PERSONNEL BOARD
STATE OF WISCONSIN
MADISON
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ROBERT O. UEHLING
CLERK OF SUPREME COURT
MADISON, WISCONSIN

No. 349

August Term, 1973

STATE OF WISCONSIN : IN SUPREME COURT

Paul R. Safransky,

Appellant,

v.

State Personnel Board,

Respondent.

NOTICE
This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports

62 Wis 2d. 464

APPEAL from a judgment of the circuit court for Dane County: HON. W. J. JACKMAN, Circuit Judge. Affirmed.

The appellant, Paul R. Safransky, was employed by the State of Wisconsin in the Department of Health and Social Services, Division of Mental Hygiene at Southern Colony. Safransky was classified as an Institutional Aid I and his duties involved acting as houseparent for 8 to 15 moderately and mildly retarded teenage boys. The appellant had attained permanent status and tenure by successfully completing his training period.

Shortly after the appellant had achieved permanent status, a controversy arose concerning Safransky's avowed homosexual status and several job related incidents. On confrontation of the facts involved in the controversy, the Superintendent of Southern Colony, John M. Garstecki, terminated the appellant's employment.

The following notice was given:

"You are hereby notified that you are discharged from employment at Southern Wisconsin Colony and Training School due to problems associated with your homosexual life style.

"Specifically, you admitted at a disciplinary hearing conducted on June 29, 1972 that you were an avowed homosexual. This confirmation of your life style has caused a substantial concern <u>in that you have openly discussed your activities with co-workers and in the presence of residents while on duty.</u> This has created a problem with respect to your working relationship with co-workers and has raised substantial concern with respect to your relationship with residents and the image they perceive of you in your position as a houseparent." (emphasis supplied)

Safransky appealed his dismissal to the State Personnel Board pur-suant to Sec. 16.05, Stats. and on October 27, 1972 a hearing was held to determine whether the appellant's termination was for "just cause." Sec. 16.28 Stats.

At the hearing, the Department of Health and Social Services called several witnesses so as to show that appellant's conduct was incompatible with that required of an employee at Southern Colony and that the appointing authority had "just cause" for its termination of Safransky's employment.

The Department's first witness was Mary Tucker who served in a position similar to the appellant's at Southern Colony. Miss Tucker testified that Safransky often discussed his homosexual life style with employees while in the presence of the residents. Miss Tucker testified that one such incident of conversation took place while seated in the dining room in the presence of seven or eight children.

"Well, he told me that, well, that's when he told me about his roomm was an impersonator and he turned tricks with, you know, with other men, and that he had to come over to the Department and get the key, and how he sets the wigs, and the one night the roommate come in and he was in bed and the room-mate started---He got into bed and started plucking the hairs off his chest. And just how they dressed and dancing and different things."

Similarly, Miss Tucker testified that the kids could understand such a conversation. She also testified that during that conversation Safransky commen in the presence of the residents that one of the residents - Charlie - had a swish walk and that he would make a good "drag queen."

Mrs. Irene Saltys, an aid at Southern Colony, testified that on another occasion Mr. Safransky commented that one resident would make a lovely girl.

came over to him, squeezed Testard's leg, smiled and winked and stated that he had a date that evening. This action disturbed the residents who were there and resulted in questions from the residents as to the reasons for Safransky's actions. Testard also testified that other conversations took place in front of the children. This testimony was repeated by Patricia Dolan, a registered nurse at Southern Colony, who stated that Mr. Safransky discussed his homosexual activities in front of the patients and that one such conversation took place in front of a patient who, himself, had homosexual problems.

The final witness called by the Department was Shirley Lamborn. Miss Lamborn testified that Safransky called her a lesbian on several occasions. One such occasion in particular was in the presence of several residents who, according to Miss Lamborn, were capable of understanding what a lesbian is. On other occasions and while in the presence of patients, Mr. Safransky would comment to the effect that it was a good thing she (Miss Lamborn) was a woman. Miss Lamborn stated that Safransky was going to dress up one of the patients as a woman because he looked like he would make a nice looking queen.

On the bais of the aforementioned testimony, the State Personnel Board made the following findings of fact.

"1. That the appellant, Paul R. Safransky, is a classified State employe, in the Department of Health and Social Services, Division of Mental Hygiene at Southern Colony with the classification of Institutional Aide 1 in salary range 1-06 and was receiving a monthly salary in the amount of $630.00 per month.

"2. That the appellant had attained permanent status and tenure by successfully completing his probationary period, and at sometime thereafter, the Superintendent of the Southern Wisconsin Colony and Training School became aware that the appellant admitted that he was an avowed homosexual. On discovering this information, the Superintendent conducted an investigation and hearing where the appellant confirmed and admitted that this information was true. On confirmation of this lifestyle, the Superintendent notified the appellant on July 18, 1972, that his employment was terminated for this reason.

"3. After the receipt of this letter of termination, appellant, by letter of July 26, 1972, timely appealed his discharge to the State Personnel Board.

"4. That the Southern Wisconsin Colony and Training School is an institution operated by the Department of Health and Social Services for the purpose of providing domiciliary care, custody and training of mentally deficient persons.

"5. The Department of Health and Social Services is charged with the guardianship and care of those persons committed to its institutions and is required to provide for supervision, care, treatment and training of those assigned to its custody.

"6. That the appellant, at the time of his termination, was employed as a houseparent in Tramberg Hall in the Southern Wisconsin Training School and that he was assigned to a regular shift and his duties involved direct, daily care, training and supervision of mildly and moderately retarded teenage boys.

"7. That one of the appellant's duties and responsibilities as a houseparent was to provide proper training, example and image to those children under his supervision.

"8. That after he acquired permanent status and prior to his discharge, the appellant admitted that he is an avowed homosexual and on occasion discussed his homosexual activities and associations with other employes in the presence of the institution's patients.

"9. That homosexual activity is contrary to the generally recognized and accepted standards of morality and the appellant's activity of this nature had a substantial adverse effect in the performance of his job duties.

"10. Because the appellant, in his position duties, served as a houseparent which required intimate personal contact with those retarded children assigned to his care and placed upon him the burden of displaying proper parental care, custody, control and moral training, his admitted homosexual tendencies and attitudes constituted an adverse influence to the proper performance of his position duties and his discharge on this basis should be sustained."

The Personnel Board made the following Conclusions of Law:

"1. That the action of the respondent's discharge of the appellant as an Institutional Aide I at the Southern Wisconsin Colony and Training School on July 18, 1972, was a valid exercise of his discretion and just cause, therefor, existed, and such termination action is hereby affirmed and sustained."

The actions of the Board were affirmed on appeal, the court stating that:

"We are satisfied there is substantial evidence to show good cause for plaintiff's discharge. The evidence is present that plaintiff openly and repeatedly talked about his homosexual life style, a subject offensive to some co-employees, and in the presence of patients. The patients plaintiff attended were of a special type, being retarded adolescent males, two of whom had engaged in homosexual activity which the institution discouraged. While there is no evidence that he openly instructed his patients in his way of life, he did appear at work adorned with eye makeup, eye shadow and mascara and with makeup. There is no evidence that he had done any overt act of sexual indulgence with any patient or co-employee, he had, on one occasion, suggested he would like to dress a male patient as a girl. He insisted on his right to discuss his way of life at work when asked to desist. We do not think that the institution has to wait for something bad to happen when an employee such as plaintiff flaunts his unorthodox conduct and there is even a hint that he might go farther than talk about it. The talk is enough in the sensitive conditions under which he worked."

From the Judgment of the Circuit Court affirming the Order of the Board of Personnel, the appellant appeals:

HANLEY, J. Two issues are presented on this appeal:

1. Whether there is substantial evidence to show that the appellant is chargeable with the conduct complained of, and

2. Whether there is substantial evidence to show that such conduct, if true, constitutes just cause for discharge.

The procedure involved in an appeal by an employe 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 employe of permanent status is based on just cause. The Board must determine whether the discharged employe 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 889.

"... [T]he appointing officer must present evidence to sustain the discharge and has the burden of proving that the discharge was for just cause.

"...

"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." 1/

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 Dept. 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.

The Board found that the appellant had on occasion discussed his homosexual activities and associations in the presence of the institution's patients. Testimony concerning these discussions was elicited from numerous members of the staff at Southern Colony. The testimony was uncontradicted that Paul

1/ Reinke v. Personnel Board (1971), 53 Wis. 2d 123, 191 N.W. 2d 833.

Safransky discussed his homosexual attitudes in the presence of the residents of Southern Colony. It is uncontradicted that Safransky labeled another co-worker a lesbian in the presence of residents who were capable of understanding the meaning of such a term.

At the hearing additional testimony was elicited concerning the fact that Safransky wore feminine makeup while employed at Southern Colony. It was testified to that the appellant once grabbed the leg of a male co-worker. This action by the appellant resulted in questions from his patients as to his actions. Such acts were admitted by the appellant.

The Board made a finding "that homosexual activity is contrary to the generally recognized and accepted standards of morality." No evidence was submitted as to this finding. Therefore, the finding is not supported by the evidence.

We are satisfied that there is credible evidence to support all the findings of the Board with the exception of the finding as to the accepted standards of morality. As to the Board's finding that homosexuality is contrary to the accepted standards of morality, we hold that whether homosexuality is immoral or not is irrelevant to the determination of "just cause."

Having determined that the evidence is sufficient to support the Board's finding as to the conduct complained of, this court must determine whether such conduct constitutes "just cause" for dismissal.

The court has previously defined the test for determining whether "just cause" exists for termination of a tenured municipal employee as follows:

> "...one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. The record here provides no basis for finding that the irregularities in appellant's conduct have any such tendency. It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service." <u>State ex rel. Gudlin v. Civil Service Comm.</u> (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 799.

Courts of other jurisdictions have required that a showing of a sufficient rational connection or nexus between the conduct complained of and the performance of the duties of employment. 2/

The basis for such a requirement of "just cause" or rational nexus is between conduct complained of and its deleterious effects on job performance as constituting grounds for termination of tenured government employees has been to avoid arbitrary and capricious action on the part of the appointing authority and the resulting violation of the individual's rights to due process of law. Only if the employee's misconduct has sufficiently undermined the efficient performance of the duties of employment will "cause" for termination be found.

In determining whether "cause" for termination exists, courts have universally found that persons assume distinguishing obligations upon the assumption of specific governmental employment. Conduct that may not be deleterious to the performance of a specific governmental position - i.e. a Department of Agriculture employee - may be extremely deleterious to the performance of another governmental occupation - i.e. teacher or houseparent in a mental ward. Thus it is necessary for this court to determine the specific requirements of the individual governmental position.

In the instant case, the appellant was charged with the duties of care, training and supervision of mildly and moderately retarded teenage boys. It was the duty of the appellant to emulate parentship and present a code of conduct that the residents of Southern Colony could copy. He was to represent and project to the patients an appropriate male image consistent with that experienced by the remainder of society.

One specific aspect of the responsibilities of the houseparent was to direct the patients to a proper understanding of human sexuality. Such an under-

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2/ See Norton v. Macy (D[illegible] Cir. 1969), 417 F. 2d 1161; Richardson v. Hampton (D.C. D.C. 1972), 345 F. [illegible]p. 600; Wentworth v. Laird (D.C. D.C. 1972), 348 F. Supp. 1153; Morrison v. Board of Education (1969), 1 Cal. 3d 214, 82 Cal. Rptr. 174, 461 P. 2d 375.

standing required the projection of the orthodoxy of male heterosexuality. Consistent with the projection of the normalcy of heterosexuality by the houseparent was the requirement that he project the unorthodoxy of male homosexuality to the patients under his care.

It was the finding of the Board of Personnel that the appellant failed to comply with the above dscribed requirements of the job of houseparent. It was also their finding that the conduct of Safransky complained of had a substantial adverse effect in the performance of his job duties. His discussions concerning his homosexual associations and activities in the presence of residents constituted an adverse influence to the proper performance of his position duties - namely, the projection of the orthodoxy of male heterosexuality. We are satisfied that such findings are supported by substantial evidence. The deleterious effect on proper job performance is obvious. An individual fulfiling the position of houseparent cannot discuss homosexuality in the presence of his wards without at least communicating an idea of tacit approval of such action. The patients are all too vulnerable to accept as orthodox those ideas propounded by their houseparent. Likewise, the labeling of another houseparent as lesbian - a term which the patients could understand - in the presence of the residents could not be said to have projected a proper understanding of orthodox sexuality.

The unorthodox attitudes of Mr. Safransky were similarly projected with deleterious effects on several other occasions. The incident of grabbing of another houseparent's leg caused questions from the patients concerning Safransky's actions. The doning of feminine face makeup, including eyeshadow, mascara and tinted base caused comments from some of the residents as to Mr. Safransky's "strangeness." Such actions were entirely inconsistent and substantially deleterious to the effective performance of the job of houseparent at Southern Colony.

The appellant claims that his off-duty association with other homosexuals is constitutionally protected. While such may be the case, this court need not herein determine whether mere association with other homosexuals during off-duty

hours is constitutionally guaranteed. [3/] The appellant was terminated for activities performed while on duty. Such being the case, the appellant's off-duty associations and activities are not in issue. Likewise, the question of whether an individual may be terminated solely for his homosexual status is not an issue and need not be determined.

The appellant's claim that his dismissal for on-duty self-avowal of homosexuality and discussions of his homosexual life style is a denial of his First Amendment right of free speech cannot be sustained. Recently, this court ruled that an individual's First Amendment rights are necessarily limited by the manner and place of their exercise. This being true, the court in State v. Elson (1973), 60 Wis. 2d 54, 208 N.W. 2d 363 ruled that despite the fact that defendant's actions came within the general area protected by the First Amendment, the fact that he chose to exercise that right in a mental ward excepted his conduct from constitutional protection.

"Defendant's conduct might be tolerated under different circumstances such as a confrontation on a public street. It cannot be tolerated in a mental hospital ward in the presence of numerous patients." supra, at p. 61.

Similarly, in Acanfora v. Board of Education of Montgomery County, supra, the court upheld the transfer of a known homosexual teacher from a classroom teaching position to a non-teaching position because of his unrestrained off-duty advocacy of his homosexual way of life. The court reasoned that though such speech is generally constitutionally protected, such unrestrained exercise of that right under certain circumstances may constitute grounds for termination or discharge.

"The instruction of children carries with it special responsibilities, whether a teacher be heterosexual or homosexual. The conduct of private life necessarily reflects on the life in public. There exists then not only a right of privacy, so strongly urged by the plaintiff, but also a duty of privacy. It is conceded that it would be improper for any teacher to discuss his sex life in the school environment...

"As a result of the distinguishing obligations which a person assumes upon signing a contract to teach children, the standard must shift to accord with the goals of the educational process. The question becomes whether the speech is likely to incite or produce imminent effects deleterious to the educational process. Such speech is not within the bounds of the 'protectable' and the Board of Education is not precluded from taking reasonable action with respect to it." supra, at pp. 855-856.

3/ See Acanfora v. Montgomery County Board of Education (D. Md. 1973), 359 F. Supp. 843; Wood v. Davison (N.D. Ga. 1972), 351 F. Supp. 543.

Because of the teacher's impropriety in advancing his sexual tendencies during off-duty time, the court upheld the action of the Board of Education.

We conclude that there is substantial evidence in view of the entire record to sustain the decision of the Board upholding appellant's discharge. The record also supports the finding that the appellant's actions constituted just cause for discharge.

By the Court: - Judgment affirmed.