

75 2: 13 STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#145-252

DONALD R. FERGUSON,

Petitioner,

-vs-

STATE OF WISCONSIN
BOARD OF PERSONNEL,

Respondent.

MEMORANDUM

DECISION

Petitioner, employed by the Department of Health and Social Services as an Information Specialist 3, was notified October 8, 1973 that his employment with the Department was being terminated on the basis of unsatisfactory performance during his 6-month probationary period in the job. Prior to this promotion to the Information Specialist 3 job with the Department, petitioner had worked about 2½ years as an Information Specialist 2 with the University of Wisconsin, achieving permanent Civil Service status in that job.

On July 3, 1974, the Personnel Board ordered that petitioner be given a "just cause" discharge hearing on the basis of his permanent status acquired in his University job. (This Order is of questionable validity, as it appears to abrogate by Board decision an administrative rule having the force of statute. While that Order is open to challenge on judicial review of the final determination of the Board, the issue of its validity is not now before the Court.) At the hearing, on November 6, 1974, it became apparent that the Department's letter of discharge gave inadequate notice to petitioner of the reasons for his dismissal. In addition, the Department failed to comply with a part of the July 3 Order requiring it to furnish petitioner a week prior to the hearing with a list of witnesses it intended to call. The Board therefore refused to take the testimony of the Department's witnesses. Lacking an evidentiary basis on which to consider, let alone uphold, the Department's action, the Board entered an order reinstating the petitioner

as an Information Specialist 2. However, the Board stayed the operation of the order for a week, saying that if in that time the Department could provide petitioner with a list of witnesses and an adequate letter of dismissal the Board would schedule a further hearing on the merits. The Department complied with the condition, and the Board set a further hearing for February 12, 1975.

Petitioner objects to any further hearing, relying on Sec. 16.05(1)(e), which provides, "After the discharge hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employee fully." Under the statute, petitioner argues, the Board if it does not uphold the discharge must reinstate the employee without delay or qualification. Petitioner claims that by allowing a further hearing, the Board violated a non-discretionary duty imposed by statute. Petitioner brings an Alternative Writ of Mandamus to compel the Board either to unconditionally reinstate him or to decide his case on the basis of the evidence (that is, the lack of evidence) on the record as a result of the truncated November 6th hearing.

Mandamus will issue in the sound discretion of the Court to compel a public officer to perform a clear, unequivocal duty not involving the exercise of the officer's discretion. Walter Laev, Inc. v. Karns, 40 Wis. 2d 114 (1968). A motion to quash the Alternative Writ is in effect a Demurrer, testing whether the petitioner has stated a "cause of action" for mandamus. Laev at 121. The issue then is whether by postponing the effective date of its Reinstatement Order and providing for a further hearing the Board violated a non-discretionary duty.

The petitioner's brief correctly states the duty of the Board under the "shall reinstate fully" language of Sec. 16.05(1)(e) when it quotes former Personnel Board Chairman John Shiels as saying:

"The Personnel Board after the hearing must either sustain the appointing authority or reinstate the employe fully. S. 16.05(1)(e), Wis. Stats. This means that the Board cannot modify or reduce the disciplinary penalty which has been imposed. It cannot ameliorate punishment, even though it may

feel that it was too severe. The Board cannot reverse the action of the appointing authority because he has been too harsh. If there be just cause to impose discipline, the discipline imposed must be sustained."

The Board in this case made no attempt to modify the Department's proposed action, and therefore did not violate its duty under the statute. In fact, a due process of law hearing in this case has not yet been completed.

Petitioner's real objection to the Board's order seems to be not that it failed to provide for his full reinstatement, but rather that it failed to reinstate him immediately. The order, while phrased in a roundabout and somewhat confusing way, in effect granted the Department a seven-day continuance during which it could correct the defects in its case. By so doing, the Board violated no statutorily-imposed duty. Sec. 16.05(1)(e) does not deny the Board the power to order a continuance. Nor does it require that a hearing be concluded after only one session, even if neither employer nor employee request further sessions. It is far from unreasonable of a quasi-judicial administrative body like the Board to continue a hearing so that it may have before it sufficient facts to make an informed decision on the merits of a case. It was equally reasonable of the Board, however, to provide that if the Department failed to take advantage of the continuance, that the Reinstatement Order should go into effect.

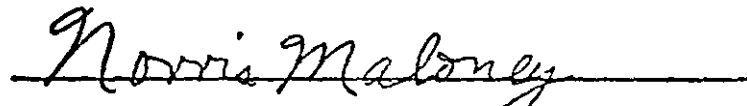
Petitioner may think it unfair that the Board granted the Department a second chance to present its evidence against him. Any such unfairness does not so deny petitioner due process as to invoke the supervisory powers of this Court to prevent it, however. State ex rel. Thompson v. Nash, 27 Wis. 2d 183, 194-5 (1965).

Petitioner has not shown the Board to have violated a non-discretionary duty, and therefore has not stated a "cause of action" for Mandamus.

Defendant's Motion to Quash the Alternative Writ of
Mandamus is granted.

Dated: February 12, 1975.

BY THE COURT:


NORRIS MALONEY, CIRCUIT JUDGE