STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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ROBERT YOUNG,

Petitioner, Case No. 140-131

vs.

PERSONNEL BOARD, MEMORANDUM DECISION

Respondent.

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BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

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This is a proceeding under ch. 227, Stats., to review the decision and order of respondent board dated May 11, 1973, which determined that the findings made in its findings of fact constituted just cause for termination of respondent's employment by the Department of Health and Social Services and his discharge from such employment, and affirmed the same. Petitioner's appeal was dismissed upon the merits.

A tremendous record is before this Court for review. As stated in the preliminary recitals, hearings were held by the board at which testimony was taken on April 14, July 17, August 30, August 31, November 1, November 2, November 3, and November 14, 1972. The Department of Health and Social Services (hereafter the department) called 11 witnesses and the respondent 23 witnesses. The transcript consists of 1,548 typewritten pages. The documentary record down to the time of the making of the board's decision consists of 114 numbered documents, some of them many pages long. Included in these documents are the exhibits offered by the parties or

entered by the board. Because of the nature of the contentions advanced by counsel the Court deemed it essential to read the transcript, which the Court has done. The Court also had read all documents which the Court deemed had any relevancy to the issue of denial of due process.

Many of the essential facts are set forth in the board's findings of fact. These findings read:

> "1. The appellant, Robert Young, was a classified employe, employed by the State Department of Health and Social Services, Division of Family Services, at the Milwaukee District Office. He commenced his employment May 18, 1970, in the classification of Psychologist 3, Salary Range 1-15, and after the completion of a six-month probationary period, acquired permanent status on November 19, 1970.
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> "2. That Milton Varsos was Division Chief Psychologist situated in Madison, Wisconsin, and was responsible for the professional supervision of the appellant.
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> "3. That the appellant was assigned to the Milwaukee District Office and his immediate administrative supervisor was one Mr. Holton, Chief of Special Services of the Milwaukee Office.
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> "4. That the primary duty of a psychologist in a district or regional office is to perform clinical psychological testing of clients receiving service from the Division of Family Sercices, and to timely make reports thereof to the social worker who is in charge and responsible for providing case work services for such client.
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> "5. Within the Milwaukee district most clients requiring psychological evaluations consisted of minor children who were formally in the custody and control of the Department of Health and Social Services, or referred by county welfare departments.
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> "6. That on January 3, 1972, the appellant was given a letter from Frank Newgent, Administrator, Division of Family Services, State Department of Health and Social Services, advising the appellant that his services were to be terminated effective January 3, 1972.
>
> "7. That the stated reasons for the termination of the appellant's employment were:

"(a) That the appellant's work output was below par and that the results thereof were of questionable validity and that they were not timely made to be of value to the social worker involved and that the appellant required constant supervision in the performance of his duties.

"(b) That the appellant failed to utilize supervision and follow the directives of his immediate supervisors and comply with existing agency rules and regulations.

"(c) That the appellant failed to keep regular office hours and that he failed to properly account for the use of his working time and failed to follow the expressed request of Mr. Varsos, the Chief Psychologist, in the manner and methods by which his work was to be performed.

"(d) That the appellant had maintained poor relationships with many of the other staff members and that he used derogatory terms and critical language of social workers and other staff members and that on occasion was given to outbursts of anger and he failed to control and conduct himself in a disciplined, professional-like manner.

"8. Based on all of the received exhibits and direct testimor in this matter, the Board finds to a reasonable certainty, by the greater weight of the credible evidence, that just cause exists for the termination of the appellant's employment in that:

"(a) He failed to promptly administer psychological examinations when requested and furnish timely reports thereof to the appropriate social worker.

"(b) He failed to punctually maintain office hours when requested and allocate and coordinate work time as required to quantitively complete the requested psychological tests.

"(c) He failed to advise his supervisor or secretary of his deviation from his scheduled activities.

"(d) He failed to cooperate with supervisory direction to restrict his job duties to clinical testing.

"(e) He failed to administer and score diagnostic tests in the manner directed by his supervisor.

"(f) He failed to schedule diagnostic tests so that they can be concurrently scored and evaluated.

"(g) He failed to maintain cordial working relationships with fellow staff members and expressed a distrust of the staff social workers.

"(h) He failed to accept supervisory control and was unwilling to accept criticism and constructive direction by his superiors.

"(i) He failed to recognize the limitations prescribed on his job responsibilities and encroached upon the responsibilities of the staff social workers in counseling clients and recommendations for custodial placement and remedial therapy.

"(j) He failed to control his emotional outbursts and conduct himself in a disciplined, professional manner.

"(k) He failed to recognize the right of his supervisor to direct his assignment of work and manner of performance and comply with the administrative directives.

"9. That although the appellant is a professional employe, it was the prerogative of his supervisors to require him to follow agency directives in maintaining office hours and contribute to a harmonious atmosphere in working with his fellow employes.

"10. The record does not substantiate any conclusion or inference that the appellant's discharge was motivated by any direct or indirect racial considerations."

THE ISSUES

Based upon the contentions advanced in petitioner's brief and oral argument the Court deems the issues to be:

(1) Was petitioner denied due process which requires a reversal and remand?

(2) Is the board's Finding of Fact No. 8 supported by substantial evidence in view of the entire record as submitted?

(3) Were the board's findings and conclusions arbitrary and capricious?

(4) Was the disciplinary action taken against petitioner motivated by any direct or indirect racial considerations?

ALLEGED DENIAL OF DUE PROCESS

Petitioner's contentions of denial of due process is based not only upon the record returned to this Court but also upon testimony taken and exhibits received in evidence at the hearing had before this Court, pursuant to sec. 227.20(1), Stats., and the order of this Court dated December 3, 1973. Except for the issue of the specificality of the charges listed in the notice of discharge, all the other alleged denials of due process occurred in the proceedings before the board. The Court will consider each of the contentions of denial of due process which it deems merit consideration.

(a) Lack of Specificality of Notice of Discharge

As set forth in Finding of Fact No. 6, the notice of discharge consists of the letter of Newgent to petitioner dated January 3, 1972, and the reasons for the discharge as stated in this letter are stated in paragraphs (a), (b), (c), (d) and (e) of Finding of Fact No. 7.

It is the Court's conclusion that these stated reasons are sufficiently specific to comply with sec. 16.28(1), Stats., and Pers. 23.01, Wis. Adm. Code. State ex rel. Richey v. Neenah Police and Fire Comm. (1970), 48 Wis. 2d 575, 582. As was the case in State ex rel. Messner v. Milwaukee County Civil Service Comm. (1972), 56 Wis. 2d 438, 445, no attempt has been made to demonstrate that petitioner's ability to defend

himself before the board was in any way impaired by lack of specificality in the charges stated in the notice of discharge.

(b) Denial of Pre-Hearing Discovery

The petitioner complains of the board's denial of his counsel's request to the board for the issuance of subpoenas for purposes of pre-hearing discovery. At the time this matter was heard by the board there was no statutory provision for discovery examinations prior to hearing in administrative agency proceedings. It was held in State ex rel. Thompson v. Nash (1965), 27 Wis. 2d 183, 191, that sec. 326.12, Stats., (later sec. 887.12) has no application to administrative agency proceedings. The board has adopted no rule authorizing pre-hearing discovery.

The Court is satisfied that the failure of the legislature and the board to provide for pre-hearing discovery in administrative agency proceedings does not constitute a denial of due process.

(c) Alleged Change in Board's Rules

Petitioner has charged that the board changed its rules during the extended course of the hearings with respect to how witnesses were brought before the hearings.

The board has adopted only limited rules of procedure which are included in the Wisconsin Administrative Code (Pers. 23). However, it also informally adopted rather detailed rules of procedure, a copy of which was furnished to petitioner's attorneys January 17, 1972 (Document 4). A copy of the current rules, which has the same provision with respect to how the appearance of witnesses are to be secured in proceedings before the board as was contained in the copy of rules supplied to

petitioner's counsel, constitutes Exhibit 3, 1-8-74. This provision is Article XVI which reads:

"WITNESSES

"If either the Appellant or the Respondent requires the testimony of state civil service employes at the hearing, he shall submit to the Executive Secretary of the Board, a reasonable time in advance of the hearing, a list of the names and addresses of such employes and a statement as to why they are required. If the Board deems that their testimony may be relevant and material, the Board will require such employes to be present. Employes so required to attend hearings shall be granted leave with pay for attendance and travel time and necessary travel expense.

"The Board has the power of subpoena and subpoenas may be obtained from the Secretary of the Board to require the attendance at hearings of witnesses who are not state civil service employes. Such witnesses shall be entitled to fees and mileage provided for witnesses in civil actions in courts of record. Fees and mileage for such witnesses shall be paid by the State if the Board finds that their testimony was relevant and material to the appeal. If no such findings be made, the fees and mileage for the witness is the responsibility of the party issuing the subpoena. As a condition of requiring attendance of a witness, the party should tender fees and mileage and seek an adjustment if such should be paid by the state. ss. 16.05(6) Wis. Stats."

The first paragraph of the above quoted provision of the board's rules of procedure is an implementation of sec. 16.05(3), Stats., which statute provides with respect to hearings held by the board:

"All state officers and employees shall attend and testify when requested to do so by the board."

Petitioner's counsel voiced objections to the provision in Article XVI of the board's rules of procedure which required them to furnish the board with a statement with respect to the state civil service employees whom counsel might request be ordered to appear stating why such employees were required

as witnesses. The basis of this objection was counsel for the department would be able to obtain from such a statement in advance of the hearing the nature of the testimony petitioner intended to present, and thus in effect be granted pre-hearing discovery which was denied to petitioner. This issue came to a head in a pre-hearing conference held before board member Julian October 17, 1972.

Julian's opinion and order issued upon this pre-hearing conference is dated October 20, 1972, and constitutes Document 78. At page 4 thereof it is stated, ". . . there is no sound reason for not issuing to counsel such subpoenas as he desires in blank to subpoena the witnesses he desires." Paragraph 3 of the order portion thereof provided for the issuance of up to ten blank subpoenas to counsel for petitioner, as counsel desired, with no restriction that they were restricted to witnesses not state employees.

This change in procedure for summoning witnesses made by Julian's order of October 20, 1972, is the only change that occurred, and petitioner is in no position to object thereto because it was made as a result of action taken by his counsel and was a change in his favor, and not to his prejudice.

(d) Failure to Issue Subpoenas

The ground upon which petitioner contends due process was denied him which has been argued most strenuously before this Court is that of the failure of the board to issue subpoenas for state employee witnesses when requested by petitioner's counsel.

In order to keep this issue in proper perspective it

should be kept in mind that the department, which had the burden of proof, presented its witnesses first and it was not until part way through the hearing of November 2, 1972, that the department rested its case (Tr. 885). Then the petitioner presented his witnesses. Thus it was not until then, or the day prior thereto, that petitioner was required to have his own witnesses present before the board.

Prior to the pre-hearing conference before Julian on October 17, 1972, petitioner's counsel had made at least two requests to the board to have subpoenas issued for a considerable number of state employees but without specifying the dates when they should appear. The board did not comply with these requests, preferring to rely on the procedure provided in the first paragraph of Article XVI of its rules of procedure for compelling the appearance of such state employee witnesses. Proper procedure would have been for the board to have afforded petitioner's counsel the option of either having the board utilize the procedure of it compelling the attendance of such witnesses as provided in sec. 16.05(3), Stats., and the first paragraph of Article XVI of its rules, or of providing counsel with subpoenas for service on them under the second paragraph of such Article XVI.

However, by paragraphs 1 and 2 of Julian's order of October 20, 1972, issued after the pre-hearing conference of October 17, 1972, it was directed that subpoenas issue for all of the witnesses listed in a document entitled "List of Witnesses and Documents" filed with the board by petitioner on October 17, 1972, which were to be subpoenas duces tecum.

Such "List of Witnesses and Documents" filed by petitioner on October 17, 1972, the Court is satisfied constitutes Document 41, although it bears no filing stamp impression nor other notation of date of filing.

That the subpoenas ordered issued by Julian were issued appears from the copies of the same, 28 in all, constituting part of Document 114 which is to be found near the back of Vol. 5 of the bound record. (Document 114 consists of five subpoenas issued August 28,1972, followed by the 23 issued October 20, 1972, and only the first of the 28 bears the Document number 114 in red.) Further proof that these subpoenas were issued appears from the statement made at the close of the November 1, 1972, hearing wherein counsel stated, "I do have State's witnesses under subpoena. I want to keep them under subpoena. . ." (Tr. 825).

The only claim of prejudice advanced by petitioner with respect to the failure of the board to honor petitioner's request for subpoenas earlier than it did is that it developed that two of the persons previously named in the requests for subpoenas by the time the subpoenas were issued could not be served because both had then left state employment and were without the state. These were Lynn Crosson and William Neuroth who had been employed as social workers in the department's Milwaukee office at the time petitioner was employed there.

By letter of April 10, 1972, to Donald Sterlinske, attorney for the board (not for the department) Marshafsky stated (Ex. 1, 1-8-74):

> "It is our understanding that any state employee that we want will be available on notice without subpoena, and for that reason you advised Mr. Gesler that the issuance of subpoenas would be unnecessary. Moreover, it is our understanding that these people will come as if subpoenaed duces tecum.
>
> "I am therefore enclosing a list with this letter of all witnesses that we want to call adversely. I give notice at this time but cannot specify the point in time at which we will call them, since I presume that the State's case and my cross examination of state witnesses will last the first day."

Attached were the names of 25 persons including those of Crosson and Neuroth.

The first time that petitioner's counsel notified the board of the time when counsel desired Crosson and Neuroth to appear before the board was when Attorney Gesler wrote Grenier, secretary of the board, under date of August 14, 1972, and listed the names of 24 persons and specified the date and hour each was to be available to testify. Crosson was listed to appear on August 29th at 11 a.m. and Neuroth was listed to appear at 10 a.m. of that day (Document 43). On August 18, 1972, Ahrens, the board's chairman, wrote to Schmidt, secretary of the department, that petitioner desired to have 14 listed persons appear and testify on August 31, 1972, at specified hours and to bring with them certain documents and closed the letter with this sentence, "This is in the nature of a subpoena and should not be disregarded" (Document 44). Crosson's and Neuroth's names were included among the 14 names listed.

Document 48 is a handwritten memo written and signed by Grenier dated August 24, 1972, in which he states that he had advised Gesler that Crosson was on leave of absence

to attend school in Canada and Neuroth had resigned "from the service". On August 28, 1972, Kunz, Director of Manpower of the department's Division of Family Services, wrote Grenier that Neuroth had terminated his employment on August 25, 1972, and had accepted a position in Kentucky, and that Crosson "has terminated her employment with the Division of Family Services . . . and is attending school at Colton College in Ottawa, Canada on a DFS stipend" (Document 51).

On January 12, 1972, and again on February 1, 1972, "C.P.", an investigator for petitioner's counsel, interviewed Miss Crosson and had then dictated memos of these interviews (Documents 3 and 6). By motion dated September 5, 1972, petitioner's counsel moved the board to admit into evidence Documents 3 and 6 or in the alternative that the board authorize funds with whic to permit counsel to pay Miss Crosson's air fare and maintenance on a trip from Canada for the purpose of giving testimony (Document 58). This motion was heard by Julian at the pre-hearing conference of October 17, 1972, and ruled on in his order of October 20, 1972 (Document 81). The request that the board pay air fare and maintenance for Miss Crosson to come from Canada and testify was denied, but petitioner was given the alternative of having Documents 3 and 6 admitted into evidence or of taking her deposition by telephone. The order further provided that the board would reserve the receipt into evidence of Documents 3 and 6 until the close of the testimony of the case.

There later appears in the record a typed memorandum from Julian to Grenier dated November 6, 1972, (Document 85) which states: "On November 3, the board received a call from Miss

Crosson and decided to send her a letter directing her to appear at a hearing on November 14, 1972, informing her that her air fare would be paid by petitioner. However, such letter was not to be sent until the board received a telephone call or written communication from Warshafsky confirming the fact that he would pay the air fare. The board gave Warshafsky until 4 p.m. of November 7, 1972, to decide whether or not he would be able to pay the air fare." At the bottom of Document 85 there appears this notation in pencil, "11-7-72 No call was received by 4:00 P.M. from Mr. Warshafsky" and it is initialed "WG" which indicates that Grenier made the notation. Julian's memo (Document 85) is verified by pages 1202-1209 of the transcript.

At the close of the hearing there was no ruling made by the board on the admission of Documents 3 and 6 into evidence, nor any offer of the same into evidence by petitioner's counsel. However, the Court assumes that the board took the Crosson statements into consideration in making its findings. Most of Miss Crosson's statements made to the investigator, as recorded in these two documents, are of very little value evidence-wise because in the nature of personal conclusions of her own with no facts stated on which to ground the same.

The Court is of the opinion that there was no duty on the part of the board to notify the department that Miss Crosson must stand ready and available to testify until petitioner's counsel had notified the board of the time and place of hearing at which they wanted her present. By the

time they did this she had already gone to Canada. With respect to issuing a subpoena for her, petitioner's counsel had not requested a signed blank subpoena for Miss Crosson, and the request that the board issue a completed subpoena for her was defective in not stating the time and place of hearing to be inserted therein by the board. Thus the Court concludes there was no denial of due process with respect to the Crosson incident.

With respect to Neuroth there has been no showing made of any prejudice to petitioner because he was not subpoenaed in time to appear. At the time the sheriff attempted to serve the subpoena on him he was in Kentucky (Tr. 1121-1122). The only offer of proof as to what Neuroth might have testified is a statement Warshafsky made on the record that, "If we could call these witnesses [Crosson and Neuroth], in addition to those items that we have, perhaps, repetitively dwelled on, the calling of the white parents, and things of that sort, we would in addition be offering proof of hostility towards Mr. Young because he had a picture of Angela Davis in his office, hostility towards Mr. Young because he recommended that various of the social workers read a book by the title 'Black Rage' and other incidents of that nature."

It will be noted that this offer of proof relates to the racism issue and does not tie in the department executives who participated in the decision to discharge petitioner with such alleged acts of racism. Therefore, as will be discussed later in this decision, acts of racial discrimination by some

staff workers does not have much materiality on the issue of whether there was a racial motivation in petitioner's discharge.

The Court is satisfied that there has been no denial of due process by the board in failing to provide a subpoena for Neuroth sooner than was done.

(e) Going Off the Record During Course of Hearings

The petition for review alleges that "substantial dialogues, discussions and rulings" were had and taken off the record by the board over the strenuous objection of counsel for the petitioner. The transcript discloses that at times discussions were had off the record but discloses no objection by petitioner's counsel. During the course of the hearing for taking evidence of procedural irregularities before the Court, petitioner's counsel called board member Julian as a witness to establish proof of irregularity in going off the record.

Julian was asked if he recalled a certain statement made off the record by board member Brecher, and then this occurred:

> "THE COURT: Is this something that was said and not taken down by the reporter?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: At a formal hearing?
>
> THE WITNESS: Yes, sir. It was said either, as I recall, just before or after a recess; it was like - and my recollection is something that he said something to the effect of - that the Japanese - that he had been to the Orient, and that the Orient - the Japanese didn't like colored people, and he used the words 'colored people.'
>
> THE COURT: Did he say this right in the hearing?

"THE WITNESS: Yes, sir.

MR. VERGERONT: Well, the testimony is either before or after recess.

THE WITNESS: Either just before or after a recess. I remember it, because there was a recess at that time and I remember because there was Mr. Warshafsky jumping up and down and screaming and saying, 'I want that on the record' or something to that effect.

THE COURT: Well, just give what he said now.

THE WITNESS: He said that the Japanese didn't like colored people, or didn't like -- didn't like Mr. Warshafsky's people, being I take it white people, any more than they liked colored people. That was as much as I remember of it. It seemed to me to be a rather strange statement and somewhat of a non sequitur at the time, but not particularly unusual.

Q /By Mr. Warshafsky/ From Mr. Brecher?

A From Mr. Brecher."

The Court is in agreement with Julian that this statement by Brecher was a nor sequitur. However, it is now a matter of record so that petitioner has the benefit of it for this court review and, therefore, cannot now predicate a claim of denial of due process because of it not having been made a matter of record.

Outside of this one incident petitioner has not offered any proof of anything else which transpired off the record which should have been recorded.

(f) Delay in Holding and Consummating Hearings

Sec. 16.05 (1e) and (2), Stats., requires that the board hold a hearing within 45 days of receipt of request for the granting of an appeal made by an employee with permanent status who claims to have been discharged without just cause. Petitioner waived this 45 day requirement.

It is unfortunate that the hearings extended over such a long period with some rather long intervals between them. However, the board is comprised of five part time members who receive only nominal pay for their services. Because in most cases they are employed in other occupations they therefore cannot sit on a day after day continuing basis. At least two of the delays were occasioned by requests of petitioner's counsel. The reason no hearing was held in August prior to August 30th was because of petitioner's senior counsel's vacation plans. Some delay was also probably occasioned by a change in membership of two of the five members of the board after the commencement of the hearings.

The Court is of the opinion that the delays in holding and concluding the hearings is not such a denial of due process as to require that the board's order be reversed and the matter be remanded for the reinstatement of petitioner.

(c) Alleged Grounding of Board's Findings on Excluded Evidence

The petition for review also alleged that the board in reaching its findings of fact considered stricken testimony. To establish this petitioner's counsel called Chairman Ahrens as a witness in the hearing on procedural errors held before the Court and this transpired:

"EXAMINATION BY MR. WARSHAFSKY:

* * *

Q In your considerations of this matter, did you give weight - I am not asking you how much, and I am not going to cross-examine in detail - but did you give weight to the fact that there was testimony that Mr. Young didn't do what his boss told him to do?

A Did I give weight to that?

"Q Yes?

A Very much so.

Q Did you give weight to the fact that Mr. Young had evidently not been out - or there was some testimony he had not been out at the childrens home when he claimed he was out there and was signing out for the childrens home?

A Did I give weight to that?

Q Yes?

A Oh, it was a consideration.

Q All right. In other words, the fact that the man is telling his boss and putting down all this information by his going out to the childrens home, but then it turns out he never signed up at the childrens home, indicated to you that he was, if not goofing off, at least not carrying through with the way he should; is that right?

A Yes, there were many indications.

Q But sir, let's -- you consider that; right?

A Considered it, yes.

Q Did you consider the fact that all of that testimony was stricken?

(Whereupon, at this point occurred several objections and the question was never answered.)"

The fact is that the testimony relating to petitioner's not signing in at the children's home when his diary record showed him being there had afterwards been stricken by the board. The reason for the striking is that those executives of the department who participated in the discharge did not learn of the discrepancies between the diary time records and the children's detention home records until after the discharge. However, Ahrens at the hearing held before the Court on January 8, 1974, apparently didn't recall the striki..

out of this testimony, which had occurred two years previously and had not been alerted to this when questioned by Warshafsky.

There was an abundance of other testimony that petitioner had disobeyed orders of his supervisors, Holton and Varsos, and this is what the Court understood Ahrens was referring to when he gave the answer, "Yes, there were many indications."

The fact is that there is none of the specific findings made in Finding of Fact 8 which could have been grounded on any discrepancy in his diary time recordings and the children's detention home records, because there is no finding of having misrepresented where he was in any time records kept by him. The closest possible finding would appear to be that of paragraph (c) of Finding 8, "He failed to advise his supervisor or secretary of his deviation from his scheduled activities," but that is grounded on other testimony than that relating to the children's detention home records.

Furthermore, Ahrens is but one of the three members who concurred in the majority order and findings of the board.

The Court concludes that the petitioner has failed to establish that the board in making its findings of fact gave consideration to stricken testimony.

(h) Discrepancy in Dates Between Findings and Order

The board's findings of fact and conclusions of law bear date of June 11, 1973, while its order is dated May 11, 1973. On the basis of these dates petitioner contended that the board first made its order and then its findings and conclusions. However, the order commences with this recital,

"The board having made and issued its Findings

of Fact and Conclusions of Law enters the following Order:"

This matter of discrepancy in dates was gone into in the hearing conducted by the Court and was cleared up by the testimony of Grenier, the board's secretary.

He testified that the secretary who typed the findings and conclusion and order had changed the date from May to June on the former but not the latter and they were both signed by Chairman Ahrens on the same date which was June 11, 1973. The board's minutes for its meeting of May 25, 1973 recites the following:

> "The majority of the Board approved the Findings of Fact, Conclusions of Law and Order in the matter of Robert Young, Appellant vs. Wilbur J. Schmidt, Secretary, Department of Health & Social Services, Respondent. Member Julian dissented and will be preparing a dissenting opinion. Both opinions will be issued concurrently."

The board's minutes for its meeting of July 5, 1973, states:

> "The Board discussed the majority and minority opinions in the matter of Robert Young, Appellant, vs. Wilbur J. Schmidt, Secretary, Department of Health and Social Services, Respondent, and the majority issued its opinion along with the minority opinion of Member Julian."

There was no majority opinion apart from the findings of fact, conclusions of law, and order, and because of this and the action taken at the May 25th meeting, the Court construes the reference to majority opinion in the July 5th minutes to mean such previously approved findings, conclusions and order.

The Court finds and determines that the findings, conclusions and order were all signed on the same day by Chairman Ahrens which was June 11, 1973.

(1) Over-all View of Court on Due Process Issue

"The cardinal and ultimate test of the presence or absence of due process of law in any administrative proceeding is the presence or absence of 'rudiment of fair play long known to our law'." State ex rel. Madison Airport Co. v. Wrabetz (1939), 231 Wis. 147, 153; State ex rel. Ball v. McPhee (1958), 6 Wis. 2d 190, 199:

The over-all view which the Court gained from the reading of the transcript was not only that the board's conduct of the hearings throughout was completely in accord with the "rudiments of fair play long known to our law" but leaned over backwards,to employ a slang phrase, in doing so. The Court will mention a few of the things that have caused the Court to come to this conclusion.

Petitioner moved that there be a segregation of witnesses and this motion was granted.

Petitioner also moved that when employees of the department were called to testify each be given an assurance of protection against reprisal and this motion was also granted and each department witness, other than executives called by the department, was given such assurance (Tr. 885-889). The wording of this assurance appears at pages 888-889 of the transcript.

When the witness Buck, who is Director of St. Vincent Group Home and had given testimony strongly adverse to petitioner, later failed to produce records pursuant to a subpoena duces tecum which petitioner's counsel had stated he needed for purposes of cross-examination, Buck's entire testimony was stricken (Tr. 941).

Numerous rulings were made on objections to questions put to witnesses and motions to strike made by opposing counsel, and these rulings were eminently fair and, if anything, on the whole favored petitioner rather than the department.

WAS FINDING OF FACT NO. 8 SUPPORTED BY SUBSTANTIAL EVIDENCE IN VIEW OF THE ENTIRE RECORD AS SUBMITTED?

Finding No. 8 is the finding that found just cause existed for the termination of petitioner's employment and specified eleven categories of conduct in which petitioner failed to perform duties or act in an acceptable manner.

The Court determines that there is substantial evidence in view of the entire record as submitted to sustain Finding No. 8 in all particulars. Much of the evidence was in sharp conflict but the credibility of witnesses was for the board to resolve and it did so by the findings embodied in Finding No. 8.

The Court does not summarize herein the evidence which supports each of the eleven particularized findings because after reading the transcript it does not believe that whether such findings are supported by substantial evidence can be seriously questioned. Furthermore, the brief of the Attorney General has taken up separately each of the eleven findings made in Finding No. 8, has fairly and extensively summarized the evidence which supports each, and has given the transcript pages for each fact stated.

By resolving every conflict in testimony and drawing every inference in favor of petitioner, it is possible, as board member Julian has done in his dissenting opinion, to reach factual conclusions the opposite of those reached by

the board majority. This is not said in criticism of the dissenting opinion because the author of it should not be criticized for resolving conflicts in testimony and drawing inferences therefrom contrary to the findings of the majority of the board.

One fact stressed by the dissenting opinion, the October 28, 1970, evaluation of petitioner by Varsos, probably warrants comment. Varsos testified that important facts regarding unsatisfactory conduct and performance by petitioner were unknown to him at the time of his evaluation, and that petitioner's work deteriorated thereafter. It is apparent board member Julian did not accept this explanation while the remaining board members did.

WERE THE BOARD'S FINDINGS AND CONCLUSIONS ARBITRARY AND CAPRICIOUS?

Petitioner contends that the board's findings and conclusions were arbitrary and capricious because Severson's conduct and testing was not subjected to the same scrutiny and supervision as was petitioner's, and because petitioner during a comparable period performed more psychological tests than Varsos.

Except for a short period during petitioner's employment when a lady psychologist was employed, the department's Division of Family Services had three psychologists on its staff: Varsos, Severson and petitioner. Varsos has his office in Madison and his title is that of Chief Psychologist and Severson and petitioner were under his supervision. Petitioner was assigned to the Milwaukee office of the division and was to service a seven county area in southeastern Wisconsin, but

most of his work was done in Milwaukee County, Severson had the remainder of the state in which to do psychological testing. Both Varsos and Severson had been employees of the department for many years.

The reason petitioner's conduct and his work were subjected to such close supervision by Varsos, and Severson's work and conduct were not, is simply that petitioner was a new employee who Varsos thought required such supervision while Severson was a seasoned employee in whose work Varsos had gained confidence. The board had the right to conclude that petitioner was not held to a higher standard of professional conduct than was Severson.

The number of psychological tests Varsos performed during a particular period was brought out by petitioner's counsel to show that, while Varsos had criticized the quantity of tests given by petitioner, Varsos during this period had performed a less number. However, Varsos had extensive other duties to perform in addition to giving psychological tests (Tr. 385). For example, one of these duties was coming to Milwaukee and teaching a course there to social workers.

The Court is of the opinion that the findings and conclusions of the board were not arbitrary or capricious.

THE RACISM ISSUE

The Court has not the slightest doubt that petitioner's senior counsel, Mr. Warshafsky, sincerely believes that racism lies at the root of petitioner's discharge. The terrific battle he waged in behalf of his client before the board, and the tremendous amount of work and energy he put into it, attests to the strength of this conviction. Because of this the Court

came to the conclusion that this was the most important issue in the case. Therefore, the Court in reading the transcript / attempted to make notes as the reading progressed of every bit of testimony that had a bearing on this issue so as to be sure not to miss anything deemed material in writing this decision.

What racism is was expressed by the witness Girardeau who testified racism meant to her one racial group which considers itself superior to other racial groups (Tr. 991). Of course it is not possible to ascertain what the racial views of a particular individual are except as that individual expresses the same through spoken words or actions. The sense in which racism will be used in this decision is that it consists of spoken words or conduct by an individual indicative that he considers another person,or persons, to be inferior to white people generally because of the race of such other person, or persons. Thus words or conduct which objectively viewed display racism are not relieved of their racial import because spoken or done without conscious realization of being such, or by inadvertence.

During the discussion on the record which preceded the taking of testimony at the first hearing of April 14, 1972, the matter of petitioner's affirmative defense of racial discrimination was brought up and Chairman Shiels made this ruling (Tr. 17):

> "I should advise you at this time Mr. Pleyte /counsel for the department/ that if the affirmative defense as presented is proved to the degree that in any, that it in any way taints the disciplinary action taken against the appellant, regardless of what you may prove within the four corners of Board's Exhibit 1 /the letter of discharge/, that the appellant will prevail."

Later, Chairman Ahrens at the first hearing at which he presided, that of August 30, 1972, stated that there was no reason to change this ruling (Tr. 286).

The board by its Finding of Fact No. 10 has construed Chairman Shiel's ruling to mean that if petitioner's discharge was "motivated by any direct or indirect racial considerations" then petitioner was to prevail on his appeal. Without this interpretation by the board the Court would have arrived at the same construction.

As will appear from the Court's summary of the evidence bearing on racism, there was evidence adduced by petitioner's counsel that some individuals employed in the department's Milwaukee Regional Office of its Division of Family Services (hereafter the Milwaukee office) entertained racist views and even that such office was racist. This evidence is irrelevant and immaterial. In order for evidence on racism to be relevant it must be such as to provide a basis for finding that the department executives who participated in making the decision were directly or indirectly motivated by racial considerations. The three executives in question were Varsos, Holton and Erickson. As previously mentioned, Varsos is the department's chief psychologist stationed at Madison and he supervised petitioner's professional work as a psychologist. Holton is chief of the Special Services Section of the Milwaukee office and supervised Young administratively. It was Holton's responsibility to see that petitioner observed office rules such as the time he was to report to work and notifying the secretary when he left the office during office hours and informing her where he was going. All referral

assignments for petitioner performing psychological services were routed through Holton. Erickson was the director of the Milwaukee office and as such had over-all supervision and direction of the operation of that office and the employees employed there.

The Court will now proceed to summarize all of the evidence adduced bearing on the racism issue which it believes is worth noting.

Member Julian in his dissenting opinion makes the statement, "It was routine practice for white parents to be called to tell them that a Black psychologist (appellant) was going to interview and test their child." The testimony does not substantiate this statement of "routine practice." All that it does establish is that this notification of white parents occurred in one isolated instance. Social worker Vandermause, employed in the Milwaukee office, had as a client Robert _____ who was residing with foster parents in Glendale and the boy had been referred to petitioner to make a psychological test (Tr. 1013-1014). Vandermause discussed the matter with his supervisor, Mrs. Bridgeman (Tr. 1014, 1034). Mrs. Bridgeman told him that if he felt if the race of the psychologist might have anything to do with the foster parents resisting the testing they be told in advance that petitioner was black (Tr. 1034) and this was done (Tr. 1017). Young learned of it and was offended and refused to go to the house to do the testing (Tr. 1016-1017). Holton testified that Vandermause and Mrs. Bridgeman were called in afterwards by Erickson about the incident and definitely told that under no

circumstances was the race, religion or ethnic background of anyone to be discussed with a client prior to contact (Tr. 55). While Holton was not personally present at this conference he testified the source of this information was petitioner (Tr. 56). Erickson testified that petitioner had brought the incident to his attention and he talked to Mrs. Bridgeman about it (Tr. 1066). Erickson stated he did not approve of what Mrs. Bridgeman had done and issued instructions that henceforth unless Young requested that someone be told he was black, that never again should there be any mention to anybody that the psychologist was black (Tr. 1067).

Petitioner testified he talked to Varsos about the incident and Varsos stated he would talk to Mrs. Bridgeman about it but he received no feed back (Tr. 1171-1172). Varsos testified that he talked to Mrs. Bridgeman about the matter and thinks one of the other supervisors was also present (Tr. 565). When Varsos questioned them about the incident they indicated it was their concern that petitioner would not meet with a serious rejection by the foster parents that led them to give the advance notice that petitioner was black (Tr. 566). Varsos further stated he "indicated" to them he did not approve of this and that his preference would have been to have told petitioner what he might expect and let petitioner handle it himself and make whatever decision he wanted to make in the handling of it (Tr. 566).

Mrs. Bridgeman denied that either Erickson or Varsos had ever discussed with her whether parents should or shoult not be told about the race of the psychologist (Tr. 1029).

Thus there is a direct conflict between the testimony of Erickson and Varsos and that of Mrs. Bridgeman on that point, and it was the function of the board and not for this Court to make the determination of which of these witnesses were telling the truth.

Petitioner's counsel questioned a considerable number of witnesses about the "Eldredge Cleaver syndrome". What this syndrome is appears from testimony Varsos gave with respect to a conference he had with petitioner on April 14, 1971. Varsos testified, "He [petitioner] shouted that Ryan [one of the social workers on the Milwaukee office staff] had the Eldredge Cleaver syndrome. 'He thinks all black males want to get into white girls' pants'" (Tr. 580). In giving this testimony Varsos was reading from his typed memorandum of that conference (Tr. 579-580). Varsos further testified he asked petitioner to give him evidence for this remark and he could not (Tr. 580). Ryan is the only individual who was identified by name in this record as having the Eldredge Cleaver syndrome. Holton also heard of the Ryan incident from petitioner (Tr. 101). Bonner, a black social worker, when asked about what white professionals in the office were saying about this syndrome, answered, "There was some discussion in social work terms about fascination with white women." (Tr. 1367).

Witnesses Girardeau (Tr. 990), Evans (Tr. 1011), Smith (Tr. 1021), and Matthews (Tr. 1051) all employed in the Milwaukee office when petitioner was employed and called by petitioner as witnesses, testified that they had never heard of the Eldredge Cleaver syndrome. The only testimony of the

Eldredge Cleaver syndrome having been discussed by any members of the Milwaukee staff apart from the Ryan incident was given by the witness Bonner who testified that at a party one night at Corey Thomsen's house the syndrome was discussed (Tr. 1378). In answer to a question put by member Julian, Bonner agreed what was really being discussed was a passage from Cleaver's book (Tr. 1379). It is the Court's view that the Eldredge Cleaver syndrome evidence is not of much significance in passing on the question of whether petitioner's discharge was motivated by racism.

A written request dated February 17, 1971, was presented to Erickson signed by 21 staff employees, 15 of whom were white and 6 black, which inquired as to what progress had been made toward continuing the "Black Client-White Worker Series" (Tr. 63, 68). This series had consisted of several meetings of staff members in which black client-white worker relationships were discussed. It was not a course taught by an instructor. The attendance had dropped from 30 to 13 through lack of interest and the series was discontinued (Tr. 1063). The request of February 17, 1971, was referred to Holton,and petitioner indicated a desire to participate in the program (Tr. 70-71). Holton contacted the University of Wisconsin and found it had a program which would fit "our needs" (Tr. 71). The Governor's freeze on funds caused postponement of such plans (Tr. 71, 1061). People connected with the University Extension had advised that if a Black-Client White-Workers course was to be instituted the instructors should come from outside the office staff (Tr. 1060-1061).

Petitioner made an offer to Varsos that he teach such a course (Tr. 702). Varsos refused this offer (Tr. 702). His reason for doing so was that petitioner was new on the staff and lacked readiness for it and "had a great deal to do in getting his own work up to par" (Tr. 1486).

Petitioner's counsel asked Varsos if he was aware of any dispute between petitioner and the social workers about petitioner having possession of, and making reference to, the book "Black Rage" (Tr. 718). Varsos stated he was not aware of such a dispute, and thought it would have been a good idea if petitioner had recommended to social workers that they read "Black Rage" (Tr. 719).

Petitioner testified there was adverse reaction to his having a picture of Angela Davis on his bulletin board by the "general white staff" (Tr. 1174). He further testified that Varsos saw it when he came to Milwaukee periodically and said nothing to begin with but once asked petitioner if he felt that picture being on the bulletin board was apropos (Tr. 1175). Petitioner felt it was but Varsos said it was not, it was political (Tr. 1176). However, there is no testimony that any instruction was ever issued to petitioner to take it down.

Social worker Odegard was asked by petitioner's counsel if she could name anybody who made the remark that petitioner had an inordinate desire or affection for white women, and she answered she could (Tr. 979). She then reluctantly named staff members Corrie Tamsen and Tayco Park (Tr. 979). It developed that in so far as Corrie Tamsen was concerned it was merely a repetition of rumor or gossip, but

Tayco Park's remarks were a personal observation. The witness stated that Tayco Park, who is of Japanese descent, said petitioner went into her office quite regularly and got very close to her which was somewhat frightening to her, and said to her, "How can you stand to live here, to work in an office like this, that is so racist; that these are the people who have bombed Hiroshima" (Tr. 981-982).

While at the moment of writing this part of the decision the Court is unable to put its finger on the page of the transcript where it occurred, it is the Court's recollection that petitioner testified that he discussed with Varsos the view of some psychologists that the standard psychological tests are inapplicable to black children because of their cultural background. However, Varsos denied that petitioner had done so (Tr. 599). Varsos testified that in 1970 he had held Human Growth and Development workshops on this problem for staff and case workers in facilitating the understanding of the inadequacies of testing of black children (Tr. 603-604). He also stated he had worked with staff psychologists in terms of tests that are more applicable to specific children (Tr. 603). Varsos insisted that petitioner in giving these standard tests follow the test instructions and score the results exactly according to the test manual, and if the petitioner had the opinion that the test score failed to give an accurate picture of the youngster's potential, this opinion should be expressed as comments in the evaluation portion of his report.

The witness Girardeau, who was one of the staff who signed the request to Erickson for the continuance of the

Black-Client White-Worker series, said that there was racism in the "department" and all the signers of that request shared this view (Tr. 989-990). She also expressed the feeling that white social workers not only treated black clients, but also black social workers, as if they were inferior (Tr. 991). As an example of why she felt that she was so treated, she stated the facts of a case involving a youngster where she had made a recommendation one way; a white worker was then assigned to make a report and recommended a different disposition; and the white worker's recommendation was followed (Tr. 997-998). However, she also testified she knew of no promotions in the Milwaukee office that had been based on color (Tr. 999).

The witness Evans, when asked if she was aware of any racism during her tenure in the department, replied, "I think there is racism everywhere and of course by saying that I would say, yes" (Tr. 1011). When asked in what way it affected the department, she stated "it was sort of a built-in racism . . . it was there and you know, because you can feel it" (Tr. 1011).

The witness Matthews is one of the section chiefs in the Milwaukee office, that section being County Administration. He testified he thought the Milwaukee office staff had difficulty discussing the crucial issue of race and that this had not been resolved for years (Tr. 1053). He stated that Erickson had not in some subjective way wanted to give lesser service to black children, but thought "that is the reality, that is life" (Tr. 1056). In answer to a question put by member Julian, Matthews stated, "I think if we're honest with one

another we know that we have institutional racism" (Tr. 1059).

Petitioner testified: At a coffee break he was discussing with other employees a proposal he had heard or read about use of forcible brain implants by use of electrodes placed in the brains of black people to correct their conduct and he expressed his moral indignation at such a proposal; and someone said, "Why are you so concerned with these things? Why don't you concern yourself with more mundane matters?" (Tr. 1142-1144). On another occasion Varsos told petitioner he was there to do his job and not create problems and antagonize anyone. (Tr. 1148). This included people petitioner thought were advancing racist problems (Tr. 1148). A schism developed between black and white workers on how to handle black clients, with obvious hostilities between substantial segments of the two groups (Tr. 1166). He also mentioned that some people felt Bonner's wearing of a dyshaki (a long shirt standing for blackness) to work and a militant haircut were threatening to the staff (Tr. 1167). There was also a schism between black and white workers as to whether racism was present in the Milwaukee office (Tr. 1169). Petitioner tried to inform Varsos of the worsening of the situation, but Varsos "didn't want any added problems which would contribute more to the situation than was already present" (Tr. 1170).

In rebuttal to this testimony by petitioner that Varsos had told petitioner not to antagonize fellow employees and create further problems, Varsos testified that the petitioner had used inflammatory language, became very angry, shouted, and

described the staff in very uncomplimentary terms; and Varsos told petitioner "to cool it so that we will not precipitate or worsen the situation by approaching people on this basis" (Tr. 1542-1543).

Bonner, the black social worker who wore the dyshaki, went to the county jail to see an 18 year old client incarcerated there and was given a rough time by the sheriff's employees even though he showed his I.D. card, and was searched before being admitted (Tr. 1361-1362). When Bonner got back to the office he complained to his section chief, Mills, but is not sure what action Mills took, if any (Tr. 1363). Mills, Holton and Erickson, according to Bonner, did not respond to complaints of black professionals in a manner Bonner or the black professionals thought was satisfactory (Tr. 1365).

A review of this summary of the testimony on the racism issue makes manifest that there is no direct evidence that Holton, Erickson and Varsos were motivated by racism in reaching their decision that petitioner should be discharged. Thus if a finding were to be made that such discharge was motivated by racism it would have to be grounded on an inference drawn from this testimony. The majority members of the board by making Finding of Fact No. 10 in effect stated they were unable to draw this inference from the evidence. In order for the Court to upset this finding it would be necessary for the Court to determine that but one reasonable inference could be drawn from the evidence, and that is that the discharge was motivated by racism. This the Court is unable to do.

Let judgment be entered affirming the order here under review.

Dated this 27th day of January, 1974.

By the Court:

Augie R. Currie

Reserve Circuit Judge