

JERROLD H. BENTS,

Petitioner,

DECISION

v.

**RECEIVED**

WISCONSIN PERSONNEL COMMISSION,  
and OFFICE OF COMMISSIONER OF  
BANKING,

APR 10 1989

Case No. 88 CV 4234

Respondents.

**Personnel  
Commission**

This is a proceeding commenced under ch. 227, Stats., and Sec. 230.45(1)(a), Stats., to review a decision and order of the Personnel Commission (Commission) dated July 13, 1988, which determined that the Office of the Commissioner of Banking had just cause to discharge the petitioner, Jerrold H. Bents.

Petitioner contends that the Commission's Decision is erroneous in that it is based upon (1) findings of misconduct unsupported by substantial evidence; (2) findings of misconduct that were not originally charged to petitioner in his letter of discharge; and (3) incorrect interpretations of the law concerning "just cause" for discharge of civil service employees.

**STANDARD OF REVIEW**

The scope of the Court's review in this matter is controlled by Sec. 227.57, Stats., which states (in relevant part):

(5) The Court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a

provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) ..The...court...shall set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

On judicial review under ch. 227, Stats., an administrative agency's Findings of Fact are conclusive if supported by substantial evidence in the record. Chicago, M., St. P. & P. RR. Co. v. ILHR Dept., 62 Wis. 2d 392, 396, 215 N.W.2d 443 (1974). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Gateway City Transfer Co. v. Public Service Comm., 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948).

#### DECISION

The substantive provision of law controlling the Commission's action is Sec. 230.34(1)(a), Stats., which reads (in relevant part):

An employee with permanent status may be ... discharged ... only for just cause.

A finding of "just cause" will be upheld on review if there exists substantial evidence that (a) the employee committed the conduct complained of and (2) a sufficient rational nexus existed between the misconduct and the efficiency of the employer or the continued performance of the employee's duties. Safransky v. Personnel Bd., 62 Wis. 2d 464, 472-73, 215 N.W.2d 379

(1974).

Petitioner maintains that two specific findings made by the Commission are not supported by substantial evidence and, therefore, may not be invoked to support petitioner's discharge. Finding 8a reads

8. Appellant inadequately performed his duties as chief fiscal officer of the OCB:

a. 1984 annual report data. The 1984 Annual Report for OCB contains a page entitled "Abstract of Earnings and their Distribution of State and Mutual Savings Banks and Trust Companies at the close of Business..." which is stripped verbatim from the 1982 Annual Report. Appellant was the immediate supervisor over Gail Propson who helped prepare these numbers and had responsibility for reviewing her work. He also helped put together the final report.

Petitioner claims the above finding is erroneous because it "implies that petitioner bears some responsibility for the mistake".

Petitioner does not deny that, as administrator of the Administrative Division, he was the direct supervisor over Ms. Propson. Nor does petitioner deny supplying input into the report, albeit in a different section. In addition, Mr. McKenzie testified that petitioner was in a position to review the accuracy of the report in question. The Court concludes there was substantial evidence to support the finding that petitioner inadequately performed his administrative duty as chief fiscal officer.

Petitioner next contends that the Finding regarding

his failure to handle a smoking complaint is also not supported by substantial evidence. The pertinent portion of this finding states:

"...Riedasch had complained to appellant several times about the problem and appellant took no steps to deal with it, despite having told her he had reported it and done everything within his power, when he finally took some action the day that Riedasch brought the matter to Mckenzie's attention, one of his steps was to go to the office manager, a person who had no supervisory authority over the offending smoker." (Final Decision and Order at 3-4)

Petitioner's objection to the above finding is that there is no evidence that Ms. Riedasch "repeatedly" complained to petitioner. The Court finds no substantial evidence in the record to indicate that Ms. Riedasch complained to petitioner more than once. In this regard, the findings is inaccurate and because it implies a repeated failure to act on petitioner's part it must be stricken.

Petitioner next contends that finding 11a must be deleted because it is based upon uncharged conduct and, therefore, provided petitioner inadequate notice of the charge. This Court agrees.

The issue before the Commission was framed as follows:

Are the allegations contained in the letter of discharge true, and if so, do they constitute just cause for the discharge of the appellant?

At no point in either the pretermination letter or the notice of discharge was the incident described in finding 11a mentioned, let alone raised as an instance of insubordination. Therefore, it cannot be used to justify petitioner's discharge and is hereby deleted.

Petitioner's objections to the paragraph introductions of findings 8, 10, and 11, are without merit.

Given the recognized expertise of the Commission in the area of employment status, it is appropriate to remand this matter to the Commission. On remand, the Commission must determine, consistent with this Decision, whether the nexus standard enunciated in Safranshy has been satisfied and, if so, whether discharge was the appropriate penalty. The latter finding involves a value judgment making the Commission the body more appropriate to make that decision. See Deep v. Personnel Comm'n 140 Wis. 2d 32, 409, N.W.2d 142 (Ct. App. 1987).

On remand, petitioner argues that the Commission should be required to measure petitioner's performance against the level of performance from other administrative officers in his position.

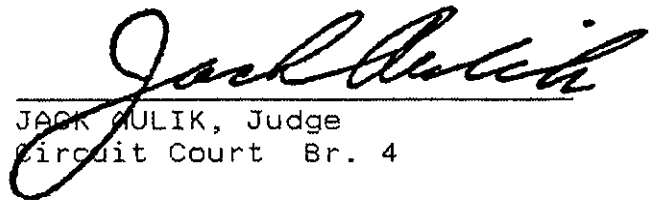
Petitioner can cite no published authority for such a requirement and this Court finds none. Protection against arbitrary action is found in the standard adopted by the Commission in determining whether discipline imposed is appropriate. That standard involves a two part analysis: (1) The weight or enormity of the employee's offense or dereliction, including the degree to which, under the Safransky test, it did or

could reasonably be said to impair the employer's operation, and  
(2) the employee's work record with the respondent.

The case is remanded to the Commission for proceedings not inconsistent with this opinion.

Dated at Madison, Wisconsin this 3 day of ~~March~~ *April*, 1989.

BY THE COURT:

  
JACK GULIK, Judge  
Circuit Court Br. 4

cc: Atty. Richard Graylow  
Atty. Bruce Olsen, AAG