

OFFICIAL

PERSONNEL BOARD
STATE OF WISCONSIN
MADISON
STATE PERSONNEL BOARD

STATE OF WISCONSIN

GARY F. LOBNER,

Appellant,

v.

LESTER P. VOIGT, Secretary,
Department of Natural Resources,
and C. K. WETTENGEL, Director,
State Bureau of Personnel,

Respondents.

Case No. 73-168

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OPINION
AND
ORDER

Before AHRENS, Chairman, SERPE, JULIAN and STEININGER

OPINION

Facts

The facts are not in dispute so far as they relate to the legal question raised by the Respondents before hearing. On September 18, 1972, the Appellant commenced his employment as a Natural Resources Specialist 3-Operator/Instructor with the Department of Natural Resources. On March 7, 1973, before the completion of his six-month probationary period, he was terminated. On October 9, 1973, Respondent Wettengel wrote the Appellant that he had removed Appellant's name from the register of eligible candidates for the position of Natural Resources Specialist 3 - Operator/Instructor. The letter stated that the action was being taken in accordance with the provisions of Pers 6.10 of the Wisconsin Administrative Code since "the agency has reported that your work performance was unsatisfactory during a previous period of employment, and you were terminated during the probationary period." Appellant appealed the Respondent Wettengel's action in removing his name from the list of eligibles. In his appeal letter, he contends that his dismissal while on probation was caused by inappropriate motives on the part of his supervisor and that to remove his name from the list of eligibles compounds the wrong. At the pre-hearing conference in the matter, the Respondents took the position that since the Appellant had been discharged from this position, while a probationary employe, he might be properly removed from the list of eligibles for such position. The parties agreed that the Board should resolve that question in advance of scheduling a hearing in the matter.

Issue

The issue for determination raised by these facts is whether a showing that an eligible candidate for a position, had been previously discharged as a probationary employe from the same permanent classified position, constitutes a sufficient basis for the Director removing the eligible from the employment register of eligible candidates for the position.

An Eligible Candidate Has a Right
To a Hearing on the Reasons
For Removal From an Employment Register

The Board has jurisdiction to hear appeals of interested persons from actions and decisions of the Director. The action the Appellant is challenging in this appeal is the action of the Director of the State Bureau of Personnel in removing his name from an employment register. Section 16.05(1)(f), Wis. Stats., 1971, provides for such appeals and for the Board after hearing to either affirm or reject the Director's action. This appeal does not involve the question whether a probationary employe may appeal his or her discharge as being without just cause. Counsel for Respondents argue that to give the Appellant a hearing on whether his work performance was unsatisfactory would violate Pers 13.09(1)(a), ^{1/} which provides that "the appointing authority may dismiss any employe during a probationary period without the right of appeal." The Appellant is not appealing the action of his appointing authority in discharging him; he is appealing the action of the Director in denying him the opportunity of future employment by removing him from the employment register. If Appellant should prevail in this appeal, he would not be entitled to be reinstated to the job from which he was discharged; he would be replaced on the employment register and be eligible for certification to employing units according to his examination grade and ranking on the register. Pers 13.09(1)(a) is inapplicable since the matter at issue is the removal action of the Director, which is subject to appeal.

^{1/} Wisconsin Administrative Code, October, 1972.

The Director may not refuse to certify an eligible candidate except for the reasons enumerated in his rules. Section 16.13, Wis. Stats., 1971, provides:

(1) The director shall provide by rule, the conditions, not otherwise provided by law, under which an applicant may be refused examination or reexamination, or an eligible refused certification. These conditions shall be based on sufficient reason and shall reflect sound technical personnel management practices and those standards of conduct, deportment and character necessary and demanded to the orderly, efficient and just operation of the state service.

(2) Whenever the director refuses to examine an applicant, or after an examination to certify an eligible, as provided in this section, then said director, if requested by the person so rejected within 10 days of the date of receipt of such notice of rejection, shall give to him a full and explicit statement of the exact cause of such refusal to examine or to certify, as the case may be.

Pers 6.10, Wisconsin Administrative Code, October, 1972, provides:

In addition to provisions stated elsewhere in the law or rules, the director may refuse to examine the applicant, or after examination to certify an eligible.

. . .

(10) Except on promotions, where work record . . . are unsatisfactory . . .

Pers 26.02 provides. "Personnel actions which are appealable include . . .

(2) Certifications." In the instant case, the Appellant is appealing the Director's action in removing him from the employment register of eligible candidates, allegedly because of the Appellant's unsatisfactory work record. While the Director in his letter to the Appellant did not state that Appellant's work record was unsatisfactory, the Director did rely on such claim as the reason for his action. The Director only vouched "that the agency has reported that your work performance was unsatisfactory", but, nevertheless, the statutes and the Director's rules prescribe the conditions under which an eligible may be denied certification. Those conditions require a demonstrable factual basis. The rule provides that the Director may refuse to certify an eligible whose work record is unsatisfactory. It does not provide that the Director may refuse to certify an eligible whose work record is unsatisfactory, according to an agency's report. The power to disqualify rests with the Director and the Director's actions are subject to appeal. If he relies on the

eligible's work record as the basis of disqualification then he must be able to show by witnesses and evidence that the eligible's work record was unsatisfactory and that the eligible should be barred from employment with the state.

Respondents argue that proof of being discharged during a probationary period is "presumptive" proof of an unsatisfactory work record. Respondent Wettengel argues, "Dismissal during a probationary period from the same position would indicate an unsatisfactory work record." Respondent Voigt argues, ". . . there is a presumption that after observation of a probationer's work performance, the appointing authority has determined that the probationer has not effectively carried out his duties and responsibilities. There is a further presumption that his determination is correct since there is no right of appeal." To the contrary, no presumption attaches to the discharge of a probationary employe since the employe has no opportunity to test in a hearing before an impartial fact finder whether his discharge is for just cause. Since the Department's action in discharging the Appellant during probation has never been determined as either having been for just cause or having been without just cause, the Director may not rely on the fact of such probationary discharge, and nothing more, to justify removing Appellant's name from the employment register

While the state may discharge an untenured public employe, without a hearing, it may not bar him altogether from state employment without a hearing. In Board of Regents of State Colleges v. Roth, 408 U.W. 564 (1972), the court held that the state need not, under the United States Constitution, give an untenured professor the reasons for the non-renewal of his teaching contract and a hearing on such reasons. However, the court made clear that non-renewal or discharge was one thing, but that a proscription "that foreclosed his freedom to take advantage of other employment opportunities," was another matter. The court said.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "to be deprived not only of present government

employment but of future opportunity for it certainly is no small injury" Joint Anti-Fascist Refugee Committee v. McGrath, supra, at 185 (Jackson, J., concurring). See Truax v. Raich, 239 U.S. 33, 41.

Professor Roth in this situation was free to seek reemployment as a political science professor with the state universities, the same kind of position he occupied when the Oshkosh campus administration decided not to renew his contract. Before the state forecloses an eligible from employment with it, it must give him a hearing on the reasons it has decided to impose this disqualification upon him. Such requirements are recognized in the statute affording the eligible the reasons for non certification and a hearing before the Board on the Director's action. Further, such requirements are recognized in the Director's rules stating the reasons for disqualification of eligibles and providing for appeals relative to certification. To remove an eligible candidate from an employment register, without a hearing, might constitute a denial of due process.

We conclude that the Appellant is entitled to a full evidentiary hearing on whether the Director's action in removing his name from amongst the eligibles on the employment register for Natural Resources Specialist 3 - Operator/Instructor allegedly for an unsatisfactory work record should be affirmed or rejected.

ORDERED

IT IS HEREBY ORDERED that the matter be forthwith set for hearing on whether the Appellant's work record was unsatisfactory and whether, if it was, that reason was sufficient cause for removing Appellant's name from the register of eligible candidates for certification to positions as Natural Resources Specialist 3 - Operator/Instructor.

Dated Mar 29, 1974

STATE PERSONNEL BOARD

By William Ahrens
William Ahrens, Chairman