STATE OF WISCONSIN

STATE PERSONNEL BOARD

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RONALD MALM,

Appellant,

v.

PRESIDENT, University of Wisconsin,

Respondent.

Case No. 75-230

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OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

The appellant was discharged while on probation. He has appealed this discharge pursuant to Article IV, §10 of the contract between WSEU and the State of Wisconsin.

FINDINGS OF FACT

1. The appellant was employed by the University of Wisconsin from June 8 until November 30 of 1975. During this time he was serving a probationary period in a Building Maintenance Helper (BMH) II position.

2. On September 3, the appellant was warned by his supervisor, Mr. Walls, that his attendance record was unsatisfactory. The appellant's lead worker, Mr. Griffith, also gave at least one group warning to the employes of the work section concerning excess absenteeism.

3. On November 26, the appellant was notified that his probationary employment would be terminated as of November 30 because of his unsatisfactory attendance record.

4. The appellant had been absent from work for a total of fifty-nine hours

between June 8 and November 26. Forty of these hours were missed in the twelve and one half weeks of employment before the warning by Mr. Walls. The remaining nineteen of the hours were accumulated in the twelve weeks after the warning.

5. Sixteen of the hours of absence accumulated after the September 3 warning were due to back pains which the appellant feels resulted from work activities. After the absences, the appellant reported the existence of the back pains to Griffith who replied that the appellant should let him know if he felt the pains were the result of a work related injury. The appellant did not, however, talk to Griffith again regarding the matter nor did he submit an injury report or medical verification of an injury.

6. The decision to terminate the appellant was based on his attendance record for the entire six months.

7. A probationary service report, form AD-PERS-19, was completed at the time of termination.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this appeal pursuant to Wis. Stats. §16.05(1)(h) and §111,91(3) and pursuant to Article IV, §10 of the collective bargaining agreement between the State and the American Federation of State, County, and Municiple Employes, Council 24, Wisconsin State Employes Union, AFL-CIO.

Malm v. Weaver, 75-230, 3/21/77 (Interim Order in this case).
Wixson v. President, University of Wisconsin, 77-90, 2/20/78.

2. The standard of judgment is whether or not the respondent's action of discharging the appellant was arbitrary and capricious.

Wixson, supra.
In re Request of the American Federation of State, County, and Municipal Employes (AFSCME), Council 24, Wisconsin State Employes Union, AFL-CIO, for a Declaratory Ruling, 75-206, 8/24/76.

3. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of the credible evidence, that the respondent's action was of an arbitrary and capricious nature.

In re Request of the American Federation, supra.

4. The appellant has failed to carry this burden. Thus, it must be concluded that the respondent's action was not arbitrary and capricious.

OPINION

In Wixson v. President, University of Wisconsin 77-90, 2/20/78, the Board stated:

> The "arbitrary and capricious" standard used in probationary employe termination cases provides a substantially different legal standard than the standard used in the review of disciplinary actions taken against employes with permanent status in class under § 16.05(1)(e), stats. In the latter case the employer has the burden of showing there is just cause for the discipline imposed. In the former case the employe has the burden of showing that the employer's action was "arbitrary and capricious." The phrase "arbitrary and capricious action" has been defined by the Wisconsin Supreme Court as: "either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful, and irrational choice of conduct." Jabs v. State Board of Personnel, 34 Wis. 2d 245, 251(1967).

Applying this standard, it must be concluded that the appellant has failed to carry his burden. He has not shown the termination action to be without a rational basis or to be an unconsidered, wilful, and irrational choice of action.

In attempting to carry his burden, the appellant has not challenged the accuracy of the attendance record submitted by the respondent or the fact that

the respondent did actually consider this record before making the decision to terminate. Instead, he asserts that a decision to terminate based upon this record is unreasonable since he had significantly improved his attendance subsequent to the warning, since there had been no definite attendance standards set for him to meet, and since other permanent employes in his work section had been absent as much, or more, than he had.

It is true that the appellant's attendance record did improve subsequent to the warning. It may also be true, as he asserts, that all but three of the hours missed after that warning were due to a work related injury. Nevertheless, the respondent cannot be held to be responsible for knowing the cause of those absences where the facts show that the appellant did not adequately inform him of that cause.[1] Nor can the respondent's termination action be held to be arbitrary and capricious where the appellant has missed a total of fifty-nine hours of work during the twenty-four and one-half weeks of his probationary period—even if there was some improvement by him towards the end of that time period.

Similarly, the lack of detailed attendance standards and the existence of a high number of absences by certain permanent employes are not sufficient to establish that the termination action was arbitrary and capricious. The respondent here used a case by case approach in reviewing attendances rather than a strict standard approach. While this may have resulted in poorly defined limits of attendance record acceptability, it is apparent both that the appellant understood that excess absenteeism was unacceptable and that he had been warned that his rate of absence was considered excessive. Although it might have been

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1. See Finding of Fact #5.

advisable for the respondent to have articulated the limits of attendance record acceptability in more detail, the failure to do so does not make the termination action irrational or without reasonable basis. Any comparison of the appellant's attendance record with that of certain permanent employes is not appropriate here because the standards for retaining and dismissing permanent employes are significantly different from those for probationary employes and because of individual differences such as the prolonged illness of one permanent employe and his medical verification of that illness.

In addition to these assertions, the appellant also contends that Wis. Stats. § 16.30(2) and Wis. Adm. Code § 18.03(2) set a standard of allowable absences at four hours every two weeks and that the absences of the appellant meet this standard. Yet, the appellant's absence rate of fifty-nine hours in twenty-four and one-half weeks exceeds the sick leave time granted in Pers. 18.03(2) by ten hours. Furthermore, the statute and rule are not meant to set absence records standards for use in judging a probationary employe's employment record. Rather, they are meant to establish the maximum limits within which the state will provide compensation to an employe during his inability to work because of sickness.

Finally, the appellant argues that the University has violated Wis. Adm. Code § Pers. 13.08(5). This provision requires agencies either to develop and implement their own plans for evaluating probationary employes or to use the model plan developed for that purpose by the Director. When an agency does develop its own plan, it is also required to file that plan with the Director. The appellant contends that the University has violated the rule by failing to file a plan.

However, the testimony and the appropriate provisions of the Administrative Practices Manual[2] show that the AD-PERS-19 form used by the University is the Director's plan referred to in Pers. 13.08(5). Having used this plan, the University is under no obligation to file its own plan.

The appellant has thus failed to carry his burden of showing that the termination action was so unreasonable as to be without rational basis or to be the result of an unconsidered, wilful, and irrational choice of conduct. The respondent's action thus cannot be considered to be arbitrary and capricious.

ORDER

IT IS HEREBY ORDERED that this appeal is dismissed and the action of the respondent is affirmed.

Dated: May 18, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson

2. See Administrative Practices Manual; Bulletin #9; Part, Personnel; Section, Employe Development; Subject, Uniform Standards for Filing Probationary Service Training Qualification Report.