STATE OF WISCONSIN

STATE PERSONNEL BOARD

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GREGORY P. SOWKA,

Appellant,

v.

SECRETARY, Department of Transportation,

Respondent.

Case No. 77-80

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OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This appeal, filed pursuant to Article IV, s. 10 of the contract between WSEU and the State of Wisconsin, concerns the discharge of the appellant from state service while he was on probation.

FINDINGS OF FACT

1. On September 13, 1976, the appellant began employment as an Enforcement Cadet with the Bureau of Enforcement; Division of Motor Vehicles; Department of Transportation.

2. Enforcement Cadet employes spend the first twenty-two weeks of their employment attending the Wisconsin State Patrol Academy. While enrolled at this academy, the cadets participate in a variety of programs designed to prepare them for work as a State Patrol Trooper. One of these programs is a three week field work session in which each cadet is assigned to ride with an experienced trooper who acts as a coach. Upon graduation from the academy, the cadets are assigned to district units where they perform either the duties of a State Patrol

Trooper or the duties of a Motor Vehicle Inspector.[1]

3. Enforcement Cadets remain on a probationary employment status for the first six months of their employment. Thus, cadets are on probation during their enrollment at the academy and during their first three to four weeks of work in the districts after graduation. At the end of this time, they move into either State Trooper 1 or Motor Vehicle Inspector I positions.

4. The appellant attended the academy from September 13, 1976, until his graduation on February 18, 1977. He was then assigned to perform trooper duties in State Patrol District 5. He first reported for work there on February 21, 1977. At this time, only about three weeks remained on the appellant's probation in the Enforcement Cadet position.

5. The appellant spent his work day on February 21 obtaining equipment and attending orientation meetings. During one of these meetings, the appellant was informed of a work schedule change.

6. The appellant worked on five days between February 22 and March 1. Four of these days were spent patroling with experienced troopers. Because of a scheduling error on his part, the appellant spent most of the fifth day working alone.

7. During this period of time, the appellant encountered the following difficulties in the performance of his duties:

a. He used the WISPERN radio—a special radio which he knew was to be used only in emergency situations—in an attempt to establish a meeting with a local law enforcement officer for a discussion of possible housing in the area.

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1. If the number of trooper positions vacant at the time of graduation is equal to or larger than the number of graduating cadets, then all of the cadets are assigned trooper duties. If, however, the number of cadets exceeds the number of trooper positions available, then those with the lowest academic scores are assigned inspector's duties until additional trooper positions become available.

b. He failed to follow one of the scheduling changes he had been informed of during the orientation sessions. This resulted in his starting an hour late and patroling the wrong geographic area on February 27. It also resulted in his working alone rather than with an assigned trooper.

c. He took an excessive amount of time to report to his assigned work area on February 27 after being notified via radio that he was working in the wrong area. Although the appellant was only 15 to 20 minutes from the proper work area at the time of notification, he did not arrive there until about an hour and three quarters later because of the excessively long route he took and because of the fact that he stopped three motorists on that route.

d. He unnecessarily involved himself in police matters while off duty and out of uniform.[2]

e. He issued several citations on February 27 for which he set court appearance dates that he should have known were improper.

f. He used improper radio format on several occasions and seemed to have difficulty in correcting this error after being informed of its existence and nature several times.

g. He made an error in judgment and violated patrol policy by keeping a pocket knife on the radio console of the car where a prisoner or passenger could easily reach it.

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2. The appellant, who was neither in uniform nor on duty, was being driven to a local State Patrol office by two on duty, uniformed troopers. While they were in the city of Black River Falls, the troopers became involved in an incident between the occupants of two automobiles. Two on duty, uniformed city police officers were also present and although the situation was well under control, the appellant unnecessarily involved himself in the matter by taking a flashlight from the patrol car, crossing the street to one of the cars, and inspecting the interior of that car—which was occupied by a passenger at that time—by shining the flashlight through the car windows. At this time, one of the local police officers was also inspecting the car. The appellant made remarks to that officer concerning what he felt was improper about the officer's method of inspection.

8. Sgt. Spurgin, the appellant's immediate supervisor, was informed of these difficulties. He also received complaints that the appellant was unwilling to take guidance, that he was overly eager in pursuing cars, that he approached stopped cars with his hand too close to his gun, that he appeared to be overly fearful during his contacts with stopped motorists, and that he displayed a bad attitude toward co-workers and the motoring public.[3] In addition, Sgt. Spurgin was informed by the two troopers who had worked with the appellant that they did not wish to work with him again.

9. On March 2, Sgt. Spurgin rode with the appellant for about four hours of his work shift. Later that day, the appellant attended a meeting with his District 5 supervisors——Sgt. Spurgin, Lt. School, and Capt. Goetch. During this meeting, the appellant was given the opportunity to respond to each of the complaints that had been received about him and to discuss the performance problems he had encountered. His supervisors felt that during this meeting the appellant expressed either a lack of willingness to improve or an inability to improve.

10. Sgt. Spurgin, Lt. School, and Capt. Goetch agreed after the meeting that they should recommend termination of the appellant's employment. This decision to recommend termination was based on the appellant's performance during the six days on which he had worked at the District.[4]

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3. It should be noted that there was conflicting testimony as to the acceptability of the appellant's manner of approach to stopped motorists. Also, his manner in pursuing cars was only critized by one trooper.

4. Because of Bureau policies, very little information concerning the appellant's performance as a cadet was known to them. Thus, their decision was based on the time that he had spent at District 5.

11. Capt. Goetch took this recommendation to the State Patrol headquarters in Madison on March 3. Capt. Goetch met there for over an hour with Lt. Hlavaka, who was in charge of personnel matters, and with two other officers—Field Force Capt. Blied and Major Lacke. During this meeting, Goetch was asked to justify his recommendation in light of each of the alleged grounds. At this time, additional information concerning the appellant's performance at the academy was also considered.[5]

12. A final decision to terminate was reached based on the appellant's work record during his entire six months of probationary employment. This decision was approved by Col. Versnik, Director of the State Patrol, after consulting with Major Lacke, Lt. Hlavaka, and John Roslak—Department of Transportation Personnel Director.

13. The appellant was notified of his termination on March 5, 1977.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this appeal pursuant to Wis. Stats., s. 16.05(1)(h) and s. 111.91(3) and pursuant to Article IV, s. 10 of the

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5. Lt. Hlavaka was informed about the appellant's performance at the academy by the contents of written evaluations from that time period and by his conversations with Capt. Rehberg who was in charge of the academy. The information Hlavaka received indicated that although the appellant had done well in some areas and had shown that he possessed good potential, he had also displayed problems in attitude, in accepting and following orders, in exercising good judgment, in getting along with others, in accepting the validity of rules and regulations, and in being at the proper locations at designated times. Lt. Hlavaka also knew that the appellant had been placed in the "satisfactory" evaluation category at the academy as opposed to a lower category such as "needs improvement." Capt. Rehberg told Hlavaka that the academy staff had been somewhat concerned about the appellant but that they had wanted to give him a chance in the field because of his good potential.

collective bargaining agreement between the State and the American Federation of State, County, and Municiple Employes, Council 24, Wisconsin State Employes Union, AFL-CIO.

> Sowka v. Rice, 77-80, 7/22/77 (Interim Order in this case.)
> In re Request of AFSCME, Council 24, WSEU, AFL-CIO, for a Declaratory Ruling, 75-206, 8/24/76.
> Wixson v. President, University of Wisconsin, 77-90, 2/20/78.

2. The standard of judgment is whether or not the respondent's action of discharging the appellant was arbitrary and capricious.

> In re Request of AFSMCE, supra. 1.
> Wixson, supra. 1.

3. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of the credible evidence, that the respondent's action was arbitrary and capricious.

> In re Request of AFSCME, supra. 1.
> Wixson, supra. 1.

4. The appellant has failed to carry this burden. Thus, it must be concluded that the respondent's action was not arbitrary and capricious.

OPINION

In Wixson v. President, University of Wisconsin, 77-90, 2/20/78, the Board stated:

> 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 243, 251 (1967).

Applying this standard to the present case, it must be concluded that the appellant has failed to carry his burden. He has not shown the termination to be without a rational basis or to be an unconsidered, wilful, and irrational choice of action.

To the contrary, a review of the record shows that after the appellant's supervisors learned of his performance difficulties they confronted him with these difficulties and provided him with ample opportunity to explain his conduct. It was only after considering the conduct involved, the appellant's explanation of that conduct, and the demands of a trooper's work that his supervisors decided to recommend termination. This recommendation was again scrutinized by Lt. Hlavaka and Capt. Blied who also considered the appellant's full probationary employment record. Col. Versnik did not take final action until after he had received similar recommendations from these two members of his staff and from Mr. Roslak. Certainly, this cannot be characterized as an unconsidered decision. Nor, for that matter, can it be viewed as an unreasonable decision for which there was no rational basis. For the appellant had participated in a long, comprehensive, and practically oriented training program for a position of great responsibility and impact. Yet upon his arrival at District 5, he still made a large number of errors within a short period of time, displayed an attitude which lead his supervisors to believe that improvement on his part would be unlikely, and alienated fellow workers at the district. Furthermore, he experienced these difficulties while functioning in a position where small

errors or shortcomings can bring large consequences. Finally, the appellant's performance while training for the trooper position at the academy indicates that these problems were not totally unexpected. Under these circumstances, the Board must conclude that the respondent's decision to terminate the appellant's probationary employment was not an unreasonable decision having no rational basis.

In challenging the propriety of the discharge, the appellant asserts that only his performance at District 5 can be used in determining whether or not the termination was arbitrary and capricious, that the period of time spent there was too short to allow for a rational decision on the matter, and that it was only natural that he make some errors in light of the newness of the environment and duties. The Board does not agree with the assertion that only the probationary time spent at District 5 is at issue here. While it is true that the initial discharge recommendation was based only on events that occurred during the time spent at District 5, it is also true that the final decision to terminate was based on the appellant's entire probationary work record. Because he has successfully graduated from the academy with a "satisfactory" final evaluation, the appellant argues that no performance deficiencies or difficulties could have arisen in that time frame which could have been considered in making a discharge decision. This argument is unpersuasive. A probationary employe maybe evaluated at any time during his probationary period. The fact that any existing misconduct or performance difficulties on his part do not outweigh his merits at any one of these evaluation times does not mean either that the misconduct and deficiencies do not exist or that they cannot be considered in later overall assessments of the employe's probationary performance. A satisfactory rating at any one point during a probationary period does not allow an employe to in some way start with a totally clean slate from that point in time.

Moreover, the Board does not agree that the termination action would have automatically been irrational even if it were limited to scope to the appellant's time at District 5.[6] In light of the facts of this case, that period of performance was sufficient to allow for a reasonable determination with a rational basis. Any further argument that mistakes such as the appellant's were only natural because of the unfamiliarity of the situation also fail when viewed in terms of the nature and number of problems involved here and in terms of the long, comprehensive, and practically oriented training the appellant had received.[7] Although the geographic area may have been somewhat new to him, the appellant was not unfamiliar with performing the duties of a trooper or with the policies and procedures of the Patrol.[8]

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6. The appellant cites Weaver v. Wisconsin Personnel Board, 71 Wis. 2d. 46, (1976) in which the court found that a performance rating for layoff purposes was not the result of a rational process where the employe's performance in a position had been evaluated without his even having performed the duties of that position and where the supervisor evaluating him testified both that he thought the required evaluation was impossible and that he eventually just evaluated the employe in terms of his prior position which was as different as "night and day" from the position in question. The distinctions between the facts of Weaver and the present case are obvious.

7. A good example of the thoroughness and practicality of the training is the three weeks that the appellant spent working regular patrols with an experienced trooper coach. During this time, the appellant was allowed to gradually assume, and gain experience in performing, the duties he was later required to perform upon reporting to District 5.

8. In fact, the record suggests that new troopers may well be more familiar with some policies of the Patrol pertaining to proper methods of performance than more experienced troopers are. Troopers perform their work with a great deal of independence and with very little direct supervision. The record suggests that this leads to some divergence between Patrol policy and actual pratice over a period of time.

Finally, the appellant asserts that the decision to terminate was so rushed that it was irrational. He points to the testimony showing both that the respondent was keenly aware of the limited time left in his probationary employment status and that Sgt. Spurgin would not have recommended termination had more probationary time been available.[9] However, the record still shows that adequate review and consideration were given to the appellant's performance and that the decision to terminate which was based on that performance was not arbitrary. Thus, whatever concern there was over this time constraint did not prompt the respondent to make a decision that was so hasty as to be unreasonable. In fact, Capt. Goetch and Lt. Hlavaka both testified that they would have recommended termination even if more probationary time had been available and Col. Versnik stated that he applied the just cause standard used for permanent employes in making his decision to terminate.

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9. There seemed to be some confusion as to what would have happened if the appellant had been allowed another month or two to improve but had failed to improve sufficiently during that time period. By that point in time, the appellant would have been promoted to State Trooper I* and would have begun another probationary period in that position. The respondent seemed to feel that it may not have been possible to terminate him completely from state service—under either the arbitrary and capricious or the just cause standard—if his performance problems continued at that time because he would have gained permanent status in class at the Enforcement Cadet or Motor Vehicle Inspector I level after completing his probation as a cadet. However, there seemed to be significant uncertainty on this point. The Board suggests that the respondent avail itself in the services of the State Bureau of Personnel in resolving this matter.

* The respondent felt that a probation extension at the cadet level was not possible in this case. Thus, at the end of his Enforcement Cadet probation, the appellant would have become a Trooper I.

Thus, the appellant has failed to carry his burden of showing to a reasonable certainty, by the greater weight of the credible evidence, that the respondents action was either so unreasonable as to be without a rational basis on the result of an unconsidered, wilful, and irrational choice of conduct. Consequently, it must be concluded that the action to terminate was not arbitrary and capricious.

ORDER

IT IS HEREBY ORDERED that the respondent's action is affirmed and this appeal is dismissed.

Dated: June 16, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson