appeal from Garner v. DOC, 94-0031-PC, 11/22/94

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

W. JEAN GARNER,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

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PERSONNEL COMMISSION

Case No. 94-CV-013477

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MEMORANDUM DECISION

This matter is before the court on an appeal from a decision of the Wisconsin Personnel Commission, under Wis. Stat. s. 230.87 and ch. 227. The Commission's decision upheld the termination of W. Jean Garner's employment with the Department of Corrections (DOC). Ms. Garner asks the court to overturn the decision by finding that the DOC did not have just cause to dismiss her and acted arbitrarily in categorizing her work rule violations as Category B violations rather than the less serious category A, and, in an argument raised for the first time in its reply brief, that the DOC did not have adequate standards for making that determination.

An appeal under ch. 227 is not an opportunity for *de novo* review of the plaintiff's entire case, nor is it the time to bring up legal arguments for which there was no argument made at the hearing. It is, rather, a determination of whether the finding

made by the administrative agency is supported by substantial evidence in the record. When the court reviews an agency decision under Wis. Stat. s. 227.57 (6), it may not substitute its judgment as to the credibility or the weight of the evidence on a disputed finding of fact, but must consider impeaching or rebutting testimony. Bucyrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 418-19, 280 N.W.2d 142 (1979). If reasonable minds *might* reach the same conclusion as the agency, based on all of the evidence in the record, the decision will be upheld. Bucyrus-Erie, 90 Wis. 2d at 418; Madison Gas and Electric Co. v. Public Service Commission, 109 Wis. 2d 127, 133, 325 N.W. 2d 339 (1982). The job of the court is to look for evidence in the record, together with its reasonable inferences, that supports the agency's findings, not to find support for a different conclusion. Chilstrom Erecting Corp. v. DOR, 174 Wis. 2d 517, 525, 497 N.W.2d 785 (Ct. App. 1993). The Commission found just cause for the petitioner's termination, and this court finds substantial evidence in the record to uphold that decision.

The petitioner was an inmate complaint investigator at the Racine Correctional Institute from January 26, 1992 until she was terminated on March 4, 1994. Her position was classified as administrative. In a time period of six months, occurring between August of 1993 and January of 1994, she accumulated five category B work rule violations. She was given a letter of reprimand for the first violation, a one-day suspension for the second violation, and a three day suspension for the third violation. She appealed

the second and third violations to the Commission, which reduced the three day suspension to a two day suspension, but upheld the imposition of both disciplinary actions. The fourth and fifth violations were both cited in her letter of termination.

The petitioner appealed her termination, and a hearing was held on August 23rd and 24th, 1994, on the issue of whether there was just cause for her discharge. The subissue was whether the degree of discipline imposed was excessive. The Commission issued its Final Decision and Order (FDO) dated November 24, 1994, which accepted and adopted (as amended) the proposed decision and order incorporated therein. The Order consists of 39 findings of fact and three conclusions of law, and ultimately concludes that the DOC met its burden of proof and showed by a preponderance of credible evidence that there was just cause to terminate Ms. Garner, and affirmed the termination.

On appeal, the petitioner challenges that finding of just cause by now challenging the categorization by the DOC of the first, fourth, and fifth violations as violations of category B work rules, over different work rules that would have resulted in category A violations.

First Violation: The first problem in her challenge is that the Commission did not "review" the first violation, as it had never been appealed pursuant to Wis. Stat. s. 230.44. (FDO, para. 8 & n.7.) The Commission did, however, accept testimony regarding that violation because the DOC relied on it as a reason for Ms. Garner's termination. The Commission did not have jurisdiction to

overturn the *discipline* imposed for that violation because it was not appealed. (FDO p. 13, Ruling on Evidence.) For this reason, while this court considered it as a part of the overall review of the case, it also does not have jurisdiction to consider a specific challenge to the discipline imposed and/or change that discipline, even though the petitioner argues extensively for that change.

Fourth Violation: The petitioner maintains that the fourth Category B violation either should never have been charged, or if so, should have been charged as a violation of Work Rule #14, failure to give proper notice, rather than Work Rule #7, failure to provide accurate and complete information when required by management. The violation stemmed from a written request by the petitioner to "take the medical records from my appointment Monday in Chicago to Madison Tuesday, December 28, 1993. I do plan to report for work as I return from Madison." She neither went to Madison that day, nor did she return to work, nor did she call in to say she would not be returning.

Despite Ms. Garner's explanation for her failure to use the day as she said she was going to, i.e., that she was gathering medical records in Milwaukee for her IME as she had previously been instructed, finished late, and did not think to call in, there is substantial evidence in the record for the Commission to reasonably find just cause that this a Category B violation.

The petitioner's own request for the time off led her supervisor to believe she would be at work on December 28. According to the Guidelines for Employee Disciplinary Action,

improper notification of absence occurs if the employee calls in after the start of the scheduled shift up to the end of the shift. (R-68, III.A.2.b.) That is not what occurred here. The petitioner said she was coming to work, but never showed up, and did not call in. Her behavior expressly violated a category B rule: Absence Without Notice (No Call, No Show). (R-68, III.B.4.)

The argument that there is no standard to determine the difference between category A and B violations is fallacious. The petitioner is asking the court to go outside the standard to find a reason not to charge her with the rule she violated. The mitigating circumstances she cites--attempting to obtain medical records--are directly related to her own failure to follow a previous directive from her supervisor. Further, her argument that she was charged with category B violations because her supervisor "didn't like her" and would have been charged with category A violations if he had liked her is wholly without merit. The court finds that there is an express violation of the standard and substantial evidence in the record to uphold the Commission's finding of just cause in upholding this discipline.

Fifth Violation: Ms. Garner also argues that the incident that occurred on January 13, 1994 that resulted in a charge of insubordination should be reviewed by the court to find mitigating circumstances to justify a finding that the category B violation should not have been charged. As stated above, the court is to look for evidence that justifies the agency's finding.

The hearing examiner did evaluate the claim that her

supervisor, Mr. Cina provoked Ms. Garner into insubordination on January 13, and found facts in the record sufficient to refute that claim: Mr. Cina did not know that Ms. Garner's representative would not be available on the day he rescheduled the hearing, and reasonably expected her to be ready for a hearing the following day because it was only being rescheduled due to the fact that she called in sick on the day it was scheduled.

The Commission found that just cause existed for imposing discipline for the petitioner's insubordinate acts on January 13, 1994. Ms. Garner initially refused to provide the name of her mental health professional, and refused to return to her supervisor's office when instructed to do so. There is adequate support in the record for this finding.

Termination: The petitioner argues that she was fired because her category B violations should have been charged as category A violations, that her termination did not have anything to do with her job performance, and that the DOC did not have just cause to fire her.

In order to find just cause for termination, work rule violations must impair the efficient performance of the duties of employment. Safransky v. Personnel Board, 62 Wis. 2d 464, 475, 215 N.W.2d 379 (1974). Conduct which is not directly related to job duties must be more strictly construed to find just cause, so as to avoid arbitrary and capricious action. State ex rel. Gudlin v. Civil Service Commission, 27 Wis. 2d 77, 87, 133 N.W.2d 799 (1965). No accusation was made that the petitioner's actual job performance

merited her dismissal. Substantial evidence was presented that the efficient operation of her department, and thus the climate of the prison, was affected.

The hearing examiner anticipated strong disagreement to the finding of just cause for the termination when the insubordination charge was included, and found that just cause for the termination existed even if that charge was excluded. That finding was based on evidence of the petitioner's entrenched negative attitude toward her supervisor, and her past demonstration that lesser measures were ineffective to correct her behavior. (FDO, pp. 14-15.) The Commission supported the alternative analysis of the examiner, as does the court.

The corrective discipline utilized by the DOC provides that, upon the fourth Category B violation an employee may be discharged. (R-68, p. 6.) There is substantial evidence in the record that the hearing examiner and the Commission sorted through the evidence here to make the determination that the DOC had just cause for Ms. Garner's termination. There is also evidence that the Commission fully explored the petitioner's argument that mitigating factors should be considered in evaluating the insubordination claim. (FDO pp. 2-3.)

The record shows that the petitioner herself resisted her supervisor's authority from her first act of dishonesty to her last one of insubordination. This resistance of authority did impair the efficiency of the workplace. In a prison setting, this resistance could only be regarded as an aggravating factor in the

termination decision.

The petitioner's request to reverse the decision of the Wisconsin Personnel Commission is therefore denied. Counsel for the Wisconsin Personnel Commission shall prepare an order consistent with this decision affirming the findings of fact, conclusions of law, and decision of the Commission in all respects.

Dated this 28th day of November, 1995, at Milwaukee, Wisconsin.

BY THE COURT:

/s/ Patrick J. Madden

PATRICK J. MADDEN
Circuit Court Judge