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JANE NORTH, \*

Appellant, \*

v. \*

ZEL RICE, Secretary, \*

Department of Transportation \*

Respondent. \*

Case No. 75-62 \*

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**OFFICIAL**  
 OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of a demotion pursuant to Section 16.05(1)(e), stats.

FINDINGS OF FACT

The Appellant is a long-term state employe with over 30 years of service. In October, 1973, she transferred from the Revocation and Suspension Unit, Driver Responsibility Section, to the Safety Responsibility Unit (SRU) in the same section, in the Bureau of Driver Control, Division of Motion Vehicles, Department of Transportation. This transfer resulted from a legislative simplification of the registration statutes which caused the elimination of her prior position and all other positions of the same classification in that section. Appellant's new position varied from her prior position both in terms of differences in subject matter and in the fact that her new position involved extensive public contact while her old position did not.

While there was little testimony concerning Appellant's work record with DOT prior to the transfer, the transcript does support findings that she had never been subject to disciplinary action that would have been

appealable to the Personnel Board, but that her previous work had not been entirely satisfactory to the department.

Following her transfer the Appellant received three months of intensive training during which she did paperwork under close supervision with detailed review. This work did not involve contact with the public. Six months of close training followed. This involved handling telephone and personal inquiries at the unit's front counter under close supervision, the provision of assistance when she was unable to handle a problem, and close review of her output, including some monitoring of phone calls. The Appellant had available a manual which set forth detailed guidelines on handling particular problems. Following her initial nine month training period, the Appellant received continual on-the-job training consisting primarily of review of errors and counseling and instruction with regard to her duties and responsibilities.

Although the Appellant worked very hard she did experience difficulty with some aspects of her work. These resulted in technical errors in processing cases and in friction with the public. These problems continued throughout the period of her tenure in the position in question. In addition to the on-the-job training referred to above, Appellant's supervisors also attempted to lighten her workload. One of her co-workers attempted to help her by offering to take over some of her work when Appellant appeared to have a backlog. She was also told that she should advise the persons who brought her files when she was too busy to take more calls.

The attempt to reduce the workload was only partially successful. One reason was that the Appellant was reluctant to allow others to take work assigned to her. Another was that although some of the files would be brought to Appellant's co-workers when Appellant told the people who brought

her files that she was busy, in some instances the co-workers would suggest that files be returned to Appellant if she were not on the phone at the time, and thus files would be returned to her. Overall, the Appellant continued to carry a heavy workload.

On January 28, 1975, Appellant received a letter concerning some of the problems she was having, setting forth her supervisors' concerns, and indicating that improvement was necessary, Respondent's Exhibit 1. On April 28, 1975, she was demoted from Licensing and Vehicle Registration Representative 2 to Clerk 2. The demotion letter of that date contained nine items in the enumeration of reasons for the demotion. The parties submitted a copy of the demotion letter marked Respondent's Exhibit 7 with certain parts enclosed in drawn-in boxes, and the stipulation that the factual allegations contained in the letter were correct with the exception of the matter contained in those boxes. This stipulated material is incorporated by reference into these findings. A copy of Respondent's Exhibit 7 is attached to this decision.<sup>1/</sup> Findings as to the boxed material follows:

Allegation 1 (pp. 1 & 2): We find that Appellant was not rude, abrupt, or discourteous to Mr. Fellner.<sup>2/</sup>

Allegation 3 (p. 4): As to the first paragraph, the Respondent failed to put in any evidence on this specific incident, and we therefore find that he failed to sustain his burden of proof with regard to it. As to the second paragraph, this is more an argument than a factual allegation and accordingly we make no finding with regard to it.

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1/ Note that there is no box intended on page three.

2/ There was no direct testimony as to this incident from anyone other than Appellant and we weigh this more heavily than the hearsay concerning what was essentially an allegation by Mr. Fellner.

Allegation 4 (p. 4): The allegation that Appellant's error resulted in undue and misleading work for the attorney necessarily follows from the preceding stipulation and is therefore made a finding. The Respondent failed to sustain his burden that this brought criticism and embarrassment to the department.

Allegation 6 (p. 5): The boxed material in this allegation is more an argument than a factual allegation and therefore we make no finding with regard to it.

Allegation 8 (p. 5): The Respondent sustained his burden of proof with regard to this allegation, and the boxed material in this allegation is incorporated as a finding.

#### CONCLUSIONS OF LAW

The Respondent stipulated, and we conclude, that the burden of proof in an appeal of a demotion, such as this, is on the appointing authority. The Supreme Court has provided guidance as to the requirement for "just cause" imposed by Section 16.28(1)(a), stats., in State ex rel Gudlin v. Civil Service Commission, 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965):

" . . . 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."

In this case, the record and the findings support a conclusion that there was just cause for the demotion. The Appellant was a hard worker, but the nature and quantity of errors in her work reduced her efficiency and that of the SRU sufficiently to sustain the appointing authority in his decision to demote. The Appellant has raised a number of specific grounds of error which we will discuss separately.

LACK OF OBJECTIVE STANDARDS

Appellant argues that Respondent was required to objectively set minimum performance standards and to communicate them to Appellant and that this was not done. However, the record reflects continual counseling of the Appellant with regard to her work performance, including specific problem areas. We do not believe there is any requirement that the employer establish a quantifiable error rate for a position of this nature.

LACK OF PROPER TRAINING AND SUPERVISION

The record does not support this argument. Appellant had intensive initial training plus continuing on-the-job training. While the Appellant's workload was heavy, her supervisors did attempt to lighten it and were partially successful. To the extent that this effort was not more successful, part of the blame lies with the Appellant.

We cannot conclude that Respondent was obligated to attempt to find an alternative position for Appellant that would not involve a demotion. The only authority cited by counsel on this point is Section 16.32(2), stats. However, this only applies to employes who become "physically or mentally incapable of or unfit for the efficient performance of (their) duties," and although the Appellant testified she had a mild case of diabetes and occasionally took medication for her nerves, the record does not support a conclusion that she was in any way unfit for or incapable of performing her duties as required by the statute.

It may be that in a given case a failure to try to secure or facilitate a lateral transfer would amount to a failure of just cause for a demotion. However, in the case before us the Appellant had encountered some difficulties in previous work that did not involve contact with the public. Furthermore, there were no positions at the same level available in her previous unit from which she had transferred.

While we would encourage agencies to make every reasonable effort to assist in every way possible employees who have difficulty in the performance of their duties, we are unable to perceive on this record any deficiency of management or training that would support a conclusion of failure of, just cause for the demotion or any other legal basis for overturning the demotion.

#### ABSENCE OF PROGRESSIVE DISCIPLINE

Appellant's argument on this point may be summarized as follows: the Respondent was required to use progressive discipline, and since the Respondent did not impose all of the disciplinary or corrective measures available to it prior to the demotion, it did not use progressive discipline and the demotion accordingly was erroneous. In the first place, we have previously held that:

"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." Jacobson v. Hart, No. 74-124 (2/23/76), p. 7.

This principle is particularly appropriate in a case such as this where the problem is one of performance and not "discipline" in the traditional sense of the term. Furthermore, the concept of progressive discipline does not require that each measure available to an employer be utilized before a more severe measure can be imposed, even though in a given case a failure to utilize a graduated approach may amount to a failure of just cause. In any event, we conclude that in this case "progressive discipline" as such was utilized. The letter of January 28, 1975, amounted to a reprimand, and the Appellant was counseled continually during her employment.<sup>3/</sup>

As noted above, progressive discipline does not require the exhaustion of

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<sup>3/</sup> These facts also refute Appellant's argument that she was not given sufficient warning that her work was deemed unsatisfactory and that she was in jeopardy of further disciplinary action.

all intermediate steps before the utilization of a more severe one.

EXCESSIVE DISCIPLINE

The argument that demotion in this case was an excessive measure is closely related to the argument that the Respondent failed to utilize progressive discipline. In Zabel v. Rice, Wisconsin Personnel Board No. 75-66 (8/23/76), we dealt with a similar issue:

" . . . this board may not substitute its judgment for that of the agency; rather, it must conclude whether the conduct proven, in the context of all the circumstances, constitutes just cause for the suspension." p. 4.

We conclude that the demotion imposed here was not so disproportionate as to be without just cause.

IRREGULARITIES IN DEMOTION LETTER

Appellant alleges that the demotion letter should not be held to have the legal effect of a demotion because it fails to follow the statutory citations contained in the sample letter appended to the decision in Beauchaine v. Schmidt, Wisconsin Personnel Board No. 73-38 (10/18/73). The demotion letter here cites Section 16.28(1)(b):

"Pursuant to the provisions of S. 16.28(1)(b), Wis. Stats., you are hereby notified that the reasons for these actions are . . . ."

The sample letter contains the same language but cites only S. 16.28(1).

Section 16.28(1)(b) contains, in part, the following language: "The appointing authority shall, at the time of any action under this section, furnish to the employe in writing his reasons therefor." The citation in Respondent's letter is correct and the variation from the Beauchaine sample letter<sup>4/</sup> does not detract from its effectiveness as a demotion letter.

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<sup>4/</sup> In Beauchaine at p. 10 we noted: "We do not propose this (sample) letter as the last word on the subject; nor do we claim the letter to be the only acceptable form or style. The letter is offered only as a general guide toward what is minimally required . . . ."

CONCLUSION

While we conclude that the Respondent's action demoting the Appellant must be sustained, we believe it is important to observe that this decision should not be construed as critical personally of the Appellant. The record reflects that she worked hard at her job. The situation that developed was unfortunate but it is inevitable that as employes move from position to position some will find, for whatever reasons, that despite no lack of effort they are unable to perform adequately their new duties. The statutes provide that an employer faced with such a situation may reduce an employe in pay or position, while further providing the employe with protection of the requirement that the employer be required to demonstrate just cause for the demotion. This type of transaction is by no means reserved for cases of breach of discipline or dereliction of duty.

ORDER

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

Dated February 23, 1977.

STATE PERSONNEL BOARD



Laurene Dewitt, Chairperson