STATE OF WISCONSIN | STATE PERSONNEL BOARD

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LARRY JORSCH,

Appellant,

v.

ADJUTANT GENERAL, Department of Military Affairs,

Respondent.

Case No. 76-148

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OFFICIAL

ORDER

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

## ORDER

We hereby adopt as final the attached Proposed Opinion and Order of the hearing examiner with the following additions:

## FINDINGS OF FACT

### Mandatory Disclosure of Names of Witnesses

Just prior to the commencement of the hearing, the hearing examiner outside the presence of appellant or his attorney discussed with respondent's attorney the fact that neither party had submitted a list of witnesses pursuant to Section Pers. Bd. 2.01, W.A.C. and that she therefore assumed that neither party would raise an objection to any witnesses that would be called. Based upon this discussion, respondent's attorney did not raise an objection to appellant's only witness himself testifying. Appellant objected to any of respondent's witnesses testifying pursuant to Section Pers. Bd. 2.01. Respondent then moved to strike appellant's testimony for failure to comply with the mandatory disclosure rule, Section Pers. Bd. 2.01.

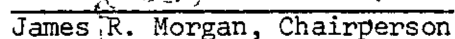
## CONCLUSIONS

### Mandatory Disclosure of Names of Witnesses

In light of the discussion the hearing examiner had with respondent's attorney before the commencement of the hearing, we concluded that respondent did not waive his right to object under Section Pers. Bd. 2.01. However, we reach an anomaly if we grant both respondent's motion to strike appellant's testimony and appellant's motion to disallow the testimony of respondent's witnesses pursuant to Pers. Bd. 2.01 in that the record will reflect no testimony at all. In the interest of justice, we conclude that both motions are denied and the testimony of all the witnesses at the hearing are part of the record.

Dated: June 16, 1978

STATE PERSONNEL BOARD



James R. Morgan, Chairperson

STATE OF WISCONSIN STATE PERSONNEL BOARD

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| LARRY JORSCH,<br><br>Appellant,<br><br>v.<br><br>ADJUTANT GENERAL, Department of Military Affairs,<br><br>Respondent.<br><br>Case No. 76-148 | PROPOSED OPINION AND ORDER |

Before:

## NATURE OF THE CASE

This is an appeal from the termination of a probationary employe. We issued an earlier Opinion and Order dated July 22, 1977, in which we denied both respondent's motion to dismiss and appellant's motion for immediate reinstatement. During the course of the hearing both motions were renewed by the respective parties.

## FINDINGS OF FACT

Appellant was hired in April, 1976 as a Security Officer at Truax Field. By letter dated July 29, 1976 appellant was terminated from such employment. The reasons for his termination are set forth in appendices A and B (Board Exhibit 5 and 6, respectively). The parties stipulated at the hearing to the following dates:

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|---|---|
| July 30, 1976 | Effective Date of the Termination |
| July 31, 1976 | Appeal by Appellant |
| August 10, 1976 | Appeal to Pers. Bd. signed by Appellant and his Attorney |
| September 30, 1976 | Prehearing Conference |
| December 15, 1976 | Completion of Briefing Schedule |
| July 22, 1977 | Interim Opinion and Order |
| August 24 & 25, 1977 | Hearing |

Truax Air National Guard Base, the 128th Air Tacticial is a part of the national defense system. There is classified material kept on base. There are also twenty aircraft stationed on the base, plus explosive, small arms including rifles, revolvers and ammunition, and a large fuel storage vat. The buildings also houses administrative facilities including office equipment. The base itself encompasses all areas owned or leased by the military complex but not the streets leading to the buildings, which are off the immediate property. In other words there are public areas which run between the base buildings.

The line of command as it applied to appellant was: General Lison, Colonel Dawson, chief of support services and Sgt. Everson. Sgt. Everson was a federal employe who supervised the security of all federal property under the jurisdiction of the base. Part of his duties included the supervision of the security officers who were on duty from 4:00 p.m. until 7:30 a.m. on weekdays and 24 hours a day on weekends. Security officers were to report on a form called a blotter: who was on duty, the readiness of the equipment, the condition of the grounds and any incidents of significance. These reports were to be filled out by the security officer on duty. Each morning the blotters were reviewed by Everson.

Because Sgt. Everson's work day ended at about the same time the security officers came on duty, he told them to go to the more senior officer on duty for advise. Seniority was determined by length of employment. Appellant understood that the senior security officer on each shift determined who went on patrol first. Appellant also believed that during the training process the senior officer could tell the non-senior officer what to do and what not to do. Sometime after June, 1976 Meyers was officially designated as Training Officer. Prior to that time there was no official training program.

Sgt. Everson ended his work shift just about the same time that the security officers began theirs. On the first day of work appellant arrived just as Everson was leaving. Appellant was assigned by Everson to work under security officer Ertha Thomas in a training capacity.

Appellant's duties and responsibilities as a security guard were to hand check all locks and doors especially the ammunition building and the medical supplies building. Appellant believed that part of his duties included helping civilians who were in the area of the base and in need of assistance. He did allow civilians access to the wash room facilities and the telephone in the security office.

In his case in chief, appellant testified to an incident involving another security officer who was black. On July 18, 1976 appellant and the other security officer Ron McCane, worked a shift beginning at 3:30 p.m. Mr. McCane had begun working for the department one day before appellant. Appellant, therefore, believed McCane was "senior" to him. Mr. McCane told appellant to take the police vehicle and patrol the grounds first which he did. He returned two hours according to procedures. McCane then left on patrol and returned about two and one half hours later. Appellant went out again on patrol but about 15 to 20 minutes later he was called back by McCane so that he could go out. Evidentally there was no emergency or other procedural reason for his return so he refused. McCane called Everson who order both men to file a report of the incident. Upon review of this incident, Sgt. Everson determined both men were at fault. Within two weeks of the incident both men were terminated. The incident triggered an investigation into their individual records. General Lison, commander of the base and the appointing authority, testified that he did not believe the incident

involving McCane was in and of itself that serious. His decision to terminate was based on appellant's entire record.

## SHOWING FILMS

There was a television set located in the security office. There were no rules prohibiting the employes from watching as long as their work was performed. It does appear that the set was removed at times because of excessive watching.

During one of their shifts together appellant told Thomas he had access to stag movies. Thomas urged him to bring on base the films and the equipment to show them. Appellant stated that at first he thought it would be wrong to do so but changed his mind when Thomas argued that there was not much difference between the television being on and the films being shown.

The record shows that stag movies were shown about four times while appellant was on duty, and that he was the one who had brought them onto the base. Several employes who were off duty stayed to watch the films. While the films were being shown, appellant apparently performed his duties at the security office. The films lasted about an hour and a half. No one told appellant during the showing of the films that he should stop them.

After he learned of the showings, Sgt. Everson spoke to appellant and Thomas about it. Sgt. Everson did not displine any of the people who watched the films.

## FREQUENT VISITORS

Appellant was also observed having visitors numerous times during the time of his employment. His wife would come, staying about 15 minutes and bringing appellant his dinner. He also had friends who did the same for him. One of appellant's fellow security officers, John Gavigan, also observed two men in a van visiting appellant while he was on duty. The van was seen only on public

streets. Gavigan advised appellant that they should leave. They did so shortly thereafter.

Another security officer, Louis Meyers, who at the time of the events of this case had permanent status and class, testified that he thought it was all right for nonauthorized personnel to come on base to use the telephone or wash room or to bring food if they were escorted on and off. Sgt. Everson testified that there was no written policy regarding persons visiting a security officer on base while he was on duty. The reasonableness of the frequency and the duration of the visits was determined by him. If the visit interfered with job performance, he would give the employe a warning. He did not reprimand appellant or others for having visitors because he did not feel it was that frequent of a problem. He did not consider it a serious violation to have someone bring a person lunch.

## UNAUTHORIZED USE OF SP VEHICLE

Everson also testified that the security officer had no authority to pursue vehicles and no authority off of military property. Appellant evidently reported that he confronted a man whom he thought to be on the base and asked him to leave. Words were exchanged but eventually the man did leave. (See Respondent's Exhibit #1). Appellant pursued a vehicle parked behind a military building on the base property when it speeded away without its lights on when he approached it. He followed to get the make, color, and license plate number of the car after he called the other security officer to check the building. He ceased the pursuit when the other officer reported the building was secure. In yet another incident appellant observed an unoccupied double parked car. As appellant approached some people returned to their car and attempted to leave. Appellant stopped the car on a public street using his red lights to get

some identification. Appellant noted these incidents on the blotter.

Appellant testified that he found a person walking near base one cool and rainy evening. He stopped the security vehicle to check the individual's indentification. While he did so, he permitted the person to sit in the security vehicle. Appellant further testified that he did not know of any written rule prohibiting an unauthorized person in the security vehicle. On another occassion when Meyers and he were on duty together, appellant took some military personnel to a restuarant about 10 minutes away from the base because their plane could not take off that evening. He did so on Meyers' order.

After he read about the above incidents on the blotter, Sgt. Everson spoke to appellant about them, informing him that he had not followed proper procedures. He then advised the appellant what the proper procedures were.

Both Dawson and Everson testified that security officers had no authority to pursue vehicles on public streets even those abutting base buildings. However, they were authorized to stop vehicles or pedestrians in order to get some identification if possible. To determine whether it was possible the officers were to use a reasonableness test in light of all other policies and regulations.

In addition, no one was to ride in the security vehicle except authorized personnel. It was to be used to transport official military visitors to and from their motels. No civilians were to be transported without authorization. There was a requirement that there be a written or oral order allowing specified personnel to be transported. The only other use of the vehicle was for the patrol of the base.

EXCESSIVE BREAK TIME

Since the work shifts were exactly 8 hour's there was no provision for lunch breaks; however, the men were permitted to eat while on duty. Also, intially the men were permitted to take a reasonable amount of time to go off base to get something to eat. The time permitted was short, 10 to 20 minutes inasmuch as there was no schedule lunch break. There was no testimony that anyone had received a written reprimand for taking lunch breaks or leaving the base to bring back food.

There was evidence of only one instance when appellant took an excessive amount of time on break. He had ordered a sandwich and went to pick it up. In total he was off base about 45 minutes because the order which he intended to bring back to the base was incorrect. Gavigan testified that he had once taken 30 to 45 minutes off base but he never repeated it when he learned that it was too long. Meyers testified that he figured that the men were entitled to two 10 minute breaks over the 8 hour shift and about a 20 minute dinner break.

Everson testified that originally the policy on breaks was one of reasonableness. A security officer could go off base to get food if he returned within a reasonable time, about a half an hour or less. He was aware that the policy was abused occasionally but felt it was not often enough to cause a problem. Sometime after April, 1976, the policy changed so that the security officers were not permitted to go off base for food.

COMPROMISE OF THE COMBINATION

The gate to the base was kept secure by a combination lock of four digits. A wrench was used to change the combination which could be done in about one minute by one person. The combination was changed at least annually, whenever

anyone terminated his employment, or when the lock was compromised. Since January, 1977 until the time of the hearing the combination had been changed about three times.

Prior to Everson's being placed in charge of security, the policy of who had knowledge of the combination was very lax. After June, 1975 he instituted a policy wherein no one was to know the combination but the security officers and himself. There was one exception to the rule. Everson authorized the fire department to know the combiantion because the security officer was not located directly at the gate. However, he rescinded that authorization when he became aware of abuses.

Dawson testified that in the fifteen years that he had been at Truax the main gate had been compromised many times until the policy regarding who had knowledge of the combination was changed. In the past when the combination had been compromised, he had limited the discipline to a verbal reprimand. He had not recommended termination because the actions were negligent, not willful.

On June 10, 1976, appellant gave the combination of the front gate lock to one Sergeant Fawcett. Appellant determined on his own that Fawcett should have the combination because he was the only one with keys to a building on base which contained a couple of million dollars worth of equipment. Appellant knew that Fawcett was not connected with the fire department. He also knew the combination was only to be given to the fire department and other security officers.

The change in the policy in allowing the fire department know the combination occurred sometime after appellant began working for respondent. It appears that appellant had been given a leave of absence so that he could

earn extra money driving a truck. Although the testimony is not clear, it appears that the change in policy may have occurred during this leave of absence. Everson testified that he did not formall reprimand appellant for his compromising the lock because his action was discovered shortly after it occurred and no harm was done.

## INABILITY TO GET ALONG WITH OTHERS

Everson testified that he was aware of bickering among the security officers. The bickering he was informed of always appeared to involve appellant.

## CONCLUSIONS

We hereby adopt our decision as contained in the Opinion and Order dated July 22, 1977. We also support the decision of legal counsel to the Board, stating the respondent would be limited in his proof to the reason set forth in the letter of termination and the letter from Charles Larsen. (See Appendices A and B.)

## MOTION TO DISMISS

Appellant called only one witness to testify, himself. His testimony on direct in the case-in-chief dealt only with the incident which arose between McCane and him. He alleged that the single reason he was terminated was because of that incident. If McCane who was black was terminated, then appellant who was white would also have to be terminated to avoid any inference of discrimination. Respondent then moved to dismiss this appeal on the grounds that appellant failed to sustain his burden of proof. In In re Request of AFSMCE, Council 24, WSEU, AFL-CIO, for a Declaratory Ruling, Case No. 75-206, August 24, 1976 the Personnel Board held that the burden of proof was on an appellant to prove that the decision to terminate his employment while on

probation was arbitrary and capricious. Further, the Board held that this burden was the same as the one used in civil court cases, that is, that "the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence." (Case No. 75-206, at page 8)

In the instant appeal we cannot conclude that appellant met his burden of proof. Certain reasons set forth in the letter of termination and additional reasons were submitted by letter from Charles Larsen. (See Appendices A and B) In his case-in-chief, appellant simply stated why he believed he was terminated without addressing those reasons given by respondent.

For purposes of this motion, the reasons set forth by respondent were not refuted and must be assumed to stand. We cannot conclude, therefore, that respondent's decision to terminate was arbitrary and capricious even in light of appellant's evidence on the incident involving McCane.

THE TERMINATION WAS NOT ARBITRARY AND CAPRICIOUS

In Jabs v. State Board of Personnel, 34 Wis. 2nd 245 (1976), the Supreme Court defined arbitrary and capricious as action "either so unreasonable as to be without rational basis of the result of an unconsidered, willful, and irrational choice of conduct." (Id. page 251) The reasons which were contained in the two letters attached to this Opinion and Order seem to separate into the following categories: showing films on base while on duty; frequent visitors while on duty; unauthroized use of the security police vehicle; excessive amount of time used on breaks; compromising the combination of the main gate lock; and inability to get along with co-workers.

## SHOWING FILMS

Appellant admits acquiring and showing the films on more than one occasion. While the evidence shows that this activity did not interfer with appellant's performance of his duties and responsibilities, the conditions in the security office cannot be said to have been normal during the showings. There were even people who stayed after work or who came specifically to view the films. A television set whether in use or not would not create the same conditions or atmosphere. This showed a serious lack of good judgement on the part of appellant.

## FREQUENT VISITORS

It is difficult to determine a definition of frequent in the context of this case. It does not appear to us that appellant had too many visitors too frequently. There was no testimony on how these visitors may have interupted appellant in the performance of his duties. Most of the visitors apparently were ones who brought him food. These visitors included his wife and friends.

## UNAUTHORIZED USE OF SP VEHICLE

Under this category we include the alleged pursuit, detention, uses of the vehicle off base, and permitting unauthorized personnel in the vehicle. Appellant admitted each of these incidents but argued that either he did not know the policy prohibiting his actions or the circumstances under which he did act were such that they mitigated the gravity of the violation. We agree with appellant. While his actions are not to be condoned, his explanations of these incidents remained largely uncontroverted.

## EXCESSIVE BREAK TIME

There is evidence of only one dinner break during which appellant was away from the base over a half an hour while he was supposed to be on duty. Appellant

used poor judgment in taking so long. However, there was no evidence of other occasions and a single, nonrepeated incident is not sufficient for termination.

COMPROMISE OF THE COMBINATION

Appellant admitted that he gave the combination to Fawcett who was not part of the security force or the fire department. He did so on his own without a superviosr's authorization. He also admitted that he knew that the policy at the time he was hired was that only security officers and the fire department were to have the combination. We conclude that this is a very serious violation of the security of the base. Appellant showed very poor judgment in not obtaining authorization before giving the combination to Fawcett.

INABILITY TO GET ALONG

There was little evidence on this charge except Everson's testimony about the alleged bickering. There was no evidence except for the incident involving McCane, which showed that this alleged inability to get along with fellow security officers interfered with of interupted performance of duties and responsibilities of any personnel at any time.

After reviewing the above charges and the standard by which we are to evaluate the termination of a probationary employe whose position is covered by contract, we conclude that the respondent's actions were not arbitrary and capricious. We draw this conclusion primarily from the two charges of showing films and compromising the combination.

However, we also conclude that respondent was lacking severely in its handling of personnel. The training program for new security officers was very inadequate. There should minimally be a set of written policies and regulations

covering all aspects of the job including the types of actions which gave rise to this termination. These policies should be readily accessible to all officers. There should also be a clear line of supervision such that new personnel are not relying on inadequately training and poorly informed security officers for their training and information. We agree with respondent that the base needs good security because of its military nature. However, from the record before us it appears that when appellant was employed, the security was relatively lax for lack of proper and adequate training.

ORDER

IT IS HEREBY ORDERED that respondent's action to terminate is affirmed.

Dated: ______________________, 1978 STATE PERSONNEL BOARD

______________________
James R. Morgan, Chairperson