

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIAM C. RUFF, *
*
Appellant, *
*
v. * DECISION
* AND
Executive Director, STATE OF ORDER
WISCONSIN INVESTMENT BOARD, *
*
Respondent. *
*
Case Nos. 80-105,160,222-PC *
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NATURE OF THE CASE

This is a consolidated appeal of two reprimands and the termination of appellant by respondent. A hearing on the merits was held before a hearing examiner appointed by the Personnel Commission.

FINDINGS OF FACT

1. Appellant was an employe in the classified civil service, working for the State of Wisconsin Investment Board as an Administrative Officer 2-assistant director of mortgages and real estate, from December, 1973, until March, 1978, when he was laid off from that position. In October, 1978, he returned to the Investment Board as a Research Analyst 4-Confidential, in the bond area, which position he held until January, 1980, when he was mandatorily reinstated to an Administrative Officer 2 position as Assistant Investment Director for public bonds, which position he held until his termination in June, 1980.

2. James LaFleur, Executive Director of the Board, in a letter of termination dated June 4, 1980, assigned the following reasons for the

decision to terminate appellant from the position of assistant investment director for public bonds and to not demote him to another position with the Board: 1) unsatisfactory work performance, as partly set out in two reprimands and one rejected recommendation for suspension; 2) lack of demonstrated record of learning or accomplishment after more than four months on the job; 3) consideration of appellant's prior work history which showed that his performance in the Research Analyst 4 position was not satisfactory; and 4) appellant's past history with the Investment Board which showed that he was viewed by four former supervisors as "not capable of being supervised and a detriment to the morale and productivity of this organization." (Respondent's Exhibit 53)

3. A nationwide recruitment process for the assistant investment director position did not attract the most qualified and experienced available candidates, but rather attracted a group of applicants with only entry-level qualifications for the position. The testing for the position was designed for entry-level candidates.

4. Appellant was mandatorily restored to the Administrative Officer 2 (AO 2) position in January, 1980, after achieving a score of 77.70 and being ranked as the number 5 candidate for the position. The appointment was made on the basis of appellant's eligibility for mandatory reinstatement by scoring 70 or better on the application.

5. No employee of the Investment Board participated in scoring the achievement history questionnaire used to rank applicants for the position. No interviews were conducted with eligible candidates.

6. Appellant was reinstated to the AO 2 position with permanent status in class, without having to serve a probationary period.

7. An employe with mandatory reinstatement rights is generally entitled to the same treatment as a new employe with respect to the provision of entry-level job training.

8. Until he occupied the position of Research Analyst 4, appellant's professional experience had been exclusively in the mortgage and real estate area.

9. As Research Analyst 4, appellant's primary function was to provide senior research analysts with historical, analytic reports on companies in the Board's bond portfolio, which the senior analysts used to review the portfolio and prepare industry outlooks to assist the investment directors in management of the portfolio.

10. The position of assistant investment director for public bonds is a very responsible position, requiring the individual filling it to participate in making bond portfolio management and investment decisions, to negotiate and complete portfolio transactions and to develop accurate information on which to base these decisions and actions, all for a public bond portfolio valued at more than 1.5 billion dollars. The public bond area also provides market information and analysis to those employees responsible for managing the private bond investments.

11. Appellant's supervisor, John Zwadzich, Investment Director for Public Bonds, expected appellant to be at full performance level in his position upon assuming his duties in January, 1980.

12. Mr. Zwadzich, in spite of his expectation of immediate full performance from Mr. Ruff, spent a great deal of time with him from the beginning of his employment explaining the basic concepts in the bond market such as difference between discount and par valuations of bonds; the calculation of yield to call on a bond; general bond market structure; operative concepts in computing and analyzing relative valuations of different bond issues; showing Mr. Ruff how to perform calculations on forms used by the Board to analyze potential bond transactions; use of a ledger system to keep track of transactions. Appellant was in fact provided with on-the-job training and orientation.

13. Mr. Ruff's lack of experience and of basic knowledge in the bond area was noted by Mr. Zwadzich within the first few weeks of Mr. Ruff's employment; Mr. Ruff admitted lack of experience in bond market trading and in the general area of decision-making in relation to trading activity.

14. In addition to spending a considerable amount of his time and attention to explain to appellant the basic components of his position, Mr. Zwadzich also recommended a basic course of reading to appellant.

15. Appellant did not seriously follow up on the recommended reading and did not choose to spend more than an occasional few hours of time beyond 4:30 p.m. on his work attempting to better educate himself or to complete his work, and did not keep up-to-date in his reading of current market information sources.

16. Entry level competence in the highly responsible position of assistant investment director for public bonds includes a knowledge of basic concepts, definitions and the ability to complete basic calculations concerning bond transactions, even if an individual does not have extensive bond market trading experience.

17. During his first week on the job, in January, 1980, appellant was instructed to become familiar with the use of a computer service and terminal used by the Board to gather and analyze information for the management of the public and private bond portfolios. As of June, 1980, appellant was still unable to use the service sufficiently well to give his supervisor and co-workers confidence in the comparative data analyses he provided them. Mr. Zwadzich always looked over information which appellant was asked to provide to the private bond investment director or his assistant, before appellant actually provided the information.

18. Appellant on many occasions provided Mr. Zwadzich with incomplete or inaccurate analyses of potential bond trade transactions. Mr. Ruff on at least two occasions provided Mr. Zobel, investment director for private bonds, and his assistant Mr. Ulevich, with incomplete or inappropriate information and unreliable market analysis, when he was asked to provide price information to analyze a possible private bond transaction. (Respondent's Exhibit 67)

19. Appellant was instructed to prepare a report containing comparative analysis of available computer information services and programs which the Board would consider adding to its array of information services. The initial timetable given by Mr. Zwadzich for completion of

this project was not realistic, but he continued to give appellant new, later deadlines. As of the date of his termination, appellant had not done even an outline or rough draft of such a report.

20. Appellant's predecessor in the AO 2 position had prepared several reports concerning the use of computer information programs, both with respect to the system already installed with the Board and with respect to those considered for future use by the Board. (Respondent's Exhibit 9 & 14). These reports were provided to appellant on his first day on the job, to learn from and to use as examples of the type of analysis required of him. (Respondent's Exhibit 24) As of April 15, 1980, appellant, by his own admission, was just beginning to understand what was expected of him. This admission shows a serious problem with his performance which entirely justified the conclusion that he was not capable of performing his duties in a reliable manner.

21. Appellant contends that he did not know until January 31, 1981, that he was expected to prepare a written report on the various computer information services. In view of the information he had received in conversations with Mr. Zwadzich and in view of the nature of the project, it should have been obvious to appellant that the project was one which could not be accomplished except by production of a written report comparing the various information services.

22. On April 25, 1980, Mr. Zwadzich, at appellant's request, provided him with a detailed working outline of the computerized bond services project. Mr. Ruff responded by requesting Mr. Zwadzich to fill out the outline for him in greater detail.

23. Mr. Ruff, during his entire tenure as assistant investment director for public bonds, was never able to effectively manage his working time in the independent and professional manner called for by the nature of his position. He could not carry out all of his duties during a regular eight hour day. Rather than work additional hours, as necessary, appellant increasingly placed on Mr. Zwadzich the burden of organizing his work time for him. (Respondent's Exhibit 30, 25, 57, 27, 29; Appellant's Exhibit 7 & 8)

24. Mr. Zwadzich twice reprimanded appellant, once on March 19, 1980, and once on April 7, 1980. The March reprimand was for failure to complete on deadline assignments concerning computerized bond services. The April reprimand was for below standard work performance in understanding the bond market, particularly in terms of market valuation of bond issues, and for failure to properly supervise the progress of an ongoing portfolio credit review program. Mr. Zwadzich discussed each reprimand in detail with appellant and gave him lengthy written responses. (Respondent's Exhibit 54 & 55)

25. Appellant grieved both 1980 reprimands to Mr. LaFleur.

26. James LaFleur responded to the grievance of the March, 1980, reprimand, reviewed the materials submitted by appellant and by his supervisor and met with each of them individually. Mr. LaFleur's response included consideration of appellant's lack of bond investment management experience, but concluded that his prior work experience with the Board's accounting and data processing methods, and his research experience as a Research Analyst 4, should have enabled him to complete the assigned work. (Respondent's Exhibit 54)

27. Mr. LaFleur responded to the grievance of April, 1980, after reviewing all documents submitted and after discussion with appellant, Mr. Zwadzich, Mr. Zobel and Mr. Ulevich. Mr. LaFleur concluded that appellant lacked basic understanding of bond markets and that the problems cited in the reprimand resulted from this lack of understanding. Mr. LaFleur also found that not all of Mr. Zwadzich's criticisms were warranted. (Respondent's Exhibit 55)

28. On April 21, 1980, Mr. Zwadzich recommended to Mr. LaFleur that he suspend Mr. Ruff for failure to complete the computerized bond services report project. Mr. LaFleur declined to issue the suspension since he had concluded that Mr. Ruff's problem was not so much one of discipline but of competence. (Respondent's Exhibit 43) The Commission agrees with this conclusion.

29. Over a period of five months, appellant's performance failed to improve sufficiently to give Mr. Zwadzich and Mr. LaFleur or any other Board employe who had to rely on appellant's work product, confidence in the reliability of information or opinions provided by Mr. Ruff. The lack of confidence increased as Mr. Ruff failed to significantly improve his performance over time.

30. There was just cause to terminate appellant from the position of assistant investment director for public bonds. The basis of the cause was appellant's lack of competence in the position, and his failure to improve.

31. Appellant's performance in the position of Research Assistant 4 was generally average or below average. He had some of the same kinds of problems in that position which he later showed in the position of assistant investment director for public bonds -- weakness in analytic and writing ability, need for detailed outlines and instructions and difficulty in accepting criticism of his work performance. (Respondent's Exhibits 10, 11, 12, 15, 16, 18, 19, 20, 21, 62, 68; Appellant's Exhibits 15, 16, 17, 18, 19, 20)

32. Mr. Ronald Niedziela, appellant's supervisor during Mr. Ruff's tenure as Research Analyst (RA 4) evaluated his performance not only on the basis of his own observation of appellant's performance, but also on the basis of evaluations solicited from senior analysts with whom appellant worked.

33. Mr. Niedziela also considered factors which were not part of appellant's performance of the duties of RA 4.

34. In October, 1979, Mr. Ruff placed two telephone calls to the Governor's office to inquire about the appointment of trustees to the Investment Board. During the second call he spoke to an individual to whom he identified himself by name but not by employment, and volunteered his opinion about the professional competence of the appointees, one of whom he did not approve of.

35. When questioned about the telephone call by Mr. LaFleur approximately 1-2 weeks after the event, shortly after Mr. LaFleur became aware that the call had been made, Mr. Ruff was extremely evasive about the content of the telephone conversation, saying that he could not remember what

he had said. Mr. Ruff does not deny that he was evasive in his answers.
(Transcript pages 279-281; 447-450)

36. On October 18, 1979, Mr. LaFleur reprimanded Mr. Ruff for "blatant evasiveness in the face of clear and direct questions;" for violating a Board work rule prohibiting "false and malicious statements" about trustees; for failing in his obligation as an employe to "refrain from deliberate acts which are designed to embarrass or otherwise detract from the reputation of this agency, its staff and trustees."

(Respondent's Exhibit 15)

37. On October 19, 1979, Mr. LaFleur wrote a memorandum to Mr. Ruff in which he ordered Mr. Ruff to "cease and desist from any and all attempts, direct or indirect, to undermine public confidence in the Board or any of its policies for the purpose of furthering your own interests. If you ignore this order, you may be dismissed for cause from employment by this agency." (Respondent's Exhibit 16)

38. Mr. LaFleur's decision not to demote Mr. Ruff back to RA 4 after his termination from the position of assistant investment director for public bonds was based in part on evaluations of Mr. Ruff's performance by Mr. Niedziela, in which Mr. Ruff was rated unsatisfactory on his attitude, among other things. (Respondent's Exhibit 53)

39. Mr. Niedziela's unsatisfactory rating of Mr. Ruff's attitude was based in part on the October, 1979, reprimand for his expression of dissatisfaction with the Governor's appointments to the Board's trustees.
(Respondent's Exhibit 21)

40. Other bases for the decision to terminate Mr. Ruff from employment with the Board included his history, over a period of years, of conflict with different supervisors, which created situations in which the functions of the Board could not be efficiently carried out.

Mr. Ruff's attitude problem was one of which Mr. LaFleur and others had been well aware before and after the October, 1979, telephone call to the Governor's office.

41. Since his return to the Board in October, 1978, as Research Analyst 4, Mr. Ruff's performance had been only marginally satisfactory. (Tr. 376-378; 384-385; 391)

42. Mr. Niedziela had not disciplined Mr. Ruff while he was Mr. Ruff's supervisor, but testified that the reason he did not do so was that the process would have taken too much time and energy away from the performance of his job function as Director of Research (Tr. 417-418).

43. Mr. Ruff was not at any time relevant to this appeal qualified for the position of Research Analyst 7.

44. Mr. Ruff's attitude and performance were detrimental to the functioning of the Board before and after the October, 1979, incident, for reasons not related to that incident.

45. The decision not to demote Mr. Ruff was not excessive discipline.

CONCLUSIONS OF LAW

1. The respondent has the burden of persuasion to show to a reasonable certainty by the greater weight of credible evidence that there was just cause for the termination of appellant from the position of assistant investment director for public bonds.
2. The respondent has met his burden of persuasion.
3. There was just cause to terminate appellant from the position of assistant investment director for public bonds.
4. Respondent has the burden of showing to a reasonable certainty by the greater weight of credible evidence that the decision to terminate appellant from all employment with the Investment Board rather than to demote him to the position of Research Analyst 4 was not excessive discipline.
5. Respondent has met his burden of persuasion.
6. The action of the respondent in terminating appellant from the Investment Board rather than demoting him to the position of Research Analyst 4 was not excessive discipline.
7. The burden of persuasion is on appellant to show to a reasonable certainty by the greater weight of credible evidence that with respect to the letters of reprimand in Case Nos. 80-105 and 80-160-PC, the respondent violated through incorrect interpretation or unfair application, a rule of the administrator, State Division of Personnel, or a civil service statute (Subchapter II, Chapter 230, Wis. Stats.).

8. Appellant has failed to meet his burden of persuasion in Case Nos. 80-105 and 80-160-PC.

* OPINION

This case presents a variety of issues for decision. Appellant contests his termination from a position as assistant investment director for public bonds and the decision to terminate him completely from employment with the Investment Board, rather than to retain him with the Board in another capacity. He contests two reprimands received in 1980 from his supervisor, Mr. John Zwadzich. The burden of proof for each issue as well as a statement of the legal standards to be met on each issue was set out in the Interim Order issued by Commissioner Brehm on August 21, 1980.

I. The Termination from the Public Bond Area.

Appellant argues that respondent failed to show just cause for the termination because Mr. Zwadzich's instructions and assignments to appellant were unclear, and because Mr. Zwadzich had generally unreasonable expectations of Mr. Ruff's performance. Mr. Ruff further argues that respondent should have, but did not, provide on-the-job training to him when he began working as assistant investment director for public bonds. Mr. Ruff also contends that respondent has violated his rights to file grievances and has violated his First Amendment rights to free speech.

Respondent alleges that there was ample just cause to terminate Mr. Ruff for failure to carry out his duties in a timely and competent manner. While no formal on-the-job training was provided to appellant, his super-

visor, Mr. Zwadzich spent a great deal of time with him providing informal training during his entire term of employment as assistant investment director. Respondent also argues that appellant's characterization of his professional experience in his application for the position of assistant investment director was overly optimistic in representing himself as having had prior portfolio management experience. The basic argument is that appellant was not qualified for the position when he was appointed to it and did not subsequently acquire, nor take reasonable steps to acquire, the necessary knowledge to carry out his duties in a competent manner. The decision to sever the entire employment relationship with appellant rather than to demote him was based on his long history of conflict with various supervisors and on injudicious false and derogatory public statements about the operations of the Board in 1977 and 1978, and the appointment of a Board Trustee in 1979, all of which showed unsatisfactory performance because he was virtually unsupervisable.

Appellant had no bond portfolio management experience when he was mandatorily reinstated to the position of assistant investment director for public bonds. Mr. Zwadzich did not participate in the certification process which resulted in Mr. Ruff's certification for the position. Mr. Zwadzich was sufficiently familiar with Mr. Ruff's employment history with the Investment Board to know that the majority of appellant's experience was in the mortgage and real estate area and not in bonds. He also knew that Mr. Ruff had a relatively brief period of employment (a little over one year) as a Research Analyst 4 with the Board. When Mr. Zwadzich

and Mr. Ruff first discussed the duties of Mr. Ruff's position as assistant investment director, both men acknowledged Mr. Ruff's lack of market experience. Mr. Zwadzich nevertheless made clear to Mr. Ruff that he expected him to be at full performance level immediately or very shortly after commencing the job. Despite this stated expectation, Mr. Zwadzich provided Mr. Ruff with on-the-job training in the form of daily discussions of basic market concepts, explanations and demonstrations of how to carry out basic tasks of record-keeping, analysis and the like. Mr. Zwadzich also recommended a basic reading program to Mr. Ruff, which included a professional text in the bond area, the daily Wall Street Journal, the reports written by Board employes. Mr. Ruff did perform some of his duties competently, but did not perform other duties competently, particularly those duties which required analytic comparisons of various bond issues and which required Mr. Ruff to make recommendations on whether to undertake market transactions.

Mr. Ruff was barely qualified for the position at entry level. The nature of the responsibilities of the position are such that the employer can reasonably expect an employe, even at entry level, and even one who is receiving on-the-job training, to make a conscientious effort to bring himself up to full performance as soon as possible and to undertake the job with a professional attitude, prepared to exercise initiative in both the learning process and in the performance of the duties of the position. Mr. Ruff lacked experience. He did not show, during almost five months of employment, the necessary initiative or professionalism required of a

person occupying the position of assistant investment director of public bonds. See Findings 22 & 23. He spent little if any time on the job beyond eight hours a day. This is not a requirement of the job per se but the failure to put in professional time and make the effort to do the job is significant. The failure to show sufficient improvement in competence and to make the effort to acquire competence after almost five months is also significant.

Mr. LaFleur correctly perceived the problem as one of attitude and of competence. He felt that Mr. Ruff's attitude toward Mr. Zwadzich was one "which defies any form of supervision." (Respondent's Exhibit 53) The record shows that Mr. Ruff does not take criticism well. The record also shows that this attribute tends to result in criticism not being well given by his supervisors. Although this is an unfortunate situation, the result of these personal dynamics is that Mr. Ruff did not give sufficient attention to the valid performance-related content of either the formal reprimands he received or of the informal conversations with Mr. Zwadzich and Mr. LaFleur, of which there were many. The consequence of this failure must be borne by Mr. Ruff, in view of the efforts actually made by his supervisors to help him understand the duties of his position and the time he was given to show improvement in competence and attitude. There was just cause to terminate Mr. Ruff from the position of assistant investment director for public bonds.

II. The Decision Not to Demote.

Mr. LaFleur considered lesser sanctions before deciding to terminate Mr. Ruff's employment by the Board. Looking at the positions for which appellant was qualified, Mr. LaFleur found that he could have been demoted to his former position of Research Analyst 4. Demotion was not carried out because Mr. LaFleur had determined that retention of Mr. Ruff in any capacity then available would be a detriment to the functioning of the Board. The appellant alleges that this decision was based on evaluations of his performance which violate his First Amendment rights to criticize public officials even when he is an employe of the State of Wisconsin. The parties argued the constitutional issues in post-hearing briefs.

Once just cause has been found for the imposition of some discipline, the second step in the analysis is to determine whether the discipline actually imposed was excessive, under all the facts and circumstances of the employment situation. The Commission has determined there was just cause to terminate appellant from the position of assistant investment director. The only remaining issue is whether the decision to terminate his employment with the Board, by not demoting him, was excessive discipline. The Commission cannot second guess the employer, and render its own independent decision in the matter, but can only examine the record to determine whether the action taken was excessive.

No constitutional violation was alleged to have occurred in the decision to terminate Mr. Ruff from the position of assistant investment director. The constitutional issue is focussed on the excessiveness of the discipline.

While employed by the State of Wisconsin Investment Board, appellant did engage in speech critical of his employer which was directed outside of the workplace, to the office of the Governor who appointed the trustee of whom appellant was critical. Such speech may be protected by the First Amendment to the United States Constitution. This case differs from the typical case because the speech at issue was not directed at the public but at a public official responsible for a decision with which appellant was in disagreement. This type of speech, whether characterized as public or private speech, may be within the scope of protected speech of public employes, under certain circumstances. Givhan v. Western Line Consolidated School Dist. et al., 439 U.S. 410 (1979).

The First Amendment rights of public employes to comment publicly on matters of public concern which are related to their employers' functions are protected from employer interference, subject to a balancing of State and private interests not imposed on the speech of private employes. Pickering v. Board of Education, 391 U.S. 563 (1968). The Supreme Court in Pickering set out the broad outlines of the interest analysis involved. Generally, the interest of the employe as a citizen in speaking on issues of public concern must be balanced against the interest of the State in providing efficient public service. The interest of the employe is more likely to be preferred over the interest of the employer in situations where the issues involved are of genuine public concern; where the disruption of the employer's functions is at an acceptable level; where the employer had an opportunity to respond to the statements of the employe,

where the employe acted in good faith, even if the information disseminated was not correct. There is no objective measure of what issues are of genuine public concern, or of what is an acceptable level of disruption or inconvenience to an employer. Each case must be examined and decided on its own facts. It is possible, however, for the employer to base a disciplinary decision in part on an employe's exercise of protected speech, where the employer's decision would have been reached in the absence of protected speech. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). The employer must have relied on other permissible reasons at the time of the decision. Givhan v. Western Line Consolidated School District et al., 439 U.S. at 412, N. 12 (1979).

"The constitutional principle at stake is sufficiently vindicated if such an employe is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision... on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." Mt. Healthy v. Doyle, 429 U.S. at 285-286.

The facts of this case show that the employer based its decision not to demote on appellant's complete employment history, over a period of years, including the quality of his work, his attitude, his judgment, his total contribution to the efficient performance of the employer's function. The protected speech constituted one factor in a performance evaluation decision which was in turn one factor in the final decision. There is no

strong direct link between the protected activity and the discipline imposed. The speech occurred almost eight months before appellant's termination from the Board. During that eight months' time appellant was hired to a new position of great responsibility with the Board, failed to perform it adequately and was terminated from it. During his tenure as assistant investment director for public bonds, Mr. Ruff continued the same course of conduct which had resulted in his prior problems with prior supervisors. The employer reached a point where it was determined that the high level of supervision needed, the personal friction created by such supervision, and the unsatisfactory work product of Mr. Ruff, all interfered with the functioning of the Board to a degree which would no longer be supported. Under all of these circumstances, the decision not to demote Mr. Ruff was not excessive discipline.

III. The Reprimands of March and April, 1980.

Appellant argues that the reprimands he received in 1980 were without just cause. The standard for judgment is not just cause, but whether the reprimands violated a civil service statute or a rule of the Director of the Bureau of Personnel (now Administrator of the Division of Personnel). See Interim Order dated August 21, 1980. No proof was offered of any such violations. The record shows the reprimands were for the stated reason of inadequate work performance. Appellant's testimony failed to show that such a conclusion by Mr. Zwadzich was unreasonable or in bad faith. In any event such a showing would have had to have been successfully argued to be a violation of rule or statute before the reprimands could be overturned.

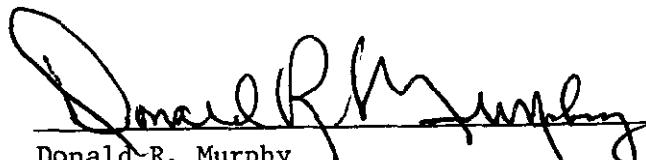
ORDER

The action of respondent in terminating appellant from the position of assistant investment director for public bonds and in not demoting appellant to another position within the Investment Board is affirmed and this appeal is dismissed.

Dated Aug 6, 1981

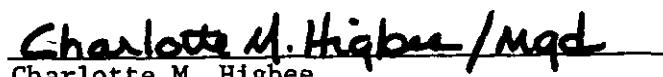
STATE PERSONNEL COMMISSION


Gordon H. Brehm
Chairperson


Donald R. Murphy
Commissioner

Dissenting in part:

I concur with the majority Decision and Order as relates to the respondent's termination of appellant from the position of assistant investment director for public bonds. I would reject the respondent's action in not demoting appellant to the position of Research Analyst 4 or another position within the Investment Board.


Charlotte M. Higbee
Commissioner

AR:mek

Parties

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