

STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

\*\*\*\*\*

#134-443

#135-001

PAUL L. MARLETT, \*

Petitioner, \*

-vs-

MEMORANDUM

STATE OF WISCONSIN, \*  
PERSONNEL BOARD, \*

OPINION

Respondent. \*

\*\*\*\*\*

Prior to December 11, 1970, Paul L. Marlett, Petitioner, was employed by the State of Wisconsin as the Director of the Bureau of Payroll and Personnel of the Department of Industry, Labor and Human Relations. On December 2, 1970 Mr. Marlett was notified by Edward E. Estkowski, Chairman of the Department of Industry, Labor and Human Relations, that the petitioner's employment was to be terminated, effective December 11, 1970. This action by Mr. Estkowski, Mr. Marlett's appointing authority, was taken pursuant to §16.24(1), Wis. Stats. An appeal was timely filed with the State Board of Personnel contesting the dismissal. The Personnel Board entered a Memorandum Decision dated October 8, 1971, and Findings of Fact and Conclusions of Law and Order dated October 22, 1971, which upheld the discharge. Mr. Marlett has petitioned the Court for review of the Findings of Fact, Conclusions of Law and Order of the Personnel Board, pursuant to Ch. 227, Wis. Stats.

Petitioner contends that the summary termination of his employment from a permanent civil service position without a prior due process of law hearing and without a showing by the State of a compelling need to immediately terminate the employment was unconstitutional in that such a procedure violated the petitioner's right to due process of law prior to being deprived of his property.

Exhibit 2  
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petitioner further contends that he was denied due process of law during the hearing before the Board of Personnel, and that the Board's Findings of Fact and Conclusions of Law are affected by errors of law. Finally, petitioner contends that the Findings are not supported by substantial evidence in view of the entire record as a whole.

#### DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

Counsel for petitioner has made extensive arguments that the failure of the State to conduct a pre-discharge hearing violated the petitioner's constitutional right not to be deprived of his property right in his employment without due process of law. This is a question that the Court cannot properly reach. The petitioner is without standing to challenge the procedure by which he was discharged at this stage of his appeal procedure.

It is well established law in this state that one who voluntarily claims and enjoys the benefits and privileges of a statute cannot be heard thereafter to say that the statute is unconstitutional in order to escape its burdens. State ex rel. Brunkjorst v. Krenn (1959) 8 Wis. 2d 116, 120, 98 NW 2d 394; Zweig v. Ind. Comm. (1955) 269 Wis. 324, 330, 69 NW 2d 440.

Petitioner has already been afforded the benefits of a post-discharge hearing, a benefit provided by statute. Petitioner argues, however, that he is not challenging the constitutionality of the statute by which he was afforded a post-discharge hearing. Rather, he is challenging the constitutionality of his not being afforded a pre-discharge hearing.

The Court is cognizant of this distinction. However, while not challenging the constitutionality of the specific statute that provides the petitioner with a post-discharge hearing, the petitioner is challenging the totality of the procedure for discharge provided by the statute, including its lack of a provision for a pre-discharge hearing.

Mr. Marlett did avail himself to the benefits of the procedure of which the post-discharge hearing is a part, and it is obvious that had he prevailed at that hearing before the Personnel Board and had been reinstated, he would not be here now challenging the constitutionality of the procedure by which he was discharged. After being discharged, Mr. Marlett voluntarily chose to utilize the appeal procedure provided by statute. By so electing to pursue the procedure established by statute, Mr. Marlett effectively waived his right to challenge the constitutionality of that statute in this Court.

The Department had established a written grievance procedure for all employees other than Union members, including executives. A grievance was defined as: "\* \* \* unfair treatment or dissatisfaction with aspects of his working conditions \* \* \*." Step Four provided for a meeting with the three-member Commission to attempt to resolve the grievance.

On November 9, 1970, petitioner telephoned Mr. Stephen Reilly, his immediate supervisor who was directly responsible to the Commissioners, informing Mr. Reilly that petitioner was going to file a grievance in regard to Mr. Reilly's supervision of the petitioner. No grievance was filed, but rather Steps One through Three were shunted out by the petitioner directly appealing to Mr. Estkowski, Chairman of the Commission, on November 23rd for a meeting of the commissioners on petitioner's claim that Mr. Reilly was treating him unfairly.

The commissioners scheduled a meeting between Mr. Reilly and the petitioner for 10:00 a.m., November 25, 1970, at which time the Chairman announced that the purpose was to attempt to resolve any difficulties into a harmonious relationship. Petitioner and Mr. Reilly were allowed unlimited time to discuss problems including petitioner's failure for several months to convert the payroll to a computer at a wasted cost of \$2,000.00 per month. After a conference

of several hours in the morning, the Commissioners reconvened privately that afternoon, and based upon the interview with Mr. Reilly and petitioner, the Commissioners decided to ask for Mr. Marlett's resignation to take effect not later than December 31, 1970.

Mr. Marlett at first indicated there would be no problem in obtaining other work, but later changed his mind and decided to assert his rights under the Civil Service Law.

The scope of court review under §227.20 is stringently restricted. "\* \* \* The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

"(a) Contrary to constitutional rights or privileges;

"\* \* \*

"(d) Unsupported by substantial evidence in view of the entire record as submitted; or

"(e) Arbitrary or capricious."

The only constitutional questions that this Court in this particular action can consider are those involved in the hearing, Findings of Fact and Conclusions of Law made before the Personnel Board. The Court cannot reach out and determine that the Legislature should have enacted some additional statute guaranteeing to employees a pre-discharge due process of law hearing before some neutral body other than the employer. There may or may not be merit in the argument that in the interest of fairness the Legislature should have gone farther than they did and provided a pre-discharge hearing before a neutral person, but if such legislation is attempted to be done in a court in violation of the Doctrine of Separation of Powers of the government, it should have been done in a separate declaratory action prior to the appeal to the Personnel Board.

## DUE PROCESS BEFORE THE PERSONNEL BOARD

Considering the petitioner's contention that he was denied due process of law before the Personnel Board, several particular contentions are made. First, it is contended that the Personnel Board was prejudiced against the petitioner due to the fact that the appointing authorities who dismissed the petitioner were the three Commissioners of the Department of Industry, Labor and Human Relations, first line public officers appointed by the Governor. The petitioner, in his brief, implies that the Personnel Board would be more hesitant to reverse an unjust dismissal decision made by these men than they would a dismissal decision made by lower ranking appointing authorities. Petitioner provides no evidence that this is the case, nor any other evidence that would indicate that the Personnel Board was either partial toward the Commissioners of the Department or biased against Mr. Marlett. As such, this contention is without merit.

Secondly, the petitioner contends that the key witnesses to the petitioner's case before the Personnel Board, being former employees of Mr. Marlett and under the supervision of the appointing authorities who dismissed Mr. Marlett, were informed that they should not talk to the petitioner's representatives during working hours, and as a result, these witnesses refused to talk to the petitioner's investigators under any circumstances, making the preparation of the case inordinately difficult. These witnesses were informed that they were not to talk to the petitioner's representatives during working hours. This was certainly a reasonable request. Working time should be devoted to work. These witnesses were never directed, however, to refrain from discussing the case with petitioner's investigators outside of work. If they refused to cooperate with Mr. Marlett's representatives, they did so as a matter of choice. The Department was under no duty to require the employees to discuss the case during working hours, and had no authority to direct them to discuss or not to discuss the case during non-working hours. The petitioner was afforded the benefit of the power of subpoena, and he has failed to show how his case was prejudiced by requiring the presence of his witnesses in this manner. This second contention, therefore, is similarly without merit.

Thirdly, the petitioner contends that the presence of Mr. Reilly, Mr. Marlett's former immediate superior and the superior of many of the witnesses called, in the hearing room had a "chilling effect" on the testimony of the subordinate employees. The Board refused to exclude Mr. Reilly over the petitioner's objection to his continued presence. It is indeed true that these employees who testified were dependent upon Mr. Reilly for their continued employment, raises and promotions, and it may have been a matter of sound discretion to exclude him during the testimony of his subordinates, had the Board possessed that discretionary power. However, §16.24(1), Wis. Stats. states that "\* \* \* the board shall hold a public hearing \* \* \*." The only hearing which the board may close at the request of the appellant are those involving appeals from an action taken by the director of the Board. §16.05(1) Wis. Stats. This was not such an appeal. Furthermore, the petitioner has not shown that any of the witnesses would have testified differently had Mr. Reilly been excluded from the hearing room. All witnesses were under oath, and the opportunity for extensive cross-examination was afforded. Without some specific evidence, it is unreasonable for the Court to surmise that Mr. Reilly's presence altered the substance of the testimony of his subordinates.

#### ERRORS OF LAW IN THE PERSONNEL BOARD'S DECISION

Petitioner contends that the Board erroneously placed the burden of proof on him (to prove that the charges were false) rather than upon the appointing authority (to prove that the charges were true). Petitioner further contends that the Board erred in evaluating the evidence, in that they applied a "substantial evidence" test such that the appointing authority only had to support the charges with substantial evidence and the Board merely had to decide whether "a reasonable man acting reasonably might have reached the same decision," Robertson Transport Co. v. PSC (1968) 39 Wis. 2d 653, 159 NW 2d 530, then clearly the burden of proof (used in the sense of "burden of persuasion") would have had to have been on the petitioner to establish

that the facts, as they existed, did not constitute "substantial evidence." If, on the other hand, the Board applied the "preponderance of evidence" test such that the charges had to be proved to the Board to a reasonable certainty, by the greater weight of the credible evidence (the standard used in ordinary civil actions), then logically the burden would have necessarily been on the appointing authority. Which of these two standards of evaluating evidence were used, therefore, is the determining factor on both the issues.

All parties here agree that the burden of proof is to be properly placed upon the appointing authority to establish that the discharge was for "just cause" and that the charges are to be proved by the appointing authority to a reasonable certainty, by the greater weight of the credible evidence. Reinke v. Personnel Board (1971) 53 Wis. 2d 123. The sole question is whether or not the Board did in fact apply the proper standard of evidence, and consequently whether or not the burden of proof was properly placed on the appointing authority.

There are two references in the Memorandum opinion and one reference in the Board Findings of Fact to the evidentiary standard used by the Board in evaluating the evidence presented to them. The Memorandum opinion states that "if there be substantial convincing objective evidence that a director has not competently managed the programs and personnel within his bureau that he should be subject to discipline," and the opinion concludes "that Respondent made a record of substantial objective evidence of the failure of the Appellant to manage a significant and important program assigned to him. Such establishes just cause for his discipline." (Emphasis supplied). Similarly, the Findings of Fact state "[t]hat there is substantial objective evidence in the record of the appellant's failure to competently manage the payroll conversion, which was a significant and important program assigned to him." (Emphasis supplied).

In Reinke v. Personnel Board (1971) 53 Wis. 2d 123, the Personnel Board Memorandum Decision which was the matter of controversy stated that "[t] here is substantial evidence that appellant did \* \* \*. In fact, it could easily be viewed as proof just short of that beyond a reasonable doubt." Despite this final sentence indicating what the Board felt may have been the conclusiveness of the evidence presented to them, the Supreme Court reversed the Personnel Board, holding that "[t] he function of the board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence. \* \* \* The substantial evidence test is applicable only on judicial review; and therefore, the board misinterpreted its function, when it found that there was substantial evidence to support the action of the appointing authority."

In the present case there is no indication from either the Memorandum Opinion or the Findings of Fact that the Board applied the proper evidentiary standard as enunciated by this recent Supreme Court decision. In fact, the only indicating language in either would indicate that the improper standard was used. Both the opinion and the Findings refer to "substantial" evidence. Neither indicate that the charges were proven to a reasonable certainty.

Counsel for the State argues, pointing to the record, that the appointing authority here presented an "affirmative case," and concludes from that that the Board used the proper standard. The fact that the Department of Industry, Labor and Human Relations presented their evidence against Mr. Marlett in the affirmative, however, has no relation upon the evidentiary standard that was thereafter applied to that evidence received. From the language of the Board's Memorandum Opinion and the Findings of Fact the Court can come to no conclusion but that the Board used the erroneous standard in evaluating the evidence. It might further be noted that the Reinke decision, enunciating the proper standard, came down two months after the Personnel Board's decision in this case, and this fact would tend to indicate that the Board, when its decision was made, was still following its prior practice of using the standard of evidence held erroneous in Reinke.



• Since it is now the Personnel Board's duty to re-evaluate the evidence in light of the proper evidentiary standard, it would be improper for the Court to comment upon the evidence at this time.

The decision of the Personnel Board is reversed and remanded to the Personnel Board for action consistent with this opinion. Counsel for the petitioner may draft the appropriate Order, submitting same to opposing counsel 10 days before presenting it to the Court for signature.

Dated this 24th day of May, 1972.

BY THE COURT:

Norris Maloney  
NORRIS MALONEY, CIRCUIT JUDGE