STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOHN WEAVER, President,
University of Wisconsin,

Petitioner, Case No. 146-209

vs.

MEMORANDUM DECISION

STATE OF WISCONSIN
PERSONNEL BOARD,
(George M. Schroeder),

Respondent.

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

This is a proceeding instituted under ch. 227, Stats., to review a decision of respondent board entitled Opinion and Order dated February 21, 1975, which decision required petitioner to reinstate George M. Schroeder, a former employee of the University of Wisconsin-Stevens Point, who had previously been discharged. The opinion portion of the decision under the heading "Facts" sets forth the facts found by the board.

The letter of discharge was dated January 15, 1973, effecting Schroeder's discharge and was signed by Leon Bell - Assistant Chancellor of the University of Wisconsin - Stevens Point. This letter was delivered personally to Schroeder on January 16, 1975, by Krebs, Director of Physical Plant of that university, pursuant to authorization from Bell, the appointing authority. This letter reads as follows:

> "This is to inform you that you are discharged from your position of Craftsman Painter in the University Residence Halls effective 4:30 P.M. this date, January 16, 1973.
>
> "I am taking this action in light of your insubordinate attitude toward your supervisor and your refusal to follow instructions.
>
> "Comments by you on a work order dated October 27, 1972 (just one of a series of such cases) demonstrates your insubordinate attitude toward your supervisor. On that

"work order you indicate that most work orders you receive, 'have been confused or hectic and careless in make-up just like a small kid would write'. For that action and that of similar nature which proceeded it you were suspended for five days without pay as a disciplinary action. The suspension was from Monday October 23, 1972 through Friday, October 27, 1972.

"On Tuesday January 2, 1973 a meeting was held between yourself, Mr. Hiram Krebs, Director of Physical Plant, Mr. Roland Juhnke, Director of Personnel Services and your supervisor Marvin Sorenson, Craftsman Foreman. During that meeting it was spelled out and agreed to by you that you would accept Mr. Martin Varga, Maintenance Man as your assistant and use him as such. That you would use Mr. Varga to perform duties such as placing drop cloths, cleaning rooms for painting, patching cracks in plaster, etc. and as time allowed train him to assist in actual painting duties. Your supervisor reports that you have completely and totally disregarded the agreement reached on January 2nd and in fact that you have not been painting yourself rather that you have been acting as the helper and Mr. Varga as the painter.

"Pursuant to the provisions of Section 16.05(2) Wis. Statutes, you are entitled to appeal this action to the State Personnal Board, 1 West Wilson Street, Madison, Wisconsin, provided your written request is postmarked within fifteen (15) days of the effective date of this action."

Schroeder timely appealed his discharge to the board. On March 20, 1973, a prehearing conference was scheduled before board member Julian, as hearing officer, which was attended by counsel for both President Weaver and Schroeder to frame the issues to be taken up at the subsequent hearing on the merits. Counsel at this pre-hearing conference stipulated the wording of the issue set forth in the fourth paragraph of the letter of discharge. There was disagreement with respect to the insubordination charge contained in the second and third paragraphs, it being the contention of Schroeder's counsel that this issue should not be considered by the board. Hearing Officer Julian agreed with the position taken by Schroeder's counsel.

There was an ensuing delay and it was not until October 5, 1974, that the board entered its Opinion and Order on Determination of Issues. This stated that one of the issues had been agreed to by the parties at

the prehearing conference. With respect to the insubordination charge set forth in the second and third paragraphs of the letter of discharge, t board's opinion stated:

> "Appellant [Schroeder] objects to this charge being considered on the grounds 1) the conference officer at the March 1973 conference found that this was not sufficiently specific to give the Appellant adequate notice and 2) that the charge does not meet the standards for a disciplinary notice enunciated in Beaucha v. Schmidt, Case No. 73-38, October 18, 1973. We agree with Appellant on both points."

This October 15, 1974, Opinion and Order of the board concluded with this ruling:

> "We conclude that such charge does not constitute a basis for an issue for determination at the hearing."

The hearing on the merits was held November 6, 1974. Counsel for President Weaver attempted to introduce evidence on the insubordination issue set forth in the second and third paragraphs of the letter of discharge but the board adhered to its prior ruling of October 15, 1974, and excluded such evidence. Counsel for Weaver, however, was permitted to make an offer of proof setting forth the substance of the evidence which would have been presented on that issue except for the board's ruling excluding it.

At the close of the presentation of the evidence in behalf of President Weaver with respect to the charge set forth in the fourth paragraph of the letter of discharge Schroeder's counsel moved that Schroed be immediately reinstated because Weaver had failed to sustain his burden of proof. The board deferred passing on the motion at the time but in its decision of February 21, 1975, the board stated with respect to such motion·

> "We are now of the opinion that the Appellant's motion must be granted."

THE ISSUES

Petitioner's brief sets forth the issues to be decided on this review as follows:

A. Was Respondent's decision that Petitioner failed to meet its burden of proof on the charge against appellant, and that therefore the discharge was without just cause, supported by substantial evidence in view of the entire record as submitted?

B. Did Respondent err as a matter of law in refusing to consider a second charge contained in the discharge letter and in excluding evidence on that issue?

SUBSTANTIAL EVIDENCE ISSUE

The test of substantial evidence for purposes of sec. 227.20(1)(d), Stats., is whether reasonable minds could arrive at the same conclusion reached by the administrative agency. Stacy v. Ashland County Dept. of Public Welfare (1968), 39 Wis. 2d 595, 603. In Copland v. Department of Taxation (1962), 16 Wis. 2d 543, 554, it was stated that the test of reasonableness is implicit in the statutory words "substantial evidence." To the same effect is Reinke v. Personnel Board (1971), 53 Wis. 2d 123, 139. The weight and credibility of the evidence are matters for the agency to determine. Hilboldt v. Wisconsin R. E. Brokers' Board (1965), 28 Wis. 2d 474, 482. When more than one inference can reasonably be drawn, the finding of the agency is conclusive. Pabst v. Department of Taxation (1963), 19 Wis. 2d 313, 322.

Petitioner is bound by the issue with respect to the charge contained in the fourth paragraph of the letter of discharge which was stipulated to at the prehearing conference. This issue was so stated (Board's Exhibit 3, p. 6):

> "Issue No. 1 would read, whether the Appellant [Schroeder] on or about January 2, 1973 agreed to take on and supervise a Maintenance Helper and then refused to supervise him as agreed in conflict with the agreement; and if so, was this just cause for termination."

The board in its findings accepted as true that which was stated in the fourth paragraph of the discharge letter with respect to what was

spelled out to Schroeder and agreed upon at the January 2, 1973, meeting with respect to his duties regarding Varga, the helper. The words of the discharge letter so stating are.

> "On Tuesday, January 2, 1973 a meeting was held between yourself, Mr. Hiram Krebs, Director of Physical Plant, Mr. Roland Juhnke, Director of Personnel Services and your supervisor Marvin Sorenson, Craftsman Foreman. During that meeting it was spelled out and agreed to by you that you would accept Mr. Martin Varga, Maintenance Man as your assistant and use him as such. That you would use Mr. Varga to perform duties such as placing drop cloths, cleaning rooms for painting, patching cracks in plaster, etc. and as time allowed train him to assist in actual painting duties." (Emphasis supplied.)

Sorenson in his testimony stated that the instructions given Schroeder included having Varga "do some painting if warranted if he did have time for it" (Tr. 52, morning hearing).

The board's findings state with considerable detail when and what Sorenson observed regarding the work of Schroeder and Varga from January 3 through January 12, 1973. The Court has carefully read the transcript and finds no inaccuracies in such findings. No other representative of the employing institution testified to any observations made during that period. These findings do not disclose any instance where Schroeder was doing work which under his instructions he should have had Varga doing as helper. The evidence establishes that the mixing of paint is something that required being done by Schroeder as painter and not by the helper. There was no evidence that Schroeder going to the paint store [illegible]rchase painting materials was a function which should have been entrusted to Varga.

Krebs testified that at the January 16, 1973, conference in his office, which ended with his handing of the letter of discharge to Schroeder, this transpired (Tr. 16-17, afternoon hearing).

> "I asked George [Schroeder] a very specific question relating to his use of Mr. Varga in the complete contrast to the directions given in the January 2 meeting. His answers were in the affirmative, that he had wilfully not followed the instructions that he had been given."

The board commented on this testimony in its decision as follows:

> "It is true that Mr. Krebs testified that Appellant admitted to him not using Varga in the precise way envisioned in the agreement (or instructions). This is understandable since the agreement (or instructions) were worded in such a way that, assuming as we do here that the discharge letter accurately reflected what Appellant was told on January 2, 1973, it has no precise meaning. If, as Appellant testified, Varga did no more than the menial tasks, so-called, he probably would have spent the major portion of his time standing around. . . ."

The Court is in agreement with this comment of the board.

Petitioner's brief sets forth verbatim testimony of Schroeder given from notations made by him in a memorandum book as to what work he did on each work day commencing January 3, 1973, until his discharge, the substance of which was omitted from the board's findings. None of this evidence in the opinion of the Court is material on the issue of improper utilization or supervision of Varga with the possible exception of what Schroeder did on January 12th. Schroeder was asked these questions and gave these answers (Tr. 89, afternoon hearing):

> "Q Directing your attention to Friday, the 12th, what, if anything, were you doing that day?
>
> A The mason had finally moved out of the paint room, and I moved the junk into the paint room.
>
> Q What do you mean by junk?
>
> A Well, buckets and cans.
>
> Q What, if anything, was Martin Varga doing that day?
>
> A Working on rooms.
>
> MR. MURPHY: You mean painting? Is that what you mean?
>
> THE WITNESS: Yes, sir."

From this testimony a reasonable inference could be drawn that Varga could have performed the moving chores while Schroeder painted. However, this testimony also could raise a reasonable inference that possibly it was necessary the moved materials were required to be placed in particular locations in the paint room known only to Schroeder.

The burden of proof was on petitioner and he offered no proof that this task was one which Varga could have satisfactorily performed.

The testimony of Schroeder with respect to the utilization of his own time during the period of January 3, through January 15, 1973, indicates he was doing very little painting and was not producing the painting work expected of him. However, this is wholly irrelevant to the issue as framed of whether he refused to properly supervise Varga.

It is the Court's conclusion that the board's determination that petitioner failed to sustain his burden of proof with respect to the issue as framed relating to the charge contained in the fourth paragraph of the letter of discharge is supported by substantial evidence in view of the entire record as submitted.

REFUSAL OF BOARD TO CONSIDER OTHER CHARGE

This issue has to do with the board's adherence to its ruling made in its Opinion and Order entered upon the prehearing conference that it would not consider the insubordination charge contained in the second and third paragraphs of the letter of discharge.

Sec. 16.28(1)(a)(b), Stats., provides in part as follows:

> "(a) An employe with permanent status in class may be removed, suspended without pay, discharged, or reduced in pay or position only for just cause. . . .
>
> "(b) . . . The appointing authority shall, at the time of any action under this section, furnish to the employe in writing his reasons therefor. The reasons for such action shall be filed in writing with the director within 5 days after the effective date thereof." (Emphasis added.)

Sec. 16.28(1)(b) does not spell out how specific the reasons must be stated in a letter or memorandum of discharge. Respondent's brief contends that the statute is amplified by use of the words "time limitations" appearing in Pers. 23.01, Wis. Adm. Code, which provides:

". . . The appointing authority shall at the time of the action furnish such employe with a written statement as provided in section 16.28 (1), Wis. Stats., setting forth his reason therefor, the time limitations thereof, and the employe's right of appeal. . . ."

The Court is satisfied that the word "thereof" in the phrase "time limitations thereof" appearing in such rule relates to the preceding word "action" and not to "his reason therefor". In other words it is the "time limitations" of the discipline imposed which must be stated.

There are, however, due process requirements that require certain specificity in the reason for discharge set forth in a letter of discharge. Under the statutory procedure for an employee in the classified state service contesting an imposition of discipline against him, the letter of discharge constitutes, in effect, the complaint against him in the subsequent hearing before the board. Due process requires that the charge or charges specified therein be sufficiently specific to enable the employee to know what acts on his part are being charged so that he can adequately defend himself against them. See State ex rel. Messner v. Milwaukee C. Civil Service Comm. (1972), 56 Wis. 2d 438.

As previously noted herein, the board in its ruling of October 5, 1974, gave two reasons why it would not consider the insubordination issue. One was that it was not sufficiently specific to give Schroeder adequate notice. The other was that it did not meet the standards for a disciplinary notice enunciated in the board's decision in Beauchaine v. Schmidt.

The Court is in complete agreement with the board with respect to the first of these two reasons but not the second. The Court is satisfied upon reading the second and third paragraphs of the letter of discharge that the same do not meet the specificity requirements of due process with respect to any acts of insubordination except the specific act on Schroeder's part which occurred October 27, 1972. He was

disciplined for the October 27, 1972, insubordination by a five day suspension and was not subject to further discipline for that act.

There are some unusual situations where the reason given in the letter of discharge coupled with undisputed knowledge which the disciplined employee already possessed will meet the notice requirement of due process. An illustration of this was provided in John Pfankuck v. State of Wisconsin Personnel Board, Case No. 141-409, decided by this Court July 17, 1974, where the report of the employee to the employer provided the facts upon which the letter imposing discipline was grounded. It is difficult to imagine a situation when this could be the situation where a general charge of insubordination is made in a letter of discharge. However, the Court has examined the offer of proof made at the hearing by petitioner's counsel to ascertain if there was any attempt made to adduce evidence that the insubordination charge in the letter of discharge was adequate to advise Schroeder of what particular acts of insubordination he was charged. The offer of proof, however, did not address itself to that aspect.

Here the board attempted to impose the "five W's" requirement of a letter imposing discipline laid down in its Beauchaine decision handed down nine months after Schroeder's discharge. The same thing was done by the board in the Pfankuch case and this Court there pointed out that the rule of the Beauchaine case could not be applied retroactively. It has long been held that the requirements of due process cannot be measured through the mechanical application of a formula. The unusual fact situation in the Pfankuch case provides the perfect illustration of a situation where a letter imposing discipline could comply with due process without complying with the 5 W's rule laid down in the board's Beauchaine case decision.

However, inasmuch as the insubordination charge portion of the letter of discharge did not meet the test of due process it is not [illegible]

that the board was in error in also grounding its ruling that it would not consider the insubordination issue becauee the letter did not meet the test laid down in Beauchaine.

Let judgment be entered affirming the board's decision of February 21, 1975.

Dated this 26th day of August, 1975.

By the Court:

Reserve Circuit Judge