conduct and the efficient operation of the public service; otherwise, legal cause is not present."

The use of this new phrase, "gross misconduct," by the state agency would apparently indicate that, in dealing with behavior not directly affecting service efficiency, a more stringent standard than that quoted above was intended.

Such a stringent standard is found in the interpretation of the term "misconduct" in §108.04(5), Wis. Stats. It is well settled that the interpretation of a statute made by a court or an agency in a quasi-judicial proceeding must be consistent with the purpose of the statute. Milwaukee Transformer Co. v. Ind. Comm., supra. The purpose of chap. 108, Wis. Stats., is to provide unemployment compensation to all but the most undeserving discharged employees. Therefore, the "misconduct" precipitating the discharge which will result in forfeiture of subsequent unemployment compensation payments has been defined stringently as follows:

"The general standard for determining whether * * * conduct is misconduct is whether such behavior reflects an 'intentional and substantial disregard of the employer's interests or the employee's duties.'" Milwaukee Transformer Co. v. Ind. Comm., supra at 511.

The purpose of the Department of Health and Social Services regulation in including the word "gross" in the phrase "guilty of gross misconduct" would also seem to be intended as a stringent protection of the employee against arbitrary dismissal. Therefore, the stringent standard of conduct as set forth in Milwaukee Transformer would seem appropriately applied to "gross misconduct," and this Court will do so.

Wisconsin Statutes 46.22(2) reads:

" * * *

"The county board of public welfare shall:

"(a) * * *

"(b) * * *

"(c) Supervise the working of the county department of public welfare and shall be a policy-making body determining the broad outlines and principles governing the administration of the functions, duties and powers assigned to said department under s. 46.22 (4) and (5)." (Categorical aids).


In light of this statute, it could not be questioned that the Adams County Board of Public Welfare had an express interest in both supervising Mr. Berkan's administration in regard to categorical aids, and making policy to control Mr. Berkan's distribution of such aids.

Mr. Berkan's efforts to bar that Board from exercising these statutory prerogatives must be viewed as an intentional and substantial disregard for the Adams County Welfare Board's interests, and was an unreasonable attempt to interfere with that Board's duties and authorities. Accordingly, this Court holds as a Conclusion of Law that Mr. Berkan's conduct constituted "gross misconduct" within the meaning of PW-PA 10.12(2), County Merit System Rules.

The Decision of the State Board of Personnel must be affirmed, and counsel for the State Board may draft the appropriate Judgment, submitting the same to opposing counsel 10 days before presenting it to the Court for signature.

Dated this 23 day of November, 1971.

BY THE COURT:


NORRIS MALONEY, CIRCUIT JUDGE