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NANCY J. COOK,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 75-144

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OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of the termination of a probationary employe following a promotion. The Respondent has moved for dismissal of the appeal.

FINDINGS OF FACT

These findings are based on uncontested matters found in the record to date. The Appellant was an employe in the classified service as a Typist III with permanent status in class at the University of Wisconsin Water Resources Center. On June 23, 1975, she was promoted to a position as Administrative Assistant I, Journals Department, University Press. She was terminated in the latter position effective November 29, 1975, and was restored to a Typist III position with the Water Resources Center effective December 1, 1975.

The employer ascribed the unsuccessful completion of probation to inadequate work performance. The Appellant alleges that the real reason for her termination is personal discrimination by her immediate supervisor. She alleges that her supervisor stated that she intended to "drive Nancy [the Appellant] out of her job as soon as possible," and engaged in a campaign of personal harassment to that end. The Appellant produced two signed statements from persons stating that they had overheard the aforesaid remark by the supervisor.

The Respondent denied these allegations and filed various memos and other documents concerning Appellant's work performance and the background for the termination.

CONCLUSIONS OF LAW

Respondent's basic position is that as a probationary employe Appellant is not entitled to a hearing on termination before the Personnel Board, either as a matter of state law or constitutional entitlement. Section Pers. 14.03(1), Wisconsin Administrative Code provides in pertinent part as follows:

FOR PROMOTION WITHIN THE SAME AGENCY. In accordance with section 16.22(1), Wis. Stats., the employe shall be required to serve a probationary period. At any time during this period the appointing authority may remove and shall restore the employe to his or her former position or a similar position and former pay rate without the right of appeal. (Emphasis Supplied.)

In Ferguson v. Schmidt, Wis. Pers. Bd., No. 73-161, 7/3/74, we held in essence that once an employe has attained permanent status in class, he or she has a form of tenure and may not be terminated from state employment without cause and a right to appeal. This was in the context of an inter-agency promotion and termination. We also discussed S. Pers. 14.03(1), Wisconsin Administrative Code and noted that the nature of the tenure attained by state employes only protected them with regard to removal from state service, and not with regard to removal from the promoted position:

In such cases, the concept of the employe being on probation in the higher position is preserved. In other words, the appointing authority might dismiss him from that position; the rule uses the term 'remove' the employe without the right of appeal. However, the appointing authority must restore the employe to his or her lower position or a similar position.

P. 4.

Therefore, we conclude that under state law the Appellant does not have the right to appeal her removal from the position which she was promoted. We further conclude she has no appeal rights under the due process clause of the Fourteenth Amendment. The theory that public employment constitutes a property interest that is protected by the Fourteenth Amendment was explored by the Supreme Court in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972); and Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 (1972).

In Board of Regents of State Colleges v. Roth, supra, the court discussed the theory involved in the concept of property:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it.

* * *

Property interests, of course, are ... created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
408 U.S. at 577-578, 92 S. Ct. at 2709.

Roth was terminated at the end of his probation at U.W.-Oshkosh. There was no provision in his contract for renewal or extension, nor was there such a provision in the statutes or Administrative Code. Although most teachers hired on a year-to-year basis are rehired, the court, in finding that he had no property interest in retention, held:

But the District Court has not found that there is anything approaching a 'common law' of reemployment, See Perry v. Sinderman, 408 U.S. 593, at 602, 92 S. Ct. 2694, at 2705, 33 L. Ed. 2d 570, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him. 408 U.S. at 578, 92 S. Ct. at 2710, note 16.

In Perry v. Sinderman, supra, the discharged teacher had no contractual or statutory claim to continued employment but he could point to a de facto tenure program under the college's Faculty Guide and state-wide guidelines. The court held:

A person's interests in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit
408 U.S. at 601, 92 S. Ct. at 2699.

In the case at bar, Appellant has not pointed to any such "rules or mutually explicit understandings." In fact, Appellant's probationary status and lack of appeal rights are explicitly spelled out by S. Pers. 14.03(1).

Also not present in this case are "charges against the [Appellant] that might seriously damage [her] standing and association in [her]

community," see Richards v. Board of Education, 58 Wis. 2d 444, 454, 206 N.W. 2d 597 (1973), which would entitle the Appellant to a hearing. An allegation of inadequate work performance such as is found here does not impinge "a person's good name, reputation, honor, or integrity" in the sense utilized by the United States Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707 (1972). Any other interpretation would result in extending a right of appeal to any probationary employe terminated because of failure to perform adequately, which is clearly contrary to the theory espoused by the court.

Although we conclude that we do not have jurisdiction of this matter as an appeal, we also consider the possibility of taking jurisdiction as an investigation pursuant to S. 16.05(4), Wis. stats.:

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.

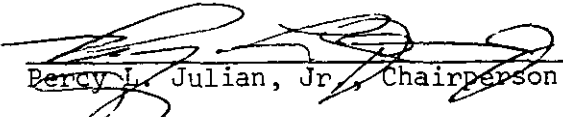
In Schwartz v. Schmidt, Wis. Pers. Bd., 74-18, 1/17/75, we held that "the purpose of the section seems to be directed to broad policy matters related to the 'enforcement and effect' of the civil service law." p. 3. In this case we do not perceive at this point matters related to "broad policy." However, an allegation that an employe was removed from a position as a result of personal discrimination is very serious indeed.¹ While we are reluctant at this juncture to pursue a formal investigation we will remand this case to the Director of the Bureau of Personnel and request that he conduct an investigation pursuant to S. 16.03, Wis. stats.

ORDER

IT IS HEREBY ORDERED that this appeal is dismissed and a copy of this file be remanded to the Director of the Bureau of Personnel. The Director is requested to investigate the Appellant's complaint pursuant to S. 16.03, Wis. stats.

Dated March 22, 1976.

STATE PERSONNEL BOARD


Percy L. Julian, Jr., Chairperson

¹It should be emphasized that at this point in this proceeding, there has been no attempt to determine what the facts are concerning the allegation of personal discrimination