appeal from Eft v. DHSS, 86-0146-PC, 11/23/88
rehrg den 1/12/89

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Personnel Commission

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MARTIN EFT,
Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,
Respondent.

MEMORANDUM DECISION AND ORDER
Case No. 89CV644

BEFORE THE HON. ROBERT A. DE CHAMBEAU, CIRCUIT COURT BRANCH I

This matter is before the court on petition for administrative review under Chapter 227. Petitioner seeks to overturn a determination of the Wisconsin Personnel Commission (hereinafter "Commission"). In that decision, the Commission adopted its examiner's proposed decision of August, 1988, which affirmed the Department of Health and Social Services, Division of Vocational Rehabilitation's (hereinafter "Division"), decision to demote the petitioner from field office supervisor to an analyst position which he now occupies. After careful review, the court concludes that the decision below must be upheld.

COMMISSION'S FINDINGS AND CONCLUSIONS

Petitioner became an employee of the Department of Health and Social Services, Division of Vocational Rehabilitation (DVR) in 1960. His initial position was that of a rehabilitation counselor in the Milwaukee office of the Division of Vocational Rehabilitation. In 1978, he became a Regional Administrator for the cities of La Crosse, Eau

Claire, and Ladysmith, Wisconsin. Later he was reassigned to the geographic area of Green Bay, Oshkosh, Sheboygan, and Fond du Lac, Wisconsin.

In 1982, petitioner was laid off from his administrator position. After the lay-off, he accepted a supervisor position limited to his prior pay rate. In January, 1984, petitioner was reassigned as a field office supervisor in Portage, Wisconsin. As field office supervisor, his duties included supervising eleven staff people, supervising and monitoring the field office Vocational Rehabilitation programs, managing the field office budgets, developing, planning and implementing area Vocational Rehabilitation programs, and implementing public relations programs and interagency coordination and resolution of area problems.

Mr. Rodney Van Deventer was petitioner's regional administrator and supervisor until January, 1986, when he was replaced by Mr. Olaf Brekke. At the time Brekke replaced Van Deventer, Van Deventer told Brekke that petitioner needed close supervision.

On July 2, 1986, Brekke wrote petitioner informing him that as of July 7, 1988, he was demoted from Supervisor 2 in the Portage office to a Program Analyst 4 in the division's central office in Madison, Wisconsin. In that letter, respondent stated that appellant had violated work rules 1, 3, 5, and 7, while functioning as supervisor in the Portage office. The rules, which it is reported petitioner violated over the course of nine different incidents, are as follows:

1. Disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directives or instructions.

3. Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment, or supplies.

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 employee.

7. Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

The Commission found that as early as a year before the letter of demotion, respondent had expressed concerns to petitioner about his work performance. In October, 1985, petitioner was suspended for one day for violating work rule 1. In addition, petitioner was not given discretionary pay increases and other pay increases were delayed.

The Commission found that after taking over as supervisor of the Portage field office, Mr. Brekke closely scrutinized petitioner's work performance and discussed his concern about such performance.

By letter dated June 6, 1986, respondent gave notice to petitioner's attorney that a predisciplinary hearing had been scheduled for June 12, 1986. Petitioner attended the hearing with his attorney. On June 13, 1986, Brekke informed his supervisor, Ken McClarnon that the investigation had resulted in a determination that appellant had violated DHSS work rules 1, 3, 5, and 7. Brekke recommended a five-day suspension without pay and a demotion to a non-field supervisory staff position. On July 7, 1988, petitioner was

demoted from Supervisor 2 to Program Analyst 4.

The Commission found that:

a. Petitioner failed to provide direction, offer helpful analysis or provide timely monitoring of management case work and address general work-related problems.

b. Petitioner instructed homecraft teacher not to provide instruction to clients in Richland County until dispute with field office supervisor was resolved.

c. Petitioner improperly reassigned counselor caseloads in Juneau/Columbia and Sauk counties.

d. Petitioner failed to show concern and sensitivity to sexual assault and harassment victims.

e. Petitioner failed to provide his supervisor with a complete and accurate report about a sexual assault victim.

The Commission also found that the evidence was inadequate in regard to the allegation that petitioner failed to maintain good working relationships with community service providers and failed to differentiate significant issues form trivia.

In addition, the Commission distinguished petitioner's conduct from other DVR employes whose discipline was comparatively less severe. In comparison, the Commission stated that, "[N]one of the cases offered by appellant offered in this connection evinced the depth of deception, deceit and inveiglement of other parties found in the instant matter before the Commission." In conclusion, the Commission found that, "[A]ppellant's conduct impaired his performance of his assigned duties as field office supervisor and reduced the efficiency of DVR."

In its conclusions of law, the Commission found that

the respondent had proved by the clear preponderance of the evidence that the imposed discipline was for just cause, and was not excessive.

On January 12, 1989, the Commission denied petitioner's petition for rehearing and this proceeding followed.

STANDARD OF REVIEW

The right of judicial review is entirely statutory. Orders of administrative agencies are not reviewable unless made so by statute. Wis. Environmental Decade v. PSC, 93 Wis. 2d 650, 657, 287 N. W.2d 737 (1980). Sections 227.52, 227.53, and 227.57, Stats., govern this Court's scope of review of the Commission's determinations.

QUESTIONS OF LAW

This court is not bound by an administrative agency's determination of a question of law. Nottelson v. DILHR, 94 Wis. 2d 106, 115, 287 N.W.2d 763 (1980). An administrative agency's conclusion of law will be sustained if it is reasonable, even if an alternative view is equally reasonable. Kenwood Merchandising Corp., et al. v. LIRC, 114 Wis. 2d 226, 230, 338 N.W.2d 312 (Ct. App. 1983). Great weight is to be accorded to the construction and interpretation placed on a statute by the administrative agency charged with the duty to apply such statute. Wis. Environmental Decade v. ILHR Dept., 104 Wis. 2d 640, 644, 312 N.W.2d 749 (1981). Some deference must be given to the agency in the areas in which it has specialized knowledge and

expertise. Therefore, reviewing courts should not upset an agency's conclusions of law if any rational basis for it exists. Dairy Equipment co. v. ILHR Dept., 95 Wis. 2d 319, 327, 290 N.W. 330 (1980).

QUESTIONS OF FACT

The standard of review differs as to an agency's findings of fact. An agency's findings of fact will not be disturbed upon judicial review if "supported by substantial evidence in the record." Section 227.57(6), Stats. "Substantial evidence", for purposes of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Gilbert v. Medical Examining Bd., 119 Wis. 2d 168, 195, 349 N.W.2d 68 (1984). Substantial evidence does not mean a preponderance of the evidence, but rather whether taking into account all the evidence on the record, reasonable minds could arrive at the same conclusion. Madison Gas & Elec. Co. v. PSC, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982).

APPLICABLE STATUTES

Section 230.34(1)(a), Stats., provides:

> An employee with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides:

> Demotion, layoff, suspension or discharge. If an employe has permanent status in class, the employe may appeal

a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleged that the decision was not based on just cause.

DECISION

Petitioner requests this court to reverse the Commission's Decision and Order because petitioner was not given a fair and impartial review. Ultimately, petitioner is seeking reinstatement to his former pay grade with benefits. Respondent, on the other hand, claims that there was "just cause" for the demotion in accordance with Section 230.34(1)(a), Wis. Stats.

The standard of "just cause" is defined in State ex rel Gudlin v. Civil Service Commission, 27 Wis. 2d 77, 87, 133 N.W.2d 799 (1965) as:

> ... whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works ... also... that conduct of a municipal employee ... in violation of important standards of good order ... so substantial, or repeated, flagrant or serious that his retention in service will undermine public confidence in the municipal service.

Having reviewed the Commission's findings of fact, this court finds that there is substantial evidence in the record to support the Commission's factual determinations. Therefore, I will not disturb the commissioner's findings of fact.

In addition, giving consideration to the Commission's findings of fact, and giving due deference to the agency's experience and specialized knowledge, the court finds the Commission's conclusion of law that petitioner was demoted for just cause is not erroneous and is reasonable. This

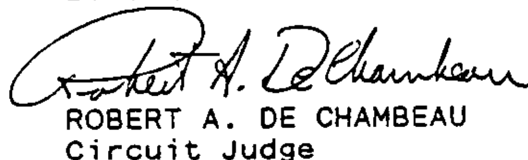
court agrees with the Commission in that petitioner's conduct in the hiring scheme alone was sufficient to warrant the discipline imposed. It is apparent from the record that the commission carefully considered and weighed all the evidence and, in doing so, they reached a decision which I find to be reasonable.

Based on this court's review of the entire record in this matter, its reading of the briefs, its study and consideration of the relevant statutory and case law, this court concludes that the Commissions findings of fact are supported by substantial and credible record evidence and that its conclusions of law are reasonable and are, therefore, not erroneous. Therefore, pursuant to sec. 227.57(2), Stats., this court affirms the commissions's Findings of Fact, Conclusions of Law and Order under review in this case.

IT IS ORDERED, ADJUDGED AND DECREED that the Commission's Findings of Fact, Conclusions of Law and Order, Case No. 86-0146-PC, dated November 23, 1988, are hereby affirmed.

Dated this 10 day of May, 1990.

BY THE COURT:



ROBERT A. DE CHAMBEAU
Circuit Judge