

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEPHEN GERDIN, Complainant,

vs.

FOX VALLEY TECHNICAL COLLEGE, Respondent.

Case 54
No. 62173
MP-3910

Decision No. 30669-B

Appearances:

Mr. Stephen J. Gerdin, 2111 Henry Street, Apartment 4, Neenah, WI 54956, appearing on his own behalf.

Michael Best & Friedrich, LLP, by **Attorney Prasanth J. Jayachandran**, 110 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202, appearing on behalf of Fox Valley Technical College.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 4, 2003, the Complainant, Stephen J. Gerdin, filed a complaint with the Wisconsin Employment Relations Commission (WERC) against Respondent Fox Valley Technical College, herein the College. The complaint alleged that the Respondent committed unfair labor practices under the State Employment Relations Act, Sec. 111.80 *et seq*, Wis. Stats., as well as any other applicable statutes, with respect to the termination of his employment on August 8, 2002, and the refusal of the College to allow him to grieve the termination due to his alleged probationary status. On July 23, 2003, the Commission appointed Steve Morrison, a member of its staff as Examiner for the purpose of making and issuing Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.07 and 111.70(4)(a), Wis. Stats. On August 7, 2003, the Commission issued an Order substituting John R. Emery, a member of its staff, as Examiner. The College filed an answer to the

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complaint on August 20, 2003, and a hearing was conducted on September 26, 2003, in Appleton, Wisconsin. The proceedings were transcribed and the transcript was filed on October 20, 2003. The Respondent filed a post-hearing brief on November 21, 2003. On December 10, 2003, the Complainant advised the Examiner that he would not be filing a brief, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

1. Stephen J. Gerdin, the Complainant herein, was a municipal employee within the meaning of Sec. 111.70(1)(i), Wis. Stats., and was employed at the Fox Valley Technical College, first as a non-union temporary employee and later as a long-term substitute employee. The Complainant was not an employee within the meaning of Sec. 111.81(7), Wis. Stats.

2. Respondent, Fox Valley Technical College, herein the College, is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., with offices located at 1825 North Bluemound Drive, Appleton, Wisconsin. The College is not an employer within the meaning of Sec. 111.81(8), Wis. Stats.

3. The Fox Valley Technical College Educational Support Association is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., with offices located at 921 West Association Drive, Appleton, Wisconsin.

4. The Complainant was hired by the College on November 5, 2001, as a non-union temporary employee to work as a custodian during the medical leave of bargaining unit custodian Deb Kempen. During his tenure as a temporary non-union employee, the Complainant worked first shift.

5. On February 18, 2002, due to Ms. Kempen's continuing medical leave, the College converted the Complainant's employment status to that of long-term substitute, a bargaining unit position. On or about that date, the Complainant met with Human Resource Manager Amy Beaman to discuss his status change. At that time, Ms. Beaman explained the effect of a transfer into the bargaining unit, including union dues, fringe benefits and job orientation.

6. At the time of his status change, the Complainant became a member of the bargaining unit represented by the Fox Valley Technical College – Education Support Personnel Association and subject to the collective bargaining agreement between the College and FVTC-ESPA. At that time, he also began to pay union dues and to receive employment benefits provided under the contract. Prior to February 18, the Complainant did not pay union dues or receive any employment benefits beyond his hourly wage.

7. Article V, Section A., Paragraph 1, of the collective bargaining agreement provides that all new employees shall serve a 180-day probationary period, commencing on their effective date of hire. Article V, Section A, Paragraph 3 of the collective bargaining agreement denies terminated probationary employees access to the contractual grievance procedure and provides that any such termination shall not be arbitrary or capricious.

8. On February 29, 2002, Ms. Beaman sent the Complainant a letter confirming his status change and outlining the effect thereof, as follows:

. . .

This will confirm our offer and your acceptance of the status change in your Custodian I position from non-union to a long-term substitute. This status change will be effective retroactive to your hire date of November 5, 2001.

Your salary will remain at \$13.28 per hour and will continue on a bi-weekly pay cycle. As a long-term substitute employee, you will be a member of the bargaining unit and therefore be subject to all the terms and conditions covered by the ESPA union contract, with the exception of seniority.

You will be required to pay union dues at the rate of \$21.00 that will be deducted from your pay check, except for the months of June, July and August. Union dues will begin on the next available pay date of Friday, March 15th for the time period beginning on Monday, February 18th. I have enclosed a copy of your ESPA union contract for your review.

As a Fox Valley Technical College employee, you will receive the following fringe benefit package. Benefits will be in effect as of Monday, February 18, 2002.

- Paid Life Insurance \$50,000
- Paid Seat Belt Insurance \$20,000
- Paid Income Protection Insurance
- Optional Health and Dental Insurance
- Optional Dependent Life Insurance
- Optional Supplemental Life Insurance
- Paid Vacation/Holidays
- Paid Sick Leave Days
- Paid Emergency Leave Days
- Paid Bereavement Leave Days
- Flexible Spending Account

The documents describing these benefits, will be covered in more detail at the time of your new employee orientation. Additional enclosed documents include a new employee orientation schedule, parking pass, and mandatory direct deposit information. Please take some time to read through the enclosed documents and bring them with you on your first day of employment.

New employee orientation sessions have been scheduled for you. The enclosed blue benefits folder containing forms that need to be completed and within 30 days of the effective date of the beginning of your benefits. Please complete as many of these forms as you can, and bring them with you to your benefits orientation.

We are pleased to welcome you to the team at FTVC, and hope that your time here will prove to be a rewarding and beneficial experience!

...

9. Subsequently, in March or April, 2002, the Complainant approached Ms. Beaman with a question about his official hire date as a long-term substitute, at which point she advised him that his start date was in February. He then asked if his probationary period would end on August 16, 2002, to which she responded that sounded about right. The Complainant had a later conversation with Ms. Beaman regarding vacation and tuition reimbursement, at which time he reiterated his understanding that his probationary period ended on August 16.

10. At the time of his transfer, the Complainant was assigned to work second shift because shift assignment is determined by preference according to seniority. At that time, he received orientation and training in custodial duties from the second shift leader, Carol Struck.

11. Subsequent to the Complainant's transfer, Janice Oehlke, the manager of custodial operations for the College, began to notice a decline in his job performance. She received a complaint from food service instructor Bernie Cooley regarding the cleanliness of a restroom and personally instructed the Complainant regarding the issues complained of and the required action. Later, in June, 2002, Ms. Oehlke personally observed an improperly cleaned restroom over a period of days and again had occasion to address the Complainant on the issue and order him to clean the room to the appropriate standard. On another occasion between May and July, 2002, Ms. Oehlke received a complaint from Jeff Igel, a chef in the food service, requesting that the Complainant be reassigned from cleaning the kitchen area due to poor attitude and incompetence.

12. At the Complainant's request, on July 17, 2002, Ms. Oehlke performed a performance evaluation and prepared a staff development plan for him, which she discussed personally with the Complainant. The "Observations" portion of the evaluation form noted a

drop-off in productivity and quality of work, poor time management and a pattern of complaining to management and other employees about his job duties and expectations. The Complainant did not at that time dispute the comments on the evaluation.

13. On July 31, 2002, Janice Oehlke completed a Probationary and Transfer Employee Progress Report on the Complainant, which is the College's standard practice for employees at the end of their probationary period. The report noted that the Complainant's date of hire was February 18, 2002, and that his probationary period ended on August 16, 2002. The report provided for assessment of the employee in 10 areas: 1) application to the job, 2) ability to learn, 3) teamwork, 4) adaptability, 5) organizational skills, 6) utilization of time, 7) initiative, 8) communication, 9) demonstrates cooperative & productive behavior, and 10) reliability - according to a four-tiered scale: outstanding, competent, developing and below standards. The Complainant was rated "below standards" in areas 1, 4, 5, 6, 7 and 9. He was rated "developing" in areas 2 and 8. In area 3, he was given a split rating of "developing" in getting along with co-workers and "below standards" in teamwork and conflict resolution. In area 10, he was also given a split rating of "competent" in attendance and punctuality and "below standards" in dependability and follow-through. In the "comments" section of the report, Ms. Oehlke stated: "Steve has not been successful in meeting the team established cleaning standards. He has asked for assistance and been give [sic] guidance to learn new/different ways to complete these tasks but I have seen very little change or improvement. He is not meeting expected productivity levels. Reports from FVTC staff and team members about a negative attitude and complaining about the workload and tasks he is asked to do." The Complainant was provided a copy of the report on August 1, 2002, and signed it to acknowledge receipt. He did not object to the reference to his probationary period ending on August 16.

14. Based on the Complainant's performance review, Ms. Oehlke made the decision to terminate his employment. She met with Jill McEwen, Director of Human Resources, to discuss her decision and provided her with copies of the Complainant's July 17 performance evaluation and July 31 progress report. After the meeting, Ms. McEwen agreed with Ms. Oehlke's decision to terminate the Complainant.

15. On August 8, 2002, the Complainant met with Jan Oehlke, Amy Beaman and Union President Carol Radtke, at which time he was notified of his termination. At that time, the Complainant first raised the issue of the prior expiration of his probationary period, based on Ms. Beaman's reference to a retroactive November 5, 2001 start date in her February 29, 2002 letter to the Complainant. Ms. Beaman reminded the Complainant of previous discussions between them wherein the Complainant acknowledged his understanding that his probationary period ended on August 16 and told him she would not discuss the issue further. The Complainant then advised her he would be filing a grievance, collected his personal belongings and left the premises.

16. Subsequent to his termination, the Complainant requested that FVTC-ESPA support a grievance regarding his termination and met with Union Representative Roger Palek to discuss the case. At the meeting, the Complainant asked Palek to pursue the grievance based on Ms. Beaman's reference to the retroactive November 5, 2001 start date in her February 29, 2002 letter, but acknowledged to Mr. Palek his belief that his probationary period began in February. After the meeting, Mr. Palek decided not to pursue the grievance and, on September 5, 2002, sent the Complainant a letter explaining his rationale. Therein he stated, in pertinent part:

Your contention is that a phrase in your hire letter as a temporary long-term substitute started your probationary period on November 5, 2001 rather than February 18, 2002. As we discussed, this is a piece of evidence in your favor. However, the evidence against is that: 1) You did not pay union dues until February 18; 2) You were not evaluated under the District's probationary evaluation program until after February 18; 3) The probationary evaluation form clearly shows the end of probationary status in August of 2002; and 4) Benefits were not provided to you until after February 18.

I also see you as a probationary employee. The District could not have unilaterally given you bargaining unit benefits beyond that which you were entitled to under the collective bargaining agreement. Under the collective bargaining agreement, you are required to pay dues or pay a fair representative fee as part of the unit. As you did not do so until February 18, 2002, you could not be a member of the bargaining unit until that date.

17. Subsequent to FVTC-ESPA's refusal to pursue his grievance, the Complainant, on August 23, 2002, notified the College he was grieving his termination on his own. Jill McEwen responded to the grievance and informed the Complainant that as a probationary employee he did not have access to the grievance procedure and, therefore, the College would not process the grievance.

18. On September 6, 2002, the Complainant offered to pay back union dues from November 5, 2001, in an effort to support his argument regarding the retroactivity of his transfer into the bargaining unit, but the Union refused to accept.

19. On May 29, 2003, the Complainant wrote to the Wisconsin Education Association Council (WEAC) to seek their representation in a prohibited practice action against the College. On June 10, 2003, WEAC attorney Anthony Sheehan wrote to the Complainant declining his request. In his letter, Mr. Sheehan reiterated WEAC's position, previously stated by Roger Palek, that in WEAC's opinion the Complainant was a still probationary employee at the time of his dismissal and, therefore, his claim was not valid.

20. The Complainant was a probationary employee when he was terminated by the College on August 8, 2002.

21. The College's decision to terminate the Complainant was not arbitrary, capricious or made in bad faith.

CONCLUSIONS OF LAW

1. Respondent, Fox Valley Technical College, did not commit unfair labor practices within the meaning of Sec. 111.84(2)(d), Wis. Stats.

2. Respondent, Fox Valley Technical College, did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)5, Wis. Stats.

ORDER

IT IS ORDERED that the complaint herein be, and hereby is, dismissed in its entirety.

Dated in Fond du Lac, Wisconsin, this 16th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

FOX VALLEY TECHNICAL COLLEGE

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER OF DISMISSAL**

BACKGROUND

The Complainant was employed by the College from November 5, 2001, until August 8, 2002, in the capacity of a custodian. He was initially hired as a non-union temporary employee to fill in for a bargaining unit employee who was on medical leave. On February 18, 2002, the Complainant was transferred to a long-term substitute position, which is a bargaining unit position, due to the other employee's continuing medical leave. He was later given a letter, dated February 29, 2002, from Human Resources Manager Amy Beaman officially informing him of his change in status and of the benefits and other matters attending to a bargaining unit position. New bargaining unit employees are required to serve a six month probationary period, per Article V, Section A. of the collective bargaining agreement, but the Beaman letter represented to the Complainant that his probationary period would be retroactive to his original hire date of November 5, 2001. On at least two subsequent occasions, however, Beaman had meetings with the Complainant wherein she indicated that the Complainant's probationary period actually began with his transfer in February and the Complainant acknowledged his understanding of the same.

On July 31, 2001, Janice Oehlke, Manager of Custodial Operations, conducted a probationary employee review on the Complainant, which indicated that his work performance was below acceptable levels in a number of areas. Subsequently, Oehlke determined that the Complainant should be dismissed and he was terminated from his employment on August 8, 2002. The Complainant attempted to grieve his termination, but was informed by both the College and the Union he didn't have access to the grievance procedure since he hadn't completed probation. Thereafter, the Complainant filed the instant complaint, alleging that the College had violated his right to invoke the grievance procedure in that he contended that his probationary period had elapsed in May of 2002, based upon the February 29 letter from Amy Beaman, and that his termination was not for just cause. The College responded by denying that it was subject to Sec. 111.84(2)(d), Wis. Stats., under which the Complaint was filed, and, further, by alleging that the Complainant was still under probation as of August 8, 2002, and his termination was not arbitrary and capricious.

POSITIONS OF THE PARTIES

The Complainant

The Complainant elected not to file a post-hearing brief. At the hearing, the Complainant argued that the evidence established that as of the date of his termination, August 8, 2002, he had completed probation. By terminating him without just cause and not permitting him to grieve the termination, the Complainant contends that the College committed unfair labor practices and/or prohibited practices under the Wisconsin Statutes.

The Respondent

The Respondent College contends that the complaint should be dismissed for failure to state a claim under Sec. 111.84(2)(d), Wis. Stats. The cited statute falls within the State Employment Labor Relations Act (SELRA) and the College asserts that it is not an “employer” as that term is used in the Act. Therefore, the Act does not apply to the College and the complaint should be dismissed.

In the alternative, the College contends that the Complainant has failed to meet his burden of proof. There are two underlying issues: whether the Complainant was a probationary employee and whether the College was within its rights to terminate him as it did. On the first point, a contract interpretation question, the Complainant has the burden of showing that he was not a probationary employee. On the second point, assuming he was a probationary employee, the College must prove his termination was not arbitrary or capricious. The Complainant has failed to meet his burden on the first point and the College has satisfactorily proven the second.

Arbitrators have held that probationary periods do not begin retroactively to date of hire as a non-union employee. STATE OF OHIO, 115 LA 40 (MURPHY, 2000). This is exactly the claim that the Complainant makes here, based entirely on the mistaken reference to a retroactive start date in Amy Beaman’s February 29, 2002 letter. Beaman testified that the statement was a mistake, a position supported by other witnesses and other evidence. The collective bargaining agreement does not permit the College to unilaterally push back a start date to a time prior to entering the bargaining unit. The probationary period begins on the effective date of hire, which is the point at which the employee becomes a bargaining unit member. In this case, that was February 18, 2002. To treat the Complainant differently would have required the College to bargain the move with the Union, which did not occur.

The Complainant did not start paying union dues until February 18, 2002, did not receive bargaining unit benefits before that time and did not go through the College’s orientation program for new bargaining unit employees before that time. All the College’s internal documents relative to the Complainant’s status indicate a start date of February 18, 2002. The Complainant’s probationary evaluation of July 31, 2002, indicated his probationary period ended August 16, 2002, and the Complainant signed it without protest or comment. The College’s past practice indicates that employees are not given retroactive start dates as evidenced by its experience with other employees. Finally, the Complainant acknowledged to other people his belief that his probationary period did not end until August 16. Both Amy Beaman and Roger Palek testified to conversations with the Complainant on separate occasions where he indicated understanding that his probationary period commenced on his February 18, 2002 start date. In fact, after his termination, the Complainant offered to pay Union dues for the period November 5, 2001 – February 18, 2002, which the Union declined to accept, which he admitted was an attempt to establish the retroactive start of his probationary period after the fact. The Complainant’s case is entirely based on the misstatement in Amy Beaman’s

February 29, 2002 letter, but the Complainant never raised this point until after his termination and the record amply proves that he was aware of and acknowledged the actual date commencing his probation on several occasions.

Since the Complainant was on probation at the time of his termination, he did not have access to the contractual grievance procedure, nor the just cause standard for termination. Rather, the applicable standard is whether the College's action was arbitrary and capricious. It was not. The Commission has held that to be "capricious" an act must be "either so unreasonable as to be without rational basis, or the result of an unconsidered, willful and irrational choice of conduct." CITY OF WAUWATOSA, DEC. NO. 19311-D (WERC, 10/87). Further, under the arbitrary and capricious standard, the issue is not the merits of the decision, but the good faith of the employer. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 893 (1997). Here, there is ample evidence supporting the College's decision. Ms. Oehlke had a good faith basis for concluding that the Complainant's job performance was inadequate, as evidenced by his July 17, 2002, and July 31, 2002, performance evaluations. His poor performance was also a factor in his being passed over for a full-time custodial position two months prior to his termination.

The Complainant argues that his poor performance was due to inadequate training, but there is no merit to the argument. The record shows that all custodians were trained and there is no evidence suggesting that the Complainant did not receive the same training as all the other custodians. Further, the Complainant had prior experience as a custodian and represented that he had years of cleaning experience, so he apparently had some knowledge of the job before he was even hired. The Complainant introduced records of government citations on worker safety issues to buttress his claim, but the citations were issued well after his termination and do not specifically reference the Complainant, whatsoever. They are irrelevant, therefore, and should be disregarded.

The evidence is clear that the Complainant was a probationary employee, that he was treated the same as all other probationary employees and that he was not terminated for arbitrary and capricious reasons. On this basis, the complaint should be dismissed.

DISCUSSION

Jurisdiction

At the outset, it should be noted that the Complainant brings this case under Sec. 111.84(2)(d), Wis. Stats., the State Employment Labor Relations Act (SELRA), and that, as noted in Finding of Fact #2, the College is not covered by that statute. Therefore, the WERC has no jurisdiction over the College under that statute. However, the Complainant, noting his status as a layman in legal matters, also referenced violations of ". . . further state statutes of which I am unaware." (Complaint, para. D)

The College is a municipal employer under Sec. 111.70(1)(j), Wis. Stats. and the Complainant was a municipal employee under Sec. 111.70(1)(i), Wis. Stats. Further, the College's alleged acts arguably fall within Sec. 111.70(3)(a)5, Wis. Stats., which makes it a prohibited labor practice to:

. . . violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . .

Under Administrative Rule ERC 12.02(5), the complaint may be amended by the examiner at any time prior to the issuance of an order. Given the circumstances set forth above, and under the cited authority, I do so amend the complaint to reference the appropriate statute and, accordingly, find that the Complainant has stated a claim upon which relief may be granted.

Burden of Proof

The College asserts that the Complainant has the burden of proof in this case because, in the first instance, it involves contract interpretation on the question of his alleged probationary status and in such cases the burden rests with the Complainant. Assuming the Complainant is found to have been a probationary employee at the time of his termination, the College asserts that that the Complainant has the further burden of proving that his discharge was for arbitrary and capricious reasons.

The question of whether the Complainant was, in fact, a probationary employee is a matter of contract interpretation and in such cases, the Commission has held that the burden of proof is on the Complainant to establish his non-probationary status by clear and convincing evidence. 1/ The grounds for his termination is a matter of discipline. If the Complainant succeeds in establishing his non-probationary status, then, under a just cause standard, the burden is on the College to establish the justification for the termination. 2/ Otherwise, if the complainant is determined to have been a probationary employee, no just cause standard applies and he must establish that his termination was arbitrary and capricious.

1/ *TOMAHAWK SCHOOL DISTRICT, DEC. NO. 18670-D (WERC, 8/86)*

2/ *SHELL LAKE SCHOOL DISTRICT, DEC. NO. 20024-B (WERC, 6/84)*

Probationary Status

The critical question in this case is whether the Complainant was a probationary employee at the time of his termination on August 8, 2002. If he was, then, under the provisions of Article V, Section A, Paragraph 3 of the collective bargaining agreement, he was not entitled to grieve his discharge under the statutory grievance procedure. Further, the College need only show that the termination was not arbitrary or capricious, rather than meeting the more stringent just cause standard required with non-probationary bargaining unit members.

The sole piece of evidence supporting the Complainant's assertion that he was not a probationary employee is Amy Beaman's February 29, 2002 letter memorializing the terms of his transfer into a bargaining unit position on February 18, 2002. In that letter, which confirmed the College's offer and the Complainant's acceptance of the transfer, Ms. Beaman advised the Complainant that the transfer would be "effective retroactive to your hire date of November 5, 2001." If that was the case, the Complainant argues that his 180-day probationary period commenced on November 5, 2001, and would have expired on May 4, 2002, long before his termination. Standing alone, such a representation from the College's Human Resources Manager would be compelling proof and certainly makes at least a *prima facie* case for the Complainant's position. There is, however, substantial evidence to the contrary.

In the first place, several of the College's witnesses agree that Ms. Beaman's statement was a mistake and, further, that she had no authority to make such an alteration to the Complainant's employment status. No witnesses, including the Complainant, testified that this assertion was ever made on any other occasion, even when the transfer was originally offered to the Complainant prior to the issuance of Ms. Beaman's letter. The point was also made by several witnesses that the College could not have made the Complainant's status retroactive without the Union's consent, which was neither sought nor given. Under the collective bargaining agreement, the establishment of a hire date has implications for not only the probationary period, but seniority and other matters, as well, in which the Union has a vested interest and contractual rights. Had the College attempted to unilaterally convey bargaining unit status retroactively, therefore, it would have opened itself up to a prohibited practice charge from the Union. Furthermore, all the College's records concerning the Complainant indicate that his hire date, and hence the commencement of his probationary period, was February 18, 2002, and the Complainant's six-month probationary performance review was not conducted until July 31, 2002. This is buttressed by the fact that the Complainant did not pay Union dues or receive contractual benefits before February 18 and did not go through the orientation program for probationary bargaining unit members until after that date. Finally, there is no history of any College employee ever having been given a retroactive hire date in the past, making this case unique. All this convinces me that Ms. Beaman's statement was an unintended misstatement.

Even if the statement was a mistake, however, it could be argued that the College should be held to it and estopped from asserting the mistake if there was detrimental reliance on the statement by the Complainant. Under this theory, if the Complainant reasonably relied on the statement to his detriment, despite the fact that it was false, he could assert that the College should not be allowed to argue the mistake as a defense, but be held to the statement as if it were true. In order to maintain this argument, the Complainant would have to show that he relied on, or believed, the statement to his detriment and that his reliance was reasonable. This, I find, he did not do, principally because the record is replete with testimony that the Complainant, too, understood the statement to be a mistake.

Amy Beaman testified, without contradiction, to two conversations with the Complainant after his transfer in which she not only told him his probationary period began on February 18, but he also stated his understanding to that effect. Further, Union Representative Roger Palek testified, again without contradiction, that when he discussed filing a grievance with the Complainant after his termination the Complainant stated his belief that his probationary period began on February 18. This assertion was one of the principal reasons the Union did not pursue the grievance. The first time the Complainant raised the issue was at his termination meeting on August 8, 2002, despite the prior conversations with Ms. Beaman. Under these facts, there is no indication that the Complainant ever believed or relied on Ms. Beaman's statement, except insofar as he may have viewed it as an "ace in the hole" if the College attempted any disciplinary action in the window of time between May 4 and August 8. Thus, I find that the Complainant was a probationary employee at the time of his termination and was not entitled to access to either the grievance procedure or the just cause standard.

Discharge

As indicated above, under the contract, as a probationary employee the Complainant does not have the benefit of the just cause standard in challenging the grounds for his termination. In order to prevail, therefore, he must establish that the College's action was arbitrary and capricious. In order to constitute arbitrary and capricious conduct, the College's decision must border on bad faith or be so lacking in factual basis as to be irrational. Such is not the case here.

The testimony of Janice Oehlke, the manager of custodial operations for the College, is particularly instructive in explaining the College's actions. Oehlke was the Complainant's supervisor and oversaw his performance throughout his probationary period. She testified that after he became a bargaining unit member, and particularly after he transferred to second shift, the Complainant's job performance declined. On multiple occasions she observed problems with the Complainant's work and personally corrected him. She also received reports from other employees about the Complainant's poor work habits and poor attitude, in one instance even requesting the Complainant be assigned to another area due to alleged incompetence. These problems were documented in the performance review requested by the Complainant on

July 17, 2002, and the Probationary Employee Progress Report prepared on July 31, 2002. The latter, completed at the end of each bargaining unit member's probationary period, reflects that the Complainant's performance was deemed "below standards," defined as not meeting expectations, in 6 of 10 evaluation areas and partially "below standards" in two others.

The Complainant did not rebut the information contained in the two performance evaluations or the testimony of Ms. Oehlke regarding her experience with him, except to say he did not feel he was properly trained to do his job. In that regard, however, he failed to provide specific evidence as to what training he did or did not receive or whether the training he received differed from that given to other probationary custodians. He did introduce inspection reports from the Wisconsin Department of Commerce, Safety and Buildings Division, concerning safety violations discovered at the College which he asserted established the College's inadequate training procedures. These reports involve workplace safety issues, however, and do not appear to have any bearing on the College's job training procedures. Furthermore, the reports are based on an inspections conducted on October 9, October 28, November 20 and November 22, 2002, several months after the Complainant's termination and do not make any reference to him. As such, they have little probative value. He did introduce an e-mail he sent to Janice Oehlke on April 9, 2002, referencing an alleged offer by Ms. Oehlke to spend a few hours showing him how to be more organized in the kitchen and Ms. Oehlke denied ever actually observing him working in the kitchen. Neither did she admit making the offer, however. Further, even had she done so, the failure to follow up with a training session prior to terminating the Complainant would not, in and of itself, rise to the level of arbitrary and capricious conduct. The Complainant's performance problems were wide ranging and well documented. Thus, I am satisfied that under an arbitrary and capricious standard, the College has introduced ample evidence that its decision was rationally based and was not a violation of Sec. 111.70(3)(a)5, Wis. Stats.

Dated at Fond du Lac, Wisconsin, this 16th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner