STATE OF WISCONSIN STATE PERSONNEL BOARD

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LEONTINE M. BERTEAUX, *
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Appellant, *
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v. *
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C. K. WETTENGEL, Director, *
State Bureau of Personnel, *
*
Respondent. *
*
Case No. 74-31 *
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OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE, STEININGER and WILSON, Board Members.

I. Nature of the Case

Appellant was notified of the decision to extend the period of her probation. Within fifteen days of the decision, she filed an appeal with the Director of the Bureau of Personnel. After she was informed that the office of the Director was not the proper place to file her appeal, Appellant filed it with the Personnel Board but not within fifteen days of the decision.

II. Facts

Appellant began working for the Department of Revenue on October 15, 1973. Her position was classified as Property Assessment Specialist 1. She was originally in the Equalization Program of the Milwaukee office but was transferred to a position in the Sales Analysis Program on about March 1, 1974. Appellant's probationary period would normally have been completed on April 14, 1974. However, on Friday, March 22, 1974, Larry Tainter, Director, Personnel and Employment Relations, Department of Revenue wrote a letter to Appellant informing her that her probation was to be extended by three months.

On March 29, 1974 Appellant's attorney sent a letter to Mr. Tainter requesting further explanation of the action taken to extend Appellant's probationary period. Walter Kelly, Appellant's attorney, specifically requested information regarding the request for the extension by the appointing authority and the Director's response thereto.

Mr. Tainter wrote to Mr. Kelly on April 3, 1974. Enclosed with the letter was a copy of his letter to the Director and Respondent's response.

Mr. Kelly then sent a letter dated April 5, 1974 to Respondent, appealing the decision to extend Appellant's probation period. By letter dated April 15, 1974 Respondent informed Appellant that the decision to extend the probation period was a decision of Respondent's and, therefore, the appeal was not properly before him under Section 16.03 (4) (a), Wis. Stats., which permits appeals to the Director from actions of appointing authorities.

On April 22, 1974 Appellant filed an appeal with the Personnel Board. The letter requesting the appeal was received by this Board's office on April 23, 1974. This letter is the basis of the instant appeal and was numbered 74-31.

On May 29, 1974 while still on the contested extended probation, Appellant was discharged from her position with the Department of Revenue. She appealed this termination by correspondence of June 13, 1974. This appeal was numbered 74-58.

An Opinion and Order was issued on June 28, 1974 for these two appeals. It ordered the consolidation of the two cases for hearing purposes only since they were interrelated. A prehearing conference was held in August, 1974, at which issues were determined. By letter dated October 18, 1974 Appellant withdrew her second appeal (Case No. 74-58).

Upon agreement of the parties no hearing was held for the instant appeal. It was determined by the parties that the record this Board had in its file was sufficient and related all facts necessary for a decision by this Board.

III. Conclusions

The Appeal Was Timely Filed

The Personnel Board has two jurisdictional requirements which must be met before it can hear an appeal or a grievance. First there must be jurisdiction to hear the substantive issues raised by the appeal. (See Sections 16.05 (1) (e), (f), (g), (h), (4), (7), Wis. Stats..) Second, written request to be heard must be received by the Personnel Board within specified time limits. (For example, see Sections 16.05 (2), (4), Wis. Stats..)

In the instant case, the first requirement is met. The decision to extend a probationary period rests exclusively with the Director. (Section 16.22, Wis. Stats..) Respondent did so extend Appellant's probationary period upon

request of the Department of Revenue. Therefore, the Personnel Board has jurisdiction under Section 16.05 (1) (f), that is, it can hear appeals from decisions of the Director.

It is argued, however, that the second requirement is not met. Section 16.05 (2), Wis. Stats., requires in cases like the instant one that the written request be received by the Personnel Board within fifteen days of the date of notification or the effective date whichever is later. This is not a waivable requirement but one which reaches to the very heart of the Board's jurisdiction.

In Scott v. Estkowski, Case No. 359, October 5, 1970, we held:

> This Board for many years and in several similar instances has held that if a s. 16.24 or a s. 16.05 appeal was not taken within the time prescribed by the statute that the Board has no jurisdiction. This Board has never felt that there could be anything less than literal compliance, that the parties could not stipulate jurisdiction or that the Respondent could waive it.
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> There is much authority that the right of appeal to a reviewing administrative agency is purely statutory and all applicable statutory requirements must be complied with to sustain such appeal; that the time for taking an administrative appeal is generally prescribed by statute or regulation and timely application has been held necessary, delay beyond the statutory time being fatal.
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> This Board proposes to adhere to the position that it has always taken; this is, that the matter of time within which an appeal may be taken is a jurisdictional matter, and if the appeal be not taken within the prescribed time that the Board has no authority to pass on the merits of the appeal. (See also O'Neill v. Wettengel, Case No. 359, October 5, 1970; Rady v. Clapp, Case No. 73-46, May 24, 1973; and Maegli v. Schmidt, Case Nos. 74-6, 74-13, January 20, 1975.)

Appellant must have been notified of the decision by March 29, 1974, the date Appellant's attorney wrote Mr. Tainter a letter requesting further information of the action taken. Her April 22, 1974 letter of appeal was received by the Board's office on April 23, 1974, obviously more than fifteen days from the notification date.

However, her letter of appeal was not late when the effective date of the decision is used to determine timeliness. The decision of Respondent

to extend Appellant's probation was made on March 22, 1974 but the effective date of that decision was April 15, 1974 the day after the completion of her original probation.

The effective date of any decision is the day on which the decision becomes operative. For instance, in disciplinary cases the effective date is the first day the discipline is imposed. In reclassification or reallocation cases, it is the date on which the employe is reclassified or reallocated. Of course, if the decision is to deny the reclassification request, the date of the denial is the effective date since that is the date on which the decision becomes operative.

In Eisenhut v. Schmidt, Case No. 39, decided October 10, 1974, aff'd. Circuit Court of Dane County, Case No. 144-383, April 4, 1975, the Appellant was notifed on November 14, 1972 that he would be laid off on January 6, 1973. However, the decision to lay him off was made prior to November 1, 1974 when new layoff rules were put into effect. In determining which rules applied, we held that upon his notification the Appellant had a right to appeal. We also held that the effective date of the lay off was the day it was to begin, that is, January 6, 1973. We stated in that case:

> Personnel actions affecting employees take place when the employee is notified of the action, even though it is to be effective sometime in the future. On the other hand, the personnel action does not take place at the moment the Employer decides on a course of action but does not in some manner formally advise the employee of the action. (supra, p. 4.)

In the instant appeal, the effective date came approximately two weeks after the notice of the decision to extend her probationary period was received. Section 16.05 (2), Wis. Stats. states in pertinent part:

> The board shall not grant an appeal . . . unless a written request therefor is received by the board within 15 days after the effective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later . . . . (Emphasis added.)

Therefore, we conclude that Appellant filed her appeal in a timely manner on April 23, 1974 easily within fifteen days of April 15, 1974 the first day of her extended probation.

The Extension Of Appellant's Probationary Period Was Proper

The essence of this issue rests in the interpretation of Section Pers. 13.02 (3), Wisconsin Administrative Code. This subsection reads:

> In the case of employes who have not demonstrated the capacity to be granted permanent status in class within 6 months after the beginning of an original probationary period, the director may at the request of an appointing authority extend the probationary period for up to 3 additional months, provided the extension is required by either or both of the following circumstances:
>
> (a) Unanticipated change in program or duty assignment.
> (b) Substantial improvement of performance near the end of the probationary period by employers whose performance during the earlier part of the probationary period is not sufficiently adequate to warrant granting permanent status in class.

Appellant contends that the language ". . . employes who have not demonstrated the capacity to be granted permanent status . . ." acts as a condition precedent to the operation of sub (a) or sub (b). Further, she contends that the language implies a negative evaluation of the employee's performance. Therefore, Appellant's probationary period could only be extended if she were performing unsatisfactorily before her change in duties. Since she apparently received no indication that her performance was anything but satisfactory, she contends that the extension of the probationary period was improper. We do not agree with this reasoning.

The subsection must be read as a whole. If an employee has not shown "a capacity to be granted permanent status" <u>because</u> he has had an "unanticipated change" in his duties or responsibilities <u>and/or because</u> he initially was performing less than adequately but has shown marked improvement toward the end of his probation, then his probationary period may be extended.

Sub (a) above, in and of itself, does not infer that an employee's performance is poor or substandard. Rather, it simply means that the employee has been given new duties and there has not been sufficient time during which his performance can be evaluated.

That this is the proper interpretation of sub (a) is evident from the following language of the subsection ". . . provided the extension is required by <u>either or both</u> of the following circumstances . . . ." (Emphasis added.)

We interpret this language to mean that an employee may have his duties and responsibilities changed during the course of his probationary period without such change reflecting negatively on the performance of his original assignment. Further, the employee's probationary period could then be extended without necessarily implying a negative evaluation of his performance of the new duties.

A probationary employee who is not performing adequately his original duties would have to fall within the scope of sub (b) or a combination of sub (a) and (b) in order for his probationary period to be extended and his employment continued. The language clearly sets forth two alternative situations. The first alternative under sub (b) involves poor performance by the employee followed by substantial improvement in that employee's performance toward the end of his probationary period. The second situation involves a change of program or duty assignment and poor performance by the employee before or after the change of duties. Again for this second alternative, the poor performance must be followed by substantial improvement. However, it should be noted that we do not feel it is proper to change the duties of an employee who is not performing satisfactorily and who has not been informed of this fact just so his probation can be extended.

In applying this interpretation of the subsection to the instant appeal, we conclude that Appellant's probation was properly extended. Apparently Appellant's performance of her initially assigned duties was at the very least satisfactory and is not at issue. However, her assignment to the Sales Analysis Program from the Equalization Program did evidently involve a change in duties and responsibilities. This change was made approximately six weeks before the end of her probationary period. It is not unreasonable under these circumstances for the Department of Revenue to have requested an extension of Appellant's probationary period.

We, therefore, conclude that Appellant's probation was properly extended. She had apparently not worked long enough at her new assignment for the Department of Revenue to make a fair evaluation of her performance.

ORDER

IT IS HEREBY ORDERED that the Respondent's action be affirmed.

Dated November 24, 1975. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson