STATE OF WISCONSIN

STATE PERSONNEL BOARD

ANDREAS LADDIS,

Appellant,

v.

SECRETARY, Department of Health and Social Services,

Respondent.

Case No. 77-129

OFFICIAL

INTERIM
OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of a termination. The respondent moved to dismiss the appeal on the ground that the board lacks jurisdiction over the subject matter since the appellant was terminated while serving his probation and therefore was not an employe with permanent status in class pursuant to § 16.05(1)(e), stats. An evidentiary hearing was held, restricted to the question of jurisdiction, and this decision similarly is so limited.

FINDINGS OF FACT

1. On April 29, 1976, the appellant met with the Mendota Health Institute (MMHI) personnel manager and the director, who was also the appointing authority, to discuss possible employment there in the classified state civil service as a physician.

2. The MMHI director made reference to a 6 months probationary period with respect to appellant's potential employment.

3. The personnel manager made reference to a 6 months probationary salary increase in outlining the appellant's potential salary. See Appellant's Exhibit 2.

4. Neither person mentioned a 12 month probationary period.

5. The MMHI director in a letter to the appellant dated April 29, 1976, offered him this position with the following as the sole reference to a probationary period:

> "The monthly pay for the first 6 months is $2,858 and there is an $80 monthly increase beginning with your sixth month's salary on successful completion of the civil service probationary period." Appellant's Exhibit 1.

6. The appellant accepted the offer of employment contained in appellant's exhibit 1 and started work at MMHI on July 19, 1976.

7. Appellant's employment at MMHI was terminated effective on or about July 8, 1977.

8. At no time prior to receiving notice of his impending termination on or about July 20, 1977, was appellant aware that he was supposedly on a 12 month probationary period.

9. The appellant's interest in this position originally had been prompted by a newspaper advertisement which made no mention of any probationary period.

10. Prior to accepting the offer of employment at MMHI, the appellant had been engaged in the practice of medicine in Maryland.

11. In coming to MMHI the appellant left a private practice, a faculty position, and a research project in Maryland.

12. The apparent 6 months probationary period was a significant factor in appellant's decision to accept the offer of employment at MMHI.

13. The appellant is uncertain whether he would have accepted the offer if it had contained a provision for 12 months rather than 6 months probation, although under those circumstances he might have looked elsewhere for a place with more commitment to him.

14. The director approved a lengthened, 12 month probationary period for newly hired Physicians, by letter dated April 14, 1972 (Respondent's Exhibit 2), which contains the sentence: "Prospective Physicians must be informed of the twelve month probationary period during pre-employment interviews with your department."

15. The Bureau of Personnel Guidelines, Chapter 116, Probationary Periods, provides in part:

> "The length of the probationary period should be noted on the announcement. If this information is not contained in the announcement, applicants being considered for the position(s) must be advised of the length of the probationary period at or before the time of job interview." § 116.020, II. D. (emphasis in original)

CONCLUSIONS OF LAW

1. The respondent failed to provide timely notice to appellant pursuant to § 116.020, II. D., Bureau of Personnel Guidelines that he would be required to serve a 12 month probationary period.

2. The notice provisions of § 116.020, II D., Bureau of Personnel Guidelines, are mandatory rather than directory in nature. Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 570-573, ___ N.W. wd ___ (1978).

3. The extended 12 month probationary period was ineffective.

4. The appellant was only required to serve the normal statutory 6 months probationary period. § 16.22(1)(a), stats.

5. Since the appellant was not terminated from his position prior to the expiration of the 6 months probationary period, he gained permanent status in class. § 16.22(2), stats.

6. The Personnel Board has jurisdiction over the subject matter of this appeal pursuant to § 16.05(1)(e), stats.

OPINION

Section 16.22(1), Wis. stats., provides:

> "(a) All original and all promotional appointments to permanent, sessional and seasonal positions in the classified service shall be for a probationary period of 6 months. . ..
>
> (b) The director may authorize a longer probationary period not to exceed 2 years for any administrative, technical or professional position, in order to provide the appointing authority assurance that the employe has had adequate exposure to the various responsibilities which are a part of the position or classification."

As was set forth in the findings the Bureau of Personnel Guidelines require that if the length of the probationary period is not noted in the announcement, applicants must be advised of the length of the probationary period at or before the time of their job interview. In this case there is no question that the appellant was not only not advised of a lengthened probationary period here, he was specifically advised that the probationary period was 6 months. These facts lead to the question of whether the notice provision of the Bureau of Personnel Guidelines is mandatory or directory.

In Will v DHSS, 44 Wis. 2d 507, 516-517, 171 N.W. 2d 378 (1969), the supreme court discussed the question of whether internal DHSS rules governing time limits for AFDC hearings were mandatory or discretionary. The rules involved were not part of the Wisconsin Administrative Code.

> "There is dispute as to whether the manual constitutes a rule or regulation as statutorily defined, particularly because it was not enacted pursuant to the normal and statutorily prescribed procedure. The contention is that the manual material is no more than a set of suggested guidelines for the conduct of review hearings. However, we hold that the manual material does constitute a rule or statement of policy within the meaning of the statute, particularly so because the legislature has exempted purely procedural rules from the noitce and hearing requirements of ch. 227.
>
> Is such rule or statement of policy mandatory or directive? The trial court held it to be directive, not mandatory, and we agree. Since the rulemaking process of an administrative agency is derivatively a part of the legislative process, this court has applied statutory rules of construction to the construction of administrative agency rules."

Pursuant to § 16.22(1)(b), stats., the director has a specific, statutorily provided role in the establishment of a lengthened probationary period, and he has promulgated certain rules to regulate that process. In the Board's opinion, the holding of the Will case, that the manual provision should be treated the same as an administrative rule in the context of a determination as to its character as mandatory or directive, should be applied here.

With respect to the question whether this provision is mandatory or directive, the supreme court's latest discussion of this issue is particularly germane since it involves a statute in the personnel field, one requiring a hearing of charges against a suspended employe within 3 weeks. See Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 572-573 ___ N.W. 2d ___ (1978).

> "We have said that a time limit may be construed as directory when allowing something to be done after the time prescribed would not result in an injury. Appleton v. Outagamie County, 197 Wis. 4, 9, 220 N.W. 393 (1928). But where the failure to act within the statutory time limit does work an injury or wrong, this court has contrued the time limit as mandatory. In State v. Rosen, 72 Wis. 2d 200, 240 N.W. 2d 168 (1976), we held that the statutory time limit for holding a hearing on the forfeiture of a car under the Uniform Controlled Substances Act was mandatory; the car

> owner's legitimate interest in having use of the car is jeopardized unless there is strict compliance with the statutory procedure for the time of the hearing. Construing the time provision as mandatory did not impede the legislature's objective of protecting the public from drug traffic.
>
> To construe sec. 63.10(2), Stats., we must ascertain the consequences of holding that the time period is directory, and we must determine whether these consequences comport with the legislative purposes.
>
> As a result of the charges and suspension Karow is not working and is not being paid. Any delay in the hearing continues Karow in this status and thus works an injury on him.
>
> The county civil service statute reflects the legislature's balance of the interests of the public and those of individual county employes. The public has a legitimate interest in not being burdened with inefficient or otherwise undesirable employes. That interest is adequately protected by the statutory procedure for disciplining an employe, particularly the provision which permits suspension of the employe between the time when charges are filed and the hearing. See sec. 63.10(1), Stats. At the same time there is public interest—which is shared by the employe—in the employe not being wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded. This interest can be protected only by holding a hearing promptly.
>
> In view of the language of the statute, the consequences of delaying the hearing, and the objectives sought to be accomplished by the legislature, we conclude that the time for hearing set forth in sec. 63.10(2), Stats., is mandatory.

During a probationary period an employe may be terminated without any "just cause" requirement. The difference in an employe's status before and after the end of the probationary period is extremely significant. In § 16.22, stats., the legislature recognized the public interest in permitting appointing authorities the opportunity for a more extended time than 6 months for the evaluation of a professional employe. At the same time it gave the director the role of regulating and overseeing the process. The director very emphatically

required notice of the length of the probationary period at or before the time of the job interview. This notice is an important piece of information about the prospective employment and timely notice enables the applicant to make a fully-informed decision before committing him or herself to new employment. The public interest in making a lengthened probationary period available to the employer is fully served by the provisions of § 16.22(1)(b), stats. To construe the director's notice requirement as directory serves to deprive the employe of timely notice of an important piece of information about his or her job. The public interest in an extended period of observation of a professional employe could potentially be served under a mandatory contruction by an extension of the minimum 6 months period in a particular case pursuant to § 16.22(1)(a), stats., [1] and the appointing authority retains the authority to discharge for cause following the probationary period in any event. In the Board's opinion the director's notice requirement should be interpreted as mandatory.

82 C. J. S. Statutes § 374 provides:

> "A failure to follow a mandatory statutory provision renders the proceeding to which it relates illegal and void, while a failure to follow a directory provision does not necessarily invalidate the proceeding."

The respondent argues in its post-hearing brief:

> "Laddis received an original appointment (i.e., "newly hired") to a position in the physician classification. PERS 8.04, Wisconsin Administrative Code, defines "appointment" as follows:
>
> > 'Definition of appointment. An appointment is the commitment of an appointing authority to place a person in a position in his agency in accordance with provisions of the law and these rules. . .' (emphasis added)
>
> The appointment of Laddis was valid only if it conformed to "the provisions of the law and the rules." Since the director has duly established a 12 month probationary period for originally appointed physicians, and Laddis received an appointment as a physician, he was required by law to serve a 12 month probationary period. A 12 month probationary period is a necessary consequence of a valid original appointment as a physician."

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1. See, e.g., Respondent's Exhibit 1, which discusses this possibility in the case of physicians not subject to the § 16.22(1)(b), stats., extension.

The letter from the director approving a lengthened probationary period, Respondent's Exhibit 2, cited by respondent, contains the same requirement as set forth in Chapter 116 of the Bureau of Personnel Guidelines:

> "Prospective Physicians must be informed of the twelve month probationary period during pre-employment interviews with your department (DHSS)."

Although the director has established a 12 month probationary period period for originally appointed physicians, notice to the applicant is a necessary element for the additional 6 months. The failure to comply with this requirement invalidates this § 16.22(1)(b), stats., transaction, and a lengthened probationary period cannot properly be enforced here.

The appellant argued that the doctrine of promissory estoppel should be applied here to enforce the promise of a 6 month probationary period. Because of the foregoing determination the board does not have to reach this issue.

The appellant also argued that Respondent's Exhibit 2, relied on by the respondent to establish the director's approval of a lengthened probationary period for physicians, should not have been received in evidence because it was an unsigned and unauthenticated copy of a letter and there was no evidence of its receipt.

The Personnel Board is not bound by common law or statutory rules of evidence. See § 227.08(1), stats. Furthermore, pursuant to § 910.04, stats., a duplicate "is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Neither of these restrictions are present here. As to the receipt of the letter,

to the extent that this would have been necessary the Board believes that the copy of the letter is sufficient evidence to establish this given the absence of contrary evidence and considering the age of the letter (April 14, 1972).

ORDER

The respondent's motion to dismiss on the ground that the Board lacks jurisdiction over the subject matter because the appellant was terminated while serving his probation and therefore was not an employe with permanent status in class pursuant to § 16.05(1)(e), stats., is denied.

Dated: May 18, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson