STATE OF WISCONSIN . CIRCUIT COURT DANE COUNTY

DEPARTMENT OF NATURAL RESOURCES
and ANTHONY S. EARL, Secretary
of Department of Natural Resources,

Petitioners,

v.

PERSONNEL COMMISSION, (Hess)

Respondent.

DECISION and ORDER

Case No. 80-CV-5437

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Commission

The petitioners (DNR) complain that the respondent exceeded its powers because, while it found there was cause for discipline, as did DNR, it reduced the penalty imposed by DNR (five days suspension) to a suspension of one day.

In the scheme of things in Chap. 230, Wis. Stats. a suspension was based on a determination of DNR that there was just cause for discipline. This action was taken by a letter dated July 16, 1979, to the employee which notified him of the suspension for 5 days and of the reasons. Prior to the letter, the DNR conducted an ex parte investigation during which no hearing was held, no witnesses sworn nor was the employee represented by an attorney. In other words, the employee was substantially penalized without any due process hearing. But it was in accordance with Sec. 230.34.

Sec. 230.44 permits an employee who is not satisfied with the DNR's decision to "appeal." Upon such an "appeal" (and one was taken in this case) the employee is entitled to a hearing with witnesses and the right to an attorney. After the hearing the respondent commission may reject, modify or affirm the action which is the subject of the appeal. Sec. 230.44 (4). While this process before respondent is referred to as an appeal, it is in fact an initial trial, the only trial hearing provided for. It would seem that, without the procedure provided by Sec. 230.44(4), a decision such as DNR made, depriving the employee of a substantial sum of money, would clearly be deprivation of a constitutional right to due process. The provisions of Sec. 230.44 make provision for the required due process and make the respondent the judge and finder of fact. The decision of DNR may be in some ways likened to a preliminary finding of reasonable cause in a criminal proceeding. It is not a final hearing if the employee chooses not to so regard it and takes an "appeal." It is not a real appeal in the usual sense of the word but rather a demand for a due process hearing.

In the hearing the burden of persuasion rested upon DNR. Reinke v. Personnel Board, 53 Wis 2d 123, 191 NW 833 (1971). Such a rule affirms the position that the hearing before respondent is not an appeal in the usual sense, but an initial trial. If this was a true appeal, the burden of persuasion would rest on the appellant, who in this case would be the employee, not DNR.

The respondent is the trier of fact as well as the judge of the penalty, since it is given the power to affirm, modify or reject "the action which is the subject of the appeal." The action in this case was a suspension for 5 days. Petitioner's contention is that respondent may only modify the suspension if it finds the suspension was excessive. Sec. 230.44 imposes no such limit on respondent's power to judge.

The issues before the respondent were: 1. Was there just cause for discipline? and 2. What discipline should be imposed? The respondent in its determination of the issues is not bound by anything that DNR did or did not do. The statute limits it to any determination that the action of DNR was or was not reasonable. If, on the evidence it reasonably found the suspension was without just cause, even though there was evidence from which it could also have reasonably determined there was just cause, this court could not disturb the finding. So also this court is limited in its power to set aside the determination that a one-day suspension is proper on the basis of the facts shown at the hearing if the determination was reasonable. The realm of reason on the length of suspension is not fixed at one day or 5 days. It will be noted from the record that at various times and various persons recommended suspensions of 3 days and 10 days as appropriate. We cannot say that reasonable persons, based on the record of the hearing, could not conclude that one day was appropriate.

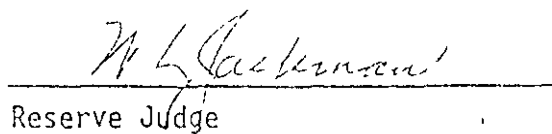
Nor, in the light of the fact that it was the obligation of respondent to determine a reasonable time of suspension, do we find any necessity for finding that 5 days was excessive. The determination of the penalty is as much an initial determination of respondent as the determination of whether there was just cause for a penalty. What the action of DNR was is not material to the determination by respondent, except that DNR's action coupled with the "appeal" initiates respondent's jurisdiction. Even if the penalty ordered by DNR was reasonable it was determined ex parte and, being so, did not afford the employee due process. On judicial review we can only act if we find the action of respondent was not reasonable. In this case we cannot so do.

We must therefore conclude that respondent did not exceed its powers and its findings and order must be affirmed.

It is therefore ORDERED that the findings and order of the Personnel Commission in the above matter are affirmed.

Dated June 24 , 1981

By the Court:



Reserve Judge