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BELFORD E. HOGOBOOM,

Petitioner,

vs.

STATE OF WISCONSIN
PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 81CV5669

JUG - 61384
Personnel
Commission

In 1980, the petitioner, Belford Hogoboom, was fired from his position as manager of the State Property Insurance Fund in the office of the Commissioner of Insurance. Hogoboom, who had been employed in the office for twenty-two years, appealed his termination to the State Personnel Commission.

After lengthy hearings before a hearing examiner, the Commission entered findings of fact which upheld the firing on nearly all points raised by the Commissioner of Insurance, Susan Mitchell, in her letter of termination. These findings included, inter alia:

(1) "Appellant's responsibility as manager of the life and property funds, until August, 1979, included a responsibility for planning and directing the operation of the funds, including hiring and training of personnel, input into departmental policies, budget, personnel and other matters, directing the management of the life fund data processing system, establishing or modifying work rules, schedules and office procedures;"

(2) "When Hogoboom took a voluntary demotion to the position of Chief of the State Property Fund his responsibility included administration of daily operations of the fund, including developing recordkeeping systems, preparation of financial reports, statistical analysis of loss experience, establishing premium rates;"

(3) "While Hogoboom testified that he was unclear about the lines of authority in the life fund in 1978 and 1979, his own testimony admits that he effectively delegated away most of his authority to [an employee under his supervision] and that, on hindsight, he realized that he was asking too much of [this employee];"

(4) "Reasons stated for the termination of appellant were his inability to detect and resolve serious problems in his areas of responsibility, failure to adequately notify [his first-line supervisor] of the problems and consistent inadequate supervision of his employees in the property fund. Specific instances of failures of appellant in his performance of duties included failure to carry out the recommendations of the Legislative Audit Bureau audit of the property fund in 1979, which recommendations were to correct prior inadequacies and errors in property fund operations which occurred under his supervisions; and failure to detect and correct serious problems in the operation of the life fund going back to 1978, including lack of accounting procedures, and billing delays of six months or more;"

(5) "The life fund, during the period of time from 1978 to 1979, when Hogoboom was in the position of chief of the fund, was not properly managed in the following respects: 1) there existed a backlog of unanswered correspondence concerning death claims, policy loans, problems with premium notices; 2) payments made to policies were inaccurately credited; 3) from October, 1978 to September, 1979, no policies were credited with payments; 4) manual and computer accounting records existed only through April, 1978, and there was no manual system used since April, 1978; 5) the [computerized data processing] system had been improperly installed and the problems had not been corrected as of November, 1979, so that policy billings were not current, billings were inaccurate, policy information was inaccurate: all of these deficiencies existed with respect to a large portion of existing policies; 6) as of January, 1980, there was a backlog of approximately 800 unprocessed applications for insurance, some dating back 6 months, which were not properly filed or handled; 7) policy underwriting had not been kept up-to-date. All of these deficiencies existed with respect to a large portion of existing policies."

(6) "Belford Hogoboom was responsible for the daily operation of the life fund until August, 1979, and was responsible for the problems existing in the fund through August, 1979, and for the effects of those problems as they continued beyond that date."

(7) "In the summer of 1979, the Legislative Audit Bureau began an audit of the property fund, and during the course of the audit discovered many problems with the operation of the property fund. A series of 28 audit memos were issued by the auditors, describing their findings and making recommendations for correcting incorrect amounts and inadequate procedures. . . Hogoboom did not satisfactorily carry out the recommendations of the auditors although he had been directed by the Commissioner to do so."

(8) "The problems which existed in the property fund were attributable to Hogoboom's inadequate supervision and training

of staff. By his own admission he was primarily involved in the property fund in 1979, yet the problems dating to 1978 were not corrected by early 1982."

(9) "The appellant did not properly perform the duties of his position as chief of the life and property funds or as chief of the property fund and did not improve his performance after he had notice that his performance was not satisfactory."

The Commission concluded that "the respondent (Insurance Commissioner) has met her burden of persuasion; and there was just cause for the termination of appellant." Hogoboom has raised a four-fold challenge to the Commission's decision: (1) several of Mitchell's witnesses violated an order of sequestration issued by the hearing examiner at the commencement of the proceedings; (2) Mitchell's decision to fire Hogoboom, in light of the opportunities for continued employment afforded Hogoboom's immediate supervisor (and his functional equivalent), was arbitrary and disproportionate; (3) Mitchell failed to comply with sec. 230.37(1), Stats., requiring regular performance evaluations; and (4) the Commission's findings of fact were not supported by the evidence, and the personnel commission articulated the incorrect burden of proof in its conclusions of law. I am not persuaded by Hogoboom's first two arguments.

As to the first, the hearing examiner exercised her discretion in granting Hogoboom's request to sequester the witnesses; testimony was adduced from several of Mitchell's witnesses that, between the morning and the afternoon sessions of the first day's proceedings these witnesses had lunch together, with respondent's counsel, and that they were asked questions of an undisclosed nature in the presence of each other regarding the case. The hearing examiner permitted Hogoboom's counsel to question these witnesses at

length regarding these communications. The hearing examiner could have disqualified any of the witnesses privy to the conversation, which could be considered violative of the sequestration order; instead, she chose to consider the testimony describing that conversation, together with their testimony relative to the merits of the appeal, and adjust the weight of that testimony accordingly--a course of action well within her discretion. See, Nyberg v. State, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977). The weight the hearing examiner afforded the testimony of these witnesses is neither readily nor properly a matter of review by this court.

Hogoboom's second argument, that he received unequal treatment in comparison with his coworkers, was fully considered by the Personnel Commission and it was rejected as irrelevant to the question whether Mitchell had just cause to fire Hogoboom (See opinion of the Commission, p. 14). I agree. The record reveals that both Hogoboom's coworkers resigned in early spring, 1980, and that Hogoboom was offered the opportunity to resign rather than be fired during approximately the same time period. The degree to which either of Hogoboom's coworkers was encouraged to stay is not clearly established by the record. If Hogoboom is making an equal protection argument, there is no factual basis, taking the record as a whole, to support such a contention. If, on the other hand, the argument merely speaks to the arbitrariness of Mitchell's decision, there is ample evidence in the record, taken as a whole, to support the Commission's finding that "the appellant personally, through his acts and omissions, was sufficiently directly responsible for the problems (resulting in his termination) that he may be held accountable for them." (Id.)

Hogoboom next argues that Mitchell's failure to show compliance with sec. 230.37(1), Stats., should somehow preclude her from firing him. That statute states as follows: "in cooperation with appointing authorities the secretary shall establish a uniform employee performance evaluation program to provide a continuing record of employee development and, when applicable, to serve as a basis for decision-making on. . .pertinent personnel actions." As a result of the lack of such a formal evaluation, Hogoboom argues that he ". . .was left to guess as to how well he was complying with the requisite duties of his position. . . and that as late as February 1980, he ". . .was receiving no indication that his job performance was less than acceptable."

The Commission, however, specifically found that Hogoboom had notice of Mitchell's concern about his job performance (Finding of Fact No. 48); and the record contains substantial evidence in support of this finding. See R. 352, 1049-50. Moreover, the record reflects that one of Mitchell's initial acts in taking office was to meet with all division heads, including Hogoboom. Although the testimony amply supports the finding that the life fund was threatened by "damaging and serious problems" at the time Mitchell entered upon her duties, Hogoboom never fully disclosed the extent of the problems during these initial meetings. (R. 379, 164). It was only gradually, as other Insurance Commission employees were brought in to help out the life and property funds and reported back to her, that Mitchell learned how inadequate the accounting, filing and employee supervision procedures were in Hogoboom's department. (R. 385). As a result, Mitchell's evaluation initially

focused on the funds operated by Hogoboom rather than on Hogoboom himself, and she was unable to assess Hogoboom's job performance until other employees began to indicate to her that his reassurances regarding the state of the funds were less than accurate. (R. 386). In light of this, Hogoboom's position that he was not given adequate statutory evaluation is untenable.

Finally, Hogoboom argues that the Commission's decision must be reversed because the Commission erroneously articulated the respondent's burden as showing "by a preponderance of credible evidence that there was just cause for the termination of appellant" (Conclusion of Law, No. 2), and that a critical finding of fact was not actually proved by respondent to a reasonable certainty by a greater weight of the evidence. However, upon careful reading, the case cited by Hogoboom in support of this contention, Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), seems to equate these two standards. There, the Court stated that the proper evidentiary standard for the Personnel Board (now Personnel Commission) to apply in determining whether the evidence justifies a dismissal is "that of other civil cases, that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." Id., at 137. The correct standard of proof was articulated and used by the Commission.


The only specific finding of fact Hogoboom points to as inadequate is Finding No. 43, stating that Bud Mandt (who was temporarily assigned to supervise the property fund and produce its annual report) discovered several serious problems with the fund. This finding, by itself, would not constitute a finding on the part of the Commission that these problems in fact existed and that Hogoboom

was thus dismissed for just cause. See, Bell v. Personnel Board, 259 Wis. 602, 49 N.W. 2d 889 (1951) [not sufficient to find belief on the part of an employer that employee was guilty of certain conduct; reviewing board must find whether employee actually guilty of such conduct]. The finding, however, does not stand in isolation. The Commission also found (with adequate supporting evidence in the record), that, relative to the property fund: (1) Hogoboom did not mention to the Commissioner in his introductory memorandum, or at any other time, the serious specific problems existing in the life and property funds; (2) Hogoboom did not satisfactorily carry out the recommendations of the auditors, although he had been directed by the Commissioner to do so; and (3) the problems existing in the property fund were attributable to Hogoboom's own inadequate supervision and training of staff.

These findings, together with the findings relative to Hogoboom's mismanagement of the life fund, are sufficient to support the Commission's conclusion that he was dismissed for just cause. The evidence in the record, and allowable inferences therefrom, is such that a reasonable person could easily have reached the decision arrived at by the Personnel Commission. As a result, the Commission's decision will be affirmed, and its counsel may draft the appropriate order.

Dated at Madison, Wisconsin this 23rd day of April, 1984.

BY THE COURT:



WILLIAM EICH
CIRCUIT JUDGE

cc: Donald E. Carroll
James P. Altman
