STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LESTER P. VOIGT, Secretary * 142-120
DEPARTMENT OF NATURAL RESOURCES,
Petitioner, *
v. *
STATE PERSONNEL BOARD, * OPINION and JUDGMENT
DEPARTMENT OF ADMINISTRATION, *
Respondent. *

Before: Hon. W. L. Jackman, Judge

Judicial Review: May 2, 1974
Appearances: Petitioner by Michael Jacobs and W. S. Stafford
Respondent by Robert J. Vergeront, Asst. Attorney General
Michael G. Amrhein by Andrew F. Slaby.

The D.N.R. suspended Mr. Amrhein because it alleged he violated D.N.R.'s code of ethics, specifically that clause that D.N.R. personnel will "refrain from acts or relations which will violate their public trust and reflect discredit on themselves or the Department". Amrhein had possession of a pheasant out of season and was found guilty thereof.

The only authority for suspending a civil service employee without pay is Sec. 16.28 which permits it "only for just cause". The respondent found that petitioner was suspended "without just cause". The record indicates that there would be no basis for any finding that the misconduct in any way interfered with performance with petitioner's duties of his position, which was not related to game law enforcement.

Respondent, in its findings, opinion and decision, relied on State ex rel Gudlin v. Civ. Serv. Com., 27 Wis 2d 77, which recognized that conduct "in violation of important standards of good order can be so substantial, repeated, flagrant or serious that his retention in service will undermine public confidence x x x " in the service. Respondent, in the case at bar, found that the misconduct was neither substantial, repeated, flagrant or serious.

Respondent, in its findings, opinion and decision, also attempts to interpret the meaning of the code of ethics and comes to the conclusion that its meaning is equivalent to misconduct as defined in State ex rel Gudlin v. Civ. Serv. Com., 27 Wis 2d 77. This so-called code of ethics is not published in the Administrative Code. It does not therefore have the effect of a rule of D.N.R. Sec. 227.026. It is a mere statement of policy. It is a general statement of the conduct expected of DNR employees. If D.N.R. wishes to rely upon a violation of its code of ethics as a basis for discipline, it would seem that the code should describe a violation as the basis for discipline. It would also seem that it would be easy for D.N.R. to say in clear terms that conviction of misdemeanors or felonies

would be just cause for discipline. We also see no reason why, if D.N.R. wishes to prescribe codes of conduct for its employees which may be the basis for discipline it does not do so by rules published in the Administrative Code, so the rules may be tested for validity without the necessity of a violation. The respondent has rightly commented upon the vagueness and probable invalidity of the code of ethics. State ex rel Morinon v. Milw. Co. CSC, 61 Wis 2d 313, 321-324.

We agree with respondent that an employee may discipline an employee for off-duty conduct that undermines confidence in a governmental agency and rightfully so. And the rule is that the burden is on the agency imposing discipline to bear the burden of proof. Reinke v. Personnel Board, 53 Wis 2d 123.

Respondent concluded that the single fall of the employee from grace was neither substantial, flagrant, serious or repeated so as to be the basis for "just cause" for discipline. In this case respondent is the ultimate finder of fact. However, respondent took the position that before discipline could be imposed D.N.R. must have positive proof that the employee's conduct did in fact reflect discredit on D.N.R., or, to put it another way, it did in fact undermine public confidence in D.N.R. The opinion seems to express, or if it does not, it certainly implies, that in order for a finding that the conduct undermined the public confidence in D.N.R., there must be a positive showing by witnesses that somehow the image of D.N.R. was damaged in the eyes of the beholder. We do not think such proof was necessary. In State ex rel Gudlin v. C.S.C., 27 Wis 2d 77, there was no proof that the municipality's reputation did in fact suffer from the employee's acts. There is conduct which is of such character that, as in State ex rel Gudlin v. C.S.C., 27 Wis 2d 77, from which the agency may infer that it will undermine public confidence. To paraphrase the language of the case last above cited: There is an area where the conduct of an employee of an agency in violation of important and fundamental standards of propriety is of legitimate concern to the agency. The public expects all employees of the agency to be concerned with the maintenances of laws and good order. When the conduct of an employee falls within the area of unacceptable conduct (violation of criminal laws, especially those relating to subjects which are the concern of the agency) this conduct may be good cause for discharge. (see 27 Wis 2d at pp 86-87)

We think the standard of proof which respondent set was too great. We are of the opinion that respondent could have found good cause for discipline from the fact that a D.N.R. employee was found guilty of violating a simple game law, even though there was no positive proof of witnesses that as a result D.N.R.'s image was tarnished. That fact can be inferred from the offense. The question to be determined is whether

the offense is likely to cause damage to D.N.R. in undermining public confidence in it, and this would depend on how substantial, flagrant or serious the offense was. The fact that it may, up to now, have been covered up so that it is not known is not as important as what effect it may probably have as it cannot be concealed forever. The respondent decided the matter on the basis of a lack of proof of present expressions of lack of confidence in D.N.R. We do not believe that, contrary to the respondent's opinion, the lack of such proof precludes a finding that the offense was so substantial, flagrant or serious as to be a likely cause of undermining public confidence in D.N.R.

We will therefore remand the record to respondent with instructions, in the light of our opinion, to reconsider and find whether the employee's offense was so substantial, flagrant or serious as to be likely to undermine public confidence in D.N.R.

It is therefore ADJUDGED: That the order of the State Personnal Board dated February 8, 1974, be and the same is set aside and the record is remanded to the State Personnel Board for further proceedings in accordance with the foregoing opinion.

Dated May 6, 1974

BY THE COURT

H. L. Cookman

Judge