



STATE OF WISCONSIN

STATE PERSONNEL BOARD

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ROBERT M. JOHNSON, \*

Appellant, \*

v. \*

SECRETARY, Department of Administration, \*

Respondent. \*

Case No. 78-29 \*

\* \* \* \* \*

PROPOSED  
OPINION AND ORDER

Before:

NATURE OF THE CASE

This is an appeal pursuant to § 16.05(1)(e), stats., of the appellant's suspension, demotion, and reduction in pay.

FINDINGS OF FACT

1. The appellant prior to his demotion was employed by the State of Wisconsin with permanent status in class as head of the State Records Center and Microfilm Laboratory, Department of Administration, and all of the appellant's actions set forth hereafter were taken in his official capacity.
2. In March, 1977, the appellant caused the sale of surplus IBM tab cards, property of the State of Wisconsin which had been in the appellant's custody at the state records center, to a scrap dealer.
3. This sale resulted in the payment of approximately \$30 to the appellant.
4. The appellant utilized this money as a part of the records center office coffee fund for the purchase of material related to the office coffee operation.

5. This transaction was similar to a number (approximately 1 or 2 per year) that had been conducted by the appellant over the course of approximately the preceding 5 years involving the sale of surplus IBM cards for scrap in similar dollar amounts and the utilization of the resultant funds in the office coffee fund and for the purchase of office furniture and accoutrements for the center as a whole.

6. In December, 1977, the appellant caused the sale of surplus IBM tab cards that were the property of the State of Wisconsin and had been in the appellant's custody at the State Records Center to a scrap dealer.

7. This sale resulted in the payment of approximately \$300 to the appellant on December 28, 1977.

8. This \$300 was retained at home by the appellant until January 6, 1978, when it was turned over to the Chief of State Protective Services.

9. The appellant had been surprised by the relatively large amount of this payment and had made no decision as to what he should do with it prior to turning it over to the chief.

10. At no time did appellant use any of the proceeds of the sale of surplus IBM tab cards for his personal gain.

11. During September, 1976, the appellant caused 2 employes at the State Records Center, while on state time and with a state truck, to move various items of household furnishings which were the private property of the appellant, from his old to his new apartment.

12. The disciplinary action taken by the respondent appointing authority, as reflected in a letter to appellant dated January 27, 1978, was as follows:

- (a) Suspension without pay for 20 working days effective February 6, 1978, through March 3, 1978.
- (b) Removal from his position as head of the State Records Center and Microfilm Laboratory.
- (c) Demotion of one pay range to Administrative Assistant 5.
- (d) Reduction in base pay to the permanent status in class minimum (PSICM) rate of pay range 15 (\$8.731 per hour).

13. Prior to this action the appellant had been employed by DOA in various classifications for approximately 13½ years with an above average performance record without any previous discipline and had achieved considerable expertise in his field of specialization of records storage and disposal.<sup>1</sup>

#### CONCLUSIONS OF LAW

1. The Personnel Board has jurisdiction over this appeal pursuant to § 16.05(1)(e), stats.
2. In this proceeding the appointing authority has the burden of proving that the discipline imposed was for just cause. See Reinke v. Personnel Board, 53 Wis. 2d. 123, 191 N.W. 2d. 833 (1971)., Zabel v. Rice, Wis. Pers. Bd. 75-66 (8/23/76).
3. The evidentiary standard to be utilized is that of to a reasonable certainty, by the greater weight of the credible evidence. See Reinke, supra, Zabel, supra.
4. In this case the respondent has failed to prove that there was just cause for the discipline imposed.

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1. The testimony of attorney Cole with respect to Chief Homele's statements regarding a certain witness which was taken subject to objection has been determined to be inadmissible as a statement made in the course of compromise negotiations, and have not been considered in reaching the above findings.

OPINION

The appellant's attorney has admitted to some misconduct by the appellant with respect to the disposition of surplus tab cards and the use of state employes and equipment to move personal belongings. However, the appellant denies that any of the proceeds from the sale of the cards was used for his personal gain, and it is argued that the penalties imposed are excessive.

In a previous opinion dealing with an allegation of excessive penalty, the Board discussed its role in reviewing the discipline imposed:

"The question . . . 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 . . . . Therefore, we conclude that 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 . . . . At the same time, the 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," Zabel v. Rice, Wis. Pers. Bd. 75-66 (8/23/76) p. 4.

The appellant's sale of surplus tab cards was alleged to have been for personal gain. The letter notifying the appellant of the nature and the grounds for the action taken against him makes this clear:

"Your conduct regarding the aforementioned incidents also violates the departmental code of ethics which indicates an employe may not use his or her position to engage in activities which result in personal gain for the individual. Prohibited activities include use of state time or equipment for personal gain or advantage. Items we cite in this instance include the receipt of money for the IBM tab cards . . . ." (Respondent's Exhibit #1, p. 2.)

The respondent failed to sustain his burden of proof that these sales were for personal gain. The respondent argued that the appellant's other misconduct

justified the discipline imposed even if the evidence presented at the hearing did not support a finding of personal gain. While the Board agrees that the remaining misconduct was serious, it does not agree that this misconduct provides just cause for the discipline imposed by respondent.

The record reflects that the scale of these tab cards was on a relatively small scale, realizing perhaps in the vicinity of \$30-\$60 a year for about 5 years.<sup>2</sup> This money was used to buy coffee for center employes and guests, and to purchase non-standard office accoutrements. This use of money concededly was improper. However, the appellant made these purchases primarily to enhance the image of the center presented to potential uses of the center. He wanted to avoid the "basement storage" image which he felt could discourage agency use of this facility. The use of the state truck and employes also concededly was improper. However, this utilization was on a relatively small scale, for approximately 2 to 3 hours. Furthermore, the appellant was under the impression that the use of the truck on this occasion would be integrated with a routine run, and although a relatively minor point which certainly does not render use of the truck proper, this is an additional mitigating circumstance.

Against these factors the Board must consider the appellant's previous record of over 13 years of employment with above average performance and no previous discipline imposed.

In the opinion of the Board, there would have been just cause for the rather extensive range of discipline imposed here if the respondent had been able to prove personal gain from the scale of the tab cards. In the absence of such proof it must be concluded that the discipline imposed was excessive and not based on just cause.

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2. The size of the December, 1977 payment was unusually large, apparently due to the volume of tab cards involved. The appellant was surprised at the size of the payment.

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This case was heard under the authority of § 16.05(1)(e), stats. This limits the Board to 2 options following the hearing: "the Board shall either sustain the action of the appointing authority or shall reinstate the employe fully." This does not permit the Board to modify the appointing authority's decision.<sup>3</sup> Therefore, since the decision of the respondent cannot be sustained, the appellant must be reinstated fully. However, in the opinion of the Board this reinstatement would not prevent the respondent from taking such disciplinary action as may be justified based on the findings set forth above.

ORDER

The appellant shall be reinstated fully.

Dated: \_\_\_\_\_, 1978

STATE PERSONNEL BOARD

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James R. Morgan, Chairperson

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3. Compare, Chapter 196, Laws of 1977, § 121, § 230.44(4)(c), stats.