STATE OF WISCONSIN STATE PERSONNEL BOARD

LOIS ZEHNER,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 74-98

OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of a termination pursuant to Section 16.05(1)(e), stats. Appellant raised the question of the adequacy of the notice contained in the termination letter at an earlier stage in the proceedings and we entered an interim Opinion and Order on this subject on February 25, 1975.

FINDINGS OF FACT

Appellant began employment with the state of Wisconsin on March 16, 1961, and her state employment was continuous until the date of her discharge on September 6, 1974. Immediately prior to accepting the position from which she was subsequently discharged, that of Technical Typist 1 at the University Health Services, she had been employed in a similar position at the Clinical Cancer Center. She had earlier been employed at the Center as a Technical Typist 2 as the result of a promotion. However, her supervisor had expressed concern to the personnel office of the Center for Health Sciences about Appellant's job performance and her suitability for the position. The response of the personnel office was to attempt to find her another position at the Technical Typist 1 or 2 level. This attempt was

unsuccessful and the further response of the personnel office was to restructure her job, remove a substantial amount of her responsibility, and demote her to a Technical Typist 1 prior to the completion of her probation at the Technical Typist 2 level. Subsequently, in January, 1974, she laterally transferred to the Technical Typist 1 position at the University Health Services (UHS).

During the period July 12, 1974, and August 23, 1974, the Appellant performed typing duties for a number of persons at the UHS. One of these was Wilma Lewis, a Clinical Nurse Specialist and Assistant Director of Public Health Programs. Some of this involved written material containing technical language from the nursing area, and consisted of reports, letters, and papers. A substantial amount of Appellant's work for Ms. Lewis was of unsatisfactory quality in terms of inaccuracies in transcription from longhand drafts, and in the amount of time required to do the work.

Another person for whom the Appellant performed duties during the period in question was Celia Lamper, a Clinical Nurse Specialist and Assistant Clinical Professor of Nursing. Appellant typed correspondence and other papers. Much of this material contained technical medical and nursing terms. Substantial amounts of this work was of unsatisfactory quality in terms of typographical errors, failure to proofread accurately, and illegible and inaccurate stencils, and in terms of the amount of time required to do the work. As a result of these problems, Ms. Lamper changed her manner of functioning by depending more on verbal communications, by doing some of her own typing, and by structuring classes so that she did not have to utilize typed instructional material for her students.

Appellant also performed typing duties during the period in question for Lowell H. Mays, Lecturer in the Department of Medicine and Psycho-

therapist at the University Health Service. This work included charts and correspondence that contained technical medical terminology. A substantial amount of this work was of poor quality in terms of misspelled words, strikeovers, and improper spacing of characters. He consistently had to return finished work to her for retyping.

The Appellant performed acceptable work for a number of other persons during the period in question. Dr. Irwin Koenig was a clinician with the UHS. The Appellant did non-technical correspondence typing and copying for him. This work basically was of good quality although it occasionally contained a small number of typing errors including misspellings and transpositions. The Appellant did some correspondence containing technical medical language for Dr. Merle Brase, a clinician at UHS. This work was basically of good quality.

Dr. Sally Mendenhall was a clinician at the UHS. The Appellant did non-technical correspondence typing for her that was basically of good quality. Mary Saurs was a nurse for whom the Appellant typed a pamphlet for students being treated at the clinic. This pamphlet dealt with various diseases and contained some technical medical terminology. Appellant's work on this paper was of good quality.

The Appellant also voluntarily did some typing during the period in question for someone who was not actually assigned to her, LuAnn Martens. This work was of good quality and consisted primarily of non-technical material including minutes of meetings and newsletters.

Kathy Clark, an Administrative Secretary 1, supervised the Appellant from March, 1974 until her termination. Ms. Clark received numerous complaints from certain employes for whom Appellant performed typing duties about the poor quality of Appellant's work. On July 12, 1974, she participated in a conference with the Appellant at which the problems with her

work were reviewed, including examples of poor typing. On this date, she was also relieved of some of her typing duties as her workload was reduced.

During the period in question Ms. Clark worked closely with the Appellant and was in a position to observe a substantial portion of her typing and saw substantial amounts of poor quality typing in terms of errors in spelling, punctuation, and strikeovers.

Stanley McDonald was the administrator of the University Health Service, responsible for its general administration. Following Appellant's commencement of employment in January, 1974, he received numerous complaints about the quality of her typing from various of the persons whose work she was assigned. Ms. Clark and he counseled with the Appellant prior to the period in question and discussed her shortcomings with her. He participated in the July 12, 1974, conference with the Appellant, along with Ms. Clark. At that time he suggested that the Appellant seek a reclassification to a level that would not pose as many difficulties as her then current position. He also told her that if her work did not improve that she would be terminated. Following this conference he continued to receive complaints and evidence of the Appellant's poor work performance. He had a further conference with her on August 15th, 1974 when he told her that if she did not seek a reclassification he would request her termination. This was followed by McDonald's request to the University personnel office that she be terminated. This was granted and she was dismissed effective September 6, 1974.

The Appellant requested and was denied union representation at the August 22d conference with Mr. McDonald. At that time her position was not covered by a collective bargaining agreement.

Following her dismissal, Appellant, in addition to filing this appeal, pursued a grievance through the non-contractual grievance procedure. In his response to this grievance, Respondent upheld the termination but offered to try to find her a position in a different classification which might have resulted in a demotion. The Appellant never responded to that offer nor did she ever pursue the other suggestions to seek reclassification to a less demanding position.

Respondent's counsel did not notify Appellant's counsel prior to the hearing that he intended to introduce certain of the exhibits that he actually introduced, that is, numbers 1-4 and 7-14. During the course of one of the adjournments between hearing dates one of the Respondent's personnel officers, Ross Reinhold, who was assisting Respondent's counsel, communicated with a witness, Marian Walluks, concerning the scheduling of her appearance and the nature of the testimony she would be called on to give.

CONCLUSIONS OF LAW

EVIDENTIARY MATTERS

The prehearing conference report (Board's Exhibit 2) contains the following stipulation:

> "The parties are under a continuing obligation to notify each other of any exhibits they intend to introduce and a list of the witnesses they intend to call up to the date set for hearing."

Appellant's exhibits 1-14, with the exception of 5 and 6, were objected to on the grounds that the Respondent had failed to provide the requisite notice. In response to the objections Respondent's counsel did not deny the failure of disclosure but made a number of arguments why the exhibits should be accepted anyway. First, he argued that he himself did not know he would be using the exhibits until the last minute. Second, that Appellant's counsel had the right to see her entire file and thus should

not have been surprised by any of the documents. Third, with regard to Appellant's No. 8, that he could not have provided a copy because much of the relevant content consisted of white correction fluid, which would not have shown up in a photocopy.

In Ferguson v. Schmidt, Wisconsin Personnel Board No. 73-161 (11/6/74), the testimony of a witness was ordered stricken because counsel failed to notify opposing counsel of the name of the witness in accordance with a board order. In the instant case, the notice requirement was imposed by a stipulation as opposed to an order, but the result should not be different in either case. See 73 AM JUR 2d Stipulations Section 11. The argument that the exhibits were not known until just before the hearing is not persuasive. The exhibits should have been disclosed no later than the time they were known to Respondent's counsel, even if this were just before the hearing. Further, the documents were in existence and known to various agents of Respondent long before the hearing. If these agents failed to disclose them to counsel until just before the hearing, this does not excuse total non-compliance with the stipulation. The argument that Appellant's counsel had access to Appellant's personnel file is also unpersuasive. Even if all of the exhibits had been in the personnel file, her attorney had no way of knowing what would be used. Access to the file did not fulfill the function of the stipulation. For these reasons we conclude that the Appellant's objections to these exhibits must be sustained and exhibits 1-4 and 7-14 are not received in evidence.

Despite the absence of actual examples of poor work performance from the record, there was sufficient testimony not connected to the excluded exhibits to support the findings concerning the quality of Appellant's work performance. In this regard we also note that Appellant did not proffer through

her witnesses examples of her good quality work.

Another evidentiary matter raised by Appellant concerns an alleged failure of compliance with an order entered by the hearing officer on June 26, 1975, ordering witnesses to refrain from speaking "with one another about the merits of this case or the testimony given by them herein." Although there was some communication between Mr. Reinhold and Ms. Walluks, there was no evidence that this concerned either the merits or the testimony already given. We conclude there was no violation of this order nor any error committed by Respondent in this regard.

JUST CAUSE

The Wisconsin Supreme Court has provided a test for the determination of just cause:

> ". . . one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works." State ex rel Gudlin v. Civil Service Commission, 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965). Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974).

In this case we conclude that the Appellant's performance of her duties and the efficiency of the group were seriously impaired by the Appellant's typing deficiencies. While some of her typing was satisfactory, this was for the most part non-technical material of small quantity. While there was insufficient evidence in this record to support a formal conclusion on this point, it appears that Appellant could have performed satisfactorily in a position in a lower classification with less complex duties and responsibilities, perhaps at the Typist 2 or 3 level. This raises a question as to whether the Respondent was under some duty to demote rather than to have discharged Appellant.

In Ferguson v. State Personnel Board, 145-252, Dane County Circuit

Court (2/12/75), the court indicated:

> "The personnel board after the hearing must either sustain the appointing authority or reinstate the employe fully. Section 16.05(1)(e), Wis. Stats. This means that the board cannot modify or reduce the disciplinary penalty which has been imposed. It cannot ameliorate punishment, even though it may feel that it was too severe. The board cannot reverse the action of the appointing authority because he has been too harsh. If there be just cause to impose discipline, the discipline imposed must be sustained."

However, we believe this reads too much into the limitations on this board's remedial powers. Section 16.28(1)(a), stats., provides for a range of disciplinary measures: "An employe with permanent status in class may be removed, suspended without pay, discharged, or reduced in pay or position only for just cause." The rule of law endorsed by the Circuit Court in Ferguson would require the anomalous result that in any case where there was cause for any of the enumerated disciplinary measures, e.g., a one-day suspension without pay, there would be cause for the most severe discipline—discharge. This result would be at odds with common sense and the legislative intent in providing a range of disciplinary measures. This board does not have the power under Section 16.05(1)(e) to reduce the discipline imposed following hearing, but that does not mean that it must sustain the director in a case where the discipline imposed is disproportionate.

This approach gets support from the director's guidelines established pursuant to Section 16.28(1)(c), stats.: "The director shall establish guidelines for uniform application of this authority among the various departments." The Director's Guidelines for Handling Disciplinary Actions, November, 1972, of which we take official notice, provide at p. 9 as follows:

The following penalties are available as disciplinary actions:

1. Verbal warning,
2. Written reprimand,
3. Suspension without pay up to 30 days,

4. Reduction in pay,

5. Reduction in position, and

6. Discharge.

The last four of these penalties are prescribed under s. 16.24(1), Wis. Stats. under the section dealing with the employee's right to appeal discipline to the Personnel Board. There is general understanding of penalties 1, 2, 3, and 6, but many people in state service are not aware of the reduction in pay or reduction in position options.

Reduction in pay refers to an agency's authority to reduce an employee to the Permanent Status in Class Minimum salary rate of his current classification as disciplinary action. Although there is little experience in utilizing this option as a disciplinary measure; it should be considered as a possible alternative to discharge.

Reduction in position is also available to the appointing officer. This penalty can be accomplished in two ways: 1) if there is a vacancy in a class that the employee is qualified for, the appointing officer can move the employee to that position and reduce his pay to the Permanent Status in Class Minimum for the lower class. 2) if no vacancy exists, the appointing officer may withdraw certain duties, reconstruct the position to warrant a lesser classification, which upon review and action by the Director of the Bureau of Personnel, results in a downward reclassification. This alternative also has been infrequently utilized. A demotion would seem an appropriate disciplinary action in situations where an unsatisfactory employee could be expected to perform satisfactorily in a job of lesser responsibility.

Standards for evaluating many personnel transactions, including discipline, are of necessity flexible. C.f., Jacobson v. Hart, Wisconsin Personnel Board No. 74-124 (2/23/76), p. 6. There should not be an inflexible rule requiring demotion in all cases where the employe appears capable of performing satisfactorily in a lower classification, and we do not interpret this director's guideline as providing one.

In this case the Appellant's supervisors made another position available to her after she had failed to successfully complete her probation in a Technical Typist 2 position. While she was employed at the UHS her supervisors unsuccessfully attempted to persuade her to seek movement to another, less demanding, classification. Following her discharge the offer of a potential demotion was made explicit to her. She failed to follow up on

this offer in any way. Given these circumstances, we must conclude that there was just cause for the discharge. Even assuming the Appellant could have performed adequately at a lower classification, such as Typist 2, on this record the failure to impose an involuntary demotion cannot be equated with a failure of just cause for a discharge.

APPELLANT'S OTHER CONTENTIONS

Appellant makes a number of other allegations of error.

UNION REPRESENTATIVE AT PRE-TERMINATION CONFERENCE

Appellant argues that the Respondent erred in denying her union representation at the pre-termination conference, citing NLRB v. J. Weingarten, Inc., 95 S. Ct. 959, 966, (1975). However, this was a case brought under the National Labor Relations Act, 29 U.S.C. Section 158(a)(1), and involved an employe who was represented for collective bargaining purposes by the Retail Clerks Union, Local 455. In the case before us, the Appellant's position was not covered by a collective bargaining agreement. We can find no basis for a conclusion that such an employe is entitled to union representation at a pre-termination conference. This conference was not part of the grievance procedure and whatever rights attach from the statewide unilateral grievance procedure, they were not available at this point.

LACK OF PROGRESSIVE DISCIPLINE

This board held in Jacobson v. Hart Case No. 74-124 (2/23/76), that "all disciplinary action does not have to comply with the theory of progressive discipline." p. 7. As was indicated in the discussion of just cause, in some cases failure to utilize a less severe action might lead to a conclusion of failure of just cause depending on the circumstances of the particular case. In this case we have already concluded that there was just cause

for the discharge. Furthermore, this was not a case of misconduct, but rather a case of inability to perform the duties and responsibilities associated with the position. Certain kinds of lesser actions usually associated with misconduct such as suspensions or reductions in pay would not be appropriate. Appellant's supervisors did counsel with her in an attempt to correct her problems and offered her a reasonable opportunity to either improve her performance or seek reclassification.

LACK OF SUFFICIENT NOTICE

We ruled on the sufficiency of the notice in an Opinion and Order entered February 25, 1975, and reaffirm this decision at this time.

LACK OF OBJECTIVE STANDARDS

Appellant argues that there were no objective standards applied to the evaluation of her work, and that she was never told what was expected of her in terms of "minimum performance standards." There was no evidence that there had ever been developed for Appellant's position or classification any quantifiable or output standards such as a particular page rate or percentage of error in typing. We cannot conclude that this level of objectivity is required. The record in this case shows there were wide variations in the nature and complexity of the work assigned to Appellant, and the conditions under which she was to complete that work. The applicable standards must be flexible because the quantity and quality of the output must depend on variables such as the complexity of the material, its intended use, and deadline pressure. In this case the Appellant had had long experience in typing in state service, including work as a Technical Typist 1 and 2. She was counseled by her supervisors who reviewed errors in her work with her. We conclude there was no error because of lack of objective standards.

LACK OF ANY WRITTEN EVALUATIONS

Section Pers. 20.04, W.A.C., requires that performance evaluations be done at least once each year. Assuming there were no performance evaluations for Appellant, there could be no error because she was not employed for a full year.

LACK OF SUPERVISION AND TRAINING

Both Ms. Clark and Mr. McDonald performed supervisory functions with regard to Appellant. Even if the class specifications for Ms. Clark's position did not include supervisory duties, there is no error in the context of this appeal in using her as a supervisor. Furthermore, again assuming that the Appellant's on-the-job supervision and instruction did not amount to "training" in some technical sense, we perceive no possible ground for error as regards the discharge.

LACK OF ALTERNATIVE WORK

Appellant argues that the Respondent failed in a duty to search the agency for alternative employment, citing Section 16.32(2), Stats. This provision applies to employes who become "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his position by reason of infirmities due to age, disabilities, or other . . . ." The record does not support a finding that Appellant fit into any of these categories, and therefore there is no basis for a conclusion that there was a violation of this provision.

ORDER

IT IS ORDERED that the action of Respondent is affirmed and the appeal is dismissed.

Dated March 21, 1977. STATE PERSONNEL BOARD

Laurene DeWitt

Laurene DeWitt, Chairperson