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November 9, 1979

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Per Comm

Re: Kevin Corcoran v. Wisconsin
State Personnel Commission
Case No. 164-166

Dear Mr. Bechler:

Enclosed find original and proposed judgment which I believe conforms to Judge Bardwell's directions.

Please approve the original as to form by signing in the space indicated and return to me. A stamped return envelope is enclosed.

Sincerely yours,

Robert J. Vergeront
Assistant Attorney General

RJV:mj

Enclosures

cc: Ms. Charlotte Higbee
State Personnel Commission
131 West Wilson Street
Madison, Wisconsin 53702

Blind Note: A copy of Judge Bardwell's favorable decision is also enclosed.

Attorney Donald Murphy
University of Wisconsin
1220 Linden Drive, Room 1744
Madison, Wisconsin 53716

Blind Note: A copy of Judge Bardwell's favorable decision is also enclosed.

KEVIN J. CORCORAN,

Petitioner,

v.

Case No. 164-166

WISCONSIN STATE
PERSONNEL COMMISSION,

Respondent.

JUDGMENT

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

The above entitled ch. 227, Stats., review proceeding having been heard by the court at 1:30 p.m. on the 25th day of October, 1979, at the City-County Building in the City of Madison; and the petitioner having appeared by Attorney Lawrence E. Bechler of the law firm of Jenswold, Studt, Hanson, Clark & Kaufmann; and the respondent Wisconsin State Personnel Commission 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 November 6, 1979, wherein Judgment is directed to be entered as herein provided;

IT IS ORDERED AND ADJUDGED that Decision and Order of the State Personnel Board dated June 16, 1978, which affirmed the action of the appointing authority, in the termination of the petitioner, Kevin J. Corcoran, a probationary employe, from a position as Cook 2 at the University of Wisconsin Center for

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Health Services, Madison, Wisconsin, effective September 10, 1976,
be, and the same hereby are, affirmed.

Dated at Madison, Wisconsin, this ____ day of November,
1979.

BY THE COURT:

Circuit Judge

Approved as to Form:

JENSWOLD, STUDDT, HANSON, CLARK & KAUFMANN

By _____
Attorneys for Petitioner

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

KEVIN J. CORCORAN,

Petitioner,

DIRECTIONS FOR JUDGMENT

vs.

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WISCONSIN STATE
PERSONNEL COMMISSION,

NOV 12 1979

Respondent.

Case No. 164-166

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

In this action petitioner seeks review, pursuant to sec. 227.16, Stats., of a decision of the Wisconsin State Personnel Board (now the Wisconsin State Personnel Commission). The question presented is whether the record supports the Board's conclusion that petitioner was not arbitrarily terminated from his probationary position as Cook 2 at the University of Wisconsin Center for Health Sciences.

Petitioner Kevin Corcoran applied for the position as Cook 2 at the University of Wisconsin Center for Health Sciences in November, 1975. In February 1976 he was interviewed for the position by Donna Sorenson and Emmett Schuchardt. The job announcement for the position stated the following qualifications:

"Graduation from high school or equivalent and 2 years experience in institutional or commercial food service, one year of which shall have been spent in cooking on a production basis or equivalent training or experience."

During the interview Sorenson and Schuchardt explained the job requirements to Corcoran. Based upon the interview and an oral examination which was given at that time, the two interviewers decided that Corcoran's training and experience qualified him for the position. He had at least four years of work experience in commercial food services as a restaurant chef. He had also studied cooking at MATC, where his courses included quantity food preparation.

Corcoran began work at the Center on March 14, 1976, as a probationary employee. His duties involved the preparation of food for hospital patients and for a hospital cafeteria. He received full-time instruction in the special cooking processes used at the hospital

during the first two weeks of work. He was also supervised daily throughout the period he worked at the Center by Donna Sorenson, who spent 15 to 30 minutes per day discussing his work performance with him. In April and July Sorenson wrote formal reviews of Corcoran's performance. Both reviews were negative. She also spoke with Corcoran several times about improving the quality of his work. Mr. Sorenson pointed out the following performance deficiencies:

- "a. His food was rejected too frequently, both by patients and the cafeteria.
- b. The food he prepared was at times inadequate in flavor, appearance and consistency (Sorenson cited specific examples in her evaluation reports).
- c. He let food stand out too long.
- d. He was often messy and disorganized in his work.
- e. He sometimes used pans which were not clean."

On September 10, 1976, shortly before his six-month probationary period was over, Corcoran was terminated. The termination letter from the appointing authority gave the following reason for the discharge:

"The reason . . . is your inability to consistently cook quality food. On several occasions Ms. Donna Sorenson, your immediate supervisor, had conferences with you in an effort to improve the quality of your cooking; regrettably these efforts failed."

Hearings were held before the State Personnel Board on May 9, and May 12, 1978. On June 16, 1978, the Board issued an opinion and order which held that Corcoran's termination was neither arbitrary nor capricious. Corcoran has appealed this order.

The scope of review in this case is limited by sec. 227.20, Stats., which provides that the Board's findings of fact shall not be overturned on judicial review if supported by substantial evidence in the record. Sec. 227.20 (5), Stats., provides that the court shall set aside, modify or remand the agency action if it finds the agency has erroneously interpreted a provision of law.

The Board concluded as a matter of law that the letters of notice provided to Corcoran regarding his termination comply with constitutional due process requirements. Corcoran challenges this conclusion on the ground that the letters were insufficient as a matter of law to give him adequate notice of the reason for his

termination. We do not agree. Corcoran contends that without more precise reasons than "inability to consistently cook quality food", he had no tools with which to meaningfully participate in the review of his performance. However, the letter of termination written on August 31, 1976, referred specifically to conferences which Corcoran had had with Sorenson regarding the quality of his cooking. He had been advised by two formal written evaluation reviews that he had specific inadequacies. He signed the report which set forth the following deficiencies:

"Cafe foods - items have been returned because of unacceptable flavor and appearance
Vegetables - overcooked - making it necessary to use in soups causing unnecessary food costs
Entree items - either overdone or underdone
Unable to complete workload. You have been assigned less items and the items which require less preparation."

We conclude that the Board was justified in determining that, in light of the detailed evaluation reports Corcoran had signed, the reference to such conferences and the ultimate reason "your inability to consistently cook quality food", that Corcoran was given sufficient notice as to the reason for his termination. Cases petitioner cites from foreign jurisdictions do not alter this conclusion. Neither are we bound by the decision of another branch of this circuit court in McCartney and County of Dane v. Wisconsin State Personnel Board, which is based on a different factual situation than the case at bar.

Petitioner tends to de-emphasize the fact that he was a probationary employee at the time of his termination. As the Court stated in Hunt v. Ward, 26 Wis. 2d 345, 132 N.W. 2d 523 (1965), the purpose of a probationary period is to afford the hiring authority an opportunity to test the ability of an employee on the job. "So far as original employment" is concerned, the Court stated, "a probationary period is the hind part of the examining and hiring process." 26 Wis. 2d at 349. Due process requirements are less stringent for probationary employees than they are for employees with permanent employment status because different rights and interests are involved.

While state employees with permanent status have an absolute right to a hearing upon discharge, sec. 16.05 (1) (e), Stats., this is not the case with probationary employees. Sec. 111.91 (3), Stats.,

provides for the possibility of labor agreements that provide review of probationary termination. However, the Board has determined that hearings under this provision shall be limited to the test of "arbitrary and capricious action", and that the burden of proof is on the terminated probationary employee. We do not agree with petitioner that because he was afforded the right to a hearing that the standard of review for him must be the same as it would have been for a permanent status employee. The Board was not obliged to determine whether Corcoran was terminated for "just cause", as they would have been had he attained permanent status. Sec. 111.91 (3), Stats., provides that when a hearing is afforded a probationary employee under the terms of a labor contract, as was the case here, that "nothing . . . shall empower the hearing officer to expand the basis of adjudication beyond the test of arbitrary and capricious action" The Board was justified in finding, upon the facts in the record that Corcoran's termination was neither arbitrary nor capricious since it was based upon the finding that he could not consistently cook quality food.

In oral argument petitioner argued that the appointing authority should have been estopped from terminating Corcoran since it hired him for a job for which he did not have the minimum qualifications. This contention is not supported by the record. The job qualifications required that an applicant have 2 years experience in institutional or commercial food service, one year of which was spent in cooking on a production basis or equivalent training or experience (emphasis added). At the time of his initial interview for the job Corcoran told Sorenson that he had at least four years commercial cooking experience, and that he had studied quantity cooking and quantity cooking management at MATC. Ms. Sorenson is a trained dietician who is knowledgeable in this area, and who was capable of determining whether Corcoran's training and experience were equivalent to the posted job requirements. On the applicant evaluation sheet she completed after this initial interview with Corcoran, Sorenson wrote: "Impressed with this young man's training and work record. The only thing he doesn't have is actual hospital experience . . . Long-term potential." Though Corcoran may have quit his previous job in reliance upon the Center's determination that he

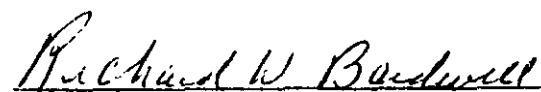
was qualified for the job as Cook 2, his subsequent failure to meet the performance requirements of that job cannot be imputed to the Center. The determination that he had the basic qualifications necessary to be hired was not arbitrary since it was supported by his previous work record. Neither was the failure to give him additional training beyond the standard two weeks at the beginning of the probationary period arbitrary since it had been explained to Corcoran at the time of his initial interview that this was not a training position and that whoever was hired would be expected to take over as Cook 2 with a minimum of supervision.

As pointed out in respondent's brief, a pattern of conduct which impairs the efficiency of the public service may be just cause for discharge. Even where an employee has permanent status and may therefore be terminated only for "just cause", courts have found such just cause to exist where acts or omissions of the employee have had a substantial adverse effect on the efficiency of the public service rendered. Jabs v. State Board of Personnel, 34 Wis. 2d 245, 148 N.W. 2d 853 (1967); Mahoney v. State Personnel Board, 25 Wis. 2d 311, 130 N.W. 2d 737 (1964); and Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). Patients at the hospital had a right to expect that Corcoran could consistently prepare quality food. According to the record he did not. We therefore conclude that the Board was justified in determining that Corcoran's termination as a probationary Cook 2 was neither arbitrary nor capricious.

Accordingly, the order of the State Personnel Board upholding the termination of Kevin Corcoran from his probationary status as a Cook 2 at the University of Wisconsin Center for Health Sciences is hereby affirmed. Counsel for the Commission may prepare a judgment affirming the decision and order under review. A copy of the proposed judgment should be submitted to counsel for petitioner before submission to the court for signature.

Dated November 6, 1979.

BY THE COURT:


Richard W. Bordwell
Circuit Judge