STATE OF WISCONSIN PERSONNEL BOARD

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BETTY JANE REIS, *

Appellant, *

v. *

JOHN WEAVER, President, University of Wisconsin, *

Respondent. *

Case No. 74-27 *

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OFFICIAL

OPINION AND ORDER

Before: DEWITT, Chairperson, WILSON, STEININGER, MORGAN and WARREN, Members.

OPINION

Nature of the Case

This is an appeal of an involuntary demotion for disciplinary purposes pursuant to S. 16.05(2), stats. In an Opinion and Order entered February 19, 1975, we denied a motion by the Appellant requesting reinstatement to her former position because the inadequacy of her disciplinary notice denied her due process of law.

Findings of Fact

The Appellant at all relevant times has been a permanent employe in the classified service and has been employed as an Administrative Secretary 2 in the School for Workers Department of the University of Wisconsin - Extension.

On January 21, 1974, Donna Beutel (then Appellant's supervisor) gave the Appellant the following written order.

> "To clarify your work assignment: You are to take dictation from all faculty members upon their request. This will take first priority over all other work unless, in a specific instance, you have been directed otherwise by myself. The rest of your work will be assigned to you directly by myself, or in my absence, by Judy. Please return all work which I have assigned to you to me upon its completion. If the work has been assigned to you by Judy, please return it to her." (Respondent's Exhibit 1)

The order directed Appellant to take dictation from all faculty members upon their request. Such dictation, unless otherwise directed by Ms. Beutel, was to be given

priority over any other work. Judy Northey was enpowered to assign work to Appellant in Ms. Beutel's absence. The order was given to the Appellant who understood its directives. Appellant was also aware of UW Work Rule Number 1 which prohibited disobedience of work orders.

On February 6, 1974, Professor Grinnold requested that the Appellant take dictation for him. Despite the January 21, 1974 written order, Appellant refused to take the dictation because she was busy typing other non-dictation material for Professor Grinnold. Appellant's supervisor was absent from the office so Judy Northey twice attempted to assign the dictation to the Appellant. Appellant refused each time. Judy Northey then took the dictation herself.

Appellant was demoted from her Administrative Secretary 2 position to a Stenographer 3 on March 8, 1974. The demotion was a direct result of the above incident. It was viewed as an appropriate discipline because of the seriousness of Appellant's actions and because Appellant had previously been suspended twice: Once for failure to follow work priorities and once for failure to comply with the instructions of her supervisor.

Conclusions of Law

We conclude that the Respondent has shown by the greater weight of the credible evidence that the Appellant intentionally disobeyed the written order of January 21, 1974, and that such disobedience when viewed in conjunction with the Appellant's earlier disciplinary suspensions constituted just cause for her demotion. Respondent has thus discharged his burden of proof. See Reinke v. Personnel Board, 53 Wis. 2d 123, 137-138 (1971).

Appellant's own testimony establishes that she understood the order making faculty dictation her first priority. Her testimony also establishes that she refused to take such dictation. All other witnesses to the incident support this view. However, Appellant argues she disobeyed no order because she was never ordered to cease typing and take dictation. This argument misses the point. The

issue in this case is not whether Judy Northey (or Professor Grinnold) verbally ordered Appellant to take dictation. Rather, the issue is whether or not Appellant refused to obey the written order of January 21, 1974 which made dictation Appellant's first priority. Her testimony establishes both that Professor Grinnold, a faculty member, requested she take his dictation and that she refused despite the fact that she was working on lower priority work. Thus Appellant did in fact disobey her written orders.

Appellant next argues that she disobeyed no order because the written order was invalid since it conflicted with a previous order issued by Ms. Beutel's superior, Robert Ozanne. This argument ignores Dr. Ozanne's testimony that his order was modified by Ms. Beutel's order. Moreover, Dr. Ozanne's order was not offered in evidence so that the Board could not compare the two orders for possible conflicts.

The validity of the January 21, 1974 order is challenged because it was not issued by an appointing authority. S. 16.04, stats. provides:

> 16.04 Duties of Appointing Authority
> (1) Each appointing authority shall:
> (b) Appoint persons to the classified service, designate their titles, assign their duties and fix their compensation, all subject to this subchapter and the rules of the director.

Clearly, the section establishes the authority of appointing authorities to assign duties to individuals they hire.

This section does not mean an appointing authority must determine the work flow in a given office. Such authority can be delegated under S. 15.02(4) of the Wisconsin Statutes. That section provides in part:

> "...The head of the department may delegate and redelegate to any officer or employe of the department or independent agency any function vested by law in the head of the department."

Contrary to Appellant's contention, delegation of this authority need not be in writing and filed with the Director of the Bureau of Personnel unless the delegated authority is to appoint individuals to or remove them from positions. Wis. Adm. Code S. Pers 1.02(1). Thus Ms. Beutel could exercise delegated

supervisory powers to determine work flow by setting work priorities for Appellant provided such an assignment of work duties was within the Appellant's job specifications. Appellant's Exhibits 7, 8, and 9 indicate that an Administrative Secretary 2 is expected to perform stenographer duties. Further, such job specifications are not exhaustive of the duties of an Administrative Secretary 2. Wis. Adm. Code S. Pers 2.04(1). Therefore we conclude the Appellant was given a lawful order to make dictation her top priority.

The Appellant argues that the order had been rescinded before February 6, 1974 by the de facto performance of the parties. Testimony by the Appellant indicates that she received work directly from individuals other than Ms. Beutel or Ms. Northey - contrary to the January 21, 1974 order which indicated that all Appellant's non-dictation work would be assigned directly by those individuals. Yet Dr. Ozanne testified the order was in effect on February 6, 1974. Moreover, there was absolutely no indication the priority established for dictation had ever been mutually ignored by the parties. Without such evidence, we can not find that the order was rescinded in the short period of time between January 21 and February 6.

Just Cause

Despite her disobedience, Appellant insists that just cause precludes her demotion. Her first argument asserts that she did not willfully or intentionally disobey the order as required by just cause. Her position is that it was impossible for her to complete two tasks at one time. Consequently her refusal to take dictation was not intentional and should be excused. But she was not required to do the impossible. Instead her order clearly set out what work was to be given priority when confronted with dictation and non-dictation work. She chose to disobey that priority.

Appellant's second argument is that just cause requires that an employee be warned under threat of discipline that his/her actions are unacceptable. Appellant cites Schroeder v. Weaver, Wisconsin Personnel Board, No. 73-24 (2/21/75).

That case involved the discharge of an employee with no warning designed to highlight the fact that his actions might be in violation of an oral order. In this case, Appellant knew her actions violated a direct, written order given to her. Further, Ms. Northey's actions in ordering the Appellant to take the dictation emphasized the seriousness of Appellant's refusal to comply.

Appellant claims the Respondent has not demonstrated that her actions had an adverse impact on her job performance or the work force. Safransky v. Personnel Board, 62 Wis. 2d 464 (1973), is cited as authority for the proposition that just cause requires such a showing. We conclude Respondent has shown the requisite impact by showing a direct refusal to follow an order designed to ensure that the most important work of the office was done first. Appellant by insisting on her own priority scheme disrupted her office and forced Ms. Northey to drop her own work and take dictation.

Appellant's last argument is that demotion is too severe a discipline for her infraction. Presumably the severity means it does not constitute just cause. However, in light of Appellant's two prior disciplinary suspensions (See Board's Exhibit 2, items 2 and 3), the demotion was neither arbitrary nor excessive. Personnel management requires some discretion in supervision and discipline. We conclude that under all the circumstances of this case, Appellant's demotion was well within the realm of this discretion.

Denial of Due Process

Appellant objects to the conduct of the hearing examiner during her hearing. She argues that she was denied due process of law in that she was not provided with an impartial hearing examiner. Appellant cites Dahlinger v. Town Board of Town of Delavan, 381 F. Supp. 474 (ED Wis. 1974) and Hortonville Education Association v. Joint District No. 1, 66 Wis. 2d 469 (1974) as authority. According to the Appellant, the hearing examiner stripped himself of his impartiality when he consulted ex parte with the Deputy Director of Personnel for the State of

Wisconsin concerning the legality of supervision of classified employees by unclassified ones. S. 227.10(2) stats., then in effect provided that in contested cases:

> (2) "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be duly offered and made a part of the record in the case. Every party shallbe afforded adequate opportunity to rebut or offer countervailing evidence."

In this case the hearing examiner summarized on the record the information he had obtained from the deputy director to give each of the parties an opportunity to rebut or offer their own countervailing evidence.

The cases the Appellant cites deal with situations where the final decision-maker investigates the factual charges against an individual and then renders the final decision. In this case, such activity is not present. The hearing examiner's ex parte communication was strictly for advice on the issue of the legal authority of Ms. Beutel.

Contrary to Appellant's argument, possible bias by the hearing examiner is not per se a violation of due process. Appellant must show bias. It will not be assumed. Stebbins v. Weaver, 396 F. Supp. 104 (WD Wis. 1975). The standard for such proof is set forth in Withrow et al. v. Larkin, 421 US 35 (1975). That case involved a hearing before the Wisconsin Physician's Licensing Board. The Appellee claimed the Board's bias (the Board had investigated the initial charges) had denied him due process of law. The U.S. Supreme Court in rejecting the claim established the following standard to show bias. Withrow et al. v. Larkin, supra at p. 47 and p. 55.

> "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

> "The mere exposure presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing."

Since Appellant has not shown any actual or imminent potential bias on the part of the hearing examiner and since the bare fact of an ex parte consultation is insufficient, we conclude that Appellant has not overcome the presumption that the hearing examiner acted honestly and with integrity.

ORDER

It Is Hereby Ordered that the demotion imposed by the Respondent is sustained and this appeal is hereby dismissed.

Dated March 21, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson