STATE OF WISCONSIN PERSONNEL BOARD

DONALD W. KROGH,

Appellant,

v.

JOHN C. WEAVER, President, University of Wisconsin,

Respondent.

Case No. 74-14

OFFICIAL

OPINION

AND

ORDER

Before AHRENS, Chairman, SERPE and JULIAN.

Background Facts

In November, 1970, the Appellant commenced his employment as a Police Officer with the Department of Safety and Security at the University of Wisconsin-Parkside in Kenosha, Wisconsin. In October, 1971, the Appellant was promoted to the position of Police Sergeant, reporting to Ronald D. Brinkman, the Director of the Department. The Appellant supervised the work of a number of Police Officers, including Officer Richard Atkins and a number of Security Officers, some of whom were students of the University, such as William Spreeberg and Eileen Reilly. The Appellant was second in command in the Department.

The Department had experienced a certain amount of internal conflict arising out of claims of mismanagement against the Director. The Appellant and other officers discussed these matters with Michael Olszyk, a student and reporter for the student newspaper, "The Ranger," to interest him in writing an article on the Department. Olszyk was unable to obtain certain information concerning the Department's budget from Gary Goetz, the Parkside Budget Director so Olszyk sought the assistance of the Appellant to procure the documents.

On January 4, 1974, Spreeberg and Olszyk made an unauthorized entry into Goetz's office in Greenquist Hall, removed certain documents from Goetz's file, made copies of them on equipment in the building and returned the originals to the file and left.

On January 25, 1974, Olszyk, who by then had developed some second thoughts about the enterprize, reported the matter to University officials. An investigation was launched, including assistance from the Criminal Investigation Division of the State Department of Justice.

On February 21, 1974, the Appellant was discharged for attempting to discredit his superior, for knowlingly failing to prevent the illegal entry into Goetz's office and for advising his subordinates not to cooperate in the ensuing investigation. Appellant filed a timely appeal.

We find the foregoing to be the material background facts; other findings of fact will be made in connection with our discussion of the issues.

Appellant Approved the Unauthorized Entry Into Goetz's Office to Copy Papers

The first charge against the Appellant includes all of the reasons given for the discharge. It provided as follows:

> "Since November, 1973, you have violated an established work rule; namely, University of Wisconsin Work Rule #1--'Disobediance, Insubordination, Impertinence, Negligence, or Refusal to Carry Out Assignments or Instructions.' During this period you knowlingly undermined the responsibility and authority of your supervisor, Director Ronald Brinkmann, by participating in and directing the efforts of others to discredit him; by providing confidential university and departmental documents to persons not within the department, namely Michael Olszyk; by acknowledging, condoning, and failing to take action against conduct which was a violation of university and state laws, namely, the entering of Gary Goetz's office on January 4, 1974, for the purpose of illegally removing and copying documents; and by advising subordinates namely William Spreeberg and Eileen Reilly, to refuse to participate in the authorized investigation relating to this matter and insisting that these subordinates refuse to discuss any of the above incidents with the authorized investigators and to deny any involvement."

The evidence adduced at the hearing concerned almost exclusively the entry of January 4 and the ensuing investigation. Only incidentally did the evidence relate to the charge of discrediting Director Brinkman. Such evidence as there was does not indicate anything more than the presentation of opinion and information concerning the management of a Department in a public university. Indeed, at least some derogatory comment by police officers against their superiors is protected by the First Amendment to the U.S. Constitution. Muller v. Conlisk, (CA 7 Ill) 429 F 2d 901 (1970). In any event, we find that Appellant did not participate in an improper scheme to undermine his superiors authority. Similarly, the only evidence concerning the Appellant's alleged efforts to obstruct the investigation was a written statement by Spreeberg that Appellant told him not to say anything to the investigators. Spreeberg in his testimony repudiated the statement. We find that the Appellant did not insist that Spreeberg and Reilly refuse to cooperate with investigators and deny their involvement.

We find that Appellant acknowledged, condoned, and failed to take action against the unauthorized entry into Goetz's office to remove budget documents for copying. Olszyk testified that, on January 2, 1974, two days before the unauthorized entry, he had asked Officer Atkins whether he had obtained any "material" from Goetz's office. Atkins said he hadn't, "and that Spreeberg would be walking the beat Friday the 4th and that he could get it for me." Olszyk further testified that he went to the Safety and Security Office at about 7:30 p.m. on Jaunary 4 and that his purpose was, among other things, to pick up "things that supposedly Bill Spreeberg was going to obtain from Goetz's office." But when Olszyk arrived at Safety and Security, Spreeberg had not yet obtained the documents from Goetz's office. Olszyk testified, "I started talking to Sergeant Krogh and at that time Atkins came in and we were just generally talking, I don't know what specifically about, and Krogh turned to Atkins and said, 'That night that you went over to Dearborn's office did you find anything?' Atkins said no to Krogh..." Olszyk further testified that throughout the two hours he was in the office, Appellant

was in touch with Spreeberg through the use of walkie-talkies. Olszyk said that he continued to press Appellant about whether Spreeberg had yet obtained the documents from Goetz's office, and Appellant repeatedly answered no to his queries.

Olszyk's testimony concerning his conversation with Appellant, immediately before leaving to enter Goetz's office, shows that the Appellant knew about and approved Spreeberg's use of his pass key to admit Olszyk to the office. Olszyk testified that Appellant said "that Bill (Spreeberg) had not obtained the documents from Goetz's office and that I could go with Spreeberg up into Goetz's office." Olszyk testified "that I kept asking him did Bill get the documents yet and that he kept saying no and that...prior to leaving said, 'Okay now, you can go with him up there.'" (emphasis added.) Olszyk, in testifying on cross examination again insisted that the Appellant's instructions to him about meeting Spreeberg was for the purpose of going into Goetz's office. Olszyk testified Appellant told him "'Well, you can meet Bill over at the Greenquist loading dock area.' I says, 'Well, did Bill get the information from Goetz's office yet?' I asked him that. He said to me, 'No, you can go with him up there.'" (emphasis added.) All of Olszyk's testimony concerning the crucial conversation prefaces any mention of meeting Spreeberg with a reference to Goetz's office. It is therefore apparent that when Appellant states that Olszyk can go with Spreeberg "up there," Appellant was approving Olszyk's going into Goetz's office and not merely to Greenquist Hall for some other purpose. Given the context in which Appellant's remarks were made, the conclusion is inescapable that the Appellant and Spreeberg had discussed between themselves a plan whereby Spreeberg would open the office for Olszyk to go in and then to assist Olszyk in copying the documents he sought. Appellant's instructions to Olszyk put the plan into operation.

In his testimony Appellant made a general denial that he had authorized or had been involved in the entry in any way. But he did not specifically deny having said what Olszyk testified he had said. To that extent, at least, Olszyk's testimony linking Appellant to the unauthorized entry stands uncontroverted.

Moreover, Olszyk's testimony that Spreeberg, before entering Goetz's office, first secured the elevator and emergency exit so that it could not be operated by anyone else suggests a planned entry and not the "spur of the moment" break-in Spreeberg testified to. Olszyk's testimony on this point and his testimony about the walkie-talkie contact that Spreeberg and Appellant maintained supports his account of what Appellant said to him. Olszyk's testimony concerning the Appellant's remark to Officer Atkins, earlier in the evening of January 4, as to whether Atkins found anything in Assistant Chancellor Dearborn's office during a night time visit indicates that this was not the first time an office had been entered in search of documents. We credit Olszyk's testimony on all of these matters.

On the other hand, Appellant's testimony involved a number of inconsistencies. Appellant testified that the first time he was made aware that an entry into Goetz's office had occurred on January 4, 1974, "was when the Criminal Justice Department /sic/ finally started their investigation." This would have been the week of February 4, 1974. Yet later he testified the first time he attached any significance to January 4 was February 21, the day he was discharged and the day he read Olszyk's written statement. It seems highly improbable that Appellant would not be more alert to the precise time he was first made aware of the occurrence of a break-in on a campus he and his men were assigend to patrol. A break-in in a campus setting would, after all, be a far more noteworthy occurrence than a similar event in an urban area where it would be commonplace. That Appellant's memory would be so vague on so crucial a point strikes the Board as implausible.

Appellant testified that Officer Atkins had both told him about the January 4 entry and then later said Atkins had never told him about it. Appellant's testimony that he knew nothing about the matter until the date of his discharge is contradicted by the testimony of Bruce Burman, the Union representative, who was contacted during the investigation. Burman testified that after learning at the February 1 Talent Hall meeting of Atkins' involvement, he called Appellant that evening and asked him "if he knew if Dick Atkins was involved in the illegal entry and if so, if he

could indicate to me (Burman) at that time his knowledge of the situation." Appellant replied, according to Burman, that he didn't know what Atkins was doing the night of January 4th. Burman's testimony after this becomes more equivocal, but at a minimum, it can be taken as indicating that on February 1, Appellant was made aware that one of his own subordinates had been involved in an illegal break-in. Appellant's own testimony concerning the Burman phone call is, to say the least, evasive. Appellant, when asked whether Burman had told him that people had been accused of breaking and entering and copying documents, replied, "We didn't go into length on anything." We conclude that contrary to his own testimony, Appellant knew about the events of January 4 since he approved them before hand and knew about the investigation from Burman.

The Appellant's actions after learning of the investigation indicate an effort to stay out of the picture as much as possible. Appellant's failure to investigate what Atkins had been up to after being clearly informed that he had been up to nothing good is puzzling behavior for a Police Sergeant. Atkins was, after all, one of Appellant's subordinate officers. Appellant's testimony that he didn't involve himself in the investigation because he didn't know anything about its subject matter is incredible. Appellant had received Mr. Burman's phone call concerning Atkins. The presence on campus of the University's legal counsel and the receipt that day of information incriminating Atkins would have aroused the curiosity of almost any police officer. Appellant's response was to remain sublimely aloof from the investigation of one of his own men and was the action of a person trying to stay low.

In summary, we conclude that Olszyk's testimony concerning Appellant's conversation with Atkins concerning a night time search of Dearborn's office, Appellant's instruction to him to meet Spreeberg to get the documents from Goetz's office, Spreeberg's precautions in securing the elevator and emergency exit to bar anyone from by chance coming upon them, as contrasted with Appellant's inconsistent, contradicted, and implausible testimony that he knew nothing of the events

and investigation concerning wrongdoing by his subordinates Spreeberg and Atkins shows clearly that the Appellant had foreknowledge of the entry and willfully neglected to stop it. Indeed, he approved it.

Appellant Made Public Records Of

Voided Parking Tickets

The second charge against the Appellant alleges he provided Olszyk copies of voided parking tickets. The charge was as follows:

> "During the period December, 1973, you violated an established work rule; namely, University of Wisconsin Work Rule #4--'Disclosure of Confidential Information to Unauthorized Persons.' During this period you provided to Michael Olszyk, a reporter for the Parkside Ranger, departmental file copies of voided UW-Parkside tickets for the purpose of a newspaper story, which was a violation of UW-Parkside Safety and Security Policies and Procedures Manual, Sec. 4.216.1, relating to not divulging information to Persons without a right to know."

The testimony is not in dispute that Appellant gave Olszyk copies of voided parking tickets and we so find. However, we shall later discuss whether such was misconduct on the Appellant's part.

Appellant Misused Spreeberg by Directing

Him to Aid Olszyk in Entering Goetz's Office

The third charge against the Appellant is that he misused students, and employees to discredit Brinkman and then to obstruct the investigation into the matter. The charge is as follows:

> "During the period December, 1973, until now, you violated an established work rule; namely University of Wisconsin Work Rule #21--'Lack of Good Judgment, Such as Discourtesy, in Dealing with Fellow Employees, Students, Customers, Other Agencies, or the General Public.' You engaged and misused both students and fellow employees, namely Michael Olszyk, William Spreeberg, and Eileen Reilly, in an endeavor to discredit your immediate supervisor and did influence and direct your subordinates not to participate in the investigation relating to this matter nor to divulge any information."

The evidence indicates that the Appellant did not misuse Olszyk who was a willing participant in making the entry so that he could get information for the newspaper article he planned to write. Appellant did not misuse Reilly since her only involvement in the matter was in connection with the parking tickets, which we shall discuss later and which did not involve improper conduct. We have already found that Appellant did not direct anybody not to participate in the investigation. The only remaining charge is the alleged misuse of Spreeberg by approving his participation in the unauthorized entry for the purpose of obtaining information adverse to Brinkman. We have already found that to be the fact of the matter and to that extent the charge of misusing Spreeberg, an employee, has been proved.

Appellant's Knowledge of and Neglect to Stop Unauthorized Entry and Misuse of Spreeberg Is Just Cause for Discharge.

We have found that various facts alleged in the charges against the Appellant are true. The question then is do those facts constitute just cause for discharge. Under the second charge, we found that the Appellant gave Olszyk copies of voided parking tickets. We conclude that since the void parking tickets were public records that Appellant was obligated to permit inspection by the press. The voided tickets constituted public records or documents within the meaning of Sec. 19.21(1) of the Wisconsin Statutes. The voided tickets here in question were on file in the offices of the Department of Safety and Security. At the time of Olszyk's inspection of the tickets -- shortly after 6:00 p.m. on December 14, 1973 -- it appears that Appellant was the ranking police officer then on duty. The voided tickets were thus under Appellant's care, custody and control. Section 19.21 of the Statutes confers a statutory right on "any person" to "examine or copy," subject to reasonable regulation, such documents as voided parking tickets. Beckon v. Emery, (1967) 36 Wis. 2d 510. And it has been said that the phrase "any person" contained in the

statutes necessarily encompasses representatives of the news media. 60 Op. Atty. Gen. 284, 292-293 (1971). Thus, even in his representative capacity, Olszyk was clearly a person with a right to examine the tickets.

It is difficult to see how Appellant or Brinkman or anyone else for that matter could have stated specific, persuasive reasons for refusing to disclose information from voided parking tickets in the face of a charge that persons who were deemed important had their tickets forgiven, while others did not. Embarrassment to the Department or its Director is the only reason that springs readily to mind, and it is not a valid reason. The public interest in the instant case would appear to favor disclosure over non-disclosure regardless of the reasons specifically stated for refusal to allow inspection. A policy of favoring campus faculty and administrators over students and others in the voiding of parking tickets would seem, if true, to need the airing Olszyk intended to give it. Where the information which may tend to establish such a policy is contained, as here, on public records on file in the Department, it cannot be said that Appellant acted improperly in allowing Olszyk to inspect what Olszyk clearly had a right to inspect. Indeed, Appellant would probably have acted improperly had he refused Olszyk access to the records.

Appellant's acknowledging, condoning, and failing to act against the unauthorized entry into Goetz's office and his employment of an employee in such activity constitutes just cause for discharge. Appellant's actions, which border on the criminal, constitute serious misconduct by a police officer. Its seriousness does not relate to its purpose in gathering information critical of Brinkman, but rather to the means used to gather it.

The seriousness of the conduct can best be assessed by comparing it to a similar event which resulted in monumental consequences for the persons who approved it and those who sought to conceal the latters identity. On June 17, 1972, an entry was made into a locked office building for the purpose of photographing papers contained in an office there. The persons who entered also engaged in wiretapping. The persons

were apprehended and prosecuted for burglary. While some persons viewed the conduct as a political prank, the public generally never questioned the criminal nature of the conduct. In the instant case, the record does not disclose any criminal prosecutions having been instigated against the Appellant, or Spreeberg or Olszyk or anybody else. Questions concerning whether all of the necessary elements of the various crimes against trespassing and theft were present may have been a factor in the decision concerning prosecution. Sections 943.10, 943.14, and 943.20, Wis. Stats., 1971. Yet in its essential aspect, the entry that the Appellant approved differed little from that perpetrated by the Watergate burglars. The entry was without the consent of the owner and it was for the purpose of copying papers. In both cases, the activity was engineered with the approval of law enforcement officers, the Attorney General of the United States in one case and the Appellant in the instant case. The public condemnation visited upon the former, anyone would think, would have detered the latter from such a serious misconduct and willful neglect of his duty to the University.

We find that the Appellant's misconduct is of such a nature that it would adversely effect his performance of his duties. Safransky v. Personnel Board (1974) 62 Wis. 2d 464. A Police Sergeant must command the respect of his subordinate Police Officers. He must be known by them to enforce the law against persons accused of crime, while at the same time recognizing such persons legal rights. He must not be known to use extra legal or illegal means to carry out his duties. If he is not known to be of this character, his subordinates may well take to closing their eyes to violations of the law and using illegal methods when it suits their purposes. In addition, the police must maintain the respect of the community they serve, which in this case includes the faculty, students, and others in the campus community. Public respect and cooperation are necessary for the police to perform their responsibilities to enforce the law. Such is seriously undermined where the police are known to engage in wrongdoing themselves.

> "A police department is a highly sensative agency entrusted and charged with the duty of protecting the community it serves from the evils of crime and corruption. To efficiently and effectively accomplish its mission it requires the respect and regard of the public, and when it has reason to believe that some of its members may be engaged in disreputable practices, it has a valid interest in purging itself of such practices..." Seattle Police Officers' Guild v. Seattle 494 P 2d 485 (1972).

For this reason, we have concluded that Appellant's discharge is for just cause.

ORDER

IT IS ORDERED that the Respondent's action in discharging the Appellant is sustained.

Dated January 2, 1975

STATE PERSONNEL BOARD

BY

William Ahrens

William Ahrens, Chairman