



The State of Wisconsin
 Department of Justice
 Madison
 53702

Robert J. Vergeront
 Assistant Attorney General
 (608) 266 2735

Bronson C. La Follette
 Attorney General

David J. Hanson
 Deputy Attorney General

February 4, 1980

The Honorable William Eich
 Circuit Judge, Branch 4
 City-County Building
 Madison, Wisconsin 53709

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FEB 6 1980

Re: Everett Hulko v. State of Wisconsin
(Personnel Board) et al.
 Case No. 164-154

**Personnel
 Commission**

Dear Judge Eich:

Enclosed find original of proposed judgment in the above which I deem in accordance with your memorandum decision. A copy is being forwarded this date to counsel for the petitioner.

If material objection is not received within ten days, please sign, date and have your clerk file the same. In such event, please have your clerk note the date of signing and filing on the copy of this letter which is attached and return same to me. A stamped return envelope is enclosed.

Sincerely yours,

Robert J. Vergeront
 Assistant Attorney General

RJV:ls

Enclosures

cc: Lawton & Cates
 Attention: Richard V. Graylow

Donald Murphy, Legal Counsel
 University of Wisconsin Central Administration

✓ Anthony Theodore
 State Personnel Commission

bcc to Anthony Theodore: A copy of favorable memorandum decision is enclosed.

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

EVERETT HULKO,

Petitioner,

v.

STATE OF WISCONSIN
(Personnel Board),

Respondent,

and

STATE OF WISCONSIN
(Personnel Commission),

Co-Respondent.

Before: HONORABLE WILLIAM EICH, Circuit Judge

The above entitled review action having been heard by the Court on the 13th day of August, 1979, at the City-County Building in the city of Madison; and the petitioner having appeared by Attorney Richard V. Graylow of the law firm of Lawton & Cates; and the respondent, co-respondent and Edwin Young, President of the University of Wisconsin, having appeared by Assistant Attorney General Robert J. Vergeront; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision dated January 30, 1980 wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Opinion and Order of the State Personnel Board dated June 16, 1978, entered in the matter of Everett Hulko, Appellant v. President, University of Wisconsin, Respondent in Case No. 76-118, which affirmed the action of the appointing authority in the dismissal of Everett Hulko from his position as Building Maintenance Helper in the Department of Family Medicine and Practice, University of Wisconsin, Madison, Wisconsin, during his probationary period effective July 11, 1976, and which held that attempted dismissal on June 14, 1976, was not

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Commission**

effective, and therefore remanded the matter to the Director of the Bureau of Personnel with instructions to reinstate Hulko for the period June 7, 1976, to July 1, 1976, with back pay and benefits, less mitigation, for such period, be, and the same hereby is affirmed.

Dated this ____ day of February, 1980.

By the Court:

Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

EVERETT HULKO,

Petitioner,

v.

STATE OF WISCONSIN
(Personnel Board),

Respondent,

and

STATE OF WISCONSIN
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**Personnel
Commission**

MEMORANDUM DECISION

Case No. 164-154

The petitioner, Everett Hulko, seeks review, pursuant to chap. 227, Stats., of an order of the State Personnel Board (now the Personnel Commission), which upheld his discharge from state employment.

Hulko was a probationary employee of the University of Wisconsin, Department of Family Medicine and Practice. His employment as a Building Maintenance Helper commenced on January 26, 1976. On or about May 16, 1976, he was injured in an auto accident, which caused his absence from work for approximately one month. While he called in sick and informed his employer that he could likely return to work on or about June 7, 1976, he did not return on that date, nor did he provide his employer with any medical statements concerning his absence.

On or about June 14, 1976, Hulko received a telephone call

MEMORANDUM DECISION

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discharge. The discharge date was modified from June 7 to July 1, 1976, to correspond to the date on which Hulko received written notice of his discharge.

Probationary employees may be dismissed at any time by the appointing authority. Sec. 16.22(1)(a), Stats. (1975). Such employees have no right of appeal (Wis. Admin. Code, Pers. sec. 13.09(1)(a)), although the Board, in its discretion, may grant a hearing on the propriety of the discharge. The employee has the burden of proving that the employer's action was arbitrary and capricious. Sec. 111.91(3), Stats. (1975).

In its written opinion the Board stated that Hulko's failure to provide information on his back surgery "clearly takes the basis for dismissal out of the 'arbitrary and capricious' area regardless of whether or not the other ground (inability to report for work) could effectively be disputed by the appellant." (Opinion and Order, p. 5) Hulko protested the Board's decision not to receive testimony by his physician regarding this second ground. The Board's decision that the first ground provided an adequate basis for a conclusion that the discharge was not arbitrary and capricious made further proceedings unnecessary.

Hulko attacks the Board's order as violative of his constitutional rights, unsupported by substantial evidence, legally erroneous, and arbitrary and capricious.

There clearly was no violation of Hulko's constitutional rights. He was given a discretionary hearing before the Personnel

MEMORANDUM DECISION

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Board and was allowed to contest the reasons for his discharge. He had the burden of proving that his discharge was the result of arbitrary and capricious action, which burden, in the Board's view, he did not discharge.

Decisions of the Personnel Board are subject to judicial review under secs. 227.15-.20, Stats. The findings of fact by the Board are not to be disturbed unless they are unsupported by substantial evidence in the record. Sec. 227.20(6), Stats. The credibility of the witnesses and weight of the evidence are matters which lie exclusively within the province of the Board. Reinke v. Personnel Board, 53 Wis.2d 123, 191 N.W.2d 833 (1971). After reviewing the record in this case, I conclude that the findings of fact are amply supported by the evidence, and they will not be disturbed.

I also agree with the Board's conclusion that Hulko failed to prove that the University's action was arbitrary and capricious. Regardless of whether Hulko was able to return to work at the time he was discharged, his failure to inform Dr. Renner of his previous back surgery when specifically asked provided a rational basis for his discharge. The employer had a right to know of this medical history, especially when Hulko was being hired for a job entailing heavy lifting. The petitioner's failure to reveal this information to his employer made it impossible for the employer to fairly evaluate his ability to do the work expected, and reflected a lack of truthfulness on his part. Discharge for this reason clearly is

MEMORANDUM DECISION


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not arbitrary and capricious action.

Since the findings of fact are supported by substantial evidence in the record and the University's action in dismissing the petitioner was not arbitrary and capricious, the Board's order will be affirmed. Counsel for the respondent may prepare an appropriate order for my signature.

Dated at Madison, Wisconsin, this 30 day of January, 1980.

BY THE COURT:



WILLIAM EICH
CIRCUIT JUDGE

cc: Richard V. Graylow
Robert J. Vergeront, Asst. A.G.