

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JERROLD H. BENTS

Appellant,

v.

Commissioner, OFFICE OF  
COMMISSIONER OF BANKING

Respondent.

Case No. 86-0193-PC

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DECISION  
AND  
ORDER  
FOLLOWING  
REMAND

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), stats., of a discharge, which is before the Commission following a remand by the Dane County Circuit Court Branch IV.

BACKGROUND

In a final decision and order entered July 13, 1988, the Commission affirmed appellant's discharge and dismissed his appeal. There followed a petition for judicial review in Dane County Court Branch IV (88-CV-4234). In its decision entered April 3, 1989, the Court upheld the Commission decision except in two particulars:

1) The Court determined that whereas the Commission had found that an employe had complained to appellant several times about an office smoking problem, and appellant had failed to deal with it, there was insufficient evidence in the record to show that the employe had complained to appellant more than once.

2) The Court determined that the incident contained in Finding 11(a)<sup>1</sup> constituted uncharged conduct and could not be used to justify appellant's discharge.

The Court's decision further stated:

Given the recognized expertise of the Commission in the area of employment status, it is appropriate to remand this matter to the Commission. On remand, the Commission must determine, consistent with this Decision, whether the nexus standard enunciated in Safransky has been satisfied and, if so, whether discharge was the appropriate penalty. The latter finding involves a value judgment making the Commission the body more appropriate to make that decision ....

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This case is remanded to the Commission for proceedings not inconsistent with this opinion.

Subsequently, the Commission sent the following letter dated July 28, 1989, to the parties:

It appears to me that further proceedings on remand would consist of arguments concerning how the Commission should decide this matter given the findings the Court ordered deleted. Therefore, the following briefing schedule is established:

Respondent:	August 17, 1989
Appellant:	September 6, 1989
Respondent:	September 18, 1989

If there is any objection or if anyone has an alternative recommendation for processing this matter on remand, please submit same within 10 days of the date of this letter.

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<sup>1</sup> "11. Appellant was insubordinate to his superiors:

a. Following an office meeting with appellant present at which the agency managers discussed the role of Genny Sanders as office manager, a major change in the way the office did business, appellant told one or more of his employees that they could ignore Sanders' directions and keep doing things as usual. (They just had to "play the game.") Appellant had voiced no objection to the plan at the meeting.

Neither party objected or submitted an alternative recommendation for processing this matter within 10 days of the date of said letter. On August 14, 1989, respondent filed a letter setting forth its arguments as to why the court-approved findings of fact constitute just cause for discharge. On September 6, 1989, appellant submitted the following letter:

It is the position of Appellant Bents, through counsel, that the remedial Order of the Trial Court requires the Personnel Commission (P.C.) to hold further evidentiary hearing on the issue of whether the (in) action(s) of Mr. Bents had a deleterious effect on the performance of his duties and adversely effected the efficient operation of the Office of the Commissioner of Banking.

The Commission will first address appellant's contention that further evidentiary hearing is required. To begin with, appellant waived his right to request an evidentiary hearing when he failed to respond within 10 days to the Commission's July 28, 1989, letter which proposed that the matter be resolved on briefs and providing the parties an opportunity to submit objections to that manner of proceeding or alternative suggestions within 10 days. Furthermore, even if appellant had not waived the opportunity to request an evidentiary hearing, the Court's decision does not require that the Commission hold an evidentiary hearing on remand.

What the decision says the Commission is required to do on remand is to "determine, consistent with this Decision, whether the nexus standard enunciated in Safransky has been satisfied, and, if so, whether discharge was the appropriate remedy." The Court's order remands the matter to the Commission "for further proceedings not inconsistent with said decision."

There is nothing in the decision and order per se that requires the Commission to conduct a further evidentiary hearing, appellant has not suggested in what way the particular circumstances of this matter require a

further evidentiary hearing, and the Commission can discern no need for one. The question before the Commission is whether, based on the findings of misconduct remaining after the deletion of those required by the Court, the Safransky test has been met; and, if so, whether discharge was the appropriate penalty. In deciding this question, the Commission is in no different posture than it was when it was considering the hearing examiner's proposed decision and order and made certain deletions, changes and additions to the findings of misconduct in response to the parties' objections and then addressed the question of just cause without further evidentiary hearing.

Turning to the merits, the Court determined that there was no substantial evidence in the record to support the finding that appellant had failed to act after Mr. Riedasch had repeatedly complained to appellant about office smoking: "The Court finds no substantial evidence in the record to indicate that Ms. Riedasch complained to petitioner more than once."

The Court further determined that there was inadequate notice of the following finding of misconduct and therefore it had to be deleted:

11. Appellant was insubordinate to his superiors:

A. Following an office meeting with appellant present at which the agency managers discussed the role of Genny Sanders as office manager, a major change in the way the office did business, appellant told one or more of his employes that they could ignore Sanders' directions and keep doing things as usual. (They just had to 'play the game.')

Appellant had voiced no objection to the plan at the meeting.

The test of just cause set forth in Safransky v. Personnel Board, 62 Wis.2d 664, 674, 215 N.W.2d 379(1979), is as follows:


"... whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works."

Notwithstanding the deleted findings, there remain findings that (in summary) appellant inadequately performed his duties as chief fiscal officer in several significant respects, he made several minor errors in performing his duties as fringe benefit and payroll officer, he was ineffective in supervising his subordinates in a number of respects, he was insubordinate to his supervisors, including an incident when he disobeyed a direct order not to discuss anything other than business with Ms. Riedasch, and he engaged in conduct detrimental to his responsibilities as affirmative action officer, including an incident when he stated to the DOA budget analyst for his agency, "there's a nigger in the woodpile at DER," and another occasion when he told Deputy Commissioner McKenzie that having to refile his agency's affirmative action plan was "bullshit" and after she reprimanded him for his remarks he said it was still bullshit. In the Commission's view, the deleted findings were only a very small part of respondent's case, and there remains a more than sufficient showing of just cause. The Commission is also of the opinion that discharge was an appropriate penalty in light of the entire record including the seriousness of appellant's misconduct and deficiencies and the findings that there were no positions available for demotion and that appellant had failed to respond positively to prior criticisms and suggestions for improving his work performance.

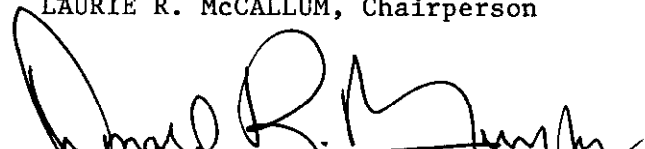
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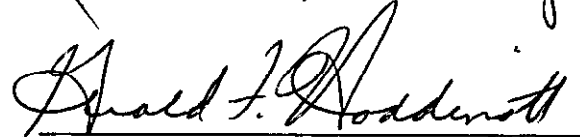
Respondent's action discharging appellant is affirmed and this appeal is dismissed.

Dated: October 4, 1989 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:gdt  
ID5/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Jerrold Bents  
4914 Tocora Lane  
Madison, WI 53711

Toby Sherry  
Commissioner, OCB  
P.O. Box 7876  
Madison, WI 53707