STATE OF WISCONSIN STATE PERSONNEL BOARD

FRANCIS JACOBSON,

Appellant,

v.

VIRGINIA HART, Chairperson, Department of Industry, Labor and Human Relations,

Respondent.

Case No. 74-124

OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE, STEININGER, WILSON and DEWITT, Board Members.

NATURE OF THE CASE

This is an appeal of a suspension for excessive tardiness. In an Opinion and Order entered February 28, 1975, we denied a motion by Appellant to void the suspension or to adjourn the hearing on the appeal.

FINDINGS OF FACT

The Appellant at all relevant times has been a permanent employe in the classified service employed as a job developer (Manpower Specialist 1) in a placement unit of the "Module A" or central office of the Milwaukee Work Incentive Program (WIN), Employment Security Division, Department of Industry, Labor and Human Relations (DILHR). Appellant's employer suspended him without pay for two weeks in October and November, 1974, on the grounds of excessive tardiness.

During the period of January through September, 1974, Appellant was required to sign in on initial arrival each day at the office. There were daily sign-in sheets used for this purpose. At 7:45 each morning his immediate supervisor would draw a red line and indicate the time under the last name signed in and collect the sheets. Although the Appellant's supervisors were generally aware of his punctuality through observation of his time of arrival, these sheets provided the basis for the exact computation of the total amount of Appellant's tardiness.

In January of 1974, Appellant was late for work a total of two hours and thirty-one minutes. In February, two hours and forty-nine minutes, and in March, April and May, a total of two hours and fifty-one minutes. In the months of June through September, 1974, Appellant's tardiness totaled two hours and two minutes.

Prior to the suspension without pay, Appellant was reprimanded on May 30, 1974, and February 27, 1974. He had been advised on May 29, 1974, that he was being charged with leave without pay on account of tardiness during March - May, 1974, and was at that time given a list of the days he was late, his times of arrival, and the number of minutes he was late for each of these months. He was also advised that if tardiness continued to occur, a two week suspension would be recommended. He was advised on February 27, 1974, that he was being charged with leave without pay for time lost in February on account of being late for work, and also given an itemized list of the occasions that he was late during that month. Similar notice was given on January 29, 1974, with regard to that month. During this entire period from January through September, 1974, Appellant received numerous verbal cautions from his supervisors concerning his tardiness.

Prior to April, 1974 all the employes in "Module A" were required to sign in in the morning. In April a new policy was instituted in that unit whereby employes who had demonstrated good attendance habits were exempted from the sign-in requirement. While a majority of the employes were so exempted, Appellant was not at any time. However, after his return from his suspension, the Appellant filed a grievance concerning the sign-in requirement. The result of the grievance was the agency's elimination of any exemptions from the sign-in requirement in January, 1975.

During the period February-March, 1975, a number of employes in "Module B" abused the sign-in procedure by falsifying the times they wrote on the sign-in sheet. This also happened at least once in Module A at an unspecified time. Some employes had attendance records which were comparable to Appellant's. Toby Werner's punctuality was as bad or worse as Appellant's through May, 1974. She was advised by the employer at the same time as was Appellant that if her attendance record remained the same she would be suspended. Following this, her

attendance improved substantially. Jerine Erwin's punctuality in October, 1974-February, 1975 was as bad or worse as Appellant's through the period January-September, 1974. Her supervisor reprimanded her frequently, saw to it that all of her late time was recorded as leave without pay, and threatened to recommend discharge if her punctuality did not improve, having prepared a letter recommending discharge to be used in the event her attendance did not improve. Prior to October, 1974, two other employes of "Module A" had been first suspended and then discharged for poor punctuality.

There were a number of other employes in Modules A and B who were late to work on certain occasions during the period of January-September, 1974.

In the prehearing conference report for this proceeding dated December 30, 1974, are the following notations:

> The Department has indicated that it would make arrangements for the Appellant to see the time records after Mr. Monson [the union representative who was representing Appellant at that time prior to the appearance of counsel] decides which records he wants to see and makes a request for examination.
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> * * *
>
> The parties stipulate that if they have any amendments or additions to their list of witnesses or exhibits they will notify the other parties by the most expeditious means possible of those changes up to the time of hearing.

In a letter to Appellant's counsel dated February 25, 1975, Respondent's counsel stated:

> Pursuant to stipulation at the prehearing conference of December 30, 1974, in the referenced matter, this is to inform you that the Respondent may include among its exhibits a copy of Department of Industry, Labor and Human Relations work rules as well as the daily sign-in sheets for Module A for January through September of 1974.

CONCLUSIONS OF LAW

We conclude that the Respondent has discharged her burden of proof by proving to a reasonable certainty, by the greater weight of the credible evidence, that Appellant was excessively tardy during the period January-September, 1974, and that this constituted just cause for the suspension imposed. See Reinke v. Personnel Board, 53 Wis. 2d 123, 137-138 (1971).

With regard to the tardiness itself, Appellant did not introduce evidence that he was not tardy. His position is that Respondent's evidence was not adequate to sustain her burden of proof. Respondent introduced the time sheets described in the findings. Appellant objected to these on a number of grounds. We conclude they should be admitted in evidence.

Appellant objected at the hearing that he had not received prior notice that the sign-in sheets would be used in evidence at the hearing, contrary to Board practice. As noted in the findings there was some sort of understanding in effect at the pretrial that these time sheets would be available for Appellant's inspection at his request. Additionally, there is Respondent's letter, the text of which is set forth in the findings, which utilized the terminology "may include among its exhibits." The letter also stated that it was "pursuant to stipulation at the prehearing conference," which must have been a reference to the stipulation concerning the exchange of exhibits. Given that there was an understanding that the Respondent was to make the time sheets available on the request of the Appellant, we conclude that although it would have been better practice for the Respondent to have used the word "will" instead of "may" in the February 25, 1975, letter, that this was adequate compliance with Board practice as reflected in the stipulation set forth in the prehearing conference report.

The Appellant also objects to the authenticity and identification of the sign-in sheets, citing S. 909.01, Wis. stats. In the first place, this provision does not apply to administrative proceedings. See S. 901.01, Wis. stats.:

> Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in SS. 911.01 and 972.11.

In any event, using S. 909.01 as a general guide to authentication and identification, we conclude that these requirements have been satisified. The section provides:

> The requirements of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

The Appellant's immediate supervisors who had custody and care of the documents during the time in question testified concerning the manner in which the sheets were signed by the employes who were required to sign in, including the Appellant. One of the supervisors testified that Appellant's signature was signed in Appellant's hand. In any event, there is a statuory presumption that a document is signed by the person by whom it is purported to be signed.[1] This presumption was not rebutted.

The fact that the claim of custody of the sign-in sheets was not "tamper-proof" does not establish the inadmissability of the documents. There was no evidence that the signatures in question were other than that of Appellant, and we conclude that the documents were properly admitted as the administrative equivalent of records of regularly conducted activity, S. 908.03 (6), Wis. stats.

Appellant makes a number of other arguments that the suspension was improper that are more or less collateral to the question of whether or not Appellant was excessively tardy as charged.

UNEQUAL TREATMENT OF APPELLANT

The Appellant argues that the Respondent discriminated improperly against Appellant because, unlike some other employes, he was not exempted from the sign-in requirement. He also alleges improper discrimination in the fact that other employes were not disciplined because of their tardiness. The Appellant cites Lewis Realty v. Wisconsin Real Estate Broker's Board, 6 Wis. 2d 99, (1959). There the court held that widely disparate penalties for identical misconduct was capricious administrative action. It also held that overly harsh penalties could amount to arbitrary administrative action:

> The board's order imposing a one month's suspension of license as to one offender and a four month's suspension of license as to another for identical misconduct is so discriminatory as to be capricious within the meaning of S. 227.20 (1) (e), Stats. . . . It is our considered conclusion that penalties, which are imposed by administrative agencies that are so harsh as to shock the conscience of the court, constitute 'arbitrary' action within the meaning of such statute.

In the instant case, we conclude that the agency's actions were not improper as discriminatory or excessive. It was not discriminatory for Respondent to refuse to exempt Appellant from the sign-in requirement after April, 1974, in light of his poor attendance. Comparing his case with the cases of other agency employes, we conclude that the

[1] Section 891.25, Wis. stats.

agency did not err in treating the employes the way it did. With respect to Ms. Werner, she was given the same warning prior to suspension as was Appellant. Her attendance improved and she was not suspended. With regard to Ms. Erwin, she was charged with leave without pay and threatened with discharge.

Personnel management requires the exercise of discretion and a degree of flexibility in imposing discipline. Punishment must be shaped with regard to the offender as well as the offense. The difference in penalties here is not sufficiently great to take the case out of the realm of permissible discretionary administrative practice.[2]

IMPROPRIETY OF SIGN-IN EXEMPTION POLICY

Appellant argues that because it was determined at one point by the agency in the course of processing Appellant's grievance that all employes should be required to sign in and that no exceptions should be made that the agency is now trying to profit from its own illegal conduct in using the sign-in sheets against Appellant. Even if it were improper to exempt anyone from the sign-in requirement, we do not understand how it can be conceived that the department would be benefiting from illegal conduct by using Appellant's sign-in sheets in this proceeding. Also, we are not convinced that the material should be excluded even if it could be so characterized.

FAILURE TO SHOW THAT TARDINESS
INTERFERED WITH THE OPERATION OF THE PROGRAM

Appellant argues that Respondent must establish that his tardiness interfered with the operation of the program before she can establish just cause for the suspension. He cites Safransky v. Personnel Board, 62 Wis. 2d 464, 474 (1974). There the court required for a showing of just cause "a showing of a sufficient rational connection or nexus between the conduct complained of and the performance of the duties of the employment." We conclude that the requisite connection or showing has been made here. In Safransky, the question was much more subtle, concerning the relationship between certain on the job behavior of the employe related to his sexual orientation and the performance of his duties. Here there is a violation of a work rule that has a clear rational basis. See Townsend v. D.H.S.S., Wis. Pers. Bd., 73-170 (1/3/75).

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[2]This is in sharp contrast with the exacerbated situation found in Mohammad Ali v. Division of State Athletic Commissioners, 316 F. Supp. 1246 (SDNY 1970), for example.

MULTIPLE PUNISHMENT

Appellant contends that he has been punished more than once for the same alleged offense, in violation of his right to be free from a form of administrative double jeopardy. Laying to one side the threshold question of the applicability of the doctrine of double jeopardy to this field, see McManus v. Weaver, 74-32, July 30, 1975, there is no multiple punishment here. What is present here is progressive discipline, which requires that the employer review a course of conduct, including lesser penalties previously imposed, before imposing a greater penalty. Thus, in this case, reprimands were followed by a suspension. As a conceptual matter, the suspension was imposed because the employe's conduct failed to improve after the reprimands, not because of his conduct before the reprimands, although the employer had to consider the entire course of conduct in fixing a penalty. As to the imposition of leave without pay, we do not believe that it can be considered punishment to refuse to pay an employe for time when he is inexcusably not working.

FAILURE TO PROGRESSIVELY
DISCIPLINE APPELLANT

Appellant's argument that Respondent failed to utilize progressive discipline rests essentially on the proposition that the suspension could and should have been for a shorter period than ten days.

All disciplinary action does not have to comply with the theory of progressive discipline. As we indicated previously, employers must have some latitude in determining the exact nature of disciplinary measures to be imposed. In this case we conclude that there was just cause for the discipline imposed.

FAILURE TO CONSIDER
MITIGATING CIRCUMSTANCES

There are always excuses for being late. In evaluating an employe's punctuality an employer should consider the reasons for the employe's tardiness. However, when an employe is repeatedly late after repeated warnings, the employer is entitled to take appropriate measures. The Appellant has made no showing that his lateness was excusable. The Appellant refers in his brief to gubernatorial directives concerning leeway in the times for beginning and ending work and allowing time to make up work missed because of inclement weather.

However, it was not established on this record that these would have been applicable to Appellant.

DEFICIENCY OF THE DISCIPLINARY NOTICE

For the reasons set forth in the Opinion and Order entered herein on February 28, 1975, we reaffirm our conclusion that the notice of disciplinary action in this case is adequate.

While we conclude that the Respondent has sustained her burden of proof in defense of the suspension, we feel it appropriate to comment on the attendance problems at the offices in quesion. It is apparent that some of the employes abused the procedure and policy on attendance. This caused resentment among other employes and a consequential morale problem. Some employes even kept records of other employes' attendance. This creates a climate that is conducive of poor morale and resentment of discipline actually imposed by management. We recommend that if it has not already done so the agency review these matters and take appropriate corrective measures.

ORDER

IT IS HEREBY ORDERED that Respondent's actions are affirmed.

Dated February 23, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson