STATE OF WISCONSIN PERSONNEL BOARD

GEORGE M. SCHROEDER,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 73-24

OFFICIAL

OPINION

AND

ORDER

III

Before AHRENS, Chairman, SERPE and WILSON.

OPINION

I. Facts

The Appellant, George M. Schroeder, began his employment with the University of Wisconsin-Stevens Point in 1966. On January 15, 1973, Appellant was discharged from his employment, effective the following day, by Mr. Leon Bell, Assistant Chancellor for Business Affairs and an appointing authority. Appellant was, at all times material to the instant case, employed as a craftsman-painter, a profession he had pursued for some 35 years.

On December 26, 1972, a certain Martin Varga was assigned to the Appellant as the latter's helper. Varga had worked as a custodian in one of the campus' academic buildings and was not himself a painter, nor did he have any experience as a painter. The University had attempted to hire a painter prior to hiring Varga, but when its attempt in this regard proved unfruitful, it created the position of maintenance man-painter -- a sort of painter's helper. This was the position that Varga filled.

It was intended that the maintenance man-painter would do what were deemed the essentially menial tasks of painting such as laying the drop cloths, patching and caulking cracks and generally preparing a room or area for painting. By

assigning these tasks to Varga, it was felt more of Appellant's time could be devoted to the actual painting, with increased productivity as the desired result. This was deemed especially important because Varga's and the Appellant's first project together was to paint the student rooms in the campus dormitories before the students who occupied them returned from semester break sometime in mid-January, 1973.

On January 2, 1973, a meeting was held at which Appellant's utilization of Varga was discussed. What there occurred is set forth by Mr. Bell in Appellant's discharge letter, which reads in material part as follows:

> "On Tuesday, January 2, 1973 a meeting was held between yourself, Mr. Hiram Krebs, Director of Physical Plant, Mr. Roland Juhnke, Director of Personnel Services and your supervisor Marvin Sorenson, Craftsman Foreman. During that meeting it was spelled out and agreed to by you that you would accept Mr. Martin Varga, Maintenance Man as your assistant and use him as such. That you would use Mr. Varga to perform duties such as placing drop cloths, cleaning rooms for painting, patching cracks in plaster, etc. and as time allowed train him to assist in actual painting duties." (Emphasis supplied.)

The issue, as stipulated to by the parties at the prehearing conference in this case, thus became "whether the Appellant on or about January 2, 1973 agreed to take on and to supervise a Maintenance Helper and then refused to supervise him and to use him in conflict with the agreement; and if so, was this just cause for termination." (Board's exhibit No. 3, p. 6.) The critical period in this case is therefore the nine working days beginning on January 2, 1973, and ending on January 12, 1973, inclusive, during which Appellant and Varga were associated.[1] We therefore only consider and make findings on those events which occurred within the time parameters above set forth.

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[1]January 13, 1973, a Saturday, January 14, 1973, a Sunday, and January 15, 1973, a vacation day, Appellant did not work and therefore did not supervise Varga. Proof of other, prior incidents which Respondent felt both explained and justified the discharge action were rejected on the hearing in this matter based on a previous Opinion and Order in this case dated October 5, 1974, which restricted Respondent in his proof, due to inadequacies in the disciplinary notice.

Marvin Sorenson, Appellant's immediate supervisor, was the only person who observed, and therefore had personal knowledge of, Appellant's and Varga's actions during the 9 working days in question.[2]

The January 2, 1973, meeting concluded at about 2:00 p.m. that day. Sorenson testified that Appellant "went back to the dormitory /Smith Hall/, and, to my knowledge, got Mr. Varga painting, and he /Appellant/ was doing some other painting."

On January 3, 1973, Sorenson observed Appellant painting the cases housing the fire extinguishers in Smith Hall, a student dormitory, and Varga painting on the second floor in the west wing of Smith Hall. Although both Appellant and Varga generally worked 8-hour shifts, Sorenson observed their activities for only half an hour.

On January 4, 1973, Sorenson made two journeys to Smith Hall, one in the morning, the other in the afternoon, for a total of 45 minutes. In the morning Sorenson observed the Appellant and Varga doing the same things they had been doing the day before. In the afternoon, Appellant was seen mixing paints for the upcoming week's work.

On January 5, Sorenson made a 15-20 minute visit to Smith Hall where he observed Appellant again mixing paint and Varga still painting on the second floor in the west wing of Smith Hall.

January 6 was a Saturday; January 7 was a Sunday; and Appellant had both days off.

On the morning of January 8, Sorenson was in Smith Hall for approximately 20-25 minutes; as he entered the building, he saw Appellant holding a paint roller in his hand and subsequently witnessed Varga still painting on the second floor.

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[2]Since June of 1971 Sorenson had been maintaining a file on Appellant's activities and at the hearing he testified with the aid of his notes.

On January 9 Sorenson again made two trips, totalling 35 minutes, to Smith Hall. He was unable to locate Appellant in the morning because Appellant was at a local paint store purchasing painting materials; in the afternoon Sorenson observed the Appellant mixing paint. Sorenson could not recall seeing Varga that day.

On January 10 Sorenson visited Smith Hall at about 9:00 a.m., remaining there for about 25-30 minutes. He observed Varga moving to another room after just having finished painting a dorm room. Sorenson did not say what Appellant was doing on the 10th, though he did see him on that day.

On January 11 Appellant and Varga were again assigned to Smith Hall. Sorenson stopped by the Hall once -- in the early afternoon -- of that day. He saw both men that day but only stated what he observed Varga doing -- painting the second floor area of Smith Hall.

On January 12 -- Appellant's last working day before his discharge -- Appellant and Varga were again assigned to Smith Hall and were again the objects of Sorenson's scrutiny. Sorenson stopped by the Hall sometime in the morning of the 12th for about 20-25 minutes. Varga was still painting on the second floor, and Appellant was in the basement of the south wing procuring supplies the precise nature of which Sorenson was uncertain.

At no time during the period from January 2, 1973, to January 15, 1973, did Sorenson observe either Appellant or Varga throughout the course of an entire working day. Sorenson surmised the amount of painting Varga had been doing from day to day by observing the area painted on a given day and comparing it with the area covered by the time he next observed Varga. Sorenson also asked Varga if the Appellant had helped him (Varga) and that Varga had said that the rooms that had been painted since he'd been with Appellant had been painted by him (Varga).

As hereinbefore indicated, it was for the alleged improper utilization of his assistant that Appellant was discharged. The discharge letter itself states

in this regard as follows:

> "Your supervisor reports that you have completely and totally disregarded the agreement reached on January 2nd and in fact that you have been acting as the helper and Mr. Varga as the painter."

In short, Appellant was discharged for allegedly failing to follow instructions. The discharge letter was the joint effort of Krebs, Juhnke and Bell and was drafted during a meeting held in Mr. Bell's office on January 15, 1973. Appellant was not present at this meeting. Moreover, at no time material hereto was Appellant warned by Sorenson, or by Krebs, Juhnke or Bell, that his utilization of Varga was the subject of such a high degree of dissatisfaction that his discharge was imminent.

Appellant did teach Varga how to patch, caulk and tape walls and ceilings and did have Varga paint the walls and ceilings of the dormitory rooms in Smith Hall after Varga had expressed an interest in doing so. Appellant did not tape, patch, or put down drop cloths for Varga. He did, however, mix paint for his and Varga's use, something Varga did not know how to do.

Prior to Varga, Appellant and the other two painters on the campus had used student helpers.

After Appellant's departure, and despite the desire to expeditiously finish painting the dormitories, no replacement for the Appellant was hired by the University.

Finally, Appellant has permanent status in class and appealed his discharge from state employment on January 23, 1973, within 7 days of the effective date of the action. After several preliminary matters were disposed of, this case came on for hearing on October 11, 1974, and November 6, 1974, at Madison, Wisconsin, before a quorum of the Board consisting of the above-named members of the Personnel Board.

We find the foregoing facts to be true and material to a determination of the instant appeal.[3]

II. Conclusions

The appeal in this case was timely and was taken by an employee with permanent status in class from the discharge action of his appointing authority. Jurisdiction is therefore present. Sec. 16.05(1)(e), (2), Wis. Stats.

In cases of this nature the burden is on the Respondent appointing authority to prove to a reasonable certainty by the greater weight of the credible evidence the allegations contained in the disciplinary notice. Reinke v. Personnel Board, 53 Wis. 2d 123, 132, 137-138. Moreover, those allegations, if and when established, must amount in law to just cause for the disciplinary sanction imposed. Sec. 16.28(1)(a), Stats.; Reinke, supra, at p. 132.

Respondent Has Not Shown that Appellant Willfully Disobeyed the January 2, 1973, Agreement.

We have found that the January 2, 1973, Agreement, as summarized in the discharge letter, provided that Appellant "would use Mr. Varga to perform duties such as placing drop cloths, cleaning rooms for painting, patching cracks in plaster, etc. and as time allowed train him to assist in actual painting." (Emphasis supplied.) The issue is whether Appellant refused to utilize Varga in a manner consistent with the said agreement, which Respondent has subsequently insisted were instructions. Whatever it is called, it clearly contemplates, or at least the Appellant could have readily understood it to contemplate, the use of Varga as a painter after Varga had completed his so-called menial tasks. The difficulty with Respondent's case is that he has not demonstrated 1) that the so-called menial tasks envisioned for

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[3] It is intended that the facts recited above constitute the Board's findings of fact after hearing, pursuant to Sec. 227.13, Wis. Stats.

Varga would consume any appreciable amount of time so as to preclude him from spending the larger share of his time painting, as he apparently did here; 2) that even if, e.g., dropping cloths or patching cracks would consume a considerable amount of time, that Varga in fact did not complete these menial tasks before proceeding to paint the walls and ceilings of the rooms in Smith Hall; and 3) that Varga could in fact do all of the menial tasks required of him. It is reasonably clear, we think, that if the purpose of assigning Varga to work with Appellant was to save the Appellant time so that he could devote himself to painting the dormitory rooms, such purpose could hardly be accomplished by expecting Appellant to spend a portion of his day teaching Varga the subtleties of proper paint mixing and stirring.

The mere fact that Sorenson often observed Varga painting while Appellant often was not seems to us unpersuasive given the fact that Sorenson only observed Appellant and Varga for approximately 20-30 minutes out of each day over a course of 8 working days, as set forth in detail above. The more persuasive fact is that Sorenson's was the only testimony offered by Respondent which tended to establish the allegations made in the letter of discharge. In our view, this was not sufficient. Noticeably absent was any testimony by Varga. We are unwilling to say that Respondent has met his burden of proof, as laid down in the Reinke case, in a matter of such gravity to Appellant by eliciting testimony concerning the allegations made from a man -- Sorenson -- who spent by far the greater portion of his day not observing Appellant or Varga. Furthermore, what Sorenson did observe was consistent, we think, with the agreement (or instructions) later reduced to writing in the letter of discharge.

It is true that Mr. Krebs testified that Appellant admitted to him not using Varga in the precise way envisioned in the agreement (or instructions). This is understandable since the agreement (or instructions) were worded in such a way that, assuming as we do here that the discharge letter accurately reflected

what Appellant was told on January 2, 1973, it has no precise meaning. If, as Appellant testified, Varga did no more than the menial tasks, so-called, he probably would have spent the major portion of his time standing around. As we have said, the agreement (or instructions) allowed for that contingency by providing that Varga should assist in the painting "as time allowed." It does not seem unduly picky for us to suggest that, in the absence of any proof whatsoever that Varga did not do the menial tasks and some evidence that Appellant did teach him to do some of them, Varga's painting of walls and ceilings was well within the terms of the agreement (or instructions).

Finally, we are disturbed by the fact that Appellant does not seem to have been given any kind of admonition by his supervisor, Sorenson, or by any other superior, that his use of Varga was bringing him perilously close to discharge. Sorenson testified that he visited Appellant's Smith Hall work station many times between January 2 and January 15, 1973, yet never a word of warning appears to have been conveyed to Appellant. Appellant, without ever being admonished or given a chance to explain his actions, was confronted on January 16, 1973, with the fait accompli of a letter of discharge. This does not appear to us to be a wise much less a fair way to treat employees.

We conclude that Respondent did not meet his burden of proof and has failed to demonstrate to our satisfaction that Appellant refused to supervise Martin Varga in a manner consistent with the agreement (or instructions) of January 2, 1973. We therefore conclude that Appellant was discharged without just cause.

At the close of Respondent's case, counsel for Appellant moved that Appellant be immediately reinstated because Respondent had failed to sustain his burden of proof.[4] The Board panel deferred passing on the motion at that time. We are now of the opinion that the Appellant's motion must be granted. Due to our disposition of this case, it is unnecessary for us to reach the issue, raised by

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[4] Transcript No. 2, p. 82.

Safransky v. Personnel Board, 62 Wis. 2d 464, 474-475, of whether the Appellant's conduct so "undermined the efficient performance of /his/ duties of employment" that cause for termination would be found.[5]

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 dischrage to the date of his receipt of Respondent's written directive to report to work.

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 Feb 21, 1975

STATE PERSONNEL BOARD

BY

William Ahrens

William Ahrens, Chairman

[5]It is intended that the foregoing section entitled "Conclusions" encompass both the Conclusions of Law required by Sec. 227.13, Stats., and this Board's "reasons" for deciding this case as we do, as required by Transport Oil Inc. v. Cummings, 54 Wis. 2d 256, 265.