STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

EDWIN A. PINNOW,

Plaintiff, Case No. 162-122

vs.

MEMORANDUM DECISION

PLAYBOY CLUB OF LAKE GENEVA, INC., and DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS,

Defendants.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action by the plaintiff employee Edwin A. Pinnow to review a decision of the defendant department dated May 28, 1976, entered in an unemployment compensation proceeding which adopted the findings of fact of the appeal tribunal and affirmed the appeal tribunal's decision denying benefits to the employee.

The findings of fact of the appeal tribunal read:

"The employe worked as a maintenance person approximately two months for the employer, a hotel and resort operator. His last day of work was October 13, 1975 (week 42).

"The employer has a well-established company rule providing that workers are prohibited from using hotel facilities without written permission of the manager.

"On the evening prior to his last day of work, the employe worked until 11:30 p.m. and then had difficulty getting his car started. He obtained a key to a health club concession which occupied a portion of the hotel from a third shift worker and spent the night in that concession. He was discovered sleeping on the premises the following morning, October 13, 1975 (week 42).

"On October 13, the employer also received information which led him to believe that the employe had falsified certain information on his employment application, in violation of another company rule. The employe was thereupon discharged on October 13, 1975 (week 42) for violation of two company rules.

"The company rules concerning remaining on the premises after hours and falsification of employment applications were reasonable. The employe was made aware of these rules when he was hired. He was not justified in his deliberate and intentional

violation of the rules of the employer. Furthermore, our courts have consistently held that honesty in the submission of employment applications is a matter of utmost concern in employment relations. If an employer is entitled to have a given question answered in such an application the employer is entitled to have it answered honestly and is entitled to rely upon the answer. To conclude otherwise would be to destroy good faith in employment relations. Disch v. Ind. Comm. & Miller Brewing Co., Circuit Court, Jan. 13, 1958.

"The appeal tribunal therefore finds that in week 42 of 1975, the employe was discharged for misconduct connected with his employment within the meaning of section 108.04(5) of the statutes."

No meaningful brief was filed in this matter by Pinnow. Therefore, in order to determine what issues are being raised by him the Court has resorted to his complaint. This complaint states these three grounds for the review sought of the department's decision:

(1) The department acted in excess of its powers in making its findings of fact "by obtaining information concerning unnecessary personal records which are being treated and investigated in a different hearing"; and that "there was a conspiracy which the plaintiff Edwin A. Pinnow will prove".

(2) That the findings of fact do not support the department's order in that Pinnow "had permission to stay on the premises that night [of October 12-13, 1975] from the third shift maintenance manager and that the security guard was responsible to follow through with obtaining the written permission from his superiors as transcripts of the first hearing will expose."

(3) That the department's order was procured by fraud because the department is "not being held responsible to uphold the American Judicial system" (and then follows a quotation from sec. 108.14(6), Stats.).

With respect to ground (1), based on the transcript of the hearing before the appeal tribunal and statements made to the Court by Pinnow

in his oral argument, the Court has concluded that the personal records referred to relate to the question of whether he had been in a mental institution during the five year period prior to his filling out the application for employment. This issue will be discussed later herein. With respect to whether there was a conspiracy which had something to do with his discharge, there is no evidence in the hearing record relating to that whatever. At oral argument the Court carefully explained to Pinnow that the Court had no power to take any testimony, but had to decide the case on the evidence in the record, this evidence being that taken before the appeal tribunal.

With respect to ground (2), there is no question but that the findings of fact support the department's order. However, when this paragraph is considered as a whole it is apparent to the Court that the issue which Pinnow was attempting to state was that the findings of fact with respect to his staying overnight on the premises are not supported by credible evidence. That is a proper issue and will be dealt with later herein. The Court has also determined from what was stated in the complaint with respect to ground (1), as amplified by Pinnow's oral argument, raises the issue of whether the finding of fact with respect to the alleged falsification of his application for employment is supported by credible evidence.

Ground (3) is entirely without merit because there is nothing in this record to indicate that the department's order was procured by fraud.

The Court will now consider the issue with respect to the findings of fact being supported by credible evidence. A hearing was held before Examiner Darra Darby sitting as the appeal tribunal at Janesville on February 2, 1976. Only two witnesses testified, they being the employee Pinnow and Floryn Cholewinski, the latter having been the employer Playboy Club's engineer in charge of the maintenance department.

In addition to the testimony of these two witnesses certain documentary evidence was introduced in the record. The following discussion of the evidence is grounded on the testimony of these two witnesses and such documentary evidence.

Pinnow began his employment by the Playboy Club on August 20, 1975. On that day he signed this statement (Exhibit 2):

> "This will serve to notify my employer that I have received my personal copy of the Playboy Clubs and Hotels Employee Handbook. Further, I understand that it is important for me to read and understand and follow the policies, practices, rules and regulations contained in this Handbook as a condition of my employment."

The Employee Handbook referred to in this statement is Exhibit 1. At the very beginning of this handbook under the heading "LAKE GENEVA CLUB/HOTEL LOCAL REGULATIONS" it is stated:

> "In addition to the policies, practices, rules and regulations stipulated herein, the following regulations apply to all employees of the Lake Geneva Playboy Club/Hotel.
>
> "* * *
>
> "3) With the exception of Bunnies, no employee may use the facilities of the Hotel without written permission of the Managing Director."

On page 28 of this handbook under the heading "EMPLOYEE RULES AND STANDARDS OF CONDUCT" it is stated:

> ". . . The types of conduct and acts enumerated below are prohibited and violators will be subject to disciplinary action including discharge.
>
> "* * *
>
> "8) Falsifying Company personnel, employment, financial or other records."

The evidence establishes that on the evening of October 12, 1975, which was a Sunday evening, Pinnow's work shift as a maintenance man ended at 11:30 p.m. In his testimony Pinnow related how his car would not start and he then contacted "Ron" who was "the head of the maintenance on the third shift" (Pinnow had worked on the second shift on October 12th), and obtained permission from him to stay in the health

club. He further testified he got the key "from the man who was in charge of the third shift," apparently again referring to "Ron."

It is undisputed that Pinnow slept that night in the health club. He was discovered there at 5:30 a.m. on October 13th by Roger Stecher, a security guard, who ordered him out of the health club and who filed a written report of the incident (Exhibit 4).

Cholewinski testified that the "Ron" referred to by Pinnow as being in charge of the third shift was Ron Fiore, a night maintenance man who was not a supervisor of Pinnow, but a co-worker. By the appeal tribunal's finding, "He [Pinnow] obtained a key to the health club concession which occupied a portion of the hotel from a third shift worker . . .", the appeal tribunal accepted Cholewinski's testimony that Ron Fiore was a co-worker and not acting in a supervisory capacity in so far as Pinnow was concerned.

Cholewinski further testified that the procedure followed in granting permission to an employee to stay overnight at the hotel is to contact either the managing director or the resident manager; and the former is on duty during the day and the latter at night so someone is there 24 hours per day. He further testified that the security guard is instructed to have an employee wishing to stay overnight contact the resident manager, which is in flat contradiction of the claim made in the complaint that it was the duty of the security guard to follow through in obtaining such written permission. Pinnow gave no testimony that he contacted the security guard about staying overnight, but stated the security guard was aware Pinnow was spending the night in the health club.

The Court determines that there is credible evidence to sustain the appeal tribunal's findings of fact with respect to Pinnow's staying overnight in the health club which was part of the hotel premises.

With respect to the alleged falsificiation by Pinnow of his job application, Cholewinski testified that on the morning of October 13th Rolf Klotz, who is in charge of security at the hotel, "mentioned that did you know that he -- his application -- he [Pinnow] had lied on his application, that he stated he had no illnesses or anything. He says, we have checked out that he has been in a mental institution." (Tr. 13). Cholewinski further testified this was the first he knew about this.

During the questioning by the examiner at the hearing this transpired (Tr. 29-30):

"Q Yes, were there, in fact, any illnesses that you had had in the past five years that you did not show on this application?

A At this point, until further proof, I'll plead the fifth amendment.

Q Well, sir, I do want to remind you that you did make some statements when you were questioning Mr. Cholewinski.

A Yes, I'd asked him if this had any influence before my hiring.

Q If you have had any illnesses in the past five years that you didn't show on this application, what were your reasons for not showing these illnesses?

A I'll plead the fifth, again.

Q Well, let me say this to you, sir, that nothing that you say is going to be used against you in the proceedings and the more information that I am able to get from you relating to the charge of misconduct they've raised here, the better I'll be able to render a decision in this matter.

A Umm - mm.

* * *

Q On Exhibit #3 [the job application], I ask you, is this your signature that appears on the second page?

A That's correct, Ma'am.

Q And did you read the information about the signature before you signed it?

A Yes, I did.

Q Was this information contained in the application true to the best of your knowledge when you signed it?

A That's correct.

Q Except for the fact that there may have been some hospitalization that you did not show on here, is that correct?

A I plead the fifth again.

Q Have you ever received any treatment for mental illness, sir? In the preceeding five years?

A I'll plead the fifth again."

The statement by the examiner to Pinnow, "I do want to remind you that you did make some statements when you were questioning Mr. Cholewinski" undoubtedly refers to this question put by Pinnow to Cholewinski (Tr. 17):

> "You had absolutely no idea at all that I had been committed for reasons that I can't talk about in this courtroom at the time --"

to which Cholewinski answered, "No, I didn't." This question by Pinnow was asked after Cholewinski had testified that Klotz had informed Cholewinski on the morning of October 13th that Pinnow had falsified his job application by stating he had no illnesses when in fact he had been in a mental institution. It is apparent that the examiner inferred that Pinnow's above quoted question to Cholewinski, in which he referred to having been "committed", referred to a commitment for mental illness, and this was a reasonable inference to make.

Furthermore, one has no right to invoke the Fifth Amendment in refusing to answer a question the answer to which would not relate to criminal conduct or to preliminary facts which might lead up to the witness's involvement in criminal conduct. Certainly the questions by the examiner to Pinnow regarding whether he had any illnesses during the past five years, or some hospitalization, during such period did not fall in that category. Therefore, Pinnow's refusal to answer these questions

by attempting to invoke the Fifth Amendment also permitted the examiner to draw the reasonable inference that Pinnow had been hospitalized for mental illness during the five years preceding the date of his job application.

While the hearsay testimony of Cholewinski about Pinnow having been in a mental institution may have been insufficient credible evidence standing alone upon which to ground the finding made that there was a deliberate violation by Pinnow of the employer's rule against falsification of personnel records, the above stated inferences which the examiner could draw corroborated it. Together, there was sufficient credible evidence to support the finding.

Pinnow in making his oral argument before the Court stated that he has a conspiracy action pending against the sheriff which relates to some of the facts with respect to which he was asked to testify to at the hearing before the appeal tribunal, and this was why he invoked the Fifth Amendment. While the Court is inclined to believe that this is the reason Pinnow invoked the Fifth Amendment at the hearing, Pinnow's idea that the pending action against the sheriff warranted him in so doing, was an entirely mistaken one.

The most troublesome point in the case for the Court to resolve has been the finding that Pinnow intentionally violated the rule that "no employee may use the facilities of the Hotel without written permission of the Managing Director." If the Court had been the trier of fact it doubts whether it would have made that finding. However, such a finding is based on something which took place in Pinnow's mind and is not required to be based on Pinnow's own statements, but may be grounded on reasonable inferences drawn from his conduct and other surrounding circumstances. The Court is unable to hold that the finding of intentional violation of the rule is not supported by credible evidence. Furthermore, the falsification of the job application standing alone was serious enough

misconduct to justify the discharge.

Let judgment be entered confirming the department's decision here under review.

Dated this 14th day of February, 1977.

By the Court:

George J. Currie
Reserve Circuit Judge