STATE OF WISCONSIN STATE PERSONNEL BOARD

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LOUISE PALMATEER,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin System,

Respondent.

Case No. 76-103

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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. At the prehearing conference the respondent raised certain objections to the subject matter jurisdiction of the personnel board. The parties have filed briefs on these questions.

FINDINGS OF FACT

These findings are based on factual allegations by the appellant and are limited to the purpose of determining whether there is a legal basis for personnel board jurisdiction. Appellant was a state employe with permanent status in class prior to her resignation on November 11, 1975. She was rehired as an Office Machine Operator III at the Memorial Library, UW-Madison, effective December 1, 1975. On December 15, 1975, she received notice that she would be on permissive probation for the first 6 months of her employment in this position.

On April 19, 1976, appellant received a letter from Ms. Jean Rowley and Ms. Ella Reutter, neither of whom were appointing authorities, that she would not pass her probationary period and would be terminated May 29, 1976. She received another letter from them dated May 24, 1976, stating that the

new date for termination would be May 26, 1976. She also received on May 24, 1976, a letter from Mr. Gerhard Naeseth, an appointing authority, stating that she would be terminated May 26, 1976.

At no time during her employment at the library was appellant counseled concerning her work performance, nor did she receive any indication that her work performance was below the required standards.

CONCLUSIONS OF LAW

We conclude that we have no jurisdiction over this case as an appeal. Section 16.05(1)(e), stats., provides that the board shall "Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to . . . discharges . . ." (emphasis supplied). We held in Ferguson v. Schmidt, Wis. Pers. Bd. No. 73-161 (7/3/74), that an employe with prior permanent status in class serving a promotional probationary period pursuant to Section Pers 14.03(2), W.A.C. would be considered an employe with permanent status in class for the purposes of Section 16.05(1)(e), stats., and was entitled to a board hearing on termination from state service due to dismissal from the new position. However, the appellant in the instant case was not promoted, and does not have the continuity of state employment present in Ferguson because of her resignation.

The appellant argues that there were a number of illegalities in the establishment of her probation and her dismissal. Even if these allegations are correct they would not necessarily establish a right to a hearing before this board, although there is always the potential in cases of this nature that because of defects in the procedure there is no effective dismissal and the employe attains permanent status more or less by default. See Section 16.22(2), stats.: "An employe gains permanent status in class unless terminated by the appointing authority prior to the completion of his probationary period."

Appellant argues that she should have been notified of her permissive probation "upon appointment," citing Section Pers 13.05(2), W.A.C. This subsection provides:

> "The appointing authority shall specify upon appointment and notify the director and report to the employe his determination to require the employe to serve a probationary period."

Respondent asserts that appellant had been told that she was to be on probation and the letter of December 15, 1975, was merely a confirmation of that. However, it is not necessary to make a finding on that point. If there were a defect in the notice to the employe by the appointing authority of the probationary period, any appeal rights would have been to the director pursuant Section 16.03(4), stats.:

> "(a)The director . . . shall hear appeals of employes from personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion . . .'
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> (d)The director shall not grant an appeal under this subsection unless he receives a written request therefore within 15 days after the affective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later."

There is no basis for personnel board jurisdiction over this contention by the appellant. Following the December 15th notice the appellant took no action to appeal this determination on the alleged lack of prior notice, but continued to serve as a probationary employe until her termination. In this context we can ascertain no basis for a conclusion that if there were a failure of prior notice that this would void or otherwise render ineffective the appointing authority's determination to require permissive probation.

Some of appellant's other arguments concern the dismissal procedure. She argues that the letter of April 19, 1976, was defective because it was not signed by an appointing authority, citing Section Pers 13.09(2), W.A.C., which requires that the appointing authority immediately notify the employe of the reasons for the dismissal and its date. In this case while the appellant

had actual notice of the dismissal on April 19, 1976, she did not receive a notice signed by the appointing authority until May 24, 1976.

She also argues that respondent failed to comply with Section 16.22(2), stats.:

> "Fifteen days prior to the expiration of an employe's probationary period, the director shall notify the appointing authority the date on which the probationary period shall terminate, and thereupon the appointing authority shall notify the director in writing whether or not the services of the employe have been satisfactory and whether or not he will continue the employe in his position. A copy of such notice shall be given to the employe."

Appellant contends she never received a copy of such a notice. Respondent contends that she received a copy of the "probationary report" with her letter of termination.

With respect to the first of these arguments, we do not believe that the immediate written notice required by Section Pers 13.09(2), W.A.C., must actually be signed by the appointing authority to be effective. Section Pers 13.09(1) ("Action by Appointing Authority") clearly indicates that the appointing authority must be involved in the dismissal. Compare, Tealey v. Lehrmann, Wis. Pers. Bd. Nos. 75-12, 116 (10/1/76). However, the provision of notice required by Section Pers 13.09(2) is a ministerial act and we conclude the notice procedure is not defective because it may be effectuated by the appointing authority's agents.

With regard to the second argument, there is a dispute of fact over whether the appellant received a copy of the notice. Assuming for the moment that she did not receive the notice, the question then is whether that renders the termination defective and invokes the operation of Section 16.22(2), stats.: "An employe gains permanent status unless terminated by the appointing authority prior to the completion of his probationary period." The answer to this question depends on whether the notice provisions of Section 16.22(2), stats., are interpreted as mandatory or directory. The Wisconsin Supreme Court has

provided an analytical framework for this inquiry. State ex rel Werlein v. Elamore, 33 Wis. 2d 288, 293 (1967):

> "In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation. Marathon County v. Eau Claire County (1958), 3 Wis. (2d) 662, 666, 89 N.W. (2d) 271; Worachek v. Stephenson Town School Dist. (1955), 270 Wis. 116, 70 N.W. (2d) 657. We have also stated that directory statutes are those having requirements 'which are not of the substance of things provided for.' Manninen v. Liss (1953), 265 Wis. 355, 357, 61 N.W. (2d) 336.
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> In 2 Sutherland, Statutory Construction (3d ed.), p. 216, sec. 2802, the author observes that provisions are normally considered directory 'which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.' The text further (p. 217, sec. 2804) states that a provision is interpreted as directory where the 'manner of performing the action directed by the statute is not essential to the purpose of the statute.'"

In analyzing Section 16.22 pursuant to these principles, we believe that the "essence of the thing to be done" with respect to notice is provided in subsection (1)(a), "Upon such dismissal, the appointing authority shall forthwith report to the director and to the employe removed his action and the reason therefor." The provisions of (2), setting forth the specific procedures of notice by the director to the appointing authority and by the appointing authority to the director and the employe, fall into the category of provisions "given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute," and where "the manner of performing the action directed by the statute is not essential to the purpose of the statute." The employe notice requirements of Section 16.22 are clearly intended to give the employe notice that he or she will be terminated prior to the completion of probation. In this case the employe had actual notice on April 19, 1976, that she would be terminated on May 29, 1976, essentially the end of her probationary period. The notice was approximately 6 weeks in advance of both her

termination and the end of her probation. This notice satisfied the manifest intent of the statute and we can perceive no prejudice to the employe if the agency failed to provide the subsequent additional notice of a copy of the probationary service report to the director.

For all of these reasons, we conclude we have no jurisdiction over this case as an appeal. The appellant also seeks to invoke the discretionary authority to investigate pursuant to Section 16.05(4), stats. We have repeatedly held that this provision should only be invoked in cases involving questions of broad policy concerning the civil service.

One of respondent's allegations is that the respondent failed to comply with Section Pers 13.085, W.A.C., which requires:

> "During the probationary period the appointing authority shall carefully observe and evaluate the employe's job performance and work progress to determine whether the employe is efficiently and effectively performing the duties of the position. Such observations shall be periodically reviewed and discussed with the employe."

She alleges that she had no communications with her supervisors relative to evaluation of her work performance prior to her notice of termination. The agency has not responded to this allegation on the record to date.

While an allegation of this nature does not necessarily have policy implications, it would appear to be poor personnel management practice as well as a violation of the above rule of the director if an employe's probation were terminated without any review with her of her job performance. If this allegation is true and it reflects any kind of ongoing management practice, it could well have serious policy implications.

Therefore, while we dismiss this appeal, we will keep the file open for the time being as an investigation request pursuant to Section 16.05(4), stats. The respondent within 10 working days of the date of service of this decision is directed to serve and file documentary evidence or other written response

to the charge of violation of Section Pers 13.085. The appellant may serve and file any response within 10 working days thereafter. The board will then determine what proceedings, if any, will be had at the point.

ORDER

This appeal is dismissed for lack of jurisdiction. The file will be kept open as a request for investigation and the parties shall proceed as set forth above.

Dated June 16, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson