STATE OF WISCONSIN STATE PERSONNEL BOARD

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WILLIAM BASCH,

Appellant,

v.

PRESIDENT, University of Wisconsin,

Respondent.

Case No. 77-86

* *

OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of a termination. In an Interim Opinion and Order entered November 15, 1977, the Board ordered a hearing scheduled on the question of whether the appellant was in a probationary status at the time of his termination. Such a hearing was held and this is the only issue before the Board at this point.

FINDINGS OF FACT

1. The appellant was employed at the U.W. - Whitewater in the classified civil service from 1968 until his resignation effective October 22, 1976.

2. At the time of the aforesaid resignation the appellant had permanent status in class as a police officer.

3. The appellant's date of birth is October 9, 1922, and he would have been forced to retire as a police officer at age 55.

4. Sometime in September, 1976 the appellant learned of a vacancy in the Security Department at U.W. - Stevens Point (UW-SP) and consulted with various UW-SP employes regarding said position (Security Officer).

5. On or about September 30, 1976, the appellant met with the head of the Protective Services department at UW-SP to discuss the vacancy.

6. At that time this employe indicated to the appellant that one of the requirements for the Security Officer position was a 6 months probationary period.

7. Sometime subsequent to this interview and prior to the appellant's receipt of an offer of employment from UW-SP (letter dated October 6, 1976, from Roland Juhnke, Director of Personnel Services, (Appellant's Exhibit #3), he had a conversation with the Personnel Director at U.W. - Whitewater who advised the appellant that in his opinion no probation would be required in the new position at UW-SP.

8. The UW-SP offered appellant employment in the vacant security officer position, effective October 25, 1976, by letter dated October 6, 1976 (Appellant's Exhibit #3). This letter did not make any reference to a probationary period. The offer was stated to be contingent upon the appellant accepting a voluntary demotion and a starting rate pay of $4.444 per hour.

9. By letter dated October 11, 1976, to Mr. Juhnke (Appellant's Exhibit #4) the appellant accepted the offer of employment and indicated his willingness to accept a voluntary demotion and the indicated starting pay.

10. At the time the appellant submitted the aforesaid letter he believed that he would not be required to serve a probationary period in this new position.

11. Sometime after submitting this October 11, 1976, letter (Appellant's Exhibit #4) and before first reporting to work at UW-SP on October 25, 1976, the appellant went to UW-SP and had his first interview with Mr. Juhnke in order

to discuss his forthcoming employment and various aspects of living in the community (Stevens Point).

12. In that conversation the appellant was informed that normally employes who transfer to UW-SP are required to serve a permissive probationary period but that this might be waived depending in part on the recommendation of the immediate supervisor.

13. At the time of this conversation the personnel management organization at UW-SP was such that Mr. Juhnke as appointing authority was the employe with the authority to decide whether appellant would be required to serve a permissive probationary period.

14. At the time of this conversation Mr. Juhnke had not made a decision regarding a permissive probationary period for the appellant.

15. Mr. Juhnke decided that the appellant would be required to serve a permissive probationary period sometime after this conversation and prior to the commencement of appellant's employment on October 25, 1976, and advised the appellant of this fact on October 25, 1976.

16. The appellant reported for work and commenced employment at UW-SP on October 25, 1976.

17. The appellant's employment was terminated effective April 21, 1977. (Letter dated April 20, 1977, from Roland Juhnke to appellant, Appellant's Exhibit #1).

18. The appellant's security officer position at UW-SP was at all relevant times subject to coverage by a collective bargaining agreement between the state and the Wisconsin State Employes Union.

CONCLUSIONS OF LAW

1. The appointing authority failed to specify upon appointment and notify the Director and report to the appellant his determination to require him to serve a permissive probationary period. See §§ Pers. 13.05(2), 8.04, W.A.C.

2. The requirements of § Pers. 13.05(2), W.A.C., are mandatory and not directory. See Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d. 565, 570-573, ___ N.W. 2d ___ (1978).

3. The respondent having failed to comply with the provisions of § Pers. 13.05(2), the appellant was never legally required to serve a permissive probationary period following his voluntary demotion to the security officer position at UW-SP and therefore, he was not in probationary status at the time of his termination.

4. Any recourse appellant might have with respect to his termination would be pursuant to contract and the Personnel Board has no jurisdiction over this appeal. See § 111.93(3), stats.

OPINION

Section Pers. 13.05(2), W.A.C. provides:

> "The appointing authority shall specify upon appointment and notify the Director and report to the employe his determination to require the employe to serve a probationary period." (emphasis supplied)

Section Pers. 8.04, W.A.C., defines "appointment" as follows:

> "An appointment is the commitment of an appointing authority to place a person in a position in his agency in accordance with the provisions of the law and these rules."

In this case, a qualified commitment to place the appellant in a position at UW-SP was made in the letter of October 6, 1976 (appellant's exhibit #3), offering the appellant employment contingent on the appellant's acceptance of a voluntary demotion and the indicated salary. These qualifications were satisfied by the appellants' acceptance of the offer of employment on the stated terms by letter of October 11, 1976 (appellant's exhibit #4). The previous statements made by the head of the protection and security department to the appellant regarding probationary periods cannot be construed as compliance with § Pers. 13.05(2) because this person lacked the authority to make the decision and the conversation preceded the appointment. Indeed, the decision regarding the probationary period was not made by the appointing authority until after the appointment. Although the appointing authority informed the appellant of his probation after he had reported for his first day of work on October 25, 1976, this was not compliance with the administrative code provision because it was after appointment.

It could be argued that the statement made by the head of protection and security at UW-SP amounted to substantial compliance with § Pers. 13.05(2) or rendered failure of compliance "harmless error" because it gave appellant actual notice prior to the appointment. It need not be determined whether these doctrines are available because in any event that statement could not constitute <u>effective</u> prior notice. Not only was the security chief not the appointing authority but the appellant was informed subsequently by the personnel manager

at UW - Whitewater that there would be no probation since appellant had already served a probationary period. This combined with the omission of any mention of probation in the October 6, 1976, letter made it reasonable for the appellant to assume there would in fact be no probation required and negates any argument of prior actual notice.

Having determined that there was a failure of compliance with § Pers. 13.05(2), the next question is whether the respondent's attempt to impose permissive probation was effective. In the Board's opinion this question turns on whether the provisions of § Pers. 13.05(2) are construed as directory or mandatory.

In Will v. DHSS, 44 Wis. 2d 507, 517, 171 N.W. 2d 378 (1969), the supreme court noted:

> "Since the rule making process of an administrative agency is derivatively a part of the legislative process, this court has applied statutory rules of construction to the construction of administrative agency rules."

The holding also was in the context of determining whether a requirement was directory or mandatory.

Therefore, the Board will use in analyzing this rule the same rules of application and construction used by the supreme court in determining whether statutes are mandatory or directory.

The most recent supreme court pronouncement in this area also involves a statute in the personnel field, one requiring a hearing of charges against a suspended employe within 3 weeks. See Karow v. Milwaukee Co. Civil Service Commission, 82 Wis. 2d 565, 572-573, ___ N.W. 2d ___ (1978):

> "We have said that a time limit may be construed as directory when allowing something to be done after the time prescribed would not result in an injury. Appleton v. Outagamie County, 197 Wis. 4, 9, 220 N.W. 393 (1928). But where the failure

> to act within the statutory time limit does work an injury or wrong, this court has construed the time limit as mandatory. In State v. Rosen, 72 Wis. 2d 200, 240 N.W. 2d 168 (1976), we held that the statutory time limit for holding a hearing on the forfeiture of a car under the Uniform Controlled Substances Act was mandatory; the car owner's legitmate interest in having use of the car is jeopardized unless there is strict compliance with the statutory procedure for the time of the hearing. Construing the time provision as mandatory did not impede the legislature's objective of protecting the public from drug traffic.
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> To construe sec. 63.10(2), Stats., we must ascertain the consequences of holding that the time period is directory, and we must determine whether these consequences comport with the legislative purposes.
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> As a result of the charges and suspension Karow is not working and is not being paid. Any delay in the hearing continues Karow in this status and thus works an injury on him.
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> The county civil service statute reflects the legislature's balance of the interests of the public and those of individual county employes. The public has a legitimate interest in not being burdened with inefficient or otherwise undesirable employes. That interest is adequately protected by the statutory procedure for disciplining an employe, particularly the provision which permits suspension of the employe between the time when charges are filed and the hearing. See sec. 63.10(1), Stats. At the same time there is public interest—which is shared by the employe—in the employe not being wrongly deprived of his or her livelihood and and not suffering injury to reputation on the basis of charges which might prove unfounded. This interest can be protected only by holding a hearing promptly.
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> In view of the language of the statute, the consequences of delaying the hearing, and the objectives sought to be accomplished by the legislature, we conclude that the time for hearing set forth in sec. 63.10(2), Stats., is mandatory.

In the case before the Board, one major purpose of §§ Pers. 13.05(2) is to give the affected employe notice that probation will be required so he or she will be able to make an informed decision in light of the effect on his or her personal interests in accepting an appointment which carries a probationary period.

In this case, the employe was leaving a position where he had attained permanent status in class after many years of state service and could only be terminated for just cause and with full hearing rights under the union contract. As a probationary employe, he could be terminated without the protection of a just cause requirement and subject only to a discretionary review before the Personnel Board limited to the question of whether the termination was arbitrary and capricious: See AFSCME, WSEU, AFL-CIO Request for Declaratory Ruling, 75-206, (8/24/76).

Whatever public interest is served by enabling a new employing unit to evaluate a transferred employe's performance and terminate him or her if it is deemed unsatisfactory, without a just cause requirement, is of course provided for by § Pers. 13.05(1). To construe § Pers. 13.05(2) as directory would deprive the employe of timely notice in order to insulate administrative error.[1] The new employing unit still retains the right to discharge, but subject to the hearing and cause requirements provided by contract.

For these reasons, the Board concludes that the requirements of § Pers. 13.05(2) are mandatory and not directory.

82 C.J.S. Statutes § 374 provides:

> "A failure to follow a mandatory statutory provision renders the proceeding to which it relates illegal and void, while a failure to follow a directory provision does not necessarily invalidate the proceeding."

The respondents' attempt to place appellant on permissive probation was void and the respondent cannot now assert a probationary status against the appellant.

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1. At the hearing the failure to include the information on permissive probation in the October 6th letter was characterized by the appointing authority as oversight.

There is a possible question as to whether appellant was required to have appealed the transaction relative to permissive probation following the time (October 25, 1976) when he became aware of it, in order to be able to assert the defects in the respondents' handling of this transaction at this time. In the Board's opinion such an appeal was not required.

Presumably, the appellant might have tried to file an appeal with the Director pursuant to § 16.03(4)(a), stats.:

> "The Director or his designated representatitives shall hear appeals of employes from personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion and such decisions are not subjects for consideration under the grievance procedure, collective bargaining, or hearing by the Board."

However, since appellant's position was subject to a collective bargaining agreement, and § 111.93(3), stats. provides:

> "If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."

it would appear that the Director would not have had jurisdiction over such an appeal.[2]

Assuming that it would have been possible for the appellant to have filed a grievance concerning the respondent's decision to require a probationary period, the failure to file such a grievance does not in the Board's opinion prevent the appellant from now asserting that he was not lawfully on probation when terminated. A failure to file a grievance within the prescribed time period presumably will prevent a further grievance on the same transaction.

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2. In Palmateer v. Weaver, Wis. Pers. Bd. 76-103 (6/16/77), the position was not subject to a contract.

However, the Board is not aware of any provision of law that would act to prevent an employe in the appellant's situation from raising the illegality of this earlier transaction in the context of a grievance or appeal of a later transaction when the grievance or appeal is timely with respect to the later transaction. Certainly such a requirement would have the potential to have a deleterious effect on the state's personnel administration. For example, in many cases of discharge of a permanent employe the agency includes in its notice of discharge and statement of reasons therefore alleged incidents of misconduct or poor performance that were the subject of prior reprimands. The employe is not and should not be foreclosed from trying to prove that these allegations of misconduct or poor performance were not true because grievances had not been filed at the times the reprimands were issued. The ramifications of an opposite rule would be to encourage the automatic filing of grievances over reprimands, poor work reports, criticisms, below average performance evaluations, and other similar management actions, for fear that failure to do so would waive the right to dispute them in a future disciplinary proceeding.

ORDER

This appeal is dismissed for lack of jurisdiction over the subject matter.

Dated: May 18, 1978 STATE PERSONNEL BOARD

James R. Morgan, Chairperson