STATE OF WISCONSIN PERSONNEL COMMISSION

WINTER HESS,

Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 79-203-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), stats., of a suspension without pay for five days. In an Interim Decision and Order dated December 4, 1979, the Commission upheld the adequacy of the letter providing notice of suspension.

FINDINGS OF FACT

1. At all relevant times the appellant has been employed by the respondent in the classified civil service with permanent status in class as a Conservation Warden Supervisor 1.

2. The appellant, as of February, 1980, had been employed by the respondent for approximately 11 years, including more than 6 years as a supervisor of other wardens.

3. During the period of appellant's employment with DNR his performance evaluations have been basically good and he has not been the subject of any disciplinary action except for the instant suspension.

4. In 1977, Warden Stanley Nogalski, a subordinate of the appellant's

while on duty, driving a state vehicle, and attempting to catch up with a suspected fishing law violator, was apprehended for speeding by Officer Ray Chasensky of the Peshtigo Police Department.

5. On November 16, 1977, the appellant, while on duty, accompanied Mr. Nogalski to a hearing on the charge to be held before Municipal Judge Guay in the Peshtigo City Building that evening.

6. On that date the court officer for Judge Guay was Officer Chasensky, whose job was to read the charges and to act somewhat in the role of prosecutor.

7. Prior to the convening of the court session, the appellant saw Officer Chasensky talking with Judge Guay outside the courtroom.

8. The appellant saw Judge Guay look at the appellant and then stop speaking.

9. The appellant then saw Officer Chasensky turn and look at the appellant and Nogalski and cease talking.

10. The appellant, inferring that they had been discussing the Nogalski case, approached them and said words to the effect of "If you're going to discuss the Nogalski case I'd like to stay and listen."

11. Judge Guay said words to the effect of "Why don't you go up to the courtroom."

12. The appellant said words to the effect of "If you're going to discuss the Nogalski case I want to stay."

13. Judge Guay then became angry and yelled at the appellant that he should go to the courtroom or he would hold him in contempt, thus ending the conversation as appellant departed.

14. Prior to this incident the appellant had been told by various

law enforcement officers that Officer Chasensky "ran" Judge Guay's court and what he wanted he got.

15. On April 5, 1979, Mr. Nogalski appeared before Marinette County Circuit Court Judge Donavan for disposition of the speeding charge.

16. The appellant had spoken to Judge Donavan prior to the proceeding and had obtained permission to be heard with respect to Nogalski's sentencing. The appellant had not informed either the prosecutor or Nogalski's defense counsel that he intended to speak.

17. The appellant appeared in the court on that date and spoke with respect to the sentencing of Mr. Nogalski. The transcript of the entire proceeding was entered as Respondent's Exhibit 2, and is incorporated by reference as if fully set forth. The complete statements of the appellant are set forth as follows, see page 16-18 of Respondent's Exhibit 2:

> THE COURT: Mr. Hess, do you wish to make a statement?
> MR. HESS: Yes, your Honor.
> I am, as you know, Mr. Nogalski's immediate supervisor. I represent his employer, the Department of Natural Resources. I am not in uniform today because I have an obligation to babysit, and I know some people in court that would probably criticize me for coming to court in uniform and babysitting. And so that is the only reason I am not wearing the colors.
> At this point it appears this is the subjective part of prosecution. The objective part you have ruled on. I take no issue with that. The subjective part is the sentencing.
> I want the Court to know that in April of 1977 I arrested the officer who initiated this action. During my interview with him he told me, 'I will get you fuckers. It might take me a long time but I will get you.'
> THE COURT: Mr. Hess, I think that is going beyond--
> MR. MIRON: If the court wishes, I will ask that we defer sentencing until I can bring Officer Chasensky in here to rebut this. As far as I am concerned, we had a negotiated plea going into this. You are entirely out of bounds.

MR. WILSON: Your Honor, Mr. Miron and the Court, I was not aware that Mr. Hess was going to make a statement. I will state that right now.

MR. HESS: This is true. I had no conversation with Mr. Wilson. If I am out of order, I apologize to the court. Tell me where I erred, and I will stay away from that.

THE COURT: I think perhaps - I think it is improper, the type of statement you made.

MR. HESS: I apologize to the court. Your Honor, I as a human being and Stan's employer, I recognize the situation for what it is. I hope the court will. And if it does recognize that situation, I hope that the court will impose a minimal fine. I don't know what the minimums are, but I hope the Court will find something that it deems justified under the circumstances.

18. The appellant appeared in court on this occasion in part to provide moral support to Mr. Nogalski, who the appellant felt was demoralized by the prosecution, a perceived lack of proper training by DNR, and the refusal of DNR to provide counsel to Nogalski.

19. On this occasion the appellant was not authorized to speak for or as a representative of DNR.

20. The respondent at all relevant times had a legitimate and paramount interest in having its conservation wardens, including the appellant, deal with judicial officers in an appropriately respectful manner.

21. The respondent at all relevant times has had a legitimate and paramount interest in having its conservation wardens, including appellant, maintain a good rapport with judicial officers.

22. The appellant's statements to Judge Guay as set forth in findings #10-13, had a negative impact on the aforesaid interests of the respondent, set forth in findings #20 and #21, and had an adverse effect on the performance of appellant's duties and the efficiency of the group with which he worked. The appellant's statement to Judge

Guay as set forth in findings #10-13, had a negative impact on the aforesaid interests of the respondent, set forth in findings #20 and #21, and had an adverse effect on the performance of appellant's duties and the efficiency of the group with which he worked.

23. The appellant's statement to Judge Donovan, set forth in finding #17, had a negative impact on the aforesaid interests of the respondent, set forth in findings #21 and #22, and had an adverse impact on the performance of appellant's duties and the efficiency of the group with which he worked.

24. By letter dated July 16, 1979, Respondent's Exhibit 1, the respondent suspended the appellant without pay for five days.

25. The respondent's interests set forth in findings 20 and 21 could have been served adequately by lesser disciplinary action of one-day suspension without pay.

CONCLUSIONS OF LAW

1. This appeal is appropriately before the Commission pursuant to §230.44(1)(c), stats.

2. The issue of whether there was just cause for the discipline imposed includes the question of whether the imposition of the discipline violated appellant's right to freedom of speech.

3. There was just cause for the imposition of some discipline.

4. The imposition of a five-day suspension was excessive and should be modified to a one-day suspension without pay.

OPINION

The appellant's conduct for which he was disciplined involved

speech. An initial question is whether a First Amendment question properly is before the Commission given the notice of hearing provided and the proceedings that have been had.

The notice of hearing contained the following statement of issue:

> "... whether the allegations contained in the letter to the appellant from the deputy secretary dated July 16, 1979, are true in whole or in part, and, whether there is just cause for all or part of the discipline imposed."

There was no reference to or argument concerning a First Amendment question any time before or during the hearing.[1]

Pursuant to §227.07(2)(c), stats., the parties to a contested case must be given notice, before hearing including "A short and plain statement of the matters asserted," or of "the issues involved."

In the opinion of the Commission the question presented in this case on this point is whether notice that the issue for hearing would be whether the facts alleged in the letter of suspension were true and whether there was "just cause" for the suspension, provided fair notice that the effect of the First Amendment might be considered in the determination of whether there was "just cause." In resolving this question it is helpful to consider the meaning of the term "just cause."

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[1] Following the submission of post-hearing briefs the hearing examiner informed the parties' attorneys in a conference phone call that he thought there possibly was a First Amendment facet to the appeal and inquired as to whether they wished to file further briefs. While both attorneys declined to file briefs, the respondent's attorney objected to consideration of any First Amendment questions at that stage of the proceedings. Appellant's attorney disagreed.

The statutes do not provide a definition of "just cause." The courts have provided the definition of the term. See, e.g., Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 474 (1974); State ex rel Gudlin v. Civil Service Commn., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965). It may be said that "just cause" means, in part, a lawful cause. See State ex rel Nelson v. Henry, 221 Wis. 127, 132 (1936):

> "Just cause cannot be founded upon a political or religious reason, it must be based upon other considerations."

Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974), involved a state employe in the classified service who was discharged for conduct that included "on-duty self-avowal of homosexuality and discussions of his homosexual life-style ...." 62 Wis. 2d at 477. The Personnel Board concluded there was just cause and sustained the discharge.

In its decision the Supreme Court stated that:

> "Two issues are presented on this appeal:
> 1. Whether there is substantial evidence to show that the appellant is chargeable with the conduct complained of and,
> 2. Whether there is substantial evidence to show that such conduct, if true, constitutes just cause for discharge." 62 Wis. 2d at 472.

After resolving the first issue the court then stated:

> "Having determined that the evidence is sufficient to support the board's finding as to the conduct complained of, this court must determine whether such conduct constitutes 'just cause' for dismissal." 62 Wis. 2d at 474.

The court proceeded to apply to the facts the test of whether there was "a sufficient rational connection or nexus between the conduct complained of and the performance of the duties of employment."

62 Wis. 2d at 474. After concluding that there was, the court discussed and rejected the claim that the dismissal violated Safransky's First Amendment rights.

Although in Safransky there apparently was no dispute as to notice, the Court's analysis makes it relatively clear that it considered the First Amendment element of the case to be included as part of the issue of "just cause." If the Court had felt that it was a separate issue, it undoubtedly would have begun the opinion by stating that there was three, not two, issues to be decided.

On the other hand, while the "nexus" test applied in Safransky presumably is present in every just cause case, First Amendment questions obviously are not. One thing that may be said about speech activity subject to the First Amendment is that it usually is relatively clearly discernible from the alleged facts of misconduct. This may be contrasted with a hypothetical case where an employe disciplined for absenteeism argues that the state violated a right to freedom of religion secured by the First and Fourteenth Amendments because the absences were to observe religious holy days. If the appointing authority did not have notice in advance of the hearing of such a claim, he or she might well be unable to litigate it effectively and be deprived of fair notice.

In conclusion, in light of the Supreme Court's handling of the "just cause" issue, particularly the formulation in Safransky of a just cause issue which included a First Amendment claim, and because the appellant's speech activity is readily discernible from the face of the letter imposing the suspension, the Commission determines that

the First Amendment question is properly before it.

In an appeal of a disciplinary action of this nature, the Commission must determine both whether there was just cause for the imposition of discipline and whether the amount of discipline imposed was excessive. See §§230.44(1)(c) and 230.44(4)(c), stats.; Reinke v. Personnel Board, 53 Wis. 2d 123, 133, 191 N.W. 2d 833 (1971); Holt v. DOT, Wis. Pers. Commn. 79-86-PC (11/8/79).

In Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.N. 2d 379 (1974), the Supreme Court discussed the meaning of "just cause" 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."

However, state employes are protected by Art. I, Sec. 3 of the Wisconsin Constitution and the First Amendment to the United States Constitution, and in a case such as this, involving speech activity, there must be further inquiry. See, e.g., Pickering v. Bd. of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968); Finnegan v. DLAD, Wis. Pers. Bd. 77-75 (6/16/78), affirmed, Finnegan v. State Personnel Board, Dane Co. Circuit Court No. 164-096 (7/19/79). In some cases involving discipline on performance grounds with respect to communications made by employes as part of their jobs, there may be a very slight First Amendment interest, analogous to a commercial speech situation. In certain cases where there is not really an issue as to the content of the communications, there may be no First Amendment interest at all. In this case, involving matters of substantial possible public concern, and considering the

content of the communications, there is a definite First Amendment component.

The determination of whether public employe speech activity is protected by the First Amendment against state infringement involves a balancing of competing interests, see Pickering v. Board of Education, 391 U.S. 563, 568-569, 88 S. Ct. 1731, 1734-1735 (1968):

> "... it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employes that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employes.
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> * * *
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> Because of the enormous variety of fact situations in which critical statements by teachers and other public employes may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

See also Chiat v. WCCJ, Wis. Pers. Commn. No. 78-152-PC (6/5/79). In balancing these competing interests, certain principles must be applied, see Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 2684-2685 (1976):

> 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 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 and ... '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 this case, the respondent's interests in having its wardens accord appropriate respect to judicial officials and in having those wardens maintain good rapport with those officials, were the subject of testimony. These interests are legitimate, important, and paramount. On the other hand there is the interest shared by the appellant and the public in having free and open discussion of matters of public concern.

With respect to the first incident, with Judge Guay, the appellant's remarks and actions had the effect of accusing the judge of unethical conduct. The record does not reflect that there was a very substantial basis for the appellant to have made this kind of accusation. This incident unquestionably had a negative impact with respect to the state's interest in maintaining a good rapport between its conversation wardens and the judiciary.

Furthermore, the appellant was on duty at the time. This is far from the situation in the Pickering case where the employe commented on a matter of general public concern and the communication was not a part of his job duties. In a case such as this the First Amendment interest is substantially less, and is outweighed by the state's interests.

As to the second incident in Judge Donovan's court, the appellant's statement as to what Chasensky said appropriately may be characterized as immaterial with respect to sentencing. What is of a good deal more significance is the fact that appellant represented to the court that he appeared on behalf of the agency when in fact he lacked such authority. Appellant's comments must be concluded to have had a substantial negative impact on the respondent's interests, which

outweighed the free speech interests involved.

Both the appellant's statements to Judge Guay and to Judge Donovan may be said to have had "a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works," Safransky v. Personnel Board, 62 Wis. 2d at 474.

The Commission next must determine whether the discipline imposed by respondent was more than was necessary to serve its legitimate interests. The greater the degree of discipline imposed, the greater is the chilling effect on speech activity. In a given case the facts may support some discipline but not the amount imposed. See, e.g., Finnegan v. DLAD, Wis. Pers. Bd. No. 77-75 (6/16/78), page 7.

This question is closely related to the question of whether the discipline imposed was, in a general sense, excessive, and should be modified by the Commission.

With respect to the general legal standard to be applied in reviewing pursuant to §230.44(4)(c), the degree of discipline imposed, the respondent cites State ex rel Gudlin v. Civil Service Commission of West Allis, 27 Wis. 2d 77 (1964), and argues that this Commission should utilize the standard there applied by the court in reviewing the Civil Service Commission's actions: "whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment." 27 Wis. 2d at 82.

In the Gudlin case the Supreme Court on appeal was reviewing a circuit court decision in a certiorari proceeding, which is a limited form of review encompassing the standard quoted in the preceding

paragraph. The Commission can not agree that it is appropriate in an administrative proceeding of the instant nature, where the employe receives a de novo hearing, and the Commission has the authority to modify the discipline imposed by the appointing authority, to apply such a standard. This would be analogous to the Personnel Board's approach in Reinke v. Personnel Board, 53 Wis. 2d 123, 134, 191 N.W. 2d 833 (1971), where the court reversed the Board's application of the substantial evidence test in a review of a discharge. The court noted that this test "is applicable only on judicial review."

In the federal civil service system discipline is imposed by the employing agency subject to review by the Civil Service Commission followed by judicial review. In Wathen v. U.S., 527 F. 2d 1191, 1203 (Ct. Claims 1975), the court discussed review of the amount of discipline imposed:

> "The appropriate penalty to impose upon an employe for infraction of an agency's rules is within the discretion of the agency subject to review on the merits by the Civil Service Commission, as in this case, and subject to judicial review on a more limited basis for procedural regularity and abuse of administrative discretion and bad faith."

See also, Wisconsin Civil Service: Report of the Employment Relations Study Commission (1977). This preceded the enactment of Chapter 196, Laws of 1977, which included the provision in §230.44(4)(c), stats., which permits the modification of actions. At page 54 of the report it specifically is recommended that the Commission be given this power, in part to make the Commission power more analgous to that of labor arbtirators who have the authority to modify disciplinary action.

On the other hand, inasmuch as the Commission does not make the

initial decision on discipline, but rather conducts an administrative review of discipline imposed by the appointing authority, it would not be appropriate merely to substitute the Commission's judgment or exercise of discretion for that of the appointing authority.

In the opinion of the Commission, the appropriate review of the amount of discipline imposed in the normal case is a review on the merits, with the discipline to be modified if, under all the circumstances, the amount of discipline is determined to be "excessive." See Black's Law Dictionary, Revised Fourth Edition, p. 670: "Tending to or marked by excess, which is the quality or state of exceeding the proper or reasonable limit or measure."

Since this is a First Amendment case, the question of the excessiveness of the discipline imposed in essence is superseded by the requirement that the state impose a penalty that is no more drastic than necessary to satisfy its legitimate interests.

In this connection, it is noted that the appellant has had a good record, without other disciplinary action taken against him, during approximately 11 years of employment with DNR. On the other hand, there were not one, but two separate incidents involved, and they were of a rather substantial nature. On balance, the Commission concludes that the respondent had "open to it a less drastic way of satisfying its legitimate interests," Elrod v. Burns, 96 S. Ct. at 2684-2685, than by imposing a five-day suspension without pay. In the opinion of the Commission, the five-day suspension imposed in this First Amendment case is excessive and it should be modified. In the context of appellant's good record and status as a supervisor

a one-day suspension without pay is a severe enough penalty to punish this behavior and discourage similar behavior in the future.

In the opinion of the Commission, the First Amendment requirement with respect to the amount of discipline provides a more stringent review of agency action than the general test of "excessiveness" discussed above. The constitutional test supersedes the general test. However, since there is a dispute as to whether the First Amendment question is properly before the Commission, it is appropriate to note by way of dictum that, in the absence of a First Amendment element the Commission would conclude that the five-day suspension was not "excessive."

ORDER

The respondent's action suspending appellant without pay for five-days is modified to a one-day suspension without pay and this matter is remanded to the respondent for action in accordance with this decision.

Dated: August 19, 1980. STATE PERSONNEL COMMISSION

Charlotte M. Higbee, Commissioner

Donald R. Murphy, Commissioner

Gordon H. Brehm, Commissioner

AJT:jmg