STATE OF WISCONSIN PERSONNEL BOARD

OFFICIAL

DAWN JANKE,

Appellant,

v.

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

Respondent.

Case No. 74-57

OPINION AND ORDER

Before JULIAN, Vice Chairman, SERPE and STEININGER.

Facts

Appellant filed a timely appeal of her layoff. At the prehearing conference, Respondent contended that the burden of proof is on the Appellant on the issue of whether she was laid off for just cause.

The Burden of Proof in a Layoff Case Is On the State

State employees, who have permanent status in class, may be laid off only for just cause. Section 16.05(1)(e), Wis. Stats., 1971, provides:

> "The board shall: Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions or discharges but only when it is alleged that such decision was not based on just cause."

The provision by its terms provides that the board may hear appeals alleging layoff without just cause in addition to demotions, suspensions, and discharges as had previously been the case. The statutory inclusion of the word "layoff" placed in

amongst the disciplinary appeals indicates a legislative intent that the same legal standard of just cause should apply in the same way to layoffs as applies to the disciplinary appeals.

The Legislature knew that the State had the burden in disciplinary cases and intended that the same rule should apply to layoff cases. On December 2, 1971, in a landmark case the Wisconsin Supreme Court decided that in a discharge case, where the employe alleges his discharge was without just cause, the State has the burden of proving its allegations against him by the greater weight of the preponderance of the evidence. This changed the Board's practice of placing the burden upon the discharged employe. Section 16.05(1)(e), Wis. Stats., 1971 became effective on April 29, 1972, approximately 5 months after the decision. Where the Legislature uses judicially construed words, it is presumed to have knowledge of that construction, Kindy v. Hayes, 44 Wis 2d 301, 314 (1969), and to intend that they be given the same construction. 73 Adm. Jur 2d STATUTES, Section 165. Such rule of statutory construction mandates that in layoff cases, the State has the burden of proof.

We do not agree with the view that the statutory standard of "just cause" means one thing in a disciplinary case and something different in a layoff case. Such was expressed in Weaver v. Personnel Board, Circuit Court Case No. 141-416, 7-9-74. In that case, the Court said that just cause did not mean the same thing when applied to a layoff as it did in the case of a discharge. It concluded that the Board should not insist that the employer demonstrate that the least efficient employee was laid off, but that if the supervisor believes the least efficient employee was laid off, that is sufficient to support the Board reaching the conclusion that the employee was laid off for just cause. Such desparate interpretations of just cause produces widely desparate results arising out of nearly identical fact situations. If an employee is discharged for unsatisfactory performance, he is entitled to insist that the employer notify him in what manner his work is unsatisfactory, a hearing on the truth of such allegations, and an

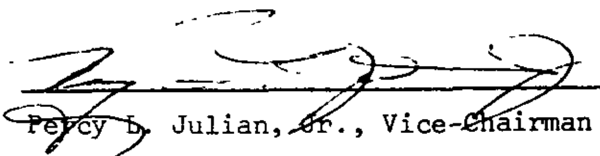
independent judgment by the Board as to whether his level of performance was sufficiently poor so that the employer had just cause to discharge him. At the same time, under the Weaver Case Opinion, if an employee is rated the least efficient employee in the layoff group, he cannot challenge this rating, unless the employee proves the supervisor or rater is guilty of bad faith or capriciousness or arbitrariness. These are standards of proof associated in the law with fraud or unconstitutional action by the State. It means that the burden of proof is on the employee and that what the employer says, unsupported by any factual evidence, is conclusive unless proven otherwise by the employee by overwhelming evidence. These standards do not usually appertain to the settlement of disputes in employment relations. The Weaver Opinion simply weights the resolution of factual disputes in layoff cases conclusively in favor of the employer. We do not believe that such rule is consistent with the protection the law affords employees against "unfair treatment". Odau v. Personnel Board, 250 Wis. 600, 605 (1947). The Board has appealed the Weaver Case and, in this and future cases, will not follow it until the Supreme Court has decided the matter.

We conclude that the Respondent has the burden of proof in this layoff case. The statute protecting an employee's job rights against layoff is identical to that protecting his or her job rights against discharge, suspension, and demotion. The job interests protected are substantially similar, since layoff may be tantamount to discharge. We conclude, therefore, that the burden of proof should be allocated to the State in layoff cases as it is, under the law, in disciplinary cases.

Dated November 25, 1974

STATE PERSONNEL BOARD

BY



Percy L. Julian, Jr., Vice-Chairman