

STATE OF WISCONSIN

PERSONNEL COMMISSION

 *
 STEVEN DROPIK, *
 *
 Appellant, *
 *
 v. *
 *
 UNIVERSITY OF WISCONSIN, *
 *
 Respondent. *
 *
 Case No. 78-260-PC *
 *

DECISION
AND
ORDER

NATURE OF THE CASE

This appeal was filed by the appellant pursuant to Article IV, Section 10 of the contract between WSEU and the State of Wisconsin, alleging that the termination of his probationary employment by the University of Wisconsin - Milwaukee was arbitrary and capricious. The appellant was a trainee in a formal training program and as such he had the status of a probationary employe under §230.28(5), Stats. and Pers. §20.03(5) of the Wisconsin Administrative Code.

FINDINGS OF FACT

1. The appellant was originally employed as an LTE in the Heating Facilities Department of the University of Wisconsin - Milwaukee in September, 1977.

2. On March 13, 1978, after passing a qualifying test, appellant was employed by the same department as Power Plant Equipment Operator Trainee, a formal 12 month program. He worked the day shift, 8 a.m. to 4 p.m. most of the time until his termination.

3. Appellant was terminated effective October 28, 1978, for the following reasons: leaving the job without permission, loafing on the

job, conduct of personal business on the phone during working hours, and having a poor attitude.

4. At the time appellant made application for the LTE and Trainee positions, respondent was aware that appellant had received an honorable discharge for medical reasons and was under a physician's care for the nervous condition which was the basis of his medical discharge. Respondent also knew that appellant was on parole and had to report regularly to his parole officer. Respondent perceived no restrictions that would impair appellant's work.

5. Terence Vaughn, Administrator of the Department of Facilities, originally hired the appellant as an LTE in the belief that respondent was giving the appellant an opportunity that he might not get elsewhere. Vaughn felt that the appellant should show he appreciated that opportunity by displaying a better attitude. He told the appellant's supervisor, Sylvester Janczak, to terminate the appellant in June, 1978, and again in July. Janczak did not do so because he wanted to continue to work with the appellant and give him a chance to improve.

6. Appellant's supervisor began keeping notes regarding the appellant's infractions of work rules and his counseling of appellant as of July 5, 1978.

7. Appellant's supervisor prepared and discussed with the appellant the University of Wisconsin - Milwaukee Monthly Summary of Probationary Employee's Progress for the months of June, July, and August 1978 (Respondent's Exhibit 4). Appellant received no rating of "unacceptable," the poorest of five possible ratings, and showed improvement over the three months in some of previously unsatisfactory areas while lapsing

into an unsatisfactory rating in others.

8. In both August and September, 1978, when discussing monthly evaluations with him, the supervisor orally advised the appellant that he would be terminated if he didn't show improvement.

9. Appellant's Monthly Summary of Probationary Employee's Progress for the month of September, 1978, was not a true indication of his work at the time in that his supervisor evaluated him more favorably in the hopes of motivating the appellant to improve. All elements were rated satisfactory except "quality of work," which had been satisfactory in the three previous evaluations, and "work habits," which had been unsatisfactory once before. The comment section noted that it was the seventh month of the training period and the appellant had not brought in any course material. This evaluation was discussed with the appellant on October 10, 1978.

10. Appellant was on vacation the week of October 16, 1978, and returned to work on October 23, 1978, at which time he received the termination letter dated October 19, 1978.

11. While appellant was employed as a trainee the Heating Plant superintendent, appellant's supervisor, assigned his daily work at the beginning of the shift. Appellant's duties consisted of cleaning boilers, changing valves, preventive maintenance of compressors, steam pumps and turbines, including changing oil and taking pressure readings, sweeping floors, and general clean-up. Most of the time appellant did not work under direct supervision.

12. The formal training program (Commission's Exhibit 4) was very

informally implemented. Neither the appellant nor Spencer Schaller, the other trainee, was aware of having been assigned to an experienced power plant operator for training, as specified in the training program. They sought help from experienced employes on their own initiative when they needed assistance.

13. Appellant's knowledge of the work was good and he was able to perform the tasks assigned. No one ever complained to him about his work.

14. None of the power plant operators with whom appellant worked were called as witnesses to provide evidence of appellant's loafing and the allegation that "they had to build a fire under him to get him to do the things he was supposed to do," as appellant's supervisor testified in regard to his lack of initiative.

15. One senior power plant employe who had worked with the appellant for one week while the appellant was an LTE found him willing to perform and learn the duties asked of him.

16. The training program required that the trainees successfully complete an independent study (correspondence) course on Steam Plant Operation offered by the UW-Extension, which consisted of 16 written assignments. The power plant superintendent (appellant's supervisor) was to review the completed assignments after they had been graded and returned to the trainee and to discuss them with the trainee.

17. Appellant and Schaller, who also began his training on March 13, 1978, received some of the course materials in August, 1978, but did not receive the textbook until September, 1978.

18. Appellant had completed 2 or 3 assignments prior to his termination but had turned none into his supervisor as of October 10, 1978. They had been returned to him with a passing grade while he was on vacation the week of October 16 - 22, 1978.

19. At the time of appellant's termination, Schaller had also completed 2 or 3 lessons.

20. Employees at the Heating Plant were permitted one personal telephone call per day, at any time during working hours. If more were necessary, the supervisor would authorize them upon request. Because the plant phone needed to be left open for incoming emergency calls regarding service, employees went to an adjacent building to make calls, where they were also permitted to go to get cans of soda.

21. There was a problem with all employees in the Heating Plant relative to personal phone calls; it was not limited to the appellant.

22. The violation of the work rules for which appellant was terminated, namely taking extended breaks, resting at the substation, showering early, and leaving the work area without permission, were substantially similar to the infractions of several of his co-workers, including his fellow trainee.

23. In dealing with the appellant, the supervisor did not follow his avowed uniform treatment of all employees, including trainees, who violated work rules, namely for a first offense, point out that the action was a violation; second offense, tell employee not to repeat it; third offense, give the employee an oral warning; after that, to give the employee a letter of reprimand, then a suspension, then termination.

24. Schaller and a permanent employe were given a one-day suspension for taking off early to go to the lakefront without permission.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to hear this appeal pursuant to §§230.45(1)(f) and 111.91(3), Stats. and pursuant to Article IV, §10 of the collective bargaining agreement between the state and the American Federation of State, County, and Municipal Employes, Council 24, Wisconsin State Employes Union, AFL-CIO. In re Request of AFSCME, Council 24, WSEU, AFL-CIO, for a Declaratory Ruling, 75-206-PC, 8/24/76. Dziadosz, Davies, Ocon, and Kluga v. DHSS, 78-32-PC, 78-89-PC, 78-108-PC, and 78-37-PC, Interim Decision, 10/9/78.

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

3. The appellant has successfully carried this burden and has demonstrated that the respondent's action in terminating his probationary employment was arbitrary and capricious.

4. The respondent's action in terminating the appellant must be rejected and the matter is remanded to the respondent agency for action consistent with this decision.

OPINION

The Personnel Commission will take official notice of the relevant Wisconsin Statutes, the Wisconsin Administrative Code, and the collective bargaining agreement between the state and Council 24 of the Wisconsin

State Employees Union, AFL-CIO.

In the course of the hearing in this matter, the hearing examiner deferred ruling on the objection to testimony concerning whether or not a copy of the letter of termination was sent to the union. The hearing examiner now finds that this testimony was irrelevant and should be stricken from the record.

Section 230.28(2), Stats. provides that the supervisor shall complete a performance evaluation of a probationary employe's work, under section 230.37, Stats., which shall be in writing and shall indicate whether or not the employe will be retained; further, a copy should be given to the employe at a reasonable time before the completion of the probation.

It is true that the Secretary of the Department of Employment Relations has not yet established a uniform employe performance evaluation program pursuant to s. 230.27, Stats. However, at no time was the appellant given an evaluation in writing advising him that he would be terminated. In fact, his last evaluation was deliberately calculated to show improvement over the previous months and to motivate him to better performance. The supervisor's only written comments concerned the correspondence course, ending with the statement, "I wonder about his attitude, if it will change once on permanent status."

That evaluation was discussed with the appellant on Tuesday, October 10, 1978. The following week, beginning October 16, the appellant was on vacation, and he returned on Monday, October 23, 1978, to be given the termination letter dated October 19, 1978. It was readily apparent that Terence Vaughn, to whom appellant's supervisor reported, had wanted the appellant fired in June, that the appellant's supervisor was trying to encourage the appellant and give him a chance to salvage his job and successfully complete the training period. One can only

conjecture as to what precipitated the supervisor's decision to terminate the appellant while he was on vacation. Needless to say, his last evaluation, inaccurate though it may have been, gave the appellant no clue to the "welcome" he would receive on his return from vacation.

In Jabs v. State Board of Personnel, 34 Wis. 2d 243, 251 (1967), the Wisconsin Supreme Court defined the phrase "arbitrary and capricious action" as: "either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful, and irrational choice of conduct."

Applying the Jabs standard to the instant case, it must be concluded that the action of the respondent employer was arbitrary and capricious. The abrupt termination of the appellant so soon after having encouraged him with an evaluation indicative of improvement clearly was an action so unreasonable as to be without a rational basis.

The capriciousness of the appellant's termination is compounded by the fact that the appellant's co-trainee was not treated similarly for the same infractions and that the co-trainee has been given a one-day suspension whereas the appellant received no formal discipline prior to termination. This disparate treatment is particularly unreasonable in the light of the supervisor's testimony that he followed the same system of progressive discipline in dealing with all persons he supervised, including probationary employees.

Further, it was unreasonable and without a rational basis to fault the appellant for failing to turn in corrected correspondence course assignments by the end of September when he had not received the textbook

until that month.

The weight of the credible evidence in this case clearly supports the conclusion that the respondent's termination of the appellant was arbitrary and capricious, and respondent's action is rejected. It is determined that the appellant should be reinstated in the training program with back pay to the date of discharge.

ORDER

IT IS HEREBY ORDERED that the action of the respondent is rejected and the matter is remanded to the University of Wisconsin - Milwaukee for action consistent with this opinion.

Dated: _____

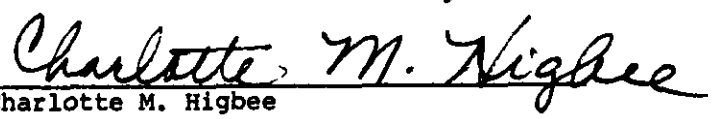
Sept 5

, 1979.

STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commissioner

CMH:jmg

7/12/79