STATE OF WISCONSIN STATE PERSONNEL BOARD

LEE DAYHOFF,

Appellant,

v.

PRESIDENT, University of Wisconsin,

Respondent.

Case No. 77-61

OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of the termination of probationary employment pursuant to s. 16.05(1)(h) and 111.91(3), Wis. Stats., and Art. IV, s. 10 of the contract between the State of Wisconsin and the WSEU.

FINDINGS OF FACT

1. The appellant was employed by the respondent as a Mechanician 2 in the Physical Plant Machine Shop.

2. The appellant commenced employment on January 17, 1977, on a six month probationary period and was terminated effective March 7, 1977.

3. The duties and responsibilities of the position are varied and include a wide variety of journeyman level machinist work.

4. During the work weeks ending February 4, 11, 18, and 25, 1977, the appellant took excessive periods of time to assemble certain lawn mowers.

5. During the days of February 17, 18, and 21, 1977, the appellant incorrectly machined certain metal parts, and, after this was called to his attention by his supervisor, took an excessive amount of time to complete the remaining (identical) parts.

6. On February 18, 1977, the appellant was physically unable, working with another employe, to wind a spring on an overhead door, and his supervisor had to replace him on the project with another employe.

7. On March 3 and 4, 1977, the appellant took an excessive amount of time to make a metal axle for a handcart and the finished product was of inadequate quality.

8. Appellant's supervisor from time to time commented to him about the quality of his work.

9. The respondent utilizes the standard Bureau of Personnel plan as published in the Administrative Procedures Manual for the evaluation of probationary employes.

10. The bureau plan does not require written evaluations of probationary employes except for the evaluation at the end of the six months probationary period.

11. The bureau plan does not have specific standards regarding the frequency of counseling probationary employes concerning job performance difficulties.

12. The notice of termination (Appellant's Exhibit #1) contained the following statement of reasons for termination:

> "Mr. Scheidegger indicates that based on his evaluation of the projects or work assignments that you have completed, your overall work performance is unsatisfactory. This determination has been made based primarily on the poor quality of workmanship and the excessive amount of time required to complete some projects . . . because of your unsatisfactory work performance your employment . . . is being terminated . . . ."

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. 75-205 (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

In the board's opinion the record provides a clearly sufficient basis for discharge on the basis of the appellant's inadequate work performance. The appellant raised several issues aside from performance.

The appellant argues that the respondent failed to comply with s. Pers. 13.085, W.A.C., which provides:

> Pers. 13.085 Progress reports. During the probationary period the appointing authority shall carefully observe and evaluate the employe's job performance and work progress to determine whether the employe is efficiently and effectively performing the duties of the position. Such observations shall be periodically reviewed

> and discussed with the employe. Each agency shall develop and implement a plan for evaluating probationary employes, or in lieu of developing its own plan, use a model developed by the bureau. Agencies shall file copies of their evaluation plan with the director or indicate their intent to use the bureau's model.

However, as indicated in the findings, the respondent used the bureau's model evaluation plan which does not require written evaluations of probationary employes except at the end of the probationary period. The appellant did receive comments from his supervisors about the quality of his work.

The appellant also argues that the respondent failed to comply with s. Pers. 13.09(2), W.A.C., which requires written notification to the employe "of the reasons for dismissal," by failing to provide a sufficiently specific statement of reasons.

The letter of termination does contain _per se_ a statement of "reasons":

> "Your overall work performance is unsatisfactory . . . poor quality of workmanship and the excessive amount of time required to complete some projects."

In the board's opinion, this notice constitutes adequate minimal compliance with the administrative code provision. A requirement of further specificity would be a function of constitutional due process.

It is a familiar principle that:

> " . . . the notice requirements of due process . . . 'will vary with circumstances and conditions' [and] cannot be defined with any 'rigid formula.'" _State ex rel. Messner v. Milwaukee Co. Civil Service Comm._, 56 Wis. 2d 438, 444, 202 N.W. 2d 131 (1972).

The determination of what procedures the due process clause may require under a given set of circumstances must begin with "a determination of the precise

nature of the government function involved as well as of the private interest that has been affected. . ." Cafeteria and Restaurant Workers U. Local 437 v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748-1749 (1961).

A state employe with permanent status in the classified service has an absolute right to a hearing upon discharge. See s. 16.05(1)(e), Stats. At that hearing the burden of proof is on the employer to show just cause for the discharge. See Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). A probationary employe such as the appellant is subject to an entirely different set of procedures upon termination. The mandatory statutory right of appeal under s. 16.05(1)(e) is limited to permanent employes and thus is not available. The legislature has provided for the possibility of labor agreements that provide a limited review of certain personnel transactions, such as probationary termination, which otherwise are statutorily not subject to bargaining. See s. 111.91(3), Stats.:

> "The employer may bargain and reach agreement with a union representing a certified unit to provide for an impartial hearing officer to hear appeals on differences arising under actions taken by the employer under sub (2) (b) 1 and 2. The hearing officer shall make a decision accompanied by findings of fact and conclusions of law. The decision shall be reviewed by the Personnel Board on the record and either affirmed, modified or reversed, and the Personnel Board's action shall be subject to review pursuant to ch. 227. Nothing in this subsection shall empower the hearing officer to expand the basis of adjudication beyond the test of arbitrary and capricious action . . .. (emphasis added)

Pursuant to this provision the state and the Wisconsin State Employes Union reached contractual agreement in Art. IV, s. 10:

> " . . . the retention of probationary employes shall not be subject to the grievance procedures except those probationary employes who are released must be advised in writing of the reasons for the release and do, at the discretion of the Personnel Board, have the right to a hearing before the Personnel Board." (emphasis added)

The Personnel Board has held that in hearings pursuant to this provision the statutory basis for adjudication is limited to the test of "arbitrary and capricious action" pursuant to s. 111.91(3), Stats., and that the burden of proof is on the terminated employe. See In re Request of the American Federation of State, County, and Municipal Employes (AFSCME), Council 24, Wisconsin State Employes Union, AFL-CIO for a Declaratory Ruling, Wis. Pers. Bd. No. 75-206 (8/24/76).

The differences between the status of a probationary employe and the status of a permanent employe as outlined above lead to the conclusion that the state has afforded a lesser property interest to the probationary employe, albeit that the probationary employe is entitled to some limited form of review of the state action terminating his employment. In the board's opinion, it does not follow that because there is some limited right of review that the probationary employe is entitled to the same due process right, including the same specificity of notice, to which permanent employes are entitled. Compare, for example, Arnett v. Kennedy, 416 U.S. 134, 151, 94 S. Ct. 1633, 1643 (1974):

> "The district court, in its ruling on appellee's procedural contentions, in effect held that the Fifth Amendment to the United States Constitution prohibited Congress, in the Lloyd - LaFollette Act, from granting protection against removal without cause and at the same time—indeed in the same sentence—specifying that the determination of cause should be without the full panoply of rights which attend a trial type adversary hearing. We do not believe that the constitution so limits congress in the manner in which benefits may be extended to federal employes."

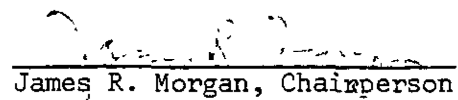
For all these reasons the board is unable to conclude that the notice given here constituted arbitrary and capricious action.

ORDER

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

Dated: June 16, 1978

STATE PERSONNEL BOARD



James R. Morgan, Chairperson