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BONNIE L. SCHWARTZ,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary,
Department of Health & Social
Services,

Respondent.

Case No. 74-18

* * * * *

OFFICIAL

OPINION
AND
ORDER

Before AHRENS, Chairman, SERPE, JULIAN and STEININGER.

OPINION

Background Facts

On March 19, 1973, the Appellant commenced her employment as a Food Service Worker 2 at the Central Wisconsin Colony and Training School in Madison, Wisconsin. On September 11, 1973, Miss Pearl Thiessen, the Food Service Administrator at the School, wrote a letter to the Appellant advising her that her employment was terminated effective September 16, 1973, or approximately three days before the completion of Appellant's probationary period. The letter said:

"In reviewing your performance as a servery FSW, your supervisors and I feel that you have not demonstrated the kind of performance necessary to qualify you for a long-term FSW, especially as related to interest, attitude and dependability."

The Appellant did not file an appeal with the Director of the Bureau of Personnel alleging that her probationary discharge was illegal or an abuse of discretion within 15 days after the effective date of the decision. On March 22, 1974, the Appellant filed a Complaint and Request for Investigation alleging, among other things, that she was an "interested person" within the meaning of Section 16.05(4), Wis. Stats., (1971), that Miss Pearl Thiessen was not an appointing authority, and

that therefore Appellant's discharge was illegal. In her Complaint and Request, Appellant asked for either 1) an investigation and remedial order, or 2) immediate reinstatement, or 3) a hearing. Shortly thereafter, the Respondent filed a response with the Board contending that a probationary employee has no right to appeal her discharge.

The Board Will Exercise Its Sec. 16.05(4) Jurisdiction

Only Where the Facts of the Case Show a Need To Do So.

The Appellant urges the Board exercise the broad authority contained in Sec. 16.05(4), Wis. Stats., 1971. Such subsection provides:

"(4) The Board may make investigations and hold hearings on its own motion or at the request of interested persons and issue recommendations concerning all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder. If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law the board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law. Any action brought against the director or appointing authority for failure to comply with the order of the board shall be brought and served within 60 days after the date of the board's findings."

The statutory language provides the Board may make investigations and hold hearings on its own motion or at the request of interested persons. The scope of such inquiry extends to all matters touching the enforcement and effect of the civil service subchapter and rules. One of the objects of the inquiry is to make recommendations. In the course of such inquiry, if illegal conduct or conduct violative of the intent and spirit of the law is disclosed, the Board may issue an order "for appropriate action within the law." The use of the word "may" indicates that interested persons do not have a legal right to compel the Board to make an investigation and do not have a legal right to compel the Board to make an order even if it finds illegal conduct or conduct violative of "the intent and spirit of the law." The law does not specify to whom the recommendations or order are to be made, but presumed they would be to the Director, where he has authority to implement them, or, if he

doesn't, to the appropriate appointing authority, or the Legislature. The purpose of the section seems to be directed to broad policy matters related to the "enforcement and effect" of the civil service law. The Appellant argues that probationary employees are subject to "tremendous disadvantages," including the abuse of being discharged by persons "masquerading" as appointing authorities, who do not have the legal authority to discharge. She argues that this practice is widespread and that a case in point was McManus v. Weaver, Case No. 73-171, March 29, 1974.

Appellant argues further that the Board should exercise its power in the manner requested in her Complaint and Request for Investigation to stop such abuses.

The Board does have the authority to investigate and hold a hearing concerning the allegation that probationary employees are being discharged by persons who are not appointing authorities. A discharged probationary employee is an "interested person." The subject matter is one "touching the enforcement and effect" of the civil service law. If the Board finds conduct which it concludes is illegal, it can issue an enforceable order for "appropriate" action. Therefore, we conclude, that given the broad language of the subsection granting the Board power to investigate "all matters" involving the civil service, the Appellant's Complaint and Request for Investigation states sufficient facts to invoke the power of the Board to proceed in the matter, if it chooses to exercise such power.

The Board will exercise its jurisdiction in instances where the facts of a particular case reflect a need to do so. In the instant case, the Appellant would appear to have had a right of appeal to the Director, provided that such had been filed within 15 days of the effective date of the discharge. A similar 15-day time limitation applies to discharge appeals by permanent employees. Assuming for the moment that a right of appeal to the Director exists, Board exercise of its jurisdiction would be to grant an appeal to an employee who did not file a timely appeal with the Director. Such exercise of jurisdiction would emasculate the statutory requirement that appeals must be filed promptly, and that if they are not they are

barred totally, even when meritorious. This is not to say that the Board would not in other instances exercise its jurisdiction, even though the subject matter might have been the basis of a timely civil service appeal, where the record raises important questions the Board deems appropriate to resolve.

ORDER

IT IS ORDERED that the Complaint and Request for Investigation herein is denied.

Dated Jan 17, 1975

STATE PERSONNEL BOARD

BY

William Ahrens
William Ahrens, Chairman