STATE OF WISCONSIN

STATE PERSONNEL BOARD

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KEVIN J. CORCORAN,

Appellant,

v.

PRESIDENT, University of Wisconsin,

Respondent.

Case No. 76-174

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OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This appeal—filed pursuant to Article IV, s. 10 of the contract between WSEU and the State of Wisconsin—concerns the dismissal of the appellant from state service while he was on probation. The appellant alleges that the termination was arbitrary and capricious.

FINDINGS OF FACT

1. The appellant began working as a Cook 2 at the University of Wisconsin Center for Health Sciences on March 14, 1976.

2. His duties and responsibilities involved the preparation of food for hospital patients and for a hospital cafeteria. Included in this work was the preparation of special types of food such as salt free, bland, and quick chill food.[1] The latter type of food required a different type of cooking which compensated for changes in consistency that occured when these items were chilled and reheated.[2]

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1. The quick chill food concept consists of cooking and chilling patients' food on the day before it is to be served. This food is then quickly reheated and served at the appropriate later time.

2. Because it was different, this type of cooking could initially be somewhat difficult.

3. For the first two weeks of his employment, the appellant was trained by another Cook 2 employe.[3] He also participated in an additional brief training program on sanitation and safety.

4. On March 29, 1976, the appellant began working by himself on the 10:30 a.m. to 7:00 p.m. shift. During the last three hours of this shift, neither the appellant's supervisor nor any other cooks were present in the kitchen.

5. The appellant received formal written performance reviews on April 7 and July 9 of 1976. His supervisor also spent from 15 to 30 minutes per day discussing his work performance with him.

6. The appellant encountered the following performance difficulties during his employment:

a. His food was rejected by patients and the cafeteria more frequently than his supervisor deemed acceptable.

b. His food products were at times inadequate in flavor, appearance, and consistency. In addition, meat products were sometimes tough while sauces were soft and other items were undercooked.

c. He let food stand out too long.

d. He operated in a messy and disorganized manner.

e. He used a pan which had not been cleaned on one occasion.

7. On September 10, 1976, the appellant's employment was terminated. He was still serving as a probationary employe at the time of this termination.

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3. The hospital menu was on a two week cycle. However, that does not mean that the appellant had the opportunity to cook every item on the menu during this two week training period since each cook would not prepare every item on the menu for each day.

8. The appellant received letters on August 24 and 31 of 1976 which notified him of this termination action. The letter of August 24 was signed by the appellant's supervisor. It gave the following reason for the discharge: "This action was taken due to your poor performance. You have not met the basic requirement of a Cook II." The letter of August 31 was signed by the appointing authority. It gave the following reason for the discharge.

> The reason . . . is your inability to consistently cook quality food. On several occasions . . . your immediate supervisor had conferences with you in an effort to improve the quality of your cooking; regretably these efforts failed.

9. The qualifications listed on the job announcement for this Cook 2 position are as follows:

> Graduation from high school or equivalent and 2 years experience in institutional or commerical food service, one year of which shall have been spent in cooking on a production basis or equivalent training and experience.

10. Prior to working for the respondent as a Cook 2, the appellant had at least four years of work experience in commerical food services as a restaurant chef. He had also attented Madison Area Technical College courses in food preparation, baking, quantity food preparation, quantity food management, and food services.

CONCLUSIONS OF LAW

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

In re Request of AFSCME, Council 24, WSEU, AFL-CIO, for a Declaratory Ruling, 75-206, 8/24/76.
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.

In re Request of AFSCME, supra.
Wixson, supra. 1.

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 arbitrary and capricious.

In re Request of AFSCME, supra.
Wixson, supra. 1.

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

5. To establish that the respondent should be estopped from terminating the appellant's employment, the appellant must show that the respondent acted in a manner constituting fraud or a manifest abuse of discretion, that he relied on this conduct, that the reliance was honest and in good faith, and that he suffered an irreparable injury because of this reliance.

See Pulliam and Rose v. Wettengel, 75-51, 11/25/75 in which the Board cites Jefferson v. Eiffler, 16 Wis. 2d 123 (1962) and Surety Savings and Loan Assoc. v. State, 54 Wis. 2d 438 (1972).

6. The appellant has failed to prove action by the respondent which constitutes fraud or a manifest abuse of discretion. Thus, the appellant has not shown that equitable estoppel lies here.

7. The letters of notice provided to the appellant regarding his termination comply with constitutional due process requirements.

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 s. 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, wilful, and irrational choice of conduct." Jabs v. State Board of Personnel, 34 Wis. 2d 243, 251 (1967).

Applying this standard to the present case, it must be concluded that the appellant has failed to carry his burden. He has not shown the termination to be without a rational basis or to be an unconsidered, wilful, and irrational choice of action.

In his appeal, the appellant has argued that his termination was arbitrary and capricious because he was inadequately trained and supervised; because he was not given additional help when his difficulties became apparent; because he was improving towards the end of his employment; and because he was willing to take a transfer, demotion, or probation extension in lieu of being terminated. This argument is, however, unpersuasive. The record shows that the appellant was given two full weeks of training in a position that was not a training level position. It also shows that the appellant stated in the employment interview that he could do Cook 2 work, that he was never led to believe that he would receive in depth training, that he received from 15 to 30 minutes of personal guidance from his supervisor each day, that he received two in depth performance reviews, that he was supervised more closely after his work problems became

apparent, that his work load was altered to compensate for his difficulties, and that he had over five months working with a menu that repeated every two weeks to improve his performance to acceptable levels. In light of these considerations, the appellant's assertions as to training, supervision, and alternative personnel actions pertain more to whether or not the respondent acted in the wisest, fairest, or most prudent manner in this situation than to whether the decision had any rational basis supporting it. But the former question is not at issue here. The arbitrary and capricious standard asks solely whether or not there was a rational basis for the termination decision and whether or not it was a considered decision. It does not question whether the respondent made the wisest decision or whether another decision supported by a more substantial or preferable rational basis was also available to the respondent. The appellant has not established a factual framework that would support an assertion that therewere flaws in the respondent's handling of his training, supervision, and request for alternative personnel actions that would deprive the termination of any rational basis.

The appellant has also argued that the did not have the necessary qualifications for a Cook 2 when he was hired by the respondent and that it was arbitrary to expect him to perform at the Cook 2 level because of this fact. The qualifications in question are two years of experience in institutional or commercial food service, one year of which shall have been spent cooking on a production basis or an equivalent amount of training and experience. These training and experience requirements are not rigid and precise formulas when, as here, they are qualified by phrases such as "or equivalent training and experience." Certainly, the Board would not say that the respondent incorrectly exercised its discretion

in determining that the appellant's several years of commercial food service work as a restuarant chef and his various course work in food production at the Madison Area Technical College were not sufficient to meet the stated qualification requirements.[4] Furthermore, even if the Board were to find that the appellant had not met these requirements, it still would not say that the respondent's termination of a probationary employe had no rational basis where that employe was erroneously hired to begin with and was unable to perform adequately after five months of employment in the position.

The appellant has argued in the alternative that even if the termination is not found to be arbitrary and capricious that it should still be overturned because of the application of the principles of equitable estoppel and the due process notice standards. In regard to equitable estoppel, the appellant must show (1) that the respondent acted in a manner constituting fraud or a manifest abuse of discretion, (2) that he relied on this conduct, (3) that the reliance was honest and in good faith, and (4) that he suffered an irreparable injury because of this reliance. See Pulliam and Rose v. Wettengel, 75-51, 11/25/75. Failure to adequately establish any one of these elements constitutes failure to establish that equitable estoppel lies. In attempting to establish conduct on the part of the respondent amounting to fraud or a manifest abuse of discretion, the appellant again asserts that he was hired for a position for

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4. See finding of fact #10. The Board also notes that the appellant was certified after competing in an examination for the position.

which he was not properly qualified.[5] As was stated earlier, the Board finds no error in the respondent's conduct on this matter. Accordingly, the Board finds no fraud or manifest abuse of discretion on the part of the respondent. Having not shown the first element necessary for estoppel, the appellant has failed to show that the respondent should be estopped from terminating his employment.

In regard to due process notice requirements, the appellant asserts that the letters of notice he received regarding his termination were insufficient under the due process standards developed in a series of cases starting with Beauchaine v. Schmidt, 73-38, 10/18/73. In these cases, the Board discussed the type of detail in notices of disciplinary actions that is required by constitutional due process principles. However, these cases involved employes who, unlike the appellant here, had a permanent employment status in the classified service and it is this factual difference that prevents the application of the standards arrived at in those cases to the facts of the present case. For, it is a familiar principle that:

> . . . the notice requirements of due process . . . "will vary with circumstances and conditions" [and] cannot be defined with any "rigid formula." State ex rel. Messner v. Milwaukee Co. Civil Service Comm., 56 Wis. 2d 438, 444, 202 N.W. 2d 131 (1972).

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5. The appellant also alleges that the training provided to him was inadequate in light of his being unqualified for the position and that this lack of training constituted a manifest abuse of discretion. Since the Board does not agree that the appellant did not meet the qualification requirements, this second argument must also fail. Nevertheless, it is again noted that the Cook 2 position is not a training level position; that the appellant was not told that he would receive any form of in depth training upon assuming the job; that the appellant was informed about the nature of the work before accepting the job; and that the appellant received two full weeks of training, day by day supervision, and over five months of cooking on a repeating menu to develop his skills.

Any determination of what procedures the due process clause may require under a given set of circumstances must begin with "a determination of the precise nature of the government function involved as well as of the private interest that has been affected. . ." Cafeteria and Restaurant Workers U. Local 437 v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748-1749 (1961). An analysis of the distinctions between the circumstances surrounding disciplinary actions taken against permanent and probationary employes clearly shows a significant difference in rights and interests that leads to different due process requirements.

A state employe with permanent status in the classified service, for example, has an absolute right to a hearing upon discharge. See s. 16.05(1)(e), Stats. At that hearing the burden of proof is on the employer to show just cause for the discharge. See Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). In contrast, a probationary employe (such as the appellant) is subject to an entirely different set of procedures upon termination. The mandatory statutory right of appeal under s. 16.05(1)(e) is limited to permanent employes and thus is not available. The legislature has provided for the possibility of labor agreements that provide a limited review of certain personnel transactions —such as probationary termination—which otherwise are statutorily not subject to bargaining. 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 accompained 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 . . .. (emphasis added).

Pursuant to this provision the state and the Wisconsin State Employes Union have reached contractual agreement in Art. IV, s. 10:

> . . . 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. (emphasis added)

The Personnel Board has held that in hearings pursuant to this provision that the statutory basis for adjudication is limited to the test of "arbitrary and capricious action" pursuant to s. 111.91(3), Stats., and that the burden of proof is on the terminated employe. See 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, Wis. Pers. Bd. No. 75-206 (8/24/76).

The differences between the status of a probationary employe and the status of a permanent employe as outlined above lead to the conclusion that the state has afforded a lesser property interest to the probationary employe—albeit that the probationary employe is entitled to some limited form of review of the state action terminating his employment. In the Board's opinion, it does not follow that because there is some limited right of review that the probationary employe is entitled to the same due process right, including the same specificity of notice, to which permanent employes are entitled. Compare, for example, Arnett v. Kennedy, 416 U.S. 134, 151, 94 S. Ct. 1633, 1643, (1974):

> The district court, in its ruling on appellee's procedural contentions, in effect held that the Fifth Amendment to the United States Constitution prohibited Congress, in the Lloyd - LaFollette Act, from granting protection against removal without cause and at the same time—indeed in the same sentence—specifying that the determination of cause should be without the full panoply of rights which attend a trial type adversary hearing. We do not believe that the constitution so limits congress in the manner in which benefits may be extended to federal employes.

Thus, the standards set forth in cases such as Beauchaine will not be applied to the notice in this case. The appellant does, however, have the right to a statement of the reasons for his dismissal.[6] His letters of notice, while not highly detailed, do provide a statement of the reason for his discharge. This statement constitutes adequate minimal compliance with the requirements involved.[7]

Finally, the appellant challenges the use of a burden of proof standard in probationary employment cases that is different from that used in cases involving employes with permanent status in the classified service. He argues that the burden of proof in appeals from probationary employment terminations should rest with the respondent as it would in appeals from terminations of permanent employment. The Board, however, has consistantly held that the burden of proof in appeals from terminations of probationary employment rest with the appellant.[8] This position is now well established and is based on

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6. See s. Pers. 13.09(2), W.A.C. and Art. IV, s.10 of the contract between the State and the Wisconsin State Employes Union which is quoted above.

7. The fact that one of the notice letters stated that the appellant had no appeal rights from the action does not affect the validity of the notice. The letter was written within a week of the Board's decision in Request of the American Federation, supra, which established the existance of such appeal rights and was obviously not a bar to the appellant's exercise of his appeal rights.

8. See In re Request of the American Federation, supra, and Wixson v. President, supra. The appellant also challenges the Board's citing of Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52 (1976) in the Request case on this matter of burden of proof. This cite refers to the distinction that the Board has found between situations where there is a just cause standard set by statute—as in Weaver—and where there is not such a standard—as in the present case. In the former instance, the burden of proof is on the respondent while in the latter instance it must rest with the appellant.

the inherent differences in purpose and function that exist between probationary and permanent employment structures.

Thus, the appellant has the burden of proof in this case and he has failed to carry that burden successfully. He has not shown by the greater weight of the credible evidence that the respondent's action was arbitrary and capricious. Nor has he shown that the respondent should be estopped from terminating his employment or that the notice provided was inadequate under principles of due process. Consequently, this appeal must be dismissed and the action of the respondent must be affirmed.

ORDER

IT IS HEREBY ORDERED that the action of the respondent is affirmed and this appeal is dismissed.

Dated: June 16, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson