STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

THOMAS ISRAEL

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Respondent.

Case No. 84-0041-PC

* * * * * * * * * * * * * * * * *

INTERIM DECISION AND ORDER

This matter is before the Commission as an appeal from a discharge. At the prehearing conference, a schedule was established for the parties to brief the question of whether the letter of discharge was legally deficient. Appellant filed a "motion to reinstate" but subsequently amended his motion to "motion to strike certain portions of letter of discharge."

At the time that an employe with permanent status in class is "removed, suspended without pay, discharged, reduced in base pay or demoted", the appointing authority shall "furnish to the employe in writing the reasons for the action." §230.34(1)(a) and (b), Stats. Neither the statutes nor the administrative code supply any additional specification in terms of what constitutes adequate notice of a disciplinary action. In its decision in Huesmann v. State Historical Society, 81-348-PC (1/8/82), the Commission summarized some state cases that provide a framework for applying the statute:

> Several relatively recent decisions by the Wisconsin Supreme Court have addressed the question of whether a particular letter of discipline has met due process requirements. In State ex rel. Messner v. Milwaukee County Civil Service Commission, 56 Wis. 2d 438, 444, 202

N.W. 2d 13 (1972), the court indicated that "due process is not to be measured by rigid and inflexible standards", and that the "notice requirement cannot be defined by any 'rigid formula.'" The court went on to define the notice requirement in terms of being satisfied by a notice:

> "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.

In Messner, the court found the notice to have been sufficient even though it did not specify the regulation that served as the basis for the discharge.

In several other recent cases, the notice was also found to be sufficient. In Richey v. Neenah Police & Fire Commission, 48 Wis. 2d 575, 180 N.W. 2d 743 (1970), a notice charging a policeman with conduct "unbecoming a police officer" at a specified time and date was upheld. In State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 242 N.W. 2d 689 (1976), the court upheld a notice that set forth sixteen separate charges, where the employe had specifically answered each charge prior to hearing. In the most recent case of Weibel v. Clark, 87 Wis. 2d 696, 275 N.W. 2d 686 (1979), the employe was merely told that he had been discharged for stealing candy from a particular restaurant that was a tenant in the building where he worked. The court ruled that "[d]espite the apparent inadequacy of the notice", the employe was unable to show he had been prejudiced by DILHR's (unemployment compensation) decision:

> The department found, based on the written statement signed by appellant when he filed his claim and on the testimony given at hearing, that appellant knew he had been fired for stealing candy from Heinemann's. The department and the circuit court concluded that appellant could not be prejudiced by the department's failure to apprise him of something he already knew. Weibel, 87 Wis. 2d 696, 704-05.

The purpose of the notice is to inform an employe of the nature of the charges so that he can adequately prepare his defense. Reynolds v. US, 454 F. 2d 1368, 197 Ct. Cl. 199 (1972); Holly v. Personnel Advisory Bd, 536 S.W. 2d 830, (Mo. App. 1976); People ex rel. Mutler v. Elmendort, 42 App. Div. 306, 59 N.Y.S. 115 (NYAD); Benjamin v. State Civil Service Commission, 17 Pa. Cmwlth 427, 332 A2d 585 (Pa. 1975). Therefore, a reasonable standard to apply in disciplinary notice cases is whether the notice is

sufficiently specific to allow the disciplined employe to prepare a defense.[FN]

In the present case, the respondent issued a five page single-spaced letter notifying the appellant that he was being discharged and the reasons for the action. The letter incorporated by reference a fourteen-page report prepared by respondent's Internal Audit Office entitled "Review of Inmate Group Canteens [at] Waupun Correctional Institution." A copy of the discharge letter, less the audit office report, is attached to this

---

FN Appellant argued that "all letters of discharge must now contain the five (5) "W's"; when, where, why, what, who" as a consequence of the decision of the Personnel Board in Beauchaine v. Schmidt, 73-38 (10/23) "and its progeny." (Appellant's brief, pp. 1 and 2). However, circuit court decisions subsequent to Beauchaine as well as decisions of the Personnel Commission indicate that the "five W's" cannot be mechanically applied. In Weaver v. State Personnel Board (Schroeder), 146-209, Dane County Circuit Court (8/28/75), Judge Currie stated:

> It has long been held that the requirements of due process cannot be measured through the mechanical application of a formula. The unusual fact situation in the Pfankuch case. [where the report of the employe to the employer provided the facts on which the letter imposing discipline was grounded] provides the perfect illustration of a situation where a letter imposing discipline could comply with due process without complying with the 5 W's rule laid down in the board's Beauchaine case decision.

In the subsequent case of Zehner v. State Personnel Board, 156-399, Dane County Circuit Court (2/20/78), Judge Currie held that the

> use of the words "wrongful act" in Beauchaine [which required notice to the employe of the wrongful acts he allegedly committed, when and where they were allegedly committed, etc] . . . is unfortunate when applied to the instant fact situation where the discharge is made for inefficiency and inability to meet the requirements of the job.

In Hess v. DNR, 79-203-PC (12/4/79) and Anand v. DHSS, 82-136-PC (3/17/83) the Commission upheld the sufficiency of disciplinary letters where the "five W" test was not met.

decision. The paragraphs of the letter have been numbered for ease of discussion.

Appellant does not object to paragraphs 1 through 6, all of which are introductory in nature and summarize the procedures that were followed prior to the imposition of discipline. However, the appellant attacks the legal sufficiency of paragraphs 7 through 12 and specifically argues that they fail to identify the specific inmates or inmate groups involved and the time the alleged activities occurred.

Paragraph 7 adequately describes two allegations; that appellant (improperly) removed fiscal control and authority from the Waupun Correctional Institution (WCI) business office as canteen concessions were transferred to inmate groups and that appellant failed to establish procedures to monitor and control inmate group financial activities.

In paragraph 8, the letter alleges lack of any controls over prices changed by inmate group canteens, thereby resulting in excessive prices. One possible defense to the allegations of excessive prices might be to produce evidence that prices charged by the inmate groups were consistent with prices charged elsewhere in the prison or in the Waupun community. As a consequence, the charge is sufficiently specific.

Paragraph 9 serves merely as an introduction to subsequent paragraphs.

Paragraph 10 includes allegations of loans between inmate groups and from individual inmates to groups as well as an allegation that some inmates were on the payroll of both the institution and of an inmate group. It is impossible to determine which inmate groups and which inmates are the subject of the allegations as well as the dates involved. Without more specific information about the charges, the appellant would be unable to prepare a defense.

Most of paragraph 11 alleges that given the unauditable nature of the inmate group concession records, the State may incur some, currently unascertainable, liability. However, the last three sentences allege direct payments to inmate group members, purchases for inmates in segregation and sizable grants that were never deposited in institution accounts. Again, absent more specific information identifying the particular grants, inmate and/or groups involved, the appellant would be unable to prepare a defense to these charges.

In paragraph 12, the respondent refers to an assault of one inmate by another arising from a dispute over the use of funds from groups canteen concession. Unless the appellant knows the identity of the two inmates and the date of the alleged assault, he will be unable to conduct his own investigation to the cause of the incident. The remaining portions of paragraph 12 are summary in nature and are described with sufficient specification.

Appellant does not object to paragraph 13 through 17. While the appellant argues that paragraphs 18 and 19 fail to specify the relevant dates, the Commission finds that paragraph 18 is sufficiently specific as to time and paragraph 19 is summary (and introductory) in nature. The appellant raises no objection to paragraph 20.

In paragraph 21, respondent alleges that the appellant sometimes wandered around the grounds of the prison farms at Fox Lake and Winnebago without checking in with the camp staff, thereby alienating the camp staff and causing security problems. By failing to identify the dates on which appellant was alleged to have visited the prison farms, the appellant will not be able to adequately defend the charge. The letter should also identify which security staff at the camps allegedly left their posts to

investigate the appellant's presence at the prison farms and the identity of the alienated camp staff.

The allegation found in paragraph 22 that appellant required his staff to make records of all conversations with persons outside the Bureau of Program Services is sufficiently specific to permit appellant to respond to the charges.

In paragraph 23, respondent alleges that appellant's inappropriate behavior caused the resignation of the Chief of the Section of Industrial Operations (Ritchey Porter) and then recites three statements from Mr. Porter's letter of resignation. If the respondent contends that the statements in the Porter letter are true and that they constitute inappropriate behavior and form a basis for discharging the appellant, it would have been helpful to have provided additional specification with respect to the allegations that appellant had directed Porter "to avoid controversial situations, always let decisions be made by the next level of management and keep all communication verbal." However, the allegation is sufficiently specific to permit the appellant to prepare a defense.

Paragraph 24 is summary or conclusive in nature and paragraph 25 merely sets out the procedure for appealing the discharge.

Having concluded that some of the allegations found in the letter of discharge are insufficiently specific to provide the appellant an opportunity to prepare a defense to those charges, the next question is one of the proper remedy. The respondent suggests that the Commission lacks the authority to strike certain portions of the letter of discharge as has been requested in appellant's motion. Respondent argues that such authority is found in neither the Commission's rules nor in the statutes granting the Commission's jurisdiction.

In the past, the Commission and its predecessor, the Personnel Board have issued numerous rulings on motions to declare letters of discipline void for vagueness and to reinstate the employe into his/her former position. Where the motion is granted, the Commission's ruling is a final decision that is subject to judicial review §227.15, Stats. Where the motion is denied, the Commission's ruling is an interim or intermediate ruling as provided in §227.07(6)(a), Stats. An objection to the sufficiency of a discharge letter is waived unless timely filed. In State ex rel. Richey v. Neenah Police and Fire Commission, 48 Wis. 2d 575, 180 N.W. 2d 743 (1970), the court concluded that the employe had "waived any objection he had to the insufficiency of the charge" where no objection was made at the time of the hearing before the board of police and fire commissioners or after such hearing. The court cited with approval McQuillan's Municipal Corporation (4th ed.), §12.257c, which provides:

> Objections to the sufficiency of the charge may be waived, as by proceeding to hearing and trial before the civil service commission without objection or, in a proper case, by asking for a continuance on stated grounds.

Where, as here, there is a specific statutory requirement that notice of a disciplinary action be provided to the employe and where the employe may waive an objection to the sufficiency of the charge unless timely raised, the Commission must be found to have the authority to rule on a motion testing the sufficiency of the notice. This result is further supported by the language of §230.43(4), Stats., which reads in part:

> If any employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the Commission. . . , the employe shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification.

In the present case, the Commission has concluded that portions of the discharge letter are vague but that the bulk of the letter is legally sufficient. In prior cases testing the sufficiency of the notice, the entire letter has been in dispute. When the Commission has found the entire letter to be insufficient, it has voided the discharge letter and ordered the appellant to be reinstated. See, for example, Huesmann, (supra). Here, the Commission concludes that those portions of the letter found to provide insufficient notice must also be stricken. Therefore, the appellant's motion to strike will be granted as to parts of paragraphs 10, 11, 12, and 21. However, given the particular facts of this case, where just four small portions of the five-page discharge letter have been found to be insufficient, the Commission will provide the respondent a period of 20 days from the date of this order in which to amend the letter with respect to those portions found to be insufficient. By merely offering additional details regarding specific charges in the letter, the respondent' amendments to the letter will fall far short of adding new charges. The addition of new charges via amendment was prohibited by the Commission in Alff v. DOR, 78-227-PC (3/8/79). In Alff, the respondent had sought to amend the discharge letter by adding two charges which were unknown to the respondent prior to the date of discharge and were alleged to demonstrate the appellant's inability to satisfactorily perform the duties of the position. In the present case, the respondents are merely being permitted to supply details in specific areas. There is nothing that would suggest that the appellant will be prejudiced by the additional specificity, which will instead permit him to prepare a defense.

ORDER

Appellant's "motion to strike certain portions of letter of discharge" is granted in part and denied in part. The following portions of the letter of discharge dated March 6, 1984, are found to be void and are ordered stricken:

1. Paragraph 10, the first three sentences.
2. Paragraph 11, the last three sentences.
3. Paragraph 12, the last three sentences.
4. All of paragraph 21.

The respondent is granted 20 days from the date of this order in which to amend the discharge letter with respect to those portions ordered stricken, above.

Dated: July 11, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

KMS:jab

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

Thomas Israel
c/o Attorney Richard Graylow
110 E. Main St.
Madison, WI 53703

Linda Reivitz, Secretary
DHSS, 1 W. Wilson St.
Madison, WI 53707

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS
1 WEST WILSON STREET
P O BOX 7925
MADISON WISCONSIN 53707

March 6, 1984

Mr. Thomas R. Israel
Post Office Box 7925
Madison, Wisconsin 53707

Dear Mr. Israel:

1. You are hereby notified that pursuant to the authority vested in me by Secretary Reivitz, you are discharged from your employment, effective 4:30 p.m., March 7, 1984.

2. On Thursday, February 23, 1984, at a meeting of you, Steve Kronzer and me, I indicated to you that I was deeply concerned about your poor performance as Director of the Bureau of Program Services. At that meeting, I indicated that you could continue in that position only if there was substantial improvement in the performance of your duties.

3. Since then, several events have intervened which, when combined with your prior lack of performance and other job difficulties, have led me to conclude that I must dismiss you from your position effective March 7, 1984. On Friday, February 24, 1984, I received the audit report on the Review of Inmate Group Canteens at Waupun Correctional Institution (WCI) and discussed it with John Paltz, John Torphy and Steve Kronzer. (A copy of the report is attached hereto and incorporated herein by reference.) On Monday, February 27, 1984, I met with Ritchey Porter, the Chief of the Section of Industrial Operations, who resigned. Mr. Porter reports directly to you. Specifics which Mr. Porter cited are discussed below in this letter.

4. On March 5, 1984, a predisciplinary meeting was held during which you were given an opportunity to respond to the reasons for your discharge as set forth herein.

5. I have considered the information available to me, including what you provided on March 5, 1984, and your job performance with the Division of Corrections, and having discussed my decision with Ms. Reivitz and Mr. Torphy, I have determined that you should be discharged from your employment because (1) in carrying out your responsibilities as Superintendent of the Waupun Correctional Institution, you allowed a situation to develop and exist that jeopardized the safety and rehabilitation of inmates and the efficient operation and security of the institution, and (2) for violating the Department Work Rules 1 and 5:

No. 1: Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.

No. 5: Disorderly or illegal conduct including, but not limited to, the use of loud, profane or abusive language; horseplay, gambling; or other behavior unbecoming a state employe.

More specifically, as follows:

While you were Superintendent of the Waupun Correctional Institution, concessions for the sale of canteen items were given to various inmate groups. (See Background on page 2 of the audit.) Mr. Victor Vaade, the Business Manager at WCI, informs me that as concessions for canteen items were transferred to inmate groups, the fiscal control and authority were removed from the business office at WCI. This began at least as early as 1981 and continued into 1983. Not only did you remove from the business office that authority and responsibility, but you failed to establish procedures designed to ensure that inmate group financial activities were adequately monitored and controlled and also failed to determine what monitoring and control was in fact given.

As a result, there were little or no controls over the operation of these inmate group canteens. There were no controls over pricing of items sold by the groups, with the result that excessive prices, sometimes as much as double what would be paid in the community or in an institution concession, were paid by inmates, many of whom could ill afford such prices. The inmates who wished to purchase items in the institution had to buy from the group concession because the institution canteen was not permitted to compete with the inmate group concessions.

Because of the lack of institution oversight and control, there were other serious violations of statutes and administrative rules.

Inmate groups made loans to other inmate groups. Individual inmates made loans to groups. Inmate groups employed and paid wages to individual inmates who were already on the institution inmate payroll. Purchases were made through the use of a coupon system without adequate record-keeping by the groups of purchases made. Purchases of goods for the concessions were made by inmates without any staff monitoring or control from the business office.

Because of the lack of adequate records, the Department Internal Audit Office concluded that the inmate group concessions were "unauditable." Because of this, there is much that is unknown about the activities of

inmate groups. Only in the coming months and years will we know whether, and to what extent, the State has incurred liability because of the activity of inmate groups. Because of the lack of records, we will never know how group funds were in fact disbursed. We do know, however, that some funds from group concessions were paid directly to group members and purchases were made for inmates placed in segregation. We know that grants in amounts as high as $8,000 were made to groups and never deposited in the institution accounts. We do not know how these sizeable amounts were spent.

12. Taken together, this lack of control over inmate groups was a most serious violation of your responsibility as Superintendent at Waupun. As a consequence, inmate groups were allowed to gain an impermissably high degree of influence and control over the inmates, which is an element of institutional life directly related to the extremely important objectives of inmate rehabilitation and institutional security. The groups abused this influence both in their dealing among themselves, and with individual inmates as well. The actual and potential consequences of your allowing inmate groups to gain this influence and control are obviously most serious. It jeopardized the safety and rehabilitation of inmates, the safety of staff and the effectiveness of the performance of their duties, and the security of the institution. It permitted inmates to have control over other inmates; it permitted groups' power over other groups. It created the potential for extortion and for groups and individuals to become involved in power struggles with one another. Indeed, what was going on with respect to group funds only began to come to light as the result of an assault of one inmate upon another. The reason for the assault was a dispute over the use of funds from the group canteen concessions. Problems of inmate attitudes and power and of staff morale problems resulting from the situation have thus been created that will take substantial time to deal with effectively.

13. This serious disregard for the security of the institution is directly attributable to you as Superintendent at Waupun. Your actions have directly violated Wis. Stat. ss. 46.08, 46.09, 46.064 and 46.065. The actions also violate HSS 309.45, 309.46, 309.48, 309.52, and 309.55, Wis. Adm. Code.

14. Since you became Director of the Bureau of Program Services, you have missed many important deadlines and failed to perform some important tasks.

15. In September of 1983, in a meeting with Steve Kronzer, I directed you to prepare program implementation plans for Industries, Farms, and the Drug and Alcohol Abuse Program. The deadline was late December of 1983. Only the Farms Plan was ready on time and virtually all of the work on this plan had been done by Bob Wagner of the Division of Policy & Budget.

16. New deadlines in mid-January were set for the Industries and Drug Plans. They were finally received on February 21, 1984.

17. On September 20, 1983, Steve Kronzer, in writing, directed you to review, comment and develop a work plan on the Medium Range Plan Review in the areas of literacy tutoring and statewide adult vocational planning. The deadline was October 14, 1983. No work plan has been forthcoming.

18. As part of our inmate work initiative, I contacted every department in State government asking that they identify jobs inmates could perform. You were assigned as the contact person, and you were contacted by the Department of Administration. Because you failed to follow-up, many potential inmate jobs were lost. Your failure to respond was communicated to us by Deputy Secretary John Torphy in February after his discussion with Mr. Thomas Alt, Deputy Secretary of the Department of Administration.

19. All of these instances are examples of your inability to get things done. These, when combined with your inappropriate behavior set forth below, often directly contrary to my instructions, indicates that you will continue to be unable to perform tasks assigned to you. Your behavior has seriously undermined your ability to work with those in the Division, including your subordinates, as well as staff in the institutions.

20. For example, I am informed by John Rehrauer, Assistant Camps Superintendent, that on September 26, 1983, you observed an Oneida Camp employee changing a tire on a personal car. You were properly concerned about this. However, you did not contact the Oneida Camp Superintendent about the matter. Rather, you ordered the employee's supervisor, John Vomastic, to Madison the following Monday, even though Mr. Vomastic did not report to you but rather to Phil Macht, the Oneida Camp Superintendent.

21. I am informed by the Fox Lake administration and Mr. James Mathews that you visited prison farms at Fox Lake and Winnebago at night and on weekends without checking in with the camp Superintendent or any other camp staff. By wandering around the grounds without checking in, you caused great concern among security staff about the presence of a stranger on camp grounds at odd hours. This caused the staff to leave their posts to check out who you were, itself creating security problems at the camps. This lack of concern for camp security and lack of courtesy has seriously alienated camp staff with whom you would be expected to work closely in the fulfillment of your farms responsibility.

22. You have instituted various limits on your staff which seriously jeopardize their ability to do their jobs. You required your top staff to make records of all phone calls and meetings with people not in the Bureau, shown by day and hour. You required staff to make records of all conversations with persons not at their peer level. This seriously jeopardizes the ability of staff to work effectively with those with whom they must work. For example, to require, as you have done, central office staff in education to make records of all conversations with educators in the institutions

with whom they work so closely, is little more than harassment and makes it very difficult for them to communicate freely and openly with their institutional counterparts. It has a similar effect on the staff outside the Bureau with whom they work. On January 30, 1984, Steve Kronzer asked you to put in writing a policy on communications for the Bureau which clarified communications between Bureau staff and other staff outside the Bureau which he could review prior to distribution. This request was reaffirmed on February 17, 1984. On February 28, 1984, a memorandum was received from you to your section chiefs, dated February 23, 1984, which deals with communications which appear to have been distributed to your section chiefs without the required prior review by Steve, and which inadequately addresses the communications issues I have described.

This deteriorating situation with staff due to your inappropriate behavior culminated in the resignation of Ritchey Porter. He cited your continued harassment and lack of support and direction from you as the reason for his resignation. Mr. Porter's letter of resignation stated that, among other things, (1) you had directed him to avoid controversial situations, always let decisions be made by the next level of management and keep all communications verbal; (2) you "lashed out at him" at a February 17 staff meeting because of his request for a contract expense, even though similar contract expenses had been previously approved by the Division; and (3) you announced that in addition to existing weekly reports, you wanted a new weekly "Accountability and Time Report of all Telephone Conversations and Meetings Shown by Day and Hour" because you had tried this at Waupun and "everyone really 'hated it.'"

These incidents and actions reflect the fact that your relationships with staff in the Division of Corrections has so deteriorated in terms of communication, interpersonal relations, leadership and morale, that it is clear you will be unable to perform any management function effectively.

For these reasons, I hereby dismiss you from your position pursuant to the authority delegated to me by Linda Reivitz. If you do not believe this decision is based on just cause, you may file an appeal with the State Personnel Commission within 30 days of the effective date of this decision or notice thereof.

Sincerely,

Walter J. Dickey
Administrator

WJD/bb