STATE OF WISCONSIN PERSONNEL COMMISSION

DON ENGLAND,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS
Respondent.

Case No. 97-0151-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a termination. A hearing was held on April 15 and 16, and May 14, 1998, before Laurie R. McCallum, Chairperson. The parties were permitted to file posthearing briefs and the briefing schedule was completed on August 3, 1998.

FINDINGS OF FACT

1. Since 1979, appellant had been employed by respondent as a supervisor with Badger State Industries, or with its successor entity, the Bureau of Correctional Enterprises (BCE). Since late 1995 or early 1996, appellant occupied a position as an Industries Supervisor at Green Bay Correctional Institution (GBCI). Since early 1996, appellant's duties and responsibilities included supervising the Fabry textile operation at GBCI. In carrying out these duties and responsibilities, appellant supervised the hiring and training of inmate and non-inmate workers, quality control, shipping, and record-keeping for respondent. The Fabry textile operation is a business partnership between a private corporation and state government which employs inmate and other workers to manufacture fleece and leather gloves and other clothing products.

2. During the first few months of the Fabry operation, the fabric scraps, the flawed finished products which could not be repaired, and the finished products rejected for other reasons, were considered waste and disposed of accordingly. In November or December of 1996, in view of the large volume of these items, appellant spoke with

Steve Kronzer, Director of the Bureau of Correctional Enterprises, to obtain guidance in regard to their disposal. Mr. Kronzer instructed appellant that these items could be distributed to non-profit organizations and to government organizations but not to for-profit entities or to individuals. Appellant was aware that flawed or rejected gloves had been provided to the maintenance units in correctional institutions for work-related purposes. Such a use would be consistent with Mr. Kronzer's instructions. In February or March of 1997, Mr. Kronzer directed that appellant keep a record of those organizations to which he distributed these items. Appellant did not keep a written record of donations of fabric scraps or flawed or rejected finished products from the Fabry operation at GBCI.

3. Some time during 1996, appellant offered a pair of flawed gloves from the Fabry operation to Dan Bertrand, warden of GBCI. Warden Bertrand did not view the offer as a joke and refused the gloves, explaining to appellant that he felt it would be a conflict of interest to accept them.

4. During the fall of 1996, appellant took a flawed right-handed leather glove from the Fabry operation, cut two fingers from the glove, stitched the glove himself or directed a subordinate to stitch the glove to finish it, and sent it to Jeff Holubowicz, supervisor of the Industries Distribution Center at Waupun Correctional Institution. Mr. Holubowicz has two fingers missing on his right hand. Appellant and Mr. Holubowicz were not personal friends and had not engaged in mutual gags or jokes in the past related to their physical disabilities.

5. In April or May of 1997, Dolores Kokinos, a computer consultant employed as an independent contractor by respondent, met appellant at GBCI so that the two of them could travel together to the Fabry headquarters outside GBCI. Prior to traveling to Fabry headquarters, appellant gave Ms. Kokinos a tour of part of the GBCI Fabry operation. When they passed a table of finished leather gloves, appellant offered Ms. Kokinos a pair. Ms. Kokinos told appellant that she didn't feel her acceptance of such gloves would be appropriate. Appellant said that it was all right and that he had had some gloves made for Margarita Burns. Ms. Kokinos put the gloves in her briefcase

but later removed them and placed them on a table in the Fabry operation before she left the unit.

6. Appellant and Ms. Kokinos traveled to the Fabry headquarters in appellant's van. During their ride in appellant's van, appellant placed a bag at Ms. Kokinos' feet and told her to take the bag with her and go through it to see if there was anything in the bag that she wanted. The bag contained gloves from the Fabry operation. In the bag were eight or nine pairs of gloves that matched, some of which Ms. Kokinos kept and some of which she gave to friends or co-workers. The remaining unmatched gloves Ms. Kokinos gave to Goodwill. Appellant at no time asked Ms. Kokinos to drop the bag off for him at a collection site for a non-profit agency nor did she volunteer to do so.

7. In June or July of 1997, appellant placed an inter-departmental envelope containing a pair of purple gloves on the desk of Margarita Gonzalez Burns, a sales and marketing representative employed in respondent's central office in Madison. Appellant was aware that purple was Ms. Burns' favorite color. Appellant later telephoned Ms. Burns and asked whether she could use the gloves and she indicated that she could. Appellant did not tell Ms. Burns where the gloves came from, and she understood that appellant had given them to her for her personal use. The gloves did not appear to Ms. Burns to be flawed in any way. The gloves had been manufactured in the Fabry operation at GBCI, and had been rejected by Fabry.

8. Some time in the late summer of 1997, Donald Lawrence, a steamfitter at GBCI, was present in appellant's work area installing an air line. Appellant was aware that Mr. Lawrence was an avid hunter and had a hunting trip planned for September of 1997. Appellant asked Mr. Lawrence if he had gloves for his trip, and Mr. Lawrence answered that he could use a pair of gloves for the trip. Appellant found a camouflage glove in a barrel of gloves that had been rejected for quality control reasons, handed it to Mr. Lawrence, and suggested that Mr. Lawrence try it on. When Mr. Lawrence indicated that it fit, appellant found a matching glove in the barrel and handed it to Mr. Lawrence. Mr. Lawrence assumed that appellant had the authority to give these gloves

to him, and that appellant was giving him the gloves for his personal use for his hunting trip. Mr. Lawrence received a written reprimand for taking these gloves out of GBCI and keeping them for his personal use. Appellant and Mr. Lawrence did not discuss the use of these gloves in the context of Mr. Lawrence's work on the air line in appellant's work area.

9. On December 22, 1995, appellant had received a written reprimand for having five unauthorized license plates manufactured by the Badger State Industries Metal Stamping Factory. One of these plates had the word "bitch" imprinted on it and was presented by appellant to a co-worker as a joke. Of the four remaining plates, at least one was imprinted with the letters "USMC" and was kept by appellant for his personal use. In the letter of reprimand, Ken Sondalle, Administrator, Division of Adult Institutions, stated as follows, in pertinent part:

> This letter will serve as official notification of a disciplinary written reprimand for violation of Department of Corrections Work Rule #1 which prohibits in part "disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directions or instructions." Your violation of Work Rule #3 which prohibits "stealing or unauthorized use, neglect or destruction of state-owned or leased property, equipment or supplies." Finally, your violation of Work Rule #5 which prohibits "disorderly or illegal conduct including, but not limited to the use of loud, profane, or abusive language; horseplay; gambling."
>
> . . . Future violation of these work rules or other work rules may lead to further disciplinary action up to and including discharge. . . .

10. In a letter from Mr. Sondalle dated September 22, 1997, appellant was notified that an investigatory meeting had been scheduled for September 25, 1997, regarding the allegation that appellant "had violated work rule C.USE OF PROPERTY 2. Theft or unauthorized possession of state or private property: equipment or materials, including the unapproved salvaging of waste or discarded materials." in regard to the Fabry Operation at GBCI. This meeting was held as scheduled.

11. In a letter from Mr. Sondalle dated October 23, 1997, appellant was notified that a predisciplinary hearing had been scheduled for October 30, 1997,

regarding his alleged violation of work rules A1, A2, and C2 in regard to a list of incidents, including those described in Findings of Fact 2, 3, 4, 6, 7, and 8, above. This hearing was held as scheduled.

12. In a letter dated November 19, 1997, Mr. Sondalle notified appellant that his employment was being terminated and cited the incidents described in Findings of Fact 2, 4, 6, 7, and 8, above as the basis for the termination. This letter also stated as follows, in pertinent part:

> This action is being taken based on violations of Department of Corrections Work Rules:
>
> A1. Insubordination, disobedience, or failure to carry out assignments or instructions.
>
> A2. Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy.
>
> C2. Theft or unauthorized possession of state or private property, equipment or materials, including the unapproved salvaging of waste or discarded materials.
>
> . . . Your actions indicate a willingness to use your position as Industries Supervisor of Green Bay Textiles to secure and remit state owned property and resources for your own personal use in violation of State laws and Department rules and policies. Your behavior and exercise of poor judgment has destroyed your credibility as an Industries Supervisor in the Department of Corrections. As an Industries Supervisor in Correctional Enterprises, you are required to enforce the law, rules and regulations through supervision of both Bureau staff and inmates. Your ability to carry out those responsibilities has been permanently impaired by your blatant violation of State law and rules, as well as Department rules and regulations.

13. Respondent's termination of appellant was consistent with its discipline of other employees who were found to have violated work rule C2.

CONCLUSIONS OF LAW

1. Respondent has the burden to show that there was just cause for the imposition of discipline.

2. Respondent has sustained this burden.

3. Respondent has the burden to show that the discipline imposed was not excessive.

4. Respondent has sustained this burden.

OPINION

The two-step analysis for disciplinary cases was discussed by the Commission in *Barden v. UW-System,* 82-2237-PC, 6/9/83, as follows:

> First the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded that there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. (citations omitted.)

The just cause standard was described in *Barden*, relying on the Wisconsin Supreme Court case of *Safransky v. Personnel Board,* 62 Wis.2d 464, 215 N.W.2d 379 (1974), as follows:

> . . . one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to impair his performance of the duties of his position or the efficiency of the group with which he works. (citations omitted.)

The record here shows that appellant engaged in the activities for which he was disciplined. Although appellant testified to the existence of mitigating circumstances, e.g., he testified that he offered the pair of gloves to warden Bertrand as a joke, that he asked Ms. Kokinos to drop the bag of gloves off for him at a charity's collection site, and that he provided the leather camouflage gloves to Mr. Lawrence in response to Mr. Lawrence's request for a pair of gloves to use while working on the air line in

appellant's work unit, this testimony was uniformly inconsistent with that provided by the witnesses who had been involved in these incidents and not credible.

Although appellant argues that it is not theft to give to individuals items which are considered waste, this contention is inconsistent with the language of work rule C2 which refers to the "unapproved salvaging of waste or discarded materials." Although appellant also argues that it is not theft of state property to give to individuals items which belong to a private entity such as Fabry, this argument is not persuasive in view of the fact that the state had custody and control of each of the items at issue here at the time that appellant gave them away and each of them was produced by a BCE operation. Appellant had ample notice, through his written reprimand (See Finding of Fact 9. above), that respondent considered it theft within the meaning of work rule C2 to provide to individuals for their personal use items produced by a BCE operation. For appellant to now assert that he was not aware of this interpretation of the work rule or that some other interpretation should apply is disingenuous and not compelling.

The record also shows that appellant violated work rules A1 and A2 by not following Mr. Kronzer's instructions that Fabry products not be provided to individuals and that a record of donations be kept.

It is axiomatic that violation of an employer work rule, particularly one relating to a serious matter such as theft, particularly by a supervisor, and particularly in a correctional setting where employees are expected to model appropriate behavior for inmates, tends to impair the performance of the duties of appellant's position or the efficiency of the group with which he works. As a result, it is concluded that respondent has shown just cause for the imposition of discipline here.

If just cause is shown, the focus of the inquiry shifts to the question of whether the discipline imposed was excessive. Some factors which enter into this determination include 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 tend to impair the employer's operation; the employee's prior record (*Barden v. UW,* 82-2237-PC, 6/9/83); the discipline imposed by the employer in other cases (*Larsen v. DOC,*

90-0374-PC, 5/14/92); and the number of the incidents cited as the basis for discipline for which the employer has successfully shown just cause (*Reimer v. DOC*, 92-0781-PC, 2/3/94).

Here, the record shows that theft is regarded as one of the three most serious derelictions in a correctional setting, the other two being inmate abuse and fraternization; that appellant had engaged in prior similar conduct, had been disciplined for such prior conduct, and had been warned that engaging in similar conduct in the future could result in discharge (See Finding of Fact 9, above); and that respondent has shown just cause for each of the incidents upon which the termination was based. In addition, respondent, through the testimony of Secretary Sullivan, has shown that termination was the level of discipline imposed in order to "continue to be consistent in the application of" work rule C2. Appellant has failed to successfully rebut this showing that appellant's termination was consistent with discipline imposed by respondent in other situations involving similar work rule violations. As a result, it is concluded that the discipline imposed here was not excessive.

Finally, appellant contends that he did not receive proper due process protections during the investigation of the alleged work rule violations and during the predisciplinary process. The basis for appellant's contention is his assertion that it was a violation of due process for Mr. Kronzer to have participated both in the investigation through his contact with Mr. Holubowicz and in the final decision-making process; and for Mr. Kronzer to have been involved in the final decision-making process in view of the fact that he was one of the first to raise concerns about appellant's activities, in view of his personal animosity toward appellant, and in view of the incentive he had during the relevant time period to find a scapegoat for the operating deficits of the Fabry operation at GBCI. Appellant cites no authority for this contention. In the predisciplinary context, the issue of due process generally revolves around the question of the sufficiency of the predisciplinary hearing under the standard established in *Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) and its progeny. Appellant has not specified how the predisciplinary process here did not meet this

standard and no deficiency is apparent from the record. In addition, since, as concluded above, the hearing record here confirms that the decision made by Secretary Sullivan to terminate appellant was consistent with the work rule violations established by the hearing evidence, inquiry into the motivations of Mr. Kronzer *vis a vis* the termination decision may be relevant but is insufficient to support complainant's argument.

ORDER

The action of respondent is affirmed and this appeal is dismissed.

Dated: September 23, 1998

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the

Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95