file Decision

STATE OF WISCONSIN

BEFORE THE STATE PERSONNEL BOARD

Richard Harriman,
Appellant,

vs.

Wilbur J. Schmidt, Secretary
Department of Health & Social Services,
Respondent.

MEMORANDUM DECISION

#418

Appellant was an Institutional Aide II at Northern Colony and Training School. He was a permanent employe in the state's classified service.

On December 9, 1970, he was issued the following letter over the signature of A. C. Nelson, Superintendent of the institution:

> "You are hereby notified that you are discharged effective December 9, 1970 at the end of your shift, from employment at Northern Wisconsin Colony and Training School due to the fact that you have been arrested twice within several weeks, the last being a charge of contributing to the delinquency of minors. It is felt that your conduct is detrimental to the institution and its employes."
> Board's Exhibit #1.

The Board became concerned immediately with the appeal and the Chairman on February 7, 1971 wrote to both counsel for the Respondent and the then attorney for the Appellant for more enlightenment as to the issues that would develop at the hearing. The Chairman's letter was intended to convey the warning that the Board would not regard an arrest or arrests of an employe, standing alone, as just cause for his discipline.

On February 9, 1971, counsel for the Respondent responded to the Chairman by letter:

> "In response to your letter of February 7, 1971, with regard to the above entitled matter, the respondent intends to introduce evidence concerning the appellant's activities outside his employment which reflect adversely on the reputation of other state employees. We will attempt to show that there was conduct unbecoming a state employe and that the appellant's arrest record is evidence of community concern regarding this conduct.

Respondent also intends to show that the fact of these arrests had a demoralizing affect on his co-workers, whether or not they were justified in so feeling.

Respondent also contends that appellant's poor attendance record was partially directly related to the criminal charges and is partially related to other aspects of his off-the-job conduct.

None of the aspects of this matter can be considered independently. The individual items; arrest record, other off-the-job conduct, attendance record, adverse public opinion and co-employee reaction, must be viewed in light of each of the others.

We hope that this answers your questions and trust you will contact us if we can provide any additional information." Board Exhibit 4.

The first arrest of the Appellant was early in November, 1970. The charge was Receiving Stolen Property (s.943.34). The charge was subsequently dismissed without prejudice when the court was advised that the complaining witness had moved out of the state.

The second arrest of the Appellant was on December 3, 1970. The charge was Contributing to the Delinquency of a Minor (s. 947.15(1)(a)). This charge was subsequently dismissed by the court.

s. 16.24(1)(a) Wis. Stats. reads in part:
"In all such cases the appointing officer shall at the time of such action, furnish to the subordinate in writing his reasons for the same."

We agree with the Respondent that the "reasons" need not be stated with the preciseness of a pleading, that it is sufficient if the employe is fairly advised of the misconduct with which he is charged.

Accordingly, this Board is not going to be literal and say that the Respondent is stuck with the reason, "arrests" - which reason is not of itself just cause for discipline. Neither is this Board going to say that the whole sequence of events that led to the arrests must be disregarded because the charges upon which the arrests were predicated were dismissed.

This Board considers that the reason given, "arrests", freely advises the Appellant that he must defend himself of any misconduct connected with his

being arrested. There is ample authority that an employe may be discharged for incidents involving the same set of facts of which he was acquitted in criminal proceedings. This is because a conviction must be on guilt beyond a reasonable doubt which is a far cry from the existence of substantial evidence required to support just cause.

The Respondent introduced no evidence of the first arrest except a news story in the Eau Claire Leader Telegram of November 3, 1970. Respondent's Exhibit 4. We agree with Appellant that this is the rankest hearsay and must be disregarded. The only other reference to the first arrest is in Appellant's testimony and is not a reference to any of the circumstances prompting the arrest.

The evidence of the second arrest was a news story in the Eau Claire Leader-Telegram on December 4, 1970 and the testimony of Lt. Omtvedt of the Eau Claire Police Department. The news story is hearsay that the Board must disregard.

Omtvedt testified that he was involved in a surveilance of a house occupied by the Mitchells which was frequented by young males and visited often during the school day by female high school students. According to Omtvedt, the investigation was the result of suspicion on the part of school officials, parents and neighbors that drugs and other narcotics were being used. It was reported that when the girls left the house they acted in an unladylike way - strangely.

Omtvedt was on the surveilance for about three months prior to December 1, 1970 when he became ill. Other officers participated. He stated that he had statements from people and had talked to people who had seen narcotics on the premises. Omtvedt testified that Appellant was a frequent visitor to the house for protracted periods while the girls were there.

Respondent made no effort to produce any witnesses who could testify that they had seen narcotics on the premises.

Omtvedt testified from his knowledge of the police records, even though he was not there, that the police made a "bust" or raid of the house on December 3, 1971. Six men, including the Appellant were apprehended in the house along with seven high school girls. When the police entered they were just sitting around the living room, except that one of the men was in the bathroom. No drugs, narcotics or other harmful agents were found. The men, including Appellant, were charged. Later when it developed that none of the girls had any school commitments at the time, all of the charges were dropped.

The Board has had a difficult time in evaluating the nature of the arrests. All of the Board Members have a feeling that the circumstances, particularly of the second arrest, are highly suspect. While there is nothing wrong with it, it is unusual for high school girls to consort en masse with older males for no particular reason. There is the feeling that perhaps the police mangled the raid because of inept techniques or poor timing. There is the feeling that there exists more evidence of what happened to precipitate both arrests than has been put into the record in competent form.

However, the Board must take the case as it is tried to it. The evidence in the record shows no appreciable misconduct. For the Board to speculate that the true facts are different than they are recorded, would be the very arbitrariness and capriciousness that the Board looks for in the actions of others.

While the Board has said that an arrest of itself is not just cause, it could be imagined that such an involvement with the law on a charge involving a heinous crime or moral turpitude would so effect the employe's fellow workers that retention of the employe would not be tenable. However, in this case, no evidence was offered that the Appellant's involvements in any wise affected his co-workers or their relations with him.

It is frustrating to compare the instant case with Nielsen v. Personnel Board, upon which Respondent relies. It is true that in Nielsen there were

allegations of arrests for disorderly conduct and child neglect of which the employe was never convicted. However, there was overwhelming evidence of misconduct of the Appellant in those very areas. As a matter of fact the child neglect charge was held in abeyance on the basis that the employe and his wife stay out of taverns for a year and that a trained social worker have general supervision of the child.

The real issue in Nielsen was whether or not off-the-job conduct of a state employe could be grounds for discipline when there was no on-the-job dereliction. The court sustained this Board's position that it could be. This determination is the reason for the rule that no person has a natural right to state employment. It is not a rule that derogates the right of an employe to maintain his job when there is no just cause for his dismissal.

Respondent introduced considerable evidence of the absenteeism of the Appellant, particularly in the latter months of 1970, and of the effect of that absenteeism on the work management in the wards to which Appellant was assigned. However, he made no effort to correlate absences to the times when Appellant was alleged to frequent the Mitchell house.

Absenteeism was not specified as a reason for termination in the letter of December 9, 1970, either directly or inferentially.

Respondent contends that this Board should consider whether or not absenteeism was just cause in this matter for the termination of the Appellant because:

1. Appellant was fully advised well in advance of the hearing that there would be reliance on that reason; and

2. The Board is always entitled to look at the entire record of an employe in reviewing his appeal.

It is true that the Appellant did have this advice after the notice from

Respondent's Reply to Contentions and from the Chairman's inclusion of absenteeism as an issue in his Determination of Issues. This does not cure the defect that s. 16.24(1)(a) requires the appointing officer to furnish the subordinate his reasons in writing at the time of the action. Absenteeism was not specifically or generally given as a reason at that time. It would be denying the Appellant due process of law to allow the Respondent to later change his reasons or to bind the Appellant by any error of the Board in setting up the hearing. This is true even though the Appellant had ample advance notice of the change in reliance.

The Board is entitled to look at the entire record of an appealing employe. However, this is done only to afford positive or negative influence on whether the specified reason or reasons are just cause. When, as here, the specified reason completely fails, the record of the employe becomes quite immaterial to the Board's decision.

Appellant should be reinstated fully.

Counsel for Appellant shall prepare Findings of Fact and Conclusions of Law consonant with this decision.

Dated:_____, 1971.

STATE BOARD OF PERSONNEL

BY_____

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