STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES BENDER,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 81-382-PC

THOMAS OLSON,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 81-383-PC

FRANK NELSON,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 81-384-PC

DECISION
AND
ORDER

NATURE OF THE CASE

These are consolidated appeals pursuant to s.230.44(1)(c), stats., of suspensions without pay of varying length imposed on the appellants.

FINDINGS OF FACT

1. The appellants at all relevant times have been employed in the classified civil service at Taycheedah Correctional Institution (TCI), an adult female correctional institution which includes security classifications of maximum, medium and minimum, and which is in the Division of Corrections, Department of Health and Social Services (DHSS), in managerial/supervisory unrepresented positions, with permanent status in class, in the following capacities:

Bender: Assistant Education Director
Olson: Education Director
Nelson: Food Service Director

2. Mr. Olson reported directly to the superintendent and appointing authority, Ms. Switala. Mr. Bender reported to Mr. Olson. Mr. Nelson reported to the institutional business manager, Mr. Radlund.

3. On August 19, 1981, the appellants left the institution around 11:30 a.m., to have lunch off the grounds at the "101 Club."

4. After finishing lunch, at about 12:30 p.m., they decided to do some drinking and to take the rest of the afternoon off.

5. At this point, Mr. Olson and Mr. Nelson had already had one drink each with lunch, and Mr. Bender had not had anything to drink.

6. At this point, and before starting to drink, Mr. Bender confirmed with Mr. Olson that he could take the remainder of the afternoon off as approved leave time. There had been some previous discussion between Mr. Bender and Mr. Olson about this topic earlier that morning.

7. At about 12:30 p.m., Mr. Olson called Ms. Krenke, TCI treatment director, at her office, and told her he was at the 101 Club and asked if she wanted to come down for lunch. He said that they had already eaten lunch and were having a few drinks at the bar. At that point he did not say that he was not coming back to the institution and there was no discussion of her taking

care of reporting his absence within TCI. She declined the offer of joining them for lunch, indicating that she had no car.

8. At about 2:00 - 2:30, Mr. Olson called Ms. Krenke again. This time, Mr. Nelson also was on the line. She again was asked to come to the club, indicating that they could come and get her. Both appellants sounded as though they were under the influence of alcohol at this point.

9. The appellants drank at the 101 Club until about 3:00 p.m. when they returned to TCI. They had consumed a total of 4 - 5 drinks each.

10. The appellants had decided to return to TCI in order to lock their desks, as required by institutional policy, and with respect to Mr. Olson and Mr. Nelson, to pick up their cars. In addition, Mr. Nelson intended to copy and circulate the next week's menu, which was his normal procedure on Wednesdays.

11. Neither Mr. Olson nor Mr. Nelson informed anyone at the institution prior to their return that they would not be coming back after lunch. In their absence, several employes were unable to locate various of the appellants and asked the control officer about their whereabouts. The control officer was unable to account for them as she had not been informed that they would not be returning from lunch. Following their return to TCI, Mr. Olson notified Mr. Borgen at the institution before he left at around 3:30 that he would be gone for the rest of the day. Mr. Borgen was acting superintendent that day.

12. Upon their return to the institution, Mr. Olson and Mr. Nelson manifested evidence of having consumed alcoholic beverages by having an odor of alcohol on their breath, slurred speech, and personal behaviour that was unusual for them, in the presence of a number of employees, and, in the case of Mr. Nelson, at least one inmate.

13. Upon his return to the institution, Mr. Bender manifested evidence of having consumed alcoholic beverages by having an odor of alcohol on his breath.

14. Upon their return to the institution, all of the appellants were in an area (Simpson Hall) frequented by inmates.

15. The appellants left TCI at about 3:30 p.m. Mr. Bender was driving his own car, Mr. Nelson was driving his van, and Mr. Olson had fallen asleep on a bench/bed in the back of Mr. Nelson's van. The back of the van was subject to inspection by the gate-keeper as they left the institution.

16. Prior to this incident, Mr. Nelson was in the practice essentially of keeping track of his own time and frequently did not inform his supervisor in advance of short periods of anticipated absences from the institution. The institution approved or condoned these practices.

17. Prior to this incident, in the absence of the superintendent, Mr. Olson did not feel it was necessary to notify the acting superintendent in advance of short absences and did not always do so. This practice was approved or condoned by the institution.

18. Prior to this incident, official institution policy as understood by the superintendent was that all such absences were to be cleared in advance with the employe's immediate supervisor, or whoever might be acting as such in the absence of the immediate supervisor.

19. The superintendent had informed Mr. Olson sometime prior to the incident of August 19, 1981, that both he and Mr. Bender should not be on leave concurrently, so as to maximize coverage of the education office.

20. Ms. Switala and the personnel manager, Mr. Regan, conducted separate investigatory interviews with the appellants on August 26, 1981, and separate pre-disciplinary interviews with them on August 27th and 28th.

21. At the beginning of each investigatory interview, each appellant was informed that Ms. Switala and Mr. Regan were investigating the events of August 19, 1981, and asked each if he had a statement. They then asked specific questions such as how much each had had to drink, whether the institution had been notified of his absence, etc.

22. At the pre-disciplinary interviews, the appellants were informed of the specific work rules each was accused of violating and asked for his response. Mr. Olson indicated that he had approved Mr. Bender's request to take leave the morning of August 19, 1981.

23. All of the interviews were conducted with little or no advance notice, such notice being provided the same day as the interviews.

24. Following the interviews, Ms. Switala and Mr. Regan consulted with employes involved in personnel and labor relations at the divisional and departmental level regarding the disposition of these cases. A consensus was reached and the following suspensions without pay were imposed:

Olson - 5 days
Nelson - 3 days
Bender - 1 day

One of the factors considered in determining the length of the suspensions was the number of work rules violated.

25. The amount of discipline imposed was, on the basis of the misconduct alleged, consistent with departmental disciplinary policy.

26. Prior to the imposition of these disciplinary actions in 1981, the appellants had no prior records of discipline over their periods of state service, approximately as follows:

Bender: 7 years
Olson: 17 years
Nelson: 13 years

27. With respect to the allegations against Mr. Olson as set forth in the letter providing notice of discipline, Respondent's Exhibit 2, the Commission makes the following findings:

A. He violated Work Rule 14 (failure to give proper notice of absence) by failing to give proper notice of his absence the afternoon of August 19, 1981. Although he was not on notice that institutional policy as perceived by the superintendent required notice to the acting superintendent, he failed to provide any sort of notice, and knew or should have known that such omission would have a tendency to create difficulties for other employes who might be looking for him.

B. He violated Work Rule 12 (manifesting evidence of having consumed alcohol beverages) by returning to work while manifesting evidence of having consumed alcoholic beverages.

C. He violated Work Rule 1 (disobedience, etc.) by disobeying the superintendent's verbal instructions to avoid scheduling Mr. Bender's time off with his own time off, by approving Mr. Bender's time off on the same afternoon (August 19, 1981) that he was absent.

D. He did not violate Work Rule 7 (failure to provide accurate and complete information) by his statement that he gave prior approval in the morning of August 19, 1981, to Mr. Bender's absence. Given the ambiguous nature of certain exchanges between Mr. Olson and Mr. Bender on this subject, Mr. Olson's statement to management cannot be characterized as improper.

E. He violated Work Rule 5 (disorderly or illegal conduct or behavior unbecoming a state employe) by failing to exert a more positive influence on Mr. Bender and Mr. Nelson on August 19, 1981, as the most senior employe, and by returning to work while under the influence of alcohol. He can not be said,

however, to have taken an excessive lunch break or to have been improperly "absent" from work, since the time in question was covered by approved leave.

28. The aforesaid work rule violations committed by Mr. Olson had a tendency to impair the performance of the duties of his position and the efficiency of the group with which he works.

29. With respect to the allegations against Mr. Nelson as set forth in the letter providing notice of discipline, Respondent's Exhibit 3, the Commission makes the following findings:

A. He violated Work Rule 14 by failing to give proper notice of his absence the afternoon of August 19, 1981. Although he was not on notice that he was required specifically to notify his superviosr of his whereabouts, he failed to provide any sort of notice, and knew or should have known that such omission would have a tendency to create difficulties for other employes who might be looking for him.

B. He violated Work Rule 12 by returning to work while manifesting evidence of having consumed alcoholic beverages.

C. He violated Work Rule 5 by his unacceptable behavior. However, the conduct involved in this violation is the same as in the preceding two work rule violations.

30. The aforesaid work rule violations committed by Mr. Nelson had a tendency to impair the performance of the duties of his position and the efficiency of the group with which he works.

31. With respect to the allegations against Mr. Bender as set forth in the letter providing notice of discipline, Respondent's Exhibit 4, the Commission makes the following findings:

A. He violated Work Rule 12 by returning to work while manifesting

evidence of having consumed alcoholic beverages.

B. He violated Work Rule 5 by unacceptable judgment which resulted in behavior unbecoming a state employe. However, the conduct involved in this violation is the same as in the preceding work rule violation.

32. The aforesaid work rule violations committed by Mr. Bender were approved and condoned by his immediate supervisor.

33. The aforesaid work rule violations committed by Mr. Bender had a tendency to impair the performance of the duties of his position and the efficiency of the group with which he works.

CONCLUSIONS OF LAW

1. These cases are properly before the Commission pursuant to s.230.44(1)(a), stats.

2. The respondent has the burden of proof.

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

4. Based on the facts that were proven, the discipline imposed was not excessive as to Mr. Nelson and Mr. Olson, but was excessive as to Mr. Bender and should be modified to a written reprimand.

5. With respect to the process and procedures followed, the appellants were afforded due process.

OPINION

The framework for the decision of disciplinary appeals is as set forth in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974), which reiterated the definition of the test for determining whether "just cause" exists for discharge as follows:

> " '...one appropriate question is whether some deficiency has been demonstrated which can reasonably 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."

All three of the appellants returned to TCI while exhibiting, to varying degrees, evidence of having consumed alcoholic beverages. The way Work Rule 12 is worded, it is a violation for an employe even to have alcohol on his or her breath. Whatever argument could or could not reasonably be made about whether alcohol on an employe's breath meets the Safransky standard outside the correctional setting, it seems clear that in a correctional institution the employer can forbid all evidence of alcohol consumption consistent with Safransky.

The appellants argue that because they used leave time on the afternoon of August 19th, they were not subject to Work Rule 12. However, each had at least one specific duty to perform at the institution. In that respect they were "at work" even if they chose to take leave time that afternoon.

Neither Mr. Nelson nor Mr. Olson provided notice of his intention not to return to work the afternoon in question. Regardless of whether there was a disseminated institutional policy requiring notice to the immediate supervisor, or, in the case of Mr. Olson, the acting superintendent, they knew or should have known that failure to provide any notice of their absence might well create problems at the institution.

With respect to the allegation as to Mr. Olson of a violation of Work Rule 7, it was not shown that Mr. Olson's version of when he approved Mr. Bender's leave was inaccurate, even though in Mr. Bender's mind he did not have such permission until after lunch.

In disciplinary appeals of this nature, in addition to determining whether there is just cause for the imposition of some discipline, the Commission also

must determine whether the amount of discipline imposed is excessive and must be modified pursuant to s.230.44(4)(c), stats. The term "excessive" means " 'Tending to or marked by excess, which is the quality or state of exceeding the proper or reasonable limit of measure.' " See Alff v. DOR, 78-227,243-PC (10/1/81). This process does not involve the substitution of the Commission's judgment for that of the appointing authority - the discipline is not to be modified merely because the Commission feels that another approach would be more appropriate, but only if it is determined actually to be excessive. Such a standard leaves the appointing authority with a wide range of discretion.

Utilizing this test, the suspensions of Mr. Olson and Mr. Nelson cannot be said to be excessive. Although one charge against Mr. Olson was not established, this was probably the least significant of the charges. Similarly, although the third charge against Mr. Nelson was essentially duplicitous, the remaining misconduct constitutes the central aspect of the charges against him. Both appellants have long prior records without discipline. However, this must be balanced against the nature of their activities and the correctional setting in which it occurred. Several employes testified independently that they not only had alcohol on their breaths, but also they were behaving in what amounts to a drunken manner. They were away from the institution for several hours without providing any notice of their absence.

With respect to Mr. Bender, the Commission is struck by the fact that throughout this episode he was in the company of his immediate supervisor, who approved and condoned his leave, the afternoon's drinking, and the return to the institution. Furthermore, although Mr. Bender had alcohol on his breath, the witnesses who observed him the afternoon in question all testified that he was not behaving unusually. While it might not be excessive in most cases to

suspend an employe simply for coming back to the institution from lunch with alcohol on his or her breath, the mitigation provided in this case by the supervisor's role is sufficiently compelling as to lead to the conclusion that the suspension was excessive. However, since Mr. Bender technically was in violation of Rule 12, some discipline is appropriate and the suspension should be modified to a written reprimand.

Finally, there was considerable discussion and testimony about the procedures that were followed by the superintendent in investigating this matter prior to the imposition of the suspensions. The appellants questioned whether the agency complied with what they perceived as the agency's disciplinary policy and procedures to which they had been exposed as members of management. However, the only issue before the Commission is whether appellants were afforded due process - i.e., under the federal constitution.

In Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L.3d 2d 15 (1974), the Supreme Court declined to conclude that the federal statutory scheme under which an employe could be discharged with a right to a post-discharge, but not a pre-discharge, hearing violated the right to due process of law. Subsequently, the United States Court of Claims in Giles v. U.S., 553 F. 2d 647, 649 (1977), specifically held that due process did not require a pretermination hearing under the Arnett decision. In Skelly v. State Personnel Board, 539 P. 2d 774, 788-789 (Cal. Supreme Court (en banc), 1975), the court interpreted Arnett as follows:

> "It is clear that due process does not require the state to provide the employe with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employe be accorded certain procedural rights before the discipline becomes effective. At a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon

the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

Based on this record, including the facts that the appellants were suspended without pay for relatively short periods rather than discharged, that they were afforded at least a limited opportunity to respond to the charges before the suspension, and that they were afforded a de novo trial type hearing following their appeal, the Commission concludes that they were afforded as much procedural protection as might be required under an expansive reading of Arnett v. Kennedy, and that their due process rights were not violated.

ORDER

The actions of the respondent are affirmed as to Mr. Olson (81-383-PC) and Mr. Nelson (81-384-PC) and those appeals are dismissed. The action of the respondent as to Mr. Bender is modified and this matter is remanded for action in accordance with this decision.

Dated: March 19, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

AJT:ers

Parties

James A. Bender
Taycheedah Correctional Institution
P.O. Box 33
Taycheedah, WI 53090

Thomas D. Olson
Taycheedah Correctional Institution
P.O. Box 33
Taycheedah, WI 53090

Frank E. Nelson
Taycheedah Correctional Institution
P.O. Box 33
Taycheedah, WI 53090

Donald R. Percy
Secretary, DHSS
663, 1 W. Wilson St.
Madison, WI 53702