

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 \*  
 JANET S. THOSTENSON, \*  
 \*  
 Appellant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
 \*  
 Respondent. \*  
 \*  
 Case No. 85-0229-PC \*  
 \*  
 \*\*\*\*\*

INTERIM  
 DECISION  
 AND  
 ORDER

This matter is before the Commission as an appeal of a discharge decision. At the prehearing conference held on February 12, 1986, the appellant moved for immediate reinstatement to her former position, alleging that the letter of discharge provided her with inadequate notice. A briefing schedule was established.

Appellant's motion arises from the language of §230.34(1)(a) and (b), Stats., which require an appointing authority to furnish written reasons for the discharge of an employe with permanent status in class. Neither the statutes nor the administrative code supply any additional interpretation 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 Richley 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/

In the more recent disciplinary notice case of Israel v. DHSS, 84-0041-PC (7/11/84), the Commission adopted a standard of whether the notice is "sufficiently specific to allow the disciplined employe to prepare a defense."

In the present case, the respondent issued appellant a two page letter dated November 15, 1985, notifying the appellant that she was being discharged and reasons for the action. A copy of the discharge letter is attached to this decision. The paragraphs have been numbered for easier reference.

As a general matter, the discharge letter need not be so specific as to provide answers to all questions that an appellant may pose regarding the basis for the discharge. The employing agency is certainly not required to attach a copy of its disciplinary investigation file to the discharge letter, nor is the agency required to provide the appellant with an analysis of the rule under which the discipline was imposed or a history of that rule. The employing agency is not required to anticipate the defenses that an employe may advance and to provide in the discharge letter, all those facts that are necessary to those defenses.

It is helpful to place the appellant's allegations in perspective by contrasting this case to that of Richey v. Neenah Police & Fire Commission, 48 Wis. 2d 575 (1970). As noted above, the notice in that case simply stated that Mr. Richey "did on the 4th day of March 1969, at approximately 9:30 p.m. conduct himself in a manner unbecoming a police officer." The court found that notice to have been sufficient. By comparison, the appellant's notice described the allegedly improper activity or condition, specified the three work rules allegedly violated and described individual policies and statutory provisions that were also alleged to have been violated.

Appellant contends that paragraphs 2 and 3 fail to state when she is alleged to have taken foodstamps to her apartment. A precise date, even if known to the respondent, is not a basis for the discharge action and its absence does not effectively prevent the appellant from preparing a defense. The key allegation is that the food stamps were in the appellant's apartment, not the date they may have been placed there.

Appellant also contends that the discharge letter is not sufficiently specific as to the policies described in paragraph 5, "prohibit[ing] the

removal of food stamps from the State Office Building at 1 West Wilson Street without authorization:"

When were these policies established? To whom and in what manner were these policies communicated? Who could be contacted to investigate the claim that such a policy existed? How was authorization for removal of food stamps to be obtained? Did others engage in a course of conduct that could have led the appellant to believe that her actions were not in violation of the policy? Did the policy exist? None of these questions can be answered, nor can they reasonably be investigated, based on the information provided to appellant in the discharge letter.

While it is true that the discharge letter does not answer these questions, that does not mean that the appellant is prevented from preparing a defense. The Commission disagrees with the appellant's contention that these questions cannot reasonably be investigated.

The appellant argues that the mere quotation of Work Rule #1 in paragraph 4 is insufficiently specific:

The appellant cannot determine from this notice whether it is alleged that she violated verbal instructions or written instructions. She can't determine whether she is alleged to have been inattentive to the instructions, verbal or written; or directly disobeyed the instructions. Who gave the instructions anyway? Obviously, if one is to prepare a defense related to excessive discipline inattentiveness is far different from direct contravention of an order. The prejudice in preparation here is obvious.

However, paragraph 4 must be read in conjunction with the following paragraph: the reference in paragraph 5 to violation of "established policies" indicates the basis for the alleged violation of Work Rule #1. Although it doesn't indicate whether the policies were provided to the appellant verbally or in writing, the description of the policies permits the appellant to prepare a defense as noted above.

The appellant goes on to contend that instead of merely alleging, generally, that appellant's actions violated both Wisconsin's misconduct in

public office statute (§946.12, Stats.) and 7 U.S.C. ¶2024, the discharge notice should have specified which subsections or phrases of those sections were violated. Although increased specificity would assist the appellant to prepare a defense, it is not necessary to the preparation of appellant's defense.

The appellant suggests that the discharge notice had to have indicated why (and how) the respondent selected discharge as the appropriate level of discipline:

Finally, as to the entire scenario, are we told why this discipline was imposed? Was the appellant's work record reviewed? Was there adherence to the employer's own policy of progressive discipline? Was a suspension considered? A demotion? Why or why not? We can only guess.

The lack of answers to these questions does not prevent the appellant from arguing, as a defense to the discharge, that discharge was an excessive form of discipline. It does not prevent the appellant from comparing appellant's level of discipline to that imposed against other employees of the respondent.

For the reasons set out above, the Commission issues the following order.

ORDER


The appellant's motion for reinstatement is denied.

Dated: April 16, 1986 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

KMS:jmf  
ID5/1  
Attachment

  
LAURIE R. McCALLUM, Commissioner

Parties:

Janet S. Thostenson  
226 Randolph Dr., #221B  
Madison, WI 53717

Linda Reivitz  
Secretary, DHSS  
P. O. Box 7850  
Madison, WI 53707



State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF COMMUNITY SERVICES

1 WEST WILSON STREET  
P. O. BOX 7851  
MADISON WISCONSIN 53707

RECEIVED

November 15, 1985

FEB 12 1986 hand-delivered

PERSONNEL  
COMMISSION

Ms. Janet S. Thostenson  
226 Randolph Drive #221B  
Madison, WI 53717

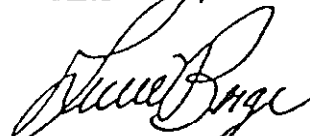
Dear Ms. Thostenson:

- 1 You are hereby discharged from your employment with the Department of Health and Social Services for violating the Department Work Rules set forth below. The discharge is effective November 18, 1985.
- 2 The reasons for your discharge are as follows. On October 31, 1985, staff of the Secretary's office were advised by Detective David Cochems of the Dane County Sheriffs Department that a search warrant had been executed on your apartment. As a result of the search, several items were seized. Among the items seized were two boxes containing food stamps of various denominations. As a result of a second search of your apartment, three boxes and one white plastic shopping bag containing food stamps of various denominations and miscellaneous material relating to the food stamp program were seized. Although the bulk of the food stamps seized were cancelled or voided, one of the boxes contained approximately \$41.00 in negotiable food stamps.
- 3 On November 4, 6, and 11, 1985, an investigatory interview and two pre-disciplinary interviews were held respectively. At the interviews you were represented by legal counsel. The items and material seized from your apartment were described for you. During the interviews you admitted to having removed on numerous occasions without authorization food stamps from Bureau of Fiscal Services and taken them to your apartment. In addition you admitted to being in possession of and having removed without authorization from the Food Stamp Center the food stamps seized from your apartment.
- 4 Your conduct is in violation of the following work rules:  
  
Work Rule #1: Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
- 5 Established policies of the Department prohibit the removal of food stamps from the State Office Building at 1 West Wilson Street without authorization. You violated these policies when you removed without authorization food stamps from the Bureau of Fiscal Services and the Food Stamp Center and took them to your home.

Janet S. Thostenson  
November 15, 1985  
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- 6 Work Rule #3: Stealing or unauthorized use, neglect, or destruction of State-owned or leased property, equipment or supplies.
- 7 Your removal without authorization of food stamps from the Food Stamp Center and taking them home constitutes theft and unauthorized use of state property.
- 8 Work Rule #5: Disorderly or illegal conduct...or other behavior unbecoming a state employee.
- 9 Your removal without authorization of food stamps from the Food Stamp Center and taking them home constitutes misconduct in public office and violates 7 U.S.C. §2024.
- 10 Sections 230.34(1)(a) and 230.44(1)(c) of the Wisconsin Statutes provide that if you do not feel that the discharge is for just cause, you are entitled to appeal the discharge to the State Personnel Commission, 121 E. Wilson Street, Madison, WI. 53702. Your written appeal must be received by the Commission within thirty (30) calendar days of its effective date or within thirty (30) calendar days after you have received notice of the discharge, whichever is later.

Sincerely,

  
Gerald Berge  
Administrator

cc. Personnel File  
Joel Winnig ✓