STATE OF WISCONSIN STATE PERSONNEL BOARD

MICHAEL FINNEGAN, Appellant, v. SECRETARY, DEPT. OF LOCAL AFFAIRS AND DEVELOPMENT, Respondent. Case No. 77-75	**OFFICIAL** OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal pursuant to s. 16.05(1)(e), Stats., of a discharge.

FINDINGS OF FACT

1. At all relevant times prior to his discharge the appellant was employed by the respondent agency with permanent status in class as a Community Services Technician 2.

2. The appellant had been instructed as part of his duties and responsibilities to develop an acceptable agency relocation reporting system by November 30, 1976.

3. The appellant failed to finish this assignment in a timely manner but did complete it by March 7, 1977, following a conference with and further directions from his immediate supervisor.

4. The appellant had been instructed as part of his duties and responsibilities to develop a "displacee questionnaire" by November 30, 1976.

5. The appellant failed to finish this assignment in a timely manner but did complete it by March 7, 1977, following a conference with and further directions from his immediate supervisor.

6. The appellant monitored through field visits two projects in December, 1976, and none in January and February, 1977.

7. The appellant's immediate supervisor had developed a criterion for appellant's performance of two field monitoring visits per month.

8. The aforesaid activities (agency relocating performance system, displacee questionnaire, field monitoring visits) constituted a substantial part of appellant's work in the area of monitoring and evaluating relocation programs.

9. The area of monitoring and evaluating relocation programs constituted a substantial part of appellant's overall duties and responsibilities.

10. The appellant's work had been, in a general sense, below average, since the commencement of employment with the agency in 1974.

11. On March 24, 1977, the appellant was conversing with a fellow employe at work during working hours, the appellant was speaking in a joking manner about women and men.

12. The appellant saw a woman approaching him and his co-worker. He stated to his co-worker words to the effect of "here comes another f________ broad."

13. At the time he made this statement, the appellant did not know that the woman was one of his supervisors and did not realize that the remark could be and was in fact overheard by her.

14. This supervisor asked about the whereabouts of another employe and the appellant responded with words to the effect of "he's home at his kid's birthday party, leave him alone."

15. The use of a wide range of profane four-letter words was fairly common practice within the division of housing, where appellant worked.

16. On October 28, 1976, appellant wrote and sent to his immediate supervisor a memo (Respondent's Exhibit 14) in response to an earlier memo to him and another employe from that supervisor. The appellant's memo contained in part the following language:

> Paul, you have the audacity to begin your memo to me and Evelyn by calling it basic communication. Furthermore, you have the nerve to expect a person to person discussion of the memo. Paul, this is not a basic communication memo, it is a basic directive mingled with undirected anger--but since you have called it such, let's talk about communication.
>
> First of all, it is not fair to me or Evelyn to vex your anger about this matter to us collectively. We cannot determine how much wrath you allocate to each of us. Perhaps you don't know yourself! Secondly, it is doubly unfair to me or anyone else to be lumped with Evelyn in this circumstance (a defensive one) because she has the proclevity when she feels aggrieved (perhaps rightly) of venting her anger by loudly foul mouthing whomever she views as the offender(s) to other staff members. Although this kind of visual protestation might be the rage of this department, I find no liking for it in myself. And I don't appreciate being made part of the subject of her abuse because of the way in which you addressed this memo. For now, not only do I have to correct things with you, I have to deal with her and the rest of the staff.

17. This memo (Respondent's Exhibit 14) prompted a written reprimand on the grounds that it was personally insulting, impolite, unprofessional and failed to contribute to a resolution of the problem. See Respondent's Exhibit 16.

18. The appellant had been counseled about poor work performance on a number of occasions through the course of his employment at DLAD.

19. The appellant was never warned explicitly that he would be discharged if he failed to improve his work performance.

20. The appellant indicated on more than one occasion to his supervisors that at least part of his difficulty with his performance was attributable to mental depression.

21. Although he had consulted a psychiatrist on three or four occasions previously in 1976, appellant did not see a psychiatrist from September 1976 until his discharge.

22. The respondent agency denied appellant's request to be placed on a permanent part-time basis in September 1976.

23. The appellant was discharged from employment by the respondent effective April 7, 1977. See Respondents Exhibit 8.

CONCLUSIONS OF LAW

1. This case is properly before the board pursuant to s. 16.05(1)(e), Stats.

2. The burden of proof to establish just cause for the discharge is on the respondent.

3. The letter of discharge (Respondent's Exhibit 8) when read in conjunction with the memo recommending termination (first three numbered subparagraphs) (Respondent's Exhibit 7) and the appellant's March 1977 performance evaluation (Respondent's Exhibit 6) provide adequate notice of the charges against the appellant.

4. The appellant's inadequate work performance as set forth in findings 3, 5, and 6, and his comments as set forth in finding 12 constituted appropriate grounds for discharge.

5. The appellant's comments set forth in finding 14 and the memo referred to in finding 16 did not constitute appropriate grounds for discharge.

6. The appellant was not "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 otherwise," as set forth in s. 16.32(2), Stats.

7. There was just cause for the appellant's discharge.

OPINION

Adequacy Of Discharge Notice

The adequacy of the discharge notice was addressed by the hearing examiner in a prehearing ruling. See Board's Exhibit 2. It was then noted that the first paragraph of the discharge letter (Respondent's Exhibit 8) in itself fails to meet the standards set forth in Weaver v. State Personnel Board (George M. Schroeder), Dane County Circuit Court No. 146-209 (8/28/75), and State ex rel. Messner v. Milwaukee Co. Civil Service Comm., 56 Wis. 2d 438, 202 N.W. 2d 13 (1972), but:

> However, that paragraph cites among other things the opinion of the division administrator, Margaret Thorpe. Also in the file is a memo marked Respondent's Exhibit 7 which is a recommendation by Ms. Thorpe to dismiss the appellant and which shows a copy to the appellant. It is not unreasonable to permit this document, which is relatively specific, to be considered in the evaluation of paragraph 1 of Respondent's Exhibit 8 from a standpoint of due process.

The March performance evaluation (Respondent's Exhibit 6), also mentioned in the discharge letter, identifies specific performance deficiencies. The first three numbered subparagraphs of the discharge recommendation memo (Respondent's Exhibit 7) are taken directly from the performance evaluation. In the board's opinion, there is no reason why the discharge letter cannot incorporate by reference other material such as this performance evaluation:

> ". . . the notice requirements of due process . . . 'will vary with circumstances and conditions' [and] cannot be defined with any 'rigid formula.'" State ex rel. Messner v. Milwaukee Co. Civil Service Comm., 56 Wis. 2d at 444.

The board affirms the hearing examiner's ruling on the adequacy of notice, including that with respect to subparagraph 2 of Respondent's Exhibit 8. See p. 2 of Board's Exhibit 2:

In Respondent's Exhibit 7 are three numbered subparagraphs on pages 1 and 2. These meet due process notice requirements and the deficiencies are stated to have been taken from the March 28, 1977, performance evaluation referred to in subparagraph 1 of Respondent's Exhibit 8. Respondent's proof concerning appellant's "continuing and increasingly unproductive work performance" will be limited to the matters set forth in the first three numbered subparagraphs contained in Respondent's Exhibit 7. However, the parties may introduce evidence of the appellant's prior work record to demonstrate whether the disciplinary action imposed was just or excessive. See Zehner v. Weaver, Wis. Pers. Bd. 74-98 (2/25/75).

With respect to subparagraph 2 of Respondent's Exhibit 8, the first, specific allegation concerning the March 24, 1977, incident and the second allegation concerning the insulting memorandum provide sufficient notice, which the appellant concedes. However, the generalized allegations of "inappropriate, insolent and otherwise disruptive behavior which adversely effects the work of other departmental staff members" and "you have developed a chronic habit of distracting the DLAD staff members from their duties by spending inordinate amounts of time in their offices when you clearly had no legitmate business to transact with them" do not provide sufficient notice and therefore, with regard to subparagraph 2 of Respondent's Exhibit 8, the respondent will be limited in his proof to the two specific incidents set forth above.

JUST CAUSE

In the board's opinion, the appellant's failure to adequately perform assigned work in the area of monitoring and evaluation of relocation programs 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 Comm., 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). There was no question that the appellant's work was in fact inadequate. In addition to other evidence, the appellan admitted this on the performance evaluation form, Respondent's Exhibit 6. In the Board's opinion there was an adequate basis for discharge in the appellant's inadequa performance, independent of the speech related incidents.

With respect to the appellant's remarks on March 24, 1977, the evidence did not reflect that the profane comment cited in finding 12 was directed at appellant's supervisor or was intentionally made loud enough to be overheard by her. The use of profane language was common in the office. On the other hand, it was

related. This comment was cited by the respondent as an example of disruptive behavior "which adversely affects the work of other departmental staff members." (Respondent's Exhibit 8). In the board's opinion, the state has the right to restrict non-work related conversation during working hours. In these circumstances it does not raise constitutional first amendment questions relative to the regulation of speech content.

The appellant's remarks cited in finding 14 and his memo cited in finding 16 are both work-related communications. Both are in part insubordinate. The employe has the right to regulate insubordinate communications, but this regulation is subject to first amendment consideration. In Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 2684-2685 (1976), the United States Supreme Court discussed the first amendment rights of public employes:

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny . . . Thus, encroachment "cannot be justified upon a mere showing of some legitimate state interest." . . . the interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end . . . "If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that broadly stifles the exercise of fundamental personal liberties."

In the opinion of the board, while the employer need not tolerate language from an employe that is insubordinate and impolite, it is required to proceed in the least restrictive manner possible. It is one thing to issue a reprimand as was done in the case of the October 28, 1976, memo, it is another thing to use this as a ground for the most extreme form of discipline, discharge. In the board's opinion, in consideration of the language used in the memo and in the remark set forth in finding 14, and the other surrounding circumstnaces, the imposition of discharge based in part on these actions is overly restrictive, an excessive punishment, and could constitute a precedent that would have a

chilling effect on employes' first amendment rights generally.

Other Issues

Appellant contends that respondent failed to comply with s. 16.32(2), Stats., which provides:

> When an employe becomes 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 otherwise, the appointing authority shall either transfer him to a position which requires less arduous duties, if necessary demote him, place him on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss him from the service. The appointing authority may require the employe to submit to a medical or physical examination to determine his fitness to continue in service. The cost of such examination shall be paid by the employing department. In no event shall these provisions affect pensions or other retirement benefits for which the employe may otherwise be eligible.

The appellant presented no medical evidence that he was incapable or unfit for duty because of his depression, and no other evidence other than his own opinion. It was brought out on cross-examination that he had seen a psychiatrist three or four times prior to September 1976, but that he had not been treated after that point. There was no basis on this record for a finding of mental incapability or unfitness. While the respondent does have the burden of proof, it does not have the burden of proving a negative, that the appellant was not mentally incapable or unfit. In Kelm v. Schmidt, Wis. Pers. Bd. No. 19 (4/23/74), cited by appellant, the employe presented medical evidence of his disability.

The appellant argues that the respondent was required to have specifically warned him that his discharge was imminent if his performance did not improve. This is not required by statute, administrative rule, or personnel board precedent. In Schroeder v. Weaver, Wis. Pers. Bd. No. 73-24 (2/21/75), there were no admonitions or warnings regarding the employe's behavior. In the instant case, the appellant was counseled on a number of occasions. The board's observation on the lack of warning in the Schroeder case should not be inter-

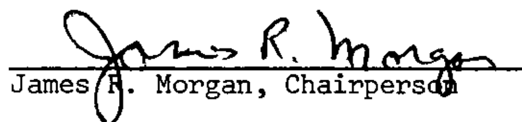
preted as a requirement that in all cases an employe must be warned explicitly that he or she will be discharged if his or her performance does not improve.

Finally, the appellant argues that the respondent's reliance on the memo of October 28, 1976 (Respondent's Exhibit 14), as part of its showing of just cause constitutes double jeopardy because it previously had been the subject of a letter of reprimand. While the board has already concluded that the memo is an improper basis for discipline, the board notes that this argument is foreclosed by the board's holding in Jacobson v. Hart, Wis. Pers. Bd. No. 74-124 (2/23/76).

ORDER

The respondent's action is sustained and this appeal is dismissed.

Dated: June 16, 1978. STATE PERSONNEL BOARD



James R. Morgan, Chairperson