STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

EARL DUTTON,

Petitioner, Case No. 140-243

vs.

STATE OF WISCONSIN
BOARD OF PERSONNEL,

JUDGMENT

Respondent.

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

The above entitled review proceeding having come on for hearing before the Court on the 12th day of February, 1974, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Steven Luse Abbott of the law firm of Rice and Abbott; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein it is directed that Judgment be entered as herein provided;

Now, therefore, it is Ordered and Adjudged that the Order of respondent State of Wisconsin Board of Personnel dated July 12, 1973, in the matter of Earl Dutton, Appellant, vs. John F. Wieczorek, Director, Monroe County Department of Public Welfare, Respondent, be, and the same hereby is, affirmed.

Dated this 6th day of February, 1974.

By the Court:

George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

EARL DUTTON,

Petitioner, Case No. 140-243

vs.

STATE OF WISCONSIN
BOARD OF PERSONNEL,

MEMORANDUM DECISION

Respondent.

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

This is a proceeding instituted under ch. 227, Stats., to review an order of the respondent Board dated July 12, 1973, which affirmed the discharge of petitioner Dutton by John P. Wieczorek, Director of the Monroe County Department of Public Welfare (hereafter the County Welfare Department), and dismissed petitioner's appeal.

Statement of Facts

Many of the material facts are set forth in respondent Board's findings of fact upon which its order was grounded. Findings of Fact Nos. 1-18, inclusive, read as follows:

> "1. That the appellant, Earl Dutton, age 49, was employed by the Monroe County Department of Public Welfare as a Case Aid 1.
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> "2. That the appellant's appointment was under the County Merit System and that the appellant had completed his probationary period and was a permanent employe as defined by the County Merit System rules.
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> "3. That the respondent, John P. Wieczorek, was the Director of the Monroe County Department of Public Welfare and responsible for the administration of

the County Welfare Department as well as the supervision of its employes.

"4. On January 17, 1973, John P. Wieczorek, the respondent, as Director of the County Welfare Department and as the appellant's supervisor, notified the appellant by letter that he was suspended as a Case Aid 1, effective January 17, 1973, until February 14, 1973. This suspension was without pay and pending further action and investigation of appellant's conduct resulting in his arrest by the Wausau Police Department on a criminal charge of contributing to the delinquency of two minor boys. This letter alleged that the appellant, on the evening of January 15, 1973, transported by automobile a minor boy 13 years of age to Wausau, Wisconsin, which resulted in the arrest of the appellant and the initial filing of such criminal charges.

"5. The Monroe County Public Welfare Board held a hearing on February 14, 1973, at which time the appellant and his attorney, Steven Abbott, were present as well as the respondent, John P. Wieczorek and Attorney Michael J. McAlpine.

"6. As the result of the hearing held February 14, 1973, the Board by formal action elected to terminate the appellant's employment as a Case Aid 1 and notify him in writing of the reasons therefor.

"7. On February 14, 1973, the Monroe County Welfare Board, under the signature of its Chairman, Vice-Chairman, and Secretary, prepared a written notification addressed to the appellant advising him that based on the evidence of the hearing held that date that his employment was terminated. The stated reasons therein were that 1) he was convicted after a plea of no contest on a reduced charge of disorderly conduct, 2) he exercised poor judgment, portrayed a negative image in the community, which had an adverse effect on the department's operations, 3) the nature of this conduct and behavior rendered the appellant unsuitable to continue his employment. Further, such notification advised him that he had the right to appeal this action to the State Personnel Board.

"8. The appellant, by his attorney, filed a timely written notification of appeal to the Personnel Board, dated February 21, 1973.

"9. The Board, in reviewing the testimony and applying the required burden of proof to a reasonable certainty, by the greater weight of the credible evidence,[1] finds the following facts to be true and correct:

[1] Reinke v. Personnel Board, 53 Wis. 2d 123 (1971)

"a. That on Monday evening, January 15, 1973, Earl Dutton was operating his automobile in Monroe County and at the request of one Donnie Y_____, a 13-year old minor boy, provided him with automobile transportation to Wausau, Wisconsin.

"b. That the said Donnie Y_____ was at the time receiving custodial supervision from the Monroe County Welfare Department, although the appellant was neither responsible for, nor aware of, such supervision.

"c. The said Donnie Y _____ requested the appellant, Earl Dutton, to transport him from Sparta, Wisconsin to Wausau, Wisconsin. At the time of this request Donnie represented that he wished to go to Wausau for the purpose of visiting his brother, who was 15 years of age, to give him some money.

"10. That the appellant and Donnie left Sparta in his automobile between 10:00 and 11:00 p.m. for Wausau, approximately 115 miles away, and arrived there approximately 4:00 a.m. on the morning of January 16.

"11. When the appellant and Donnie arrived at Wausau they were initially stopped by Wausau Police Patrolman Derke and Officer Derke interrogated both the appellant and Donnie and released them. Shortly after this release Patrolman Derke received instructions from his department to stop the appellant and bring him and Donnie in for questioning.

"12. Patrolman Derke stopped the appellant's automobile. Donnie had left the appellant's automobile and was later apprehended by another Wausau Police Officer.

"13. After apprehension Donnie was held for a period of time and released into the custody of others. The appellant, Earl Dutton, was criminally charged with contributing to the delinquency of a minor and was thereafter released from custody upon posting of bond.

"14. The appellant, Earl Dutton, returned to Sparta mid-afternoon on January 16 and reported for work at 8:00 a.m. the following day. Upon reporting for work, Curtis Moe, County Basic Services Supervisor, together with respondent, John P. Wieczorek, held a conference with the appellant for the purpose of interrogating him regarding the Jausau trip and the resulting apprehension and arrest.

"15. As the result of the conference with Dutton

on January 17, the respondent by letter advised the appellant that he was being suspended without pay pending a hearing before the County Welfare Board on February 14, 1973. This notification alleges the exercise of poor judgment in transporting a minor boy from Sparta to Wausau and that the boy was 13 years of age, a truant from home, and had a delinquency record in which the County Welfare Department personnel had prepared background information to the court.

"16. That the hearing was held on February 14, 1973, for the Welfare Board. As the result of such hearing, the Board unanimously agreed to terminate the appellant and prepared a written notice of such termination. The stated reason for such dismissal was his conviction on a charge of disorderly conduct reduced from the original charge of contributing to the delinquency of a minor and that his conduct in transporting a 13-year old boy under the circumstances exercised poor judgment and had adverse effects upon the Welfare Department within the community.

"17. Such written notice of termination February 14, 1973, was signed by the Board Chairman, Vice-Chairman, and Secretary and given to the appellant.

"18. The appellant timely appealed from such termination action by a letter of February 21, 1973."

Extensive testimony was taken and considerable documentary evidence in the form of exhibits was received at the hearing held before respondent Board on May 10, 1973, and the further supplementary facts that follow are taken from such evidence.

Petitioner had retired from the Army in 1968 after 20 years of service and had been employed by the County Welfare Department since October 15, 1969. As a Case Aid 1, he primarily dealt with budgeting recipients of welfare assistance on the basis of questionnaires and interviews with applicants. Some of these interviews were conducted at the department's office while others took place at the applicants' and recipients' family homes. He was not a social worker and did no guidance

counseling of minors. He was divorced from his wife November 15, 1972, and was residing alone as of January 15, 1973.

The stories told by petitioner and Donnie Y_____ at the hearing were in sharp conflict with respect to the origin of the trip to Wausau on the evening of February 15, 1973.

Petitioner's version was this: He had come home from work about 5 p.m., ate his supper and fell asleep about 6 p.m. / After waking around 10 p.m. he then drove to the Country Kitchen, a Sparta restaurant, alone and had pie and coffee, leaving there about 10:25. He drove toward Camp McCoy intending to visit the club there. He saw a boy hitchhiking and slowed down and stopped and picked him up. Shortly after he picked him up he asked the boy his age and he said 18. The dome light in his car was not working and he could not see the boy plainly. The boy said he was going to Wausau and asked petitioner if he would take him there. Petitioner told the boy he did not realize how far Wausau was but he was just out driving and Wausau would probably be as good a place to go as any.

Donnie Y_____ testified: He is 13 years old, is 5 feet 3 inches tall, and weighs 115-120 pounds, and his parents live in Sparta. At about 10:30 p.m. on January 15, 1973, he was in the IGA Store parking lot in Sparta with Terry Johnson. They saw petitioner drive by and yelled at him to stop. He stopped and they asked for a ride to the Country Kitchen. He took them there and petitioner, the two boys, and a third boy, Ronnie Fisher, occupied a booth together. Donnie asked for a ride to Wausau and petitioner said he "didn't know." They talked about some "tea" that Ronnie Fisher asked Donnie to

to sell to petitioner which the boys pretended was marijuana but which actually was a plastic bag containing tea. A deal was then consummated whereby petitioner gave Donnie $4 and some change for it and agreed to drive Donnie to Wausau. Terry Johnson was let out at the IGA Store, a stop was made at petitioner's home by him to pick up his brief case and a map, and they then proceeded to Wausau.

The County Welfare Board at the time it conducted its hearing on February 14, 1973, was unaware of Donnie Y____'s version of how the trip to Wausau originated, and, therefore, this played no part in the discharge of petitioner ordered as a result of that hearing. Donnie's testimony's only materiality on this review is that it may have been considered by respondent Board in determining petitioner's credibility.

Also having materiality on the issue of petitioner's credibility was the testimony of Curtis Moe, Basic Services Supervisor of the County Welfare Department, that Donnie Y_____ did not look like he was 18, but appeared much younger.

The respondent Board's findings of fact make mention that petitioner was convicted on a plea of no contest after the charge against him had been reduced from contributing to the delinquency of a minor to disorderly conduct. The penalty imposed was a $100 fine plus payment of $7 costs. This had transpired prior to the Welfare Board's hearing and ordering of petitioner's discharge on February 14, 1974. Further facts will be set forth hereinafter in connection with the Court's consideration of the legal issues.

Legal Basis Advanced by Respondent Board for Affirming Petitioner's Discharge

The legal basis upon which the respondent Board affirmed petitioner's discharge is set forth in its Findings of Fact Nos. 19 and 20, which read as follows:

> "19. That the appellant's conduct in transporting a 13-year old to a distant city, late at night, without parental permission, showed a lack of good judgment, which adversely affected his ability to work effectively in his position and prevented him from having the creditability and acceptability, required by the position, with his clients, who are children and their mothers and fathers.
>
> "20. We made no finding with respect to whether in all instances, a public employe may be dismissed merely because he has been convicted of a crime. In this case, however, we find there is a strong nexus between actual conduct, which was the basis of the conviction, and the requirements of his job."

Applicable Statutes and Regulations

Federal law, including 42 U.S.C.A., Public Health and Welfare, secs. 302(5) and 602(a), require that the state plan for administration of old age, AFDC, and other federally assisted programs shall include methods relating to the establishment and maintenance of personnel standards on a merit basis and that such plan go to the selection, tenure and compensation of employes.

The legislature, in sec. 49.50, Stats., has provided that the Department of Health and Social Services shall adopt and supervise a merit system program applicable to county welfare department employes.

Sections 46.22(1), (2)(b) and (3), Stats., require that the director of the county welfare department and the employes within such department be appointed subject to sec.

49.50(2) to (5) and the rules promulgated thereunder.

PW-PA 10.06(14), Wis. Adm. Code, provides for the termination of employment of a permanent employee for cause. PW-PA 10.03(14) provides:

> "(14) All permanent employees shall have a right to appeal termination of employment to an impartial body, or shall have a hearing by an impartial body prior to termination of employment. The ruling of this body shall be binding." (Emphasis supplied.)

An "impartial body" is defined by PW-PA 10.06(21). The respondent Board meets the qualifications of this definition but the County Welfare Board did not because it had a vested interest in the issue to be determined. Here petitioner, who at all times material herein, including the hearing before the County Welfare Board, was represented by counsel, elected to exercise the alternative of an appeal to an impartial body of his discharge rather than have a hearing prior to discharge by an impartial body. PW-PA 10.03(14) accorded him the right to choose either of these two alternatives.

The authority of respondent Board to act in this matter as an "impartial body" is granted by sec. 16.05(1)(g), 1971 Stats., which provides:

> "(g) Hear appeals, when authorized under county merit system rules under s. 49.50, from any interested party."

The respondent Board did not act as a reviewing agency by reviewing the record made before the County Welfare Board. The letter of termination by the latter Board of February 14, 1973 which is summarized in Finding of Fact No. 7, constituted the charges stating the reasons why petitioner was discharged. The evidence taken before respondent Board was for the purpose of determining whether such charges had been proved, and, if

proved, whether they constituted good cause for his discharge.

The Issues

The brief submitted in behalf of petitioner raises these issues:

(1) Is there substantial evidence in view of the entire record as submitted to sustain Findings of Fact Nos. 19 and 20?

(2) If such findings of fact are sustained by substantial evidence, do the findings establish good cause for discharge?

(3) Was the action of respondent Board arbitrary and capricious and a denial of due process?

Substantial Evidence to Sustain Findings of Fact 19 and 20

Sec. 227.20(1)(d) provides that an administrative agency's decision be reversed when it is "unsupported by substantial evidence in view of the entire record as submitted." The only two findings of fact of respondent Board which petitioner's brief has attacked are Numbers 19 and 20. Finding No. 19 found that petitioner's act in transporting Donnie Y_____ late at night to Wausau without his parents' consent "showed a lack of good judgment, which adversely affected his ability to work effectively in his position and prevented him from having credibility and acceptability required by the position, with his clients, who are children and their mothers and fathers." Finding No. 20 found there was a "strong nexus" between petitioner's conduct, which was the basis of his conviction for disorderly conduct and the requirements of his job.

Wieczorek, who has been Director of the County Welfare

Department since September 1959, testified: I felt that petitioner was not a suitable future employe. I view our staff as being mature. I do not believe that it is mature or responsible conduct for a person to pick a youngster up at this time of night and drive him 150 miles. He was charged with contributing to the delinquency of a minor. Subsequently he entered a no contest plea to a charge of disorderly conduct. This is a small community, and the initial charge of contributing to the delinquency of a minor came from the Sheriff's Department. It was picked up by the reporters and there was coverage in the newspaper and on the air. We were concerned about the feelings and discussion of community people, about the staff and their feelings, about the maturity of conduct, and about the public image of the employee (Tr. 125; 138-139).

At the hearing held before the County Welfare Board on February 14, 1973, Judy Schaub, a typist in the employ of the County Welfare Department, was present and recorded the proceedings of that hearing, and of a private meeting of the County Welfare Board which immediately followed, in shorthand and later transcribed the same in typewritten form. She testified that she did not record the testimony given at the hearing verbatim, but recorded the substance of the testimony given (Tr. 150). The original of her typewritten transcript so made (Resp. Ex. #1, Document #39) was received in evidence at the hearing before respondent Board. This transcript of the County Welfare Board meeting following the hearing sets forth, "Mr. Habhegger [chairman of the Board] stated the issue of the $100 fine, why so large. . ." The Court deems that this was a

very appropriate question for the chairman to have asked, and one that would have likely occurred to many people in the community. The large size of the fine for conviction on a disorderly conduct charge was an indication to the community that the court in imposing the fine considered that petitioner's conduct in transporting the 13-year old boy the 115 miles to Wausau constituted serious misconduct. The size of the fine imposed is part of the evidence which tends to support the finding made in Finding of Fact No. 20 that there was a strong nexus between petitioner's actual conduct, which was the basis of his conviction, and the requirements of his job. One of the requirements of his job was that he not be guilty of conduct which would cause distrust in him and his capacity to function effectively on the part of the clients of the County Welfare Department with whom he had to deal.

At the hearing of February 14, 1973, petitioner's counsel asked Wieczorek if petitioner's conduct had jeopardized his public image, and how Wieczorek knew this. Wieczorek said he could "only surmise" (p. 1 of Resp. Ex. 1, Document #39). Based on this, it is contended that the finding that petitioner's conduct prevented him from having creditability and acceptability with his clients was grounded on speculation. However, Wieczorek's testimony given at the hearing before the respondent Board, summarized above, was positive as to the extent to which the public in the community had been made aware of petitioner's misconduct. From this the respondent Board could draw the reasonable inference that petitioner's public image had been damaged and prevented him from having the creditability

and acceptability with his clients required of his position. Furthermore, if Wieczorek had been questioned at the February 14, 1973, hearing about his use of the word "surmise", in all likelihood it would have been made clear that his conclusion with respect to petitioner's misconduct having jeopardized his public image was grounded on reasonable inference drawn from the publicity such misconduct had received in the community.

The Court is satisfied that there was ample substantial evidence in view of the entire record as submitted to support Findings of Fact Nos. 19 and 20.

The Issue of Good Cause for Discharge

Counsel for petitioner contends that the findings of fact made by the respondent Board do not establish as a matter of law good cause for petitioner's discharge. These two reasons are advanced in support of this contention: (1) No rules or regulations had been adopted which prohibited petitioner's conduct in transporting Donnie Y_____ to Wausau; and (2) the conduct for which discharged occurred while petitioner was off duty and had no knowledge that such conduct would harm his employer's interests.

The leading Wisconsin case which has considered the problem of when off duty conduct of an employee may constitute good cause for his discharge is State ex rel. Gudlin v. Civil Service Comm. (1965), 27 Wis. 2d 77, 133 N.W. 2d 799. There the employee Gudlin was a civil service employee of the City of West Allis and his position was that of a "water tradesman", but the record in the case did not describe the duties of that position. He had been arrested and convicted of two charges of

disorderly conduct, and fined $60 and costs. This disorderly conduct occurred while he was off duty. One count in the information consisted of refusing to exhibit his bartender's license and refusing to go to the police station at the request of investigating police officers who had investigated a complaint against him at the tavern where he "moonlighted" as bartender. The other conduct consisted of his living in the rear of the tavern with the lady proprietor and habitually engaging in sexual intercourse with her. The Civil Service Commission held a hearing at which Gudlin was represented by counsel. The Civil Service Commission had adopted regulations which provided that causes for discharge should consist of an employee having been guilty of an immoral act, or of conduct "unbecoming an employee of the city, or wantonly offensive in his conduct or language towards the public or towards city officers or employees." The Commission concluded he had been guilty of "an immoral act, of conduct unbecoming an employee of the City, and of conduct wantonly offensive toward the public," and that such conduct "is sufficient and valid cause for his discharge from the Classified Service of the City of West Allis." On review both the Circuit Court and the Supreme Court affirmed.

The Gudlin case reviewed a considerable number of cases from other jurisdictions which had passed on the question of whether off-duty conduct of an employee of a unit or agency of government constituted good cause for discharge, and then summarized the conclusions of the Court as follows (p. 87):

> "Where a municipal employee has been discharged under a statute or ordinance which endows him with tenure, one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. The record here provides no basis for finding that the irregularities in appellant's conduct have any such tendency. It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service. In such case the conduct can reasonably be deemed cause for suspension or discharge even though it has no direct bearing upon his performance of his duties. Because arbitrary and capricious action must be avoided, the concept of 'cause' should be the more strictly construed the less the relevance of the conduct complained of to the performance of duty." (Emphasis supplied.)

In the instant case, unlike in Gudlin, the employee had engaged in conduct which the respondent Board found did impair the performance of the duties of his position. If this was a reasonable finding then the first test stated in the above quoted extract from Gudlin was met, and it is unnecessary to resort to the second stated test of conduct in violation of important standards of good order so "substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service."

As the Court views the matter, the crucial question is whether the respondent Board could reasonably make the finding it did that petitioner's conduct adversely affected his ability to work effectively in his position, and prevented him from having the creditability and acceptability required by his position. The Court's conclusion is that the respondent Board could reasonably make such finding. 14

Petitioner's position as Case Aid 1 required that he visit the homes of welfare aid recipients in connection with laying out budgeting programs as well as conferring with such recipients at the County Welfare Department office. In order to do his work effectively it was essential that the welfare recipients with whom he worked accept, and have confidence, in his judgment. The respondent Board could reasonably conclude that petitioner's widely publicized conduct with respect to his transportation of 13-year old Donnie Y_____ to Wausau in the late hours of the night was such as to cause people with whom he would have to work in his capacity as a Case Aid 1 to have no confidence in the soundness of his judgment.

While in Gudlin there was an employer regulation which the employee's misconduct violated and here there was none, the regulation in Gudlin was quite general and vague. Without any regulation, the Court deems it is part of the implied duties of a public employee not to engage in any conduct off-duty which in the exercise of ordinary prudence he knows, or should know, will jeopardize the performance of the duties of his position. The evidence in this case renders incredible petitioner's testimony that he thought this small 13-year old boy was 18 years old. The story that Donnie Y_____ told petitioner that he was taking money at that late hour of the night to his 15-year old brother in Wausau should have alerted petitioner that something was wrong and that the boy might be a run-away. In the exercise of ordinary prudence, petitioner should have realized that, if this were the case and he aided the boy by transporting him to Wausau as he did, he might be engaging in an unlawful act

the publicization of which would injure him in the performance of the duties of his position.

Was Respondent Board's Action Arbitrary and Capricious and a Denial of Due Process?

The issue raised with respect to the respondent Board's action in affirming the discharge being arbitrary and capricious, and constituting a denial of due process, is based on alleged improper action of Welfare Board members at their meeting of February 14, 1973.

Petitioner's brief contends that the transcript of the meeting of the County Welfare Board on February 14, 1973, following the public hearing held that day establishes that Board members were actuated by other reasons in reaching their determination that petitioner should be discharged than stated in the Board's letter of discharge (Resp. Ex. 1 B). The grounds for discharge stated in that letter are accurately and fairly set forth in Finding of Fact No. 7.

This contention is grounded upon the statement made by member Habhegger that he had seen petitioner with Donnie Y____ on two occasions at restaurants after the incident of January 15th; the statement made by member Schlaver that petitioner had used poor judgment in the matter of support and alimony [in his divorce action], prior complaints, and the recent incident [transporting Donnie Y____ to Wausau]; and Habhegger's asking the question about why so large a fine as $100.

The Court has already discussed Habhegger's question about the size of the fine, which the Court considers to have been an entirely proper question.

Habhegger's statement about having seen petitioner with

Donnie twice at restaurants after the January 15th incident conflicted with petitioner's testimony at the hearing of February 14, 1973, that he had seen Donnie only once after the incident and that was at a private home. Thus the statement went to petitioner's credibility as a witness. Respondent Board was not obligated to find that this statement by Habhegger, which indicated petitioner had lied in his testimony, played any material part in the Welfare Board's determination that he be discharged. In fact, the incredibility of his testimony regarding the details of his transporting Donnie Y_____ to Wausau was such that it is doubtful that Habhegger's statement had any materiality in the Welfare Board arriving at the decision to discharge petitioner.

Likewise, respondent Board was not required to find that Schlaver's remark about petitioner having used poor judgment in the matter of support money and alimony in his divorce action, and with respect to two prior complaints, materially affected the Welfare Board's determination to discharge petitioner.

It is unfortunate that these statements were made in the Welfare Board's meeting with respect to matters not brought out in the testimony at the hearing of February 14, 1973. However, these matters were not alluded to in the Board's letter stating its determination (Resp. Ex. 1 B) and the Court cannot conceive of the Welfare Board having arrived at a different determination than it did if such statements had not been made.

The Court, therefore, determines that the respondent Board's action in affirming the discharge did not constitute

arbitrary or capricious action and a denial of due process because of the occurrence of the making of these statements by Habhegger and Schlaver at the Welfare Board's meeting of February 14, 1973.

Let judgment be entered affirming respondent Board's order of June 12, 1973, here under review.

Dated this 1st day of February, 1974.

By the Court:

Reserve Circuit Judge