STATE OF WISCONSIN

STATE PERSONNEL BOARD

* *

JAMES NOWASKEY,

Appellant,

v.

PRESIDENT, UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 76-253

* *

OFFICIAL

INTERIM
OPINION AND ORDER

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

OPINION

NATURE OF THE CASE

Appellant was terminated from his position as Director of General Services at University of Wisconsin - Stout, effective December 3, 1976. On September 8, 1977, he filed a motion for immediate temporary reinstatement on the grounds that the notice of termination was insufficient and that there had been an unwarranted and unjustifiable delay in the processing of the appeal thereby violating his due process rights and causing him irreparable damage because of his tenuous financial situation.

FINDING OF FACTS

Appellant's position was classified as Director of General Services. He was terminated from that position effective December 3, 1976, by letter dated November 23, 1976. (See Appendix A, Respondent's Exhibit #1.)

Appellant filed his appeal under signature of counsel on December 6, 1976. By letter dated December 15, 1976, a prehearing conference was scheduled for January 11, 1977. At the request of appellant's counsel, the

prehearing conference was postponed until February 3, 1977, on which date it was held. At that time thirteen witnesses were named by appellant and two witnesses by respondent. By letter dated February 15, 1977, the dates of March 28, 29 and 30, 1977, were scheduled for the hearing which was to be held in Eau Claire. Counsel for respondent advised the Board by letter dated March 2, 1977, that he could not complete his investigation into the case by the scheduled hearing dates and requested a continuance until mid-May. By letter dated March 3, 1977, appellant strongly opposed such a continuance, citing the requirement of holding a hearing on a termination within 45 days of the date of the appeal. He also represented that appellant was not working and had been denied unemployment compensation. By letter dated March 15, 1977, the hearing was rescheduled for April 19, 20 and 21, 1977, in Eau Claire, Wisconsin. Statutory notice of the hearing was sent March 30, 1977.

On April 7, 1977, appellant's counsel advised the Board and respondent that he was adding two names to his witness list and that he intended to take the depositions of twelve named persons on April 14 and 15, 1977. On April 11, 1977, respondent's counsel filed a motion for protective order to forbid discovery on the grounds of annoyance and harrassment. In the alternative, he requested that the hearing be postponed. The next day he filed a list of 48 witnesses and copies of exhibits. By letter dated April 13, 1977, the hearing was postponed until May 9, 10 and 11, 1977. The location was also changed to Menomonie. Appellant's counsel advised the Board and respondent on April 14, 1977, that he intended to depose the twelve earlier named persons plus one other on April 20 and 21, 1977. He added nine names to that list on April 20, 1977. On May 2, 1977, appellant's counsel added respondent's list of witnesses to his and submitted copies of exhibits. The next day he filed

additional exhibits. On May 4, 1977, respondent's counsel named four additional witnesses and submitted more exhibits. By letter dated May 5, 1977, appellant's counsel submitted additional exhibits. On June 7, 1977, respondent added four more names as potential witnesses. On June 21, 1977, appellant listed thirteen more witnesses. Additional exhibits have been exchanged by the parties throughout the hearing.

The hearing was completed on February 15, 1978 after 35 days of hearing. Respondent's case took over twenty of those days. Respondent called 33 witnesses during his case in chief.

The motion for immediate temporary reinstatement was filed on September 8, 1977. Briefs were filed on the motion.

CONCLUSIONS

Appellant moves for immediate temporary reinstatement on two grounds: insufficiency of the letter of termination and irreparable damage caused by the delays in and length of the hearing.

Sufficiency of the Notice

In Beauchaine v. Schmidt, Pers. Bd. Case No. 75-38 (10/18/73), we set forth a test to determine the sufficiency of a letter of termination. We held:

> In order to achieve this objective, we now hold that at a minimum, notices of discipline must, on their face, tell a public employe five things:
>
> 1. What wrongful acts he is alleged to have committed;
>
> 2. Where he is alleged to have committed the wrongful acts;
>
> 3. Where it is alleged the wrongful acts took place;
>
> 4. Who says the wrongful acts occurred, that is, who accuses the employe, and
>
> 5. Why the particular penalty or discipline is going to be imposed. (Beauchaine, at p. 8)

A notice which complied with the above test would be sufficient. However, notices which fail the "5W" test may still be sufficient under the requirements of due process since due process cannot always be mechanically applied. Pfankuck v. State of Wisconsin Personnel Board, Dane Co. Cir. Ct. 141-409 (1974); Weaver v. State of Wisconsin Personnel Board, Dane Co. Cir. Ct. 146-209 (1975).

We assume from reading the entire termination letter that the first page is prefatory and that the second and third pages wherein there are eight enumerated paragraphs are the actual charges. The language contained on the first page is too vague to give adequate notice under either the "5W" test or under the requirements of due process. We conclude that the letter as a whole does meet due process requirements and in some instances the "5W's" test. However, it is not as perfectly drawn as it could be. Specifically, the charges contained in paragraphs 5 and 6 do not list dates, locations, or names of accusers. We understand that these two paragraphs involve an alleged type of misconduct which occurred over a period of three years. In Karetski v. Hill (II), Pers. Bd. Case No. 10 (10/18/73), we said at p. 4:

> "It is true that the /disciplinary/ notice does not set forth with ideal detail the date or time for each specific evidentiary base supporting the allegations of mis-management. The notice does, however, sufficiently define the time perimeter within which the wrong doing is alleged to have occurred. . . In short, the Appellant is informed that performance within the last three years as a bureau director is being called into question . . . ideally, it would have been preferable, if possible, to set forth the specific dates upon which it was alleged that the Appellant committed the acts stated in the notice. The nature of this case, as revealed by the notice of demotion, suggests that the conduct was continuing, unlike the situation in Beauchaine where there was no suggestion of continuing conduct and no dates at all mentioned in the notice." (Emphasis supplied.) But cf. Bohen v. McCartney, Wis. Pers. Bd. Case No. 74-1 (10/10/74), Order affirmed sub nom. McCartney v. Wisconsin State Personnel Board, Dane Co. Cir. Ct. Case No. 144-439 (February 3, 1975). See also Zehner v. Weaver, Pers. Bd. Case No. 74-93 (2/25/75).

Therefore, we conclude that the letter of termination when taken as a whole is sufficient and meets minimally the due process requirements. However, we also conclude that the charges contained in paragraph 6 do not meet either the due process requirements or the Beauchaine test even in light of Karetski (supra).

The Personnel Board is an administrative agency and as such must find the authority to act within the statutes which create and define it. It has limited implied powers. See American Brass Co. v. Wisconsin State Board of Health, 245 Wis. 440, 15 N.W. 2d 27 (1945).

The Board has jurisdiction to hear this appeal under section 16.05(1)(e), Wis. Stats., which reads in pertinent part:

> The board shall: . . . (e) Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions, discharges or reductions in pay but only when it is alleged that such decision was not based on just cause. After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employe fully. . . . (Emphasis added.)

The legislature has further amplified the rights of a terminated employe in section 16.38(4), Wis. Stats., which states:

> Any employe who has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and who has been reinstated to such position or employment by order of the board or any court upon review, shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he would have been entitled by law but for such unlawful removal, demotion or reclassification, and such employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order. (See also section 16.28(1)(a), Wis. Stats.)

The Board is unable to grant appellant's motion for immediate temporary reinstatement based on the irreparable harm done to him because of the length of this appeal process. We conclude we simply do not have the statutory authority to grant the requested relief. We have no reason to doubt that appellant has incurred substantial expenses which have been only compounded by

the fact that he has been without employment for the duration of this appeal. We believe that the parties, especially respondent who had the burden of proof, should have been better prepared to have estimated the time of presentation of their cases at the time of the prehearing conference so that sufficient time for the hearing could have been scheduled. Certainly, respondent could have estimated that his case alone would last longer than the three days originally scheduled. It is also apparent based upon our review of the record for this motion that there was a certain amount of repetition by respondent which could have been avoided.

In light of these considerations (the length of the hearing, the time lapse from date of appeal to conclusion of the hearing and the repetitious nature of some of the evidence), we suggest that the appellant seek some assistance from another forum perhaps the State Claims Board.

ORDER

IT IS HEREBY ORDERED that appellant's motion for temporary reinstatement is denied.

Dated: 2-20, 1978

STATE PERSONNEL BOARD

James R. Morgan, Chairperson