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DONALD U. WARMKE,

Appellant,

v.

SECRETARY, DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,

Respondent.

Case No. 77-221

* * * * *

OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert, and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal of a one-day suspension without pay pursuant to s. 16.05(1)(e), Wisconsin Statutes.

FINDINGS OF FACT

1. At all relevant times the appellant has been employed as a youth counselor 5 at the Lincoln Hills School, Division of Corrections, Department of Health and Social Services, with permanent status in class.
2. On November 28, 1977, the appellant was involved in the apprehension of a student who had escaped from school.
3. The appellant on this occasion struck the student in the face.
4. The appellant was suspended for one day, effective December 21, 1977, for this incident by the school superintendent, who is the appointing authority. See Board's Exhibit 2, letter of December 8, 1977.
5. The appellant filed an appeal with the board on December 12, 1977.

CONCLUSIONS OF LAW

1. The personnel board has jurisdiction over this appeal pursuant to s. 16.05(1)(e), Wis. Stats.
2. The appellant's striking of the student was without legal excuse.
3. There was just cause for the suspension imposed.

OPINION

In disciplinary matters such as this, the burden of proving just cause for the suspension rests with the respondent agency. See Reinke v. State Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). The court in that case held that the required burden is that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence. 53 Wis. 2d at 137.

In this case, it was undisputed that the apprehended student's nose was bleeding shortly after he was apprehended by the appellant. The only witnesses to the apprehension were the appellant and the student. The student was not called as a witness and did not testify. The appellant testified that he had pulled the student into his car and that he might have accidentally struck the boy as he reached for him or that the boy's nose might have struck part of the car as he was pulled in. The appellant denied intentionally slapping or abusing the student.

Within a few minutes after this incident, the appellant encountered two other school employes. They testified that when questioned about the boy's bloody nose, the appellant said words to the effect of "He got smart with me and I slapped him." The employes' testimony about the student's statement at this point varied but both versions were to the effect that the appellant had struck him without justification.

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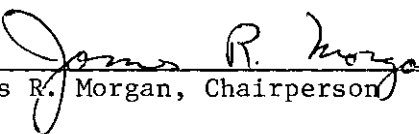
Both the statements of the student and of the appellant constitute hearsay, but both were admitted as exceptions to the hearsay rule. The student's statement was admitted as part of the "res gestae," or an excited utterance, see McCormick, Evidence, 2d Ed., §§288, 297; the appellant's statement as an admission, see McCormick, §262.* Based on these statements and all of the admissible testimony and documentary evidence, the board is of the opinion that the respondent discharged its burden of proof and established just cause for the suspension.

ORDER

The action of the respondent is sustained and this appeal is dismissed.

Dated: 3-13, 1978.

STATE PERSONNEL BOARD


James R. Morgan, Chairperson

* A good deal of other testimony and other documentary evidence was excluded as hearsay and not considered in reaching this decision.