STATE OF WISCONSIN

STATE PERSONNEL BOARD

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LAURA JEAN CHERONE,

Appellant,

v.

SECRETARY, Department of Health and Social Services,

Respondent.

Case No. 77-172

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OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal pursuant to s. 16.05(1)(h) and 111.91(3), Stats., of the termination of appellant's probationary employment.

FINDINGS OF FACT

1. The appellant commenced employment as a Youth Counselor 1 at Ethan Allen School, Division of Corrections, on May 23, 1977, with a six month probationary period, and was terminated effective August 25, 1977.

2. This position was in the classified state civil service and subject to a contract between the state and the Wisconsin State Employes Union.

3. During the course of her employment, the appellant was late for work on a number of occasions, although only once for seven minutes or more.

4. At least 3 or 4 permanent youth counselors requested of their supervisor that they not be assigned to work with the appellant again because of their evaluations following their experience working with her that she had exhibited

a lack of control in dealing with the school's residents and a tendency to not complete things she started and to leave loose ends for others to complete with respect to her supervision and control of the residents.

5. On one occasion the appellant was on patrol at the school at night checking the bars and doors on the school buildings and overlooked an open door to an outside storeroom which contained maintenance equipment such as rakes and shovels which had the potential to be used by the residents as weapons or in an escape.

6. During the period of her employment female probationary youth counselors were not permitted by supervisors to work alone in resident cottages while male probationary youth counselors were so permitted. This policy was changed sometime within the 9 month period following termination to permit both male and female employes to work alone.

7. During the period of her employment at the school she was not allowed to wear denim jeans (levis) while male youth counselors were.

8. The appellant was told by certain co-workers that she could not participate in the supervision of showers and toilet activities by the residents. The school's supervisors' policy on this did not prohibit female youth counselors from engaging in this activity.

9. Of 8 female youth counselors employed at the school between May 1, 1977, and December 1, 1977, 4 were still employed in permanent status as of March 20, 1978,[1] one had voluntairly transferred from the school on a promotional basis, one was

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1. This number included 3 employes with prior state service who were transferred or reinstated to positions at the school in May, 1977, served permissive probationary periods, and achieved permanent status in class.

terminated while on probation by the institution because it could not contact her following her injury in an accident, one (appellant) was terminated for performance related reasons, and one terminated her probationary employment for reasons which are not of record.

10. Approximately 50% of the probationary youth counselors of each sex who were employed at the school during the period May 1 - December 1, 1977, had left employment voluntarily or had been terminated involuntarily as of March 20, 1978. There were no facts on the record recording the percentage of each sex which left voluntarily or involuntarily.

11. Various supervisors and co-workers made derogatory remarks about the appellant's work performance in which they referred to her as a "broad."

12. The appellant's training, which consisted of less than a day of orientation followed by on-the-job training with permanent employes, was similar to that given other youth counselors hired in the same time frame.

13. The school had a policies and procedures manual but various individual youth counselors had the authority to set up individual programs in their own cottages that were not inconsistent with the manual.

14. At the time the appellant was hired the training and experience requirements for youth counselor 1 was the attainment of age 18 and the possession of a driver's license. There was no examination given.

15. School supervisors did not expect probationary youth counselors to perform at the full performance level upon the commencement of employment.

16. The institution had a training officer who assigned probationary employes to work for the most part with the permanent employes he considered to be better at training than others, and he monitored the probationary youth counselors progress on a continuing basis.

17. The institution's training included monthly evaluation sessions of probationary employes with a group of supervisors.

18. The appellant had 2 evaluations, one of which she participated in and one of which she did not remain for when she was informed at the outset, following her request, that she would not be allowed union representation during the meeting.

CONCLUSIONS OF LAW

1. This case is properly before the board pursuant to s. 16.05(1)(h) and 111.91(3), Stats.

2. Review of the respondent's actions is limited by s. 111.91(3) to the test of "arbitrary and capricious" action. See also Request of the American Federation of State, County, and Municipal Employes, Council 24, Wisconsin State Employes Union, AFL-CIO, for a Declaratory Ruling, Wis. Pers. Bd. No. 75-206 (8/24/76).

3. The burden of proof is on the appellant to establish to a reasonable certainty by the greater weight or clear preponderance of the evidence that the respondent's actions were arbitrary and capricious. See Request for Declaratory Ruling, etc. supra.

4. The appellant here has failed to discharge that burden.

5. The discharge of the appellant was not arbitrary and capricious.

OPINION

This board discussed the arbitrary and capricious standard in probationary termination cases in Wixson v. U.W., Wis. Pers. Bd. No. 77-90 (2/20/78):

> "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 245, 251 (1967).

Utilizing these guidelines, the board cannot conclude that the respondent acted in an arbitrary and capricious manner. The combination of the absence of training and experience requirements, the absence of any examination, and the absence of any more than a cursory orientation before the commencement of on-the-job training, all contribute to a "sink or swim" atmosphere for probationary employes. However, the institution did have a training program, and its use of an on-the-job approach cannot be said to be arbitrary and capricious.

The appellant has alleged discrimination on the basis of sex in her termination. Reviewed in the context of the "arbitrary and capricious action" standard, the board must conclude that this allegation was not sustained. Although the appellant was exposed to some disparate conditions of employment because of her sex and some discourteous language was used by other employes, the record reflects that other female employes passed probation successfully. The board reiterates that pursuant to s. 111.91(3), Stats., the "basis of adjudication" in its review of this sex discrimination facet of this appeal is limited to the test of "arbitrary and capricious action."

ORDER

The termination by respondent of appellant's probationary employment is affirmed and this appeal is dismissed.

Dated: June 16, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson