STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

L. PAUL FOTSCH,
Petitioner,
v.
STATE OF WISCONSIN and its BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION by and through its DIRECTOR, EUGENE LEHRMANN, and STATE OF WISCONSIN and its EDUCATIONAL APPROVAL BOARD by and through its EXECUTIVE SECRETARY, DAVID STUCKI,
Respondents.

#140-392

Before: Hon. W. L. Jackman, Judge

Judicial Review: December 11, 1973

Appearances: Petitioner by Richard Graylow
Respondents by Robert J. Vergeront, Assistant Attorney General

Petitioner advances two contentions: 1. That the letter of dismissal was not signed by the executive secretary (Mr. Stucki) of the Educational Approval Board (which was petitioner's employer), but by the director of the Board of Vocational Technical and Adult Education; 2. He was dismissed without a hearing to which he was entitled under the principles of Board of Regents v. Roth, 408 U.S. 564, and Richardsv. Board of Education, 58 Wis 2d 444.

Respondent contends the court has no jurisdiction because: 1. The petition was not filed within 30 days after the decision, the letter of Mr. Lehrmann, received by petitioner on August 9, 1973; 2. That the petition is neither signed by petitioner nor verified; 3. That under Pers. 13.09(1) petitioner as a probationer is not entitled to judicial review.

In view of the fact that there may be an appeal from our judgment, we will consider and express an opinion on the merits for whatever value it may or may not have.

The record shows that petitioner was employed by the Educational Approval Board as a field inspector (Educational Services Assistant III). The position description lists the department as "Wis. Board of Voc. Tech. & Adult Education Educational Approval Board." Petitioner's acceptance of the position was directed to "Roy V. Ustby, Director - Bureau of Administrative Services - Board of Vocational, Technical and Adult Education." Mr. Lehrmann, Director of the Board of Vocational, Technical and Adult Education, at the suggestion of Mr. Stucki, Executive Secretary

of the Educational Approval Board, extended probationary period for three months because petitioner was not performing his job very well and the Bureau of Personnel extended it to September 3, 1973. On August 6, 1973, petitioner was advised orally by his immediate supervisor, Mr. Stucki, that his performance was not satisfactory and a discussion was had between them, the end result being that petitioner was advised by Mr. Stucki that his employment was terminated effective August 24, 1973. On that day also Mr. Stucki, as well as Mr. Lehrmann, signed a "Probationary Service Report" which concluded that the employment be terminated. On August 6, 1973, Mr. Lehrmann sent petitioner a letter advising him that his employment "will be terminated on August 24, 1973," and gave as the "principal reason" "your failure to carry out your field inspector responsibilities with the level of judgment expected in the position x x x".

The record shows that the termination was not that only by Mr. Lehrmann, but that Mr. Stucki, Executive Secretary of the Educational Approval Board, also participated and concurred in the termination. The formal notice of August 6, 1973, by letter was by Mr. Lehrmann, but the action of termination was by both.

The Educational Approval Board was created by Sec. 38.51 and has its own rules, none of which relate to employment by it. It has the power to employ persons "under the classified service," and the administrative functions are in the charge of the executive secretary. However, the Educational Approval Board is attached to the Board of Vocational Technical and Adult Education under Sec. 15.03. Sec. 15.945. Under the terms of Sec. 15.03 we see nothing wrong with Mr. Lehrmann notifying petitioner of the decision of both he and Mr. Stucki to terminate the employment, since that was a management function to be performed by the head of the department to which the Educational Approval Board was attached. Mr. Lehrmann was merely the administrative conduit by which the decision of both himself and Mr. Stucki was transmitted.

Nor do we consider that a formal hearing was necessary. Under Richards v. Board of Education, 58 Wis 2d 444 and the cases cited, it would seem that one whose employment is terminated during probation is entitled to a hearing where the reason for termination bears a stigma of dishonesty, immorality, and the like. Petitioner claims that in this case where the termination implies inefficiency or incompetence the rule of those cases applies because he has a doctor's degree and the termination affects his ability to get another job.

If mere inefficiency or incompetence in a position creates a stigma that gives the right to a hearing, we can think of no case where the employee would not be entitled to a hearing. The expressed cause in this case is lack of good judgment in the performance of duties. This is, of course, a matter of opinion of Mr. Stucki and Mr. Lehrmann. We are of the opinion that a termination for failure to use good judgment in a position does not qualify as such a stigma as requires that petitioner have the opportunity to refute it. Nothing about it foreclosed any other opportunities for employment in the wide field of education.

If one may not be terminated during the probationary period without reasons and without a hearing there is really no reason for having a probationary period at all. Until probation is completed petitioner does not have a vested interest in the position and until he does he is subject to termination. Sec. 16.22(1)(a); Pers. 13.01, 13.09; State ex rel Dela Hunt v. Ward, 26 Wis 2d 345. No constitutional rights of petitioner are denied by such procedure. Board of Regents v. Roth, 408 U.S. 564; Richards v. Board of Ed., 58 Wis 2d 444.

We would, therefore, on the merits affirm the decision terminating petitioner's employment.

As to the objections to jurisdiction: The decision in this case was expressed in the letter of August 6, 1973, delivered to petitioner August 9, 1973. Petitioner claims that since the termination was not effective until August 24, 1973, the "30 days after service of the decision of the agency" (Sec. 227.16) did not begin to run until August 24, 1973. Respondent claims it began either on August 6 or August 9, 1973, in which event the petition filed September 21, 1973, was not timely. Since there was no hearing in this case, Sec. 227.13 does not apply. The only document which could be called a decision is Mr. Lehrmann's letter of August 6, 1973, and this is the only document relating to termination which was delivered or mailed to petitioner. This letter, then, is the decision and Sec. 227.16(1) requires that the petition for review must be filed within 30 days after service of it. While the termination did not become effective immediately, the decision was made and served. Petitioner takes the position that he was not aggrieved until August 24, 1973, and therefore the 30 days should not run until then. We think he was aggrieved by the decision since it was a decision which undoubtedly would cause him economic loss. The mere fact that the effective date of termination was postponed does not make him any the less aggrieved by it at the time it was made, since it was adverse to his interest when made. Prospective results of a decision may be the

subject of a grievance, even though the injury has not yet occurred. See, for instance, Norway v. Bd. of Health, 32 Wis 2d 362. We are of the opinion that the record shows petition for review was not served or filed within 30 days after service of the decision and therefore was not timely and this court has no jurisdiction.

Respondent also complains that the petition was not signed or verified by petitioner. While it is customary for petitions to be verified, there is nothing in Chapter 227 that requires it. Sec. 263.24 would seem to require it, but that section would permit amendments to supply defective verifications. On a review under Sec. 227.16 the matter is tried solely on the basis of the record, and in the absence of alleged procedural irregularities that are not a matter of record, which is not true in this case, the issues tried are only those of law. The verification is to the truth of facts, not assertions of law. The purpose of verification is to require the pleader to verify the existence of facts under oath so that he will not assert facts which he does not believe to be true. Where the sole issues raised by the pleading are those of law, as on a demurrer, there is no reason for a verification. See 30 WSA 612. That is apparently why Sec. 102.23 does not require a complaint under that section to be verified. It would be the better practice to verify a petition under Sec. 227.16 to avoid the issue we are here presented with but we are of the opinion that in a case such as this where the grounds of relief are based solely on issues of law, absence of verification is not fatal and could easily be remedied if necessary.

If the petition is a pleading, which we agree with respondent it is, Sec. 227.16 does not require the petitioner himself to sign it. Sec. 263.23 permits an attorney to sign a pleading as was here done.

Respondent's contention that petitioner has no right to "appeal" under Pers. 13.01, has no merit. The right to appeal under that provision of the code refers to appeals within administrative proceedings and not judicial review under Sec. 227.16.

This opinion is too long but we wished to cover all contentions of the parties. For the reasons above stated, we conclude that the court does not have jurisdiction because the petition for review was not timely served or filed, and it is therefore

ORDERED: That petitioner's petition is hereby dismis

Dated December 12, 1973

BY THE COURT

W. L. Jackman

Judge