STATE OF WISCONSIN PERSONNEL COMMISSION

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*
DAVID BARDEN, *
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Appellant, *
*
v. *
*
President, UNIVERSITY OF *
WISCONSIN - SYSTEM, *
*
Respondent. *
*
Case No. 82-237-PC *
*
* * * * * * * * * * * * * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), stats., of a discharge of an employe with permanent status in class.

FINDINGS OF FACT

1. The appellant commenced employment at the University of Wisconsin - Milwaukee (UW-M) in August, 1979, as a Power Plant Superintendent 2. He subsequently was reclassified to Power Plant Superintendent 3 and prior to his discharge had permanent status in the classified service.

2. At all relevant times before his discharge, the appellant was employed as the assistant to the Superintendent of the University Heating and Chilling Plant, Sylvester Janczak, incumbent. His duties and responsibilities included the supervision of subordinate employes in the operation and maintenance of the plant, and the supervision of the entire plant in Mr. Janczak's absence.

3. The appellant's overall performance evaluation prior to his discharge had been rated as good by Mr. Janczak. In his last performance

evaluation dated January 28, 1982, Respondent's Exhibit 2, Mr. Janczak entered the following under "Additional Comments":

> I have found Dave to be an asset to the plant. He has given me counseling, support, insight in problems, the feeling of having a capable assistant that I can depend on. I would find my job more difficult to handle without him.

4. For some period of time within the appellant's tenure at the plant there had been a number of disciplinary problems with plant employes and certain incidents of machinery sabotage probably attributable to plant employes, all of which was known to Mr. Janczak and his immediate superior, Mr. Melkus, as well as to the appellant.[FN]

5. Mr. Melkus began employment as Director of Physical Plant Services at UW-M on July 1, 1982. Shortly thereafter, he instituted a policy that when a supervisor was on vacation, another supervisor was to be on duty. This meant that in the Heating and Chilling Plant, both Mr. Janczak and the appellant could not take simultaneous vacations, since they were the only two supervisors.

6. It was Mr. Janczak's practice to take his vacation by taking off each Friday during the fourth quarter of each calendar year.

7. On September 10, 1982, Mr. Melkus approved Mr. Janczak's request for vacation Friday, November 26, 1982 (the day after Thanksgiving).

8. On September 25,1982, the appellant submitted a request for vacation the week of November 21, 1982. Mr. Janczak did not respond to this request until October 26, 1982.

9. The appellant had planned to use this vacation for a hunting trip in the northern part of the state with his family and a friend. His wife had arranged a vacation from her job to go with him.

[FN]The Commission has added the phrase "as well as to the appellant" to Finding #4. This addition was made upon the request of the respondent, in consultation with the hearing examiner and accurately reflects the record.

10. On October 26, 1982, Mr. Janczak called the appellant into his office and informed him that he would be unable to take the aforesaid vacation because the appellant would need to cover the plant on Friday, November 26th, in his absence, and that the appellant would have to attend as a witness a worker's compensation hearing that had been scheduled for November 24, 1982.

11. The appellant became incensed and stated that he intended to phone in sick for the entire week starting on Monday, November 22, and ending on Friday, November 26, 1982, and that he intended to "submarine" the aforesaid workers compensation hearing and would testify for the claimant and against the UW-M, or words to that effect.

12. The following day, October 27, 1982, they met again in Mr. Janczak's office. In response to Mr. Janczak's question as to whether the appellant's feelings had changed from the day before, the appellant in anger stated that they had not, and that he intended to agitate and "work on the troops to stand up for their rights," and "to keep them in an uproar" and that Mr. Janczak would find more grievances than he ever had had before, or words to that effect.

13. With respect to the aforesaid workers compensation proceeding, the appellant had not been responsible for the claimant's training, and had never given her instructions on the use of a ladder. His truthful testimony would not have supported UW-M's case.

14. Before October 26, 1982, there had never been a similar outburst like this on the part of the appellant toward Mr. Janczak or any other supervisor.

15. The conversations that occurred as set forth in findings 11 and 12 occurred outside the presence and hearing of subordinate employes. On one occasion when a subordinate came in the office, the appellant ceased his statements.

16. Following a meeting on November 3, 1982, which included the appellant and Mr. Melkus wherein the appellant essentially admitted having made the remarks set forth above in findings 11 and 12, and evidenced animosity toward Mr. Janczak, Mr. Melkus determined to discharge the appellant.

17. The appellant was discharged effective November 12, 1982, pursuant to a letter dated November 11, 1982, by, among others, Mr. Melkus, and drafted by him, Respondent's Exhibit 4.

18. The statements made by the appellant as set forth in findings 11 and 12, with the exception of the remarks concerning the workers compensation proceeding, had a tendency to impair the performance of the appellant's duties and the efficiency of the group with which he worked.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44(1)(c), stats.

2. The burden of proof is on the respondent to demonstrate that there was just cause for the imposition of discipline and for the amount of discipline imposed.

3. The respondent has established just cause for the imposition of some discipline but not for the discharge of appellant.

4. The discharge constituted excessive discipline and should be modified to 20 days suspension without pay.

OPINION

At the prehearing conference held on January 10, 1983, the parties agreed that the following issue was presented for hearing:

> Whether there was just cause for the discharge.
>
> Sub-issue: Whether the discipline imposed was excessive. (Prehearing Conference Report dated January 11, 1983.)

The definition of just cause was set forth by the Wisconsin Supreme Court in Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379(1974), as follows:

> ... one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to impair his performance of the duties of his position or the efficiency of the group with which he works. ...State ex rel Gudlin v. Civil Service Comm. (1965), 27 Wis. 2d 77, 87, 133 N.W. 2d 799.

In addition to determining whether there was just cause for the imposition of disciplinary action, the Commission must also consider whether the discipline actually imposed was excessive. The latter inquiry is mandated by the change in the civil service code effected by chapter 196, Laws of 1977, which vested in the Commission, in addition to the authority to affirm or reject disciplinary actions, the authority to modify them. See §230.44(4)(d), stats. Under prior law, the predecessor personnel board only had the authority to "... either sustain the action of the appointing authority or reinstate the employe fully." See §16.05(1)(e), stats.(1975).

In Holt v. DOT, Wis. Pers. Comm. No. 79-86-PC (11/8/79), the Commission discussed these concepts as follows:

> In the opinion of the Commission, the current statute clearly requires a two-step analysis of a disciplinary action or appeal. First the Commission must determine

> whether there was just cause for the imposition of discipline. Second, if it is concluded that 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. See, e.g., State ex rel Iowa Employment Security Commission v. Iowa Merit Employment Commission, 231 N.W. 2d 854, 857 (1975).... p.6.

In the instant case, it is readily apparent that most of appellant's comments were intemperate and insubordinate and met the Safransky test in that they could "...reasonably be said to impair the duties of his position or the efficiency of the group with which he works." This cannot be said of his remarks concerning his testimony at the workers compensation hearing. On this record, it is undisputed that all that the appellant said he would do at the hearing was to tell the truth, even though this testimony would have been detrimental to the respondent's case.

In considering the severity of the discipline imposed, the Commission must consider, at a minimum, the weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation, and the employe's prior work record with the respondent.

In this case, these two factors are somewhat interrelated. It is difficult to evaluate the seriousness of the conduct complained of, including the degree of threat to the integrity of the work unit, without considering the employe's prior record.

The record clearly shows that the appellant lost his temper when he learned that his vacation had been denied. However, his employment record before that had been good. His immediate supervisor of over three years testified that this was the first time Mr. Barden had spoken to him in this

manner. The Director of Physical Plant Services, who made the effective decision to discharge the appellant, testified that based on his employment record, he wouldn't have expected Mr. Barden to have made the statements he did on October 26 and 27, 1982.

The respondent certainly does not have to tolerate the kind of insubordination here shown, and certainly can demand that the assistant superintendent of the heating plant be supportive of management, particularly in the context of the incidents of sabotage.

However, in determining whether discharge was excessive, the appellant's insubordination and threats to "agitate" the rank and file must be weighed against his good work record and the fact that this was the first such incident in over three years of employment, as discussed above, and that the exchange did not occur in front of any subordinate employees. The Commission also must consider the factor that one of the grounds for discipline, the threat regarding the workers compensation proceeding, has been found on this record not to meet the Safransky test of misconduct, and therefore would not be a permissible basis for the imposition of any discipline at all.

Under all of these facts and circumstances, the Commission concludes that the discharge was excessive and should be modified to a suspension of twenty working days without pay. A more severe penalty of demotion is not warranted, in the Commission's opinion, because the appellant has demonstrated that he has the ability to perform the duties and responsibilities of the position, and a substantial suspension is intended to address the need to avoid such outbursts in the future. The appellant is entitled to be restored to his previous position, with compensation as set forth in

§230.44(4), stats., less the period of suspension of twenty working days without pay.

ORDER

The action of the appointing authority discharging the appellant is modified to a twenty working day suspension without pay, and this matter is remanded to the appointing authority for action in accordance with this decision.

Dated: June 9, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:lmr

LAURIE R. McCALLUM, Commissioner

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