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FIELDING HUESMANN III,
 Appellant,

v.
 Director, STATE HISTORICAL
 SOCIETY,
 Respondent.

Case No. 81-348-PC

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DECISION
 AND
 ORDER

This matter is before the Commission as an appeal from a discharge. Appellant filed a Motion for Reinstatement due to alleged errors and deficiencies in the letter of termination. The parties agreed to submit the matter on briefs.

FINDING OF FACT

The letter of discharge (Commission's Exhibit #1), dated August 12, 1981, was signed by Richard A. Erney, Director of the State Historical Society.

The letter states, in part:

Pursuant to the provisions of Chapter 230.34(1)(a), Wisconsin Statutes, you are hereby notified that the reasons for this action are:

- a. Over the past nine months, despite repeated counseling, you have demonstrated an inability to perform the duties required of you in a satisfactory manner, TO WIT: you have failed to meet reasonable leadership expectations; the organization of the work effort you were charged to direct has been inadequate; you have often failed to develop proper work schedules for the crews you were directing; your inspection of work in progress was irregular; you often neglected to make corrections when needed; you have frequently failed to follow proper procedures for requisitioning supplies; you have failed at times to have necessary supplies available at the work sites when needed; and frequently your relationship with fellow employees has been strained. In short, your performance has not met reasonable expectations.
- b. Notwithstanding repeated counseling by Mr. Alan Pape and Mr. John Harbour, you have not responded satisfactorily nor have you made effective improvement despite your written intention to do so.

CONCLUSION OF LAW

The letter of discharge failed to provide the appellant with adequate notice of the reasons for discharge, thereby denying him due process of law.

OPINION

The appellant argues that respondent's discharge letter failed to comply with the requirements of s.230.34, Wis. Stats., and violated appellant's right to due process of law.

The statutory standards and procedures for disciplining a civil service employe with permanent status in class are found in s.230.34, Wis. Stats. In particular, s.230.34(1)(b), Wis. Stats., provides in part:

The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action.

Neither the statute nor any administrative rules establish more precise requirements regarding notice of disciplinary actions.

However, several relatively recent decisions by the Wisconsin Supreme Court have addressed the question of whether a particular letter of discipline has met due process requirements. In State ex rel. Messner v. Milwaukee County Civil Service Commission, 56 Wis. 2d 438, 444, 202 N.W. 2d 13 (1972), the court indicated that "due process is not to be measured by rigid and inflexible standards", and that the "notice requirement cannot be defined by any 'rigid formula.'" The court went on to define the notice requirement in terms of being satisfied by a notice:

"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Messner, 56 Wis. 2d 438, 444.

In Messner, the court found the notice to have been sufficient even though it did not specify the regulation that served as the basis for the discharge.

In several other recent cases, the notice was also found to be sufficient. In Richey v. Neenah Police & Fire Commission, 48 Wis. 2d 575, 180 N.W. 2d 743 (1970), a notice charging a policeman with conduct "unbecoming a police officer" at a specified time and date was upheld. In State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 242 N.W. 2d 689 (1976), the court upheld a notice that set forth sixteen separate charges, where the employe had specifically answered each charge prior to hearing. In the most recent case of Weibel v. Clark, 87 Wis. 2d 696, 275 N.W. 2d 686 (1979), the employe was merely told that he had been discharged for stealing candy from a particular restaurant that was a tenant in the building where he worked. The court ruled that "[d]espite the apparent inadequacy of the notice", the employe was unable to show he had been prejudiced by DILHR's (unemployment compensation) decision:

The department found, based on the written statement signed by appellant when he filed his claim and on the testimony given at hearing, that appellant knew he had been fired for stealing candy from Heinemann's. The department and the circuit court concluded that appellant could not be prejudiced by the department's failure to apprise him of something he already knew. Weibel, 87 Wis. 2d 696, 704-05.

In the present case, the letter of discharge is devoid of any specific information that would allow the appellant to identify those actions that resulted in his discharge. The letter makes broad conclusory statements without supplying any of the underlying details. The letter's only reference to the date of the allegedly unsatisfactory performance is to "the past nine months." This indefinite period can readily be contrasted to the specific time and date supplied to the policeman/appellant in Richey, supra. In that case, even though the notice merely referred to conduct "unbecoming a police officer", identification of the hour and date of the incident allowed the appellant to prepare a defense. In contrast, Mr. Huesmann's discharge letter fails to specify both the time and the nature of the incidents.

Respondent argues that the "repeated counseling" referred to in the discharge letter provided the appellant with specific notice of his unsatisfactory performance. While respondent, by way of affidavit, was able to document the occurrence of these counseling sessions, there was no showing that the matters discussed during the sessions were identical to the allegations in the discharge letter. Even if the appellant were now able to recall the counseling sessions word-for-word, he would not know which (if any) of the incidents mentioned during the sessions were going to be relied upon by the respondent at the discharge hearing.

The appellant has shown that the respondent's failure to provide adequate notice may prejudice its case before the Commission:

Much of the rationale behind these [notice] requirements is to enable the employe to secure counsel and, in turn, for counsel to effectively evaluate the situation. Counsel cannot assume the client has total recall of any and all incidents or discussions that may have taken place over a nine-month period. (Appellant's Reply Brief, p.3).

In addition, the appellant has not filed a detailed answer to the charges in the discharge letter that would indicate that he was actually aware of the precise nature of the allegedly unsatisfactory performance. See DeLuca, supra, and Hess v. DNR, Case No. 79-203-PC, 12/4/79.

Based upon the above analysis the Commission concludes that the notice in this matter was, in fact, inadequate, and that if the appellant is to be discharged a more complete written notice of the basis for the discharge must be given him. Appellant is entitled to back pay and fringe benefits commencing on the effective date of the improper termination, as provided in s.230.43(4), Wis. Stats.

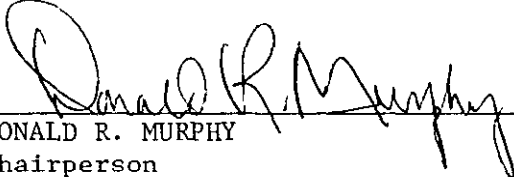
ORDER

Appellant's Motion for Reinstatement is granted, thereby voiding the letter of termination dated August 12, 1981. Respondent shall reinstate the

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appellant with full back pay and fringe benefits commencing upon the effective date of the voided termination, as provided in s.230.43(4), Wis. Stats.

Dated: Jan 8, 1981 STATE PERSONNEL COMMISSION


DONALD R. MURPHY
Chairperson

KMS:ers

Parties

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