STATE OF WISCONSIN STATE PERSONNEL BOARD

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DUANE ZABEL,

Appellant,

v.

ZEL RICE, Secretary,
Department of Transportation,

Respondent.

Case No. 75-66

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OPINION AND ORDER

Before: JULIAN, Chairperson, STEININGER and WILSON, Board Members.

NATURE OF THE CASE

This is an appeal of a suspension pursuant to Section 16.05(1)(e), Wis. Stats. The parties have waived a hearing and submitted this matter on the basis of a deposition and various documentary evidence and written briefs.

FINDINGS OF FACT

The Appellant at all relevant times has been an employe with permanent status in class employed as a sergeant in the State Traffic Patrol, Department of Transportation. The specific incident that precipitated the suspension occurred on February 1, 1975, when the Appellant's car was stopped in Manitowoc by a city police officer for speeding. The Appellant had been traveling at a speed of 38 miles per hour in a 25 miles per hour zone. The police officer did not issue a summons to the Appellant but did make a report which eventually reached the Appellant's superiors. At the time of his apprehension the Appellant was driving an unmarked state patrol squad car and was in uniform. He had just completed a 13 hour tour of duty and was on his way home.

On April 13, 1973, Appellant had received a formal letter of reprimand dated April 2, 1973, which cited incidents of exceeding the speed limit on July 31, 1971, and November 25, 1972, and one incident of driving to the left of a yellow line on November 26, 1972. The letter of reprimand contained instructions for an administrative appeal of the reprimand. The Appellant did not appeal the reprimand.

The Appellant's reputation within the state patrol between 1973 and 1975 was that he was a fast driver. Appellant's supervisor had confronted him with his reputation and the Appellant had denied the allegations.[1]

Part of Appellant's duties as a sergeant includes supervisory duties and participation in the disciplinary process for subordinate officers as well as enforcing traffic laws.

Law enforcement agencies including the Manitowoc Police Department and the Wisconsin State Patrol use discretion in administering and enforcing the traffic laws.

Exhibits concerning the handling of other disciplinary matters in the State Patrol by the agency were placed in evidence. One officer received a letter of criticism for speeding about 10-15 miles per hour over the limit and passing two vehicles, causing an oncoming vehicle to brake sharply and partially leave the roadway, while the trooper was pursuing a truck for speeding and expired registration. Another trooper was given a negative performance report for operating a vehicle left of a yellow line while pacing a speeder.

After Appellant's superiors learned of the February 1, 1975, speeding incident they requested and received a memorandum from him regarding it. The memorandum was not placed in evidence but we find from the testimony

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1. See transcript, p. 35: (Captain DeGuire): "I said listen, this doesn't serve you well, and you told me at that time, listen, either let them prove their case or keep their mouth shut."

that the Appellant never contested the fact that he had been exceeding the speed limit by 13 miles per hour prior to the time he was stopped and that he did not advise his supervisors that he was coming off a 13 hour shift at the time. The department imposed a one day suspension without pay effective on May 5, 1975.

CONCLUSIONS OF LAW

In a disciplinary matter such as this the burden is on the Respondent to prove that the suspension was for just cause. Reinke v. Personnel Board, 53 Wis. 2d 123, 132(1971). The evidentiary standard is "to a reasonable certainty, by the greater weight of the credible evidence." 53 Wis. 2d at 138.

In this case the parties have stipulated that the Appellant in fact was speeding in Manitowoc on February 1, 1975, as reported by the apprehending officer, and our findings reflect this. The question then is whether that conduct constitutes just cause for the suspension. In Safransky v. Personnel Board, 62 Wis. 464(1974), the Supreme Court discussed at some length the concept of "just cause," and thus provides guidance for this determination:

> "The court has previously defined the test for determining whether "just cause" exists for termination of a tenured municipal employee as follows:
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> ". . . *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. The record here provides no basis for finding that the irregularities in appellant's conduct have any such tendency. It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service." State ex rel. Gudlin v. Civil Service Comm. (1965), 27 Wis. 2d 77, 87, 133 N. W. 2d 799.
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> Courts of other jurisdictions have required a showing of a sufficient rational connection or nexus between the conduct complained of and the performance of the duties of employment.
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> The basis for such a requirement of "just cause" or rational nexus is between conduct complained of and its deleterious effects on job performance as constituting grounds for termination of tenured

> government employees has been to avoid arbitrary and capricious action on the part of the appointing authority and the resulting violation of the individual's rights to due process of law. Only if the employee's misconduct has sufficiently undermined the efficient performance of the duties of employment will "cause" for termination be found.
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> In determining whether "cause" for termination exists, courts have universally found that persons assume distinguishing obligations upon the assumption of specific governmental employment. Conduct that may not be deleterious to the performance of a specific governmental position—i.e., a department of agriculture employee may be extremely deleterious to the performance of another govermental occupation—i.e., teacher or houseparent in a mental ward. Thus it is necessary for this court to determine the specific requirements of the individual governmental position." 62 Wis. 2d at 474-475.

There is certainly no question that there is a direct relation between the driving record and the job performance of a sergeant in the Wisconsin State Patrol who must both enforce traffic laws and supervise and participate in the discipline of other troopers. The question rather is whether the penalty imposed here was excessive under all the circumstances. In making this determination, it is important to recall that the role of the Personnel Board in reviewing this transaction is not the same as that of a reviewing court, a mistaken approach that the Supreme Court found erroneous in Reinke v. Personnel Board, 53 Wis. 2d 123, 134(1971). Therefore, we conclude we are not restricted to a determination whether the discipline imposed is supported by substantial evidence or constitutes an abuse of discretion or is inherently disproportionate to the offense. C.f., Ricci v. United States, 507 F. 2d 1390, 1393, n.3 (U.S. Court of Claims 1974). McTiernan v. Gronowski, 337 F. 2d 31, 35, 37-38 (2d Cir. 1964), Jallings and McKay v. Smith, Wisconsin Personnel Board Nos. 75-44, 45 (8/23/76).

At the same time, 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.

The appointing authority in this case considered not only the speeding violation of February 1, 1975, but also the violations outlined in the April 2, 1973, reprimand, and Appellant's reputation as a fast driver, in deciding to impose a one day suspension for the February 1, 1975, speeding incident. In Jacobson v. Hart, Wisconsin Personnel Board No. 74-124 (2/23/76), we stated that progressive discipline ". . . requires that the employer review a course of conduct, including lesser penalties previously imposed, before imposing a greater penalty." p. 7. In the instant case the Respondent is entitled to consider the 1973 reprimand in determining a penalty for the 1975 speeding incident. The Appellant had an opportunity to appeal this reprimand but failed to do so. We will accept the factual characterization of the incidents contained in the notice of reprimand at face value in reviewing the just cause determination.

However, reliance by the Respondent on Appellant's reputation for speeding is another matter. The Appellant had been confronted by Captain DeGuire concerning his reputation and had denied the allegations. While an employer is not restricted to formally adjudicated disciplinary actions in determining a penalty, we conclude that in the instant case we will not consider this reputation evidence in reviewing the just cause determination.

As to the February 1, 1975, speeding incident there was no dispute as to the basic facts. While the Respondent was not aware of the fact that the Appellant was coming off a 13 hour shift at the time of the incident, we conclude that where, as here, there was no hearing prior to the imposition of the penalty, that we may properly consider such mitigating circumstances in the evaluation of just cause.[1]

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1. In an abstract sense the Appellant may have had some duty to provide this evidence of mitigating circumstances to his superiors when he filed his memorandum on the speeding incident. However, we are not prepared to reach this question on this record which does not disclose all the specific facts surrounding the solicitation of the memorandum and the procedures used in imposing the suspension.

In consideration of all the facts and arguments properly before us we conclude that there was just cause for the one day suspension imposed. The Department of Transportation has legitimate concerns regarding the driving record of its state patrol officers, particularly those in supervisory positions, and we conclude that the penalty imposed is not disproportionate.

The Appellant contends that other officers received lesser penalties for similar or more serious offenses. We conclude that the differences in the handling of the cases in this record are "not sufficiently great to take the case out of the realm of permissible discretionary administrative practice." Jacobson v. Hart, supra. Appellant also argues that there was no evidence that the Manitowoc police officer who stopped him on February 1, 1975, would have arrested him had Appellant been a civilian under similar circumstances. We conclude that this is not relevant and material to the just cause question.

We conclude that the Respondent's action in suspending Appellant must be sustained, and that the Appellant is not entitled as a matter of right to any further administrative review of this matter. However, we do not believe it would be inappropriate for the Respondent to re-review the suspension in light of the mitigating circumstances concerning the Appellant's extended tour of duty on February 1, 1975, and accordingly we call this possibility to his attention.

ORDER

IT IS HEREBY ORDERED that the one day suspension imposed by Respondent is affirmed and this appeal is hereby dismissed.

Dated August 23, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson