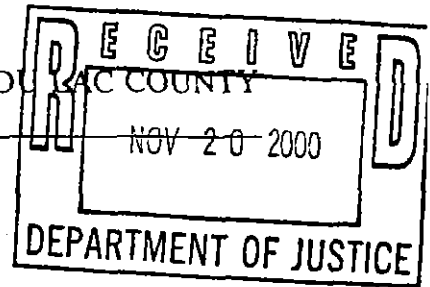


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STATE OF WISCONSIN PERSONNEL COMMISSION COURT

FOND DU LAC COUNTY



LYNN HINTZ,

FILED

Petitioner,

DECISION

vs.

NOV 16 2000

Case No. 99CV000340

PERSONNEL COMMISSION,

Respondent. **CAROL A. MARK**
FOND DU LAC COUNTY, WIS.
Clerk Of Circuit Court

A Petition For Judicial Review was filed on August 10th, 1999, by petitioner, Lynn Hintz, seeking review of the decision of the Personnel Commission issued on August 2nd, 1999. The petitioner has submitted a brief; the respondent has filed a responsive brief, and petitioner's rebuttal or reply brief has also been received. In addition, the administrative record has been compiled and consists of transcription of the numerous tape recorded hearings before Commissioner Donald R. Murphy, as well as various compiled volumes of exhibits and written materials of the proceeding. Included within the record are three videotapes concerning inmate "John"

The matter before the Court concerns the decision of the Personnel Commission which upheld a 10 day suspension and disciplinary demotion of Lynn Hintz from Health Services Nursing Supervisor to Registered Nurse. The petitioner contends that the discipline imposed was without just cause, in violation of due process, and that it was excessive. Petitioner asserts the Personnel Commission made findings of fact and conclusions of law not supported by the record, and seeks reversal of the decision, reversal of the discipline, and to be made whole. The respondent contends the Commission's decision was supported by substantial evidence.

The petitioner, as a State employee, is entitled to seek judicial review pursuant to Ch. 227, Wis. Stats. The standard of review concerning an agency's findings of fact requires a

circuit court to affirm those findings of fact that are supported by substantial evidence in the administrative record. Substantial evidence is defined by the test of whether reasonable minds could arrive at the same conclusion the agency did. Madison Gas & Elec. Co. v. Public Serv. Comm'n., 109 Wis.2d 127, 133, 325 N.W.2d 339, 342-43 (1982). See, Wis. Stats., Sec. 227.57(6), and William Wrigley, Jr. Co. v. DOR, 160 Wis.2d 53, 71, 465 N.W.2d 800 (1991). This Court is not permitted to weigh the evidence nor determine the credibility of witnesses. Bucyrus-Erie Co. v. ILHR Dept., 90 Wis.2d 408, 418, 280 N.W.2d 142 (1979); Omernick v. Department of Natural Resources, 100 Wis.2d, 234, 251 (1981), 301 N.W.2d 245. When two conflicting lines of evidence are both supported by substantial evidence, it is for the agency to determine which view of the evidence it wishes to believe. Robertson Transport Co. v. Public Service Comm., 39 Wis.2d 653, 658, 159 N.W.2d 636 (1968). When the evidence supports more than one inference, the finding and choice of the agency is conclusive. Vocation. Tech. & Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis.2d 230, 240, 251 N.W.2d 41 (1977). Upon judicial review, the circuit court may not make an independent determination of the facts. Hixon v. Public Serv. Comm., 32 Wis.2d 608, 629, 146 N.W.2d 577 (1966). The circuit court is confined to the determination of whether there was in fact substantial evidence to sustain the findings that were in fact made. E.F. Brewer Co. v. ILHR Department, 82 Wis.2d 634, 636, 264 N.W.2d 222 (1978). This Court is not permitted to second guess the agency's proper exercise of fact finding determination, even if this Court reviewing the record anew, would come to a different result. Briggs & Stratton Corp. v. ILHR Department, 43 Wis.2d 398, 409, 168 N.W.2d 817 (1969). It has been held that it is this Court's duty to search the record to locate substantial evidence, if it exists, which in fact supports the agency's decision. Vande Zande v. ILHR Department, 70 Wis.2d 1086, 1097, 236 N.W.2d 255 (1975).

The phrase, "substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gateway City Transfer Co. v. Public Service Comm., 253 Wis.2d 397, 405-06, 34 N.W.2d 238 (1948). As stated in Hamilton v. ILHR Dept., 94 Wis.2d 611, 618, 288 N.W.2d 857 (1980);

[T]he agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.

It has further been stated that so long as reasonable minds could agree, the Court must uphold the agency's decision, even if it is against the great weight and clear preponderance of the evidence. Omernick, supra.

This Court's standard of review concerning errors of law are reviewed pursuant to Sec. 227.57(5), Stats. This Court must determine whether there is a rational basis to support the agency's conclusions of law. American Motors Corp. v. LIRC, 119 Wis.2d 706, 710, 350 N.W.2d 120, 122 (1984). However, the same case admonishes the circuit court to hesitate before substituting its judgment for that of the agency upon a question of law when there is a supporting rational basis. Supra, at 710. Historically, the courts give varying degrees of deference to an agency's interpretation of a statute when the legislature has empowered that agency with the duty of administering the statute, when the agency's interpretation is of long standing, the interpretation involves expertise, technical competence, specialized knowledge, and when the agency through its interpretation and application may therefore provide uniformity and consistency in the field within its specialized knowledge. Lindsey v. LIRC, 171 Wis.2d 499, 506, 493 N.W.2d 14 (1992). This Court concludes that determining what constitutes "just cause" and what should be the appropriate punishment are areas for which the Commission has a primary responsibility for determination of fact and policy in that area of the law, that the

Commission has developed significant expertise and precedent, that the agency is designed to provide uniformity and consistency in that field, and therefore this Court must give weight and deference to the legal conclusion of the Commission. See, Esparza v. DILHR, 132 Wis.2d 402, 406, 393 N.W.2d 98 (Ct. App. 1986), Frank v. Personnel Commission, 141 Wis.2d 431, 434, 415 N.W.2d 533 (Ct. App. 1987); Brookfield v. Milwaukee Sewerage Dist., 171 Wis.2d 400, 421, 491 N.W.2d 484 (1992). The decision of the Commission must be afforded "great weight" due to its expertise, and experience in reviewing facts similar on issues of just cause and appropriate discipline. Richland Sch. Dist. v. DILHR, 174 Wis.2d 878, 891-92, 498 N.W.2d 826 (1993).

ANALYSIS

The Court will first address the finding of fact that petitioner instructed staff on March 17th, 1997, to leave John on the floor. At page 20 of the Final Decision And Order, the Personnel Commission concluded that this charge from the letter of discipline (paragraph 8 of the Findings Of Fact) was true and proven. This Court has reviewed volume two of the record which includes respondent's exhibits #3, 4, 5, and pages 1-248 (pages 1-64 constitute the investigation team report). The relevant testimonies by witnesses before the hearing examiner has also been reviewed. This Court's consideration of the arguments of the attorneys from their briefs, coupled with an examination of the record, reveals the issue presented to be extremely fact intensive, similar to what this Court sees juries wrestle with on every sexual assault trial or murder trial. Who said what, when, and to whom become very critical issues. What witnesses often say to an investigator, isn't always the same that they testify to under oath. A fact finder must weigh the evidence presented, assess credibility, and exercise judgment as to the weight and credit to be afforded to the evidence. Many times, the accused, whether a

criminal defendant, or a person like the petitioner, denies the allegation of what was said and the fact finder must also resolve that testimony.

Thus, the Court in volume 13 of the testimony, has reviewed the testimony of William McCreedy, pages 34-115, as testified on February 4th, 1998, before hearing examiner Donald R. Murphy, Commissioner. Parenthetically, the Court notes that the respondent's brief, page 13, only refers to Mr. McCreedy's personal notes at volume two, R-4, and ignores the actual testimony of Mr. McCreedy. This Court's review of Mr. McCreedy's testimony reveals that it presents plausible evidence of a nurse, with prior correctional experience at the Dane County Jail, who testified that petitioner did give the directive to leave John on the floor at a staff report meeting. Mr. McCreedy further testified that he documented the petitioner's statements in a personal note and in fact discussed his concerns with his supervisor approximately three days later. Cross-examination attempted to show Mr. McCreedy wanted to trade shifts with the petitioner or alternate shifts. That was denied by Mr. McCreedy and further evidence on re-direct also revealed that Mr. McCreedy did not apply for the vacant position after the petitioner's demotion. Mr. McCreedy was also new to the unit and was still under orientation and did not countermand petitioner's directive nor confront the petitioner with his concerns. As the Court considers that testimony and evidence of his personal notes, the Court being mindful that it is not permitted to weigh the evidence nor determine credibility, but rather is only consider the evidence as to whether it is substantial and whether a reasonable person might accept that testimony to support a conclusion, this Court as a matter of law now finds this to be substantial evidence as it is such that a reasonable mind might accept as adequate to support a conclusion, that the petitioner did give a directive to leave John on the floor.

In addition, the record also supports the Commission's finding from the testimony of

Theodore Otto (volume 13, page 20, lines 22-25). Parenthetically, again, the State's brief fails to cite the Court to the actual testimony of Mr. Otto, but rather only cites the Court to witness Otto's comments in his interview with investigative team (volume 2, respondent's exhibit #5, page 58). The Court reaches the same conclusion regarding Mr. Otto's testimony, namely that it is presented clearly and straight forward, that the petitioner gave the directive to leave John on the floor. The Commission, in its discretion, was entitled to weigh the credibility and weight of Mr. Otto's testimony and as such it constitutes relevant evidence such as a reasonable person (mind) might accept as adequate to support a conclusion that the petitioner gave the directive.

The arguments of the petitioner are unpersuasive because they basically ask the Court to second guess the Commission's discretion to determine facts on the evidence, even if this Court reviewing the record anew, would come to a different result. Nor is it a persuasive argument that other witnesses present at the time Mr. McCreedy claims he heard the petitioner's directive, deny it or say they don't recall it being said. That is a matter for the Commission to weigh and give credit to the testimony as it finds believable and worthy of its consideration. The fact that there was an entry team later in the evening on March 17th, under the order of Lieutenant Koenig does not limit nor preclude the Commission from choosing to believe the testimony of Otto and McCreedy. Also, the petitioner's argument that the investigation was biased does not prevent the Commission from giving full weight and credit to the McCreedy and Otto testimony. Likewise, the petitioner's additional argument that other major players were not interviewed, does not, nor has it been shown that it would, prevent the Commission from relying on the testimony of McCreedy and Otto. The Commission, as finder of fact, has the responsibility to give weight and credit to the testimony of witnesses, and the absence of investigation team evidence or the presentation of counter evidence by other staff members present again is asking

this Court to determine the weight and credibility of witnesses, and to second guess the agency's determination, even if this Court would come to a different result. While the petitioner has successfully attacked inaccuracies in the investigative team report, the Commission still heard the testimony of McCreedy and Otto and had the prerogative to give weight and credit to their testimony, even in the face of the petitioner's refutation and clarification of the actual testimony from Linda Edmunds, and Sherri Sayles. This Court also rejects the petitioner's troubling argument that the investigative team was biased against the petitioner and other female nurses and foreign born physicians, because there is no evidence that the Commission improperly considered race, sex, or place of or natural origin in its determination of the facts.

The next issue concerns the Finding Of Fact that petitioner failed to have formal policies and procedures in place at the new infirmary. From a review of the briefs of the parties, and the evidence before the Commission, this Court is satisfied that there is substantial evidence in the record, such that reasonable minds could arrive at the same conclusion the Commission did, that the petitioner in fact had sufficient time, ability, and resources to have in place formal policies and procedures for the new infirmary. The Commission did exercise its discretion by acknowledging a concern that the petitioner's supervisor, Burkley, had conducted performance evaluations while noting the failure to have policies and procedures developed, nonetheless still giving the petitioner positive performance evaluations. Nonetheless, the evidence does support the Commission's finding.

Next the Court considers the Finding Of Fact that the petitioner failed in her duties relating to the delivery of quality health care in the infirmary, and that, as a result, inmate John was as a result given poor health care and suffered a deterioration of his condition while at the new infirmary (See page 20 of Final Decision And Order.) This finding has two components.

The first is that petitioner caused a deterioration of John's health, the second is that petitioner failed in her duties by not providing quality health care. This particular issue is fact driven in the field of medical care, charting, nursing standards, medical practices, and requires this Court to review the record for what evidence has been submitted. Certainly, to a lay person it is difficult to pinpoint causation between a nurse and physician when it would be generally believed that a physician would bear greater responsibility for the actual performance of the patient. It is not lost on this Court, nor was it lost on the Commission, that the Commission did review the other disciplinary actions taken or referrals made to the medical examining board and nursing board regarding physicians and nurses involved with the care of John.

This Court's review of the record reveals that the following facts were available for the Commission to consider in support of its finding: Patient John did lose weight while on the unit; patient John did not consume sufficient foods nor water; John's patient chart was not adequately maintained; and patient John was allowed to remain on the floor per Petitioner's directive. Other facts in the record to support the agency's determination, for example, would be PC Fact 25, that there was no nursing assessment done on March 16th, 1997. The DOC disciplinary letter does allege the lack of consistent and qualitative documentation in the charts of inmate. PC Fact 27 also notes that there was no nursing assessment done on March 18th, 1997. However, the record is without substantial evidence that John had that the diagnosis of malignant neuroleptic syndrome and devoid of evidence that he in fact suffered from that condition.

The petitioner's arguments about the discrepancy of the scales used to weigh the patient John, whether or not expert testimony should have been presented, whether the patient went to intensive care as opposed to the geriatric ward at University of Wisconsin Hospitals, whether the physicians were at fault for the patient's deterioration, are all matters that the Commission

had the responsibility to weigh and consider.

On the pending issue under consideration, the respondent's brief, page 11, cites the Court to the investigative team report, volume 2 at page 44. That page contains the conclusion of the investigative team that, "Lynn Hintz as Infirmary Manager directed the care inmate John received which resulted in inmate John having a serious medical decompensation which resulted in his hospitalization." The previous pages of "issue #4" at pps. 37-41, fails to document any evidence, facts, conclusions, or opinions, that support the conclusion of the team that Lynn Hintz's conduct or lack of conduct was a cause of inmate John's condition. No witness testified before the administrative law judge that Lynn Hintz's conduct or lack on conduct had any causal relationship to John's medical condition. There are no facts that prove this directly or indirectly. For the Commission to rely on a conclusion by the investigative team, which is not supported by any causative facts, nor any opinion of an expert nurse or physician, clearly is a finding of fact not supported by substantial evidence, such as a reasonable mind might accept as adequate. This conclusion is also supported by the number of interactions inmate John had with physicians, psychiatrists, and psychologists, who all have been cited in one way or another for deficient performances. Without further substantial evidence, this Court concludes that the Commission was unable to conclude the ultimate responsibility of Petitioner's conduct for the condition inmate John was in. There has been no showing that John's condition would have been any different had Nurse Hintz done anything different or complied with any of the other deficiencies claimed in supervising, charting, etc.

The other argument in respondent's brief is that the testimony of Lynn Hintz provides further evidence to support the Commission's finding. That argument, at page 11, does not show substantial evidence upon which the Commission could have concluded its finding.

Petitioner Hintz's testimony does not admit any causation to the worsening of John's medical condition.

This Court further concludes that no deference need be shown the Personnel Commission on this point because it would be outside the body of experience of the Personnel Commission and is a matter better suited before the medical board or nursing board of professional standards.

Therefore, this Court concludes that the finding of fact that Petitioner caused a deterioration of John's condition must be stricken from the decision of the Personnel Commission. However, the second component of the finding that petitioner failed in her duties relating to the delivery of quality health care in the infirmary is affirmed because there is substantial evidence to support that conclusion, i.e. deficient charting, lack of policies, supervisory responsibility for staff, and for directing John to remain on the floor.

Next the Court considers the issue of whether petitioner provided false information during the DOC's investigation when she denied telling staff to leave John on the floor. As the Court has already reviewed evidence concerning this issue as it relates to whether the petitioner did in fact instruct staff to leave inmate John on the floor, that having been found to have substantial evidence, the Court therefore concludes that there is substantial evidence that petitioner did in fact deny it to the investigative team. This issue was a matter for credibility and the Commissions' findings in that regard cannot be second guessed by this Court.

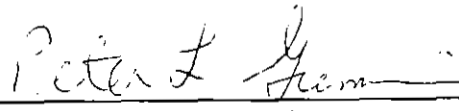
The final issue before the Court is whether or not the Commission exercised its discretion in demoting the petitioner and imposing a 10 day suspension without pay and whether the Commission set forth a reasonable basis for its decision regarding the petitioner's discipline. This Court does recognize the Personnel Commission's experience and expertise in matters of discipline, and therefore will not conduct an ab initio review but defer to the Commission's

conclusions if they are reasonable and whether the Commission utilized a reasonable method for its decision. Upon this Court's review of the record and the analysis set forth by the Commission, this Court concludes that the Commission did properly weigh the evidence, did consider mitigating factors, and gave an appropriate rationale for its reasons for the discipline as imposed. The Court therefore concludes that the record before the Commission demonstrates that it did properly exercise its discretion and did set forth a reasonable basis for its discretion regarding Hintz's discipline. Even though this Court has found a lack of substantial evidence in the record concerning causation between the petitioner's conduct and John's medical condition, the discipline and Commission's analysis still is valid and otherwise is properly supported by the other deficiencies found by the Commission of the petitioner's conduct.

Therefore, it is the conclusion and order of this Court that the Commission's final decision and order dated August 2nd, 1999, is affirmed in all respects, except as to the claim that petitioner Hintz's conduct caused inmate John to suffer a deterioration of his medical condition.

Dated this 16 day of November, 2000.

BY THE COURT



Honorable Peter L. Grimm
Circuit Judge

xc: John J. Niemisto, Asst. Attorney General
Helen Marks Dicks

Mailed this 17th day of November, 2000, by hps.