STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

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#141-416 & #141-493
JOHN C. WEAVER, President
University of Wisconsin
System,

Petitioner, *

-vs- *

STATE OF WISCONSIN, *
PERSONNEL BOARD,

Respondent.

MEMORANDUM

OPINION

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Kent Mayes, a police officer at the Parkside campus of the University of Wisconsin system, was laid off in June, 1973. He challenged the layoff before the Wisconsin Personnel Board. The Board, in an opinion dated December 20, 1973, stated that employer must show "just cause" for layoffs of employees. Based on its view of that standard, it concluded that Mayes was not laid off for just cause, and ordered his reinstatement with back pay, regardless of whether there was any money in the budget for this purpose. The University petitioned for review of the Board's decision.

The Board has power to hear appeals in layoff cases by virtue of ss.16.05(1)(e). That section was written in its present form by c. 270 L. 1971, specifically to meet previous opinions of the Attorney General; 29 Op. Atty. Gen. 37 (1940); Informal opinion of Feb. 9, 1965; 60 Op. Atty. Gen. 142 (1971), that the Board lacked power to hear layoff cases. The Board's power to hear such cases was not made unconditional -- it could review a layoff decision (as well as other personnel actions) "only when it was alleged that such decision was not based on just cause." ss. 16.05(1)(e). If there is no allegation that "just cause" is lacking, then the Board may not hear such an appeal.

"Just cause" is not one of those obsecure legal terms of art understanding of which requires exhaustive scholarly analysis. Very simply, it means "cause sufficient at law" or "lawful ground". 23A Words and Phrases 264. The words "proper legal basis" very adequately capture the meaning of the term. To bring an appeal of a personnel decision before the Board, then, ss. 16.05(1)(e) requires the employee to allege that the decision was made without a proper legal basis.

The standard for determining whether there is a proper legal basis for a personnel decision is not the same in all cases. There are two basic standards, one applicable to removals, discharges, demotions and suspensions and the other to layoffs.

A disciplinary action against an employee--a discharge or other decision mentioned in ss. 16.28(1) Stats.--is for just cause only when based on misconduct sufficiently serious to warrant the action. Thus, excessive absence without leave, Jabs v. State Bd. of Personnel, 34 Wis. 2d 245 (1967), deliberate refusal to perform job tasks, Mahoney v. State Personnel Board, 25 Wis. 2d 311 (1964), or mistreating an inmate at a correctional institution (had the charge been proved), Reinke v. Personnel Board, 53 Wis. 2d 123 (1971), are examples of misconduct which can provide a proper legal basis for a discharge or other disciplinary action.

In order to find that a proper legal basis for a discharge exists, the Board must be convinced that the alleged act or course of misconduct actually happened. Therefore, only evidence which is probative of the actual occurrence of the misconduct should be considered by the Board in such a case. As the Supreme Court said in Bell v. Personnel Board, 259 Wis. 602 (1951):

> "In determining whether Bell was discharged for just cause, it was not sufficient for the board to find that Marcus believed Bell was guilty of certain conduct which, if true, would constitute just cause for the discharge; but rather, whether Bell actually did these things which the Board has found that Marcus believed Bell did."

Thus, in the Reinke case, supra, the mere belief of a supervisor that Ms. Reinke slapped an inmate has no evidentiary force.

The standard for showing a proper legal basis--"just cause"--for a layoff is quite different. The statement of the main issue in this case by the Board indicated the shape of this standard: "Were the procedures outlined in ss. 16.28(2), Wisconsin Statutes and Personnel 22, Wisconsin Administrative Code, with respect to layoffs followed and was the layoff of the Appellant otherwise proper under the applicable law?" (T-4). No showing of employee misconduct is required in a layoff case.

Specifically, a proper legal basis for the layoff of a permanent status employee exists under the following circumstances:

1. The layoff is because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in the duties or organization of the unit. (16.28(2) Stats.))

2. Probationary, provisional and emergency employees have been laid off prior to the layoff of the permanent employee. (16.28(2) Stats.))

3. The appointing authority (employer) has conferred with the director of personnel a reasonable time in advance of the date of the layoff to assure compliance with the rules. (16.28(3) Stats.))

4. The group of employees in a unit considered for layoff includes the three (or where more than one employee is to be laid off, double the number of positions to be vacated) least senior employees in the unit. Wisc. Adm. Code Pers 22.03(3).

5. The appointing authority has ranked the persons in the layoff group according to their relative job performance. Wis. Admin. Code Pers. 22.03(4).

6. The most efficient and effective employees--that is, those with the highest relative rankings-- are retained. Wis. Adm. Code Pers 22.03(5).

Even in states or localities where the statutes and personnel rules do not make so clear a distinction between the standards for a proper legal basis for discharges as contrasted with layoffs, courts have agreed that showings of economic necessity establish that a layoff was based on "just cause". See for instance Crede V. City of Pittsburgh, 49 A. 2d 700 (Pa., 1946); Dooling v. Fire Comm'r. of Malden, 34 N.E. 2d 635 (Mass., 1941); Karcz v. Luther Mfg. Co., 155 N.E. 2d 441 (Mass., 1959).

In determining whether the appointing authority followed the personnel rules as to retaining the "most efficient and effective" employees, the Board should not use the evidentiary standard of Bell, which, while appropriate to discharge cases, is inappropriate in this context. The evaluation of the relative performances of employees by nature requires the supervisor to make a "judgment call." A layoff system based on supervisors' evaluations of employees "efficiency and effectiveness"--criteria which in themselves involve a great deal of subjectivity--necessarily places great reliance on the supervisors' "beliefs and conclusions" about their subordinates' relative merits. Evidence of those beliefs and conclusions--such as standard personnel rating sheets--is relevant, probative and controlling on the issue of whether the most efficient and effective employes have been retained.

It is to be expected that employees will not always concur in the evaluations of them made by their supervisors. Sometimes the unhappy employees' peers may support their dissent. But so long as the personnel regulations provide that the appointing authority shall rate employees for layoff purposes, supervisors' evaluations of employees are not required to correspond to those of other subordinates in order to be valid. Nor need those evaluations be "corroborated" by other extrinsic proof showing that the supervisor's judgment was in some abstract sense "correct".

Applying the foregoing analysis to this case, it is apparent that the Board's determination that Mayes was not laid off for just cause was erroneous. The University produced uncontroverted evidence showing that the requirements of ss. 16.28(2) and Wis. Adm. Code Pers. 22 had been met. The Board felt, however, that the standard evaluations form--called the "Layoff Performance Rating Scale"--did not constitute evidence of job performance, as it showed "only what the Respondent believed the employees' performances to be."

Having declined to consider this evidence, the Board concluded that there was no evidence to show that the most efficient and effective employees had been retained, and that therefore the University had not shown that a proper legal basis existed for Mayes' layoff.

The exclusion of the evaluation forms from consideration was based on an application of the Bell rule, supra, which is error in a layoff case on the issue of relative employee efficiency. The Board should have considered only the "Layoff Performance Rating Scale," which is conclusive in a layoff case, unless proved to be arbitrary, capricious, or in bad faith.

Chairman Julian was overly imbued with a broad notion of the powers of the Personnel Board based on a misconstruction of the Reinke case. There can be no crossbreeding between a discharge for cause under Reinke and a layoff for economic reasons. The Board must be reversed.

Counsel for the Petitioner may draft the appropriate Judgment in accordance with this Opinion, submitting the same to opposing counsel 10 days before presenting it to the Court for signature.

Dated: July 9th, 1974.

BY THE COURT:

/s/ NORRIS MALONEY

NORRIS MALONEY, CIRCUIT JUDGE