STATE OF WISCONSIN STATE PERSONNEL BOARD

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ALMA R. CHAYKA,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 75-118

* *

OFFICIAL

OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE and DEWITT, Board Members.

OPINION

I. Findings of Facts

Appellant was a probationary employee employed by the University of Wisconsin—Madison, Physical Plant Division at the time she received a letter dated September 29, 1975 and signed by John R. Erickson, Supervisor of Operations. The letter in part stated:

> You are hereby advised that because of your failure to call in an absence and your unacceptable attendance record, your employment as a Building Maintenance Helper 2 (probationary) is being terminated effective September 26, 1975. This action is taken under the provisions of Section 16.22, Wisconsin Statutes and is not subject to further appeal.

Appellant's position was classified as Building Maintenance Helper 2 which is covered by the Blue Collar collective bargaining unit. On October 10, 1975 Appellant through Anthony J. Bonanno, President, UW Employees Union Local 171, filed an appeal from her termination based on Article IV, Section 10 of an Agreement between AFSCME Council 24 Wisconsin State Employees Union, AFL-CIO and the State of Wisconsin (hereinafter Agreement), which was signed by the parties to the contract on September 14, 1975. The

Agreement was adopted by the legislature by Chapter 72, Section 2, Laws of 1975, which was published September 29, 1975.

II. Conclusions of Law

Jurisdiction under the Agreement

The Personnel Board as an administrative agency has only that authority which is expressly granted to it or can be necessarily implied. American Brass Co. v. State Board of Health, 245 Wis. 440 (1944). Appellant contends that she has a right to a hearing before the Personnel Board pursuant to Article IV, Section 10 of the Agreement, which provides:

> Notwithstanding Section 9 above, the retention or release of probationary employees shall not be subject to the grievance procedure except those probationary employees who are released must be advised in writing of the reasons for the release and do, at the discretion of the Personnel Board, have the right to a hearing before the Personnel Board.

The Agreement from which the above section is quoted was signed by the parties on September 14, 1975. However, the Agreement did not become effective until September 30, 1975. The legislature adopted the Agreement by Chapter 72, Section 2, Laws of 1975, which was published September 29, 1975 and which provides:

> This act shall become effective on the day following publication providing, however, that upon the administrative date closest to approval of the joint committee on employment relations, employes in the bargaining unit may commence to earn the wages and additional compensation provided for in the agreement subject to approval by the legislature and the governor, and to be paid after the effective date of this act. This act shall remain in effect until June 30, 1977.

Therefore, the decision and action taken to terminate Appellant occurred before the Agreement went into effect. Appellant was terminated effective September 26, 1975 by letter dated September 29, 1975. The Agreement became effective on September 30, 1975. We conclude, therefore, that Appellant cannot invoke the jurisdiction of this Board under Article IV, Section 10 of the Agreement.

Jurisdiction under Section 16.05(4)

Appellant contends that even if she has no right of appeal under the Agreement which went into effect on September 30, 1975, the Board should exercise its descretion under Section 16.05(4) and take jurisdiction over the appeal. Appellant claims that the letter of September 29, 1975 was not signed by an appointing authority and, therefore, the termination is void.

Section 16.05(4) provides in pertinent part:

> 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 disclosed 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.

The language of this section creates a discretionary power in the Board. We have held that this authority will generally only be exercised when broad and important policy issues are involved. (See Schwartz v. Schmidt, Case No. 74-18, January 17, 1975; Brodbeck v. Warren and Wettengel, Case No. 74-114, November 25, 1975; and Bullette v. Rice, Case No. 75-133-I, January 27, 1976).

In Schwartz (supra) the Appellant whose position was classified as Food Service Worker 2 was an employee who was discharged while still on probation. Alleging that she was not discharged by an appointing authority, the Appellant sought to invoke the Board's jurisdiction under Section 16.05(4). We held that:

> 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. (Schwartz, at p. 3.)

In Schwartz, however, we declined to take jurisdiction because the Appellant failed to appeal her termination within the 15 day limit which is provided for under Sections 16.03(4)(d) and 16.05(2). In the instant case, Appellant's letter appealing her discharge was received by the Board's office on October 10, 1975 which is clearly within the 15 day limit.

The question then remains whether the Board should exercise its discretion and hear this case. Generally, an employee who is terminated while on probation has no right of appeal. (See Sections 16.05(1)(e), 16.22(1)(a), and 16.28(1)(a), Wis. Stats.; Wisconsin Administrative Code Pers. 13.09(1)(a).)

However, Appellant is alleging that she was not terminated by an appointing authority. The appointing authority or his or her delegated subordinate officer is the only person who has the authority to terminate an employee—even a probationary employee—from state service. (See Sections 16.04(1)(d), 16.22(1)(a), and 16.28(1)(a), Wis. Stats.; Sections Pers. 1.02(1), 23.01 and 13.09(1)(a); Odau v. Personnel Board, 250 Wis. 600 (1947); McManus v. Weaver, Case No. 73-171, March 29, 1974; Tealey v. Lehrman, Case Nos. 75-12 and 75-116, October 1, 1976.)

Therefore, we will take jurisdiction over this case under Section 16.05(4). However, we wish to stress that this is a threshold determination. The sole issue which we will address is whether or not Appellant was terminated by an appointing authority or his or her delegated subordinate. We reserve for a later time the right to determine what relief, if any,

will be granted to Appellant should we conclude that she was not terminated by an appointing authority. See Section 16.05(4), Wis. Stats.

ORDER

IT IS HEREBY ORDERED that Respondent's motion to dismiss for lack of jurisdiction is denied.

Dated December 21, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson