

6. Following the commencement of his employment and through his last day of actual work, May 14, 1976, the appellant performed the work expected of him in a satisfactory manner.

7. On May 16, 1976, appellant was involved in an auto accident.

8. The appellant failed to report for duty thereafter but called in sick.

9. The appellant exhausted all of his sick leave prior to June 14, 1976.

10. The appellant was called at home on June 14, 1976, by his immediate supervisor and was told he was being let go or words to that effect.

11. No appointing authority was involved in the aforesaid transaction.

12. The appellant stated that he had a doctor's appointment for later that day and he would thereafter let the supervisor know if he could go back to work.

13. The appellant was later that day advised by a doctor that he could go back to work.

14. The appelland did not report back to the department because he had been told he was terminated.

15. A letter of June 29, 1976, from the appointing authority to the appellant, Respondent's Exhibit 1, stated as follows:

This is confirmation of the conversation between Peter Hagen, your immediate work supervisor, and yourself on June 7, 1976 at which time you were informed of your termination with the Department of Family Medicine and Practice due to the fact that you were unable to report to work because of injuries to your back. We have also reviewed your application which had been submitted to us at the time of your interview and noted no indication was made to previous medical conditions which could result in inadequate work performance.

We find that it is necessary to fill this position and therefore are terminating you from state employment during your probationary period. Since this termination is occurring during your probationary period, there are no rights to appeal this decision.

16. The appellant received this letter July 1, 1976.

17. In an initial determination on unemployment compensation issued by Job Service, DILHR, (Appellant's Exhibit 7) the determination was made that appellant "was physically able to work and substantially available for work on the general labor market when he started his claim for benefits in week 25, ending 6/19/76."

CONCLUSIONS OF LAW

1. This matter is properly before the board pursuant to s. 111.91(3) and 16.05(1)(h), Wis. Stats.

2. The attempted dismissal of June 14, 1976, was not in compliance with s. Pers. 13.09(2), W.A.C., was ineffective, and constituted arbitrary and capricious action.

3. The appointing authority failed to terminate the appellant's probationary employment prior to July 1, 1976, which is the effective date of the termination.

4. There is an identity of parties between this appeal and the aforesaid unemployment compensation proceeding.

5. There is not identity of issues or "cause of action" between this appeal and the aforesaid unemployment compensation proceeding.

6. The requisite elements of res judicata not being present, the board is not bound by the aforesaid unemployment compensation decision.

7. The burden of proof is on the appellant to show that the termination of his probationary employment constituted arbitrary and capricious action.

8. The appellant failed to discharge that burden.

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OPINION

The June 14, 1976, discharge was ineffective because it was not in writing and was not effectuated by an appointing authority. See s. Pers. 13.09(2), W.A.C. This constituted arbitrary and capricious action in that it failed to comply with the basic rules on dismissal procedures. The June 29, 1976, letter (Respondent's Exhibit 1) was in writing, signed by an appointing authority, and contained reasons for the discharge. This letter is unclear as to the discharge date. It purports to confirm a conversation of June 7, 1976, and appears to ratify that as the effective date of the transaction. In any event, a retroactive discharge would have been ineffective. See State ex. rel. Tracy v. Henry, 219 Wis. 53, 61 (1935): "a subsequently effective discharge, pursuant to subsequently furnished and filed legal reasons, could not possibly operate retroactively so as to be deemed effective as of the date of the original illegal discharge."

The appellant argues that the June 29th letter was ineffective because it lacked a statement of reasons for discharge, attempted to retroactively terminate appellant effective June 7, and was not sent to appellant immediately. As set forth above, in the board's opinion the letter did contain a statement of reasons. The June 7th discharge date is ineffective but this does not render the discharge itself ineffective. The June 29th letter was an attempt to comply with the legal requirements for dismissal with respect to the attempted June 14th dismissal. As a result of that June 14th telephone call, the appellant had not returned to work but had applied for unemployment insurance benefits. In the board's opinion the effective date of discharge was July 1, 1976, when the appellant received the letter. If the letter had indicated an effective date of "immediately," "on receipt of this

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letter," or on some future date, the appellant would have had notice that he was entitled to additional wages and benefits but this would not have changed the basic fact that the respondent did not intend to continue appellant's employment. In this context, an error in providing notice of the correct effective date of the dismissal should not be interpreted as an omission of a mandatory requirement which voids the transaction, see Laddis v. Carballo, Wis. Pers. Bd. No. 77-129 (5/18/78); Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 572-573, ___ N.W. 2d ___ (1978). With respect to whether the notice was provided "immediately," it was "immediate" in the context of a July 1st effective date.

The standard of review in cases of this nature is limited to a determination of whether there was "arbitrary and capricious action." Section 111.93(3), Stats. The appellant failed to provide requested information about his medical background in a preemployment interview. In the board's opinion this clearly takes the basis for dismissal out of the "arbitrary and capricious" area regardless of whether or not the other ground (inability to report for work) could effectively be disputed by the appellant. While the hearing was held open for the possible submission by appellant of a deposition by a doctor regarding this second ground, the board's determination that the first ground provided an adequate basis for a conclusion that the basis for the discharge was not arbitrary and capricious action makes further proceedings unnecessary.¹

1. The board notes that the elements for res judicata are not present in an unemployment compensation decision regarding the appellant's ability to work. See Prior v. DOA, Wis. Pers. Bd. No. 77-70 (5/18/78).

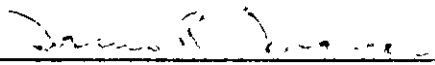
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ORDER

This matter is remanded to the director with direction to reinstate appellant for the period June 7, 1976 - July 1, 1976, less mitigation, and with direct payment to DILHR of any unemployment insurance benefits received by appellant during that period, in accordance with unemployment compensation law.

Dated: June 16, 1978

STATE PERSONNEL BOARD


James R. Morgan, Chairperson