

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,
STATE OF WISCONSIN,

Petitioner,

v.

WISCONSIN PERSONNEL
COMMISSION, STATE OF
WISCONSIN (Robert Lyons),

Respondent.

JUL 3 1981

Personnel
Commission

MEMORANDUM DECISION
Case No. 80CV4948

Petitioner, Department of Health and Social Services (Department) seeks review of the portion of a decision and order of the Personnel Commission (Commission) which found that the Department's termination of the employment of Dr. Robert Lyons constituted excessive discipline.

FACTS

The material facts are not in dispute. Dr. Lyons, a radiologist, was employed by the Department as a medical consultant in the Facilities Assistance Section of the Bureau of Quality Compliance, Division of Health. His duties included consulting with the Bureau and the staffs of health care facilities, and conducting medical and professional reviews of the patient records submitted by the facilities.

As part of his assignment, Lyons was requested by Edna Bach, an employee of the department (and a registered nurse) in July, 1978, to conduct an on-site evaluation of the medical

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treatment given a "brittle" diabetic at the Portage County Home. The patient had died shortly after leaving the home. Lyons informed Bach that in his professional judgment he was not competent to evaluate treatment for diabetes, and recommended that an internist review the records. His recommendation was not followed, and on August 11, 1978, Louis Remily, the assistant bureau director, orally instructed Lyons to visit the Home and investigate the situation. Lyons again stated that he did not feel competent to evaluate the treatment for diabetes, and recommended that an internist review the records. His recommendation was not followed, and on August 11, 1978, Louis Remily, the assistant bureau director, orally instructed Lyons to visit the Home and investigate the situation. Lyons again stated that he did not feel competent to evaluate the treatment for diabetes and did not complete the assignment. On November 16, 1978, Janice Stovall, Lyons' boss, gave him written instructions to visit the Home and conduct the investigation by November 29, 1978. Lyons was further instructed that if he felt that he could not make a judgment as to the medical treatment given the patient, he was to compile the facts for referral to the Board of Medical Examiners for evaluation and review. Because Lyons felt that even a compilation of the facts required a medical judgment regarding diabetes, he did not complete the task. This second refusal resulted in a written reprimand by Remily on December 4, 1979, in which Remily stated that Lyons had violated Work Rule 1 which prohibits all Department employees from committing any of the following acts:

"1. Disobedience, insubordination, inattentiveness,

negligence or refusal to carry out written or verbal assignments, directions or instructions."

Lyons filed a grievance under the Department's non-contractual grievance procedure on January 4, 1979.¹

On March 21, 1979, Remily again directed Lyons in written form to carry out the identical assignment this time by April 4, 1979, warning him that failure to do so would result in disciplinary action. Continuing to maintain that he was not qualified to perform the task, Lyons did not comply and, as a result, he was suspended from his employment from April 9, 1979 to April 13, 1979.

On April 19, 1979, Remily issued another formal directive to Lyons, ordering him to carry out the Portage investigation and warning him that his failure to complete the task by April 27, 1979, would result in further disciplinary action. When Lyons did not perform the assignment by April 27, 1979, he was discharged.

Lyons filed appeals of his suspension and discharge on May 2, 1979 pursuant to sec. 230.44(1)(c), Stats. These appeals, and Lyons' earlier appeals of his reprimand and grievance denial were consolidated for hearing. After a proposed decision and the

¹This grievance ultimately was denied at all three stages of the Department's grievance procedure. The Department maintained that the visit did not require any medical judgments and that Lyons was asked only to gather facts. Lyons was informed at these appeal stages that continued disregard of the instructions could lead to discharge.

²The Personnel Commission ultimately dismissed the appeal of the grievance denial as untimely.

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filing of objections to the decision, the final order of the Commission was issued July 23, 1980. A majority of the Commission concluded that the job assignment which Lyons refused to carry out was a reasonable assignment (Findings of Fact #15, #16), that the Department had "just cause" for imposing discipline and that the 5-day suspension was appropriate (page 15, Opinion). As to the discharge, however, the majority concluded that the further discipline was without cause and that the discharge constituted excessive discipline (page 15, Opinion).

The Commission ordered that Lyons be made whole for the back pay and benefits lost AFTER his suspension through the date his position was subsequently eliminated. For the latter period the Commission ordered that Lyons be entitled to all rights including transfer rights he would have had, had he not previously been discharged without lapse in coverage.

The Department timely petitioned for review pursuant to Ch. 227, Stats., limiting the petition to the Commission's decision regarding the discharge and raising three main challenges to the Commission's decision: (1) that the Commission failed to make material Findings of Fact regarding the events occurring between the time Lyons was suspended and the time he was terminated; (2) that the Commission committed an error of law in concluding that the disciplinary action resulting in Lyons' discharge was not based on just cause; and (3) that the Commission committed an error of law in concluding that discharge constituted excessive discipline.

As for the first contention, the record is clear and the

essential facts are not in dispute. The necessary findings can, therefore, be supplied without a remand. Connecticut General Life Ins. Co. v. DILHR, 86 Wis.2d 393, 404-405, 273 N.W.2d 206 (1979) citing Forest Home Dodge, Inc. v. Karns, 29 Wis.2d 78, 87, 138 N.W.2d 214 (1965). On April 19, 1979, Lyons was requested for the fourth time to complete the previously assigned task by April 27, 1979. He failed to comply and was subsequently terminated effective April 30, 1979. It is undisputed that the job assignment was reasonable and that Lyons refusal constituted "just cause" for disciplinary action by the Department.³ The only issue, therefore, is whether the Commission erred in concluding that discharge constituted excessive discipline.

The Department argues that an appeal to the Commission of a discharge decision under sec. 230.44(1)(c), Stats., involves two separate questions: (1) was the discipline based on "just cause"; and (2) should the particular discipline imposed be "modified" pursuant to sec. 230.44(4)(c), Stats., because it is unreasonable or excessive? In my judgment, the record establishes that the Commission used just such an analysis in its determination. At page 7 of its Opinion the Commission stated:

³Lyons' brief challenges the Commission's Findings that the job assignment was reasonable, that it was within the scope of his duties, and that it did not require him to engage in unethical conduct. The Department correctly argues that this issue is not properly before the court, for the petition for review is specifically limited to the portion of the Commission's order regarding the discharge and the remedy. Neither Lyons nor the Department sought timely review of the Commission's decision (or findings) regarding the prior suspension.

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

' . . . clearly requires (sic) 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."

Using this analysis, the Commission first determined that the misconduct (three refusals to carry out the same reasonable work assignment) provided "just cause" for discipline and that the particular discipline imposed (a five-day suspension) was reasonable. The Commission then concluded that the subsequent misconduct (a fourth refusal to perform the identical work assignment) provided just cause for discipline, but that the particular discipline imposed (termination) was excessive.

Lyons correctly points out that the issue before the Commission was the propriety of his refusal to carry out the assignment, not the number of times he was required to reiterate that position.

As stated above, the Commission did find that Lyons' continued refusal to carry out the reasonable work assignment provided just cause for discipline. This finding is not before the court on this review. As to the second step, however, the reasonableness of the discipline, the Commission concluded that although suspension after the third refusal was reasonable, termination after the fourth refusal constituted excessive discipline.

The Department argues that a "just cause" analysis in reviewing whether Lyons' discharge constituted excessive discipline was erroneous. The Commission's analysis follows the supreme court's approach in Safransky v. Personnel Board, 62 Wis.2d 464, 474, 215 N.W.2d 379 (1974) where it was stated:

"Having determined that the evidence is sufficient to support the Board's findings as to the conduct complained of, this court must determine whether such conduct constitutes 'just cause' for dismissal." (emphasis added)

The Department contends that discharging Lyons for his "repeated acts of insubordination" was "the most eminently reasonable and obvious response under the circumstances," and that "service of [the] suspension cannot purchase for the employee the right indefinitely to refuse to perform a reasonable work assignment." The Department also asserts that affirmance of the Commission's decision would seriously undermine the appointing authority's ability to assign duties, discipline employees and even to perform the statutory mission of the agency.

I believe that the Commission considered all the circumstances of the case and properly found that termination constituted excessive discipline. While I appreciate the Department's arguments that termination was the next logical step in its progressive discipline procedure, and that such a sanction was considered necessary to deter other employees from refusing to carry out reasonable work assignments, I believe the Commission majority correctly recognized Lyons' conduct as a repeated refusal to carry out a single act, and not four separate and distinct acts of

insubordination. As a result, I do not consider that Lyons' refusal to carry out the task (based on his professional opinion that he was unqualified to do so) has the potential to so undermine the Department's functions as to warrant his discharge. I note also that the cases cited by the Department in support of its contention that insubordination constitutes just cause for discharge involve fact situations wholly dissimilar to the instant case, and, as such, do not provide authority for reversal here.

The Commission looked to all of the circumstances of the case and properly recognized that in his professional staff role Dr. Lyons himself must assess his personal competence, that in the past the Department has hired outside consultants to handle some of the evaluation problems (including treatment of diabetes), that on a previous occasion an outside consultant was hired on Lyons' specific recommendation, that Lyons' continued refusal to perform this one assignment was based on his honestly held belief that he was unqualified to do it, that Lyons had performed all other assigned tasks prior to his discharge, and that his prior professional work record and history was quite good.

Sec. 227.20(2), Stats., provides that the reviewing court shall affirm the agency's action "unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specific provision of this section." The record in this case does not reveal either errors of law or an abuse of discretion on the part of the Commission. There is substantial evidence in the record as a whole to support the decision.

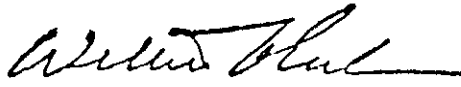
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and it must be affirmed. Counsel for the Commission may prepare an appropriate order for my signature.

Dated at Madison, Wisconsin, this 14th day of July, 1981.

BY THE COURT:



WILLIAM EICH

cc: John G. Barsness
Maureen McGlynn
Robert W. Larsen

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