

STATE OF WISCONSIN

STATE PERSONNEL BOARD

\* \* \* \* \*  
 JAMES CHAPIN,  
                     Appellant,  
 v.  
 PRESIDENT, University of Wisconsin,  
                     Respondent.  
 Case No. 76-162  
 \* \* \* \* \*

\*  
 \*  
 \*  
 \*  
 \*  
 \*  
 \*  
 \*  
 \*  
 \*  
 \*

# OFFICIAL

OPINION AND ORDER

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

### NATURE OF THE CASE

The appellant was discharged while on probation. He has appealed this discharge pursuant to Article IV, §10 of the contract between WSEU and the State of Wisconsin.

### FINDINGS OF FACTS

1. The appellant was employed as a Building Maintenance Helper HI by the University of Wisconsin Oshkosh (UWO) from March until July 1976.
2. The appellant worked on a 3:00 p.m. to 11:00 p.m. shift. His duties consisted of general custodial work on the third floor of Dempsey Hall. Included in these duties was the cleaning of a women's restroom.
3. The appellant's supervisor was Mr. Robl. Mr. Robl's supervisor was Mr. Wolter.
4. Millard Edmonds, Director of Personnel - UWO, was informed in mid-May that women working in the offices of Dempsey Hall had complained about the appellant being "overly friendly" and about his entering the women's restroom without their permission while they were occupying it.

5. Mr. Edmonds then told Mr. Wolter to investigate, to talk to Mr. Robl, and to give the appellant a verbal warning.

6. Mr. Robl then informed the appellant that complaints had been received regarding his entering the women's restroom and that he should not attempt to perform custodial duties in that room until the late night hours of his shift. At that time, Mr. Robl also warned him about being overly friendly with the female members of the third floor office staff at Dempsey Hall.

7. No other incidents were reported to Mr. Edmonds until late July when Mr. Wolter told him of a complaint from a woman who worked in Dempsey Hall. She had complained that the appellant had reached for a string hanging from the crotch of her pants.

8. Mr. Edmonds discussed the matter with Mr. Wolter. He also discussed the appellant's general work record with Mr. Robl who felt that the appellant was a good worker. He did not, however, discuss this specific complaint with either the appellant or Mr. Robl.

9. At this time, Mr. Edmonds was also informed that the appellant had again been entering the women's restroom while it was occupied.

10. Mr. Edmonds did not personally verify these complaints because of his concern for the embarrassment of the women involved. Instead, he had a female member of his staff, Mary Koepp, call the woman that Wolter had told him about and verify her complaint. He also had her investigate in regard to restroom incidents involving other women.

11. Mr. Edmonds gave the instruction to discharge the appellant after concluding that the information in Ms. Koepp's report did not vary from what he had previously been told and that the appellant had displayed an inability to improve his conduct since the time of the warning.

12. The appellant was a probationary employe at the time of the discharge.

13. At the close of the hearing, the respondent requested the opportunity to acquire and file affidavits from parties residing outside the state. The record was left open for this purpose. The appellant later filed objections to the affidavits being made a part of the record.

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this appeal pursuant to Wis. Stats. §16.05(1)(h) and §111.91(3) and to Article IV, §10 of the collective bargaining agreement between the state and the American Federation of State, County, and Municipal Employes, Council 24, Wisconsin State Employes Union, AFL-CIO.

Chapin v. Weaver, 76-162, 3/21/77 (Interim Order in this case).  
Wixson v. President, University of Wisconsin, 77-90, 2/20/78.

2. The standard of judgment is whether or not the respondent's action of discharging the appellant was arbitrary and capricious.

Wixson, supra, 1.  
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, 75-206, 8/24/76.

3. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of the credible evidence, that the respondent's action was of an arbitrary and capricious nature.

Chapin v. Weaver, supra, 1.  
In re Request of the American Federation, supra, 2.

4. The appellant has failed to carry this burden. Thus, it must be concluded that the respondent's action was not arbitrary and capricious.

OPINION

In Wixson v. President, University of Wisconsin, 77-90, 2/20/78, the Board stated:

"The 'arbitrary and capricious' standard used in probationary employe termination cases provides a substantially different legal standard than the standard used in the review of disciplinary actions taken against employes with permanent status in class under §16.05(1)(e), stats. In the latter case the employer has the burden of showing there is just cause for the discipline imposed. In the former case the employe has the burden of showing that the employer's action was 'arbitrary and capricious.' The phrase 'arbitrary and capricious action' has been defined by the Wisconsin Supreme Court as: 'either so unreasonable as to be without a rational basis or the result of an unconsidered, willful, and irrational choice of conduct.' Jabs v. State Board of Personnel, 34 Wis. 2d 245, 251 (1967)."

Applying this standard, it must be concluded that the appellant has failed to carry his burden as to the facts that are the basis of the discharge. Although he denies the offensive conduct complained of, he has not shown the discharge action to be without rational basis or to be unconsidered, willful, or irrational in nature. Thus, it cannot be concluded that the respondent's action was arbitrary and capricious.

No determination need be made in regard to the appellant's objections to three affidavits presented by the respondent. Even without these affidavits, the respondent's discharge action would be affirmed.

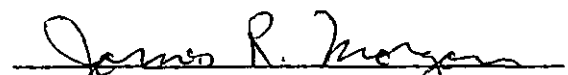
While the failure to obtain the appellant's version of the reported incidents prompting his discharge does not render that discharge arbitrary and capricious, the Board does suggest that such action would be preferable where the charges are as serious as those in the present case.

ORDER

IT IS HEREBY ORDERED that the action of the respondent is affirmed.

Dated: April 11, 1978

STATE PERSONNEL BOARD

  
James R. Morgan, Chairperson