
 WILLIAM BASCH, *
 Appellant, *
 vs. *
 JOHN C. WEAVER, President *
 University of Wisconsin Systems, *
 Respondent. *
 Case No. 77-86 *

OFFICIAL

INTERIM OPINION
AND ORDER

Before: Morgan, Hessert and Warren, Board Members.

NATURE OF THE CASE

This is an appeal of a termination. At the prehearing conference a number of issues were framed:

- "1. Whether or not the Appellant was on probation at the time of his termination."
- "2. If he was not on probation, whether or not the Personnel Board has jurisdiction to hear this appeal."
- "3. If he was on probation, whether or not respondent's action to terminate Appellant's employment was arbitrary and capricious."

Also, by letter of July 12, 1977, the respondent's counsel moved for a determination that the board lacks jurisdiction in this matter except as it relates to Article IV Section 10 of the agreement between AFSCME and the State of Wisconsin. Respondent's counsel has objected to any evidentiary hearing before a decision on his motion. The parties through counsel have filed various written arguments and evidentiary material. The board has reviewed the entire record to date in this matter.

OPINION

Appellant submitted a proposed Stipulation of Facts in support of his position. While this had not been agreed to by respondent, the Appellant's attorney stated in a letter to the board dated August 2, 1977 that it "represents

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the facts involved in this appeal from the standpoint of the Appellant." It alleges that the Appellant accepted a voluntary demotion from a position he had held for 8 years as a police officer at U.W. - Whitewater to a position as a security officer at U.W. - Stevens Point. The Appellant does not dispute that he was orally notified on his first day of employment at U.W. - Stevens Point, that he was to be on permissive probation, although he disclaims any recollection of such notification. He does allege that he had no notice of any kind of this permissive probation prior to his first day of employment and that he would not have accepted the transfer had he known prior to his acceptance that he would be required to serve a permissive probationary period. He alleges that while employed at U.W. - Stevens Point he was provided all the benefits of a permanent employe, that union dues were withdrawn from his salary in the same manner as a permanent employe, and that his name appeared on a list of permanent and probationary employes prepared by the campus personnel director as among the permanent employes in the bargaining unit.

Appellant bases his argument that he was not on probation at the time of his termination on the provisions of § Pers. 13.05(2), W.A.C.:

"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."

The Appellant argues that "the decision to make such a requirement must be communicated at the time of appointment or else it is waived." Letter of August 2, 1977.

The respondent relies on the board's decision in Palmateer vs. Weaver, 77-103 (6/16/77):

"Appellant argues that she should have been notified of her permissive probation 'upon appointment,' citing Section Pers. 13.05(2), W.A.C. This subsection 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.'

Respondent asserts that appellant had been told that she was to be on probation and the letter of December 15, 1975, was merely a confirmation of that. However, it is not necessary to make a finding on that point. If there were a defect in the notice to the employe by the appointing authority of the probationary period, any appeal rights would have been to the director pursuant Section 16.03(4), stats.:

'(a)The director . . . 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 . . .

* * *

(d)The director shall not grant an appeal under this subsection unless he receives a written request therefore within 15 days after the affective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later.'

There is no basis for personnel board jurisdiction over this contention by the appellant. Following the December 15th notice the appellant took no action to appeal this determination on the alleged lack of prior notice, but continued to serve as a probationary employe until her termination. In this context we can ascertain no basis for a conclusion that if there were a failure of prior notice that this would void or otherwise render ineffective the appointing authority's determination to require permissive probation."

This case potentially differs from the Palmateer case depending in part on what facts might be established. First, the Appellant here alleges a number of ways in which he had received positive indications that he was in permanent status following the commencement of his employment. Second, he alleges facts regarding his reliance on a non-probationary status prior to accepting the appointment, which may form the basis of an equitable estoppel. See Pullian and Rose vs. Wettengel, Wis. Pers. Bd. 75-5 (11/25/76).

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The respondent's motion cannot be determined without the requisite evidentiary basis on the above points, if not others. However, it seems clear that if the Appellant were determined not to be in a probationary status that any recourse regarding the termination would be through the contractual grievance procedure and not as an appeal to this board pursuant to s.16.05(1)(e), stats. See s.111.93, stats., Schrimef vs. Hart, Wis. Pers. Bd. No. 75-48 (11/26/75).

ORDER

The respondent's motion to dismiss is denied. This appeal shall be scheduled for hearing on the question of whether Appellant was in a probationary status at the time of his termination.

Dated: 11-15, 1977.

STATE PERSONNEL BOARD


James R. Morgan, Chairperson