

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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JEROME PRIOR,

Appellant,

v.

SECRETARY, Department of  
Administration,

Respondent.

Case No. 77-70

\* \* \* \* \*

## 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 probationary termination. This decision addresses a question which arose at the hearing as to whether the decision in an unemployment compensation proceeding could be res judicata or conclusive on the Personnel Board. The findings set forth below are limited to the purpose of deciding this issue.

### FINDINGS OF FACT

1. The appellant was discharged from his probationary employment as a Building Maintenance Helper 2 because he allegedly was outside his work area, going through a desk and looking through tax returns in the mail room, and subsequently filed an appeal with this Board.

2. In an appeal tribunal decision of an unemployment compensation examiner a finding was made that the employe (appellant) was discharged, but not for misconduct connected with his employment, within the meaning of s. 108.04(5), Stats., and that the employer (respondent) had not established his allegation that the

appellant had improperly searched through desk drawers and check files in a room outside his assigned work area.

3. The aforesaid appeal tribunal decision was not appealed further by the respondent and became final.

#### CONCLUSIONS OF LAW

1. There is an identity of parties between this appeal and the aforesaid unemployment compensation proceeding.

2. There is not identity of issues or "cause of action" between this appeal and the aforesaid unemployment compensation proceeding.

3. The doctrine of res judicata or collateral estoppel is available in Personnel Board proceedings.

4. The requisite elements of the doctrine not being present, the Board is not bound by the aforesaid unemployment compensation decision.

#### OPINION

In Marquardt v. DILHR, Wis. Pers. Bd. No. 77-214 (4/11/78), the Board held that in appropriate cases the doctrine of res judicata or collateral estoppel could be applied to prevent rehearing of matters that had already been decided. The elements of that doctrine are an identity between the parties and an identity between the "causes of action or the issues sued on," Leimert v. McCann, 79 Wis. 2d 289, 294, 255 N.W. 2d 526 (1977).

The statutory authority for the Board to hear an appeal, such as this, of termination of a probationary employe, is found at s. 16.05(1)(h), and 111.91(3), Stats.

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See In re Request of AFSCME, Council 24, WSEU, AFL-CIO, for a Declaratory

Ruling, Wis. Pers. Bd. No. 75-206 (8/24/76). Section 111.91(3), Stats., provides:

"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, nor shall anything in this subsection diminish the authority of the Personnel Board under s. 16.05(1)."

In this declaratory ruling the Board held that the "arbitrary and capricious" test provided the legal standard for probationary termination appeals and that the employee had the burden of proof.

In an unemployment compensation proceeding we are dealing with an entirely different statutory framework and a different set of guidelines. To cite only one significant distinction, the employee, as above noted, has the burden of proof in a probationary termination case. In an unemployment compensation proceeding the employer asserting misconduct has the burden of proof. See Boynton Cab Co. v. Giese, 237 Wis. 237, 243 (1941). In Martin v. DOT, Wis. Pers. Bd. No. 76-59 (4/11/78), cited by appellant, the employee alleged the same misconduct and the same statutory violations in both proceedings, before the Personnel Board and the Equal Rights Division. There was also a stipulation to hold the Personnel Board appeal in abeyance pending the resolution of the equal rights case.

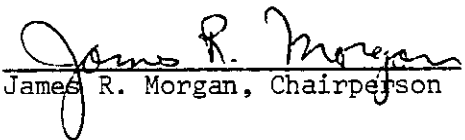
Sine there is no identity between the cause of action or issues res judicata cannot be applied.

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ORDER

The unemployment compensation decision referred to in the finding 2,  
above, shall have no res judicata effect on this appeal.

Dated: May 18, 1978      STATE PERSONNEL BOARD

  
James R. Morgan, Chairperson