STATE OF WISCONSIN PERSONNEL BOARD

KATHLEEN BEAUCHAINE,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary Department of Health and Social Services,

Respondent.

OPINION AND ORDER

No. 73-38

Before: JULIAN, STEININGER, and BRECHER, Board Members,

JULIAN, writing for himself and Board Members STEININGER and BRECHER.

In a letter dated March 8, 1973, Appellant was notified that she was to be suspended without pay for one day as a disciplinary action taken against her by Rex. T. Duter, Superintendent of the Wisconsin School for Girls. The Wisconsin School for Girls is part of the Division of Corrections, which in turn, is part of the Department of Health and Social Services. Appellant, a permanent civil service employee, brought this timely appeal.

By a motion made orally and in writing, Appellant has challenged the sufficiency of the suspension notice. She alleges that the notice is defective on its face under Wisconsin law and the United States Constitution. She has requested the entry of an order directing her reinstatement with back pay and a restoration of any other benefits, privileges or rights lost as a result of her suspension.

The full text of the letter notifying Appellant of her suspension is reproduced as an Appendix to this opinion. However, in pertinent part, the notice provides for a one-day suspension without pay and advises that the suspension is to be imposed

"for failure to carry out [her] assigned duties by dismissing [her] class prior to the appointed time and in disregard to (sic) the specific instructions of [her] immediate supervisor." This was the sole explanation given to Appellant for her suspension. The notice provides no date or time when the infraction allegedly occurred. The notice does not indicate that there was any rule governing the allegedly wrongful conduct in force at the Wisconsin School for Girls. The notice of suspension does not allege that any work rule or regulation was violated.

In her challenge to the sufficiency of the suspension notice, Appellant's contentions are twofold. First, she argues that the notice is defective because it does not adequately apprise her of the particular acts allegedly committed and, specifically, the date and time of such acts. She asserts that the notice fails to advise her fully of the specific issues to be brought before the Board, in order to avoid unnecessary surprise at a hearing before the Board, and to inform her fully of her alleged wrongful conduct. In short, Appellant contends that her right to due process of law has been violated because she has not been told the date nor time of her alleged offense, and, thus, has been given no fair notice of the charges against her. Second, Appellant contends that the notice fails to meet the requirements of Section 16.28(1)(b), Wis. Stats., which requires the appointing authority to furnish to the employee in writing the reasons for her suspension.

Although the Respondent concedes that the issue before the Board is solely a question of law, he, nevertheless, contends that the Board is without jurisdiction to decide this question. The Respondent asserts that even if the disciplinary notice is constitutionally and statutorily defective, Appellant was clearly denied due process of law, and the issue before the Board

is solely a question of law, the Board must still hold a factual hearing and hear the entire case before it can take any action. The Respondent also contends that the notice of discipline is sufficient on its face.

We shall deal separately with the contentions of each party.

JURISDICTION OF THE BOARD AND THE NEED FOR A FACTUAL HEARING

The contention of the Respondent that the Board is without jurisdiction to entertain this motion is without merit. The Respondent cites no authority to support his position. He concedes that the appeal is timely. The appeal is one that may properly be heard by the Board under Section 16.05(1)(e), Wis. Stats. The Board has jurisdiction over the case. A motion, after all, is nothing more than a request for action to be taken by the Board. The Board clearly has the authority to entertain such a request under its statutory authority.

The contention of the Respondent that there need be a factual hearing under the circumstances of this case is also without merit. The parties have agreed that the issue presented for decision here is solely a question of law. There are no facts with regard to that question of law in dispute.

The reliance of the Respondent upon Section 16.05(1)(e), Wis. Stats. to support his position is misplaced. That section provides that "...after the hearing, the Board shall either sustain the action of the appointing authority, or shall reinstate the employee fully... ." The Respondent argues that no action of the Board can be taken until after a hearing. On the contrary,

> "There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but only a question of law or administrative policy of such a nature that there

> is neither a dispute as to material facts nor a need to ventilate the underlying facts to aid in policy determination." Municipal Light Boards, etc. Mass. v. Federal Power Com'n., 450 F.2d 1341, 1345 (D.C. Cir. 1971); cert denied, 405 U.S. 989, 92 S.Ct. 1251 (1972). Citizens for Allegan County, Inc. v. F.P.C., 134 U.S. App. D.C. 229, 414, F.2d 1125 (1969).

We do not read this statute to require a factual hearing in every case, particularly where the issues to be decided are questions of law and where, as here, the parties have been given full opportunity to brief the questions presented.

Moreover, the Respondent waived oral argument. At the prehearing conference in this case, there was initial oral argument on the motion of the Appellant. Subsequently near the close of the prehearing conference, the hearing officer advised counsel for both parties that unless there was a request for oral argument or a good reason for it, the motion would be decided without oral argument. Counsel for the Respondent specifically agreed to that procedure. (See Transcript, Prehearing Conference of April 5, 1973, page 11). Since counsel for the Respondent specifically waived a hearing, we do not believe he is in a position to complain that one was not provided. There is nothing in the statutes to indicate that a party may not waive the rights given therein. Accordingly, we conclude that the Board has jurisdiction to hear this case and the pending motion. We further conclude that there is no necessity for a factual hearing to decide this motion, since the question is solely one of law.

DUE PROCESS OF LAW

In our opinion, the letter of March 8, 1973, from Rex T. Duter, to the Appellant, insofar as it serves as a notice of charges and notice of the reasons for her suspension fails to afford the Appellant due process of law. It fails to state in

any way whatsoever the date or time of the alleged infraction. To say that Appellant is suspended "for failure to carry our [her] assigned duties...and in disregard to (sic) the specific instructions of [her] immediate supervisor" and to fail to set forth the date or time of the alleged infraction is to tell her virtually nothing to permit her to defend herself. The date of the alleged infraction is the most crucial part of a notice of discipline. It provides the employee with the opportunity to zero in on the allegations and to prepare a defense to them. It gives meaning to the right to meet the charges by competent evidence. It allows the employee seasonably to know what the charges or claims preferred are. It provides a sequence by which alleged events become meaningful and without which alleged events are meaningless. Here, however, neither the date nor the time of the alleged infractions appears in the notice of charges. A more complete failure to accord the rudiments of due process of law is difficult to conceive.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental actions injure an individual and the reasonableness of the action depends on fact-finding, as in the present case, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. "The fundamental requisite of due process of law is the opportunity to be heard." Glannis v. Ordean, 234 U.S. 385, 394 (1914). Yet the opportunity to be heard is meaningless unless one knows in advance about what he is to be heard. In short, fair notice of the specific charges is an essential ingredient of due process. Morgan v. United States, 304 U.S. 1, 18-19 (1938); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Covey v. Town of Sommers, 351 U.S.

141 (1956); General Electric Co. v. Wisconsin E.R. Board, 3 Wis.2d 227, 241 (1958); Petition of Village Board of Wheatland, 77 N.D. 194, 42 N.W.2d 321 (1950); Abrams v. Dougherty, 60 Cal. App. 297, 212 Pac. 942 (1922); Alton & Southern Ry. v. Commerce Commission, 316 Ill. 625, 147 N.E. 417 (1925); See also Folding Furniture Works v. Wisconsin L.R. Board, 232 Wis. 170, 191-192 (1939).

State ex rel. Messner v. Milwaukee Co. Civil Service Comm., 56 Wis.2d 438 (1972), is not to the contrary. There the disciplinary notice which was upheld by the Wisconsin Supreme Court specifically advised the Appellant of the particular acts allegedly committed. More particularly, the notice provided the date and time of her alleged violations. Indeed, in Messner the appellant did not argue that the n tice failed to apprise her of the particular acts allegedly committed. 56 Wis.2d at 442. This is, the precise issue that the Appellant raises here. Appellant argues that the notice fails to apprise her of the particular acts allegedly committed because, inter alia, it fails to tell her when they were committed.

Moreover, the Appellant, unlike the appellant in Messner, both alleged and demonstrated that her ability to defend herself was impaired by the failure of the notice to recite the date and time of the alleged violations. At the prehearing conference in this case, counsel for the Appellant, on her behalf, advised the hearing officer in the presence of the Appellant and counsel for the Respondent that the information regarding the date and time of the alleged infractions was critical and that he could not prepare a defense for her without knowing that information.

While it is true that procedural due process requirements may vary from one case to another, depending upon the facts, the circumstances, and the weight to be accorded to the interests of the individual and the interests of government, it is clear that the State no longer has a totally free hand to do what it will, when it will to state employees. Public employment cannot be interfered with without that procedural due process required by the Fourteenth Amendment. Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Folding Furniture Works v. Wisconsin L.R. Board, Supra, 191. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or "privilege". Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (denial of a tax exemption); Goldberg v. Kelly, 397 U.S. 254 (1970) (withdrawal of welfare benefits); Slochower v. Board of Higher Education, supra, (discharge from public employment). See also Londoner v. Denver, 210 U.S. 373; 385-386 (1908); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926); Opp. Cotton Mills v. Administrator, 312 U.S. 126 (1941).

Due process in administrative proceedings of a quasi-judicial nature (as in the present case) has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence, See Tadano v. Manney, 160 F.2d 665, 667 (9th Cir., 1947), which is generally equated with adequate notice and a fair hearing. See Opp. Cotton Mills v. Administrator, supra.

To contend, as Respondent does, that the notice of discipline is unimportant and that the main ingredient of fair play is the hearing is to fail to appreciate the nature of procedural due process. A full hearing is no answer to Appellant's lack of knowledge concerning the date and time of the alleged infraction.

Without that knowledge, a hearing only adds to her disadvantage. The United States Supreme Court, by whose rulings we are bound, has specifically stated that "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence, but extend...to the beginning and intermediate steps." Morgan v. United States, 304 U.S. 1, 20 (1938); Cf. Gonzales v. United States, 348 U.S. 407, 414 (1955).

While it is true that strict and technical rules of pleading are not applicable to proceedings before administrative agencies, such as the Personnel Board, it is also true that the objective is the due process concept of fair notice so as to avoid surprise and to allow an Appellant to adequately meet the charges.

In order to achieve this objective, we now hold that at a minimum, notices of discipline must, on their face, tell a public employee five things:

1. What wrongful acts he is alleged to have committed;
2. When he is alleged to have committed the wrongful acts;
3. Where it is alleged the wrongful acts took place;
4. Who says the wrongful acts occurred, that is, who accuses the employee; and
5. Why the particular penalty or discipline is going to be imposed.

The criteria just set forth are nothing more than the five "W's" which journalists have relied on for years in writing news articles. We believe these criteria are easily understood. By requiring management to utilize these criteria in preparing notices of discipline and by judging the sufficiency of those notices by use of these criteria, we believe the difficulties experienced by both labor and management regarding notices of discipline will be alleviated. In addition, we have provided an

objective tool by which management may measure its performance.

We emphasize that strict and technical rules of pleading are not and will not be required. However, notices which on their face, do not minimally convey, in terms understandable to the average employee, the information required by the five criteria identified above will be nullified.

We hold that the notice in this case is not sufficient to make the Appellant "reasonably apprised of the issues in controversy." Cella v. United States, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016. The notice does not give the Appellant "a reasonable opportunity to know the claims of the opposing parties." Morgan v. United States, supra; J.B. Williams Co. v. Federal Trade Commission, 381 F.2d 884, 888 (6th Cir. 1967).

The concept of fair notice is, as I indicated above, a bedrock concept in any scheme of procedural fair play. Without Appellant knowing in advance the dates or times in question, affording her a hearing is a meaningless gesture. The historic rights of confrontation and cross-examination, over 2,000 years old, which were engrafted into our Constitution are meaningless without advance knowledge of the dates and times surrounding the allegations. If the rights of confrontation and cross examination are basic ingredients of a fair hearing,[1/] then the most basic ingredient must be adequate notice of the charges and issues.

Indeed, no sound reason really exists for denying an appellant specific notice of the charges against her including the dates and times thereof.

There is nothing in the record to indicate that the appointing authority is unable to give the appellant a more specific notice.

1/ Green v. McElroy, 360 U.S. 474, 496, n. 25 (1959).

We are aware that some people argue that the various appointing authorities of the state agencies, whose aggrieved employees may appeal disciplinary actions of their agency to the Personnel Board, are not attorneys or do not have the advice of counsel in preparing notices of disciplinary actions appealable to the Personnel Board, and, accordingly, are not able to make the notices specific. Frankly, we doubt the accuracy of the contention that the advice of counsel is not available to the appointing authorities of a state agency for aid in preparing notices of disciplinary action appealable to the Personnel Board. We find such a contention even more difficult to accept when attorneys for the various agencies routinely appear before us day after day, in hearings before this Board. Of course, the agencies have the Office of the Attorney General at their disposal for assistance.[2/] Moreover, this Board has from time to time published guidelines and recommendations on disciplinary procedure and law to which the various agencies have access.

Notwithstanding all of these options, however, we are prepared to assume that the various state agencies need guidance in the preparation of notices of discipline. We have, therefore, attached as an Appendix to this opinion a sample letter notifying a specific employee of the proposed imposition of discipline. We do not propose this letter as the last word on the subject; nor do we claim the letter to be the only acceptable form or style. The letter is offered only as a general guide toward what we believe is minimally required by the United States Constitution and the Wisconsin Statutes. The differences between the notice of March 8, 1973, given Appellant in this case and the sample letter in the Appendix are readily apparent.

2/ See generally, sections 165.015 and 165.25(5), Wis. Stats.

We believe that a sound and practical by-product of requiring specificity in the notice of discipline is that hearings may be considerably shortened and issues narrowed by an emphasis on more specific and simply stated notices. It takes no imagination to realize that a real and practical result will also be a monetary saving to the already overburdened Wisconsin taxpayer. We will not hesitate to dispose of a case primarily on legal issues when the situation, as here, warrants.[3/] By so doing, we not only serve the interests of justice, but also the interests of efficiency.[4/]

3/ Our present procedures present no impediment to summary disposition of a case; see Shields, J.H., Disciplinary Appeals, Comments on Procedures Before the State Personnel Board, Article IX, p. 4.

4/ Delay is widely acknowledged as a major inadequacy of the administrative process. The late Dean Landis captured the magnitude of the problem a decade ago when he remarked "Inordinate delay characterizes the disposition of adjudicatory proceedings before substantially all of our regulatory agencies." J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 5 (Submitted by the Chairman of the Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary), 86th Cong. 2d Sess. (Comm. Print 1960). There has been almost no improvement in recent years. See, e.g., REPORT ON THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, 28-32, 34 (1969). See also, generally, Freedman, Review Boards in the Administrative Process, 117 U.Pa. L. Rev. 546 (1969); Goldman, Administrative Delay and Judicial Relief, 66 Mich. L. Rev. 1423 (1968). But Cf. G. Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U.Pa. L. Rev. 485, 523-24 (1970).

Professor Davis suggests, and we concur, that administrative agencies might make more use of summary judgment when only questions of law or statutory interpretation are presented. K. DAVIS, ADMINISTRATIVE LAW TREATISE, Sec. 8.13 at 578 (1958).

We have, therefore, determined that the motion of the Appellant should be granted.

FAILURE TO COMPLY WITH SECTION 16.28(1)(b) WISCONSIN STATUTES

As a further and independent ground for granting the motion of the Appellant for summary reinstatement, we hold that the disciplinary notice failed to comply with Sec. 16.28(1)(b), Wis. Stats.,[5/] requiring the appointing authority to furnish to the employee in writing his reasons for the suspension. In order to comply with Section 16.28(1)(b), Wis. Stats., the reasons must be intelligible and reasonably specific so as to allow an employee to know what it is alleged he did. We interpret this to mean that he must also know when it is alleged he violated a rule or regulation of the appointing authority. The reasons cannot be stated in vague, ambulatory language. The date of the alleged infraction must be stated. The contents must be reasonably plain to the average employee.

The notice of March 8, 1973; fails to tell the Appellant when it is alleged her infractions occurred. The notice does not comply fully with Sec. 16.28(1)(b), Wis. Stats. because to fail to tell the employee when it is alleged her infractions occurred is to make the reasons assigned for the proposed punishment meaningless. We believe that to allow the notice of March 8 to stand is to fail to breathe substance into the command of the legislature embodied in section 16.28(1)(b).

5/ Section 16.28(1)(b), Wis Stats. provides:

"(b) No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employee in writing, his reasons therefor. The reasons for such action shall be filed in writing with the director within 5 days after the effective date thereof."

CONCLUSION

In deciding this matter as we do, we have endeavored to heed the admonition of Professor Clark Byse "Not to fall into the trap of equating the requirements of the Fourteenth Amendment with one's personal views of desirable procedure." Byse, "Procedure in Student Dismissal Proceedings: Law and Policy," Journal of College Student Personnel, March, 1963, at 140. However, while considering the questions raised in this case, we have not overlooked possible considerations of wise public policy. A wise Department may well make a prudential judgment that it ought to give its employees more procedural protection than the Constitution and laws demand.

ORDER

Accordingly, for the reasons stated in the foregoing opinion and the entire record in this case,

IT IS HEREWITH ORDERED That the Appellant be and she hereby is fully reinstated to her position in the classified service with back pay and the same rights, privileges, and immunities to which she was entitled prior to the imposition of the suspension upon her by the letter of March 8, 1973.

Dated at Madison, Wisconsin, this 18th day of October, 1973.

BY THE PERSONNEL BOARD:

Percy L. Julian, Jr.
BOARD MEMBER

Board Members AHRENS and SERPE took no part in this decision.

APPENDIX

NOTICE OF SUSPENSION

State of Wisconsin/ Department of Health and Social Services

Division of Corrections
Wisconsin School for Girls
Oregon, Wisconsin 53575

March 8, 1973

Mrs. Kathleen Beauchaine
713 Valley Rd.
Madison, WI 53714

Dear Mrs. Beauchaine:

This letter is to advise you that you are suspended from your employment at the Wisconsin School for Girls for one day without pay for failure to carry out your assigned duties by dismissing your class prior to the appointed time and in disregard to the specific instructions of your immediate supervisor.

This suspension will occur on Monday, March 12, 1973.

Pursuant to provisions of Section 16.24(1), Wisconsin Statutes, and the Wisconsin Education Council contract, you are entitled to either appeal this action to the State Personnel Board, Madison, Wisconsin or to file a grievance with Mr. Sanger B. Powers, Administrator, Division of Corrections, Department of Health and Social Services, State Office Building, Madison, Wisconsin, 53702.

Sincerely,

/s/ Rex T. Duter
Rex T. Duter
Superintendent

RTD:h
cc: Central Personnel Office
Bureau of Personnel
Mr. Tom Bina, WEC
S.B. Powers
L. Douglas
Personnel File

SAMPLE NOTICE OF DISCIPLINE

September 15, 1972

Mr. John Doe
629 Summit Street
Madison, Wisconsin 53703

Dear Mr. Doe:

You are herewith notified that pursuant to authority vested in my by the Department, you are herewith (suspended, demoted, discharged, removed, etc.) (if applicable) for a period of (insert time period) .

Pursuant to the provisions of Section 16.28(1), Wis. Stats., you are hereby notified that the reasons for this action are:

1. It is alleged by Arthur Good, your supervisor, that on September 8, 1972, you struck one James Smith at the Administration Building, contrary to the rules [if the rule is in writing, specify which rule] of the Department of Health and Social Services, Division of Corrections.

2. On September 10, 1972, you failed to turn in your field report, contrary to a specific order given you by Sam Johnson, your immediate superior.

3. It is alleged by your superior that on September 7, 1972, at approximately 10:15 a.m. (if time is known) you drank alcoholic beverages on the job, contrary to the rules [specifying them] of the Department of Health and Social Services and the Division of Corrections.

You were aware of the rules of this Department and Division covering the violations mentioned above because you were told about them on August 1, 1972, (if appropriate) [and you were given a copy of them on or about (date), 1972].

In addition, you know such conduct violated the rules because you were (warned) (counseled) about it in the past, specifically on (date), 1972, by (name of person who did counseling or warning), at (place of counseling or warning.)

Pursuant to the provisions of Sections 16.05(1) and 16.05(2), Wis. Stats., you are entitled to appeal this action to the State Personnel Board, One West Wilson Street, Madison, Wisconsin, provided your written request is postmarked within fifteen (15) days of the effective date of this action, or within fifteen (15) days of the postmark date of this letter, whichever is later.

Very truly yours,

John M. Superintendent
Appointing Authority.