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February 23, 1978

RECEIVED
FEB 23 1978
STATE PERSONNEL BOARD

Lawton & Cates
Attorneys at Law
110 East Main Street
Madison, Wisconsin 53703

Attention: Richard V. Graylow

Re: Lois Zehner v. State of Wisconsin (Personnel Board)
Case No. 156-399

Gentlemen:

Enclosed find Notice of Entry of Judgment in the above-entitled proceeding which is herewith served upon you by mail.

Very truly yours,

Robert J. Vergeront
Assistant Attorney General

RJV:pag
Enclosure
cc: Anthony Theodore
Legal Counsel, State Personnel Board
Room 905, 131 West Wilson Street
Madison, Wisconsin 53702

Charles J. Stathas
Legal Counsel, University of Wisconsin
Room 1746, 1220 Linden Drive
Madison, Wisconsin 53702

bcc: I am also enclosing a copy of Judge Currie's favorable memorandum decision.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LOIS ZEHNER,

Petitioner,

v.

NOTICE OF ENTRY OF JUDGMENT

STATE OF WISCONSIN PERSONNEL BOARD,

Case No. 156-399

Respondent.

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

To: Lawton & Cates
Attention: Richard V. Graylow
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Petitioner

RECEIVED
FEB 23 1978
STATE PERSONNEL BOARD

PLEASE TAKE NOTICE THAT JUDGMENT in the above proceeding, a copy of which is attached, was entered in the office of the Clerk of Courts for Dane County, Madison, Wisconsin, on the 20th day of February, 1978.

Dated this 23rd day of February, 1978.

BRONSON C. LA FOLLETTE
Attorney General

By:
ROBERT J. VERGERONT
Assistant Attorney General

Attorneys for Respondent

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LOIS ZEHNER,

Appellant,

vs.

STATE OF WISCONSIN
PERSONNEL BOARD,

Respondent.

JUDGMENT

Case No. 156-399

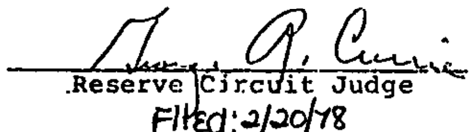
BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been heard by the Court on the 16th day of January, 1978, at the City-County Building in the city of Madison; and the petitioner having appeared by Attorney Richard V. Graylow of the law firm of Lawton & Cates; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of 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 Opinion and Order of respondent State of Wisconsin (Personnel Board) dated March 21, 1977, entered in the matter of Lois Zehner, appellant, v. John C. Weaver, President, University of Wisconsin, case No. 74-98, be, and the same hereby is, affirmed.

Dated this 20th day of February, 1978.

By the Court:



Reserve Circuit Judge

Filed: 2/20/78

FEB 2 3 1978

STATE PERSONNEL BOARD

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LOIS ZEHNER,

Appellant,

vs.

STATE OF WISCONSIN PERSONNEL BOARD,

Respondent.

MEMORANDUM DECISION

Case No. 156-399

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

This is a proceeding by petitioner Lois Zehner under ch. 227, Stats. to review an opinion and order of the State Personnel Board (hereafter the Board), which opinion contains findings of fact and conclusions of law, dated March 21, 1977, and which order affirmed the action of John C. Weaver, President, University of Wisconsin, acting through Ross Reinhold, the Employment Relations Director of the University's Center for Health Services (hereafter UHS), in discharging petitioner effective September 6, 1974.

While petitioner had been an employee of the state from March 16, 1961, up until the time of her discharge, this review is only concerned with her employment as a Technical Typist beginning in January, 1974, and particularly with that part of such employment extending from July 12, 1974 through August 23, 1974. This is because the Board's prior opinion and order dated February 25, 1975, limited the University's proof to only such incidents of petitioner's performance which occurred during this latter period.

Counsel for the petitioner has filed no new brief subsequent to the commencement of this review proceeding, but relies upon the extensive brief filed with the Board.

THE ISSUES

Petitioner raises these issues:

(1) Whether there is substantial evidence in the record to support the findings of fact made by the Board on the issue of whether petitioner had been discharged

for just cause.

(2) Whether the form of the termination notice was sufficient under the law.

(3) Whether the denial of petitioner's request for union representation at the pre-termination conference on August 23, 1974, requires that she be reinstated.

(4) Whether the University was required to practice progressive discipline whereby resort to discharge would be the final step.

(5) Whether certain exhibits were received in evidence that violated a stipulation made at the prehearing conference of October 30, 1974.

(6) Whether Reinhold's talking to one witness after the making of the "gag" order of June 26, 1975, required that petitioner be reinstated.

(7) Whether the University failed to set objective standards to measure petitioner's performance.

(8) Whether the University was required to make a written evaluation of petitioner's work.

(9) Whether the University failed to properly train and supervise petitioner.

(10) Whether the University violated sec. 16.32(2), Stats., in not transferring petitioner to another position, the duties of which she was able to perform.

The Court does not understand that petitioner is raising any issue that, if the Court should find that the Board findings of fact with respect to petitioner's incompetent and inefficient job performance are supported by substantial evidence, these findings are insufficient basis to support the Board's conclusion of law that there was just cause for her discharge.

STATUTES AND AUTHORITIES ON "JUST CAUSE"

Section 16.28(1)(a), Stats., provides in part:

> "An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in pay or demoted only for just cause . . . ."

Section 16.05(1)(e), Stats., provides:

> "(1) The board shall:
>
> " * * *
>
> "(e) Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions, discharges or reductions in pay but only when it is alleged that such decision was not based on just cause. After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employe fully. . . ."

Section 16.28(1)(a), Stats., does not define just cause. What constitutes just cause must be determined on a case-by-case basis in view of all of the circumstances.

In 15A Am. Jur. 2d, Civil Service sec. 63, p. 90, it is stated:

> "Under a statute requiring 'just cause' for the removal, discharge, or demotion of an officer or employee in the classified civil service, the quoted words mean cause sufficient in law, or any cause which is detrimental to the public service. Legal cause for disciplinary action exists if the facts found by the commission disclose that the employee's conduct impairs the efficiency of the public service, but there must be a real and substantial relation between the employee's conduct and the efficient operation of the public service; otherwise, legal cause is not present."

In State ex rel. Gudlin v. Civil Service Comm., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965), the court stated:

> " . . . Because arbitrary and capricious action must be avoided, the concept of 'cause' should be more strictly construed the less the relevance of the conduct complained of to the performance of duty."

The Supreme Court has considered just cause in a number of cases: Mahoney v. State Personnel Board, 25 Wis. 2d 311, 313, 130 N.W. 2d 737 (1964); Jabs v. State Board of Personnel, 34 Wis. 2d, 245, 250, 148 N.W. 2d 853 (1967).

In every case it has held that the grounds cited by the appointing authority which were proven would constitute just cause only where they were within the duties of the employee, or affected the employee's ability to perform duties legally assigned, and there was a real and substantial relation between the employee's conduct or ability and the efficient operation of the public service.

A pattern of conduct which impairs the efficiency of the public service may be just cause for discharge.

In 67 C.J.S. Officers sec. 62, Civil Service Laws, p. 260, it is stated:

> " . . . removal may be justified on the ground of inefficiency, imcompetency, or misconduct . . . ."

Want of capacity, incompetency and gross inefficiency are grounds for dismissal.

McQuillin Municipal Corporation (3rd ed), sec. 12.235 at pp. 243-244, states in part:

> "Want of capacity, incompetency and gross inefficiency generally constitute grounds for the removal of officers and employees. Civil service laws frequently authorize the removal of employees for incompetency or inefficiency.
>
> "Whether an officer or employee is incompetent or inefficient depends, as a general rule, upon the circumstances of the particular case. . . ."

THE COURT'S DECISION

A. Substantial Evidence to Support Board's Findings of Fact.

In Reinke v. Personnel Board, 53 Wis. 2d 123, 138, 191 N.W. 2d 833 (1971), the Supreme Court set forth this test of substantial evidence:

> "'"'[T]he term substantial evidence should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.'"

Petitioner had been a Technical Typist 1 at the University Health Services since January, 1974. The position standards for such position are set forth in Respondent's Exhibit 2. Duties involve typing highly complex medical terminology, formulae and statistical tables. Required knowledge, skills and abilities include:

> "Working knowledge of English and spelling.
> "Ability to type technical material by rote.
> "Ability to understand and carry out written and oral instructions.

"Ability to acquire working knowledge of publisher format requirements."

Board's Exhibit 1 consists of the discharge letter dated August 23, 1974, a letter from Stanley E. MacDonald dated August 15, 1974, setting forth specific deficiencies and copies of letters dated August 15, 1974, from Kathy Clark to Mr. MacDonald and from MacDonald to Ross Reinhold with reference to such deficiencies.

The appointing authority essentially charged petitioner with:

Inability to meet reasonable performance standards for her position.
Excessive typing errors.
Inappropriate set-up of typed material.
Lack of necessary technical typing competence to perform the job in a satisfactory manner.
(Reinhold letter of August 23, 1974).
Failure to competently perform in the following areas:

"1. Proofreading completed work for correction of typing errors.
"2. Clarification of text, which you do not understand, by omission of words and complete sentences.
"3. As many as 7 and 9 rough drafts required before completion of letters.
"4. Letter cramping, centering, spacing, narrowing margins, etc.
"5. Reproduction through spirit processing or mimeograph, finished product not legible.
"6. Correction of errors with white paint, whole paragraphs painted out and typed over, not acceptable for physician's signature.
"7. Disregard for set procedures and instructions, indications of wanting to do things your own way.
"8. Attempts of putting your work on others, without arrangements by supervision."
(MacDonald letter, August 15, 1974).

Other charges involved:

Numerous typing errors.
Misspelled words left uncorrected.
Inability to comprehend simple instructions as to how Mrs. Lewis would like her work done.
Lack of knowledge as to how to set up page 2 of a letter.
Lack of knowledge as to how wide margins should be.
Failure to grasp the ability to be an efficient typist.
(Clark letter of August 15, 1974).

The Board made these material findings of fact:

"Appellant began employment with the state of Wisconsin on March 16, 1961, and her state employment was continuous until the date of her discharge on September 6, 1974. Immediately prior to accepting

the position from which she was subsequently discharged, that of Technical Typist 1 at the University Health Services, she had been employed in a similar position at the Clinical Cancer Center. She had earlier been employed at the Center as a Technical Typist 2 as the result of a promotion. However, her supervisor had expressed concern to the personnel office of the Center for Health Sciences about Appellant's job performance and her suitability for the position. The response of the personnel office was to attempt to find her another position at the Technical Typist 1 or 2 level. This attempt was unsuccessful and the further response of the personnel office was to restructure her job, remove a substantial amount of her responsibility, and demote her to a Technical Typist 1 prior to the completion of her probation at the Technical Typist 2 level. Subsequently, in January, 1974, she laterally transferred to the Technical Typist 1 position at the University Health Services (UHS).

During the period July 12, 1974, and August 23, 1974, the Appellant performed typing duties for a number of persons at the UHS. One of these was Wilma Lewis, a Clinical Nurse Specialist and Assistant Director of Public Health Programs. Some of this involved written material containing technical language from the nursing area, and consisted of reports, letters, and papers. A substantial amount of Appellant's work for Ms. Lewis was of unsatisfactory quality in terms of inaccuracies in transcription from longhand drafts, and in the amount of time required to do the work.

Another person for whom the Appellant performed duties during the period in question was Celia Lamper, a Clinical Nurse Specialist and Assistant Clinical Professor of Nursing. Appellant typed correspondence and other papers. Much of this material contained technical medical and nursing terms. Substantial amounts of this work was of unsatisfactory quality in terms of typographical errors, failure to proofread accurately, and illegible and inaccurate stencils, and in terms of the amount of time required to do the work. As a result of these problems, Ms. Lamper changed her manner of functioning by depending more on verbal communications, by doing some of her own typing, and by structuring classes so that she did not have to utilize typed instructional material for her students.

Appellant also performed typing duties during the period in question for Lowell H. Mays, Lecturer in the Department of Medicine and Psychotherapist at the University Health Service. This work included charts and correspondence that contained technical medical terminology. A substantial amount of this work was of poor quality in terms of misspelled words, strikeovers, and improper spacing of characters. He consistently had to return finished work to her for retyping.

The Appellant performed acceptable work for a number of other persons during the period in question. Dr. Irwin Koenig was a clinician with the UHS. The Appellant did non-technical correspondence typing and copying for him. This work basically was of good quality although it occasionally contained a small number of typing errors including misspellings and transpositions. The Appellant did some correspondence containing technical medical language for Dr. Merle Brase, a clinician at UHS. This work was basically of good quality.

Dr. Sally Mendenhall was a clinician at the UHS. The Appellant did non-technical correspondence typing for her that was basically of good quality. Mary Saurs was a nurse for whom the Appellant typed a pamphlet for students being treated at the clinic. This pamphlet dealt with various diseases and contained some technical medical terminology. Appellant's work on this paper was of good quality.

The Appellant also voluntarily did some typing during the period in question for someone who was not actually assigned to her, LuAnn Martens, This work was of good quality and consisted primarily of non-technical material including minutes of meetings and newsletters.

Kathy Clark, an Administrative Secretary 1, supervised the Appellant from March, 1974 until her termination. Ms. Clark received numerous complaints from certain employes for whom Appellant performed typing duties about the poor quality of Appellant's work. On July 12, 1974, she participated in a conference with the Appellant at which the problems with her work were reviewed, including examples of poor typing. On this date, she was also relieved of some of her typing duties as her workload was reduced.

During the period in question Ms. Clark worked closely with the Appellant and was in a position to observe a substantial portion of her typing and saw substantial amounts of poor quality typing in terms of errors in spelling, punctuation, and strikeovers.

Stanley MacDonald was the administrator of the University Health Service, responsible for its general administration. Following Appellant's commencement of employment in January, 1974, he received numerous complaints about the quality of her typing from various of the persons whose work she was assigned. Ms. Clark and he counseled with the Appellant prior to the period in question and discussed her shortcomings with her. He participated in the July 12, 1974, conference with the Appellant, along with Ms. Clark. At that time he suggested that the Appellant seek a reclassification to a level that would not pose as many difficulties as her then

current position. He also told her that if her work did not improve that she would be terminated. Following this conference he continued to receive complaints and evidence of the Appellant's poor work performance. He had a further conference with her on August 15, 1974, when he told her that if she did not seek a reclassification he would request her termination. This was followed by MacDonald's request to the University personnel office that she be terminated. This was granted and she was dismissed effective September 6, 1974."

The transcript is in three sections, each covering a separate Board hearing and contains 907 pages. The Court read all of the testimony of witnesses in the transcript but not all of the statements made on the record by the hearing officer or counsel. As the Court read the transcript he had before him the 47 page summary of testimony with its page reference to the transcript contained in the respondent Board's brief; and made notations of such additions, deletions or changes on such summary as he thought necessary. However, on the whole the Court found such summary to be remarkably accurate, and of great value in writing this decision.

The UHS is a large department of the University and includes among other activities the operation of University Hospitals and the Public Health Programs. The director of UHS is Dr. Kabler, a physician. Dr. Kabler delegated to his administrative assistant, Kathy Clark, the duty of supervising the Technical Typists 1 including petitioner. At the time of testifying she had four Technical Typists 1 under her supervision. Kathy Clark was petitioner's supervisor from March, 1974, until her discharge.

Kathy Clark testified: Among the people petitioner did typing for were Mrs. Lewis, Miss Lamper, Professor Mays, Dr. Koenig and two environmental specialists Pope and Calhoun. She had received complaints about petitioner's work from Mrs. Lewis, Miss Lamper, Professor Mays and Pope and Calhoun prior to July

12, 1974. On July 12, 1974, she had a conference in her office with petitioner attended by MacDonald. At this conference petitioner was shown examples of her work and its poor quality; areas that were wrong were pointed out; and petitioner was told to proofread more carefully and have Clark assist her if necessary. Petitioner said she would try harder. Pope and Calhoun were taken off petitioner's duty list reducing her work, and a Technical Typist 2 assigned to them to do their work.

With respect to what occurred between July 12 and August 23, 1974, Clark further testified: Mrs. Lewis complained about petitioner's work "every day" and showed Clark copies of petitioner's work. Miss Lamper also complained. Professor Mays was already unhappy and gave most of his work to another secretary. Clark attempted to assist petitioner to upgrade her work product by answering questions and reviewing her work. Mrs. Lewis and Miss Lamper repeatedly brought work back to petitioner, corrected her and showed how they wanted their work done. Petitioner brought Clark a paper entitled "Contraception" for Dr. Beasley and asked Clark to read the final copy before it was given to Dr. Beasley. It was 8 or 9 pages long and Clark found two sentences that had been left out and 21 misspelled words. The draft was then returned to petitioner to retype after Clark corrected it.

Clark further testified: Petitioner's typing work was very poor consistently. The Beasley contraceptive paper was typical of her work. Words were misspelled, there ~~was~~ were bad margins that were run all the way down on the page, and there was excessive use of corrective fluid and strikeovers. Petitioner's work was not satisfactory. At the meeting of July 12th, MacDonald detailed the performance standards they expected of petitioner: If there were two or three corrections with white correction fluid on a page, petitioner was to start over; margins should be left on all sides; the date and closing "sincerely yours" were not to be forgotten, and she was to proofread.

Dr. Beasley, who is a physician, testified she gave no work

to petitioner to type after July 12, 1974, except the contraception paper which had been given to petitioner in the form of a handwritten copy. Dr. Beasley testified she was very satisfied with petitioner's work on the contraception paper. However, this final draft given to Dr. Beasley was typed after Clark had proofread the "final copy" presented to her by petitioner, and Clark had made the many corrections on it she testified to having made.

Mrs. Lewis testified: She is a Clinical Nurse Specialist at UHS and Assistant Director of the Public Health Programs. Petitioner was assigned to do her secretarial work on July 12, 1974. The work consisted of typing letters and reports. This consisted of typing letters and reports, usually assigned in handwritten copy with written or verbal instructions. Where technical language was involved Lewis usually had it spelled out. She was not always satisfied with the work petitioner returned to her. The poor quality was frequent enough that she complained to Kathy Clark, petitioner's supervisor. If corrections were necessary, Lewis would make them and have petitioner redo the work as often as necessary. In some instances much time was spent on redrafts. Lewis often has deadlines and when petitioner's work was not at a level Lewis desired, and there was a deadline, she would seek out some other secretary to do it. In one instance petitioner made errors on the first draft and Lewis made corrections but petitioner made some of the same errors on the second draft. It ended up in four drafts being typed by petitioner,and even on the fourth draft corrections had been made on that by use of correction fluid. Lewis was under pressure to get it in the mail that day, so a xerox copy was used to obtain a satisfactory copy. (The use of correction fluid while it shows up on a typed original does not show on a xeroxed copy).

Lewis further testified: She is presently served by Amy Krembs, a Technical Typist 1, who does her work in a satisfactory

manner. She expects that anyone who is classified as a typist to transcribe accurately and proofread and understand the work that they are doing. Petitioner did not seem to understand this. Petitioner did not meet the level of performance which she expected from a typist. She took her criticisms of petitioner to Kathy Clark, and objected to the quality of petitioner's work, the time it took to do it and return it in useable condition, and the time it took Lewis to give instructions repeatedly to petitioner.

Celia Lamper testified: She is a Clinical Nurse Specialist and Assistant Clinical Professor of Nursing at UHS. Petitioner was assigned to do her secretarial work from January through the summer of 1974. Lamper gave her assignments to petitioner in handwritten form and would indicate anything that was unusual or any unusual medical terminology and informed petitioner she would be available if petitioner had questions. Lamper was usually dissatisfied with petitioner's work, and talked to petitioner about it and told her to be more attentive to typographical errors and to proofread material before returning it to Lamper. In some instances stenciled material were returned which was illegible. The stenciled materials were to provide an educational resource for the staff to refer to and for orientation of new staff nurses. Often the errors made by petitioner would change the sense of the content. If there was an error "we" would be getting 75 copies with the error in it, and on some occasions Lamper had to pass out the material with the errors. The stencils never looked as if they had been typed by a professional typist. There were always some errors in the finished product, and some were critical such as omitting words. Medical terms were misspelled.

Lamper further testified: In the third week of July, 1974, petitioner typed an 8-page curriculum vitae which had numerous errors in it. Lamper found it necessary to proofread each page

and found words and sentences which had been left out, and several pages had to be retyped. During the period from July 12 until August 23, 1974, the quality of petitioner's work remained essentially the same. There were typographical errors, spacing errors and many examples of correction fluid being used so that the final copy was not acceptable. Her spacing and margins did not improve and Lamper never felt petitioner's work looked like a professional typing job. Lamper had given petitioner the curriculum vitae at 8:00 a.m. which Lamper had to have at noon and it took all four hours for petitioner to complete it, and Lamper was tied up the whole morning monitoring and proofreading. There were so many errors Lamper could not have given the original copy to anyone. Lamper complained to MacDonald and gave him examples of petitioner's work which Lamper considered unsatisfactory. Lamper could not function the way she desired having petitioner as secretary because of being unable to have materials ready when she needed them for classes or meetings, and was not able to depend on a product to which she felt she could sign her name and send out to other professionals. The quality of work of her other secretaries was usually highly satisfactory and they did their own proofreading.

Dr. Lowell Mays testified: He is a lecturer in the Department of Medicine, and on the staff of the UHS. He has degrees in theology and psychology, one of them being a Ph.D. degree. The work of Dr. Mays is the preparation of a long narrative report on a patient and involves preparation of a chart for other professionals to use. His work has to do with the social and behavioral needs of patients. The petitioner was assigned to him July 12, 1974, to do his secretarial work. He had hoped to dictate most of his material to petitioner but found she had difficulty doing her work accurately. He then changed his work habits so as to do the behavioral workups and chart notations in his own handwriting but discovered petitioner had difficulty spelling the words he used and in doing accurate

typing. He had to have her redo the work and this caused delays of two or three days because of her schedule and his.

Dr. Mays further testified: He withdrew his work from petitioner because he had a personal desire that anything he put in a medical record be very accurate. Dr. Mays could not depend upon petitioner for the consistency of accuracy which he required and which he felt the System for Health Sciences should provide. On a scale of 1 to 10, with 10 being excellent, 5 satisfactory, and 1 incompetent, he would rate petitioner's work 3. The accuracy of her typing was unacceptable. There were quite a few strikeovers, she used a lot of white correction fluid, and in retyping a single letter in a word it would be higher than the other letters. While her work improved it never achieved a form of excellence which he considered acceptable. Dr. Mays never found her work satisfactory. While her accuracy improved for a time, the improvement was short-lived.

The Board's findings of fact also sets forth instances of work which petitioner typed for individuals other than Lewis, Lamper and Mays which were satisfactory. However, the Court determines that the Board's characterizations of these instances of satisfactory work, "While some of her typing was satisfactory, this was for the most part non-technical material of small quantity" is a reasonable inference which the Board was entitled to draw from the evidence presented. For example, one of the witnesses called by petitioner was Dr. Irwin Koenig. He is a doctor of medicine and works full time seeing students for diagnosis and treatment. Dr. Koenig testified: After July 12, 1974, petitioner did nontechnical typing for him in the form of correspondence with insurance companies, attorneys and physicians. Most letters were cover letters of two or three lines for records and x-rays being forwarded. Petitioner did a good job for him, made a few mistakes, but all girls do.

The credibility of all witnesses was for the Board to determine as was also the weight to be accorded the testimony of

the witnesses Clark, Lewis, Lamper and Mays as compared to the testimony of satisfactory work by petitioner given by witnesses called by her.

The Court concludes there was substantial evidence in the record to support all the findings of fact made by the Board on the issue of whether petitioner was discharged for just cause.

B. Sufficiency of the Form of the Termination Notice.

This issue was ruled on by the Board in its separate opinion and order dated February 25, 1975. The termination notice actually consists of two parts: MacDonald's letter to petitioner dated August 15, 1974, and Reinhold's letter to petitioner dated August 23, 1974, both of which are found in Board's Exhibit 1 and the essential contents of both letters have been set forth herein under subdivision A hereof.

In its opinion of February 25, 1975, the Board cited Beauchaine v. Schmidt, Wis. Pers. Bd. Case No. 73-38 (October 18, 1973), which held that in order for a termination notice to meet the minimal procedural standards of due process it must advise the terminated employee: (1) the wrongful acts he allegedly committed, (2) when, and (3) where they were allegedly committed, and (4) who accuses the employee of the wrongful acts, and (5) why the particular penalty is imposed.

The Board concluded that while the instant discharge letter (apparently only referring to the Reinhold letter and not the MacDonald letter) was not as specific as it would prefer, it believed it met the minimal due process requirements delineated in the Beauchaine case.

The Court has concluded the MacDonald letter constitute part of the discharge notice. The use of the words "wrongful act" in Beauchaine in setting forth the five requirements of a termination notice is unfortunate when applied to the instant fact situation when the discharge is made for inefficiency and inability to meet the requirements of the job.

The respects in which petitioner's work was inefficient and failed to meet the requirements of her job were specifically spelled out. MacDonald's letter listed in detail the complaints with respect to petitioner's work that had been received prior to the July 12, 1974 conference with petitioner, and stated, "I have received many more complaints from professional personnel in your area of responsibility since the date of August 12, 1974, repetitious of the above." The quoted date of August 12, 1974, is an obvious error because it is clear from the preceding contents of the letter he meant July 12, 1974.

The Board by its order of February 25, 1974, limited the University's proof at the hearing of instances of poor or substandard performance on petitioner's part to those which occurred between July 12, 1974 and August 23, 1974. This made it unnecessary for petitioner to adduce proof as to the nature of her job performance which occurred prior to July 12, 1974.

The Court is of the opinion that the termination notice met due process procedural standards.

C. Denial of Petitioner's Request for Union Representation at Pre-Termination Conference of August 23, 1974.

As found by the Board, petitioner requested union representation at the pre-termination conference she held with MacDonald on August 23, 1974, which request MacDonald denied.

Section 111.82 Stats., provides in part:

> "State employes shall have the right . . . to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Petitioner relies on NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L. Ed. 2d 171. In that case the United States Supreme Court upheld an interpretation by the National Labor Relations Board (NLRB) of the provision of section 8(a)(1) of the National Labor Relations Act containing the same language as the portion of sec. 111.82, Wis. Stats., underlined above except for the insertion of the word "other" in lieu of the word

"lawful" preceding the word "concerted". NLRB held that the employer violated section 8(a)(1) of the federal act by denying the employee's request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The Court of Appeals for the Fifth Circuit had reached the opposite conclusion in its interpretation of the statute. The rationale of the Supreme Court's decision is set forth in this extract (420 U.S. at p. 266):

> "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no 'need' for union assistance at an investigatory interview. 'While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview.' 485 F2d, at 1138. It is the province of the Board, not the courts, to determine whether or not the 'need' exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life, . . ."

The Board in its opinion distinguishes the Weingarten, Inc. case on the ground that it involved an employee who was represented for collective bargaining purposes by a union while here petitioner's position was not covered by a collective bargaining agreement and stated:

> "We can find no basis for a conclusion that such an employe is entitled to union representation at a pre-termination conference."

However, even if the Board were in error in this interpretation of sec. 111.82, Stats., the Court is of the opinion that petitioner was in no way prejudiced by the denial of union representation at the August 23, 1974, conference and that the University should not be penalized by having to reinstate the employee.

D. Whether University Was Required to Practice Progressive Discipline Before Resorting to Discharge.

While sec. 16.28(1)(a), Stats., provides for a range of

disciplinary penalties, it is not open to a reasonable interpretation that lesser specified penalties must be applied progressively in ascending order before discharge. There may be situations where discharge would be unappropriate and too harsh a penalty to impose but this is not such a case.

In this case the petitioner had been warned on July 12, 1974, that if the quality of her work did not improve by the end of August, 1974, she would be terminated. When August 23, 1974, arrived and there had been no improvement in petitioner's record the University could well conclude that a written reprimand or a suspension would serve no useful purpose.

The Board's opinion, at pages 8-9 refers to certain guidelines promulgated by the Director of the Bureau of Personnel which listed various types of discipline which were available to the appointing authority. One of these was "Reduction in position". The Board's opinion pointed out these facts. Petitioner's supervisor had made available another position, that of Technical Typist 1, when she had failed to successfully complete her probation in a Technical Typist 2 position. While she was employed at the UHS her supervisors unsuccessfully attempted to persuade her to seek movement to another less demanding qualification. Following her discharge the offer of a potential demotion was made explicit to her. She failed to follow up on this offer in any way.

The Court agrees with the Board's conclusion, ". . . on this record the failure to impose an involuntary demotion cannot be equated with a failure of just cause for a discharge."

E. Whether Certain Exhibits Were Received in Evidence That Violated the Stipulation Made at the Prehearing Conference of October 30, 1974.

The prehearing conference report (Board's Exhibit 2) contained a stipulation that the parties were under a continuing obligation to notify each other of any exhibits they intended

to introduce, and to furnish a list of witnesses they intended to call. Respondent's Exhibits 1-14, with the exception of 5 and 6, were objected to by petitioner on the grounds the University had failed to provide adequate notice thereof. While the hearing officer presiding at the hearing received such exhibits, the Board at page 6 of its opinion excluded Respondent's Exhibits 1-4 and 7-14, and commented, "Despite the absence of actual examples of poor work performance from the record [as a result of this exclusion of certain exhibits] there was sufficient testimony not connected with the excluded exhibits to support the findings concerning the quality of appellant's [petitioner's] work performance." The Court agrees.

F. Reinhold's Talking to One Witness Which is Claimed to be a Violation of the "Gag" Order of June 16, 1975.

The witness referred to is Marian Walluks, a Senior Personnel Analyst of the State Bureau of Personnel. It was brought out on her cross examination that Reinhold made an appointment over the telephone to see her and then he came to her office and they talked together for a time of between 15 minutes and a half hour, but he mentioned nothing to her in the terms of the merits of the case. Furthermore, Walluks' testimony did not relate to the merits of the case, the quality of petitioner's work performance or any contacts that had taken place between petitioner and University personnel.

The "gag" order was one made by the hearing officer who presided at the June 25, 1975, hearing which ordered witnesses to refrain from speaking "with one another about the merits of this case or the testimony given by them herein." Reinhold had testified at that hearing.

The Board at page 7 of its opinion ruled on this claimed violation of the "gag" order as follows:

> "Although there was some communication between Mr. Reinhold and Ms. Walluks, there was no evidence that this concerned either the merits or the testimony already given. We conclude there was no

violation of this order nor any error committed by respondent in this regard."

The Court is of the opinion that it was within the province of the Board to interpret the words "merits of this case" contained in the "gag" order as it did, and thus to find that no violation of such order had taken place.

G. Alleged Failure of University to Set Objective Standards to Measure Petitioner's Work Performance.

The Board's determination of this issue appears at page 11 of its opinion and reads:

> "Appellant argues that there were no objective standards applied to the evaluation of her work, and that she was never told what was expected of her in terms of 'minimum performance standards.' There was no evidence that there had ever been developed for Appellant's position or classification any quantifiable or output standards such as a particular page rate or percentage of error in typing. We cannot conclude that this level of objectivity is required. The record in this case shows there were wide variations in the nature and complexity of the work assigned to Appellant, and the conditions under which she was to complete that work. The applicable standards must be flexible because the quantity and quality of the output must depend on variables such as the complexity of the material, its intended use, and deadline pressure. In this case the Appellant had had long experience in typing in state service, including work as a Technical Typist 1 and 2. She was counseled by her supervisors who reviewed errors in her work with her. We conclude there was no error because of lack of objective standards."

Mrs. Walluks testified: Position standards for the various classified positions in state service administered by the State Bureau of Personnel do not specifically include quality standards for a given position. Quality standards at a departmental or work unit level are based on needs of the unit. The administrator or supervisor sets the standards. The term Technical Typist 1 implies a necessary quality as shown by "typing highly complex medical terminology for publication purposes." A Technical Typist 1 would be expected to proofread her own work before submitting it to her supervisor or another. The work should be basically 100% accurate.

The evidence establishes, assuming the Board found Kathy

Clark's testimony credible, that she as petitioner's supervisor had communicated to petitioner the quality standards expected of petitioner's work.

The Court finds no merit to the contention that objective standards had not been set by the University to measure petitioner's work performance.

H. Whether University Was Required to Make Written Evaluation of Petitioner's Work.

The Board's opinion at page 12 points out that Section Pers. 20.04, Wis. Adm. Code, requires that performance evaluations be done at least once a year. Inasmuch as petitioner had been employed by UHS in the position of Technical Typist 1 for only approximately eight months prior to her discharge, there was no legal requirement that a written evaluation of her work in that position have been made by the University.

I. Whether University Failed to Properly Train and Supervise Petitioner.

Petitioner had been a Technical Typist in state service since September, 1967. As Technical Typist 1 is the lowest grade of Technical Typist, this means she had been a Technical Typist 1 since that date. She was first employed by the Public Service Commission and later transferred to the University Hospital where she spent 60 percent of her time typing x-ray reports for 20 to 25 staff and resident doctors from dictaphone tapes. In December, 1972, she went to the Clinical Cancer Center as a Technical Typist 2 on probation. She failed her six month probation in that position and testified that part of the problem was typing deficiencies. She was demoted back to her Technical Typist 1 classification and, as previously stated herein, on January 4, 1974, she began work for UHS.

Petitioner's over all supervisor was MacDonald, Administrator of UHS. As petitioner then possessed several years experience as a Technical Typist 1 he assumed she was capable of performing

the function of that position. These were stated in the testimony of Mrs. Walluks previously summarized herein. There was no requirement that the University further train her in the skills expected of anyone who had for some years occupied that position classification.

What was new to petitioner in her work at UHS was the frequent use of medical terminology in the work she was to type and the particular format of the work desired by each staff member for whom she did secretarial work. With respect to medical terminology she was provided with a medical dictionary for her own separate use, and in much of her work she typed from handwritten manuscript in which the medical words were written out. With respect to the format to be used; it appears from the testimony of those staff members who testified they were critical of petitioner's work that they specifically instructed her with respect to format.

The first two months of petitioner's employment she was supervised by Charlotte Manning who about March 1, 1974, retired from state service. Petitioner testified Mrs. Manning did not testify. Thereafter, petitioner's immediate supervisor was Kathy Clark whose position classification was Administrative Secretary 1. Clark had 3 years experience as Technical Typist 1 and secretarial experience in private employment working in various company offices prior to that. She testified on June 25, 1975, she then had four years experience as Administrative Secretary 1. Her assigned duties were to act as personal secretary to Dr. Kabler, Director of UHS and to supervise the four Technical Typists working for UHS.

Petitioner criticises the assignment of Clark to supervise petitioner because the job description standards for Administrative Secretary 1 do not contain any mention of supervisory duties. The Court deems this is immaterial with respect to the issues of this case so long as Clark was assigned the duties of supervising the Technical Typists and performed those duties in a way that was not prejudicial to petitioner. The previously summarized testimony of Clark demonstrates that she tried to be

helpful to petitioner in pointing out deficiencies in her work and aid her in correcting them.

The Court is satisfied that the Board could reasonably conclude as it did that the deficiencies in performance for which petitioner was discharged were not due to any lack of proper supervision.

J. Alleged Violation by the University of Sec. 16.32(2), Stats., in Not Transferring Petitioner.

The Board's opinion properly disposed of petitioner's contention with respect to this issue as follows:

> "Appellant argues that the Respondent failed in a duty to search the agency for alternative employment, citing Section 16.32(2), Stats. This provision applies to employes who become 'physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his position by reason of infirmities due to age, disabilities, or other . . . .' The record does not support a finding that Appellant fit into any of these categories, and therefore there is no basis for a conclusion that there was a violation of this provision."

Let judgment be entered affirming the Board's opinion and order which are the subject of this review.

Dated this 20th day of February, 1978.

BY THE COURT:

Reserve Circuit Judge