

OFFICIAL

STATE OF WISCONSIN

PERSONNEL BOARD

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JAMES A. LA ROSE,
Appellant,

v.

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

Case No. 73-114

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JAMES A. LA ROSE,
Appellant,

v.

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

Case No. 73-144

* * * * *

Before: AHRENS, Chairman, JULIAN, STEININGER, and WILSON.

OPINION

AND

ORDER

OPINION

Background Facts

On June 17, 1968, James A. La Rose, the Appellant, commenced his employment for the Respondent as the Mail Services Coordinator at the University of Wisconsin-Milwaukee in Milwaukee, Wisconsin. Sometime in December, 1971, or thereabouts, Richard K. Houlihan was appointed Director of University Service on campus and became the Appellant's supervisor. Appellant's duties involved

responsibility for the operation of the Mail Service, which served the campus community of approximately 30,000 persons. He supervised 12 civil service employees and 1 student employee. Robert F. Schulz was informally designated the Assistant Coordinator by the Appellant and his employment in Mail Service predates that of the Appellant. Two Mail Service employees, Janie Lee Gresbach and John W. Hanin had been employed in the Mail Service as civil service employees for approximately three years and held university degrees. Ralph F. Haas was employed in Mail Service and was the Union Stewart.

On April 4, 1973, Mr. Houlihan wrote Appellant a reprimand letter for having made a phone call to an employee of another department who found the call embarrassing. Appellant filed a grievance in the State-wide grievance procedure and appealed the University's third step determination that the letter was warranted to the Board. The Board referred the grievance to the Director of the Bureau of Personnel for his report and investigation, but neither was ever made. On August 29, 1973, the Respondent discharged the Appellant by a letter which listed twelve (12) charges as the reasons for his action. The Appellant filed a timely appeal. The parties agreed that in this proceeding the Board should resolve the dispute between them relative to both the letter of reprimand and the discharge.

We find the foregoing to be the material background facts in the matter and will hereafter make specific findings concerning each of the charges set forth in the letter of discharge.

Alleged Failure to Respond to Discussions
and Evaluations

The first charge against the Appellant is that he violated the University work rule relating to insubordination by not carrying out suggestions made in

discussions and evaluations. The charge states:

1. Your violation of University of Wisconsin Work Rule 1, in that you failed to respond to:
 - A. numerous discussions emphasizing the importance of good personnel relationships to total supervisory job performance.
 - B. two successive annual evaluations highlighting the need for improvement in personnel relationships.

The work rule prohibits "Disobedience, insubordination, impertinence, negligence, or refusal to carry out assignments or instructions."¹ Mr. Houlihan gave two examples of the kind of discussions he referred to in subsection A of charge 1. In one instance, in November, 1972, he attempted to counsel Appellant in the area of personnel relationships. In a second incident, he said that he felt that the Appellant could have any job at the University that he wished, if he would improve his personnel relationships with his clients and his employees. Mr. Houlihan prepared two Performance and Development Reports for the Appellant. One on April 20, 1972; the other on April 12, 1973. Both reports rated the Appellant as satisfactory. Both lauded his managerial abilities and said that suggestions had been made or implemented to improve his personnel relationships. The Appellant received full merit pay increases at about the same time as the reports and an interim increase in between.

In essence, the Appellant is being discharged under this charge for refusing to follow "instructions" when the instructions at the time they were made were viewed as counseling and suggestions. Moreover, the charge alleged a failure to respond, but does not specify what acts the Appellant did or did not do to demonstrate that he refused to carry out these claimed instructions. Furthermore, while the Appellant must obviously have known that Mr. Houlihan felt he could improve in personnel relationships, he was rated satisfactory overall and received merit pay increases. Indeed, in the last Report,

¹ We have no occasion on this appeal to determine whether University Work Rule 1 is valid since that issue is not raised here.

Appellant commented that since he was meeting his budgetary and service objectives, he felt that undue emphasis had been placed on his personnel relationships. Such comment hardly bespeaks a person who was given to understand that what was made as a suggestion is really an order, and failure to obey will lead to discharge. We find that the Respondent has failed to show the Appellant failed to respond to clearly discernible instructions and assignments in contravention of Rule 1 of the University.

Alleged Failure to Respond to
Instructions in Letters of Reprimand

The second charge against the Appellant is that he violated Rule 1 relating to insubordination, by not carrying out instructions contained in certain letters of reprimand. The charge states:

2. Your violation of University of Wisconsin Work Rule 1, in that you failed to respond to my instructions in letters of reprimand of November 27, 1972, and April 4, 1973, regarding the elimination of your shortcomings in the area of human and personnel relations.

The language of Rule 1 has been previously set out in full in the discussion of the first charge. On November 27, 1972, Mr. Houlihan advised the Appellant in a letter that his "attitude, tone of voice, and language during our conversation on Friday when you objected to some arrangements that I had made, was absolutely unacceptable." The letter further stated:

"I told you in a conversation on Monday morning, November 27, 1972, that if I had one more indication of this type of behavior on your part that I would make a major change regarding your assignment."

The letter made clear that although the language that Mr. Houlihan regarded as offensive was directed at him, that he was concerned just as much with Appellant's conversations with employees and other University personnel. The letter stated that if it happened again, it would result in a major change of assignment.

We read the letter to be a warning letter, which put the Appellant on notice, that if unacceptable language and performance was used in the future, the Respondent might take disciplinary action. This would require that, if the Respondent felt there had been misconduct by the Appellant, he discipline him for such subsequent misconduct, rather than on an unspecified charge¹ that he failed to respond to the letter. We find that Appellant did not violate Rule 1 by allegedly failing to respond to any alleged instructions contained in the reprimand letter dated November 27, 1972.

The reprimand letter of April 4, 1973, will be considered in a somewhat different manner than the earlier reprimand letter. This is because the letter does contain specific instructions to make a series of appointments at the Personnel Office, which is the subject of the third charge. At the same time, the letter of April 4 was appealed through the State-wide grievance procedure to the Board and is a matter for consideration in this proceeding. The Appellant has never conceded that the Respondent was justified in issuing the letter. Since the Respondent has supported its action, in part, on the basis of the letter, the matter of whether the Respondent had cause to issue such a letter at all will be considered in this proceeding.

The letter of April 4 read, in part, as follows:

"The incident of your telephone calls which were embarrassing to another department employee as cited in the step two grievance of Diane Philipp of April 2, 1973, was a serious personnel judgmental error."

The Appellant was reprimanded for what he allegedly said in a telephone call to Ms. Penny Benning. The Appellant was trying to contact John Michaelis, a Mail Service employee, who was absent from work, but was scheduled to pick up the mail early the next morning. Mr. Michaelis did not have a home telephone, but had a friend, Ms. Diane Philipp, who worked in the News Service,

another University department, through whom Appellant had reached him before. The Appellant called News Service to contact Ms. Philipp. He explained to Ms. Benning, who answered the phone, that he was attempting to reach Ms. Philipp to pass a message to Mr. Michaelis. Appellant requested Ms. Philipp's phone number in order to do so. He testified that he was not abusive to Ms. Benning, when he spoke to her on the telephone. The record does not indicate what was said in the conversation. Neither Ms. Benning nor Ms. Philipp testified as to what Appellant allegedly said, which might have caused either of them embarrassment. We find that the Respondent has failed to prove that the Appellant's telephone call to Ms. Benning was "a serious personnel judgmental error." There was no showing whatsoever as to the content of the phone conversation and we cannot speculate as to its content.

We find that Appellant did not fail to respond to any instruction in the first reprimand letter and that the second reprimand letter was not proved and further that Appellant did not violate any University rule thereby. The matter of whether he failed to respond to instructions contained in the April 4 letter is the subject of the third charge.

Alleged Failure to Follow Instructions

To Go To Counseling

The third charge alleged that the Appellant failed to follow instructions to obtain counseling at the Personnel Office. The charge states:

3. Your violation of University of Wisconsin Work Rule 1, in that you failed to follow my instructions, a job assignment, to contact the University of Wisconsin-Milwaukee Personnel Office to avail yourself of their counseling service, within ninety days (April 4 - July 4, 1973), the objective of which was to be to improve your performance in the area of personnel relationships, particularly with members of your own staff.

The letter did instruct the Appellant to make a series of appointments with Mr. Larry Calvin of the Personnel Department for counseling to "improve your...personnel relationships." It stated further, "Abrasive and authoritarian response to problems must be moderated or eliminated." The letter set forth two scenarios. If no improvement in the Appellant's style in dealing with people and staff morale occurred in 90 days, "a change in your assignment will come under consideration." On the other hand, Mr. Houlihan stated in the letter, that the reprimand letter of April 4, and the letter of November 27, 1972, would be removed from the files, "if no further incidents of this type occur within six months of this date." As previously indicated herein, the Appellant filed a grievance claiming that the reprimand letter was unjustified, and we have previously found its contents not proved. He initially filed it at Step 2 of the grievance procedure, where Mr. Houlihan affirmed his original position. Appellant then appealed the grievance to Step 3. At that step, the Appellant met with Allen C. Cottrell, the Employment Relations Manager at the Milwaukee campus. The Appellant asked Mr. Cottrell if he might fulfill the requirements of the letter by talking to Mr. Calvin once and see what Mr. Calvin could offer. Mr. Cottrell discussed the matter with Mr. Houlihan and they agreed that because of the sensitivity of the situation, a one-time shot might be deemed sufficient compliance with Mr. Houlihan's instructions. Mr. Cottrell advised the Appellant that probably one session with Mr. Calvin would be sufficient. On May 14, 1973, Mr. Cottrell, in a memorandum, upheld the Respondent's action in giving the Appellant a letter of reprimand and, sometime thereabouts, communicated this answer to the Appellant. Appellant advised Mr. Cottrell he intended to appeal his grievance to the Board, which he did. Subsequently, the Appellant met informally with Mr. Calvin and discussed the Respondent's reprimand letter.

Mr. Calvin advised him that one factor in the Appellant's favor was his ability to get the work done; but Mr. Calvin advised the Appellant he should "give in on the little things where it wasn't a matter of discipline."

We find that notwithstanding the alleged facts contained in the April 4 letter of reprimand were not proved, the Appellant did comply with the instructions contained within the letter, and therefore, did not violate a University rule as alleged in the third charge.

Alleged Deteriorating Morale in Mail Service

The fourth charge against the Appellant in support of the Respondent's discharge action is that morale had recently deteriorated in the Mail Service.

The charge was as follows:

4. The evaluation and report of the University of Wisconsin-Milwaukee Personnel Office, undertaken after the ninety day period without contact from you, which indicated a marked deterioration, rather than improvement, in the morale of the University of Wisconsin-Milwaukee Mail Services staff as evidenced by a series of transfer requests from key personnel of the University of Wisconsin-Milwaukee Mail Services.

This charge does not allege any violation of a work rule. Sometime in the late spring of 1973, two incidents touched off a dispute between the Appellant and some of the employees employed in Mail Service. Ms. Gresback wished to play her tape recorder at her work station. The Appellant forbid her from doing so, since he felt that he could not permit her to do so without permitting the other employees to do likewise. Appellant felt this would result in rock and roll music, and the like, going out over the telephone lines from Mail Service when persons telephoned. Similarly, the Appellant forbid employees in Mail Service to eat doughnuts while sorting or processing mail, on the grounds sugar and crumbs would get on the mail. Ms. Gresback was not in

sympathy with the Appellant's position in these matters. On June 25, 1973, she, Mr. Hanin, and Mr. Schulz, requested a transfer out of Mail Service. Their requests prompted Mr. Houlihan to request the Personnel Office to interview Mail Service employees who had requested transfer. Five interviews were conducted. The three aforementioned employees were interviewed, as was Mr. Haas, who had been suspended by the Appellant for disciplinary purposes three times within the last year and a half, and another employee. Ms. Carmen Vaughn, the Personnel Manager, who conducted the interviews, with Mr. Houlihan sitting in, concluded that the employees requested the transfers "because of the personality, negative attitude and actions of the supervisor." No effort was made to evaluate the disharmony in the Mail Service in terms of other considerations. The Appellant was not interviewed. Employees who had not requested transfer were not interviewed. No consideration was given the fact that the Appellant himself had requested to be transferred out of Mail Service, nor that Schulz had reached the top of his pay range and desired advancement, that Ms. Gresbach and Mr. Hanin held University degrees and might not be particularly well disposed to the Appellant's supervision and that Mr. Haas might understandably wish to leave the Mail Service to avoid further discipline. No consideration was given to the fact that many of the complaints against the Appellant relating to supervision regarding sick leave and employees' personal activities relating to tape recorders and eating doughnuts, bore a direct relationship to Appellant's efforts to operate the Mail Service in a businesslike manner.

On August 3, Mr. Houlihan, in a letter, temporarily suspended the Appellant, so Mr. Houlihan could investigate the following matters:

- 1) Appellant's failure to respond to instructions in the two reprimand letters previously discussed, 2) failure to take counseling, 3) deteriorating morale

since the ninety day period referred to in the April 4 reprimand letter. The suspension letter shows that the central charge against the Appellant arose out of the April 4 reprimand letter and Appellant's telephone call to Ms. Benning. It is involved in the charge of failing to respond to instructions, not going to counseling, and established the time period for evaluating morale.

We find that the charge of deteriorating morale was not demonstrated by the evidence. The employees who requested transfer had a strained relationship with the Appellant over a long period of time. Mr. Haas had been disciplined a number of times by the Appellant. Mr. Schulz had been blocked from advancement by the Appellant being appointed Coordinator five years earlier in preference to himself. Ms. Gresbach had become irked at the tape recorder and doughnut incidents, but the cause of the disaffection had been of longer standing. We find no evidence of misconduct by Appellant to support the implied charge that Appellant committed acts in the ninety day period adversely affecting employee morale.

Alleged "frustrated bitch" Who Needs a

"good lay" Remark

The fifth charge is that Appellant made the remark that Ms. Gresbach was a "frustrated bitch and all she needs is a good lay to straighten her out." The charge alleges a violation of the University work rule against profane and abusive language and discourtesy in dealing with fellow employees.^{/2} Robert V. Poppert, the Printing Seminar Coordinator, testified that in May, 1973, Appellant made the remark to him in the course of a discussion in Mr. Poppert's office, without any other persons present. Mr. Hanin testified

^{/2}—Rule 6 states: "Disorderly or illegal conduct including but not limited to the use of profane or abusive language, horseplay, and other such behavior unbecoming a University employee." No issue has been raised as to the validity of this rule under the guarantee of freedom of expression established by the First Amendment to the U.S. Constitution, and we do not decide that question. However, we note that the remarks made concerning Ms. Gresbach would in all likelihood fall outside of the bounds of protected expression.

that he heard the Appellant make the remark while he (Hanin) was working at the labeling machine in Mail Service. The Appellant admits making the remark to Mr. Poppert, but denies having made it to Mr. Hanin. We credit the testimony of Mr. Hanin on this point and find that the Appellant made the remark. We further conclude that making this remark alone does not constitute just cause for discharge.

Alleged "bitch" to be Straightened Out
on the Machines Remark and Ms. Gresbach's

Assignment to the Machines

The sixth charge is that Appellant referred to an employee in a derogatory term and threatened to penalize her with a particular work assignment because of his displeasure. The charge alleges a violation of the University rules prohibiting the lack of good judgment in dealing with fellow employees.^{/3}

The charge is as follows:

6. Your violation of University of Wisconsin Work Rule 21, in that your remark to another employee that Miss Janie Gresbach was "being a bitch, and you would straighten her out by putting her back on the machines" was most inappropriate, and was taken as threat and reprisal--rather than "training" by Miss Gresbach when you did, in fact, assign her to the labeling machine.

No evidence was introduced to show that the Appellant made the remark or that his assignment of Ms. Gresback to the labeling machine was other than as a normal work assignment to move the mail. Indeed, Mr. Hanin who reputedly overheard the remark did not testify that Appellant made such a remark. Appellant denied making such a remark. We find that he did not do so.

^{/3} The same comments we made in footnote #1 are applicable here.

Allegedly Inadequate Accounting for Petty Cash

The seventh charge is that Appellant inadequately accounted for petty cash. The charge stated as follows:

7. Your violation of University of Wisconsin Work Rule 3, and actions contrary to the provision of Chapter 36.10, Wisconsin Statutes, in your very inadequate accounting practices regarding the funds related to the University of Wisconsin-Milwaukee Mail Service "cash box."

An audit of August 3, 1973, revealed that the fund contained \$10.30. Subsequent investigation indicates that the sum should have been greater.

There are not sufficient receipts to support expenditure of the funds. There are not sufficient records in The University of Wisconsin-Milwaukee University Services Accounting Office nor The University of Wisconsin-Milwaukee Cashiers Office to identify funds that should have been transmitted and reported according to the provisions of Chapter 36.10, Wisconsin Statutes.

The University rule cited prohibits failure to supply information when required. The petty cash fund had been in existence for the five years that the Appellant was in charge of the Mail Service and before that. It was an informal fund which usually contained about \$10. Cash for it was obtained by Mail Service employees metering mail for individuals on campus and cash was expended at Appellant's direction as reimbursement for gasoline for the trucks and other out-of-pocket minor expenses. No written record was made of receipts into petty cash or for disbursements out of it. The Respondent had not audited the fund for at least five years, and only did so after the Appellant's suspension. Mr. Houlihan had never even suggested to Appellant that the fund should be operated in any manner other than the way it had been for that period. We find that while the petty cash was operated without strict accounting this had been a long-established practice and that the Appellant did not violate any University rule in this regard.

Alleged Improper Evaluation of Mr. Schulz

The eighth charge is that the Appellant downgraded Mr. Schulz in the latter's performance evaluation report because the Appellant himself had been downgraded. Mr. Schulz testified that the Appellant advised him of the reasons why he was receiving a "satisfactory" rating, rather than the higher one he had received in prior years. He testified that the Appellant then commented that he hadn't received such a tremendous evaluation himself. The Appellant testified he evaluated Mr. Schulz before he had received his own evaluation from Mr. Houlihan. The evidence further indicates that Appellant was not downgraded in the evaluation involved. Appellant testified further that he gave Mr. Schulz the reasons for his evaluation and then commented that all of us think we should get a better evaluation than we get. We find that the Appellant did not downgrade Mr. Schulz, because of any action with respect to Appellant's own evaluation.

Alleged Fear of Intense and Intimate Questioning

The ninth charge is that the Appellant created an atmosphere of fear in Mail service which caused employees to hesitate to request valid sick leave. No evidence was introduced relative to an "intense and intimate questioning" as alleged or that the requested sick leave was "valid." The evidence indicates that Appellant had insisted that John Hanrahan, a Mail Service employee, get his teeth cleaned on Saturday rather than take sick leave during the week. It further indicates Appellant insisted that Mr. Michaelis who was suffering asthma, go to the doctor's office for shots on his off hours, since his absenteeism had already become a serious problem for Mail Service. Mr. Houlihan testified that employees told him they feared the Appellant's

language in questioning them about sick leave requests. One such employee was Mr. Mauch, who was granted time off to take his wife to the hospital, but told Mr. Houlihan, he feared the Appellant's reaction if he asked for additional time into the afternoon when his wife was delayed at the hospital. Mr. Mauch did not appear as a witness to attest to his fears. Appellant testified that if employees had a poor record on sick leave requests, he questioned them about their requests and, that if they didn't, such requests were honored as a matter of course. Appellant was not advised concerning Mr. Mauch's fears by either Mr. Houlihan or Mr. Mauch. While Mr. Mauch's situation lends credence to the charge that the Appellant engendered trepidation in his employees, the episodes with Mr. Hanrahan and Mr. Michaelis show that the Appellant was diligent in inquiring into sick leave requests so that sick leave was not abused so as to interfere with the Mail Service. We find that, based on the evidence presented, Appellant did not create an atmosphere of fear as alleged and did not violate any University rule in that regard.

Alleged Creation of Atmosphere Where Employees

Did Not Disagree nor Discuss Problems

The tenth charge against the Appellant was that he created an atmosphere in which employees feared to disagree with him or discuss problems. The evidence shows that Mr. Schulz, Ms. Gresbach and other employees did discuss their problems with the Appellant. We find that Appellant did not create an atmosphere which foreclosed Mail Service employees from discussing their problems with him.

Allegation of Metering Personal Mail

The eleventh charge against the Appellant was that he "converted University funds to his personal use" by metering his personal mail in contravention of University policy. Appellant testified that, if he metered his personal mail, he put the payment therefor into petty cash. The record contains no evidence to the contrary. The evidence indicated that it was common practice for University employees to submit their mail for metering and pay cash into petty cash. We find this to be true. We find that Appellant did not convert University funds to his personal use. We find further that Appellant did meter his personal mail, as did other employees, and that such acts do not constitute just cause for discharge.

Alleged Unauthorized Use of Keys, Files, and
Dictating Equipment

The twelfth charge against the Appellant was that after he was suspended he used the key to the coordinator's office and took files and dictating equipment out of the office. The charge cites the violation thereby of four different University rules. After his suspension, the Appellant went to the coordinator's office and took home personnel files for the purpose of updating them so that they would be in good order for whoever replaced him. The dictating machine was already at his home. Appellant worked on the files at home and then approximately a week later returned to the Respondent the keys, files, and dictating machine. Appellant had no reason to believe his action was not authorized and, indeed, shows his conscientious concern for his job responsibilities. We find that his conduct was justified and not just cause for discharge.

Conclusion

We conclude that the only charges which have been proven to a reasonable certainty by the greater weight of the credible evidence as true are as follows: Charge 5, the "frustrated bitch who needs a good lay" remark; Charge 7, concerning inadequate accounting for petty cash; Charge 11, concerning metering personal mail; and Charge 12, regarding taking keys, files, and equipment.

Charge 5 is an unfortunate remark and should not have been made; however, we conclude that one offensive, obscene remark by a supervisor is not just cause for discharge.

Charges 7 and 11 regarding petty cash and metering mail were practices of long standing involving no misconduct by the Appellant; we conclude they are not just cause for discharge.

Charge 12 regarding the keys, files, and equipment was justified conduct by Appellant and is not just cause for discharge.

In the aggregate, charges 5, 7, 11, and 12 are not just cause for discharge.

It is unfortunate there was no indication in the proceedings that the Department gave consideration to any action other than discharge such as reassigning the Appellant to other duties within the University system.

ORDER

IT IS HEREBY ORDERED that the Respondent immediately reinstate Appellant to his former position, or a substantially similar position, without any loss of seniority or other benefits and with full back pay from the date of his discharge to the date of his receipt of Respondent's written directive to report to work.

IT IS FURTHER ORDERED that Respondent rescind in writing the reprimand letter of April 4, 1973.

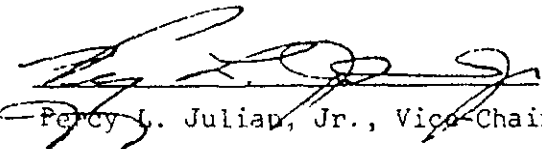
IT IS FURTHER ORDERED that, within 10 days of the date of this Order, the Respondent shall advise the Board in writing concerning what steps he has taken to comply herewith.

Dated

July 3, 1974

STATE PERSONNEL BOARD

BY


Percy L. Julian, Jr., Vice-Chairman