STATE OF WISCONSIN PERSONNEL COMMISSION

MARGARET KENITZ,

Appellant,

v.

JOHN WEAVER, President,
UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 76-29

FINAL
DECISION

NATURE OF THE CASE

This is an appeal of a termination commenced pursuant to §16.05(1)(e), Stats. (1975). The respondent has objected to subject-matter jurisdiction on the ground that the appellant was a probationary employe at the time of termination and did not have permanent status in class.

The case has been submitted for decision on the jurisdictional objection on the basis of the arguments of counsel, two depositions taken by the appellant and certain documents of a jurisdictional nature in the file. The commission has considered in its deliberations on the objection the depositions of Messrs. Cissell and Pagenkopf filed October 4, 1978, and December 27, 1978, respectively, with attachments, the letter dated January 23, 1979, from Mr. Graylow, with attachments, the letter dated February 7, 1979, from Mr. Murphy, the letter dated February 5, 1976, to Mr. Julian from Ms. Kenitz, with attachments, the letter dated September 20, 1976, to Mr. Richard Graylow from Mr. Knoll, and the letter dated September 23, 1976, to the commission from Mr. Graylow.

FINDINGS OF FACT

1. The appellant began employment with the respondent at U.W. - Platteville on August 11, 1975, as a stenographer 2, a position in the classified service.

2. The appellant's employment was terminated effective at the end of work on February 10, 1976.

3. Said termination was effectuated by a probationary service report setting forth various deficiencies, dated 1/30/76, signed by her supervisor Mr. Pagenkopf and the appointing authority, Mr. Dunn, a copy of which was given to the appellant on January 30, 1976.

4. The appellant filed an appeal with the personnel board of her termination on February 10, 1976.

5. The appellant sent a letter to Verne Knoll, deputy director, state bureau of personnel, dated February 11, 1976, requesting his review of the situation.

6. By letter of February 13, 1976, the director refused jurisdiction over the appeal on the grounds that the statutes and rules provided that a probationary employe could be dismissed at any time without the right of appeal.

7. On June 2, 1976, Mr. Joseph Cissell, an employe of the bureau of personnel, called on the appellant at her home.

8. That visit was made at the direction of Mr. Knoll.

9. The purpose of the visit from the standpoint of Mssrs. Knoll and Cissell was not as part of an official investigation but, as expressed in Mr. Cissell's deposition, "to talk to an individual who had felt that an injustice had been done to her through Wisconsin State Government." p. 11.

10. Mr. Cissell did not talk to any officials at U.W. - Platteville regarding Ms. Kenitz's dismissal.

11. By letter dated September 20, 1976, following inquiry by appellant's attorney, Mr. Knoll reiterated that he had no jurisdiction over the transaction and indicated that he had made an informal inquiry into the matter but that he could take no further action.

12. By letter dated September 23, 1976, and filed with the board on September 24, 1976, the appellant's counsel stated that it was his contention that Mr. Knoll had recently closed his investigation and notified him of that by the aforesaid letter, and, "We are, accordingly, this day appealing the matter of the nonretention of Ms. Kenitz to the State Personnel Board pursuant to this letter."

CONCLUSIONS OF LAW

1. The appellant's employment was terminated prior to the completion of her 6 month probationary period.

2. The director's response to appellant's appeal of this transaction was that he lacked jurisdiction.

3. The effective date of this decision was February 13, 1976, the date of his letter to the appellant as set forth in finding #6.

4. The appellant failed to appeal the director's decision as aforesaid within 15 days as required by §16.05(2), Stats. (1975).

5. The appellant did not attain permanent status in class.

6. The appellant is not entitled to a hearing on constitutional grounds.

7. The commission lacks jurisdiction over this appeal.

OPINION

The appellant has made a number of arguments why there is jurisdiction over this appeal, and they will be discussed in the order they have been raised.

The appellant first argues that she was terminated because of protected speech activity in violation of rights secured by the First Amendment. This argument runs to the merits and not to the question of jurisdiction. Section 16.05(1)(e), Stats. (1975), provides for jurisdiction over appeals by employes with permanent status in class. If the employe does not have permanent status there is no authority to hear the merits of the appeal.

The appellant also argues that she is entitled to a hearing by the due process clause of the Fourteenth Amendment because the nature of the charges against her have diminished her ability to gain further employment. The appellant cites Hortonville Ed. Assoc. v. Joint School Dist. No. 1, 66 Wis. 2d 469, 490-491 225 N.W. 2d 658 (1975), where the court found a deprivation of liberty in the allegations of misconduct stated in the reasons for discharging the teachers. The charges, that the employe had breached their contracts and engaged in an illegal strike, were held to have a detrimental effect on the teachers' reputations and their opportunities for re-employment. These charges cannot be equated in severity with the statements of alleged inefficiency contained in the probationary service report.

The appellant also cites Whitney v. Board of Regents, 355F. Supp. 321, 323 (E.D. Wis. 1973) (per J. Reynolds). There the court held that a

nonrenewed, non-tenured teacher was entitled to a hearing to clear his name of charges of being an "inadequate and immature faculty member." However, in a later case the same judge held that the following reasons for the nonrenewal of a non-tenured teacher did not require a hearing:

> "1. Failing to meet the required standards of preparation for class.
> 2. Failing to meet the required standard of class control and discipline.
> 3. Failing to meet required standards of articulation of presentation of course materials.
> 4. Failing to meet the required standard of community involvement.
> 5. Failing to show an interest in upgrading himself in his particular discipline in order to become eligible for unequalified certification.
> 6. Evidencing a lack of cooperation in implementing the school policies relating to community involvement, student selection, and development of teaching materials." Hajduk v. Vocational Technical & Adult Ed. Dist. No. 13, 356 F. Supp. 33, 34 (E.D. Wis. 1973).

See also Calo v. Paine, 385 F. Supp. 1198, 1208 (D. Conn. 1974): "a dismissal statement is stigmatizing if it charges an employe with immorality, dishonesty or some serious personality defect or societally condemned status which it is beyond the power of the individual to change."

In the opinion of the commission the comments on the probationary service report: "quantity of work is low ... has been a procrastinator on filing ... argumentative on established practices and policies ...," etc., do not meet the standards of any of these state or federal cases for the requirement of a hearing. It is also noted in passing that the court in Whitney held that the only purpose of a hearing is to provide a forum for clearing the employe's name, and reinstatement is not a possible remedy.

The appellant argues that the commission has jurisdiction over this case as an appeal from a decision of the director pursuant to §16.05(1)(f),

Stats. (1975). The only appealable decision involved here is the decision contained in Mr. Knoll's letter of February 13, 1976, that the director lacked jurisdiction over the matter. This decision was never appealed to the board. While the director had some further informal involvement in the matter through his agent Mr. Cissell, he never deviated from his position that he lacked jurisdiction over the matter as an appeal of an action of an appointing authority pursuant to §16.03(4)(a), Stats. The appellant's attempt by letter dated September 23, 1976, to appeal her non-retention on the basis of Mr. Knoll's letter of September 20, 1976, reiterating his earlier position that he lacked jurisdiction, and stating that while he had made an informal inquiry he could take no further action, is in the opinion of the commission a "bootstrap" attempt at appealing the director's earlier decision on jurisdiction.

It has to be remembered that under the existing statutory scheme the director had a general oversight responsibility for the civil service system as a whole. See, e.g., §16.03(1)(a), Stats. (1975): "The director is charged with the effective administration of this subchapter." This general authority was in addition to the director's quasi-judicial authority to hear appeals of employes under §16.03(4), Stats. In this case, the director did not perceive a basis for jurisdiction over the appeal under §16.03(4), in part because of the constraints imposed by §Pers. 13.09(1)(a), W.A.C., but he did interview the complaining party, apparently as part of his civil service oversight role. His subsequent reiteration of his lack of jurisdiction over an appeal of the termination is not independently appealable when his initial denial of jurisdiction was not timely appealed.

The appellant makes a number of arguments that her probation was

not properly terminated prior to the end of the 6 months period and therefore she attained permanent status.

Appellant contends that Mr. Pagenkopf was not an appointing authority. Section 16.22(2), Stats. (1975), requires that probationary termination be made by appointing authorities. However, the probationary service report was signed not only by Mr. Pagenkopf but also by Mr. Dunn as the "agency head or representative."

Appellant has made no allegation that Mr. Dunn was not an appointing authority. The respondent has alleged that he was. There is nothing in this record which provides any direct evidence on this point. However, there are two factors which support the finding that he was an appointing authority.

In the opinion of the commission, when dealing with a probationary discharge, the burden of proof is on the appellant as to all points relative to subject-matter jurisdiction. The burden would only shift at such point as the appellant might establish that she had attained permanent status in class, since that would be the point at which the just cause requirement would be imposed by §16.05(1)(e), Stats. (1975). C.f. Reinke v. Personnel Board, 53 Wis. 2d 123 (1971). The appellant has neither argued that Dunn was not an appointing authority nor presented any evidence that he was not. This leads to the second factor, which is the presumption that in the absence of evidence to the contrary that statutory requirements for administrative action have been complied with. See 73 C.J.S. Public Administrative Bodies and Procedure §145.

The appellant also contends that she was not provided with the reasons for her termination. This argument is refuted by the fact that she

was given a copy of the final probationary service report.

The appellant's final argument is that the appellant worked more than 6 months. This rests on an analysis of total days of employment from August 11, 1975 - February 10, 1976 (183 + 17 hours of overtime). It is argued that this is more than 6 months. However, §990.01(21), Stats., provides that months means calendar months.

ORDER

This appeal is dismissed for lack of subject-matter jurisdiction.

Dated: Feb 28, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

Charlotte M. Higbee
Commissioner

AJT:jmg

2/16/79