STATE OF WISCONSIN STATE PERSONNEL BOARD

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MELVIN E. WEBER,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 76-105

* *

OFFICIAL

INTERIM ORDER

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

NATURE OF THE CASE

This is an appeal of a termination or nonretention of a probationary employe. At the prehearing conference the following issues were raised by the Respondent:

1) If Appellant's position is not included under a collective bargaining agreement, then Respondent objects to the board's jurisdiction since Appellant was a probationary employe at the time of his discharge.

2) If Appellant's position is included under a collective bargaining agreement, then Respondent objects to the board's taking jurisdiction under Art. IV, Sec. 10 of the union contract because no remedy is provided in case the board were to hear the appeal, and, therefore, no authority has been given to the board to grant relief. Furthermore, by statute (S. 16.05 (1) (e)), and code (Pers. 13.09 (1)(a)), probationary employes do not have a right to appeal from termination.

At the same prehearing the parties agreed to the following stipulation:

2) If Appellant's position is included in a collective bargaining unit, the parties agree to hold the appeal in abeyance until the board issues a determination of the meaning and scope of Article IV, Section 10, as it applies to the board's jurisdiction and procedures.

It now appears that Appellant's position was included under a collective bargaining agreement referred to above.

ORDER

In a declaratory ruling in case number 75-206 entered August 24, 1976, a copy of which is attached, we decided certain questions concerning the nature of our authority under Article IV, Section 10, and related sections of the contract, and statutory provisions. Since we decided that probationary employes are entitled to limited hearings under the contract pursuant to the provisions of S. 111.91(3), stats., it is ordered that the Respondent's request for dismissal is denied and that this matter be scheduled for prehearing before a member of the Board legal staff acting as an impartial hearing officer in accordance with the provisions of S. 111.91(3), stats., and the decision in case number 75-206. Since these are cases of first impression under the contract, at or prior to the prehearing the Respondent may make any argument he desires relevant to the question of whether the Board in the exercise of its discretion should grant Appellant hearing rights.

Dated August 27, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson

STATE OF WISCONSIN STATE PERSONNEL BOARD

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

Case No. 75-206

OFFICIAL

DECLARATION OF RIGHTS

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

NATURE OF THE CASE

This is a proceeding for a declaratory ruling pursuant to S. 227.06(1), stats.

The underlying facts were set forth by the petitioner in its original and amended petitions for declaratory ruling and are undisputed. The petitioner is the American Federation of State, County and Municipal Employes (AFSCME), Council 24, Wisconsin State Employes Union, AFL-CIO. The petitioner has been recognized by the Wisconsin Employment Relations Commission as the exclusive bargaining agent for various state employes. Sometime after July 1, 1975, Council 24 and the Department of Administration, the latter acting on behalf of the State of Wisconsin, reached agreement on a collective bargaining agreement covering wages, hours, and conditions of employment for all those employes for which Council 24 was certified as the exclusive bargaining agent. Where material to this petiton, Article IV, Section 10 of this collective bargaining agreement provided as follows:

> Section 10. Exclusion of Probationary Employes
>
> Notwithstanding Section 9 above, the retention of probationary employes shall not be subject to the grievance procedures except those probationary employes 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.

Article X, paragraphs 121 and 122 of the agreement provide as follows:

> 121 The Personnel Board may at its discretion appoint an impartial hearing officer to hear appeals from actions taken by the Employer under Section 111.91 (2) (b) 1 and 2 Wis. Stats.
>
> "1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.
>
> 2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classification to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocations."
>
> 122 The hearing officer shall make a decision accompanied by findings of fact and conclusions of law. The decision shall be reviewed by the personnel board on the record and either affirmed, modified or reversed,the personnel board's action shall be subject to review pursuant to Ch. 227 of the Wisconsin Statutes.

The collective bargaining agreement was ratified by the legislature and was subsequently signed by the Governor on September 25, 1975, and published September 29, 1975.

The petitioner requests that this Board adopt its contentions on the following subjects relative to Article IV, Section 10, Paragraph 7, Request for Declaratory Ruling:

(a) The time limitation, if any, within which a probationary employe must bring the question of his or her nonretention to the Personnel Board;

(b) The allocation of the burden of proof;

(c) The quantum of proof or evidence required of the party having the burden of proof; and

(d) The legal standard, if any, against which the proof presented is to be measured.

Following notice a public hearing was held at which the petitioner and representatives of the Department of Administration appeared and spoke. In addition to the original and amended Request for Declaratory Ruling and a memorandum of authorities filed by petitioner, we also have received a "statement of position and memorandum in opposition to request for declaratory ruling," filed by the Bureau of Collective Bargaining, Department of Administration, and a letter brief from the Department of Administration. This matter was held in abeyance for several months while the parties pursued negotiations which apparently have not been successful.

DISCUSSION AND DECLARATION

The initial issue presented by this case has been framed by the statement of position and memorandum filed by the Bureau of Collective Bargaining:

> It is the position of the Department of Administration (DOA) that the Request for Declaratory Ruling be dismissed on the ground that the Board lacks jurisdiction to hear an appeal from a nonretained probationary employe or, in the alternative, may only investigate and hear matters on its own initiative; and the Board is in no way obligated by the terms of the Agreement between Council 24 and the State.
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> * * *
>
> Since the terms of Section 111.91 Wis. stats., make probationary policies a non-bargainable issue, the State has no authority to enter into an agreement on such matters. Therefore, the language of Article IV, Section 10 of the Agreement is void and the Board retains only those powers granted under Section 16.05 Wis. Stats.
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> Statement of Position and Memorandum in Opposition to Request for Declaratory Ruling filed by Bureau of Collective Bargaining, January 8, 1976, pp. 1, 3.

We agree with the Bureau's statement, taken in a general sense, that we have no jurisdiction to hear appeals of nonretained probationary employes pursuant to S. 16.05 (1) (e), stats. We also agree that pursuant to S. 111.91 (2) (b), stats., that the employer is prohibited from bargaining on:

(b) Policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certifications, appointments, and policies with regard to probationary periods.

The Bureau thus argues that the clause is void to the extent that it is interpreted to provide any appeal rights for nonretained probationary employes, and that the clause should only be interpreted consistent with and as a reflection of the Board's general investigatory power under S. 16.05(4), stats. However, the legislature has provided for the possibility of an agreement providing limited hearing rights regarding certain actions of the employer that fall within the areas where bargaining is prohibited. See S. 111.91(3). stats.:

> The employer may bargain and reach agreement with a union representing a certified unit to provide for an impartial hearing officer to hear appeals on differences arising under actions taken by the employer under sub (2) (b) 1 and 2. The hearing officer shall make a decision accompanied by findings of fact and conclusions of law. The decision shall be reviewed by the personnel board on the record and either affirmed, modified or reversed, and the personnel board's action shall be subject to review pursuant to ch. 227. Nothing in this subsection shall empower the hearing officer to expand the basis of adjudication beyond the test of "arbitrary and capricious" action, nor shall anything in this subsection diminish the authority of the personnel board under S. 16.05(1).

This subsection provides a limited exception to the general prohibitions of S. 111.91(2)(b). It allows agreements that provide limited review of certain personnel transactions which would otherwise not be permitted to be the subject of bargaining and submission to the grievance procedure. There is no reason to conclude that Article IV, Section 10, is void as dealing with prohibited subjects set forth in S. 111.91(2)(b) if the contract clause can be interpreted within the parameters of the express statutory exception to S. 111.91(2)(b).

The parties to this agreement have in fact reached explicit agreement for the review of such actions of the employer by a hearing

officer appointed by the personnel board. See Article X, paragraphs 121 and 122, set forth above. In our view, these two paragraphs with the underlying authority of S. 111.91(3), stats., provide a basis for review of the nonretention of probationary employes, independent of Art. IV, Sec. 10. Thus there is available another approach to Article IV, Section 10 — that it is a caveat to the grievance procedure and has its genesis in Article X paragraphs 121 and 122, and S. 111.91(3), stats. This is in addition to the other two approaches, i.e., that Article IV, Section 10, is a source of new hearing rights or that it simply reflects the existing investigative power of the Personnel Board pursuant to S. 16.05(4), stats.

It is clear that to the extent that the contractual clause is violative of the statutory prohibition on subjects of bargaining, it is void. See Board of Education v. WERC, 52 Wis. 2d 625, 635 (1971). The petitioner argues in essense that the ratification of the collective bargaining agreement by the legislature in some manner overruled, or provided a legislative exception to, the specific prohibitions of S. 111.91 (2) (b) 1, stats. A copy of the bill ratifying the agreement, 1975 Senate Bill 626, Chapter 72, Laws of 1975, is attached hereto as an appendix. This bill ratifies the agreement and authorizes an expenditure of funds for its implementation. The basis for this bill is twofold, SS. 16.086 (1)(bf), and 111.92, stats. The former provision includes the following:

> Provisions of the compensation plan that the joint committee on employment relations approves which require legislative action for implementation, such as changes in fringebenefits and any proposed amendments, deletions, or additions to existing law, shall be introduced by the committee in companion bills, to be put on the calendar. . . It is the intent of the legislature to make this process consistent with that set forth under S. 111.92.

Section 111.92(1) provides in part as follows:

> Tentative agreements reached between the department of administration . . . and any certified labor organization shall . . . be submitted to the joint

> committee on employment relations . . . If the committee approves the tentative agreement, it shall introduce in companion bills, to be put on the calendar, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law.

The bill ratifying the agreement contains nothing to change existing law. If such changes were required, they would have been introduced in the form of "companion bills." Lacking such companion legislation, there is no basis for the argument that the legislative ratification of the agreement somehow repealed the prohibitions of S. 111.91(2) (b) 1, stats.

The argument that Article IV, Section 10, is only a reference to the Personnel Board's power of investigation bestowed by S. 16.05(4), stats., is not persuasive in light of the more specific review provisions in Article X. The investigatory power is quite broad, covering "all matters touching the enforcement and effect of this subchapter [Chapter 16, Subchapter II] and rules prescribed thereunder," and can be invoked on the Board's own motion. On the other hand, the provisions of S. 111.91(3), stats. cannot be effective without the agreement of the parties. Since Article X contains an agreement for an independent route for review of non-retention of probationary employes, in accordance with the express statutory provisions of S. 111.91(3), stats., it is more reasonable to assume that Article IV, Section 10, refers to this authority of the Personnel Board which does require the agreement of the parties for implementation.

The language of Article IV, Section 10, makes the appeal rights of nonretained probationary employes discretionary with the Personnel Board. The contractual language simply recites ". . . probationary employes who are released . . . do, at the discretion of the Personnel Board, have the right to a hearing before the Personnel Board." However, this language and the "discretion" vested in this board is consistent with Article X, paragraph 121:

> The Personnel Board may at its discretion appoint an impartial hearing officer to hear appeals from actions taken by the employer under Section 111.91 (2) (b) 1 and 2 Wis. stats. (Emphasis supplied.)

While there is no reference in Article IV, Section 10, to the hearing officer mechanism and review on the record by the Board as provided by Article X, paragraphs 121 and 122, we believe it is reasonable to interpret the word "hearing" as a shorthand term that could encompass the Article X provisions. Compare, Van Susteren v. Voigt, Wis. Pers. Bd. No. 73-126, 128 (December 11, 1975), p. 6; Morgan v. United States, 298 U.S. 468, 480-481, 56 S. Ct. 906, 911-912 (1936); which contemplated a broad definition of the term "hearing," including the taking of evidence by an examiner.

The Bureau of Collective Bargaining suggested in argument before the Board that the interpretation of the contractual provision requested by the union should properly go to the contractual grievance procedure. In this regard we note that the contractual language defining the scope of the grievance procedure is quite limited:

> Article IV, S. 1, para. 33. A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this agreement.

In the proceeding before us, there is no allegation of a violation of a specific provision of the agreement. Rather, the petition seeks a declaratory ruling pursuant to S. 227.06(1), stats.:

> Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforced by it.

As we interpret this subsection, the "statute enforced" by this Board in the context of this proceeding is S. 111.91(3), stats., which provides explicit statutory authority for hearings concerning the subject matter contained in Article IV, Section 10 of the agreement. Even if the agreement contained a more expansive definition of grievances, as, e.g., any dispute over the interpretation of the contract, we question whether the contract could prevent

a body such as the Personnel Board, that by contract has been given express power to resolve certain types of disputes, from interpreting in response to a request for a declaratory ruling those provisions relating to it, including a threshold determination of the extent of its power under the contract. If a party were to refuse to proceed to a hearing in a given case involving an appeal of a probationary employe, it would appear to us that it would be at this point that the grievance mechanism would come into play.[1]

Given the foregoing interpretation of the statutory basis of Article IV, Section 10, we turn to S. 111.91(3), stats. for the answers to the questions propounded by petitioner. The statutory basis for adjudication is limited to "the test of 'arbitrary and capricious' action," and this provides the legal standard to be applied by the hearing officer and the Board. Since the employer is not required to show cause for the nonretention, it does not have the burden of proof. See Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52 (1976). The quantum of proof or evidence is that normally utilized. See Reinke v. Personnel Board, 53 Wis. 2d 123, 137 (1971): "If there is no statutory counterpart, the required burden of proof is that of other civil cases, that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." Finally, as to the time within which an employe must bring the question of his or her nonretention to the Board, we see no reason to vary from the time limit agreed to in the contract for the presentation of grievances. This is familiar to the parties and will promote uniformity in the resolution of disputes under the contract. This time limit is found in Article IV, Section 1, paragraph 36:

> All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

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[1] Whether this would create an issue concerning an administrative res adjudicata, and if so, how it would be resolved, are questions we do not reach.

We will not attempt to set forth any specific standards regarding the exercise of discretion referred to in Art. IV, Section 10. The concept of discretion involves the exercise of judgment under all the circumstances, including factors such as this Board's caseload, which is subject to change. At this time, we believe it is inappropriate on this request for declaratory ruling to state more than that we would decline to hear appeals under this clause when they appear on their face to be frivolous. In any given case the Respondent is free to make any relevant argument why this Board should not exercise its discretion.

Given the existence of the express agreement contained in Article X, paragraphs 121 and 122, which has an express statutory basis in S. 111.91 (3), stats., and the interest in interpreting the contract in a manner that would be consistent with existing law, we perceive no necessity to take evidence on the intentions of the parties in reaching this agreement.

Rights declared.

Dated August 24, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson

Appendix

STATE OF WISCONSIN

1975 Senate Bill 626

Date published*: September 29, 1975

CHAPTER 72, LAWS OF 1975

AN ACT to ratify the agreement negotiated between the state of Wisconsin and the (blue collar and nonbuilding trades) Wisconsin state employes union, AFSCME, Council 24, and its appropriate affiliated locals, AFL-CIO, and authorizing an expenditure of funds.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. **Agreement ratified.** The legislature hereby ratifies the tentative agreement negotiated between the state of Wisconsin, department of administration, and the Wisconsin state employes union, AFSCME, Council 24, and its appropriate affiliated locals, AFL-CIO, covering employes in the blue collar and nonbuilding trades bargaining unit under the provisions of chapter 111 of the statutes, as approved by the employes of the blue collar and nonbuilding trades bargaining unit and approved and recommended by the joint committee on employment relations and authorizes the necessary funds from section 20.865 (1) (cm) of the statutes for implementation. Official certified copies of that agreement shall be filed with the secretary of state.

SECTION 2. **Effective date.** 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.