STATE OF WISCONSIN STATE PERSONNEL BOARD

EVERETT HULKO,

Appellant,

v.

JOHN C. WEAVER, President, University of Wisconsin,

Respondent.

Case No. 76-118

OFFICIAL

INTERIM
OPINION AND ORDER

Before: DEWITT, Chairperson, WILSON, STEININGER, and MORGAN, Members.

NATURE OF THE CASE

Appellant was a probationary employee at the time he was discharged. His position was covered by a certified bargaining unit. He has appealed his discharge pursuant to Article IV, Section 10 of the union contract. Respondent has moved for dismissal for lack of jurisdiction.

DECISION

In Request of the American Federation of State, County and Municipal Employes, Council 24, Wisconsin State Employes Union, AFL-CIO for a Declaratory Ruling, Case No. 75-206, August 24, 1976, we decided that we had jurisdiction under Article IV, Section 10 of the Agreement between AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO and the State of Wisconsin (hereinafter the Agreement) to hold a hearing on the termination of a probationary employee. Further, we declared that the authority to hold the hearing was discretionary and that we would decline to hear appeals under this section when they appeared on their face to be frivolous. We further held that the burden of proof was on the Appellant to prove

that the Respondent's action was arbitrary and capricious.

Respondent has moved to dismiss the instant appeal and other similar appeals for the following reasons:

a.) the Board lacks jurisdiction over this appeal under Sections 16.05(1)(e) and 16.28(1)(a), Wis. Stats.; further, the Board has not resolved the conflict between the above sections of the civil service law and the related Administrative Code Sections (see Section Pers. 13.09) which clearly do not give appeal rights to employees who are terminated while on probation and Article 4, Section 10 of the contract which does grant those rights.

b.) Appellant has alleged no violation of constitutionally protected rights under the rule of 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. 2494 (1972);

c.) the Board lacks jurisdiction under Article 4, Section 10 of the Agreement between AFSCME Council 24 Wisconsin State Employes Union, AFL-CIO and State of Wisconsin because it has failed to establish standards by which it will exercise its discretion (i.e., due process violation and unconstitutionality by vagueness); and further, the standards which should be adopted are those found in Perry and Roth (supra) and, as stated above, there has been no allegation of a violation of constitutional rights;

d.) even if the Board exercises its discretion and grants a hearing to Appellant, there are no remedies provided and no provision giving the Board authority to fashion a remedy.

e.) even if the Board has jurisdiction under Article 4, Section 10 of the Agreement, it should not exercise its discretion and hear the appeal because Appellant has failed to make any meritorious argument which would warrant the Board's taking jurisdiction. He has not raised any issue which is unique so that the Board should hear his appeal. (Conference Report, October 21, 1976, Chapin v. Weaver, Case No. 76-162).

Section 16.28(1)(a) Jurisdiction

We agree with Respondent that we do not have jurisdiction under Section 16.05(1)(e) or 16.28(1)(a) to hear this appeal. Both these sections define the right of appeal in terms of an employee who has attained permanent status in class. Further, Section 16.22(1)(a), Wis. Stats., and Section Pers. 13.09(1), W.A.C., state clearly that an employee terminated while on probationary status has no right of appeal.

At first glance, there does appear to be a conflict between the civil service laws and Article IV, Section 10 of the Agreement. However, the legislature has made it clear that the civil service statutes have limited effect on state employees who are covered by a union contract entered into pursuant to subchapter V of Chapter 111. See Sections 16.01(3) and 111.93. Section 111.93(3) provides that:

> If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

We determined in the Declaratory Ruling on Article IV, Section 10 that:

> 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 . . . . [S. 111.91(3)] 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. (Declaratory Ruling, at p. 4.)

We went on to find that the rights provided under Article IV, Section 10 of the Agreement were within the exceptions covered by Section 111.91(3). We further determined that there was an independent basis for the right to a hearing before the Board, that is, Article X of the contract. Therefore, although we agree that there is an apparent conflict between the provisions in the civil service law and the Agreement, the contract clause prevails. Our taking this position does not place us in a contradictory position. The civil service law and the Agreement arise out of separate chapters of the statutes (Subchapter II of Chapter 16 and Subchapter V of Chapter 111, respectively). Although generally the rights and privileges provided nonrepresented employees under the civil service law are extended through the Agreement to represented employees and vice versa,

it is possible and it was evidently foreseen by the legislature that this would not always be the case. See Section 111.91(3), Wis. Stats. Therefore, we conclude that the limited right to a hearing that nonretained probationary employees have under Article IV, Section 10 of the Agreement is not in such conflict with the civil service law as to prohibit us from exercising our discretion to hear this case.

Roth and Sindermann Requirements

In Board of Regents of State Colleges v. Roth, 408 U.S. 582, 92 S. Ct. 2701 (1972) and Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2717 (1972), a nontenured assistant college professor appealed from the nonrenewal of his one year school contract. In reversing the Court of Appeals and District Court decisions requiring the University to provide reasons for and a hearing on the nonrenewal, the Supreme Court stated that:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite. (403 U.S. at p. 569-571, 92 S. Ct. at p. 2705.)

The Court went on to say that the nature of the interest at stake is the factor to look to when determining whether due process rights apply. (408 U.S. at p. 571, 92 S. Ct. at p. 2706.) In giving the broad term "liberty" some meaning the Court stated that "there might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated." It cited as examples the situations where the charges against the employee "seriously damage his standing and associations in his community" and where the action against the employee impose upon him "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (408 U.S. at p. 573; 92 S. Ct. at p. 2707.)

In discussing the meaning of the term "property interests," the Court stated that:

> Property interests, of course, are not created by the Constitution. Rather they 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 entitlements to those benefits. (408 U.S. at p. 577; 92 S. Ct. at p. 2709.)

The Appellant in this appeal relies on Article IV, Section 10 of the Agreement for the basis of his appeal. The Agreement is a contract which is negotiated between the State of Wisconsin as an employer and the AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO as the representative of the employees. The contract is entered into pursuant to subchapter V of Chapter 111, Wis. Stats. The contract clause in question certainly comes within the above cited language on property rights. Without the provision for a hearing in the contract clause, there would arguably be no entitlement to a hearing. This would be true whether or not the contract clause is sufficient to invoke due process rights. Therefore, we conclude that the contract clause creates a property right such that a probationary employee is entitled to a hearing on his termination at our discretion. An individual appeal may also raise issues which would mandate the right to a hearing on an infringement of a person's liberty.

Standards for Exercising Jurisdiction

Article IV, Section 10 of the contract grants a probationary employee the right to a hearing but only at the discretion of this Board.

In the Declaratory Ruling we declined to set forth a strenuous set of standards by which we would exercise our discretion to hear appeals under Article IV, Section 10. However, we did state that in the case where the appeal was frivolous on its face we would decline to take jurisdiction. Furthermore, we held that Respondent was entitled to present any arguments he

wished as to why we should not exercise our jurisdiction in a particular case.

The discretion under the contract clause has not been limited by Sections 16.05(1)(g) or 111.91(3), Wis. Stats. or Article X of the Agreement. A general statement of existing law is found in American Jurisprudence which states:

> Generally speaking, the only restraint upon the exercise of an admitted discretion by an administrative agency is that it act in good faith and not in abuse of its discretion . . . . Discretion, particularly in the exercise of a determinative power or a power judicial in nature, must be a sound discretion, and the action taken must rest on reasonable grounds. 2 Am. Jur. 2d Administrative Law Section 192.

Respondent urges that the standard we should adopt in these cases is that one found in Roth and Perry. As has been discussed above, we feel that the rule of Roth does apply to some extent to these cases. A probationary employee who is terminated has a limited degree of protection under Article IV, Section 10 of the Agreement. He is entitled to petition the Board to hear his appeal. However, since we do not believe that the only basis of justification for our taking jurisdiction of this case is that there may be a violation of Appellant's due process rights, we will not limit the exercise of our discretion to that standard. We stated in the Declaratory Ruling that the burden was on the Appellant to prove that the act of termination was arbitrary and capricious. It is quite conceivable that an act of termination could be arbitrary and capricious without ever reaching the dimensions of a violation of constitutional rights. Therefore, we reiterate that we will continue to develop the standard by which we will exercise our discretion case by case.

Remedies

We find little merit in Respondent's argument that we do not have jurisdiction to hold a hearing because the contract clause does not have a provision for remedies. Needless to say, the authority to hold a hearing would be meaningless without a complementing authority to fashion an adequate remedy if one is found to be needed. We conclude that the provision for hearing is tantamount to providing this Board with the authority to fashion remedies. Adams v. City of Shelbyville, 57 NE 114, 154 Ind. 467 (1900).

Furthermore, the basis of our authority under this particular clause is Section 111.91(3). This subsection has a clear provision for remedy when it states:

> 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 Chapter 227.

Exercise of Discretion

By letter dated June 29, 1976 Respondent terminated Appellant for his alleged inability to report for work on June 7, 1976. Apparently Appellant was in a nonwork-related automobile accident on May 16, 1976. Appellant claims that the conversation between his supervisor and him which was the basis of the termination occurred on July 14, 1976 and that he was able to return to work on that date. We conclude that these allegations merit our exercising our jurisdiction to hear this appeal. There is a question of fact when Appellant's supervisor spoke to him about returning to work and whether he was able to do so.

We have used a minimal standard to determine whether we will exercise our discretion to hear this appeal. As more appeals are filed and more hearings held under Article IV, Section 10, the standard used to make the jurisdictional determination will undoubtedly become more definitive.

ORDER

IT IS HEREBY ORDERED that Respondent's motion to dismiss is denied.

Dated March 21, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson