OFFICIAL

STATE OF WISCONSIN PERSONNEL BOARD

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JAMES WEBSTER,

Appellant,

v.

NORMAN M. CLAPP, Secretary,
Department of Transportation,

Respondent.

Case No. 73-136

OPINION

AND

ORDER

* *

Before AHRENS, Chairman, JULIAN and STEININGER.

OPINION

Background Facts

Appellant James Webster was a permanent employee classified as a Data Processing Machine Operator 3 (DPMO 3) with the State Department of Transportation at the time this dispute arose. Appellant worked in the Bureau of Systems and Data Processing, an operation that stores information on all licensed drivers and registered motor vehicles in the state. Access to this information must be maintained for use by law enforcement officers on a 24-hour a day, 7 days a week basis.

Appellant's bureau operated in three shifts, Appellant normally working the first shift from 7:30 a.m. to 4:00 p.m., five days a week. Every third weekend a different group of technical personnel would rotate on to weekend duty. As a matter of course, management always tried to have a secondary or backup person available during night and weekend shifts in case of a computer breakdown or some other emergency.

On July 25, 1973, John McEssy, a DPMO 3 who usually worked the third shift from 12:00 midnight to 8:00 a.m., quit his job without giving any prior notice. This fact was immediately known to the eight other employees in Appellant's bureau, and it appears that they were aware this would mean a probable disruption of their normal work schedules -- including weekend duty on different shifts.

The immediate problem presented was filling the vacancy created by McEssy's departure that would occur in the third shift on Sunday, August 5, and Monday, August 6, 1973. Even if management had been able to find a permanent replacement for McEssy, it seems unlikely that he could have been initiated into the routine quickly enough to fill the vacancy that was to occur. It thus became necessary for management to seek volunteers. A request sheet seeking volunteers was put out on August 1, 1973, and it quickly became apparent that, while volunteers had often been readily available in the past, none would be this time.

August 1 was a Wednesday, and Appellant had the next day off. When Appellant reported for work on Friday morning, August 3, 1973, he was told by a supervisor that he had been assigned to the third shift for two successive nights beginning at 12:00 midnight on Sunday, August 5. Assigning employees to vacancies in shifts when no volunteers are forthcoming was a longstanding policy of management -- a policy of which the employees were aware. Since the vacancy was for a DPMO 3, Appellant was more likely to be chosen to fill it, for it was also management's policy to seek other DPMO 3's to fill a vacancy in that classification before going outside it. Appellant, however, flatly refused his assignment to the third shift. At 2:00 p.m. on the afternoon of August 3, Appellant was again told he would have to work the third shift on August 5 and 6. Appellant again refused -- in no uncertain terms --

and was informed that failure to show up for work as scheduled would result in disciplinary action being taken against him.

Appellant failed to report for his assigned shifts on both days. As a result, he was suspended from duty without pay for one day, August 7, 1973, by the Respondent pursuant to Section 16.28(1)(a) and (b), Wis. Stats. Appellant filed a timely appeal to this Board.

We find the foregoing facts to be true and to be material to the issues which the Board must resolve.

Issues

1. Was Appellant given reasonable notice of the scheduled work from 12:00 midnight to 8:00 a.m. on August 5 and 6, 1973, in the circumstances of this case?

2. Was some rule unknown to Appellant unfairly applied so as to cause him to be assigned work during time he was normally not scheduled to work?

3. Was James Webster suspended from duty without pay for one day for just cause pursuant to Section 16.28(1)(a) and (b), Wis. Stats.?

Appellant Was Given Reasonable Notice in the Circumstances of This Case

We begin by noting that there is no statutory or administrative provision mandating that the Respondent give reasonable notice before it changes the working schedule of its employees. We are, in short, dealing in an area where the rights of employees who are not covered by a collective bargaining agreement are minimal. But we are persuaded that even if Appellant

were entitled to reasonable notice, he was given reasonable notice in this case.

Appellant was first informed that he had been assigned to work the third shift on August 5 and 6, 1973, at 7:45 a.m. on August 3, 1973. This was more than 40 hours before the third shift was to begin. The crux of Appellant's contention of unreasonableness centers on the fact that management knew of the vacancy at least 11 days in advance and that it made no effort to recruit volunteers until August 1, 1973. Unsuccessful in that endeavor, management turned to Appellant only 40 hours prior to the shift and after he had made plans for the weekend with his family.

While this is not unpersuasive, we are nevertheless compelled to reject Appellant's argument and to find that the notice was reasonable. Our finding is prompted at least in part by the nature of the work involved. This was not a job that, with safety, could be ignored. While it is true that nothing of consequence occurred when Appellant absented himself from his assigned work, that cannot be the test. What is important is what might happen if a secondary or back-up person were not present when an accident or emergency occurred. It appears there had already been a fire in an electrical support mechanism of the computer. The impact of such an occurrence on a weekend could be severe, with the possible closing down of the computer until repaired and attendant loss of access to information of importance to law enforcement officers.

It is also true that management did not immediately notify a specific employee that he would be working the third shift on the 5th and 6th upon learning of the vacancy created by McEssy's abrupt departure. But all the employees understood that with McEssy gone, they would be subject to disruption in their normal work schedules, especially with regard to weekend

work. If Appellant had no specific notice that he would be working the 5th and 6th, he surely could not have believed that there were no possibility that he would be working McEssy's shift on those two days.

In any case, we are of the opinion that in the circumstances, the 40 hours notice was reasonable. In the absence of statutory limitations on management's right to assign hours of work, what is reasonable notice is necessarily an ad hoc determination. In Armco Steel Corp., 32 LA 62 (1959), three employees of Armco Steel Corporation were scheduled to work certain shifts, but 24 hours before they were to report, they were notified that no work would be available. Each reported for work but were given no work to perform. They then filed grievances alleging that the company arbitrarily changed their work schedules in violation of their union contract and that they were entitled to be paid for reporting for work as scheduled. The arbitrator held that though the schedule change was in violation of their union contract, the grievants were not entitled to reporting pay. The arbitrator held that the 24-hour notice was reasonable within the meaning of a contract provision excusing the employer from liability for reporting pay if "management gives reasonable notice of a change in scheduled reporting time or that an employee need not report." 32 LA at 64, 67. We conclude that the 40-hour notice here given was reasonable notice to the Appellant.

Appellant Was Not Unfairly Assigned to Work During the Time He Was Not Normally Scheduled to Work

Appellant contends that some unknown rule was unfairly applied in his case causing him to be scheduled to work the third shift on August 5 and 6. As stated above, management attempts to fill vacancies in a certain job classification with employees from the same class before going outside

that class. Here management concentrated on finding a DPMO 3 to fill McEssy's vacant slot. But the only other available DPMO 3 besides Appellant was a Mrs. Sharon Stewart who was working the second shift that weekend. To work the third shift, Mrs. Stewart would have had to work 16 hours straight. It appears, moreover, that there already existed vacancies in the second shift, and management did not want to disrupt that shift even further. It also appears that assigning a DPMO 3 other than Appellant necessarily meant granting overtime hours (more than 40 hours per week), and this management tried to avoid. Finally, Donald F. Tietz, the Computer Operations Supervisor, testified that while other people in Webster's classification had been assigned overtime in 1973, Webster had never been assigned overtime prior to this incident. Appellant was thus the logical choice. His selection was not the product of the irrational or arbitrary impulses of management, but rather was based on factors management had a right and a duty to take into account. The fact that management did not take Appellant into its councils does not by itself make management's manner of assignment unfair. Management has a duty to attempt to be fair about the manner in which it assigns employees to various shifts. In any case, we are unconvinced that the failure on the part of management to lay bare its thought process in this regard was necessarily unfair to Appellant. We find that Appellant's assignment was based on reasonable considerations fairly applied to him.

Appellant's Suspension from Duty for One Day Without Pay was for Just Cause

The Respondent suspended the Appellant for one day without pay for Appellant's refusal to report to work. We find that the Appellant did

refuse to report to work without excuse or mitigating circumstances since he received reasonable notice of a change in his work schedule. Therefore, we conclude that the suspension was for just cause.

ORDER

IT IS ORDERED that the action of the Respondent suspending Appellant from duty for one day without pay is sustained.

Dated June 28, 1974

STATE PERSONNEL BOARD

BY William Ahrens

William Ahrens, Chairman