

STATE OF WISCONSIN

PERSONNEL COMMISSION

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RAVI ANAND, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 82-136-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

NATURE OF THE CASE

This matter is before the Commission as an appeal from a discharge. The appellant filed a motion for reinstatement due to alleged errors and deficiency in the letter of termination. As a result of the respondent's request for a hearing on the motion, the Personnel Commission issued an interim order dated August 5, 1982, scheduling such a hearing. The following Ruling, Finding of Fact, Conclusions of Law, Opinion and Order relate to the motion for reinstatement.

EVIDENTIARY RULING

At the outset of the hearing, appellant registered a standing objection to any testimony, witnesses or exhibits produced by the respondent during the proceedings except for the letter of discharge. (Respondent's Exhibit #1). Ruling on the objection was reserved and will now be made.

Appellant's objection asserting that the inquiry before the Commission in the motion for reinstatement is limited to the "the four corners" of the letter of discharge is overruled. The Commission in Case No.

81-348-PC, Huesmann v. State Historical Society, indicated its reliance upon State ex rel Messner v. Milwaukee County Civil Service Commission, 56 Wis. 2d 438, 44, N.W. 2d 13 (1972) in which the court indicated "due processes is not to be measured by rigid and inflexible standards", and that the "notice requirement cannot be defined by any 'rigid formula'." Messner further indicates with regard to the notice requirements of due process that such requirements will "vary with circumstances and conditions." In order for the Commission to determine whether the notice requirement as defined in Messner ("reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections", Messner, 56 Wis. 2d 438, 444.), was met, the Commission will allow the respondent to present the "circumstances and conditions" relative to the letter of discharge and respond to appellant's motion for reinstatement alleging errors and deficiencies in the letter of termination.

This ruling is not contrary to Huesmann where in lieu of a hearing the Commission's consideration of "circumstances and conditions" was accomplished through affidavit and briefs.

FINDINGS OF FACT

1. By letter dated June 8, 1982, the respondent discharged the appellant effective June 9, 1982.

2. The discharge letter in its second paragraph states:

This action is being taken because your performance has failed to improve to minimally acceptable standards and remains inadequate in the following areas: conceptual skills, analytical skills, program knowledge, timeliness, and writing skills. These inadequacies have been brought to your attention through written and verbal evaluations and communications by Mr. Wagner and others that date back to April, 1980. Efforts were made by your supervisor

and others to explore alternative jobs. However, such searches proved fruitless. (Respondent's Exhibit #1).

3. A written performance planning and development report (PPD) regarding the appellant's performance was prepared by the respondent department in June of 1979. It specifically indicates performance problems and the need for improvement with regard to timeliness and writing skills. (Respondent's Exhibit #2).

4. A written discretionary performance award (DPA) justification report indicating the appellant's performance as unsatisfactory and recommending no "merit increase" was prepared by the respondent in July of 1980. The written justification for the denial of merit indicates performance problems in the area of timeliness, writing, and analysis used. (Respondent's Exhibit #3).

5. A written PPD completed in April of 1981 states that appellant's performance has not met expectations and specifically mentions problems with timeliness, written products, program knowledge and ability to analyze program and policy issues. It further states that "of most concern relative to appellant's performance, however, is the lack of conceptual skills" (Respondent's Exhibit #4).

6. In a September, 1981, written justification for the denial of a merit increase stating that appellant's performance was unsatisfactory, respondent indicated that the appellant's performance had been unsatisfactory with specific mention of analytical and conceptual skills, timeliness, program knowledge, and writing skills. Conceptual and analytical skills are indicated to be of "greatest concern." (Respondent's Exhibit #5).

7. On November 2, 1981, respondent corresponded with the appellant in writing referencing the prior evaluations and denials of merit increases and problem areas. The letter closes with the following statement:

Because we cannot accept your unsatisfactory performance any longer we are putting you on notice that unless permanent and substantial change is made in your performance, you will be involuntarily demoted or discharged from employment in four months. Your performance must be established at a satisfactory level in order for you to avoid demotion or discharge and continue in your current job. At the end of the four months a decision will be made concerning your employment status.

Monthly meetings will provide you an opportunity for continued and timely feedback about your performance during these next four months. (Respondent's Exhibit #6).

8. On November 2, 1981, respondent prepared a written work plan for the appellant for a four month period, November 2, 1981 to March 2, 1982. Two specific assignments including explanations, objectives, sequences and timetables for the projects were set forth. Appellant was informed "your performance during this four month period will be evaluated on the basis of these assignments." (Respondent's Exhibit #7).

9. The four month "trial period" was, on November 5, 1981, extended by approximately one month to accommodate the appellant's vacation plans. (Respondent's Exhibit #8).

10. On March 31, 1982, respondent notified the appellant in writing that the "trial period" had ended and a request was made that appellant submit an assignment that was due in order that it could be reviewed and "a decision made on your employment status." (Respondent's Exhibit #18).

11. On May 7, 1982, respondent communicated in writing with the appellant indicating that the overdue paper had not been received and that unless it was received by May 24, " a final decision will be made on your employment status without it." (Respondent's Exhibit #19).

12. The respondent's correspondence with the appellant on March 31, 1982, and May 7, 1982, (Respondent's Exhibits #18 & 19) each contained the following statement:

On November 2nd you were notified that unless a permanent and substantial change was made in your performance during a four month trial period, that you would be involuntarily demoted or discharged from employment. On November 5th this trial period was extended by approximately one month to March 30th to accommodate your vacation plans. A work plan was developed to guide your efforts during the trial period and we met frequently to discuss your work products and performance during this period.

13. During the "trial period" supervisory employes of the respondent met frequently with the appellant to review his performance. The focus of these meetings was the written work product of the appellant. The supervisors had critiqued the written work product, indicated on it their handwritten comments, and participated in lengthy discussions with the appellant regarding his work product and their written notes critiquing it. (Respondent's Exhibits #9-22).

14. On June 2, 1982, respondent corresponded with the appellant in writing concerning the appellant's performance during the four month period. The letter states:

As I indicated in our meeting earlier today, I have reviewed the final products of your four month trial period and do not find them to be acceptable. Your performance has continued to be inadequate in the following dimensions: conceptual ability, program knowledge, analytical skills, timeliness, and writing skills. Therefore, I am considering recommending that you be discharged.

The letter goes on to inform the appellant that a meeting would be held on June 4th to provide the appellant with an opportunity to respond (Respondent's Exhibit #23).

15. A meeting was held on June 4, 1982, to give the appellant an opportunity to respond with regard to the allegations concerning his performance. Appellant attended with his attorney. (Respondent's Exhibit #1).

16. The discretionary performance award justifications and the PPD's referenced above contained information and/or examples and/or explanations of the appellant's performance deficiencies.

17. Appellant received a copy of each and every document referenced as Respondent's Exhibits #1-23 and participated in meetings during which he had ample opportunity to question and explore the statements made in Respondent's Exhibits 2-23.

18. At all times relevant to this matter, appellant was employed as a Planning Analyst 3 at the Division of Policy and Budget in the Bureau of Evaluation of the Department of Health and Social Services.

19. The letter notifying the appellant of his discharge was "reasonably calculated under all the circumstances to apprise" the appellant "of the pendency of the action and affords" him "an opportunity to present" his objections. It meets the requirements of due process.

CONCLUSIONS OF LAW

The letter of discharge provided the appellant with adequate notice of the reasons for discharge. He was not denied due process of law.

OPINION

The appellant argues that the respondent's discharge letter failed to comply with the requirements of §230.34, Wis. Stats. and violated the appellant's right to due process of law.

The statutory standards and procedures for disciplining a civil service employe with permanent status in class are found in §230.34, Wis. Stats. In particular §230.34(1)(b), Wis. Stats. provides in part:

The appointing authority shall at the time of any action under this section furnish to the employe in writing the reasons for the action.

Neither the statute nor any administrative rules establish more precise requirements regarding notice of disciplinary action.

Appellant argued at the hearing and through a memorandum of authorities presented at the hearing that "this litigation is controlled particularly and precisely by:"

- 1) Huesmann v. Director, State Historical Society, Case No. 81-348-PC, (1/8/82) particularly page 3, particularly page 4;
- 2) Beauchaine v. Schmitt, Case No. 73-38, (10/18/73);
- 3) Bohen v. McCartney, Case No. 74-1, (10/10/74);
- 4) Affirmed, Dane County Circuit Court, the Honorable Michael B. Torphy presiding, Jerry McCartney et al v. Wisconsin State Personnel Board, Circuit Court Case No. 144-439 (2/3/75).

The Beauchaine case deals with the sufficiency of a suspension notice. In this decision, the Personnel Board with regard to the due process concept of fair notice stated:

In order to achieve this objective, we now hold that at a minimum, notices of discipline must on their face tell a public employe five things: 1) What wrongful acts he is alleged to have committed; 2) when he is alleged to have committed the wrongful acts; 3) where it is alleged that the wrongful acts took place; 4) who says the wrongful acts occurred, that is, who accuses the employe and 5) why the particular penalty or discipline is going to be imposed. (The "five W's" test)

In the Bohen case, the Personnel Board held that a disciplinary notice was inadequate because the notice did not meet the "Five W's" test

and such lack of specificity did not meet due process requirements. The court in its affirmation of the Bohen Board decision (McCartney et al v. Wisconsin State Personnel Board) agreed that the notice of discharge was not sufficiently specific but made no comment or endorsement of the Five W test. Appellant's assertion that, at a minimum, notices of discipline must on their face contain the Five W's in order to constitute due process is incorrect. In a memorandum decision, Case No. 146-209, Weaver v. State of Wisconsin Personnel Board, Dane County Circuit Court, (8/26/75), Judge Currie, while recognizing that due process requires a certain degree of specificity and citing Messner, stated "There are some unusual situations where the reasons given in the letter of discharge coupled with undisputed knowledge which the disciplined employe already possessed will meet the notice requirements of due process." Judge Curry cited the case of John Pfankuck v. State of Wisconsin Personnel Board, Case No. 141-409, Dane County Circuit Court, (1974) as an "illustration of a situation where a letter imposing discipline could comply with due process without complying with the Five W's rule laid down in the Board's Beauchaine case decision." In the Weaver case, the Personnel Board had given as one of the reasons for refusing to consider an insubordination charge contained in a letter of discharge was that it (the charge) did not meet "the standards for disciplinary notice enunciated in the Board's decision in Beauchaine v. Schmitt." (The Five W's test). Judge Curry stated "that the Board was in error in also grounding its ruling that it would not consider the insubordination issue because the letter did not meet the test laid down in Beauchaine." (The Five W's test). It is possible, therefore, to meet a requirement of due process without an individual listing of the Five W's.

It is not the Commission's intention to abandon the Five W's. In fact, they are not only desirable but perhaps necessary in the vast majority of discipline notices. They would be looked for in traditional instances of discipline (For example, absenteeism, tardiness, insubordination, falsification of records, theft, etc.). A key word in the Five W's is "wrongful." This generally connotes "improper" or "offensive" or "intentionally violative of acceptable conduct." An allegation of an inability to perform at an accepted standard such as the instant case is not associated with the connotations previously mentioned. Thus, it is a different kind of a case and not a "usual" case vis-a-vis discipline.

Citing Huesmann, the appellant asserts his letter of discharge does not meet the test of due process because of the "conclusory statements" given in the appellant's letter of discharge. In Wagner v. Little Rock School District, 373 Federal Supplement, 876 (1973), the court stated:

In most cases, due process notice contemplates accusations of specific acts or patterns of conduct unequivocally identified rather than general charges relating to attitudes and behavior patterns unsupported by specific factual allegations. The court does not intend to suggest, however, that notice in the form of conclusory allegation in all cases is constitutionally inadequate. In a case of dismissal for incompetency, the decision may be based on the evaluation of many variables that might require unreasonable efforts to reduce to specificity. In such cases, however, the school authority should bear a heavy burden of justification to insure that the lack of specificity does not become a cloak for arbitrariness.

In reviewing the "circumstances and conditions" of the appellant's discharge notice, we have the situation of the appellant being a professional employe working as a Planning Analyst 3, engaged in efforts which result in written studies, evaluations, reports, etc. The work is complex and the process of performing the work does not necessarily lend itself to a review in which specific individual events or actions or

efforts may be cited. Likewise, the finished product is not necessarily something that can be evaluated by a purely quantitative and measurable set of standards. Respondent's dissatisfaction with the appellant's conceptual skills, analytical skills, program knowledge, timeliness, and writing skills were identified in the written PPD's and merit denial justifications. Information about and examples of his perceived shortcomings were contained in these written evaluations. Explanation of the criticisms, definition of the problems, and specific examples of projects wherein the shortcomings were noted were given. In a written notice to the appellant, the respondent in November of 1981 made specific mention of the previous written evaluations and gave the appellant emphatic warning that unless improvement were made, he would be demoted or discharged after a four month trial period. During the trial period, appellant was assigned to specifically described projects and had frequent meetings with the respondent to review respondent's written critique of the appellant's written work.

Through the documents given the appellant by the respondent, the appellant knows which projects he worked on, the inabilities perceived by the respondent, the nature and definition of the inabilities, the examples of the inabilities and how serious the respondent felt the inabilities were. The appellant was given warnings and was given a trial period involving a performance review of work on given projects. These things were established to be of a specificity sufficient to meet due process requirements.

At the hearing, the appellant acknowledged:

- 1) he knew the respondent felt there were performance problems in the 5 areas stated in the discharge letter (conceptual skills,

analytical skills, program knowledge, timeliness, and writing skills);

2) he had been informed of problems in the 5 areas through the PPD's and DPA's;

3) he had been informed of problems in the 5 areas during the trial period;

4) he had been given specific examples of the problems;

5) he had been informed of the 5 problem areas at the meeting on June 2nd;

6) he had been put on notice in November that he would be terminated or demoted if his performance did not improve;

7) he was informed throughout the trial period that his performance was unsatisfactory and it (performance) was jeopardizing his continued employment;

8) he had been given at or about the time they were written by the respondent, copies of all documents entered as exhibits by the respondent at the hearing.

Given the "circumstances and conditions" of this matter, the record of the hearing on the motion, and the knowledge of the affected employe, the Commission concludes the letter of discharge was "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action" and it affords the appellant an opportunity to present his objection.

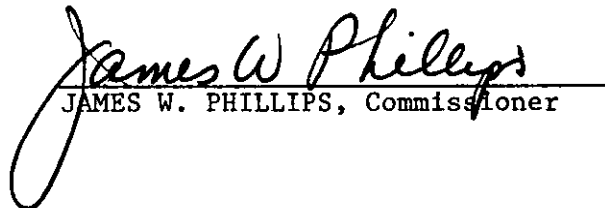
ORDER

Appellant's Motion for Reinstatement is denied.

Dated: March 17, 1983 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Commissioner

JWP:jmf


JAMES W. PHILLIPS, Commissioner

Donald R. Murphy, Chairperson, did not participate in the decision in this matter

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