STATE OF WISCONSIN PERSONNEL COMMISSION

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ROBERT LYONS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 79-81-PC

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DECISION
AND
ORDER

NATURE OF THE CASE

This case is an appeal to the Commission of the reprimand, suspension, and termination of appellant from the position of staff physician in the Bureau of Quality Compliance, Division of Health in the Department of Health and Social Services.

The Commission adopts in part and rejects in part in its Final Decision and Order the Findings of Fact, Conclusions of Law and Opinion in the Proposed Decision of the hearing examiner, with changes, amendments and additions described below. A copy of the Proposed Decision is attached hereto. In addition to reviewing the transcript of the hearing and the evidence of record, the Commission has consulted with the hearing examiner and has considered the objections of the parties to the Proposed Decision.

FINDINGS OF FACT

Finding 12 is amended for the sake of clarity to read:

> 12. None of the individuals who participated in the job assignment and the disciplinary decisions were physicians; none of these individuals were competent to assess from a medical point of view the propriety of appellant's refusal to carry out the assignment.

Finding 14 is rejected because the Commission does not find that it is supported by the evidence presented. The Commission finds that the testimony of the medical expert witnesses did not go to the actual objective level of appellant's expertise in the field of diabetes, but rather emphasized their opinion that a physician is the best judge of his or her own capabilities. (Vol. 1, Tr. 166-168, 176; Vol. 2, Tr. 11-17). The Commission nevertheless finds, based on the remaining findings and on the analysis set out in the Opinion below, that the discipline imposed on the appellant was excessive.

Findings 15 and 16 are deleted because they are not necessary or relevant to the decision of the Commission.

Finding 17 is renumbered as 15 to conform to the changes resulting from deletion of other findings, above.

Finding 16 is added as follows:

> 16. The assignment of Dr. Lyons to make an on-site appraisal of the patient problem and compile the case facts if he felt he lacked expertise to make a judgment, was a reasonable assignment. (Resp. Exh. 1,3).

This finding is added because a finding on the issue of reasonableness is required by Stanton v. State Personnel Board, Case No. 160-188 (Dane Co. Cir. Ct. 1978). The Commission finds the assignment was reasonable because its performance did not require the expertise of a specialist in the field of diabetes. The medical training and experience of Dr. Lyons were sufficient to carry out the task. Additional reasons for the finding are set out in the Opinion which follows on page 3.

Findings 18 and 19 are renumbered as 17 and 18, respectively to conform to changes in numbering of other findings.

CONCLUSIONS OF LAW

Conclusion 5 is amended as follows:

5. The respondent has sustained its burden of proving there was just cause for the suspension of appellant.

Conclusion 6 is added as follows:

6. The respondent has failed to sustain its burden to prove there was just cause for the termination of appellant.

The Commission agrees with the hearing examiner that the termination was excessive discipline, but concludes that the suspension was not excessive, for the reasons set forth in the Opinion, below. Conclusion 5 is amended to reflect this decision.

OPINION

The Commission rejects portions of the Proposed Opinion and substitutes the following Opinion for the Opinion of the hearing examiner, with an introductory discussion of the various changes from the Proposed Opinion in keeping with amendments and additions to the Findings and Conclusions set forth above.

INTRODUCTION

The discussion of the question of the reasonableness of the assignment, at p.14 below, is included in this Opinion in support of the conclusion of the Commission reflected in Finding 16. As discussed in greater detail below, the Opinion reflects the different conclusion drawn by the Commission from that of the hearing examiner, after consideration of the testimony and evidence presented at the hearing and summarized by the hearing examiner in the Proposed Decision, which summary is incorporated into the Opinion of the Commission. The hearing examiner's discussion of the unreasonableness of the assignment at p. 14 of the Proposed Decision is deleted from the Opinion.

The discussion at p. 13 of the Proposed Decision, with respect to what the appellant must show in order to respond to the respondents' prima facie case, is modified. The Proposed Decision states that following Stanton, supra, appellant must show the assignment to be unreasonable once respondent has established its prima facie case. That statement reflects only part of the option open to appellant. Since the just cause standard focuses both on the actions of the parties and on the propriety of the discipline imposed, the appellant may argue that even if the assignment was reasonable, the discipline imposed was excessive.

Some of the discussion at the bottom of p. 10 of the Proposed Decision describing the situation existing in July, 1978 when Dr. Lyons first heard of the patient is rejected because it is redundant and parts of it are superfluous to the decision of the Commission. The reference, in the same paragraph, to August, 1978, is changed to read July, 1978, to correct an error.

The sentence, "The supervisors must accept his professional judgment and assessment of his own capabilities," at p. 11 of the Proposed Decision is deleted because the Commission finds it is not fully accurate with respect to every instance in which appellant and his supervisors may disagree, such as the instance which gave rise to events leading to this appeal. Further discussion of this point appears in the Opinion below.

The discussion at p. 14-15 of the Proposed Decision with respect to whether there was just cause for the suspension is modified to conform with the conclusion of the Commission that the suspension was for just cause, for the reasons set out below.

1. Position of the Parties

Respondent argues that an unexcusable refusal to obey lawful and reasonable instructions constitutes insubordination and is just cause for suspension or termination. The Department contends there were no overriding ethical considerations to justify Dr. Lyons' refusal to carry out his assignment to conduct an on-site investigation or at least a compilation of case history of a deceased patient at the Portage County Home. The assignment was therefore within his position description and was not a poor business decision, and the appellant had no excuse for the insubordination.

Appellant contends that it was solely within his professional expertise to determine whether he was qualified to carry out the assignment, and whether carrying it out would violate his medical judgment and professional ethics; therefore, no work rule violation occurred. He also alleges that

the employer breached his legitimate expectations when it required him to act in an area where appellant's judgment should control. Appellant's written closing arguments also address the issue of whether the Commission has jurisdiction of an appeal from the reprimand imposed on Dr. Lyons. This issue will be discussed separately from the termination and suspension.

2. Discussion

A. The Legal Standards

The legal standard for determining the propriety of the discharge is whether the discharge was for just cause. Just cause exists in this case if there was misconduct by the appellant which has undermined the efficient performance of his position. Safransky v. Personnel Board, 62 Wis. 2d 464, 475 (1974). The refusal to carry out a written assignment may constitute just cause only where the assignment was within the duties of the employe's position. Zehner v. State of Wisconsin Personnel, Case No. 159-399 (Dane Co. Cir. Ct. 1978). Whether these standards have been met and whether there is just cause for Dr. Lyons' discharge must be determined by analyzing the facts and circumstances of the case. Reinke v. Personnel Board, 53 Wis. 2d 123 (1971); Zabel v. Rice, Case No. 75-66, Pers. Bd. 1976. Dr. Lyons' refusal to carry out an assignment is not in dispute. There is no dispute that the refusal was a work rule violation. The assignment was to make an on-site evaluation of a potential medical treatment problem and then decide whether he was qualified to judge the propriety of the care given to a deceased "brittle diabetic" patient. If he felt unqualified, he was to compile the case facts for presentation to others so that an evaluation could be made.

(Resp. Ex. 1, 4a, 6). Dr. Lyons felt no purpose would be served by an on-site evaluation. He had already talked to Edna Bach, R.N., and Charles Kirk, R.N., and determined that he could not render a judgment regarding the patient's care.

The burden of proof to establish just cause is on the employer. Reinke v. Personnel Board; Standon v. State Personnel Board, Case No. 160-188, (Dane Co. Cir. Ct. 1978). In Stanton, the court described the presentation of evidence in an appeal of a discharge as including the establishment of a prima facie case by the employer, which then shifts the burden of going forward with the evidence to the employe. In this case the employer must show that there was a refusal to carry out an assignment which was within the employe's position description. Once this prima facie case is established, the employe has the burden of going forward with evidence on the issue of the reasonableness of the order. The burden of persuasion remains on the employer. If the order was unreasonable, neither the suspension nor the discharge was for just cause. It would not be misconduct to refuse to obey an unreasonable order.

The Commission has previously held that the current provisions of §230.44(4)(c), Wis. Stats.,

> "...clearly requires a two-step analysis of a disciplinary action on appeal. First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline." Holt v. Department of Transportation, Case No. 79-86-PC, Pers. Comm. 11/79.

The Commission in this case can uphold all of the discipline imposed, or some of the discipline imposed, if it finds just cause for the imposition of discipline. If, however, the Commission finds no just cause for the imposition of discipline, it can reject all of the discipline imposed.

B. The Facts and Circumstances of the Case

The assignment was within the duties of Dr. Lyons' position. His position description shows the duties of the position to be primarily in two areas:

> 1) Provide direct professional in-service and consultations as to needs/requirements relating to facilities, medical directors and physicians regarding Title XIX Medicaid Program Requirements;
>
> 2) Provide medical input to assure compliance with Title XVIII, XIX, and licensure regulations and in the evaluation of medical services. (App. Ex. 5).

There was testimony from Dr. Lyons that he inserted a modification of one of the task descriptions under number "2", namely that he would accept <u>appropriate</u> special assignments as needed. (Emphasis indicates Dr. Lyons' modification.) He was concerned that he would not be asked to carry out an assignment which was unprofessional, unethical or beyond his medical expertise. (Vol. 2, Tr. 32). There was, however, no testimony showing the Portage County Home incidents involved a "special" assignment rather than a normal consultation request. (Vol. 2, Tr. 24-32). The testimony of Dr. Lyons and of Mr. Louis Remilly, his supervisor, indicated the kind of request at issue here is not special in any way. (Vol. 1, Tr. 10-12; Vol. 2, Tr. 63-64). Appellant was aware that such consultations were included in his position. (Vol. 2, Tr. 24-32).

Dr. Lyons had completed other consultations outside his specialty of radiology, both before and after he refused to go to the Portage County Home. (App. Ex. 6a-b, 6d; Resp. Ex. 10). His supervisor nevertheless did not expect him to be an across-the-board medical specialist. (Vol. 1, Tr. 49).

In several prior instances outside specialists had been called in to conduct investigations and evaluations of patient care. In one particular instance, Dr. Lyons recommended outside specialist evaluation and his recommendation was followed. (Vol. 1, Tr. 88-89). In another instance the Bureau of Quality Compliance conducted an in-depth investigation with outside specialists, of a series of problems of poor medical and nursing care involving diabetic patients. (Vol. 1, Tr. 45-46). Respondent's witnesses offered explanation of why these instances differed from the Portage County Home incident. For the first case, another physician was brought in because he lived near the particular nursing home involved in that case, and was already an outside consultant under contract with the state. (Vol. 1, Tr. 88-89). The in-depth institutional investigation involved a long-term series of problems at another nursing home. (Vol. 1, Tr. 120; Vol. 2, Tr. 53). The last instance was one where a psychiatric specialist was required under federal program guidelines. (Vol. 1, Tr. 45). None of these examples suggest any reason why the Portage County Home situation was one where an outside specialist would have been inappropriate, but only show the variety of circumstances where one <u>was</u> appropriate. In fact, in one case where

Dr. Lyons' recommendation was followed, the reason given at the hearing was that a specialist happened to live in the area of the problem. It is certainly not a convincing explanation of why Dr. Lyons' suggestion was not taken in the Portage County Home case. Since Dr. Lyons' termination, the Bureau has no permanently employed physicians, but retains outside physicians for consultation as needed. (Vol. 1, Tr. 46-47).

The patient involved in the Portage County Home case was deceased when Edna Bach initially contacted Dr. Lyons about the problem in July, 1978. The evidence at the hearing indicates that the only attempt made by the employer to comply with her initial consultation request was to order the appellant for a period of eight months to carry out an assignment for which he felt unqualified. During this extended period, Dr. Lyons continued to perform his duties and carried out other assignments given to him by his supervisors.

Dr. Lyons' position description is broadly phrased to encompass a wide range of assignments. Respondent argues in its closing brief that "once the employer provides fair notice to the employe of the duties contemplated by a particular position, the employe must either refuse the employment or expect to be called to perform the duties as assigned by the employer." The situation is not as simple as respondent argues. Dr. Lyons is a licensed professional supervised by non-professionals who are not his peers in his area of training and expertise. Mr. Remilly and Mr. Fiss acknowledged that they could not judge the correctness of Dr. Lyons' medical opinions. (Vol. 1, Tr. 54, 59; 124-125). The unre-

butted testimony of appellant's expert witnesses strongly underscored his contention that he is the only qualified judge of his own expertise. Dr. J.D. Kabler, Director of University Health Service of the Madison Campus of the University of Wisconsin, President of the Dane County Medical Society, and member of the Board of Trustees of the State Medical Society of Wisconsin, testified that a professional may well be the best authority on his or her own qualifications to perform a certain task. (Vol. 1, Tr. 168, 176). Dr. Gerald C. Kempthorn, Chairman of the Commission on Mediation and Peer Review of the State Medical Society, testified that Dr. Lyons' refusal to carry out the Portage County Home assignment was the appropriate response in that case. (Vol. 2, Tr. 16-17).

Respondent's counsel emphasized at the hearing that the agency did not want to force Dr. Lyons to do anything he was not competent to do and that his instructions for the on-site visit to the Portage County Home included the option to compile facts without evaluating the patient's case history. The testimony of appellant's supervisors is equivocal on the question of whether they were asking Dr. Lyons to exercise medical judgment in the compilation of facts. Mr. Remilly, Dr. Lyons' first line supervisor, did testify, however, that his instruction to appellant to compile facts did call for him to exercise medical-technical judgment. Mr. Remilly and Mr. Fiss both felt appellant was competent to make an on-site evaluation of the situation before finally deciding whether he was qualified to do an in-depth evaluation of the patient's history of care. (Vol. 1, Tr. 57-59; 124-125,128). The assignment was more

than just a request that appellant take an extra step before deciding whether he was qualified to go further. The assignment also included the request to compile case facts for presentation to the State Board of Medical Examiners for purposes of conducting a peer review of the treatment provided by the on-site physician. Both Dr. Kabler and Dr. Kempthorn supported Dr. Lyons' contention that even the compilation of facts of a medical history involves the exercise of medical expertise and judgment. (Vol. 1, Tr. 166-167; Vol. 2, Tr. 11-13). Dr. Kabler testified that if the compilation/evaluation of facts is made by a person not competent to do so, then the ultimate evaluation based on those facts is not valid. (Vol. 1, Tr. 167). Dr. Kempthorn agreed with Dr. Kabler. (Vol. 2, Tr. 15-17). None of the employer's witnesses disagreed with or attempted to rebut any of the expert testimony. The agency response to the experts was to reiterate its concern that the supervisory right to assign duties would be eroded if appellant were permitted to decide the scope of his own duties. (Vol. 1, Tr. 37-42). This concern was shared by Administrator Robert Durkin, who counselled appellant in January, 1979. (Vol. 2, Tr. 69-70).

The testimony and exhibits presented at the hearing show certain weaknesses in the arguments of both parties. The appellant sincerely but mistakenly believed it would have been unethical to carry out the assignment at the Portage County Home. He also mistakenly argued that the assignment was outside the scope of his position description. Respondent argued mistakenly that insubordination is any unexcused refusal to carry

out a supervisory order, and that the only valid excuse would be the unethical nature of the assignment. In closing arguments, respondent relied primarily on a 1914 Wisconsin State Supreme Court Decision defining insubordination as "good ground" for discharge.[1] More recent administrative agency, circuit court and state supreme court decisions defining just cause and detailing the nature of the burden of proof and the nature of evidence in administrative appeals of terminations clearly set out a more flexible legal standard than that suggested by respondent. Dr. Lyons does not have to prove the assignment was unethical in order to show there was not just cause for his discharge. The burden of persuasion is on the respondent. The appellant may argue that the assignment was unreasonable and all discipline was unjustified. He may also argue that even if the assignment was reasonable, the discipline imposed was excessive.

Mr. Remilly was concerned that Dr. Lyons' refusal to carry out one assignment would open the door for appellant to continue to narrow the scope of his duties until his position became ineffective to carry out the mission of the agency. This legitimate concern was voiced in early August, 1978. (Resp. Ex. 1). Mr. Remilly verbally requested Dr. Lyons to carry out the Portage County Home assignment in August, 1978. Written instructions were issued in November and December, 1978, and in March and April, 1979. Appellant was reprimanded in December, 1978, counselled by Division Administrator Robert Durkin in January, 1979, and suspended

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[1] Thomas v. Beaver Dam Mfg. Co., 157 Wis. 427 (1914).

and terminated in April, 1979. (Resp. Ex. 4a, 6, 8a, 9). During this entire period, appellant continued to perform other duties of his position. The continuing instructions and refusals had to do with only one assignment and no attempt was made to transfer or reassign Dr. Lyons. The appellant was disciplined and discharged for a single act. In the context of appellant's employment history before and after the refusal of one assignment, it is clear that the single act did not impair the efficient performance of any of his other duties.

The testimony of the expert witnesses does not support a contention that Dr. Lyons was not qualified to compile the facts of a patient's case history. Most of the medical testimony goes to the question of expertise, but does not convince the Commission that specialized expertise beyond that of the appellant was necessary to perform the assignment. This is so even though the medical testimony was uncontraverted. The physicians did not state that Dr. Lyons was personally unqualified to compile the case history, but only stated their belief that his opinion of his qualifications should have been accepted by his supervisors. The situation did not involve decisions with respect to present and future care of a living patient. Instead, the situation was one with little risk. In such a low-risk situation the appellant's supervisor reasonably requested appellant to take another look at the situation to see if he felt qualified to proceed further. The issue here is not whether medical judgment was required to perform the assignment at any level. Presumably. Dr. Lyons had to use his medical judgment to

decide if he was professionally qualified. The issue really concerns the level at which appellant was asked to exercise his professional judgment. The medical experts and respondent's witnesses have different concerns and different perceptions with respect to expertise. The experts are concerned with the principle that a physician is the best judge of his or her own ability. Appellant's supervisor did not directly disagree with this principle. Mr. Remilly's concern was that although there were times when he may have had to defer to Dr. Lyons' professional judgment, that this was not one of those times. Even if Dr. Lyons compiled the case facts for presentation to the Board of Medical Examiners and then felt uncomfortable that he had missed something, there is no reason to believe he would be unable to communicate with the Board and assist it with any investigation it may have undertaken. In the opinion of the Commission, the assignment was a reasonable one.

In light of all the facts and circumstances of the case, the five-day suspension was appropriate and was for just cause. Appellant did decline to carry out a duty within his position description. Any further discipline was, however, excessive. The appellant's prior good professional record and history, his honestly held, principled belief that the assignment was improper and his continued performance of all other assigned duties of his position for eight months, until his termination, lead to the conclusion that the termination was excessive discipline and was without just cause.

The reprimand is appealable under §230.45(1)(c), Wis. Stats., as the final step under a state employe grievance procedure relating to conditions of employment. It was not appealed in a timely fashion, however, as required in the DHSS's Unilateral Grievance Procedure. (Resp. Ex. 7b). The grievance procedure requires an appeal to be filed within 15 days of the employer's decision at the third step of the process. In this case, the third step answer of the employer was dated March 2, 1979, and the appeal to the Commission was filed on March 23, 1979, more than 15 days from the date of the employer's third step answer. The appeal of the reprimand is therefore untimely, and the Commission will not decide whether it was justified.

The suspension of appellant is upheld but the termination is rejected. The appellant is entitled to be made whole to the extent of damage suffered after the five-day suspension, including reinstatement to his former position with back pay and benefits, except for the period of the suspension, through the date the position was eliminated. As of the date the position was eliminated, appellant is entitled to all rights accrued to his position, including transfer rights, among others, without any lapse in coverage.

ORDER

The action of the respondent suspending appellant is affirmed. The action of the respondent in terminating appellant is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated July 23, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Chairperson

Gordon H. Brehm
Gordon H. Brehm
Commissioner

AR:mew

DISSENT

I think the majority has overlooked some pertinent undisputed facts and misapplied the law in coming to their decision.

The majority's findings of fact takes the reader chronologically from July, 1978, through April 15, 1979, covering three incidents of insubordination and penalties incurred by appellant. This might suggest that appellant was subsequently terminated on April 30, 1979 without further incident but this was not the case. On April 19, 1979 appellant was again directed in writing to carry out a previously assigned on-site medical evaluation. Appellant was given until April 27, 1979 to complete the assignment and advised that failure to perform such duties would result in disciplinary action. It is unquestionable that appellant having received discipline on three previous occasions including a five-day suspension without pay for failing to execute an identical directive knew the possible consequences of his actions. Nevertheless, he refused to carry out such directive for the fourth consecutive time. Subsequently, appellant was terminated. The majority was silent on the impact of these undisputed facts.

In addition, the majority misapplies the legal standards in Zehner and Safransky (supra) to the instant case. These cases did not involve insubordination yet the legal standard therein was applied. It is well settled in cases involving insubordination, as here, that there is no real question of there being a connection between the refusal to carry out a reasonable job assignment and the efficient performance of the

employer's activities. It need not be proved. Proof of the act of insubordination is sufficient. Since the majority correctly concludes that appellant refused to carry out a reasonable order, the misapplication of Zehner and Safransky is not critical.

The majority in essence concedes that appellant is insubordinate but again gets off track by misinterpreting the law. Section 230.44(4)(c) Wis. Stats. does authorize this Commission to affirm, modify or reject the subject action. However, in an appeal of a disciplinary action it does not require this Commission to determine 1) whether there was just cause for the imposition of the discipline and 2) whether there was just cause for the discipline actually imposed. Holt v. Department of Transportation, Case No. 79-86-PC, was in error in regard to the second step; no such standard exists in §230.44(4)(c). The legal standard in the second step is not just cause, but whether or not the discipline is reasonable. The Commission's authority to modify a subject action is based upon discretion. State of Iowa ex rel. v. Iowa Merit Employment Commission 231 N.W. 2d 854 (1975). The legal standard for exercising judicial discretion is reason.

The majority correctly concluded that respondent had just cause for suspending appellant for five days without pay in April, 1979 and I concur. However, the majority ignored appellant's subsequent act of insubordination. It is within this context that I find the majority opinion inconsistent. I fail to understand the logic that appellant's third refusal to execute a reasonable directive was insubordination but his fourth refusal to perform the same directive should be ignored. I also fail to

understand how four separate and distinct acts of insubordination can be distilled into a single act.

After the majority found the appellant to be insubordinate they should have determined the reasonableness of the discipline imposed. They did not. Instead they decided their reasons for declaring the discipline excessive were more worthy than respondent's reasons for imposition of the discipline. This constitutes a subjective test and is in error. The majority should have applied the legal test of whether or not the discipline imposed upon appellant by respondent was reasonable. It is clear that insubordination is sufficient reason for discharge. The 1914 case of Thomas v. Beaver Dam Mfg. (supra) is still good law. The majority without legal justification, supplanted respondent's reasonable decision with their own preference. It is for the reasons expressed that I affirm respondent's termination of appellant.

Dated July 23, 1980

STATE PERSONNEL COMMISSION

Donald R. Murphy
Commissioner

DRM:mew