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STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#137-216

RUTH JOAN MARLETT, Surviving
Spouse, and Personal Representative *
of PAUL L. MARLETT, Deceased,

Petitioner, *

MEMORANDUM

-vs-

DECISION

STATE OF WISCONSIN
PERSONNEL BOARD,

Respondent.

This is an action for review of the Decision by the Board of Personnel dated August 24, 1972.

There are three issues raised in this case:

1. When the 5-member Board of Personnel had by attrition shrunk to three qualified and acting members, was the action of the only two who heard the testimony in making Findings of Fact and an Order that the discharge of Mr. Marlett was for justifiable cause a proper and legally valid order of the Board of Personnel?

2. Mr. Marlett having died a month before the Order, viz., July 14, 1972, would his cause of action in this special proceeding survive under §895.01, Stats., in the event the decision of the Board of Personnel had been that he was discharged without cause?

3. Is there substantial evidence in the record to sustain the finding of the Board of Personnel that by the greater weight of the credible evidence to a reasonable certainty that Marlett's discharge "was for just cause"?

If issue No. 3 is answered in the affirmative, this would obviate any necessity for the consideration of issue No. 2. However, in order that the Supreme Court may have the full rationale of this Court, all three issues will be considered and determined.

1. Order of the Board of Personnel

Two long-time members of the Board of Personnel, John H. Shiels and Jerome Slechta, resigned from their service to the State on July 16, 1972, and July 24, 1972, respectively. In the meantime on June 12, 1972, this Court remanded this case to the Board of Personnel because the verbiage used in making the Findings of Fact and Conclusions of Law was not in strict accord with the decision of December 2, 1971, in Reinke v. Personnel Board, 53 Wis. 2d 123. The remand was done by stipulation with the approval of Chairman John H. Shiels.

Chairman Shiels granted the petitioner two weeks within which to file additional briefs, all of which was not complied with, but petitioner did file a brief on July 12, 1972. The respondent filed his brief on August 17, 1972.

On August 24, 1972, of the three remaining members on the Board, only two could act because the petitioner had demanded that Mr. Brecker disqualify himself from the case because there was some of the oral testimony that he had not heard. Petitioner refused to allow Brecker to participate even with a reading of the transcript of the testimony, as provided in §227.12, Stats., insofar as he had not heard all of the testimony and would be unable to pass upon the credibility of the witnesses. On August 24th the two remaining members, who had heard all of the testimony, made and signed the Findings of Fact, Conclusions of Law and the Order which was signed by the Chairman.

Petitioner's Motion for Judgment Notwithstanding the Findings of Fact and Conclusions of Law must be denied because it would amount to judgment as of a default, and most certainly there is no default in this case. It is at most an imaginary default created chiefly through the ingenuity of Petitioner's counsel in specifying which Board members are eligible and those who are not eligible to act upon business properly brought before them.

Wisconsin Statutes 15.07(4) provides:

"A majority of the membership of a board constitutes a quorum to do business and, unless a more restrictive provision is adopted by the board, a majority of a quorum may act in any matter within the jurisdiction of the board."

The only two members remaining on the 3-man Board who were eligible to participate pursuant to the demand of Petitioner met and reviewed the Findings of Fact and Conclusions of Law, and it is stated in the prelude to the Findings that such Findings are based on "all of the evidence produced at the initial hearings and on review of the transcripts of the testimony of all of the witnesses and consideration of all exhibits offered and admitted, * * *."

The Findings of Fact and Conclusions of Law and the Order based thereon have been made in due and proper form and are valid.

2. Does Proceeding Survive Death of Employee?

The Attorney General contends that a special proceeding for wrongful discharge of a civil service employee is a tort action and does not survive the death of the employee. The Attorney General is mistaken, however, as this is a contract action.

A contract of employment for an indefinite period of time is terminable at the pleasure of the employer. Irish v. Dean, 39 Wis. 562 (1876); Hanson v. Chicago, B. & O. R. Co., 282 F. 2d 758 (7th Cir., 1900) cert. denied 356 U.S. 850. However, a contract of employment in which the employee has brought something additional into the relation, such as an investment, can be terminated only for cause. Forrer v. Sears, Roebuck, & Co., 36 Wis. 2d 388 (1967).

The very groundwork of the civil service law is to provide that an employee may be discharged only for cause. Therefore by statute the legislature has put the civil

service employee on exactly the same basis as an employee who has made an investment along with his contract for services.

A contract action which is assignable survives the death of the beneficiary. City of Milwaukee v. Boynton Cab Co., 201 Wis. 581 (1930). At early common law only choses in action arising from a contract were assignable. Under modern law the assignability of things in action is the rule, and nonassignability the exception. 6 Am. Jur. 2d, Assignments, §27, §29.

No court could be so cruel as to say that a civil service employee who has been discharged unlawfully without cause could not assign the pending action to a banker in order to provide bread for his children.

3. Evidence in Record - Re: Cause

The Board of Personnel sits as the trier of fact with the appointing authority on the one hand and the employee on the other to assess and evaluate the evidence, including the credibility of the witnesses. A finding of fact that the discharge was for cause can be made only if the Board of Personnel is satisfied to a reasonable certainty by the greater weight of the credible evidence, that the discharge was justified. Reinke v. Personnel Board, 53 Wis. 2d 123, 137.

However, in a judicial review of the Board of Personnel action, this Court is bound by the Substantial Evidence Rule. In applying the Substantial Evidence Rule the Court may only determine whether a "reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside. * * * [T]he test of reasonableness is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's." Kenosha Teachers Union v. WERC, 39 Wis. 2d 204, 205 (1968).

In regards to substantial evidence in the record, the Court commends Assistant Attorney General Robert J. Vergeront for aiding the Court by compiling a fine abridgement of testimony before the Personnel Board.

It should be noted that in the hearing before the Personnel Board the appellant Marlett waived the opportunity for a Bill of Particulars regarding the specification of reasons for the termination. In lieu thereof, he was afforded assurances that the respondent could put in his case first, that there could be deferred cross examination of respondent's witnesses and sufficient recesses to enable him to defend against specific charges. This format was generously followed.

From viewing the record as a whole regarding substantial evidence the Court agrees with and adopts the portion of the Personnel Board's Memorandum Decision as hereinafter set forth:

"Appellant was a high level state employe (Personnel Administrator of the Department of Industry, Labor and Human Relations) and except for Brown of the Investment Board, was the most responsible employe that has been involved in a disciplinary hearing in over a decade.

"Brown v. Personnel Board, Dane County Circuit Court, Case No. 122-378, Oct. 17, 1967, is cited frequently in the briefs of the parties to this Board. Brown is indeed a landmark case in the employment performance of top public employes. The Board is of the opinion that this case stands for the proposition that a division director cannot be discharged for just cause because his superior who has the burden of running an entire agency does not subjectively regard the director as performing adequately.

"The Board, however, does not believe that Brown condones incompetency in high position as a normal incident of civil service. The Board does believe 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.

"Numerous charges have been made against Appellant. These include poor housekeeping, permitting a noisy and disruptive office, lack of harmony among his staff and failing to do things requested by the State Bureau of Personnel that he had agreed to do. There was no real denial of these derelictions by the Appellant.

"While none of these specifications or the cumulation of them would warrant discharge, they are a part of the totality of the picture of the Appellant's performance as a Bureau Director.

"Where Appellant really got into trouble was in the conversion from the old payroll system to a new one.

"The conversion to the new payroll system involved creating two turnabout documents for each of the 1800 to 2000 employes of DILHR. One document related to personnel, the other to payroll.

"The creation of the turnabout documents is a big job requiring a great deal of clerical work by people who understand payroll. It, however, is not an impossible job or even one of difficulty if handled properly.

"It was the expectation of the State Department of Administration that DILHR could 'go live' on the new system with September, 1970 'A' payroll. The State Department of Administration administers central payroll. The Board believes that Appellant was aware of this expectation.

"From the record it would appear that the conversion work began in June. DILHR was not ready to 'go live' in September; it was not ready to 'go live' in October. As a matter of fact it was not parallel with the old and new systems as of those times.

"This delay was not academic. It was costing DILHR about \$2000 a month to proceed as it was.

"Reilly (Stephen J. Reilly, Executive Secretary of Department of Industry, Labor and Human Relations and Marlett's immediate superior) became convinced that DILHR would not be able to 'go live' in November. This was critical because if the November deadline was missed, the department could not, because of the schedules of the State Department of Administration, 'go live' until sometime in 1971.

"Reilly, then and about October 15, 1970, took drastic action. He removed Appellant from direction of the payroll function. He put one Kemmerer, a systems analyst, in charge. Kemmerer with the assistance of Reilly, two accountants brought in and the utilization of the entire staff of Appellant's bureau, put on a crash program that somehow was sufficiently able to accomplish the conversion so as to 'go live' on the November 'A' payroll.

"Appellant as a bureau director failed to bring to fulfillment a program that it was his duty to have completed. He cannot take refuge behind the members of his staff or shove the responsibility off on his superiors. A reasonable adequate manager could have accomplished the conversion of the payroll of DILHR to the new system at least for the November payroll.

"It really is immaterial to inquire why the Appellant failed even though the record is full of detail. However, the more important ones other than Appellant's lack of appreciation of the importance or urgency of completing conversion were:

"Permitting the initial work to be done by a group of summer YOC young people who had no experience or real supervision;

"Initially having a supervisor of payroll who was antagonistic to the conversion and hostile toward those involved in it;

"In July, assigning the conversion to one girl with no background in payroll and who virtually did not know what she was doing;

"By refusing or failing to utilize the training offered to his people by the State Department of Administration.

"By refusing to accept the services of a systems analyst to aid in the conversion.

"By neglecting to implement the several steps agreed upon to expedite the conversion;

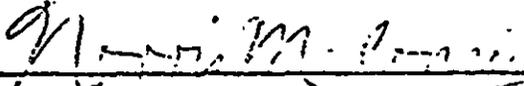
"By lulling Reilly out of directive action by telling him that the conversion was proceeding well and that the old and new systems were parallel when actually things were bad and there was no parallel."

There is substantial evidence in the record, when considered as a whole, that does sustain the Findings of Fact, Conclusions of law and Order of the Board of Personnel that the employee was discharged for cause.

Counsel for the Board of Personnel may prepare the appropriate Judgment, submitting same to opposing counsel 10 days before presenting it to the Court for signature.

Dated: November 30, 1973.

BY THE COURT:



NORRIS MALONEY, CIRCUIT JUDGE