

The following guiding principles of conduct are aimed at securing honorable human relationships and establishing mutual confidence and respect.

Personnel of the Department of Natural Resources will at all times:

...

10. ...refrain from any acts or relations which will violate their public trust and reflect discredit on themselves or the Department.

On Saturday, October 21, 1972, the Appellant violated the State's hunting laws by possessing a pheasant during the closed season. He was arrested by a Conservation Warden of the Department and on the following Monday, October 23, had a discussion concerning the matter with his immediate supervisor and a higher Department official. On March 27, 1973, over five months later, the Respondent wrote the Appellant a letter advising him that as a result of the incident, he was to be suspended for ten (10) work days, from Monday, April 16, 1973, through Friday, April 27, 1973 for violating item number 10 of the code of ethics.

The Appellant's offense was committed on a Saturday. His disciplinary notice advised him that his suspension would take place during a twelve-day period from Monday, April 16 through Friday, April 27, 1973. The notice specified that the suspension was for "ten (10) work days", which we find consisted of two five-day normal work weeks of Monday through Friday, with Saturday, April 21, and Sunday, April 22 not included in the computation, since he did not work those days. We find further that Appellant was off-duty on Saturday, October 21, 1972, when he violated the game laws by possessing a pheasant during the closed season.

Distribution of the Code of Ethics

Appellant testified that if a copy of the code of ethics had come to the Brule office in the mail, he would have read it, although he does not remember having done so at anytime before this proceeding was initiated.

We find that the manner of distributing the code of ethics and the fact of its publication and distribution as a part of a manual of Department Policies and Procedures was adequate notice to employes of the code provisions. We find that the Appellant had notice of the code of ethics.

Violation Did Not Affect Job Performance

We find that Appellant's violation of the game laws did not in any way affect his ability to perform his normal job duties. No evidence was introduced by the Respondent relative to what his duties were and no evidence was introduced to show that the violation interfered in any way with his job performance.

No Proof of Discredit to Department

As indicated by Mr. Thoresen's testimony, the Respondent imposed discipline on the grounds that the Appellant's game law violation reflects discredit on the Department. Any claim that the same act violated a public trust or discredited the employe himself raises Constitutional questions concerning the government's intrusion into the personal lives of its employes and the lack of any specification to warn employes what off-duty acts might lead to discipline.

State ex rel Mormon v. Milwaukee County CSC, 61 Wis. 2d 313, 321-324 (1973),

In passing, we note that a Code of Ethics is desirable, but if it is used as a disciplinary vehicle, then its terms must be specific and fair within the requirements of substantive Due Process. Under this particular Code, the employe is not advised that any penalty will flow from a violation of these rules. Further, we observe that the Code lacks definition of such words as "acts or relations", "public trust", or "discredit on themselves", which causes the language of item 10 of the Code to be so vague and overbroad that it denies the Appellant fair notice of what is permitted and what is proscribed. In fact, item 10 of the Code is arguably so broad that it draws within its grasp activities which are protected by the Constitution of the United States. We conclude that it is proper in this case to consider only whether Appellant's act reflects discredit on the Department.

A public employer may discipline an employe for his or her off-duty conduct, where it undermines public confidence in the governmental agency. In State ex rel Gudlin v. Civil Service Commission, 27 Wis. (2d) 77 (1965), p. 87, the Court said:

It must, however, also be true that conduct of a municipal employe, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service. In such case the conduct can reasonably be deemed cause for suspension or discharge even though it has no direct bearing upon his performance of his duties.

In that case, the Court held that the West Allis, Wisconsin city civil service commission might reasonably conclude that a city employe was properly discharged for living with and fathering a child by a woman who was not his wife while married himself. It indicated further that suspension, with reinstatement conditioned upon a change

in the employe's conduct, might have been adequate to protect the city's interests. Nevertheless, the Court could not say that on the particular facts in that case that the commission's action was arbitrary. Applying the test of that case to the instant case, we do not think the Appellant's offense was either substantial, flagrant, or serious. Obviously, Appellant's single offense was not oft repeated.

The Respondent did not demonstrate that Appellant's offense dis-credited the Department.^{1/} It did not introduce any evidence to show that the Appellant's offense undermined public confidence in the Department. On the paucity of proof presented, we are unable and unwilling to infer that a single instance of possession of a pheasant, out of season, in violation of the game laws is conduct that damages the reputation of the Department and which, in addition is so substantial, oft-repeated, flagrant, or so serious that it undermines public confidence in the State service. No evidence was introduced, for example, as to how many persons outside the arresting warden, the court personnel, and the Appellant's supervisors, even knew of Appellant's offense, nor that any member of the public expressed a lack of confidence in the Department as a result of this incident. If the Appellant is to be suspended for ten (10) days for allegedly engaging in conduct which reflects discredit on the Department, then the Respondent must prove the Department was so affected. Bell v. Personnel Board, 259 Wis. 602 (1951); Reinke v. Personnel Board, 53 Wis. 2d 123 (1971). This was not done.

Accordingly, we are constrained to conclude that the Appellant was suspended without just cause.

^{1/} While no definition of the terms "reflect discredit on...the Department" is given by the Code of Ethics, applying common sense principles, and the rule of the Gudlin Case, we interpret this phrase to mean conduct which damages the reputation of the Department and which, in addition, is so substantial, oft-repeated, flagrant, or so serious that it undermines public confidence in the State service. The retroactive application of the Code, as herein defined, to the Appellant in this case, were it not for our finding that he did not violate the Code, might raise serious questions of Due Process. Bouie v. City of Columbia 378 U.S. 347 (1964). On the other hand, failure to interpret the Code would leave it void for vagueness.

ORDER

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

IT IS HEREWITH ORDERED that the Respondent immediately reinstate Appellant fully, rescind the ten (10) work-day suspension imposed on the Appellant from April 16, 1973 to April 27, 1973, and pay to him full back pay for such period.

Dated Feb 3, 1974

STATE PERSONNEL BOARD

BY

William Ahrens
William Ahrens, Chairman