STATE OF WISCONSIN PERSONNEL COMMISSION

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MICHAEL A. LIETHEN,

Appellant,

v.

Chairperson, WISCONSIN GAMING COMMISSION,

Respondent.

Case No. 93-0095-PC

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INTERIM DECISION AND ORDER

This appeal arises from a discharge decision During a prehearing conference held on August 19, 1993, the parties agreed to submit briefs on the following preliminary issue·

> Whether, in its effort to meet its burden of proof, respondent is restricted to that conduct of appellant specifically described in the July 1, 1993, discharge letter, or whether the respondent may also rely on that conduct described in the letter dated August 17, 1993.

The following facts appear to be undisputed

1. Prior to July 1, 1993, appellant was employed by respondent as the director of its Office of Indian Gaming. Appellant's position was classified as Attorney 14-Management.

2. On May 28, 1993, John Tries, who is Chairman of the Wisconsin Gaming Commission, met with appellant and informed him of concerns regarding appellant's work performance. Appellant was placed on paid leave pending the outcome of inquiries into his performance.

3. Commencing early in June of 1993, there were numerous telephone conversations and letters between appellant's attorney and representatives of respondent regarding appellant's employment.

4. By letter dated June 11, 1993, appellant was informed that respondent was "considering taking disciplinary action, which could include termination for just cause... for certain acts of misconduct as set forth in the attached documentation." The 3 page "Attachment" listed four "areas of general concern, twenty-three "specific examples of inadequate job performance,"

five "serious problems" regarding appellant's previous work as General Counsel for the Wisconsin Lottery, and four areas in which appellant exhibited a "lack of knowledge of and consideration for the rules and regulations of the Commission."

5. Appellant subsequently responded in writing to the allegations, and in many cases requested further information or clarification of the allegations. By cover letter dated June 15, 1993, respondent provided what it described as "all supporting documents regarding the allegations against Mr. Liethen."

6. A meeting regarding appellant was held on June 23, 1993, between appellant's attorney and representatives of respondent. The meeting was characterized by respondent as a pre-disciplinary meeting and by appellant as a pre-determination meeting.

7. Appellant's counsel and respondent exchanged correspondence subsequent to the June 23rd meeting.

8. By letter from respondent dated July 1, 1993, appellant and his attorney were advised

> The purpose of this letter is to inform you that Michael Liethen is terminated from employment with the Wisconsin Gaming Commission ("Commission") effective immediately upon transmittal of this letter. While subsequent letters will set forth all bases for this termination, there is one recent action which necessitates this immediate action on our part.
>
> Both Attorney McQuillen [appellant's attorney] and Mr. Liethen's physician have previously advised us, on numerous occasions, both orally and in writing, that Mr. Liethen was under a physician's directive not to attend to any work-related matters. This rationale was used as a basis for Mr. Liethen's being unable to address any matters with Commission personnel. By letter of June 24, 1992 from myself to Attorney McQuillen we noted that Mr. Liethen had been served with a subpoena requesting documents he had generated in his capacity as Director of the Office of Indian Gaming. Consequently, this work product was the property of the Commission. We stated in the June 24, 1993 letter that, consistent with the forgoing request that Mr. Liethen not attend to job-related duties, we would not contact him regarding the subpoena. We stated both the Commission and the Department of Justice would await Mr. Liethen's Contact, and requested that we be advised as to how Mr. Liethen wished to proceed relative to the subpoena.

> It has come to our attention that Mr. Liethen, unilaterally and without contact with this office or the Attorney General, has provided documents pursuant to this subpoena which are the product of the State of Wisconsin. Provision of these documents is inconsistent with the position of the Commission, which has claimed a privilege regarding these documents and has attempted to quash the subpoena. As a licensed attorney, Mr. Liethen should be well aware of the ramifications of responding to a subpoena without consulting with either the custodian of the documents, or counsel for the State. His unilateral action has resulted in the provision of what the Commission regards as confidential documents to third persons. It has also undermined the ability of the Commission to maintain its motion to quash this subpoena. Mr. Liethen's actions have compromised the on-going investigation which was the subject of the documents released.

9. The appellant's conduct which was specifically described in the July 1st letter occurred after the June 23rd meeting and, therefore, was not discussed at that meeting.

10. On July 2, 1993, appellant appealed the discharge to the Commission pursuant to §230.44(1)(c), Stats.

11. By letter dated July 16, 1993, the parties were notified that a pre-hearing conference would be held on August 19, 1993.

12. In a letter dated August 17, 1993, to appellant and his attorney, respondent "set forth all grounds known to date by the Wisconsin Gaming Commission... supporting the termination of Mr. Liethen's employment with the Commission." The letter includes the following:

> By my letter to you dated July 1, 1993, in which we informed you of the Commission's decision to immediately terminate Mr. Liethen, I also informed you of one of the bases for the commission's conclusion that just cause for this termination existed. As more information concerning Mr. Liethen's job performance and response to the subpoena becomes available, it may be necessary to supplement this and our previous response.

The letter then went on for 6 and 1/2 pages to describe four "general" allegations relating to gaming certificates, four "specific" allegations relating to gaming certificates, three allegations relating to the "Arthur Andersen Audit," two allegations of "other actions taken without authority," five allegations of "insubordination," and four allegations of "incompetence."

DISCUSSION

Pursuant to §230.34(1)(a), Stats , an "employe with permanent status in class... may be... discharged... only for just cause " Notice of a discharge is required by §230 34(1)(b), Stats ·

> The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action

Here, the discharge was effective immediately upon transmittal of the July 1, 1993, letter. Pursuant to §230 34(1)(b), Stats., the respondent was required to provide appellant with the reasons for the discharge, in writing and *at that time*. Although the July 1st letter made reference to subsequently providing appellant with additional reasons for the action, the discharge was, according to the letter, necessitated by *one* recent action, i.e. the appellant's response to the subpoena There was nothing in the letter even generally describing other conduct which served as the basis for the respondent's action The clear requirement of §230.34(1)(b) precludes the respondent from now relying on reasons other than the one that was identified in the July 1st letter of immediate discharge.

While the respondent notes that previous decisions of the Commission have allowed the employer to rely on information shown to have been communicated to the employe or to have been known by the employe in determining the sufficiency of the notice of discipline, none of these cases have dealt with the situation present here where the notice only listed one reason for the discipline and respondent sought to add reasons at a later date. For example, in Asche v. DOC, 90-0159-PC, the three reasons listed in the notice were fairly general but specifics as to the reasons had been provided to the employe during the investigative and pre-disciplinary meetings. The written summaries from those meetings showed that the employe had understood the specifics. The Commission held that the disciplinary notice was sufficient with respect to the misconduct which it generally described, to the extent the appellant could be shown to have been provided the specifics of that misconduct at some earlier point in the disciplinary process

The present case is not one in which the misconduct was generally described in the letter of discipline, and specifically explained earlier in the

process. The July 1st notice was silent as to misconduct by appellant other than the incident involving the subpoena.

If respondent's position in this matter were adopted, an agency imposing discipline could issue a notice which was totally silent as to the reason for the action, and then, if an appeal was filed, could set forth the reasons for its action right up until the date of the hearing on the appeal.

The Commission recognizes that the respondent engaged in a lengthy predisciplinary process with respect to what it described as performance problems of the appellant. But if the respondent wished to rely on those "performance problems" as a basis for its July 1st termination decision, it had a statutory obligation to so notify the appellant. It did not do so until well after the time of the disciplinary action.[1]

The result reached here is consistent with the Commission's decision in Israel v. DHSS, 84-0041-PC, 7/11/84, which granted in part and denied in part appellant's motion to strike certain portions of the letter of discharge. In that case, the question was whether the notice was sufficient to permit the appellant to prepare a defense.

> [T] he 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.... Here, the Commission concludes that those portions of the letter found to provide insufficient notice must also be stricken.... 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's 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. (Emphasis added)

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[1] According to the respondent, no grounds were alleged in the August 17th letter that were not previously communicated to appellant or his attorney.

In the present case, and in light of the information provided in the July 1st letter, the respondent's August 17th letter is clearly an attempt to add new charges rather than to clarify charges which had, at the time of the discharge, been identified as reasons for the action Adding those reasons now would be contrary to the specific language of §230.34((1)(b).

ORDER

In seeking to meet its burden of proof in this matter, the respondent is restricted to that conduct of appellant specifically described in the July 1, 1993, discharge letter, and may not rely on that conduct described in the letter dated August 17, 1993.

Dated: October 20, 1993 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner