

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 CHESTER MILLER, *
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 Appellant, *
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 v. *
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 President, UNIVERSITY OF *
 WISCONSIN, *
 *
 Respondent. *
 *
 Case No. 76-238 *
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 * * * * *

DECISION
AND
ORDER

This matter is before the Commission following the issuance of a recommended Decision by Commissioner Edward Durkin, acting as hearing examiner. A copy of the hearing examiner's Decision is attached hereto. The Commission has had the benefits of argument by counsel for the parties and has consulted with the hearing examiner.

The Commission adopts as its findings the findings set forth in the Proposed Decision, except that findings 18 and 19 are amended to read "Mr. Erickson" instead of "Mr. Ferguson." This amendment is made to conform to the evidence and to correct what must be considered typographical error as this case contains no reference to any Ferguson. Finding 25 is amended by addition of the following: "A copy of this letter was not sent to the administrator." The reasons for this addition are set forth in the opinion.

The Commission rejects in part the Conclusions, Opinion and Order of the hearing examiner and substitutes the following for reasons which are set forth in the Opinion.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §§16.05(1)(h) and 111.91(3), Stats., (1975), and §129(5), Chapter 196, Laws of 1977.

2. Pursuant to §111.91(3), the basis of adjudication is limited to the test of arbitrary and capricious action.

3. The actions of the respondent were not arbitrary and capricious prior to May 18, 1978, when the Personnel Board concluded that appellant had not resigned or quit.

4. The respondent failed to terminate appellant's employment following May 18, 1978.

5. The respondent's failure to terminate appellant's employment after May 18, 1978, was arbitrary and capricious.

OPINION

The basis of adjudication of an appeal of this nature is limited to the test of arbitrary and capricious action. See §111.91(3), Stats, (1975). "Arbitrary and capricious" action has been defined 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 245, 251 (1967).

As has been set forth in the various Interim Decisions entered by the Board and Commission in this matter, the respondent originally moved to dismiss for lack of subject-matter jurisdiction on the ground that the appellant had resigned and had not been terminated. An evidentiary hearing was held on the jurisdictional issue and on May 18, 1978, the Personnel

Board issued an Opinion and Order concluding that the appellant had not resigned or quit and denying the Motion to Dismiss..

The actions of the respondent in failing to terminate appellant following the incident of November 1976 were not arbitrary and capricious. The University was proceeding on the theory that the appellant had quit or resigned. While the Personnel Board ultimately reached a different conclusion, it cannot be concluded based on the Board's findings that the University's theory of resignation was without any rational basis, or the result of "an unconsidered wilful and irrational choice of conduct."

However, once the Personnel Board issued its Decision that appellant had not resigned, the respondent's reliance on its theory of resignation was no longer sustainable under an arbitrary and capricious standard. In fact, the respondent argues that at this point it did terminate the appellant. The Commission does not agree that the letter to Mr. Miller from Mr. Sprang dated September 28, 1978, constituted a termination letter. This letter does not purport to terminate the appellant but indicates that he would have been terminated had he presented himself for work. There is no indication that a copy of the notice was sent to the Director (now Administrator, Division of Personnel) as required by §Pers 13.09(2), Wis. Adm. Code. The respondent argues that there is no proof that a copy of the letter was not sent to the Director. However, the letter indicates copies were sent to individuals other than the Administrator and this is some evidence, which was not rebutted, that it was not sent to the Administrator.

Based on the Commission's conclusions that the respondent did not act in an arbitrary and capricious manner, prior to the Board's Decision of

May 18, 1979, and that the letter of September 28, 1978, was not an effective letter of termination, it is unnecessary to address the respondent's arguments that the appellant is estopped from arguing that the termination letter was untimely.

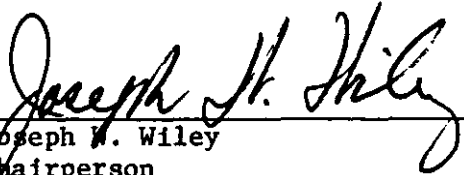
Since the basis of adjudication under §111.91(3) is limited to the test of arbitrary and capricious action, in the opinion of the Commission any remedy must be limited to redress of the arbitrary and capricious action of the respondent, or from the date of May 18, 1978. Therefore, the appellant should be reinstated with back pay and benefits from that date. While the review authority conferred by §111.91(3) necessarily implies reasonable remedial powers upon a determination of arbitrary and capricious action, the Commission does not believe that this would include interest on back pay, which is not a remedy provided by statute under any situations as set forth in subchapter II of Chapter 230.

ORDER

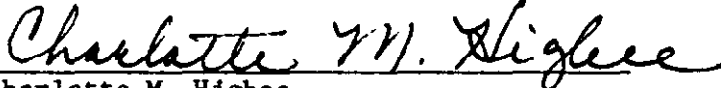
The actions of the respondent are affirmed in part and rejected in part and this matter is remanded for action in accordance with this decision.

Dated: August 30, 1979.

STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commission

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

CHESTER MILLER,
Appellant,

v. ,

President, UNIVERSITY OF
WISCONSIN,
Respondent.

Case No. 76-238

* * * * *

PROPOSED
OPINION
AND
ORDER

NATURE OF THE CASE

This is an appeal by an employe who was terminated during his probationary period. The case has already had a number of decisions by the Personnel Board and Personnel Commission. In a Decision dated May 18, 1978, the Personnel Board determined that "The appellant did not at any time effectively as a matter of law, resign from or quit his employment with the respondent." In an Order dated June 16, 1978, the Personnel Board denied appellant's motion for an order to dispose of the case by reinstating appellant. Their reason was that the hearing had been a jurisdictional one and that respondent should be allowed to be heard on the substantive questions. The appellant then moved that the Personnel Commission allow all the testimony and documentary evidence present at the evidentiary hearing held on November 17, 1977, together with the applicable Findings of Fact, Conclusions of Law, and the Opinion and Order of the State Personnel Board, dated May 18, 1978 be considered evidence for any decisions by the Personnel Commission.

The Personnel Commission on February 8, 1979 issued an Interim Decision and Order that the Findings of Fact contained in the May 18, 1978, Decision are binding and conclusive on the parties, on the basis of collateral estoppel, in further proceedings in this appeal, to the extent that those Findings are material to the substantive issues.

The Commission also determined that the transcript of that hearing was hearsay.

The Commission also set the issue for the hearing of March 28, 1979 as: Was Mr. Miller wrongfully terminated under the provisions of Subchapter II, Chapter 16, Stats. (1975), by the University of Wisconsin-Madison, on or about November 23, 1976, in the manner set forth in the Findings of Fact contained in the Personnel Board Decision dated May 18, 1978?

FINDINGS OF FACT

1. The appellant began employment with the respondent as an employe in the classified service, Building Maintenance Helper 2, on September 27, 1976.
2. On November 19, 1977, the appellant was assigned to and reported for work on the second shift (4:30 p.m. - 1:00 a.m.) at South Hall.
3. Previously the appellant's normal assignment had been at Van Vleck.
4. While at Van Vleck the appellant had not been assigned keys, he was given keys for his work at South Hall.
5. He was instructed that these keys should be left at work when he left the building.

6. At approximately 6:45, the appellant had a discussion with his two supervisors, Mr. Bender and Ms. Smith.

7. The supervisors discussed appellant's problem with chalk dust, various available protective devices, and the appellant's duties.

8. The supervisors spoke in normal tones and were not abusive, hostile, threatening or demanding.

9. The appellant became loud and hostile.

10. Approximately 15 minutes after this conversation, the two supervisors were seated at a table in Van Vleck.

11. The appellant came in, tossed his keys on the table in the direction of Ms. Smith and said words to the effect of "I won't work for an outfit like this, I quit."

12. The appellant's emotional state at this time was disturbed and agitated.

13. The appellant then left the building and did not return to work.

14. On November 22, 1976, the next regularly scheduled work day, the appellant contacted the then president of Local 171, Mr. Bonnano, with regard to his work status.

15. At the appellant's request, Mr. Bonnano early that afternoon called the personnel manager of the division of physical plant, Mr. Sprang, and told him that the appellant was ready to go back to work that evening.

16. Mr. Sprang responded that he wanted to investigate the matter before determining whether the appellant should go back to work and that the appellant should not go to work that night.

17. Later that afternoon the appellant spoke with Mr. Sprang and in response to Mr. Sprang's question whether he would be interested in getting his job back, if possible, the appellant said yes.

18. A meeting was then arranged for November 23, 1976, with the appellant, Mr. Bender, Mr. Sprang, and Mr. Ferguson, Mr. Bender's supervisor.

19. Prior to that meeting Mr. Ferguson presumed that they would be taking appellant back on the job.

20. During that meeting those present discussed the appellant's chalk dust problem and other work related matters but the appellant never actually requested his job back.

21. The appellant became loud and hostile in tone.

22. Mr. Erickson at this point decided that it would not be a good idea to take appellant back on the job and concluded the meeting by telling the appellant that he accepted his resignation of the previous Friday.

23. At all times prior to November 19, 1977, the appellant was considered to have performed his work in a competent manner.

24. Appellant was never sent any notice of termination from his job at the University of Wisconsin.

25. Appellant was sent a letter on September 28, 1978, explaining to him his employment status with the University of Wisconsin. The letter gave the reasons for accepting appellant's resignation. This letter was sent and received by appellant 22 months after his termination.

CONCLUSIONS OF LAW

1. This case is properly before the Personnel Commission under s. 230.45 of the Wisconsin Statutes.
2. The burden of proof is upon the appellant to prove that his termination was wrongful and therefore such termination was arbitrary and capricious.
3. The appellant has met that burden of proof.

OPINION

Much of respondent's arguments continue to be that appellant resigned and therefore they treated him as a resignation rather than a termination. However, respondent was aware within two days that appellant did not intend to resign and that he would be appealing any termination. Respondent declined to address the subject of whether appellant should be terminated for nearly two years.

This two year delay in attempting to terminate Mr. Miller is unreasonable and unsupportable by the Commission. If appellant had been terminated during his probationary period and been given a chance for a hearing, this present case would have been long settled.

During the hearing, the respondent entered no new reasons why Mr. Miller should have been terminated as a probationary employe. The Personnel Board has already ruled that appellant did not resign and no additional evidence was entered in the record which would permit the Commission to overturn the ruling of the Personnel Board.

Since the appellant did not resign, and there was no move to terminate him properly, he must be reinstated to his job as a Building Maintenance Helper 2 at the University of Wisconsin.

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ORDER

That appellant, Chester Miller, be reinstated to his position that he was wrongfully terminated from with full backpay, seniority, and all other benefits. His seniority shall be September 27, 1976, and his back pay shall be to November 23, 1976. Such back pay shall include interest of 6% annually from the time the appellant would have earned his pay had he not been terminated.

Dated: _____, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

Charlotte M. Higbee
Commissioner

EDD:jmg

6/26/79