

# OFFICIAL

STATE OF WISCONSIN

PERSONNEL BOARD

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 CARL W. RADY,  
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 Appellant,  
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 v.  
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 NORMAN M. CLAPP, Secretary,  
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 Department of Transportation,  
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 Respondent.  
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 Case No. 73-135  
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OPINION

AND

ORDER

Before AHRENS, Chairman, JULIAN, STEININGER and WILSON.

## OPINION

### Background Facts

In November, 1969, the Appellant, Carl W. Rady, commenced his employment in the District 2 office of the Division of Highways, Department of Transportation, in Waukesha, Wisconsin.

On April 26, 1973, he was assigned to a design unit supervised by Frederick J. Smith. Smith had been the Design Supervisor of a design unit since 1958 and had been employed by the Division of Highways since 1951.

Some time on May 2, 1973, Appellant left his work station at the request of Ralph Blum, an Assistant Administrator with the Division of Highways. Appellant went to the supply room to assist Blum in "clarifying" some photographic problems Blum was experiencing. Upon Appellant's return to his work station, he stepped into Smith's office, and an argument ensued. Precisely what was then said and done are the factual matters at issue in this appeal, part of which is from the three-day suspension given Appellant as a result of the altercation. Appellant appealed the suspension.

On May 22, 1973, Appellant was given an administrative leave because he was having some marital problems and needed time to work them out. Appellant returned to work about the 20th day of June. On June 24, 1973, Appellant addressed a letter to Robert T. Huber, Chairman of the Highway Commission, in which Appellant announced that he would leave his work station without permission on the following day. Appellant stated that he was challenging what he saw as the malfeasance of his District 2 superiors and would return to work only if certain conditions were met.

On June 25, at approximately 8:15 a.m., Appellant left work and later that morning District Engineer T. R. Kinsey discharged him for having done so without permission and without having notified his supervisor. Appellant appealed the discharge.

We find the foregoing facts to be true and material to a determination of the issues in this case.

#### Appellant Was Suspended for Just Cause

Appellant and his supervisor, Frederick J. Smith, were the only witnesses to the May 2 incident, which resulted in Appellant's 3-day suspension without pay, although both testified that employees heard at least part of their argument. Their argument lasted at least 15 minutes, and their stories of what occurred vary in important particulars.

Smith testified as follows: he was in the habit of keeping a diary of the daily activities in his office, partly out of personal interest, partly for the purpose of evaluating employees he supervised. Smith was in the act of making an entry in his diary, when Appellant appeared at his office door. Appellant asked Smith if he "kept a record of every time an employee left the room to take a crap or something." Smith replied that he

didn't have to answer that. Appellant then asked if he could use company time to write a record of his own. Smith told him that he expected 8 hours of effort from him.

Coffee break time came, and Smith went to the rear of the room, where the coffee machine was located. Appellant followed Smith to the coffee machine, where Appellant tried to explain that he'd been absent from his desk for the purpose of helping Blum in the supply room. Smith replied that he (Smith) was Appellant's supervisor, not Blum, and that Appellant was still responsible to him, whenever Appellant left his work station. Appellant replied by calling Smith a "wise guy," who had a "big mouth." Smith, thereupon, ordered Appellant to return to his desk, but Appellant refused, stating that Smith lacked authority to tell Appellant what to do while it was still coffee break time, as it was then. The two then returned to Smith's office, and Smith again ordered Appellant to return to his desk. Appellant refused giving the same reason as before. Smith, in his "Memorandum to the File," which he testified he wrote immediately after the incident, stated that he then told Appellant that Appellant had been absent from his desk since 2:15 p.m., and, as the afternoon coffee break extended from 2:30 to 2:45 p.m., Appellant had already used up his coffee break. It is at this point that Smith says Appellant made an obscene gesture with his finger and said "screw you." Appellant then demanded to see a union steward immediately, but Smith refused this request, because of the arrangements he felt necessary to have to be made for such meeting. Smith suggested instead that Appellant put his feelings or opinions in writing, and he would process them. Appellant then returned to his desk.

Appellant's version of the May 2 incident differs not only in some particulars, but also in tone and emphasis. Appellant testified as follows:

He went into Smith's office to explain his whereabouts, because he knew he was under "surveillance." Appellant said it was Smith who initiated the use of abusive language by saying that he, Smith, didn't "give a goddamn where I was, I left without his permission." When Appellant tried to explain his activity for the previous 10 minutes anyway, Smith didn't appear to believe him, but nonetheless refused to verify Appellant's story with Ralph Blum.

When time for the afternoon coffee break arrived and both men had gone to the coffee machine, Appellant says that Smith was talking quite loudly and was very excited. Appellant told Smith "that he had a big mouth and everybody in the whole office was hearing us. When we were at the coffee machine, he told me to kiss his ass." Smith denies that he ever told Appellant to "kiss his ass." Appellant testified that after both men had returned to Smith's office, "...because of the emotional involvement now, I requested that somebody, a union steward, be present to calm the situation." This request was denied by Smith. The Appellant testified that at that point he said "screw it" and left the office, but that he did not make a gesture of any kind. In Appellant's version, his saying "screw it" was not a conscious defiance of authority, but merely an expression of resignation since Smith had made it clear he was not going to calm down and be reasonable.

It is undisputed that Appellant told Smith that he had a "big mouth" within earshot of other employees. It is also undisputed that the two men's argument took place in part during a walk through the length of the office to the coffee machine and continued to the time they returned to Smith's office. It is not, therefore, unreasonable to conclude that the other employees were aware of what Smith termed the "situation." But in arguing

with his supervisor at the coffee machine, in calling him a "big mouth" within earshot of other employees, and in refusing to obey the first order to return to his desk, Appellant's behavior tends to establish that Appellant was guilty of insubordination. The very fact that Appellant refused to follow a direct order from his supervisor to return to his desk, lends support to the view that, in fact, it was Appellant who was provocative and unreasonable. Absent Appellant's own assertive disposition, it is difficult to understand why he simply didn't obey Smith's order and return to his desk. Any grievance Appellant might have had concerning the order's interference with Appellant's entitlement to a coffee break could have been resolved through other means. Moreover, while Appellant was entitled to a coffee break, continuing a running argument with a supervisor, after being told to desist, is another matter. Appellant followed Smith back to his office where he pressed the matter further, prompting a second order from Smith to return to his work station.

The evidence in this case establishes the aggressiveness with which Appellant approached his disagreements with management. He pursued Smith to the coffee machine and back to Smith's office to press his explanation of his absence long after it should have been clear that his best course was simply to drop the matter. Thus, we deem it more reasonable to conclude that it was Appellant who used abusive language, referring to the occasions that Smith might note in his diary, when he entered Smith's office and that his conduct thereafter toward Smith was unprovoked. From the pattern of Appellant's conduct in this incident, we also believe it more reasonable to conclude that Appellant did make an obscene gesture toward Smith and say "screw you" upon leaving Smith's office.

There is in all of this the problem of motive. Whereas Appellant's disposition toward Smith seems relentlessly aggressive, nowhere can a motive

be found for Smith abusing, verbally or otherwise, an employee who had been under his supervision for only 6 days. Moreover, while Smith testified that he had heard rumors about Appellant's history of tardiness for work, he also testified that he refrained from reading previous performance reports so as not to prejudice his evaluation of Appellant's work under his supervision. In short, Appellant was working on a clean slate, and it was his own aggressive conduct which landed him in trouble.

We, therefore, find the assertions contained in Smith's "Memorandum to the File" of May 3, 1973, and in Kinsey's suspension letter of the same date to be true. We find further that Appellant's behavior was unprovoked.

We found that Appellant was insolent and abusive to Smith and that he refused to obey two separate orders from Smith to return to his desk. In our view, this constitutes misconduct in the nature of insubordination. The disciplinary action was only suspension without pay for three days. We find that that action was for just cause.

#### Appellant Was Discharged for Just Cause

The evidence in this case, which Appellant does not dispute, shows that Appellant did walk off his job on the morning of June 25, 1973, without the approval of any supervisory personnel. The evidence also demonstrates that Appellant had not returned to his work station by 11:30 a.m. that morning, when the letter of discharge was written. Indeed, the evidence shows what is undisputed, that Appellant had no intention of returning to work until certain of his demands were met. It is also clear that Appellant action was in violation of the Department of Transportation's work rules (Par. II, Item 3). Finally, it is not disputed that Kinsey had the power to impose discipline, when said rules were violated.

We, therefore, find the assertions contained in the letter of discharge of June 25, 1973, to be true. The question remains whether the Appellant's action constituted just cause for his discharge. If Appellant's action had been merely an isolated incident, discharge may have been too severe a disciplinary course to follow. But we believe that the evidence in this case demonstrates the appropriateness of the action taken by management.

Appellant several times clashed with District 2 management over an environmental issue of concern to Appellant. Appellant was concerned about the damaging impact which a work stoppage in the construction of Highway 16 was probably having on Salsich Creek. He sought to bring this to the attention of his supervisors, but claimed the only result was that he was labelled an "environmental freak" in the District 2 offices. Appellant then wrote Chairman Huber, more than once, about the "Salsich Creek Disturbance" occasioned by the work stoppage and about what he saw as the District's refusal to recognize legitimate environmental issues. Appellant also wrote Rep. John Alberts of Oconomowoc, and told a reporter for The Waukesha Freeman about the Salsich Creek problem. According to Appellant, this led to his being considered a disloyal employee by his District 2 superiors. And this distrust, Appellant contends, in turn led to ill treatment by his supervisors, which was manifested by his being "shuffled" among eight different supervisors in seven days, his being assigned to menial tasks such as sorting filing cards, his being transferred for a short time to field construction work though his supervisors were aware of his existing heart condition, and his being denied use of Smith's telephone to call his doctor when he experienced chest pains. Appellant also testified that he was asked by District 2 management to secretly tape a District 2 supervisors' meeting with certain citizens groups so that

management could graphically illustrate to their Madison superiors just what it had to put up with from environmental groups. Appellant claims to have been much torn by this and believed it to be illegal. Appellant argues that walking off his job in what he claims was a wildcat strike was the only means by which he could find a forum for his grievance. Indeed, Appellant asserts that he was compelled to walk off his job. Appellant further argues that by the time of a supervisors' meeting on May 18, District 2 management was looking for a legal means to rid itself of an employee who had proved troublesome by going over its head on a matter of policy. In this view, the walk off of June 25, 1973, was merely the opportunity, imprudently offered by Appellant, for management to follow a course already agreed upon and to discharge him.

We find that management did not discharge the Appellant because of his environmental concerns. The environmental problem arising from the construction of Highway 16 seems to have resulted more from the order of Judge James E. Doyle, the District Judge for the Western District of Wisconsin, stopping work on the project, than from the indifference of District 2's management as urged by the Appellant. Appellant's contention about being "shuffled" among supervisors was refuted by testimony to the effect that he normally worked with a variety of personnel in the Division of Highways. The declining number of personnel in the Division also explains Appellant's assignment to field work and to sometimes menial tasks. Fewer personnel necessarily entailed shifting the remaining employees to some duties other than their normal job assignments. It also appears that other phones were available to Appellant at the time he experienced chest pains and it is not clear why Appellant insisted on using Smith's. The taping or "bugging" episode is the most obscure of all. John Roslak, the Department's Director of Personnel, did testify that the microphone was to be placed in the open and



not concealed. While admitting taping a meeting, Roslak insists the meeting was not secretly "bugged." We find that the Respondent was not asking the Appellant to engage in any illegal or unethical practices.

Indeed, management seems to have been very solicitous of Appellant's concerns. District Engineer Kinsey was able to write a letter on April 30, 1973, to Appellant concerning Appellant's allegations of improprieties in the operation of the office asking him to be more specific in his charges and informing Appellant he could not investigate on the basis of mere generalities or innuendos. Kinsey concluded by stating that "This investigation can be kept in strict confidence for your employment protection." Moreover, Appellant was given nearly a month's administrative leave on May 22 to work out some marital difficulties he was having. Kinsey testified that Appellant's reason for requesting the leave was sufficient and that at the time he suggested that perhaps the leave could serve a dual purpose: that besides Appellant being able to take care of his personal problems, this would provide a "good opportunity for both sides to cool off in our work relationship." Granting Appellant a substantial administrative leave partly for the express purpose of allowing both sides to cool off hardly seems like the action of a management bent on his destruction. By Appellant's own testimony, the leave was granted after a claimed cabal had been formed to get rid of him.

The Respondent had cause to be concerned with Appellant's aggressive attitude toward his supervisor. Even while on administrative leave, on May 24, 1973, Appellant had another altercation with Smith which concerned Appellant's time sheet for the week ending May 26, 1973. Smith testified that Appellant was generally abusive and threatening in his behavior toward him. In order to rebut Smith's account of the meeting, Appellant offered in evidence a "Memorandum to File" written by E. W. Braun, an employee who

witnessed the encounter. In the memo, Braun somewhat undercut both Appellant's and Smith's accounts, but in a telling paragraph also stated:

"Rady deviated from the time sheet issue into other matters. I found his train of conversation so rambling, it was difficult to follow, but seemed to concern itself about what he expected from management. Smith responded to most of the remarks. I felt he showed restraint, in that Rady became more overbearing with each sentence. Rady also waggled a finger or pencil at Smith, which Smith objected to."

This incident occurred 20 days after Appellant's suspension for insubordination.

But Appellant argues that his was a wildcat strike and that management was therefore obligated to follow the provisions of Article XIII, Section 1, Item 119 of the union agreement. Assuming that Appellant's action constituted an unauthorized strike, we think Appellant's reliance on that particular item of the agreement is misplaced.

Article XIII, Section 1, Item 119 provides in pertinent part that:

"When the employer notifies the Union by certified mail that any of its members are engaged in any such strike activity, the Union shall immediately, in writing, order such employees to return to work...."

Appellant contends that since the Respondent did not notify the Union of his strike, the Respondent was in violation of the express provisions of the union contract. We think it is apparent, however, that Item 119 confers discretion on the employer to invoke its terms when the employer decides that it is in his interest. We find that the Respondent did not violate the collective bargaining agreement and, in any event, we conclude that any claimed violation of the unauthorized strike provision does not constitute a defense for the Appellant, where the employer has just cause to discharge.

ORDER

IT IS THEREFORE ORDERED that the action of the Respondent in suspending and discharging the Appellant is sustained.

Dated June 29, 1970

STATE PERSONNEL BOARD

BY

*William Ahrens*

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William Ahrens, Chairman