

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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CARL WILKE,

Appellant,

v.

PRESIDENT, University of Wisconsin,

Respondent.

Case No. 78-30

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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 26, 1977, the appellant began his employment as a Motor Vehicle Operator 1 (MVO 1) with the University of Wisconsin at Milwaukee.
- 2. The appellant's duties and responsibilities included sorting and bagging mail, loading his delivery truck, picking up and delivering mail on the UWM campus, and making trips to the local post office.
- 3. On December 22, 1977, a close friend of the appellant's was murdered. This death upset the appellant and adversely affected his work performance.
- 4. Although the appellant's work performance was initially above average, his level of performance deteriorated during the month of January in 1978. In addition to a general decline in performance during the month, the appellant experienced

the following specific difficulties between January 17 and 26:

- a. He forgot mail twice and failed to pick up stamps at the post office on one occasion.
- b. He had an accident with his mail truck. The accident involved the scrapping of a water pipe valve and resulted in a four foot long indentation in the side of the truck.
- c. He refused to answer questions directed to him by campus police in their investigation of this accident.
- d. He became agitated when asked by his supervisor to come in one hour and thirty minutes early on one morning. He refused to give her a definite answer as to whether or not he would report at the requested time.
- e. He failed to handle an incident concerning missing mail to the satisfaction of his supervisor.

5. The appellant's employment was terminated on January 27, 1978, after a conference between the appellant and his supervisors regarding the difficulties listed above. The appellant was on probation at the time of the discharge.

6. The appellant did not tell his supervisors that his work performance had suffered because of his reaction to the death of his close friend.

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

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 AFSCME, 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.

While the time period during which the appellant experienced the majority of his performance difficulties was relatively short, the appellant does admit that his performance deteriorated during this time and the appellant's work record does contain incidents from that period of time which provide a rational basis for a decision to terminate. Certainly, the appellant cannot successfully argue that the facts of the case do not show any rational basis which would support a termination decision. Nor can he successfully argue that the respondent did not adopt a considered choice of conduct.<sup>1</sup> Consequently, the decision to terminate the appellant's employment was not arbitrary and capricious.

In his appeal, the appellant has asserted that his work performance suffered as a result of his being despondent over the death of a close friend. He asserts that his termination was unjust because his supervisors were not responsive to his situation. While the record does show that the appellant's work performance was adversely affected to some extent by his reaction to the death of his friend, the record does not show that the appellant ever informed his supervisors that this personal loss was the cause of any of his performance difficulties. Nor does the record show that these supervisors were informed of this cause by other sources. The respondent cannot be faulted here for failing to consider and respond to information which it did not know and had no duty to inquire about. The termination cannot be deemed arbitrary on this basis.

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1. The record shows that the respondent analysed various parts of the appellant's work record prior to making the termination decision. In addition, the appellant was given an opportunity to explain his performance difficulties to the respondent in the January 27 meeting.

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Thus, the appellant has failed to carry his burden of proof. He has not shown the termination to be either an unconsidered choice of conduct or a choice which is not supported by a rational basis. Consequently, the decision of the respondent must be affirmed.

ORDER

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

Dated: June 16, 1978

STATE PERSONNEL BOARD

  
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James R. Morgan, Chairperson