

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 HOWARD H. HELLER, *
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 Appellant, *
 *
 v. *
 *
 UNIVERSITY OF WISCONSIN, *
 *
 Respondent. *
 *
 Case No. 77-207 *
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 * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal from a termination of a probationary employe pursuant to s.230.45(1)(f), Wis., Stats. The case was heard before Commissioner Edward D. Durkin, who issued a Proposed Opinion and Order on February 5, 1979. On April 12, 1979, the Commission reviewed the record, examined the objections to the Proposed Decision submitted by the parties, discussed the case with the hearing examiner, and herewith issues a new Decision and Order.¹

FINDINGS OF FACT

The Commission adopts and incorporates by reference the findings of fact proposed by the hearing examiner in the Proposed Opinion and Order, a copy of which is attached. Finding number eight is amended to reflect the following typographical correction: The first phrase should read, "On September 14, 1977" rather than "On October 14, 1978."

OPINION

The Commission adopts and incorporates by reference the attached

¹This has been circulated as a Proposed Opinion and Order and is finalized without substantive change following the receipt of objections by the respondent and argument by counsel for the parties.

Opinion proposed by the hearing examiner, except that the final sentence thereof is hereby deleted. The opinion as thus modified, is further amended to include the following language:

It is the Commission's view that the potential for appellant to return to a permanent position at River Falls is immaterial. What is at issue here is whether or not his termination at Rice Lake was arbitrary and capricious. The appellant had worked only 15 days in his new position prior to receiving notice of termination. During that time he was charged with two infractions: The first, on September 9, (see finding number four), was a misunderstanding that reasonably ought to have been tolerated. The matter had never been clarified for him and he had only been on the job for five days. The second offense (see finding number eight), is only inferentially attributable to the appellant, and in any case, also ought to have been excusable in view of the respondent's past handlings of such infractions when committed by other employes.

The respondent's action in this case imposes upon a probationary employe an "error-free" standard of performance. In our view, the imposition of such a standard and the exacting of a penalty as severe as termination after only two such minor infractions is under the circumstances in this case, arbitrary and capricious and must be reversed.

CONCLUSIONS OF LAW

The Commission adopts the hearing examiners conclusions of law numbered one, two, and three, but rejects conclusions four and five. The Conclusions of law are further amended to include the following paragraphs.

4. The appellant has met that burden of proof.
5. The termination of appellant as a probationary employe was arbitrary and capricious.
6. The appellant must be reinstated with full back pay and benefits.

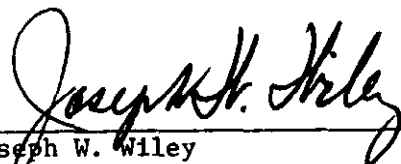
ORDER

The Commission rejects the hearing examiner's Order and substitutes the following:

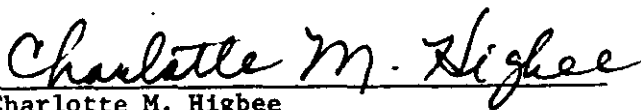
IT IS HEREBY ORDERED that the action of the respondent in terminating the appellant is REJECTED and this case is remanded to the respondent for action in accordance with this Decision.

Dated: Oct 12, 1979.

STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commissioner

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PROPOSED
 OPINION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal from a termination of a probationary employe pursuant to Section 230.45(1)(f).

FINDINGS OF FACT

1. Appellant had been classified as Building Maintenance Helper 2 at River Falls campus in a permanent position since 1969.
2. On September 4, 1977, appellant transferred to a similar position as BMH 2 in the Central System at Barron County Center, Rice Lake.
3. Appellant was assigned to a shift which started at 5:30 p.m. and ended at 1:30 a.m. He worked with at least one other worker who started at 4:00 p.m. and ended at 12:00 a.m.
4. On September 9, 1977, appellant took 2 hours compensatory time by leaving two hours early. He left a note to his supervisor that he had left early on compensatory time. Two senior employees were on duty and discussed appellant leaving early but did not tell appellant not to do it without permission. His supervisor received the message when returning to work on the 12th of September.
5. The supervisor reported to his supervisor that appellant was in violation of Work Rule II, #3, "Leaving the place of duty during a

workshift without permission." Rule II, A is very similar to appellant's supervisor's charge, but there is no II, #3 in the rules.

6. Appellant knew rules because of his work at River Falls, but taking time under the conditions he did was allowed in River Falls and, in fact, had to be taken before pay period was up. Appellant was told this was not the policy at Rice Lake via oral reprimand.

7. Appellant was advised by a letter dated September 15, 1977, that he was on a 6 month probation at his new location in Rice Lake.

8. On October 14, 1978, the East doors to the gym were found open when the morning shift arrived at work. Appellant was the last one to leave the building that evening and left by the east doors. Over 12 people had keys. Nothing was missing or disturbed in the building.

9. Two other employees have left the doors open accidentally and were not disciplined or reprimanded for it.

10. On September 23, 1977, appellant was notified that he would be terminated as a probationary employe at Rice Lake effective 10/10/77 and that he should report back to work at his former job at River Falls Campus, which he did.

OPINION

In the short time appellant was working at the Rice Lake Campus he had had two minor infractions of his work rules. The first was a misunderstanding by appellant as to the procedure he could use his compensatory time. The second was that he forgot to lock the door he used to leave the premises one evening. Others who similarly forgot to lock the door were not penalized.

These two incidents happened within the first three weeks of employment and were never repeated by the employe during the four weeks he

he worked for the employers. He was reprimanded for the first incident and reminded he was on probation. The second caused his termination.

Appellant in this case attempts to argue that he was not on "permissive probation" based on respondent's allegedly failing to notify him properly of that fact before being hired at Rice Lake. While that may be a fact, it is not properly before the Commission in this case.

Appellant points to the order of May 18, 1978 which reads: "the motion to dismiss is denied as to appellant's termination at Rice Lake and" However the conclusions of law on page 2 of that decision reads; "Appellant filed a timely appeal with respect to his probationary termination at Rice Lake." (Emphasis added). Further, this was the stipulated issue at the prehearing conference of March 27, 1978.

Based on the two minor incidents, and the fact that appellant successfully worked in a similar job for the University at River Falls campus for more than 6 years, the action of the University appears to be very harsh. However, the termination order itself recognized appellant wasn't being terminated from University employment, only employment at Rice Lake Campus. The termination order in effect only transferred appellant back to River Falls where he had a permanent position.

While the action may have been grossly unfair, it is not arbitrary and capricious and the commission must sustain the termination at Rice Lake.

CONCLUSIONS OF LAW

1. This case is properly before the commission pursuant to §230.45 and 111.91(3), Stats.
2. Review of the respondent's action is limited by §111.91(3), Stats. to the test of "arbitrary and capricious" action.
3. The burden of proof is on the appellant to establish to a reasonable certainty by the greater weight of clear preponderance of the evidence that the respondent's action was arbitrary and capricious.
4. The appellant here has not met that burden of proof.
5. The termination of appellant as a probationary employe is sustained.

ORDER

The action of respondent terminating appellant's probationary employment is sustained and this appeal is dismissed.

Dated: _____, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

EDD:jmg

3/22/79

Charlotte M. Higbee
Commissioner