

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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DENNIS L. NELSON,

Petitioner,

JUDGMENT

vs.

STATE PERSONNEL BOARD,

Case No. 163-430

Respondent.

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


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The above entitled review proceeding having been heard by the Court on the 16th day of April, 1979, at the City-County Building in the city of Madison; and the petitioner having appeared by Attorney Walter H. Erbach of the law firm of Voss, Nesson, Koberstein, Erbach & Voss; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the 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 Decision and Order of the respondent State Board of Personnel dated May 18, 1978, entered in the matter of Dennis Nelson v. Secretary, Department of Revenue, Respondent, Case No. 77-100, be, and the same hereby are, affirmed.

Dated this 23rd day of April, 1979.

BY THE COURT:

  
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Reserve Circuit Judge

DENNIS L. NELSON,

**RECEIVED**

Petitioner,

APR 27 1979

MEMORANDUM DECISION

vs.

STATE PERSONNEL BOARD,

**Personnel  
Commission**Case No. 163-430

Respondent.

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

This is a proceeding by petitioner Nelson pursuant to ch. 227, Stats., to review a decision and order of the respondent Board dated May 18, 1978, affirming the action of the Secretary of the Department of Revenue, in terminating the employment of the petitioner.

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STATEMENT OF FACTS

Prior to petitioner's discharge on May 3, 1977, he had been employed by the Department of Revenue since 1970, and at the times material to this review he had been classified as Property Assessment Specialist 5 with a working title of Chief of the Assessment Certification and Training Section. He had two employees working under his supervision, his assistant, Eugene Miller, and Ann Learn, a typist. It was the responsibility of this Section to conduct the examinations for certification of local property assessors. Commencing in 1975 the legislature has required all elected assessors and assessment personnel to be certified.

Neither Nelson nor Miller were required to be certified in order to hold their positions in state service. However, both felt they should be certified in order to maintain credibility with those who were required to be examined for certification. Certification would also be advantageous if they desired to accept an outside position in the assessment field. They early in 1977 applied to take the ASSESSOR 2 examination. On February 1, 1977, James L. Plourde, Chief of the Equalization Standards Section within the Bureau of Property and Utility Taxes of the Department,

and Nelson's immediate supervisor, by memo to Nelson (App's. Ex. 5) advised him as follows:

"In response to the request of yourself and E. Miller, I will proctor the exam(s) for you and Gene at anytime. It will not be necessary to develop new exams. You will take the same exam as all the rest. (I assume you both will pass.)"

At the time Nelson and Miller were busy giving examinations and no date was set up with Plourde for taking their own examinations. Early in April a large number of examination answer sheets were about to be sent over to the State Bureau of Personnel to be run through the computer for scoring. Nelson and Miller were the two employees who had access to the answer key to the examination. At Nelson's instigation he and Miller with the use of this answer key completed examination answer sheets for themselves. Enough incorrect answers were included so as not to indicate that they had used the answer key in writing their answers. Miller testified: On April 11th or 12th at Nelson's direction he included the answer sheets of Nelson and himself with the answer sheets of examinations that had been given in six different locations and took them to the Bureau of Personnel for scoring; and four or five days later he obtained the computer printouts with the scores. Then Miller, as was his past practice, wrote the certificate numbers on the printouts of all entrants who had scored 60 or better, that being the passing grade. From this Ann Learn then prepared letters of congratulation and the certification certificates.

However, a complication arose when on April 18th Plourde asked Nelson and Miller when they could take the examination and it was agreed that the examination would be held in Plourde's office at 1:00 o'clock on the afternoon of the following day, April 19th. After Miller thus became aware that a date had been set for taking the examination the following day, he went to Plourde on the afternoon of April 18th and told him about Nelson and he preparing their answer sheets from the answer key. Miller testified he did this "when I was sure that it was not right" (Tr. 175).

Plourde testified: After Miller had told him on the afternoon

of April 18th about how Nelson's and Miller's answer sheets had been prepared he talked with Ann Learn and asked her to bring the materials from the file so he could substantiate what Miller had told him, and he expected that information to be in his office the next morning but it was not. He then called her and again asked for this material. She did not bring it, but Nelson brought to him the printout showing his and Miller's names and test scores. Plourde then took the printout to the office of Glen Holmes, Director of the Bureau of Property and Utility Taxes.

Holmes in his memorandum to David A. Nichols, Deputy Secretary of the Department, of April 22nd (App. Ex. 4) stated that, after Plourde had brought the printout to him, Plourde and he met with Nelson and Miller separately on April 20th and both admitted they had prepared examination answer sheets using the answer key for the Assessor 2 examination.

Miller testified that the day after Nelson met with Holmes he told Miller to destroy the letters of congratulations and certificates which had been issued to Nelson and Miller, and Miller destroyed them. On the other hand, Nelson testified: April 19th he and Miller went to the office of Holmes and Holmes told them they were being given ~~5~~500 Exceptional Performance Awards. Following that meeting Miller asked him what was to be done with the certificates and letters of congratulations with respect to having passed the Assessor 2 examination. Nelson then told Miller to destroy them. Finding of Fact No. 60 is apparently grounded on this testimony of Nelson.

As a result of the Holmes memorandum to Nichols (App. Ex. 4) a letter terminating Nelson's employment was issued by Nichols May 3, 1977 (Board Ex. 2) which provided in material part:

"This is to notify you that pursuant to the authority vested in me by the Secretary of Revenue, your exceptional performance award for 1977 is rescinded and you will be discharged effective May 3, 1977 at the close of the work day.

Pursuant to the provisions of Section 16.28(1)(b), Wis. Stats. you are hereby notified that the reasons for this action are:

1. That on or about April 4, 1977 you falsified an

answer sheet for the Assessor 2 Certification examination that you were to take at a later date in that you prepared an answer sheet under your name from the answer key that was in your confidential possession. This is in violation of Department Work Rule number 7 and your duties as a state employe.

2. That on April 11, 1977 you submitted the falsely prepared answer sheet to the Bureau of Personnel of the Department of Administration for machine scoring along with the answer sheets for the examinations administered on April 7, 1977 to the Assessor 2 candidates. This is in violation of Department Work Rule 7 and your duties as a state employe.

3. That with your knowledge and approval, your subordinate Eugene Miller falsified and submitted on April 11, 1977 a personal answer sheet for the Assessor 2 examination to the Bureau of Personnel of the Department of Administration and you failed to take appropriate action. This is a violation of your duty as a supervisor with the Department.

4. That on the morning of April 19, 1977 you directed your subordinate, Eugene Miller, to destroy the following:

- (a) Prepared letters confirming that Dennis Nelson and Eugene Miller had passed the Assessor 2 examination; and
- (b) Certificates of certification as Assessor 2 for Dennis Nelson and Eugene Miller.

This is in violation of Department Work Rules 2 and 7 and your duties as a state employe and as a supervisor with the Department.

You were aware of the Department's Work Rules because you acknowledged receipt of the Employe Handbook on November 3, 1975 and understood the responsibility to become acquainted with and adhere to the directives as specified in the Work Rules and Code of Ethics chapter.

Pursuant to the provisions of Section 16.05(2), Wis. Stats., you are entitled to appeal this action to the State Personnel Board . . . ."

Nelson appealed his discharge to the respondent Board. A hearing was held before a hearing examiner on July 15, 1977.

On April 20, 1978, the hearing examiner issued her proposed decision consisting of 80 numbered findings of fact, 4<sub>x</sub> conclusions of law, an opinion, and a proposed order rejecting the action of the Secretary of the Department in terminating Nelson's employment. In her opinion the hearing examiner stated that "some measure of discipline was and is merited," but concluded that termination was not warranted.

On review the Board adopted all of the hearing examiner's 80 findings of fact, but in its conclusions of law concluded that

Nelson's termination was for just cause. The Board included in its decision an opinion stating its reasons for reaching this conclusion. The order portion of the decision affirmed the action of the Secretary of the Department in terminating Nelson.

Nelson timely instituted the instant proceeding for review of the Board's decision and order.

#### THE ISSUES

Petitioner Nelson raises these issues on this review:

- (1) Was there just cause for petitioner's discharge?
- (2) Did the Board adequately state the reasons for not following the hearing examiner's recommended conclusions of law and order?

#### THE COURT'S DECISION

##### A. The Just Cause Issue

Section 16.28, Stats., 1975, provides in part:

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

(b) No suspension without pay shall be effective for more than 30 days. 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."

In Safransky v. Personnel Board, 62 Wis. 2d 464, 472, 215 N.W. 2d 379 (1974), the Supreme Court set forth the duty of the Board with respect to discharge cases as follows:

"The procedure involved in an appeal by an employee with permanent status is clear. Sec. 16.05(1)(e), Stats., states that jurisdiction lies with the State Personnel Board to determine whether the actions of the appointing authority terminating an employee of permanent status is based on just cause. The board must determine whether the discharged employee was actually guilty of the misconduct cited by the appointing authority and whether such misconduct constitutes just cause for discharge. Bell v. Personnel Board (1951), 259 Wis. 602, 49 N.W. 2d 899.

. . . [T]he appointing officer must present evidence to sustain the discharge and has the burden of proving that the discharge was for just cause. [Citing Reinke v. Personnel Board, 53 Wis. 2d 123, 132, 191 N.W. 2d 833 (1971).]

. . .  
The function of the board is to make findings of

fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence." [Citing Reinke, 53 Wis. 2d at 137.]

The credibility of the witnesses and the weight of the evidence are matters which exclusively lie in the province of the board. Stacy v. Ashland County Department of Public Welfare (1968), 39 Wis. 2d 595, 159 N.W. 2d 630.

On appeal to this court, the standard of review is whether the findings of the State Board of Personnel are supported by substantial evidence in view of the record as a whole. Reinke v. Personnel Board, supra."

Petitioner does not contend that if he actually cheated on the Assessor 2 examination in order to be certified this would not be an offense of sufficient gravity to make his discharge one for just cause. Rather he contends that the findings of fact are not sufficient to support such a conclusion.

The findings of fact found the facts with respect to the submission by Nelson and Miller of the examination answer sheets in which most of the answers had been copied from the answer key as stated in the STATEMENT OF FACTS, above. Finding of Fact No. 49 found that petitioner "decided it would be advantageous for Miller and him to submit prepared answer sheets for machine grading with other answer sheets from a regularly administered Assessor 2 examination."

Miller being in charge of the certification process knew that it was customary procedure for Ann Learn to use the computer printouts showing examination scores in preparing the certificates to be issued to those entrants who had received scores of 60 or higher and the accompanying letters of congratulation. Nevertheless, as found by Finding of Fact No. 59, he never told either Miller or Learn not to assign certification numbers or to prepare certificates and letters with respect to petitioner and Miller.

Very significant findings are those made by Findings of Fact Nos. 63 and 64 regarding Miller talking to Plourde in the afternoon of April 18th and as a result Plourde asking to see the computer printout. In connection with these findings the undisputed testimony of Miller is material in that he told Plourde about the submission of the false answer sheets by himself and Nelson when

he "was sure that it was not right" (Tr. 175). Finding of Fact No. 64 states Plourde asked to see the printout on April 20th. Plourde actually asked Learn for the printout on the afternoon of April 18th (Tr. 100), but did not get it until the next day when petitioner brought it to him (Tr. 101).

Finding of Fact No. 69 found that neither Miller nor petitioner took the examination scheduled for the afternoon of April 19th in Plourde's office. While the findings do not spell out the reason why this happened the reasonable inference to be drawn is that the scheduled examination was not then taken because of what Miller had told Plourde on the afternoon of the preceding day.

The finding of fact which has puzzled this court is Finding of Fact No. 70 which found that although petitioner had submitted the "prepared" answer sheet, he fully intended to take the examination in the manner Holmes had arranged. This reference to Holmes alludes to a memo dated January 31, 1977, by him to petitioner (Resp. Ex. 2) which suggested petitioner and Miller get together with Plourde to take one of the existing examinations and have Plourde proctor it. This finding is ambiguous in that it does not state that petitioner had that intent as of the time he submitted the "prepared" answer sheet. It is difficult to perceive any reason for submitting such answer sheet if petitioner at that time intended later to take the examination. Finding of Fact No. 52 found that petitioner "wanted to establish on the record that Miller and he had taken and passed the examination." If no certificate was to be issued then the only way this fact would be established would have been by the computer printout. However, petitioner's brief states that such a printout had only "a limited internal use." If this is so, it is extremely doubtful that petitioner could have used the printout as proof to assessors throughout the state that he had taken the examination and passed.

An original and a carbon of each printout was received by the Department from the Bureau of Personnel. The original was found by a hard cover and kept as an official record of the Department. The carbon was utilized in issuing the certificates and the



certificate numbers were written thereon. With respect to what the original showed as to the scores petitioner and Miller had received it was a misleading and false record because of the cheating that had occurred with respect to the preparation of the answer sheets upon which such scores were based.

Once it became known that petitioner and Miller had engaged in such acts of cheating such bad publicity could be potentially damaging to the Department's certification program. Holmes testified that he had been contacted by a newspaper reporter and questioned after having talked with Nelson about his discharge, and the reporter's questions indicated he was merely attempting to verify information he had already received from someone else.

The court deems it entirely immaterial that, if petitioner and Nelson had taken the examination without benefit of the answer key, they easily would have received passing scores.

The court concludes that the findings of fact support the Board's conclusion that there was just cause for petitioner's discharge. In arriving at this conclusion the court has disregarded the issue of whether or not petitioner's act in directing Miller to destroy the certificates and letters of congratulations violated any Department work rules, and assumed that such act violated no work rules.

B. Alleged Failure of Board to State Adequate Reasons for Not Adopting the Hearing Examiner's Recommended Conclusions of Law and Order.

In the opinion portion of the decision of the Board, after quoting extensively from the decision in Safransky v. Personnel Board, supra, the Board stated:

"Using the above guidelines, we concluded that appellant's conduct does merit termination. As stated in the findings, appellant who was in charge of the entire program and who had essentially prepared the examination did falsify the answer sheet to the examination. He also approved the falsification of another answer sheet by a subordinate. These answer sheets were graded and the grades appeared on the official printout.

While we recognize that appellant's work record up until the actions leading to the termination was exemplary, we conclude that his conduct was serious and showed an extreme failure in judgment. This certifica-

cation program was a politically sensitive program. Appellant's misconduct was certainly of a nature that his retention in the position could undermine public confidence in the program just as it was gaining acceptance. His ability to perform efficiently and effectively in his position and continue to maintain a high degree of credibility for the program are seriously undermined. It is for these reasons that we conclude that appellant was discharged for just cause. For the same reasons that we conclude that appellant was discharged for just cause. For the same reasons we reject the proposed Opinion and Order which was prepared by the hearing examiner and which found the termination was not for just cause."

The court determines that the above quoted extract from the Board's opinion sets forth an adequate explanation of why the Board did not adopt the proposed conclusions of law and order of the hearing examiner.

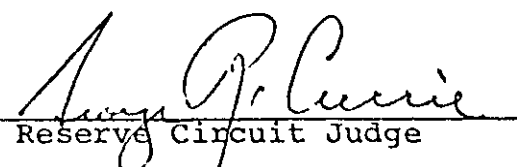
Petitioner's brief is critical of the use of the word "could" in the sentence, "Appellant's misconduct was certainly of a nature that his retention in the position could undermine public confidence in the program just as it was gaining acceptance." It is contended that this renders the conclusion stated as being speculative. Potential harm to the reputation of the certification program of the employer Department is something that was proper for the Board to consider in deciding on the measure of discipline to be imposed by reason of the petitioner's misconduct. An employee in petitioner's position should be held accountable for wrongful conduct that might reasonably damage the reputation of the program he was administering for his employer.

It is significant that the hearing examiner did not exculpate the petitioner from any misconduct but rather concluded that the misconduct was not of such a serious nature as to warrant discharge. The Board's opinion stressed as an element to be considered in imposing discipline <sup>one</sup> that the hearing examiner had ignored.

Let judgment be entered affirming the Board's decision and order.

Dated this 23rd day of April, 1979.

BY THE COURT:

  
Reserve Circuit Judge

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Personnel  
Commission

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