STATE OF WISCONSIN BOARD OF PERSONNEL

FANNIE LAUFENBERG, **

Appellant, **

vs. ** ORDER

JOHN WEAVER, PRESIDENT ** Case #553
UNIVERSITY OF WISCONSIN,
**

Respondent.

The Board having entered its Findings of Fact and Conclusions of Law in this matter, hereby makes and files the following Order:

1. That just cause existed for the termination of the appellant's employment as a Career Worker A-4, effective May 20, 1972, and that such termination is hereby ratified and confirmed.

2. That the timely appeal by the appellant from such termination of her employment be and the same is hereby dismissed on its merits.

Dated at Madison, Wisconsin this 1st day of March, 1973.

STATE PERSONNEL BOARD, By

William Ahrens

William Ahrens, Chairman

Board Member Percy L. Julian, Jr. dissents and has filed a dissenting opinion which is attached.
Board Member Susan Steininger took no part in the consideration or decision of this appeal.

STATE OF WISCONSIN BOARD OF PERSONNEL

FANNIE LAUFENBERG, **

Appellant, **

vs. ** FINDINGS OF FACT AND CONCLUSIONS OF LAW

JOHN WEAVER, PRESIDENT ** UNIVERSITY OF WISCONSIN,

Respondent. **

The initial hearing was held September 15, 1972, in Room 1100 Wilson Street State Office Building, Madison, Wisconsin, and Board members present were William Ahrens, as Chairman, Charles Brecher, John Serpe and Percy L. Julian, Jr. The appellant appeared personally and without counsel, and the respondent appeared by Burton Wagner, as attorney for the respondent. The Board having considered the transcript of the testimony together with the exhibits submitted enters the following:

FINDINGS OF FACT

1. The State Bureau of Personnel inaugerated an Affirmative Action Program in cooperation with the Federal Government. This Public Service Careers Program was dedicated to the purpose of creating a career workers series of classifications to encourage employment of persons who do not possess the minimal prerequisites, qualifications and experience. As a part of this program, a prospective employe is supervised by a job coach whose responsibility it is to secure a position within the Classified Service for the purposes of the indoctrination and training of such employe so that by the end of such probationary period, the employe is qualified then to enter the Classified Service in a class maintained within the State Compensation Classification Plan.

2. Fannie Laufenberg, the appellant herein, was hired October 4, 1971, at the University Hospitals under the Public Service Careers Program as a Career Worker A-4. The purpose of this employment was to train her on the job so that, at the end of the probationary period on April 3, 1972, she would be able to meet the minimal qualifications for the Civil Service classification of Nursing Assistant 1.

3. At the objective level as Nursing Assistant 1, the appellant would be required to assist in providing nursing care to patients within a hospital setting and to perform nursing assistant functions providing direct patient care and comfort and to work under the supervision of a Registered Nurse.

4. At the time of the commencement of her employment, the appellant was assigned to Ward 1-C at the University Hospitals working directly with patients assigned to this ward and she was to provide for the immediate personal needs of the ward patients.

5. This responsibility involved a certain amount of exercise of independent judgment and the ability to establish and understand and anticipate patient needs and requirements.

6. In the performance of the appellant's duties, she was supervised by Kathryn Thommesen who was a Nurse's Supervisor 1 in charge of the staff supervision and the coordinating of the work of the hospital employes to insure that the patients receive adequate medical care.

7. The appellant commenced her employment on October 4, 1971. In addition to the supervision which she received on the job, the appellant likewise held conferences with Mabel Smith, her job coach. Approximately four months after the commencement of her employment, the appellant was evaluated by her supervisor. At this time she was counseled and advised that, while she was a willing worker, she was needed to listen more closely to directions and that she needed to additionally concentrate to retain instructions given to her. In the event she was not sure as to what procedures to follow, that she should request instructions from her supervisor. At the time of this rating and evaluation, the supervisor indicated that she had conferred with the appellant on December 18 and December 23 on her performance. The appellant was requested to improve her personal appearance and her charting procedures and make a concerted effort to retain the training and instructions given to her on the job by her supervisor.

8. On March 27, 1972, before the expiration of the six month probationary period, Kathryn Thommesen, as appellant's supervisor, prepared an evaluation report and a recommendation to terminate the appellant's employment. This report indicated that, while the appellant was willing and was basically a good worker, that she did not have the ability to meet the basic job requirements. That she lacked the ability to understand the needs of an ill patient and was unable to retain her prior training and the instructions given to her. This report indicated an unsatisfactory ranking in the exercise of judgment and a poor rate of on-the-job learning. The accompanying attachments to the probationary performance ranking indicated the appellant needed additional

training in the evaluation of safety factors relating to patient care, and to use more discretion as to her discussions and conversations with the patients. The report recommended termination and employment in an area which did not involve direct patient involvement. The appellant was likewise criticized for her ability to anticipate and provide for the basic patient needs and that she lacks insight in judgmental ability necessary to perform at the expected level. The appellant has exhibited a difficult time understanding a patient's capabilities, depending upon the nature of his illness and the treatment being received, and appellant does not exercise good judgment in conversations with the patients. The appellant likewise has an inability to recall and retain learning experiences which necessitate continuous supervision. At the time of the report, she was not functioning at a level socially appropriate for this position.

9. After the supervisor's recommendation to terminate, the appointing officer delayed the termination of the appellant, during the probationary period, to attempt to provide additional instruction and training and to further explore the possibility of finding suitable employment within the employing unit which did not involve direct patient care.

10. On April 11, 1972, Bernice Landig conferred with the appellant relating to the recommendations for termination and discussed with the appellant a desirability of some other type of employment for her which did not involve direct patient care. At this conference, the appellant was notified that in the event other suitable employment could not be arranged, that she would be terminated for cause, effective May 20, 1972.

11. From April 11, 1972, to May 8, 1972, attempts were made by the respondent to secure a suitable vacant position and that neither the employing department nor the job coach was able to find a suitable position for the appellant. After the termination of the appellant and prior to the hearing, a job became available and the appellant was interviewed for this position and she decided that she was not interested in accepting the offer of employment.

12. That a written notice of termination, dated May 8, 1972, was signed on behalf of the appointing officer, by Ross Reinhold, advising the appellant of her termination, effective May 20, 1972. This notice advised her that this was a termination for cause, and an extension of the probationary recommendation to terminate for the appellant's inability to properly perform the required position duties and the delay was necessary to afford the appointing

officer additional time to seek other vacant positions for which the appellant may be qualified. The probationary performance report and recommendation for termination and the supporting documents and reasons were attached to the letter of termination. The stated reasons for such termination action was that the appellant was unable to satisfactorily perform the position duties and that she was unable to comprehend the requirements of effectively performing her day-to-day work in patient care and that efforts to counsel and train the appellant to meet the minimal standards were unsuccessful.

13. The Board, in applying the required burden of proof, finds that the respondent has shown clearly and convincingly that the stated reasons in the notice of termination, dated May 8, 1972, were true, that adequate cause exists for the termination of the appellant's employment.

14. The appellant's notice of appeal was timely filed.

Based on the following Findings of Fact, the Board makes the following:

CONCLUSIONS OF LAW

1. That just cause existed for the termination of the appellant's employment as a Career Worker A-4, effective May 20, 1972, and that such termination is hereby ratified and confirmed.

2. That the timely appeal by the appellant from such termination of her employment be and the same is hereby dismissed on its merits.

Dated at Madison, Wisconsin this 1st day of March, 1973.

STATE PERSONNEL BOARD, By

William Ahrens

William Ahrens, Chairman

Member Julian did not concur in the majority opinion of the Board and has filed a dissenting opinion attached hereto, dated 3-1-73

STATE OF WISCONSIN BOARD OF PERSONNEL

FANNIE LAUFENBERG,

Appellant,

v.

JOHN WEAVER, President
University of Wisconsin,

Respondent.

DISSENTING
OPINION

Before, AHRENS, BRECHER, JULIAN, and SERPE.

JULIAN (dissenting). I respectfully dissent. The decision which the majority reaches today, in my view, emasculates both the letter and spirit of the clear directions the Wisconsin Supreme Court gave to us in Reinke v. Personnel Board, 53 Wis.2d 123 (1971).

In Reinke the Court directed us to require the respondent to prove his case "to a reasonable certainty by the greater weight of the credible evidence," 53 Wis.2d at 137. The burden was placed squarely upon the respondent. The appellant does not have to prove her merit or her innocence from the accusations of her employer. By the very fact that appellant is a permanent employee in the classified service (a fact the majority concedes) she is presumed to have met the minimum criteria for performance of her duties.

But today's decision wipes away all that. The majority upholds this discharge on evidence that does not even come close to satisfying the Reinke standards. In no manner can it be said that the respondent here has met its burden of proof. Indeed, the letter of termination, on its face, does not allege facts which if proved constitute just cause for termination of appellant's employment. The letter is replete with conclusions and opinions, all unsupported by any factual underpinning.

However, assuming arguendo that the letter of termination alleges facts which if proved constitute just cause for termination of appellant's services, the respondent has not proved the allegations "to a reasonable certainty by the greater weight of the credible evidence," 53 Wis.2d at 137. The standard set by the Reinke case is not to be taken lightly. It does not mean that simply any evidence is sufficient. It means that the respondent must convince a majority of the Board to a reasonable certainty by the greater weight of the credible evidence. The respondent must convince a majority of the Board that the greater weight of the credible evidence not only leads to the result desired by the Respondent, but, also, that the desired result should be reached. Kauch v. Chicago & M.E.R. Co., 176 Wis. 21, 26, 186 N.W. 257, 259 (1922); Potter v. Schleck, 9 Wis.2d 12, 18-19, 100 N.W.2d 559, 563 (1960).

By "the greater weight of the evidence" is meant evidence which when weighed against that opposed to it has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief. "Reasonable certainty" means a sureness that is reasonable. It is not a fanciful sureness, but one founded in reason.

Once the facts have been established to a reasonable certainty by the greater weight of the credible evidence, the burden of the respondent does not end. The respondent must still show that these facts constitute just cause for the action taken or result desired.

The tragedy of this case, as I see it, is that the hospital authorities had an opportunity to terminate appellant at the expiration of her probationary period and, although then aware

of the problems of which they now complain, consciously elected to give the appellant permanent status. They now try to come before this Board and produce evidence which might be sufficient to terminate a probationary employee but is not sufficient (in my judgment) to terminate a permanent employee.

The reasons given for appellant's termination are at best amorphous. Findings of Fact numbers 8 and 9 of the majority opinion bear this out. The majority finds that the appellant's supervisors believed she could not "anticipate...basic patient needs," yet there is no credible evidence in the record to prove this, let alone to understand what is a "basic patient need." The appellant was apparently criticized by her superiors because of their belief that she needed "to use more discretion as to her discussions and conversations with patients" (Majority Findings of Fact, No. 8). The evidence presented at the hearing failed to substantiate this criticism.

The result reached by the Majority in this case is a prime reason why hearsay testimony, except as shown to be probative by courtroom standards, should be excluded from administrative hearings such as this one. The decision of the Majority is built on a foundation of hearsay, much of it once or twice removed. This hearsay has been mistaken for the hard evidence necessary to reach the result which the Majority desires.

The evidence in this case, in my opinion, permits no other conclusion but that appellant must be reinstated. Not only has the respondent failed to prove that the facts relied on to terminate appellant were true, but the respondent has wholly failed to show that those facts, even if true, constitute just cause for the termination. I would, therefore, reverse the

decision of the respondent and reinstate appellant.

Dated at Madison, Wisconsin this 1st day of March, 1973.

Percy L. Julian, Jr.
Member, State Personnel Board