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STATE OF WISCONSIN

CIRCUIT COURT
Branch 12

JANE COUNTY

BRUCE POWERS,

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Petitioner,

*

VS.

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Case No. 90 CV 3023

WI PERSONNEL COMMISSION,

*

Respondent.

*

RECEIVED

DATE:

February 12, 1991

FEB 27 1991

Personnel
Commission

BEFORE:

Honorable MARK A. FRANKEL, Circuit Judge

APPEARANCES:

Petitioner Bruce Powers in person and by
RICHARD V. GRAYLOW, of Lawton & Cates, S.C.,
Attorneys at Law, 214 W. Mifflin Street,
Madison, Wisconsin 53703-2594;

Respondent by STEPHEN M. SOBOTA,
Assistant Attorney General, Department
of Justice, 123 W. Washington Avenue,
Madison, Wisconsin 53707-7857.

PROCEEDINGS:

Oral Argument Hearing (Excerpt of
Transcript - Court's Ruling)

Diane K. Scott, RPR-CP
Official Reporter, Br. 12

is whether or not the Personnel Commission had the
 The first legal conclusion that's placed in issue
 legal conclusions.
 to some of the factual matters that intertwine with those
 conclusions that are apparently in dispute and then go on
 Now I would like to then turn to the legal
 this instance seeks to overturn the agency's action.
 State here that the burden is on the petitioner who in
 substituted judgment. I accept the assertion of the
 has been mentioned, this is not an opportunity for a
 tion is appropriately sustained on this review. And, as
 came to a reasonable factual conclusion, that determina-
 kept within its jurisdiction, applied the correct law and
 reasonable degree of deference, and if the Commission
 Commission's determination is one that is entitled to a
 been suggested in the briefs here, the Personnel
 handle on the appropriate standard of review. As has
 in any administrative review proceeding is to get a
 determination here. I think the important starting point
 I'm going to set forth my administrative review
 appearances are as they were earlier.
 THE COURT: We'll go back on the record. But

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BARON POWERS V.
 THE PERSONNEL COMMISSION
 90 CV 0073
 February 12, 1991

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1 independent authority to modify the discipline imposed by
2 the University. Section 230.44(4)(c) when one views that
3 section under the plain meaning rule of the statutory
4 interpretation it gives the Personnel Commission the
5 independent right to modify the discipline imposed below.
6 Of course there is a question raised by the Petitioner as
7 to whether or not the facts of this case justified a
8 modification, but I'll deal with that as a separate
9 question in the factual portion of this decision.

10 The other legal conclusion that I think is
11 appropriate to reach on this review is whether or not the
12 Personnel Commission's range of options is constrained by
13 the specific options or results that are argued by the
14 parties before the Personnel Commission. When I consider
15 this argument, I view that to be too narrow a reading of
16 the authority given to the Personnel Commission under
17 230.44(4)(c). That would be an implied limitation that
18 isn't expressly provided for and one that would not make
19 good sense from a policy standpoint. I am declined to
20 read the Personnel Commission's authority to be that
21 narrow.

22 Now as to the heart of this case, it really turns
23 on some of the factual deductions and conclusions made by
24 the Personnel Commission. In the factual arena, it is
25 clear and conceded by the Petitioner that the University

1 when it commenced this disciplinary action against Dr.
2 Powers considered the February 19, 1988 incident as part
3 of the misconduct underlying the original discipline
4 imposed. Everyone acknowledges that the February 26,
5 1988 incident was the more serious incident and one that
6 focused everyone's attention and interest, but that that
7 earlier incident was at least part of the initial
8 disciplinary action.

9 The Petitioner has then raised the question whether
10 or not the University would not have charged the February
11 19, 1988 incident were it not for the subsequent February
12 26th incident. That, unfortunately, I think is something
13 of a matter of conjecture. Even if I were to assume that
14 assertion to be true, I'm not persuaded that that would
15 provide a basis to preclude discipline on the earlier
16 incident if the earlier incident otherwise merited
17 discipline on the underlying facts. This is a question
18 of some prosecutorial discretion. Certainly if this were
19 a criminal case by analogy, if someone commits a
20 misdemeanor that goes uncharged and then subsequently is
21 suspected of having committed a felony, the State has the
22 latitude to charge both the felony and the misdemeanor.
23 If the defendant is then acquitted on the felony, it is
24 not a grounds for attacking the misdemeanor to say that
25 were it not for the felony the defendant would have never

1 been charged with the misdemeanor. By similar analogy
2 here, because the Petitioner was acquitted on the more
3 serious charge, it's not a valid basis to attack the
4 earlier lesser charge to say that he would not have been
5 charged with it had the second incident never come to
6 light.

7 It's also clear to me that the Personnel Commission
8 was aware of the failure of proof on the subsequent event
9 when they chose to modify the discipline as it pertained
10 only to the earlier event.

11 Then we distill the analysis down to the question
12 of the decision itself and whether or not the Commission
13 had an adequate basis to impose a letter of reprimand as
14 a sanction for the February 19, 1938 incident. My view
15 is that although the decision is not as illuminating as
16 it might be that the decision does clearly reflect what
17 can be termed a relative judgment by the Personnel
18 Commission as to the seriousness of the February 19th
19 incident, and in my view that determination is one well
20 within the parameters of what a reasonable decision maker
21 might conclude under the facts of this case. Therefore,
22 no ab initio review is required of me even if I might
23 reach a differing conclusion on the merits. Greater
24 specificity by the Personnel Commission, although it
25 would have been helpful, is not legally required, and I

1 think there are some persuasive authorities in the
2 State's brief to that effect.

3 Based on that reasoning, it's my conclusion that
4 the decision of the Personnel Commission should be
5 affirmed, and I would ask Mr. Sobota if he would draft a
6 brief order granting that relief for the reasons set
7 forth on the record.

8 MR. SOBOTA: I would be glad to do that, Your
9 Honor.

10 MR. GRAYLOW: Thank you, Judge.

11 MR. SOBOTA: Thank you very much.

12 MR. GRAYLOW: I appreciate your calling it today
13 rather than six months or a year from now.

14 THE COURT: It doesn't get easier.

15 MR. GRAYLOW: No. That's why we appreciate that.
16 At least I appreciate it very much and so does my client.

17 (Proceedings concluded.)
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