STATE OF WISCONSIN | STATE PERSONNEL COMMISSION

JAMES NOWASKEY,

Appellant,

v.

PRESIDENT, University of Wisconsin,

Respondent.

Case No. 76-253

DECISION ON PETITION FOR REHEARING AND FOR STAY PENDING REHEARING

BACKGROUND OF THE CASE

The State Personnel Board on June 16, 1978, entered an Order on this appeal which rejected the respondent's action discharging the appellant and fully reinstated the appellant. The record of this case thus transferred to the Personnel Commission pursuant to Section 127(1)(b), Chapter 196, Laws of 1977. The Personnel Board thereafter went out of existence for all purposes on July 1, 1978, pursuant to Section 128(7), Chapter 196, Laws of 1977. The respondent filed with the Personnel Commission on July 6, 1978, a Petition for Rehearing pursuant to Section 227.12, Wis. Stats., and for a Stay of the June 16, 1978, Personnel Board Order pending a decision on the Petition. The appellant filed a reply on July 18, 1978.

OPINION

Section 227.12(3), Wis. Stats., provides the criteria for consideration of a Petition for Rehearing:

> "Rehearing will be granted only on the basis of:
> (a) Some material error of law.
> (b) Some material error of fact.
> (c) The discovery of new evidence sufficiently strong to reverse or modify the Order, and which could not have been previously discovered by due diligence."

This decision will address in order each of the points raised in the respondent's Petition.

ALLEGED ERRORS OF LAW

I. A. Issuance of the Board's decision on June 16, 1978, one day after the filing of the appellant's objections, consisting of 16 pages of legal and factual argument and documentary material, on June 15, 1978, effectively deprived respondent of his right to respond in writing or orally guaranteed by sec. 227.09(2), Stats., and the due process clause of the Constitution.

Section 227.09(2) contains the following language:

> "Each party adversely affected by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral."

The respondent did not file any objections to the proposed Opinion and Order. By its terms the foregoing language does not apply to the respondent. The appellant filed written arguments in support of his objections, the respondent neither filed a response, asked for a postponement of the June 16, 1978, Board meeting, nor requested the opportunity for oral argument on the objections. The Commission perceives no violation of Section 227.09(2), Stats., or the due process clause of the Constitution.

B. The Board's reversal of its hearing examiner, who heard 35 days of testimony, observed dozens of witnesses and received hundreds of written exhibits under circumstances which make it evident that it was physically impossible for any of the Board members to have independently reviewed the evidence in the record, deprived respondent due process of law.

The procedure in Section 227.09(2), Stats., including the preparation and service of a proposed Opinion and the provision of an opportunity to file objections, was designed to provide for a fair hearing where all the agency officials do not participate in the hearing. This type of procedure does not offend due process. See Morgan v. United States, 298 U.S. 568,56 S. Ct. 906 (1936). Also, while the Board did reach a different conclusion than the hearing examiner, it adopted all of her recommended findings of fact.

C. The Board's addition of findings of fact numbered 25 and 26 and the deletion of unenumerated findings of fact contained in the examiner's proposed written decision concerning just cause necessarily involved the making of credibility determinations contrary to those of the examiner, and the Board's decision fails to reflect consultation with the examiner as required by the due process clause, Appleton v. ILHR Department, 67 Wis.2d 162, 226 N.W. 2d 497 (1975); Braun v. Industrial Commission, 36 Wis.2d 48, 153 N.W.2d 81 (1967). The Board's principal credibility determination concerned the nature of, and weight to be accorded to, appellant's performance evaluations and merit increases, since the documentary and testimonial evidence in the record surrounding both is conflicting. (In fact, as set forth in sec. II(A) below, the Board's characterization of the performance evaluations, if taken to mean the formal oral and written evaluations prepared and given by appellant's supervisor, Dr. Sommers, is actually contrary to the evidence in the record).

In both the Appleton and Braun cases cited by respondent the agency made contrary findings to those made by the examiner. In this case, the Board did not disturb the findings recommended by the examiner, but made additional findings and then reached different conclusions of law. This process does not involve a determination of credibility but rather an evaluation of the findings.

The comments in the Opinion are primarily a discussion of the findings.

There is interspersed with the commentary some additional factual matter which to some limited extent goes beyond the material which was explicitly contained in the findings. This additional factual matter is very closely related to the specific enumerated findings and does not contradict them. The Commission will amend the June 16, 1978, decision by including those parts of the proposed Opinion under "just cause," except for the first and last sentences which are restatements of the conclusion of law that the termination was for just cause, as part of the findings.

> D. The failure of the Board and the examiner to make findings of ultimate fact as required by sec. 227.10, Wis. Stats., on a number of disputed and material factual issues makes effective review of the decision of June 16 impossible, and would necessitate a remand for the making of such findings if judicial review were now sought. The following questions of ultimate fact remain unresolved by the existing Findings:
>
> 1. There is no finding as to whether appellant, as a mid-level manager and adminiatrator, was unable to work effectively with subordinates, staff colleagues and his supervisor, and as to whether such ineffectiveness, if existent, would tend to impair performance of his duties or the efficiency of the groups with whom he was required to work. This was one of the principal stated grounds for the discharge (R. Ex. 1, pp. 1-3); there is considerable evidence in the record relevant to the issue; and the parties dispute both the existence of appellant's interpersonal ineffectiveness and its effects on his job performance.
>
> 2. Although the Board's decision states (Findings 10-24) that appellant was guilty of many of the specific derelictions of duty set out in the discharge letter of November 23, 1976, there are no general findings relevant to whether these derelictions tended to impair performance of his duties or the efficiency of the groups with whom he was required to work, see Safransky v. Personnel Board, 62 Wis.2d 464, 215 N.W.2d 379 (1974). For example, . . .

The Board was required by S227.10, Stats., to make findings consisting of "a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence." In an

Interim Opinion and Order dated February 20, 1978, the Board held with respect to the termination letter (R. Ex. 1) that:

> "...the first page is prefatory and that the second and third pages wherein there are eight enumerated paragraphs are the actual charges. The language contained on the first page is too vague to give adequate notice under either the '5W' test or under the requirements of due process."

The Board also concluded that paragraph 6 of the specific charges were insufficient.

The examiner and the Board did make findings regarding the seven remaining paragraphs. The findings respondent now seeks in paragraph D.I. above relate to the general charges which the Board determined were insufficient, and therefore these findings would not be material. The findings respondent now seeks in paragraph D.2. above are integrally tied in with the legal concept of "just cause." See Safransky, 62 Wis. 2d at 474-475:

> "The court has previously defined the test for determining whether 'just cause' exists for termination of a tenured municipal employee as follows:
>
> '...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.
>
> "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."
>
> "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."

The findings on the seven specific paragraphs contained in the letter of discharge (R. Ex. 1) are basic findings. See Universal Foundry Co. v. DILHR, 82 Wis. 2d 479, 485-486, n.1 (1978):

> "Davis in his Administrative Law Text at sec. 16.04, pp.322, 323 (1972) states the following about ultimate and basic facts or findings:
>
> 'An ultimate fact is usually expressed in the language of a statutory standard. Examples: the rate is reasonable; the applicant is fit, willing and able to provide the service; the action is in the public interest; the respondent has refused to bargain collectively; the injury occurred in the course of employment. Facts might theoretically be lined up on a scale from the most specific to the most general. At one end is each statement of each witness, then a summary of the testimony of each witness, then a summary of the testimony and other evidence on each side, then the basic findings, and at the opposite end the ultimate findings. Courts do not want agencies to include detailed summaries of testimony in their findings; they want what they call the basic facts. The ultimate finding may be and usually is mixed with ideas of law or policy. The Supreme Court has said: *The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. (Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755 (1937).*
>
> 'The basic findings are those on which the ultimate finding rests; the basic findings are more detailed than the ultimate finding but less detailed than a summary of the evidence. The Supreme Court of California held that an ultimate finding of convenience and necessity in granting operating authority to a highway common carrier was not enough without a statement of *basic findings.* (California Motor Transport Co. v. Public Utilities Comm., 59 Cal. 2d 270, 28 Cal Rptr. 868, 379 P.2d 324 (1963).'"

To the extent that the additional factual material contained in the Opinion section of the proposed decision is not dispositive of respondent's objections, it is the opinion of the Commission that the "general" findings requested by respondent are not required by statute.

3. The following specific findings fail to resolve additional questions of ultimate fact which the Board was obliged to decide in order to determine whether or not just cause existed:

   a. Findings 4, 14, and 19: It is undisputed that certain departments and substantive responsibilities were removed from appellant's supervision. The fact question the Board failed to resolve was whether these changes in responsibility were necessitated, at least partially, by any incompetence or inability to manage on the part of appellant.

In discharge appeals the burden of proof is on the respondent agency. See Reinke v. Personnel Board, 53 Wis. 2d 123 (1971). To the extent that a finding on this point is considered material, a failure to make a specific finding is equivalent to a finding against the respondent. See Desmond v. Pierce, 185 Wis. 479, 488 (1925); Wis. Employment Relations Board v. Retail Clerks International Board, 264 Wis. 189 (1953).

   b. Finding 10: As stated above, the Board made no finding as to the actual or potential effects of overbudgeting, given the budgetary constraints on the state and the University for the years in question. Respondent presented evidence tending to show the negative effects, both on the University and on the delivery of the services appellant was responsible for providing, while appellant denied any negative effects and portrayed himself as commendably saving taxpayer money.

The Commission reiterates its comments under the preceding subparagraph "a"

   c. Finding 18: There is no finding as to when and if Sommers, appellant's supervisor, gave him specific directions and a timetable for completion of the receiving system project (Cf., Resp. Ex. 13 and 29).

Again, the above comments apply.

   d. Finding 19: There is no finding as to whether appellant saw to it that required inventories, under either a proposed or existing system, were actually performed for all of the areas under his supervision and control.

Again, the above comments apply.

e. Finding 22: The discharge letter charged appellant with using foul and abusive language, rather than the much more limited term of "profanity," to which the Board's finding is directed.

Findings 21 and 22 are sufficient in this regard.

f. Finding 23: There is no finding as to the real issue concerning the air conditioner, which was whether appellant knew or should have known prior to the purchase that University funds could not be used for the purpose he intended.

This finding as augmented by the additional material found in the proposed opinion is adequate.

E. The Board's conclusion that respondent lacked "just cause" to discharge appellant is erroneous as a matter of law and is unsupported by the weight of the evidence in the record as a whole.

The Commission disagrees with these conclusory allegations.

F. If the Board's decision is read as a determination that, as a matter of law, the granting of merit increases effectively precludes a later discharge for the period covered by the merit increase, such determination is erroneous.

In the Commission's opinion, the granting of merit increases is evidence of the lack of just cause for the discharge and is not action which precludes the discharge as a matter of law.

G. The Board's adoption of its interim order finding certain portions of the discharge notice of November 23, 1976, to be insufficient is erroneous as a matter of law because:

1. Appellant waived this objection. From the facts in the record, it is clear that appellant pursued extensive discovery efforts, participated in many days of hearing prior to submission of his motion, engaged in extensive cross examination on the issues of employe morale and his alleged ineffectiveness in working with his supervisors, peers and subordinates. Moreover, both parties established a full record on this issue, since the Board's "interim" order was not issued until after the

> extensive hearings in this case were actually completed. Under the circumstances, appellant waived any challenge to the sufficiency of the discharge letter by waiting until September 8, 1977, months after the first day of hearing, to do so.

While in the Commission's opinion an objection to the adequacy of notice of discipline can be waived, the determination of whether a waiver exists was, at least based on the facts and circumstances present on this record, discretionary with the Personnel Board. The Board's determination that certain facts of the discharge letter was inadequate (Interim Opinion and Order dated Feburary 20, 1978) was in a decision on a Motion for immediate reinstatement. The appellant had filed a brief in support of this Motion that contained certain arguments on the inadequacy of the letter. While the respondent filed a brief in opposition to the Motion he did not make arguments on the waiver issue at that time. The Commission does not believe that the Board made an error of law by not concluding that the appellant did not waive the issue of the sufficiency of the notice.

2. Even if there were no waiver, the Board erred in ignoring portions of the discharge letter, particularly page 1, points 1(a) through (c), and in finding paragraph 6, pages 2 and 3, inadequate. The letter must be read as as whole, and in light of appellant's position and responsibilities. Taking the letter as a whole, appellant had clear and unmistakable notice that his inability as a middle manager to work effectively with supervisors, peers and subordinates was a significant factor in the discharge decision, and it is clear from the record that appellant was completely prepared to, and did, present a full, complete defense on this issue.

The Commission agrees with the Board's Interim Opinion and Order on the sufficiency of the letter and does not believe that it constitutes an error of law.

II. The Board's decision of June 16, 1978 contains the following material errors of fact making rehearing appropriate under section 227.12(3)(b), Wis. Stats.:

A. Finding 26, concerning appellant's performance evalutation is clearly erroneous and contrary to the credible evidence in the record, if the term "perfomance evaluation" has its normal reference to a written and oral evaluation by an employe's supervisor. Even if the finding also refers to the "performance appraisals" prepared at Dr. Sommers' request by certain of appellant's colleagues and co-workers, the finding is erroneous as contrary to the greater weight of the credible evidence.

In the Commission's opinion there is an adequate basis in the record for this finding.

B. Finding 25. If this finding is used to support the implicit inference that the merit increases appellant received served to condone and approve his work performance for the period from July, 1973 to July, 1976, it is contrary to the great weight of the credible evidence.

In the Commission's opinion the merit increases in question are revelant evidence of the quality of appellant's performance.

C. To the extent that section I(D) of this petition also raised material errors of fact, it is incorporated herein by reference.

The Commission's comments under I(D) also apply here.

ORDER

The petition for rehearing is granted in part, solely to the extent necessary to amend the Board's decision of June 16, 1978, to include as part of the findings that of the original "Proposed Opinion" labeled "just cause" except for the first and last sentences. The petition for rehearing is denied in all other respects. The June 16, 1978 decision is stayed pending final determination on rehearing. The parties shall have until Auguts 4, 1978,

to file any objections and written arguments with respect to the additional findings, and until August 11, 1978, to file reply if any.

Dated: July 26, 1978

Joseph W. Wiley
Chairperson

Dated: July 26, 1978

Charlotte M. Higbee
Commissioner

DISSENT

It is my opinion that since the Personnel Board reversed the decision of the hearing examiner on June 16, 1978 the day following the filing of appellant's brief on June 15, 1978, that the respondent was effectively deprived of his rights under 227.09(4) and that therefore this case should have been scheduled for a rehearing.

Dated July 21, 1978

Edward D. Durkin, Commissioner