STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

136-453

WILLIAM A. BERKAN,

Plaintiff,

v.

STATE BOARD OF PERSONNEL,

Defendant.

Before: Hon. W. L. Jackman, Judge

Hearing on State Agency Appeal: September 21, 1972
Appearances: Plaintiff by Roy G. Tulane
Defendant by Robert J. Vergeront, Asst. Attorney General

The applicable principles of law were well explained by Judge Maloney in his opinion dated November 23, 1971, and we see no reason to repeat them.

The issues to be determined by this court are: 1. Whether there is substantial credible evidence to support the State Board of Personnel's (hereafter referred to as the Board) findings of fact, and 2. Whether those findings are adequate to support the conclusions of the Board, and 3. Whether such findings of fact and conclusions of law justify the order of the Board affirming plaintiff's dismissal from his position as Director of the Adams County Department of Health and Social Services.

Let us say at the outset that it is obvious that in making the findings, conclusions and order dated June 15, 1972, the Board was mindful of the proper application of the proper burden of proof as announced in Reinke v. Personnel Board, 53 Wis 2d 123.

A reading of the record satisfies us, as it did Judge Maloney, that each of the Board's findings of fact is supported by substantial credible evidence. While plaintiff's attorney made a convincing argument on the facts and one might draw inferences from the evidence contrary to what the Board drew, we are not the judge of the weight or credibility of the evidence. So long as the evidence and reasonable inferences drawn therefrom can reasonably be said to support the findings we cannot disturb them. We are of the opinion that they are adequately supported.

The findings of fact may be summarized by saying that the Board found that the plaintiff refused to cooperate with the county department of public welfare or accept its supervision as provided in Sec. 46.22(2), but took an uncompromising position that as to categorical aids he would accept no supervision.

Paragraph 16 of the amended findings includes the statement: "x x x that such conduct constitutes misconduct and just cause for discharge." At present and since January 1, 1972, the present PW-PA 10.10 has been in existence permitting termination of a permanent employee "for just cause". However, at the time this case was heard and review first commenced the rule, PW-PA 10.12(2) provided for dismissal "of 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." There was no finding that can be attributable to negligence or inefficiency of the plaintiff, nor any claim of conviction of a felony, so if we are to find any justification for the Board's action it must be based on a finding of "unfitness" or "gross misconduct". No express finding of unfitness was made and the nearest to "gross misconduct" was the finding that plaintiff's findings constituted "misconduct". It would have been far better had the Board used the description of conduct contained in the then applicable rule.

The evidentiary findings make it clear that plaintiff's conduct was consistent, was intentional and persistent, and was defiant. One can only conclude from these findings : a calculated course of action intended to prevent the County Welfare Board from exercising its function and thus obstructing the orderly course of administration of the county department in the manner intended by the legislature under Sec. 46.22(2). This would clearly constitute "misconduct" as that term was used in unemployment compensation cases. Cheese v. Ind. Com., 21 Wis 2d 8. In Cheese, supra, the court pointed out that "misconduct" was an ambiguous term as used in the statute, and we may say also that "gross misconduct" is just as ambiguous, and like "misconduct", as used in unemployment compensation, must be construed with a view of effecting the purpose of the rule maker. Since the rule in force prior to 1972, PW-PA 10.12(2), permitted dismissals for negligence and inefficiency in performance of duties and there is no finding which may be so construed, it must be that the Board had in mind plaintiff's intentional conduct and this fits only into a category of either unfitness or some grade of misconduct. In the ordinary sense misconduct includes any bad or improper behavior. In Boynton Cab Co. v. Neubeck, 237 Wis 249, it was recognized that mistakes, errors in judgment and inadvertence might be said to be misconduct, but that the Unemployment Compensation Act meant to exclude such behavior as misconduct and to include only that conduct that might be said to be intentional disregard of the employer's interests as found in disregard of standards of behavior which the employer has a right to expect of his employee. The evidentiary findings as found in this case fall in the category of intentional disregard by plaintiff of standards of behavior that the County Board of Welfare had a right under Sec. 46.22(2) to expect of plaintiff.

"Gross misconduct" is just as ambiguous as is "misconduct". "Gross", as used in gross negligence, is such reckless or wanton disregard of the rights and safety of others as evinces a willingness to inflict injury, which the law deems equivalent to an intent to injure. Ayala v. Farmers M.A.Ins. Co., 272 Wis 629. The word gross as an adjective implies largeness exceeding the ordinary. As used in law "gross"is said to mean out of all measure; beyond allowance; not to be excused; shameful. see State Board v. Savelle, 8 P 2d 693, 696 (Colo.). We are of the opinion that, used in the context of PW-PA 10.12(2), the words "gross misconduct" imply an intentional course of wrongful action or behavior. We cannot conceive of a higher degree of misconduct than the definition of "misconduct" used in Boynton Cab Co. v. Neubeck, 237 Wis 249, which includes the element of intent. We construe the use of the word "misconduct" as used in the Board's finding No. 16 as being the kind of intentional misconduct referred to in Boynton Cab Co. v. Neubeck, supra, and that this is the equivalent of the "gross misconduct," that is: an intentional disregard of the interests of the employing board and in disregard of the standard of behavior that board is entitled to expect.

We presume that we could send this case back to the Board with instructions to make findings using the language of PW-PA 10.12(2), but this case has already been considered twice by that Board and we think the meaning of their findings is clear enough so that we may determine that the Board did affirm plaintiff's discharge because he was guilty of gross misconduct.

We note, in passing, Judge Maloney reached the same conclusion we have: that the word "misconduct", as used by the Board in its findings, is meant that behavior which is intentional and in substantial disregard of the employer's interests and that this is also the same as the "gross misconduct" mentioned in PW-PA 10.12(2). We therefore see no purpose to be served in asking the Board to reconsider the matter. This case has gone on long enough.

We sympathize with the plaintiff, who has the courage of his convictions and the firm belief in the righteousness of his cause, but our powers are limited to redressing arbitrary and unlawful acts of the Board. We find none here.

The Attorney General will prepare the proper judgment affirming the Board, present it to opposing counsel for approval as to form, and submit it to the court for entry.

Dated October 11, 1972

BY THE COURT:

W. L. JACKMAN

Judge