STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOHN PFANKUCH,

Petitioner, Case No. 141-409

vs.

STATE OF WISCONSIN
(Personnel Board),

JUDGMENT

Respondent.

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

The above entitled review proceeding having been heard by the Court on the 8th day of July, 1974, at the City-County Building in the City of Madison; and petitioner having appeared by Attorney Richard V. Graylow of the law firm of Lawton & Cates; and the respondent 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 Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Order of respondent State of Wisconsin Personnel Board dated December 20, 1973, entered in the matter of John J. Pfankuch, Appellant, v. Wilbur J. Schmidt, Secretary, Department of Health and Social Services, Respondent, Case No. 73-45, be, and the same hereby is, confirmed.

Dated this 18th day of July, 1974.

By the Court:

George R. Currie
Reserve Circuit Judge
by Lillian Patty, Deputy Clerk

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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vs.

STATE OF WISCONSIN (Personnel Board),

MEMORANDUM DECISION

Respondent.

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

This is a proceeding under ch. 227, Stats., to review a decision of the State Personnel Board denominated "Opinion and Order" dated December 20, 1973, which sustained the action of the Superintendent of the Kettle Moraine School for Boys (hereafter the School) in suspending petitioner Pfankuch for three days for striking one of the boys confined to the school in violation of the School's "Rule of Force."

Statement of Facts

The petitioner had been a teacher at the School for about eleven years at the time the incident of March 21, 1973 occurred which gave rise to the imposition of the three days' suspension. He had the reputation of being a good teacher and a strict disciplinarian.

The School for sometime has had in effect the "Rule of Force" which provides as follows:

> "The use of force by our staff as a disciplinary or treatment measure is forbidden. It is contrary to law and the state policy of the Department of Health and Social Services.
>
> "Use of force is permissible only as a safety measure as follows:
>
> 1. To protect the lives or safety of any person;

"2. To protect property against damage; and
3. To restrain a boy from an unauthorized act.

"But, in any event, force should be used only to the extent necessary to accomplish the above-stated purposes; and only restraining techniques should be employed.

"When use of force is deemed necessary by any member of our staff, a full report of the incident should be made to the head of the department. All such reports will be referred to the Superintendent."

This rule carries out the policy of the Division of Corrections of the Department of Health and Social Services as set forth in the Division's "Manual of Juvenile Institutions Procedures." Petitioner testified that he knew of the existence of this rule. Annually teachers at the School were required to read and sign that they understood this rule, and the petitioner had done so. Twice prior to the incident of March 21, 1973, petitioner had been suspended for the use of physical force, the last occasion having occurred in September, 1972.

On March 21, 1973, petitioner and Cummings, another teacher, arranged to have their two classes meet together in the classrooms of Cummings to witness the projection of a film. There were about 15 students in both classes and the discussion of the film was led by Cummings after it had been shown. One of these students in the Cummings' class was Gervace Hinton, aged 15 or 16. When petitioner entered the room with his class Hinton said, "Get your funky ass out of here" and repeated it several times. Petitioner ignored this. Later while petitioner was rewinding the film on the projector Hinton kicked petitioner several times on the back of the legs and again petitioner took no action against Hinton.

Later while petitioner was seated across the aisle from Hinton the latter said to petitioner, "I'll beat your ass."

Petitioner admonished Hinton to be the kind of young man petitioner knew he could be. Hinton replied in a voice sufficiently loud so as to be audible to the other students, "You God-damned faggot." Petitioner understood "faggot" to be a term meaning homosexual. He arose, stepped across the aisle, and with the back of his open hand, slapped Hinton a glancing blow across the back of the head and told Hinton he could try to "take" petitioner if he wanted to.

Petitioner promptly reported the incident to Gudmanson, Principal of the School, and later in the day also informed Superintendent Prost of the incident because of a prior promise made to personally call any recurrences to Prost's attention. On that same day Gudmanson wrote a letter to petitioner (Appellant's Exhibit 1) sending a copy of the same to Prost and placing a copy in petitioner's personnel file. This letter reads in part as follows:

> ". . . There is evidence that the conduct of Gervase Hinton precipitated your physical reaction to his last remark.
>
> "However, I must strongly point out to you that the physical reaction on your part was a departure from the rule of force which you are familiar with. In your best interests combined with the responsibility of the school to all boys physical contact with boys must be limited to the circumstances prescribed by that rule.
>
> "Personally, I appreciate your ready reporting of the incident and the expression of your concern you have for behavioral accountability our boys should meet. I am at your disposal for immediate crisis intervention which will off-set the need for immediate physical contact. It is up to you to read the signs of your tolerances and seek that intervention before physical contact is seemingly the only alternative. I cannot and will not condone any staff member challenging a boy to physical contact. If any boy challenges staff it is the matter of immediate report."

On March 26, 1973, Prast by letter to petitioner advised him he was suspended without pay for the days of March 28, 29 and 30. The offense for which such suspension was being invoked was

described in the letter in these words:

> "On March 21, 1973 you did, by your own admission strike a boy in Mr. Cumming's room during the fourth period.
>
> "You have been counseled on this problem on numerous occasions in the past. You have also been suspended twice for the use of physical force against a boy and only as recently as September, 1972."

The Issues

The brief in behalf of the petitioner advances these contentions:

(1) The notice of the charge contained in Prast's letter was constitutionally defective.

(2) Petitioner is being disciplined twice for the same offense.

(3) The slapping of Hinton by petitioner the glancing blow to the back of the head with the open flat of the hand did not constitute such use of force as to violate the Rule of Force.

(4) Petitioner acted as he did to protect his own safety, to protect property from damage, and prevent an unauthorized act.

(5) Prast made no independent attempt to ascertain the degree of force which was used.

Sufficiency of the Charge

In the case of Kathleen Beauchaine v. Wilbur J. Schmidt, Secretary, Department of Health and Social Services, decided October 18, 1973, by the State Personnel Board, it was determined that in order to achieve the objective of the due process concept of fair notice so as to avoid surprise, and permit the person charged to adequately meet the charges, notices of discipline "must, on their face, tell a public employee five things:

> "1. What wrongful acts he is alleged to have committed;

"2. When he is alleged to have committed the wrongful acts;

"3. Where it is alleged the wrongful acts took place;

"4. Who says the wrongful acts occurred, that is, who accuses the employee; and

"5. Why the particular penalty or discipline is going to be imposed."

Counsel for petitioner contend that Prast's letter to petitioner of March 26, 1973, is constitutionally defective because it fails to comply with these five specified requirements laid down in the Beauchaine opinion.

Respondent Board passed upon this contention in its opinion in the instant case as follows:

> "Appellant contends that his notice of the charge against him was defective, since the notice did not specify the particular rule that the School claimed he had violated. We have recently had occasion to enumerate the principles of due process which govern the sufficiency of notices of discipline. Beauchaine v. Schmidt, Wis. Pers. Bd. Case No. 73-38 (October 18, 1973). The suspension letter, which constituted the notice of discipline to the employe in this proceeding, met the requirements of due process that we enumerated in Beauchaine. The notice requirement of the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution is a flexible concept designed to insure the employe adequate notice of the proceeding and the charges against him, and to afford him a reasonable and fair opportunity to contest those charges. In this case the Appellant was advised that he was suspended for striking a student in violation of the School's rule concerning the use of force. The notice of discipline further alleged that he was fully aware of the rule and had been counseled before concerning its violation. The notice gave him a fair understanding of what he was alleged to have done. In the circumstances of this case only, we find that due process does not require that the notice specify the rule he was alleged to have violated. State ex rel Messner v. Milwaukee County Civil Service Commission, 56 Wis. 2d 436 (1972)."

The Court is in agreement with respondent Board that the constitutional due process requirement of fair notice of the charge was met by the Prast letter in view of petitioner's

knowledge of the events giving rise to the sending of Prast's letter which petitioner himself had reported to Prast. This being so, it is immaterial whether the letter embodied all five requirements set forth in the opinion in the Beauchaine case. Furthermore, these five requirements were not laid down by respondent until approximately seven months after the Prast letter was written.

Disciplined Twice for Same Offense

It is contended by petitioner's counsel that the Gudmanson letter of March 21, 1973, was a letter of reprimand and therefore, when five days later Prast imposed the three-day suspension, petitioner was disciplined twice for the same offense.

This contention was considered and properly rejected by respondent in its opinion herein.

The last two sentences of the Rule of Force previously quoted herein required a report of the incident of March 21, 1973, to be made to the head of the department (Gudmanson) and that such report be referred to Superintendent Prast. This clearly is to be interpreted as meaning that Prast was to have the final decision in acting on the report. Whether Gudmanson had any authority to impose discipline for violation of this rule is questionable, but certainly Prast had the final say on the subject.

Whether Petitioner Exercised Force Against Hinton in Violation of the Rule of Force

Counsel for petitioner base their contention, that the glancing slap of the open hand by petitioner did not constitute the use of force within the meaning of that term, as used in the Rule of Force, upon the holding of the Supreme Court in Reinke v. Personnel Board (1971), 53 Wis. 2d 123, 140-141. In that case it

was held that the "slap" by appellant Reinke "did not involve a requisite degree of physical force necessary to sustain a finding of just cause warranting dismissal" (p. 141). However, in the instant case we are not concerned with just cause for dismissal, but for a much lesser penalty of a three day suspension.

Moreover, we have here an interpretation by the Superintendent of the School of the School's own work rule that the slap of Hinton by petitioner for the purpose of exercising discipline against Hinton was the use of force within the meaning of the rule. Furthermore, petitioner admitted he did "strike" Hinton (Tr. 10). The Court cannot hold that this was an irrational interpretation by the Superintendent. Therefore, the Court deems it to be its duty to defer to such administrative interpretation.

Alleged Purpose of Protecting Petitioner's Safety, Protecting Property from Damage, and Preventing an Unauthorized Act

Counsel for petitioner have sought to bring petitioner's act of slapping within the three permissible uses of force stated in the Rule of Force, viz.:

1. To protect the lives or safety of any person;
2. To protect property against damage, and
3. To restrain a boy from an unauthorized act.

The Court deems this contention was fully considered and rejected by the respondent in its opinion, and the Court fully approves of the respondent's conclusion. The portion of the Board's opinion dealing with this contention states:

> "Appellant argues that, even if the rule applies, under its terms, his action was to protect persons and property and prevent unauthorized acts. Appellant, in his testimony, explained that he slapped Mr. Hinton because he was apprehensive concerning what Mr. Hinton

next, and further, Appellant mentioned that he had been 'jumped' once before. He further explained that after being called a 'faggot' in front of the class, that he was concerned about his authority position in the classroom. Appellant may indeed have been concerned by the drift of events, yet he could very easily have used the normal procedures to deal with Mr. Hinton's misconduct. Certainly the name calling did not put Appellant in fear of his safety. No property was threatened. He was not restraining an unauthorized act by Mr. Hinton, because the act had occurred. Moreover, the force used was not a restraining technique; it was a slap to discipline Mr. Hinton and to make clear to all of the students Appellant's authority. We find that Appellant's action was in direct contravention of the use of force rule."

Claim That Prast Made No Independent Attempt to Ascertain the Degree of Force Which Petitioner Used

This last contention is grounded on a statement made in Reinke v. Personnel Board, supra (p. 140), "No independent attempt was made by Duter to ascertain the degree of force that was used." Duter was the appointing authority who imposed the discipline of discharge. However, in that case there was a dispute as to whether Reinke had only touched Emilie or had slapped her, and Duter had not personally investigated to resolve the dispute.

The instant case is distinguishable in two material respects. One is that there is no dispute but what petitioner did slap Hinton with his open hand. The other is that Prast had received petitioner's own report in which he admitted the slapping. Therefore, there was no reason for Prast to make any further investigation.

Let judgment be entered affirming respondent Board's order here under review.

Dated this 17th day of July, 1974.

By the Court:

Reserve Circuit Judge