STATE OF WISCONSIN STATE PERSONNEL BOARD

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JOHN DESMOND,

Appellant,

v.

MANUEL CARBALLO, Secretary,
Department of Health and Social Services,

Respondent.

Case No. 75-135

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OFFICIAL OPINION AND ORDER

Before: DEWITT, Chairperson, WILSON, MORGAN, WARREN and HESSERT, Members.

## Nature of the Case

This is an appeal of the termination of a probationary employe pursuant to Article IV, Section 10 of the contract between the WSEU and the State of Wisconsin, and Section 111.91(3), stats.

## Findings of Fact

The appellant was hired on May 12, 1975, as a probationary officer at the Wisconsin State Reformatory (WSR) at Green Bay, a subunit of the Department of Health and Social Services. He was terminated November 7, 1975, which was prior to the end of his 6 month probationary period. During his period of employment the appellant failed to perform in a satisfactory manner and the supervisory staff based the decision to terminate in part on these incidents.

On August 7, 1975, the appellant was 6 minutes late for work. This was due to his being caught in a traffic delay in front of a drawbridge. On September 10, 1975, the appellant left a vacant cell unlocked, which was a violation of the normal institutional procedure. On September 20, 1975, the appellant was approximately 2½ hours late to work. He had been scheduled to report to the institution at 8:00 that morning. When he reported to the

institution his supervisor smelled alcohol on his breath from a distance of 6 to 8 feet and observed the appellant's face to be flushed and red and his eyes partially closed. He sent the appellant home for violation of DHSS work rule #12:

> "Reporting for work or while at work manifesting any evidence of having consumed alcoholic beverages or illegal drugs or having possession of such items while on duty." Respondent's Exhibit 1.

The evening prior to this incident the appellant had attended a party at which he had been drinking from at least 9:30 p.m. until 5:00 a.m. the next morning.

The respondent also alleged that appellant had failed to notify the institution of a change in address. Based on this record we find that the appellant was not guilty of this charge.

During the course of his employment the appellant received monthly evaluations that were essentially average in nature except for the September, 1975, evaluation which was below average and which included the failure to lock the cell and the September 20th incident.

Following the September 20th incident the appellant's supervisor on the same date had recommended termination. Appellant's Exhibit 3. At that time the institutional policy was to review all questions of probationary employe termination through a meeting of the security supervisors prior to effectuation unless the cause for termination was considered to be particularly aggravated. In this instance this was not felt to be the case, and the security supervisors were unable to meet until November 4, 1975, at which time they decided to terminate the appellant. The appellant was never afforded a hearing prior to the termination although his superior afforded him a meeting to discuss the September 20th incident afterwards. At the hearing of this case before the hearing examiner, the appellant admitted that he had been late on August 7th,

that he had neglected to lock a cell on September 10, 1975, and that he had been drinking and had reported late and in the condition found above on September 20th.

The appellant's termination for these causes will tend to seriously impair his opportunities for other employment in the correctional field.

## Conclusions of Law

The review of this termination pursuant to Section 111.91(3), stats., is limited to whether the respondent's decision to terminate appellant was arbitrary and capricious. The record adequately supports the respondent's position and we conclude that it was not arbitrary and capricious. Failure to report to work on time, failure to lock a cell, and reporting to work exhibiting the effects of sustained alcoholic consumption, all clearly tended to impair the efficiency of the appellant's work unit. The appellant argues in essence that the failure to terminate him immediately after the September 20th incident and the fact that his monthly evaluations before and after September were all average supports a conclusion that his overall performance was all right and that the respondent abused his discretion in fastening on isolated instances of poor performance to support his termination. We cannot agree with this argument nor can we agree that it supports a conclusion that the respondent acted arbitrarily and capriciously in the decision to terminate.

The appellant also argued that the failure to afford appellant a hearing prior to termination violated his rights to due process of law secured by the Fourteenth Amendment to the United States Constitution. Despite the fact that appellant was not entitled to a prior hearing under state law as a probationary employe, he argues that his employability in the correctional or enforcement field has been seriously affected by his discharge for these reasons and that

this supports a conclusion that the Fourteenth Amendment entitles him to such a hearing, citing De Luca v. Common Council of the Town of Franklin, 72 Wis. 2d 672, 242 W.W. 2d 689 (1976). This case does support the appellant's position:

> ". . . liberty in an employment context is composed of two interests - a reputational interest and an employability interest; and wherever charged might seriously impair one's standing and associations in the community, the reputational interest has been infringed. An infringement upon an employability interest is shown when the reasons for dismissal are those that would significantly undermine opportunities for future employment." 72 Wis. 2d at 678-679.

However, the appellant's due process argument is foreclosed by a recent decision of the United States Supreme Court, Codd v. Velger, 45 U.S. Law Week 4175 (2/22/77). In that case Mr. Velger had been dismissed without a hearing from his position as a probationary police officer with the New York City Police Department. He alleged that certain material placed in his file had a stigmatizing effect and prevented him from finding other employment of a similar nature. The court held:

> "Assuming that all of the other elements necessary to make out a claim of stigmatization under Roth and Bishop, the remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge.' 408 U.S. at 573. 'The purpose of such notice and hearing is to provide the person an opportunity to clear his name; id., n. 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report of the apparent suicide attempt was substantially false. Neither the District Court nor the Court of Appeals made any such finding. When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing.
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> . . .The hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him."

This scenario is very similar to what transpired here. Furthermore, to the extent that a hearing might be required, the hearing afforded appellant by the contract would be constitutionally sufficient. See Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633 (1974).

For all of the foregoing reasons, we conclude that the respondent did not act arbitrarily and capriciously in terminating appellant.

Order

It is ordered that the action of the respondent terminating appellant is affirmed and this appeal is dismissed.

Dated June 16, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson