

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

ROBERT M. JOHNSON,

Appellant,

v.

Secretary, DEPARTMENT OF
ADMINISTRATION,

Respondent.

Case No. 78-112-PC

* * * * *

INTERIM
DECISION

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats. (1977) of a demotion and reduction in pay. The appellant had previously been so disciplined, plus a 20 day suspension, for the same alleged offenses. This action was appealed to the State Personnel Board, case no. 78-29. The Board found that some of the allegations were true but concluded that the discipline as a whole was excessive and that just cause, therefore, had not been established. The Board ordered Mr. Johnson fully reinstated. The respondent reinstated the appellant but immediately reimposed the demotion and reduction in pay with notice by letter dated June 28, 1978. This appeal ensued and the appellant has filed a motion for summary reinstatement or order in limine. This decision addresses that motion.

FINDINGS OF FACT

1. The Commission takes official notice of the decision of the State Personnel Board in case no. 78-29, 6/16/78, a copy of which is attached.

2. The respondent took action to reinstate the appellant and reimpose certain discipline as set forth in a letter dated June 28, 1978, a copy of which is enclosed.

3. A copy of the original letter providing notice of discipline, dated January 27, 1978, which is referred to in the June 28, 1978, letter, is also attached.

4. The appellant filed this appeal with the Commission on July 5, 1978.

CONCLUSIONS OF LAW

1. The letter dated June 28, 1978, does not provide adequate notice of discipline.

2. The respondent is not legally precluded from reimposing some discipline for those factual matters found to have been proven by the Personnel Board following the conclusion by the Board that the original discipline imposed was excessive with regard to those factual matters that were proven.

3. The doctrine of res judicata precludes the relitigation of those issues decided by the Personnel Board in its June 16, 1978, decision in case no. 78-29, and these matters should not be referred to further in this appeal. However, the parties should not be precluded from referring to the record in case no. 78-29, as to matters still in issue.

OPINION

The letter of June 28, 1978, from the respondent to the appellant gives the following notice of the reasons for the discipline imposed:

"The reasons for this disciplinary action are as indicated in my previous disciplinary letter dated January 27, 1978, or as indicated by the State Personnel Board in its Findings of Fact, Conclusions of Law and Opinion dated June 16, 1978."

In the opinion of the Commission this letter is too vague to give the adequate notice of the reasons for the discipline imposed. The January 27, 1978, letter accused the appellant of causing the sale for personal gain of surplus paper material to a local scrap dealer, and of causing the use of a state truck and state employees to move some of his personal household belongings. In the June 16, 1978, Personnel Board decision, it was found as to the first allegation that there were certain sales but not exactly as alleged in all details, and not for personal gain. There were findings that the use of state property and employees to move personal furniture had occurred essentially as alleged. There were a number of background findings as to appellant's experience and performance record including similar handling of surplus paper over the course of a number of previous years. The Personnel Board concluded that the discipline was excessive based on the allegations proven, and that there was not just cause for the amount of discipline imposed, and ordered that the appellant be reinstated fully.

The letter of June 28, 1978, does not inform the appellant whether the respondent still is relying on certain allegations of the January 27, 1978, letter with respect to which the Commission found that the respondent had not sustained his burden of proof - e.g., that the sale of surplus paper was for personal gain. The letter of June 28, 1978, does not inform the appellant whether the respondent is relying on facts found by the Board as to transactions prior to the ones alleged in the January 27, 1978, letter, which findings were made by the Board apparently as background vis-a-vis a pattern of conduct but which by themselves might constitute cause for some discipline.

In responding to the appellant's argument on this point, the respondent made the following comment:

"The intention of the June 28 letter was to discipline for the wrongful acts enumerated in the January 27 letter, as modified by the findings of the Board. The second disciplinary letter is based on the premise that the decision of the Board is correct and will not be changed on appeal. If we succeed with our appeal, the second letter will be withdrawn and the first disciplinary letter will be controlling. Consequently, the second disciplinary letter can only be properly construed as indicated above. (Letter of October 12, 1978.) (Emphasis added.)"

While this may have been the intention of the respondent, this Commission does not believe that the June 28th letter gives fair notice of it. That letter states:

"The reasons for this disciplinary action are as indicated in my previous letter dated January 27, 1978, or as indicated by the State Personnel Board in its Findings of Fact, Conclusions of Law, and Opinion dated June 16, 1978." (emphasis added)

The word "or" is used "to express alternatives or to give a choice of one among two or more things." See Black's Law Dictionary (4th Ed.). The two things involved here (the letter of January 27, 1978, and the Personnel Board decision) contain substantially different versions of the facts that might form the basis of discipline, and providing this alternative simply leaves the appellant in a quandary as to what he would have to defend against.

The Commission rejects the collateral argument that there was defective notice because the appellant was not given copies of the January 27, 1978, letter, and the June 16, 1978, decision of the Personnel Board. Due to his participation in the Personnel Board appeal proceedings he must have had possession of copies of these documents and had actual notice of their contents.

The appellant also argues that he is entitled to reinstatement on the theory that the respondent lacks authority to reimpose discipline for incidents heard in the prior Personnel Board case. This argument in turn is based on 3 grounds.

The appellant argues first that this is precluded by Statute §16.05(1)(e), Stats. (1975), which provided: "after the hearing the Board shall either sustain the action of the appointing authority or shall reinstate the employee fully." He argues that if the discipline is not sustained in its entirety the agency cannot, following reinstatement of the employee, reimpose a lesser discipline for such misconduct as was proven in the appeal hearing.

The Commission disagrees with this position for a number of reasons. First, §16.05(1)(e) simply requires full reinstatement - by its terms it does not speak to subsequent disciplinary action. Second, the reading urged by appellant leads to a legislative intent that produces an unwanted "all or nothing" effect. For example, an employee may be discharged for two incidents of misconduct. Only one of these is proven at the hearing. In the opinion of the Board the misconduct proven, while not unsubstantial, does not constitute just cause for discharge, so it orders the employee reinstated. The appellant's theory leads to the conclusion that the employee escapes all discipline for the misconduct that was proven.

Both parties cite Boyce v. U.S., 543 F.2d 290 (Court of Claims 1976). There, discharge was rejected as being "unconscionably harsh" with respect to the misconduct proven, and the court noted that the agency would not be prevented from imposing a more appropriate penalty.

The appellant also argues that additional charges on the same factual occurrences are precluded by principles of res judicata.

The doctrine of res judicata was defined by the Personnel Board in Van Susteren v. Voight, no. 73-126,128 (12/11/75), as follows:

" ... an existing final judgment rendered upon the merits is conclusive of courses of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. See 46 Am. Jur. 2d Judgments §394"

The Board held that res judicata principles applied to quasi-judicial or adjudicative administrative action, citing Davis, Administrative Law Text (3d Edition):

" ... such proceedings usually involve decisions about past facts, not constantly changing circumstances. There is a public interest in finality which is not served if a party to a controversy is permitted to relitigate it following an unfavorable decision.

The elements of res judicata or collateral estoppel are an identity between the parties and an identity between the 'causes of action or the issues sued on, Liement v. McCann, 78 Wis. 2d 289,294, 255 N.W. 2d 526 (1977)." Marquardt v. DILHR, Wis. Pers. Bd. 77-214 (4/11/78).

In the instant case there is identity between the parties and the Personnel Commission, the successor agency to the Personnel Board, is an equivalent tribunal for application of this doctrine. The Board made certain findings as to the matters alleged in the original disciplinary letter of January 27, 1978. Res judicata principles preclude relitigation of these matters in the context of this appeal. However, the Commission does not agree with appellant's position that the charges in their entirety are precluded by principles of res judicata. In his brief in support of his motion he argues:

"The principles of res judicata specify that, not only is a party precluded from relitigating issues which were actually litigated in a prior proceeding, but also that the party may not relitigate issues which he could have litigated in the previous proceeding if those issues arise out of a nucleus of fact in common with the issues actually litigated.

In the previous proceeding before the State Personnel Board, three separate charges and four separate penalties were lumped together by the respondent in a single combined disciplinary charge and penalty. Presumably this was done because the respondent felt it was to his advantage to do so, for the individual charges of misconduct could easily have been assigned individual penalties. This would have allowed the Personnel Board to review each charge individually and determine whether there was just cause for the discipline assigned to it, and these issues could have then been litigated either collectively or individually. What the respondent seeks to do in this proceeding, assign a penalty to the charges which were not rejected, could have been done by the respondent and litigated in a prior proceeding before the Personnel Board. It was only the respondent's decision to impose blanket penalties for blanket charges which precluded the issues from being fully examined. He cannot, therefore, now be heard to complain that he did not get a full hearing on the penalties for the individual charges."

However, the appellant's argument addresses not issues that might have been but were not raised in the hearing of the appeal in case no. 78-29 before the Personnel Board, but rather a different approach that the respondent might have taken in fact to the handling of the initial personnel transaction. This is wholly different from, for example, the kind of case cited by appellant where a party declined to raise an affirmative defense but then sought later to raise it in a collateral proceeding. Conway v. Division of Conservation, 50 Wis. 2d 152, 183 N.W. 2d 77 (1971).

The parties to this appeal are precluded from relitigating those issues decided by the Personnel Board in its June 16, 1978, decision in case no. 78-29. Accordingly, and based in part on the representation made by respondent that "the intention of the June 28 letter was to discipline for the wrongful acts enumerated in the January 27 letter, as modified by the findings of the board," the only issue before the Commission on this appeal is whether the allegations contained in the letter of January 27, 1978, as modified by the findings of the Personnel Board entered on June 16, 1978, in case no. 78-29, constitute just cause for

the discipline imposed by the letter of June 28, 1978.

The third argument made by appellant as to why the discipline here imposed is precluded rests on a double jeopardy theory:

" ... once an employee has already suffered punishment for disciplinary reasons, additional punishment may not be imposed for the same offense" In short, punishment was imposed and served by Robert Johnson as a result of the first disciplinary proceeding. He was actually on suspension and out of work for 20 working days, and forced to work below his occupational level and at a substantially reduced salary for five months.

There is some question whether the principle of double jeopardy applies in this kind of administrative setting. However, even in the areas of criminal prosecutions where the double jeopardy doctrine of constitutional dimension, there is no double jeopardy in the imposition of a new sentence following a decision on appeal that the original sentence was improper. See State v. Stang Tank Line, 264 Wis. 570, 574-575, 59 N.W. 2d 800 (1953).

This situation also is somewhat analogous to that in State ex rel Moman v. Milwaukee Co. CSC, 61 Wis. 2d 313, 212 N.W. 2d 158 (1973), where when only some of the charges were upheld on review of a discharge it was noted that the Commission might decide on remand that some discipline less than discharge was warranted. See also Stas v. Milwaukee Co. CSC, 75 Wis. 2d 465, 249 N.W. 2d 764 (1977).

The appellant has also moved for an order "in limine" precluding the respondent from making any reference "to those allegations which were litigated in case no. 78-29 before the State Personnel Board and were resolved in favor of the appellant." In his brief, the appellant detailed the specific points involved: "the alleged personal gain from IBM tab

card transactions and the previously alleged amounts of money involved therein."

Since the Commission has already determined that these matters are precluded from further adjudication by the doctrine of res judicata, this motion should be granted. It also follows that the same restriction should apply as to matters decided favorably to the respondent, as he has requested.

The appellant has asked the Commission not to base its decision on the transcript of the Personnel Board hearing. Since the Commission believes that the Board's findings are binding on the parties under principles of res judicata, the parties should only be permitted to supplement the record as to matters which are still in issue. Res judicata prohibits the relitigation of matters resolved in the Board proceeding, and the findings on these points are binding on the parties. To the extent that these matters are material to matters still in issue, the Commission perceives no reason why the parties should not be allowed to refer to the record by way of argument, for example, the significance of a particular finding.

For example, the Board found that the appellant caused the use of state personnel and equipment to move various items of personal property. This finding is binding on the parties and they will not be allowed to submit new evidence on this point. To the extent that reference to evidentiary matters surrounding this finding might be appropriate, the parties should be permitted to refer to the record made in the Personnel Board hearing.

The notice of discipline in this case is inadequate. Despite this defect, the Commission does not believe that it follows that the appellant is entitled to immediate and full reinstatement as he contends. This might have been appropriate under prior law, since §16.05(1)(e), Stats. (1975), provided that "the Board shall either sustain the action of the appointing authority or shall reinstate the employee fully." Current law, §230.44(4)(c), Stats. (1977), provides that "the Commission shall either affirm, modify, or reject the action which is the subject of the appeal." Given all the circumstances of this case the Commission believes it would be most appropriate to simply modify the disciplinary transaction by modifying the disciplinary letter of June 27, 1978, in accordance with the clarification provided by the respondent in his brief.

ORDER

The appellant's motion for immediate reinstatement is denied. The letter providing notice of discipline dated June 28, 1978, is deemed amended by the deletion of the next to the last paragraph which reads:

"The reasons for this disciplinary action are as indicated in my previous disciplinary letter dated January 27, 1978, or as indicated by the State Personnel Board in its Findings of Fact, Conclusions of Law, and Opinion dated June 16, 1978."

and the substitution for it of the following language:

"The reasons for this disciplinary action are as indicated in my previous disciplinary letter dated January 27, 1978, as modified by the State Personnel Board in its Findings, Conclusions and Order dated June 16, 1978, in case no. 78-29."

The appellant's motion for an order in limine is granted and the respondent's argument on this motion at page 8 of his letter brief dated October 12, 1978, is interpreted as a cross-motion for order in limine and is also granted, and the parties are directed to refrain from attempting to

to relitigate or referring to in argument matters that were decided adversely to them by the Personnel Board in case no. 78-29 (6/16/78). Reference to the record of the Personnel Board proceeding will not be precluded on blanket basis, but will be allowed where appropriate.

The hearing in this matter now scheduled for November 28-30, 1978, is postponed and a prehearing conference will be scheduled to address the question of how this appeal might be submitted for decision on the merits in light of this decision.

Dated: Nov 17, 1978.

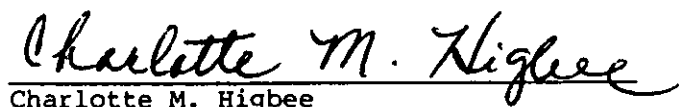


Joseph W. Wiley
Chairperson

Dated: _____, 1978.

Edward D. Durkin
Commissioner

Dated: Nov. 17, 1978.




Charlotte M. Higbee
Commissioner

Johnson v. DOA
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DISSENT

Since the original decision of the Personnel Board is now before the Circuit Court, I prefer to hold this whole matter in abeyance until that case is decided by the Court.

Dated: Nov 20, 1978.



Edward D. Durkin
Commissioner

STATE OF WISCONSIN



Martin J. Schreiber
Governor

DEPARTMENT OF ADMINISTRATION
One West Wilson Street • Madison, Wisconsin 53702

John Torp
Secret.

January 27, 1978

RESPONDENT'S

RECEIVED

FEB 13 1978

Mr. Robert M. Johnson
44 Golf Course Road
Madison, WI 53704

EXHIBIT #

STATE PERSONNEL BOARD

Dear Mr. Johnson:

Several weeks ago, an investigation was conducted by Robert Hamele, Chief of State Protective Services and his staff to verify or refute allegations regarding misuse of state materials, property and personnel involved in the operation of the State Records Center.

As a result of Chief Hamele's investigation, it appears that the allegations mentioned above are true and that you were responsible for such misuse. These actions on your part constitute serious violations of departmental work rules and the code of ethics. Accordingly, the following disciplinary actions will be taken as a result of your misconduct.

Effective February 6, 1978, you will be suspended from work without pay for 20 working days, through March 3, 1978. You will also be removed from your position as head of the State Records Center and Microfilm Laboratory and be demoted one pay range to an Administrative Assistant 5 position located elsewhere in the Department. Your base pay will then be reduced to the permanent status in class minimum (PSICM) rate of pay range 15 (\$8.731 per hour).

Chief Hamele's investigation disclosed that on five separate occasions (December 13, 15, 16, 19 and 20, 1977) a State of Wisconsin truck was seen delivering several boxes of material to Morris Heifitz, Inc. at 1802 South Park Street in Madison. Further investigation disclosed that the materials in the boxes were IBM tab cards (UC 17's) with a total net weight for the five deliveries of 20,970 pounds. Five weight tickets provided by Mr. Heifitz confirmed that such materials had been delivered to Morris Heifitz, Inc., and that the weight tickets were made out to you.

Such deliveries were also confirmed in interviews with the two drivers who made the deliveries, namely, Mark Runkel, Motor Vehicle Operator for the State Records Center and Robert Miller, a Stock Clerk with the State Records Center.

Further discussions with Mr. Heifitz revealed that on December 28, 1977, he gave you \$300 in cash as partial payment for those deliveries and he indicated further settlement would follow later. Chief Hamele confirmed from an interview with you on January 6, 1978, that you had received payment in an envelope on that date from Mr. Heifitz and that you had the money at home. Chief Hamele and Lieutenant Sewell met you at your apartment at 44 Golf Course Road and picked up the envelope.

Exhibit # 2

Mr. Robert M. Johnson
January 27, 1978
Page 2

Later, in Chief Hamele's office, the envelope was opened in your presence and the money counted totaled \$303 in cash. Mr. Heifitz also indicated that on Thursday, January 5, 1978, you contacted him to inquire about arrangements for the payment for the tab cards delivered, and you had also said you would get back to him on Monday, January 9, 1978. Mr. Heifitz told Chief Hamele that there was approximately \$500 on account as the unpaid portion of the December deliveries. Chief Hamele has since received this money totaling \$538.

In another conversation with Chief Hamele, Mr. Heifitz indicated that he gave you \$131.40 in cash for 4,380 lbs. of IBM tab cards on March 18, 1977.

None of the cash received from Mr. Heifitz by you was reported as money accruing to the State Records Center, nor were these monies deposited with the State Treasurer's Office.

During the course of the investigation, we also received signed statements from Dennis Tucker (a former employe of the State Records Center) and Robert Miller that around September, 1976, at your direction, they participated in moving one truckload of furniture from your Golf Creek apartment to the Cherokee Park apartments during working hours, using a State of Wisconsin truck.

Your conduct regarding the previously mentioned incidents violated the following departmental work rules contained in the handbook you acknowledged receipt of in writing on April 14, 1975. The handbook states that employes of this department are prohibited from committing any of the following acts:

" III. Use of Property

" 1. Misuse of government property, materials or equipment including motor vehicles.

" 2. Unauthorized use of government equipment or materials.

" 4. Unauthorized use of state property or equipment, including vehicles.

" IV. Personal Actions and Appearances

" 20. Accepting unauthorized compensation, reward, gratuity or gift of any kind or value for any matter related to the employe's job as an employe of the state."

Your conduct regarding the aforementioned incidents also violates the departmental code of ethics which indicates an employe may not use his or her position to engage in activities which result in personal gain for the individual. Prohibited activities include use of state time or equipment for personal gain or advantage. Items we cite in this instance include the receipt of money for the IBM tab cards, and scheduled nonstate activities during working hours relative to your use of your employes for moving your own personal property during state working hours, with state equipment.

Mr. Robert M. Johnson
January 27, 1978
Page 3

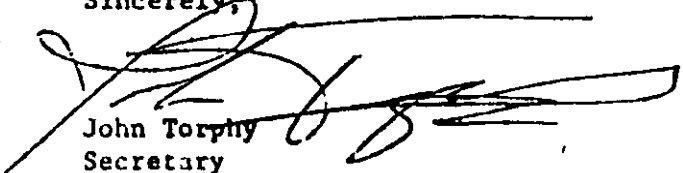
You should be aware that your actions on these dates were in violation of the department's code of ethics because you also acknowledged receiving a copy of them in writing on May 20, 1975.

Normally, we consider actions of misconduct such as yours sufficient for discharge. However, due to your long tenure with the department and a good work record except in these instances, we are not invoking the most severe penalty for your misconduct.

Upon your return to work following the 20 working day suspension, on March 6, 1978, you should report to Doris Hanson, Deputy Secretary of the Department, at 7:45 a.m. at 1 West Wilson St., Room 211, Madison, to receive your new assignment.

You have the right to appeal this action within 15 days of your receipt of this letter by filing a written appeal with the State Personnel Board, 131 West Wilson Street, Madison 53702.

Sincerely,



John Torphy
Secretary

rh

cc: Personnel file

James R. Cole
Attorney at Law
1 South Pinckney
Madison, WI 53703

STATE OF WISCONSIN

STATE PERSONNEL BOARD

* * * * *
 ROBERT M. JOHNSON,
 Appellant,
 v.
 SECRETARY,, Department of
 Administration,
 Respondent.
 Case No. 78-29
 * * * * *

ORDER

Before: James R. Morgan, Calvin Hessert in favor with Dana Warren opposing.

The Board adopts the hearing examiners Proposed Opinion and Order, a copy of which is attached hereto and incorporated by reference as if fully set forth, with the addition of the following language to the "Opinion" section:

The Proposed Opinion states at p. 5 that:

"... the appellant was under the impression that the use of the truck on this occasion would be integrated with a routine run, and although a relatively minor point which does not render use of the truck proper, this is an additional mitigating circumstance."

The Board disagrees that this was a mitigating circumstance and orders this language stricken.

While the Board regards the sale of tab cards and the use of state resources as found here to be a very serious offense, it is the opinion that the respondent has failed to discharge his burden of proving just cause for the amount of discipline imposed here in light of all the findings including the appellant's long and previously meritorious and unblemished record of state service.

Dated: June 16, 1978

STATE PERSONNEL BOARD

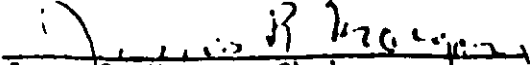

 James R. Morgan, Chairperson

Exhibit #2

STATE OF WISCONSIN

STATE PERSONNEL BOARD

* * * * *
 ROBERT M. JOHNSON,
 Appellant,
 v.
 SECRETARY, Department of
 Administration,
 Respondent.
 Case No. 78-29
 * * * * *

PROPOSED
OPINION AND ORDER

Before:

NATURE OF THE CASE

This is an appeal pursuant to § 16.05(1)(e), stats., of the appellant's suspension, demotion, and reduction in pay.

FINDINGS OF FACT

1. The appellant prior to his demotion was employed by the State of Wisconsin with permanent status in class as head of the State Records Center and Microfilm Laboratory, Department of Administration, and all of the appellant's actions set forth hereafter were taken in his official capacity.
2. In March, 1977, the appellant caused the sale of surplus IBM tab cards, property of the State of Wisconsin which had been in the appellant's custody at the state records center, to a scrap dealer.
3. This sale resulted in the payment of approximately \$30 to the appellant.
4. The appellant utilized this money as a part of the records center office coffee fund for the purchase of material related to the office coffee operation.

5. This transaction was similar to a number (approximately 1 or 2 per year) that had been conducted by the appellant over the course of approximately the preceding 5 years involving the sale of surplus IBM cards for scrap in similar dollar amounts and the utilization of the resultant funds in the office coffee fund and for the purchase of office furniture and accoutrements for the center as a whole.

6. In December, 1977, the appellant caused the sale of surplus IBM tab cards that were the property of the State of Wisconsin and had been in the appellant's custody at the State Records Center to a scrap dealer.

7. This sale resulted in the payment of approximately \$300 to the appellant on December 28, 1977.

8. This \$300 was retained at home by the appellant until January 6, 1978, when it was turned over to the Chief of State Protective Services.

9. The appellant had been surprised by the relatively large amount of this payment and had made no decision as to what he should do with it prior to turning it over to the chief.

10. At no time did appellant use any of the proceeds of the sale of surplus IBM tab cards for his personal gain.

11. During September, 1976, the appellant caused 2 employes at the State Records Center, while on state time and with a state truck, to move various items of household furnishings which were the private property of the appellant, from his old to his new apartment.

12. The disciplinary action taken by the respondent appointing authority, as reflected in a letter to appellant dated January 27, 1978, was as follows:

- (a) Suspension without pay for 20 working days effective February 6, 1978, through March 3, 1978.
- (b) Removal from his position as head of the State Records Center and Microfilm Laboratory.
- (c) Demotion of one pay range to Administrative Assistant 5.
- (d) Reduction in base pay to the permanent status in class minimum (PSICM) rate of pay range 15 (\$8.731 per hour).

13. Prior to this action the appellant had been employed by DOA in various classifications for approximately 13½ years with an above average performance record without any previous discipline and had achieved considerable expertise in his field of specialization of records storage and disposal.¹

CONCLUSIONS OF LAW

1. The Personnel Board has jurisdiction over this appeal pursuant to § 16.05(1)(e), stats.

2. In this proceeding the appointing authority has the burden of proving that the discipline imposed was for just cause. See Reinke v. Personnel Board, 53 Wis. 2d. 123, 191 N.W. 2d. 833 (1971)., Zabel v. Rice, Wis. Pers. Bd. 75-66 (8/23/76).

3. The evidentiary standard to be utilized is that of to a reasonable certainty, by the greater weight of the credible evidence. See Reinke, supra, Zabel, supra.

4. In this case the respondent has failed to prove that there was just cause for the discipline imposed.

1. The testimony of attorney Cole with respect to Chief Homele's statements regarding a certain witness which was taken subject to objection has been determined to be inadmissible as a statement made in the course of compromise negotiations, and have not been considered in reaching the above findings.

OPINION

The appellant's attorney has admitted to some misconduct by the appellant with respect to the disposition of surplus tab cards and the use of state employes and equipment to move personal belongings. However, the appellant denies that any of the proceeds from the sale of the cards was used for his personal gain, and it is argued that the penalties imposed are excessive.

In a previous opinion dealing with an allegation of excessive penalty, the Board discussed its role in reviewing the discipline imposed:

"The question . . . is whether the penalty imposed here was excessive under all the circumstances. In making this determination, it is important to recall that the role of the Personnel Board in reviewing this transaction is not the same as that of a reviewing court, a mistaken approach that the supreme court found erroneous in Reinke v. Personnel Board Therefore, we conclude that we are not restricted to a determination whether the discipline imposed is supported by substantial evidence or constitutes an abuse of discretion or is inherently disproportionate to the offense At the same time, the Board may not substitute its judgment for that of the agency; rather, it must conclude whether the conduct proven, in the context of all the circumstances, constitutes just cause for the suspension," Zabel v. Rice, Wis. Pers. Bd. 75-66 (8/23/76) p. 4.

The appellant's sale of surplus tab cards was alleged to have been for personal gain. The letter notifying the appellant of the nature and the grounds for the action taken against him makes this clear:

"Your conduct regarding the aforementioned incidents also violates the departmental code of ethics which indicates an employe may not use his or her position to engage in activities which result in personal gain for the individual. Prohibited activities include use of state time or equipment for personal gain or advantage. Items we cite in this instance include the receipt of money for the IBM tab cards" (Respondent's Exhibit #1, p. 2.)

The respondent failed to sustain his burden of proof that these sales were for personal gain. The respondent argued that the appellant's other misconduct

justified the discipline imposed even if the evidence presented at the hearing did not support a finding of personal gain. While the Board agrees that the remaining misconduct was serious, it does not agree that this misconduct provides just cause for the discipline imposed by respondent.

The record reflects that the scale of these tab cards was on a relatively small scale, realizing perhaps in the vicinity of \$30-\$60 a year for about 5 years.² This money was used to buy coffee for center employes and guests, and to purchase non-standard office accoutrements. This use of money concededly was improper. However, the appellant made these purchases primarily to enhance the image of the center presented to potential uses of the center. He wanted to avoid the "basement storage" image which he felt could discourage agency use of this facility. The use of the state truck and employes also concededly was improper. However, this utilization was on a relatively small scale, for approximately 2 to 3 hours. Furthermore, the appellant was under the impression that the use of the truck on this occasion would be integrated with a routine run, and although a relatively minor point which certainly does not render use of the truck proper, this is an additional mitigating circumstance.

Against these factors the Board must consider the appellant's previous record of over 13 years of employment with above average performance and no previous discipline imposed.

In the opinion of the Board, there would have been just cause for the rather extensive range of discipline imposed here if the respondent had been able to prove personal gain from the scale of the tab cards. In the absence of such proof it must be concluded that the discipline imposed was excessive and not based on just cau.

2. The size of the December, 1977 payment was unusually large, apparently due to the volume of tab cards involved. The appellant was surprised at the size of the payment.

This case was heard under the authority of § 16.05(1)(e), stats. This limits the Board to 2 options following the hearing: "the Board shall either sustain the action of the appointing authority or shall reinstate the employe fully." This does not permit the Board to modify the appointing authority's decision.³ Therefore, since the decision of the respondent cannot be sustained, the appellant must be reinstated fully. However, in the opinion of the Board this reinstatement would not prevent the respondent from taking such disciplinary action as may be justified based on the findings set forth above.

ORDER

The appellant shall be reinstated fully.

Dated: _____, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson

3. Compare, Chapter 196, Laws of 1977, § 121, § 230.44(4)(c), stats.



State of Wisconsin \ DEPARTMENT OF ADMINISTRATION

Martin J. Schreiber
Governor

John Torphy
Secretary

1 WEST WILSON STREET
MADISON, WISCONSIN 53702

June 28, 1978

Mr. Robert M. Johnson
44 Golf Creek Road
Madison, WI 53704

Dear Mr. Johnson:

On June 16, 1978, the State Personnel Board in Case No. 78-29 ordered you reinstated to your previous Administrative Officer 1 position as Section Chief of Records Management. Subsequently, on June 27, 1978, the Circuit Court for Dane County denied our request for a stay of the Board order.

This is to advise you that I have reinstated you fully to your previous position and pay, in compliance with the order of the Personnel Board. A state payroll check will be processed as soon as possible compensating you for the wages you lost as a result of the suspension and reduction in pay provided for in our disciplinary letter dated January 27, 1978.

The decision of the Personnel Board also found that you had committed a "very serious offense" and determined that some lesser amount of discipline would be appropriate. In accordance with that decision, we are demoting you from your Administrative Officer 1 position to an Administrative Assistant 5 position and reducing your base pay to the permanent status in class minimum (PSICM) pay rate of pay range 01-15 (\$8.731/hour) effective today, June 28, 1978. As an Administrative Assistant 5, you will function as assistant to the Division Administrator of the General Services Administration Division. Your immediate assignments, however, will be received from Bureau Director John Driscoll, and you will report directly to him.

The reasons for this disciplinary action are as indicated in my previous disciplinary letter dated January 27, 1978, or as indicated by the State Personnel Board in its Findings of Fact, Conclusions of Law and Opinion dated June 16, 1978.

You have the right to appeal this action within 30 days of your receipt of this letter by filing a written appeal with the State Personnel Commission, 131 West Wilson Street, Madison, Wisconsin 53702.

Sincerely,


John Torphy
Secretary

cc: Personnel file

Ex "D"