

ROBERT STANTON,

Petitioner,

ORDER OF REMAND

vs.

STATE PERSONNEL BOARD,

Respondent.

Case No. 160-188

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been heard by the Court on the 9th day of October, 1978, at the City-County Building in the city of Madison; and the petitioner having appeared by Attorney Bruce F. Ehkle of the law firm of Lawton & Cates; and the respondent Board having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein it is directed that this Order be entered;

It is Ordered that the above entitled matter be remanded for further proceedings consistent with the Court's Memorandum Decision, and that thereafter the respondent State Board of Personnel promptly return the record to this Court.

Dated this 30th day of October, 1978.

By the Court:

George R. Currie  
Reserve Circuit Judge

**RECEIVED**

NOV 10 1978

Personnel  
Commission

NOV 10 1978

STATE OF WISCONSIN

CIRCUIT COURT

Personnel  
Commission

DANE COUNTY

ROBERT STANTON,

Petitioner,

MEMORANDUM DECISION

vs.

STATE PERSONNEL BOARD,

Case No. 160-188

Respondent.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding under ch. 227, Stats., to review a decision of the State Personnel Board (hereafter the Board) dated November 15, 1977, which after a full hearing affirmed the action of the appointing authority, William Bechtel, Secretary of the Department of Local Affairs and Development (hereafter DLAD) in the June 21, 1976, discharge of Robert Stanton from his position as Planning Analyst <sup>3</sup> ~~III~~ in such department.

STATEMENT OF FACTS

Petitioner Stanton has a Bachelor's Degree in Mechanical Engineering and has completed all of the work necessary for his Masters Degree in Urban and Regional Planning, except the thesis. Prior to commencing his employment with the Department of Local Affairs and Development (DLAD) he had worked for engineering firms and been employed in urban and regional planning work by the City of Madison. In addition, he had done research in urban and regional planning at the University of Wisconsin where he also had been employed as a teaching assistant in the Commerce Department during the 1965-1966 school year and as a teaching assistant in the Department of Urban and Regional Planning during the Spring of 1967.

Beginning in 1969 and throughout his employment with DLAD, Stanton was employed as a Planning Analyst (PA). As a PA he and the other persons in that classification did local or urban and regional planning. Primarily he was responsible for the preparation of comprehensive, long-range plans for various areas

and regions of the State, although he also was involved in short-term planning and program implementation. The plans in question covered a variety of interrelated subjects such as land use, transportation, economic development, physical site questions, recreational and community facility planning, financial programs and such like.

Sometime in 1975 William Bechtel, Secretary of DLAD, decided to shift funding resources of the department from the planning function to the management consulting program. The shift of funds was approved by the legislature for the fiscal year 1976-1977. This intended shifting of funds was announced to the staff of the Regional Planning Section of DLAD on November 12, 1975. It was made clear that this action would have the effect of abolishing four planning positions including that of Stanton who was then classified PA3 employed in the Division of Local Affairs of DLAD. The effective date of the cuts would be June 19, 1976, which was the end of the payroll fiscal year.

Stanton submitted a monthly report for January, 1976, (Resp. Ex. 1) in which he stated that his goals for February and the rest of the biennium were "To get all my work finished and get the hell out of here." He did not apply to take the promotional examination for the position of Community Service Specialist (CSS)3 which was announced in January or February, 1976, despite the fact that he was qualified. Neither did he speak with either his supervisor George James nor the administrative officer, James McKinnon, of the DLAD regarding the future of his employment either in his present capacity or some other future position in DLAD.

On May 13, 1976, James advised McKinnon that Stanton had decided not to resign. Stanton testified that at no time did he tell James he intended to resign, and James did not testify at the hearing before the Board. However, even without Stanton having told James he intended to resign, James might have inferred the same from the above quoted statement made by Stanton in Respondent's Exhibit 1. After McKinnon received this information from James he discussed with Stanton two vacant DLAD positions in the PA

series: a PA3 position at the Division of Local Government (DEG) in Madison, and a PA3 position at the West Central Wisconsin Planning Commission in Eau Claire. The latter position would have required Stanton to move his residence from Madison to Eau Claire. There were no other positions available in DLAD which were of equivalent classification or pay level to which Stanton might transfer.

After discussing these two positions with Stanton, McKinnon recommended to Bechtel that Stanton be assigned to the Madison position at DEG. Stanton has advanced no claim that he should have been transferred to the Eau Claire position. On May 27, 1976, McKinnon sent a memorandum (Resp. Ex. 2) to Stanton assigning him to the PA3 position with DEG, and stating that Stanton's rejection of this reassignment would constitute his resignation since the department had fulfilled its obligation to offer him another position in lieu of layoff. As of May 27, 1976, there were only fifteen working days before Stanton's position would be abolished and he would have been without employment if he did not accept the transfer.

On June 4, 1976, Stanton sent a memorandum (Resp. Ex. 3) to McKinnon explaining his reasons for refusing the transfer to DEG, which reasons will be set forth later in this decision. In response, Bechtel sent a memorandum to Stanton (Resp. Ex. 4) confirming the reassignment and ordering him to report to DEG for work on June 21, 1976. This memorandum stated that Stanton's failure to comply with the order would require the department to undertake serious and severe disciplinary action, and possible discharge.

On June 9, 1976, Stanton filed a grievance concerning the order to transfer to DEG. The remedy sought was for the order to be reversed and an alternative reassignment be made. Bechtel on June 15, 1976, denied the grievance.

On June 21, 1976, Ron San Felippo, the Administrator of DEG, called McKinnon and reported that Stanton had not reported to DEG as assigned. Instead Stanton on that day had gone to his

usual work station. In the afternoon, after first holding a conference with Stanton, he was handed a letter signed by Bechtel (REsp. Ex. 5) discharging him for his failure to report to the new position as ordered by his appointing authority.

THE ISSUES

Based on petitioner's brief the court deems the issues it is required to resolve are these:

- (1) Was the Board required to find upon the records presented that the transfer of Stanton by DLAD was unreasonable thereby rendering his discharge to have been without just cause?
- (2) Did the Board fail to make a proper finding on the reasonableness issue?

RECEIVED

NOV 10 1978

Personnel  
Commission

APPLICABLE STATUTES

Section 16.28, Stats., provides in part:

"(1) (a) An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in pay or demoted only for just cause . . . ."

Section 111.90, Stats., reserves certain rights to state appointing authorities even where union contracts are involved and is applicable here:

"Management rights. Nothing in this subchapter shall interfere with the right of the employer, in accordance with this subchapter to:

(1) Carry out the statutory mandate and goals assigned to the agency utilizing personnel, methods and means in the most appropriate and efficient manner possible.

(2) Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; and in that regard establish reasonable work rules.

(3) Suspend, demote, discharge or take other appropriate disciplinary action against the employe for just cause; or to lay off employes in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and nonproductive." (*Emphasis as above*)

THE COURT'S DECISION

A. Reasonableness of Transfer

The principal argument advanced by Stanton's counsel on

oral argument was that the court should find Stanton's transfer to the PA3 position in DEG to have been unreasonable as a matter of law. The court has no authority to make findings of fact that lie in the province of an administrative agency, here the Board, to make. However, the court may properly determine that ~~any~~<sup>only</sup> one finding on a particular factual issue is supported by substantial evidence in the record.

In Reinke v. Personnel Board, 53 Wis. 2d 123, 138, 191 N.W. 2d 833 (1971), the court set forth the substantial evidence test as follows:

"'[T]he term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.'"

No contention has been made by Stanton that, if the transfer was reasonable, his refusal to accept it and report for duty at DEG as ordered would not have constituted an act of insubordination which would have provided just cause for his discharge.

Pers. 15.01, Wis. Adm. Code, provides: .

"A transfer is the movement of an employe with permanent status in class from one position to a vacant position allocated to a class having the same pay rate or pay range maximum and for which the employe meets the qualification requirements."

Mark Braunhut, who was employed by the Bureau of Personnel as a classification expert, testified: Stanton must have met the minimum training and experience requirements for the Planning Analyst <sup>3</sup>~~II~~ position and that there were no specialized skills necessary over and above those for a person to capably perform in the Planning Analyst <sup>3</sup>~~II~~ position in DEG after a short training period. Both positions were properly classified Planning Analyst <sup>3</sup>~~II~~s, that both had the same pay range maximum, and the transfer would be proper. He stated that Stanton was qualified to do the job and that he could successfully serve and do the job well quite quickly.

Other evidence tending to establish the reasonableness of the transfer was: His old position had to be abolished effective June 19, 1976, and there existed no other vacancies in positions dealing with the type of planning functions Stanton had been performing. The new position did not require that he move away from Madison where he presently resided. At the time Stanton was hired by DLAD he met the educational and experience requirements for a PA3 position. He had worked as a teaching assistant at the UW and admitted that conducting small class discussion was somewhat similar to conducting seminars, which was one of the activities of the DEG position.

Further evidence tending to support the reasonableness of the transfer was: Respondent's Exhibit 7 indicated that the job in DEG was to serve as "chief planner" and involved development of comprehensive plans and implementation of programs to improve the capability of Wisconsin's state and local governments to handle emergencies. It involved both short-term and long-term planning. While the duties varied from those listed in petitioner's job description for the job which was eliminated, as shown by Respondent's Exhibit 8, both jobs involved planning for the use of land, buildings, transportation facilities such as highways, railroads, airlines, etc., and involved the economic, physical and social characteristics of cities, villages and counties. However, the chief emphasis in the planning involved at DEG was planning for emergencies caused by natural disasters, war or riots.

The court turns now to the reasons Stanton advanced in his memorandum to McKinnon dated June 4, 1976 (Resp. Ex. 3) why he declined the "offer of reassignment" to the DEG position. The memorandum then goes on to state:

"I have several substantial reasons for declining this reassignment. The major one is that notwithstanding the fact that the 'civil service title' of that position is 'Planning Analyst 3', and that this is the same designation as is applied to the position which I now occupy and have occupied for several years, the resemblance ends abruptly with that label."

The memorandum then tells of an interview he had with San Felippo, who would have been his supervisor at DEG and what San

Felippo told him about the DEG position and stated:

"After receiving Mr. San Felippo's detailed and up-to-date description of the position, I must state that there is nothing in my background, nothing in my more than 18 years of formal education, and nothing in my work experience that would prepare or qualify me for that position. Mr. San Felippo himself, in a most courteous but also most definite manner, informed me that his opinion was exactly the same on this point.

He further informed me that the designation 'Planning Analyst 3' was originally chosen because it wasn't clear what else to call the position; that he fully intended to change it to 'natural disaster specialist' or some similar designation as soon as possible; and that he wished he had done so previously. His exact words were that the present title was 'mis-leading'.

He also made clear that the limited amount of 'planning' that was originally one of the tasks in this position was long since over with, with the result that even the 'working title' of the position, 'Emergency Preparedness Planner', did not indicate any substantive similarity to the work of a person such as myself, whose work experience and education has been in the field of urban and regional planning."

San Felippo was not called as a witness to testify so Stanton's statements in Respondent's Exhibit 3 remain uncontroverted. However, the gist of the "major" reason so advanced by Stanton for declining the DEG position was there was nothing in his past education or work position which would qualify him for the position, and that this position would not utilize Stanton's work experience and education in the field of urban and regional planning. In considering whether Stanton was qualified for the DEG position the Board was entitled to weigh Braunhut's testimony against the above quoted statements of Stanton, and accept Braunhut's expert testimony that Stanton was qualified for the position. With respect to the DEG position not utilizing Stanton's work experience and education, the Board could take into consideration that, by the time the executives in DLAD became aware that Stanton had receded from his stated intention in Respondent's Exhibit 1, "to get the hell out of here" when his position at DLAD was terminated at the end of the fiscal biennium, there then was no other comparable position vacant in the field of urban and regional planning.



The second reason Stanton stated in Respondent's Exhibit 3 for declining the DEG position was stated as follows:

"A second reason why I must decline to accept this offer involves the nature of the working relationship which would be created by the very fact that, as Mr. San Felippo told me, he prefers very strongly to have another specific individual fill this position. This fact bears heavily on what I would choose to call the subjective aspect of this position, as differentiated from the more objective matters of technical competence, experience, etc., referred to above. Any prudent person, in evaluating a prospective job, or any prudent employer evaluating a prospective employee, would surely not fail to take into account this factor, that is, the matter of how well the employer and the employee would 'get along' in the everyday interactions of the job situation. I cannot believe that my working for Mr. San Felippo in a capacity in which he has in fact been forced to accept my presence in the face of his expressed preference for another person, and with serious misgivings on his part about my qualifications for the position added to that, would create anything but the most ineffective, uncomfortable and unharmonious working relationship."

In considering this second reason, the Board could also consider Braunhut's testimony that Bechtel and not San Felippo would be Stanton's appointing authority in the DEG position, and San Felippo could not refuse to accept Stanton as an employee. Furthermore, the Board could also conclude that there was nothing in the statements made by San Felippo from which it could be reasonably inferred that San Felippo would treat Stanton unfairly or discourteously.

Stanton stated his third and last reason for declining the DEG position in Respondent's Exhibit 3 as follows:

"A third reason, although possibly of less import than the two preceding ones, is the type of schedule required of the person filling this position. This includes spending every eighth week as 'duty officer' on 24 hour call, carrying a 'pager', etc. It also includes being available to, in Mr. San Felippo's words, 'lots of calls in the middle of the night', specifically, an average of 'six or seven per week'. Clearly, the conditions of work in this position are markedly different from those which prevail in the overwhelming majority of other positions in state service; and they are, I think it accurate to say, what most people would regard as distinctly less favorable than the conditions in the vast majority of those other positions. It might be argued with considerable validity that the conditions of work in this position are more nearly similar to those prevailing in the Armed Services than to those in most civilian positions."

The Board, in considering Stanton's third reason for declining the DEG position, might well determine that acting as "duty officer" for one week out of every eight was not so rigorous an imposition as to make the transfer an unreasonable one. The record does not disclose how many, if any, of the six or seven calls received during the night on the week he might be acting as "duty officer" would require that he leave his home to attend to some emergency matter.

At the hearing before the Board Stanton stressed a further reason for declining to accept the DEG position to which he had been transferred not specifically mentioned in Respondent's Exhibit 3. This was that his acceptance of that position would be detrimental to his personal and professional interests because "it would have amounted to setting aside the entire professional occupational track that I had been on for about 10 years" (Tr. 195-196). This "occupational track" he had been pursuing included not only his work for DLAD in urban planning, but also his graduate work in that field at the university.

The evidence before the Board also brought out that the DEG position had only been funded for an additional seventeen months from the time Stanton had been reassigned to it.

Stanton contends it was unreasonable for the Board not to have considered placing him on layoff instead of transferring him to the DEG position. Pers. 22.04, Wis. Adm. Code, provides in part:

"Alternatives in lieu of separation. In the event that the services of an employe with permanent status in class are about to be terminated by layoff in a given class as a result of a reduction in force, the alternatives shall be available, in the order listed below, in lieu of separation, provided that the order of layoff as set forth in the law and these rules permit:

(1) TRANSFER. The employe shall have the right to move to a vacancy in the same class and approved option within the agency. The employe may also be considered for other vacancies within the agency in a class, for which he or she meets the necessary education, experience, capacity, knowledge and skill, and that has the same pay rate or pay range maximum.

(2) BUMPING. Where no vacancy exists, the employe identified for layoff shall be entitled to exercise bumping rights within the employing unit."

. . . .  
"(3) VOLUNTARY DEMOTION. See Wis. Adm. Code section Pers 17.04(4).

(4) INVOLUNTARY DEMOTION. See Wis. Adm. Code section Pers 17.04(2)." (Emphasis added.)

Sec. 16.28(2)(b), Stats., requires the Director of the Bureau of Personnel to promulgate rules governing layoffs and "alternate procedures in lieu of layoff." A transfer is an alternate procedure to layoff and is governed by rules of the Director.

The court is of the opinion that it was within the management rights of the appointing authority, stated in sec. 111.90(2), Stats., to transfer Stanton instead of laying him off, and that this is not an element to be considered in evaluating the reasonableness of the transfer. The approval of the Director to the transfer had been obtained.

On this record the court is of the opinion that reasonable minds might differ as to the reasonableness of the transfer. Therefore, the reasonableness issue presented a question of fact for the Board to determine, and the court cannot hold that the only permissible finding the Board might make was that the transfer was unreasonable.

B. Alleged Failure of Board to Make a Proper Finding on Reasonableness Issue.

The burden of proof to establish that the discharge of an employee was for just cause is on the employer, Reinke v. Personnel Board, supra, at page 132. Here the DLAD initially met that burden by establishing that the transfer which Stanton refused to accept was to the same civil service job classification position he then occupied paying the same salary

The Board's findings on the reasonableness issue are set forth in its conclusions of law and read:

"In determining whether a management order regarding transfer is so unreasonable as to provide justification for an employee's disobedience of that order, the test is not whether a reviewing body agrees or disagrees with the merits of the rationale for the order. Such administrative decisions are reviewable on a much less rigorous standard. See, e.g., In re Public Utilities Commissioner of Oregon, 268 P. 2d 605, 616 (Oregon 1954):

'Webster's New International Dictionary, 2d Ed., defines 'unreasonable' as 'not conformable to reason, irrational; \* \* \* beyond the bounds of reason or moderation; immoderate, exorbitant.'

While reasonable people could differ as to the soundness of the decision to order the appellant to transfer, it cannot be concluded that the decision is irrational or unreasonable in the sense referred to here."

. . .

"It is concluded that this section does not give an employe the right to refuse a transfer that is not unreasonable and then to exercise bumping rights which may result in a layoff, or to exercise some other alternative or move into layoff status."

The court is disturbed by the Board determining the reasonableness issue by applying the negative test of not being irrational. This strongly suggests that the Board merely looked at the issue of the reasonableness of the transfer in the abstract without carefully considering the reasons advanced by Stanton to support his claim that the transfer was unreasonable. That this was so is confirmed by the omission in the findings of several of the items of evidence hereinbefore stated which Stanton claimed tended to establish the transfer was unreasonable. The Board mentions only two of them, such findings being:

"Appellant asserted that he was not prepared by education or work experience to do the DEG job. However, appellant met all the minimum requirements for the position and was qualified to assume the position."

. . .

"It is appellant's contention that the position at DEG was so far removed from his normal work to take the position that it was unreasonable for Respondent to have ordered him to take the position. . . ."

There is nothing to indicate in the findings that the Board

ever considered Stanton's objections of a strained working relationship with San Felippo, the extra duties imposed by having to act as "duty officer every eighth week," Stanton's fear that acceptance of the DEG would change his future chances of continuing the type of urban and regional planning career he had been trained for, and that the DEG position had been funded for only seventeen more months.

The Supreme Court has set forth the standard of Personnel Board review. "The function of the Board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence". Reinke v. Personnel Board, supra, page 137. Thus the Board was required to weigh the evidence bearing on the reasonableness issue and in order to do so it had to consider all of that evidence, not just part of it.

After taking all these things into consideration the court determines that a proper finding with respect to the reasonableness of the transfer was not made by the Board. Therefore, under sec. 227.20(4) the matter must be remanded to the board to make proper findings of fact with respect to the reasonableness of the transfer of petitioner Stanton to the DEG position.

Let an order be entered remanding the matter for further proceedings consistent with this decision.

Dated this 30th day of October, 1978.

By the Court:

George P. Curcio  
Reserve Circuit Judge

RECEIVED

NOV 10 1978

Personnel  
Commission