

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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KENT H. MAYES,  
 Appellant,

v.

JOHN C. WEAVER, President  
 University of Wisconsin,  
 Respondent.

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OPINION  
 AND  
 ORDER

Case No. 73-112

Before AHRENS, Chairman, JULIAN, SERPE, and STEININGER.

JULIAN, writing for himself and Chairman AHRENS and Board Members SERPE and STEININGER.

OPINION

On November 1, 1971, Kent H. Mayes, the Appellant, commenced his employment for the Respondent as a police officer at the University of Wisconsin-Parkside in Kenosha, Wisconsin. Due to a cut in appropriations for the Parkside campus, the Department of Safety and Security determined that one police officer would be laid off to effect such reduction in the work force and on May 23, 1973, the Appellant was notified that in thirty (30) days he would be laid off.

On June 5, 1973, the Appellant wrote a letter to the Board appealing his layoff. In the letter, he objected to the performance evaluation he had received as part of the layoff procedure. The letter stated,

After reviewing the evaluation of the officers involved in lay off I feel I was not given a fair evaluation. I have written proof that I am better qualified than one of the officers who received a higher rating than I on the evaluation. As far as I am concerned the lay off performance rating scale was done on a very personal bases [sic] and was not fairly done.

The Appellant, in his letter, goes on to describe his own qualifications and those of one of his fellow police officers, Lawrence Augustine. He states further that he felt that Ronald D. Brinkman, the Director of the Department of Safety and Security-Parkside in Kenosha, Wisconsin felt he was causing trouble when he filed grievances as the Union Steward and desired to get rid of him for that reason.

The issue agreed to by the parties raised the question whether the procedures were correctly followed and whether the Appellant's layoff was otherwise proper. At the prehearing conference, in discussing the scope of the issue, the Appellant indicated that his objections ran to the matter of his evaluation. The Board Member presiding at the conference stated he contemplated that the matter of whether the Appellant was properly evaluated would come within the scope of the issue as agreed to by the parties.

At the outset of the hearing, the Board Chairman, without objection by counsel for the Respondent, stated that the burden of proof will be on the Respondent, who is required by law to prove to a reasonable certainty by the greater weight of the credible evidence that the facts as relied on and stated in the layoff notice are in fact true and those facts constitute just cause for the action taken.

The statutes and the Rules of the Director of the Bureau of Personnel provide that the order of layoff is based on seniority and job performance. Section 16.01(2), Wis. Stats. provides that the State shall base "the treatment of its employes upon the relative value of each employe's services and his demonstrated competence and fitness." Section 16.28(2), Wis. Stats. provides that the order of layoff of such employes may be determined by seniority or performance or a combination thereof or by other factors in accordance with rules established by the Director of the Bureau of Personnel.

The Director's rules provide that after seniority is taken into account, the employe selected to be laid off shall be the employe in the layoff group who is least efficient and least effective. Pers. 22.03, Wis. Adm. Code, provides for the procedure to be used in determining which employe shall be laid off when a reduction in force is necessary. Employes in the affected classification are ranked according to seniority in State employment.

In instances when one is to be laid off, as in this case, the three employees with the least seniority are placed in a layoff group. Those three employees are then evaluated according to their job performance based on recent and comparable standards of such performance, which in this case consisted of a performance rating on a form prescribed specifically for that purpose. Those evaluations result in a ranking of employees. The employee who ranks lowest of the three in the performance rating is then laid off to implement the mandate of the rule that "the most efficient and effective employees will be retained."<sup>1/</sup>

The purpose of both the statutes and the rules, cited above, is to ensure that the comparatively most efficient and effective employees are retained in State employment, while the least efficient and effective employees are laid off during a reduction in force. These requirements are not met merely by a showing before the Board that the Respondent believed that one employee was more efficient and effective than another, but that facts exist which support such a belief. The rule has long been established in discharge cases that the State cannot discharge an employee merely because it believes the employee has engaged in certain misconduct, which constitutes just cause for discharge; but rather, it must prove before the Board that the misconduct actually occurred. In Bell v. Personnel Board, 259 Wis. 602 (1951), the Court said,

In determining whether Bell was discharged for just cause it is not sufficient for the board to find that Marcus believed Bell was guilty of certain conduct, which, if true, would constitute just cause for the discharge; but rather, whether Bell actually did these things which the Board has found that Marcus believed Bell did.

The subject of discharges and layoff has been given similar treatment in the statutes and by the Board. Section 16.05(e), Wis. Stats. gives the Board the power to hear appeals from "decisions relating to demotions, layoffs, suspensions or discharges" (emphasis supplied), when it is alleged

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<sup>1/</sup> Wis. Adm. Code, Pers. 22.03(5), October 1972.

that such decision was not based on just cause. The Board has followed the practice, as it did in this case, of placing the burden of proof on the issue of just cause for layoff on the Respondent, the same as in discharge cases.

We turn to a review of the evidence presented at the hearing to determine whether the Respondent has met its burden of showing that the Appellant was less efficient and effective than the other police officers included in the layoff group.

The Respondent's only proffered evidence on this issue was the executed "Layoff Performance Rating Scale" forms for the Appellant and Officer Augustine, which were prepared by Director Brinkman on May 16, 1973. These forms gave numerical values to certain job-related criteria for each employe in the layoff group and resulted in a total numerical performance "score" for Officer Augustine of 1,295 and a "score" for the Appellant of 1,155. The Respondent did not try to establish by witnesses or records why higher ratings were given Officer Augustine than the Appellant for any of the rating factors listed in the form. The executed form is therefore merely the Respondent's assessment of his employes insofar as those characteristics are concerned. It does not prove anything, except what the Respondent believes. It does not establish as fact that the Appellant is sixty points loyal, which was the numerical "score" given the Appellant for loyalty on the form, and that Officer Augustine is seventy points loyal. The same is true insofar as each of the other rating categories is concerned. The Respondent has failed to produce sufficient evidence to demonstrate that there was a factual basis for his conclusion that one employe was more efficient and effective than the other. Nor did Director Brinkman's testimony regarding the loyalty rating, the only rating he testified about, except for one which will be discussed later, shed any light upon the inscrutability of his numerical evaluations. Director Brinkman explained that he ranked Officer

Augustine higher in loyalty because he had more contact with him than the Appellant, which is an improper basis for such an evaluation. He testified that another factor that affected his loyalty rating was the Appellant's attitude toward him, which he did not amplify upon, and then added in his testimony, as something of an afterthought...and to the Department. The testimony of Director Brinkman relative to the loyalty of the Appellant contrasted with the loyalty of Office Augustine remains as nebulous as does the numerical scores of sixty and seventy, respectively, on the layoff performance rating scale forms.

The only additional evidence offered by the Respondent relative to the matter was concerning the Appellant's alleged inaccuracy with his arrest reports. Director Brinkman testified that in the year and a half of the Appellant's employment, in two or three arrest cases he had filed incomplete or incorrect arrest reports and that the Appellant had to return to the Department to complete or correct them.

The Appellant's principal witness was Officer Richard Atkins, a police officer presently employed by the Respondent. Officer Atkins testified that he had worked on the same shift as the Appellant and Officer Augustine at different times during the period they were both employed. He testified that the situation has arisen where Officer Augustine would come to him and ask him, Officer Atkins, to write his reports for him because he couldn't do them himself. Atkins testified that the numerical rating given Augustine for completeness in his work was valid because he, Atkins, wrote good reports and he was the author of Augustine's reports. He testified that Augustine was prompt in completing his reports, because someone helped him. He testified that if he was in a difficult position and he needed another officer's help, he would rather have the Appellant's assistance, because he knows how Appellant reacts. He testified that he did not feel Director Brinkman had an adequate basis to compare the

two officers. He testified that Director Brinkman only rode in the squad car once in three years with him and never sat down and discussed law enforcement with him. He testified that when the Appellant started his employment, his reports were not like they should be, but they did improve. He testified that making out a traffic citation showing the wrong date was a common mistake of police officers.

We regard Officer Atkins' testimony as credible and plausible. It constitutes almost the sole testimony relative to the job performance of the Appellant and Officer Augustine. The rating forms prepared by Director Brinkman, which we have previously found do not constitute evidence of job performance, show only what the Respondent believed the employees' performances to be. Assertions of belief before a hearing of the Board are not sufficient to sustain a decision of the appointing authority if unsupported by facts. Officer Atkins' testimony gives rise to the clear inference that at least one other officer was less efficient and effective than the Appellant.

We find from the evidence before us that the Appellant was not the least efficient and effective employe amongst those employes in the layoff group in the police officer class. We are not saying that the other officer should have been laid off. All we are doing is making a finding based on the evidence before us where the evidence showed that the laid off employe was not the least efficient and effective employe in the layoff group. Upon the basis of the entire record in this case, we, therefore, conclude that the Appellant was not laid off for just cause.

ORDER

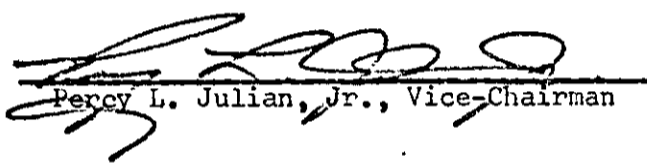
Upon the foregoing opinion and the entire record in this case,

IT IS HEREWITH ORDERED that the Respondent immediately reinstate the Appellant to his former position, without any loss of seniority or other benefits and with full back pay, from the date of his layoff to the date of his receipt of the Respondent's written unconditional offer of recall to active employment.

December 20, 1973.

STATE PERSONNEL BOARD

BY

  
Percy L. Julian, Jr., Vice-Chairman