STATE OF WISCONSIN PERSONNEL COMMISSION

ROGER E. ALFF,

Appellant,

v.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-227-PC

INTERIM DECISION

OPINION

The respondent has moved for an order amending the discharge letter which is the subject of this appeal by adding two additional charges which were unknown to the respondent prior to the date of said discharge letter and which are alleged to demonstrate the appellant's inability to satisfactorily perform the duties of his former position.

The respondent cites the following authority for the requested amendment:

> 1. "Under the statutory procedure for an employee in the classified state service contesting an imposition of discipline against him, the letter of discharge constitutes, in effect, the complaint against him in the subsequent hearing before the board." Weaver v. State Personnel Board, Case No. 146-209, Dane Co. Cir. Ct. (Currie), August 20, 1975.
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> 2. "In the Commission's view, parties to personnel appeals should be permitted a good deal of liberality in amending pleadings." Oakley v. Bartell, Wis. Pers. Comm. (10/10/78).

The Personnel Commission's policy to permit a good deal of liberality in amending pleadings, enunciated in the Oakley Case, does not extend so far as to permit the requested amendment of the discharge letter in this case. To do so would be a clear abuse of discretion, contrary to the express provisions of Section 230.34(1)(a) and (b), Wis. Stats.

(formerly Section 16.28 Stats.):

> DEMOTION, SUSPENSION, DISCHARGE AND LAYOFF. (1)(a) An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in pay or demoted only for just cause. This paragraph shall apply to all employes with permanent status in class in the classified service, except that for employes in a certified bargaining unit, covered by a collective bargaining agreement, the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the negotiated agreement.
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> (b) No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons therefor. The reasons for such action shall be filed in writing with the administrator within 5 days after the effective date thereof." (emphasis supplied)

The Wisconsin Administrative Code, Section Pers. 23.01, provides:

> "Provisions. Disciplinary action against an employe with permanent status in class, by an appointing authority shall be taken in accordance with the provisions of section 16.28(1), Wis. Stats. The appointing authority shall at the time of the action furnish such employe with a written statement as provided in Section 16.28(1), Wis. Stats., setting forth his reason therefor, the time limitation thereof, and the employe's right of appeal. A copy of such notice to the employe shall be filed with the director within 5 calendar days of the effective date thereof."

The language of both the statute and the personnel regulations is mandatory rather than directory. In Karow v. Milwaukee County Civil Service Comm., 82 Wis. 2d 565, 570-571 (1979), the court noted: " The general rule is that the word 'shall' is presumed mandatory when it appears in a statute. Scanlon v. Menasha, 16 Wis. 2d 437 443, 114 NW 2d 791 (1962)."

In State ex rel. Werlein v. Elamore, 33 Wis. 2d 288, 293 (1967), the court said in part:

> "In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the

> consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation. Marathon County v. Eau Claire County, (1958), 3 Wis. (2d) 622, 666, 89 N.W. (2d) 271; Warachek v. Stephenson Town School Dist. (1955), 270 Wis. 116, 70 N.W. (2d) 657. We have also stated that directory statutes are those having requirements 'which are not of the substance of things provided for.' Mannienen v. Liss (1953), 265 Wis. 355, 357, 61 N.W. (2d) 336.
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> In 2 Sutherland, Statutory Construction (3d ed.), p. 216, sec. 2802, the author observes that provisions are normally considered directory 'which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those rights are protected by the statute.'"

The instant case is clearly one in which the failure to obey the mandatory provision of the statute would prejudice the rights of the appellant who is entitled to receive prompt notice of the reasons for his discharge, not only so that he can prepare his case, but, more importantly, so that he has a basis on which to determine whether or not to appeal his discharge.

The amendment of the appeal in the Oakley case is not to be equated with the tardy amendment of a discharge letter; the former was a pro forma modification consonant with statutory language, whereas in the instant case respondents seek to make a substantive change by adding to the discharge letter an additional charge against the appellant which was not in fact one of the reasons for the discharge. Weaver v. State Personnel Board, Case No. 146 - 209, Dane Co. Cir. Ct. (Currie), Aug. 20, 1975, was cited by counsel for the respondent in support of the respondent's motion. Page 8 of that opinion contains the complete paragraph from which respondent's sentence (quoted pg. 1 herein) was excerpted.

> "There are, however, due process requirements that require certain specificity in the reason for discharge set forth in

> a letter of discharge. Under the statutory procedure for an employee in the classified state service contesting an imposition of discipline against him, the letter of discharge constitutes, in effect, the complaint against him in the subsequent hearing before the board. Due process requires that the charge or charges specified therein be sufficiently specific to enable the employee to know what acts on his part are being charged so that he can adequately defend himself against them. See State ex rel. Messner v. Milwaukee C. Civil Service Comm. (1972), 56 Wis. 2d 438."

In oral argument before the Personnel Commission, respondent also relied on the Elkouri's How Arbitration Works, specifically p. 635 and footnotes 115 and 116 of the Section, "Postdischarge Conduct or Charges." (copy attached) However the position cited by respondent relates to labor agreements which do not contain specific provisions requiring that all reasons for discharge be given to the employe at the time of the discharge. The applicable section begins on p. 634 with this paragraph:

> "Postconduct or Charges
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> Some agreements require that all reasons for discharge action be given to the employe at the time of the discharge. Under such provisions it has been held that only evidence bearing on the charges made at the time of the discharge should be considered in determining the existence of cause for punishment. Even without such specific contractual provision, arbitrators have held that discharge, to use the words of Arbitrator Paul N. Guthrie, 'must stand or fall upon the reason given at the time of discharge;' other reasons m y not be added when the case reaches arbitration."

In the instant case both the statute and the administrative code specifically mandate advising the employe in writing of the reasons for disciplinary action at the time of the action. Respondent's argument therefore fails with the application of the appropriate section of his own authority. For these reasons the Commission believes that the motion to amend must be denied.

ORDER

The respondent's motion to dismiss is denied.

Dated: March 8, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

Charlotte M. Higbee
Commissioner

CMH:jmg

3/6/79