STATE OF WISCONSIN PERSONNEL COMMISSION

RICK CHIAT,

Appellant,

v.

COUNCIL ON CRIMINAL JUSTICE,

Respondent.

Case No. 78-152-PC

ORDER

The appellant through counsel has filed an objection to the Proposed Opinion and Order issued by the hearing examiner under cover of a letter dated April 26, 1979. The appellant objected only to the last paragraph on page twelve of the Proposed Opinion and Order stating in part "This language should be withdrawn or modified." Letter from appellant's counsel dated May 16, 1979. Therefore, and because this last paragraph is not necessary to the substantive matters involved in this appeal, and in the absence of any objection by the respondent, the last paragraph on page twelve of the Proposed Opinion and Order is withdrawn. In all other respects the Proposed Opinion and Order, attached hereto, is adopted as the final decision of the Commission.

Dated: June 5, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

Charlotte M. Higbee
Commissioner

AJT:arl

STATE OF WISCONSIN PERSONNEL COMMISSION

RICK S. CHIAT,

Appellant,

v.

COUNCIL ON CRIMINAL JUSTICE,

Respondent.

Case No. 78-152-PC

PROPOSED
OPINION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.45(1)(f), Wis. Stats., (1977) of the termination of a probationary employe. Three days of hearings, ending February 26, 1979, were held before hearing examiner Anthony J. Theodore.

FINDINGS OF FACT

1. The appellant was employed by the respondent as a full-time employe in the classified civil service in a position classified as administrative assistant one, from May 8, 1978, through August 17, 1978.

2. During the aforesaid period the appellant was covered by the collective bargaining agreement between AFSCME, Council 24, Wisconsin State Employes Union, AFL-CIO, and the State of Wisconsin (Clerical and Related), effective September 11, 1977 - June 30, 1979.

3. Prior to this period of employment the appellant had been employed by the WCCJ as a limited term student employe during the summer of 1977.

4. During this summer employment the appellant engaged in an excessive amount of argument and debate with his immediate supervisor,

Mr. Robinson, regarding the conduct of work assignments and communications with grant recipients.

5. Prior to the appellant's appointment to the permanent position Mr. Robinson insisted and the appellant agreed that there would not be a repetition of that behavior if appellant were to receive the appointment.

6. The appellant's primary duties and following the commencement of his employment May 8, 1978, responsibilities involved work of a professional nature on a manual to assist WCCJ local grant recipients in the equal opportunities/affirmative action areas.

7. The WCCJ had received federal funding to develop this manual as a model for 56 other agencies similar to the WCCJ.

8. The development of this manual was a project of great importance and high priority to the WCCJ.

9. The development of the manual was through a team approach involving the appellant and other administrative assistants employed by the WCCJ.

10. In his work with others on the team the appellant was argumentative, stubborn, and defensive, all of which had a negative effect on the overall efficiency of the team.

11. On August 3, 1978, the appellant and his immediate supervisor, Mr. Robinson, discussed his probationary service report (performance evaluation).

12. At this time Mr. Robinson reviewed a rough draft of what was later reduced in final form to respondent's exhibit 3.

13. This discussion took more than two hours, most of which was consumed by comments and arguments by the appellant.

14. The final overall evaluation, respondent's exhibit 3, was above average, but included the following comments signed by Mr. Robinson and the WCCJ director, Mr. Wileman:

> "Effective development of employe's assignment necessitates a 'team' approach by involving all the EO/AA staff. Employe has not functioned well in the 'team' setting. He has been resistant to ideas and opinions of the 'team' and has been reluctant to accept changes or constructive criticism to work products drafted by him.
>
> This behavior has resulted in some alienation and inhibitation of the team members to freely express opinions. More importantly, this behavior adversely affects the effectiveness and quality of the EO/AA program.
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> * * *
>
> It should be noted that the employe and supervisor have discussed this matter periodically, and he agrees that this is a 'personality trait' problem which he is trying to correct. Nevertheless, this 'personality trait' has been having a major adverse impact on employe's work habits."

15. For several days following his receipt of the evaluation on August 8, 1979, the appellant devoted a substantial amount of working time discussing his evaluation with certain co-workers and team members, and the time involved in and the tension resulting from these conversations had a detrimental effect on the team performance.

16. In these discussions with his co-workers, the appellant did not suggest or encourage them to go to Mr. Robinson to discuss their own evaluations which were upcoming.

17. On or about August 14, 1978, three of the employes referred to in the preceding paragraph contacted Mr. Robinson to discuss their concerns about their upcoming evaluations.

18. On August 14, 1979, the appellant asked Mr. Robinson if he would reconsider the appellant's performance evaluation, and Mr. Robinson replied that he would not in the absence of new information, which was

not proferred by the appellant.

19. On or about August 14, 1978, the appellant submitted a written response (appellant's exhibit 4) to his performance evaluation.

20. The appellant's probationary employment was terminated by the executive director and appointing authority, Mr. Wileman, by letter dated August 17, 1978 (respondent's exhibit 1), for the following reasons:

"This termination is based on the following reasons:

1. Your inability to accept criticism from your immediate supervisor has been tantamount to insubordination.

2. Your inability to establish sound professional relationships with fellow staff members in the group setting has had a detrimental effect on fellow staff members and the project as a whole.

3. The effective implementation of the EO/AA project necessitates a group approach. However, you have shown an inability to function adequately in such a format.

4. Prior to the interim probationary evaluation, it appeared that you were making a sincere effort to correct your defensive, antagonistic and resistant attitude toward other group members' and the supervisor's suggested improvements for your work products. However, subsequent to the evaluation, there has been a serious deterioration of these efforts.

5. By creating anxiety among your fellow staff members regarding assessments of their probationary job performance and their relationship to their supervisor, you have attempted to undermine the authority of your immediate supervisor.

CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to §§111.91(3) and 230.45(1)(f), Stats. (1977).

2. The standard of review is limited to the question of whether the agency's action was arbitrary and capricious.

3. The appellant has the burden of proof.

4. A probationary termination based in part on First Amendment protected speech activity by the employe that did not have a self-sufficient basis that did not infringe constitutionally protected rights would violate the employe's rights under the First and Fourteenth Amendments to the United States Constitution and would constitute arbitrary and capricious action.

5. The termination of appellant's probationary employment under the facts and circumstances and for the reasons as set forth in the findings did not violate the appellant's rights under the First and Fourteenth Amendments to the United States Constitution.

6. The termination of appellant's probationary employment under the facts and circumstances and for the reasons as set forth in the findings was not without a rational basis and was not arbitrary and capricious.

OPINION

This review of the termination of appellant's probationary employment is limited to the question of whether the agency action was arbitrary and capricious. See §111.91(3), Stats., 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); Dziadosz v. DHSS, Wis. Pers. Commn. No. 78-32, 37, 89, 108-PC (10/1/78).

Arbitrary and capricious action is action "which is 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 245, 251 (1967).

There is no question that state employes are protected by the First Amendment, see Pickering v. Bd. of Education, 391 U.S. 563, S. Ct. (1968); Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673 (1976); Mt. Healthy School Dist. v. Doyle, 97 S. Ct. 568, (1977), Givhon v. Western Line Consolidated School Dist., 47 U.S. L.W. 4102 (1979); Finnegan v. DLAD, Wis. Pers. Bd. No. 77-75 (6/16/78).

In the opinion of the Commission, a termination of a probationary employe, based at least in part on actions of the employe protected by the First Amendment, and which did not have a self-sufficient basis grounded on non-consititutionally protected activities, would constitute action in violation of the First and Fourteenth Amendments, see Mt. Healthy City School Dist. v. Doyle, 975, Ct. at 575-576, and would constitute arbitrary and capricious action.

The determination of what is or is not constitutionally protected

speech in the context of government employment is a flexible process involving a balancing of the competing interests. See Pickering v. Bd. of Education, 88 S. Ct. at 1734-1735:

> " ... it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employes that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employes.
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> * * *
>
> Because of the enormous variety of fact situations in which critical statements by teachers and other public employes may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

See also, Mt. Healthy City School Dist. v. Doyle, 975. Ct. at 574.

In the instant case it is necessary to consider the entire context of appellant's employment at WCCJ in order to evaluate the respondent's actions.

The probationary period is considered to be an extension of the examination period, see §Pers. 13.01, WAC. The employing agency has considerable discretion in its decision whether to release or retain a probationary employe.

The record in this case reflects that shortly before his termination the appellant's performance was rated above average. However, in that evaluation the appellant's supervisors went to some lengths to pinpoint defensive and uncooperative attitudes and behavior. The agency had experienced difficulties of a similar nature with the apellant during his

LTE student employment the previous summer. The appellant's work was on a project of high priority to the agency and utilized a team technique which required for success a cooperative and non-defensive approach by the team members. There was conflicting evidence on the appellant's attitude and ability to function in the team setting. However, the respondent's somewhat negative evaluation of this area was supported not only by the testimony of the appellant's immediate supervisor, who also had worked with him the previous summer, but also by a co-worker team member, who also testified that the appellant talked incessantly to other team members about his evaluation. The appellant did not sustain his burden of proof on this point.

The appellant's supervisors identified two areas of concern with respect to the appellant's reactions to his evaluation. The first concern was that his actions were insubordinate.[1]

In the opinion of the Commission, neither the content of the comments contained in respondent's exhibit 4 nor the content of the communications made by appellant to his coworkers following the evaluation were insubordinate, nor, for that matter, insolent. See Millar v. Joint School Dist., 2 Wis. 2d 303, 314-315 (1957):

> "The general rules supported by the great weight of authority with respect to insubordination by an employee and insolence or disrespect toward an employer are well stated in

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[1] Although the letter of termination states "Your inability to accept criticism from your immediate supervisor has been tantamount to insubordination," (emphasis supplied) both supervisors testified at length that they considered substantial parts of the appellant's response to his evaluation (respondent's exhibit 4) to be insubordinate. Also, the termination letter stated that the appellant's comments to his fellow employes about the evaluation were an attempt "to undermine the authority of your immediate supervisor."

35 Am. Jur., Master and Servant, pp. 478, 480, secs. 44, 48. In sec. 44 it is said:

> 'Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer, and wilful or intentional disobedience thereof, as a general rule, justifies a rescission of the contract of service and the peremptory dismissal of the employee, whether the disobedience consists in a disregard of the express provisions of the contract, general rules or instructions, or particular commands."

In sec. 48 it is noted that:

> 'Unprovoked insolence or disrespect on the part of the employee toward the employer or the latter's representative may afford ground for the discharge or dismissal of the employee prior to the conclusion of the term of employment.'"

While the appellant's comments were quite critical of his immediate supervisor, they do not fall into the foregoing categories. Whatever interest of the employer may be served by the prevention or punishment of relatively harsh criticism of the kind involved here, it is outweighed by the free speech interest in the ability of an employe to express disagreement with his or her supervisors.

The respondent's second area of concern was tied in with the comment in the evaluation that appellant had been "resistant to ideas and opinions of the 'team' and has been reluctant to accept changes or constructive criticism to work products drafted by him." Respondent's exhibit 3. This concern focuses on appellant's actions and statements as evidence of a continuation of a past pattern of attitude and behavior which had and which threatened to have a continuing detrimental effect on appellant's and the agency's performance.

In this respect, this case is somewhat analogous to Megill v. Board of Regents, 541 F. 2d 1073, 1085 (5th Cir. 1976). In that case a professor

was denied tenure, in part because of certain statements he made: "The Board [of Regents] thought his actions reflected a lack of the attributes of professionalism and maturity needed for a tenured member of the academic community." In determining that the employer had not violated Dr. Megill's First Amendment rights, the court held:

> "Out of necessity, an academic board, in deciding whether or not to grant tenure, must consider an instructor's communications both in the classroom and outside. This review may often come in contact with free speech areas. Conflicting interests must be balanced. Employer-employe relationships are highly subjective .... Taking all of these considerations into account and balancing the asserted interests of both Dr. Megill and the Board, we find that the Board's interests outweigh those of Dr. Megill."

In the instant case the Commission feels that particularly significant factors include the nature of the probationary period in general under the civil service system, the long-standing and well-documented concern of the respondent with appellant's defensive attitude and behavior, and the nature of appellant's work, which was professional in nature, involved much communication, and placed a premimum on a cooperative and non-defensive attitude.

Based on all the facts and circumstances and looking at the appellant's response to his evaluation as a whole, the Commission is of the opinion that the reliance by the agency on appellant's response in its decision to terminate his probationary employment did not violate the appellant's First Amendment rights.

While in the Commission's opinion it was unfortunate that the agency labeled this response as insubordinate, this fact does not render illegitimate the legitimate concerns discussed above. Hypothetically, suppose an employe were fired for killing a co-worker and the employer, in its rationale

for the termination cited, the incident not only as a homicide but also as a violation of the Fifth Commandment. This reference, although an improper intrusion of religion into government activity, would not void the transaction where there was a valid and self-sufficient reason not involving constitutional infringement. So in the instant case the respondent had a rationale for termination which was valid, self-sufficient and not pretextual.

The various cases cited above make it clear that the balancing test among the competing interests involved in employe First Amendment cases will produce different results depending on the facts and circumstances of the cases.

The opinion in this case might well have been totally different if the appellant had occupied a position with different duties or had had a different track record in the attitudinal area. The Commission would have to be particularly concerned in any case where an adverse personnel action was taken against an employe based in part on alleged "defensiveness" when that in turn was based in part on the employe's critical remarks about a supervisor. This extra caution is necessary because charges of poor or overly-defensive attitude are potentially handy tools for the suppression and punishment of dissent.

On the other hand, management does have a legitimate interest in this type of behavior pattern in some employes, and in this case the concern was not only legitimate, it also was well-documented and relatively long-standing.

There are two collateral matters. The respondent attempted to introduce in evidence an unemployment compensation decision involving the

appellant. Appellant's objection was sustained by the examiner. This ruling is upheld. That decision was rendered by a tribunal operating under a different statutory framework utilizing a different legal standard, and cannot have a res judicata effect. See Prior v. DOA, Wis. Pers. Bd. No. 77-70 (5/18/78). For any other purposes it constitutes hearsay.

The appellant complained that certain witnesses were not carried in pay status while being interviewed by his representative prior to the commencement of hearings. While in the Commission's opinion, as a general principle state employes should be paid for time spent being interviewed as witnesses or potential witnesses by parties (either the employe or the employer) to these appeals, it is also of the opinion that the specific controversies about salary presented on this appeal must be decided under the collective bargaining agreement.

ORDER

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

Dated: _____, 1979. STATE PERSONNEL COMMISSION

_____
Joseph W. Wiley
Chairperson

_____
Edward D. Durkin
Commissioner

_____
Charlotte M. Higbee
Commissioner

AJT:jmg

4/25/79