STATE OF WISCONSIN PERSONNEL COMMISSION

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GREGORY DZIADOSZ,               *
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              Appellant,        *
                                *
v.                              *
                                *
Secretary, DEPARTMENT OF        *
HEALTH AND SOCIAL SERVICES,     *
                                *
              Respondent.       *
                                *
Case No.  78-32-PC              *
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INTERIM
DECISION

NATURE OF THE CASE

This is an appeal of a probationary termination. The appellant filed three motions prior to the hearing that had been scheduled in this matter, the parties agreed to limit the hearing to those motions, and accordingly this decision addresses those motions.

FINDINGS OF FACT

1. The appellant commenced employment as a Psychologist 3 at the Central Wisconsin Center effective January 31, 1978, on a probationary basis.

2. The appellant's employment as aforesaid was terminated effective March 31, 1978.

3. Prior to March 13, 1978, the appellant had not been told by his supervisors, Ms. Lomas and Dr. Song, or by anyone else, that anyone was displeased with his work performance in any way.

4. On March 13, 1978, the appellant met with Ms. Lomas and Dr. Song who told him that his two-month probationary evaluation rated his job performance as unacceptable.

5. Appellant at that time was presented with a written evaluation that specified five areas considered to be unacceptable as follows:

> "(1) Needs to improve rapport with staff.
> (2) Needs to spend considerable [sic] more time on each ward in order to become familiar with residents and staff.
> (3) Personal communication with supervisors needs improvement.
> (4) Must demonstrate a cooperative attitude toward all other staff including peers and para professionals.
> (5) Needs to effectively accomplish program goals."

6. The appellant asked his supervisors for specifics or examples with respect to the aforesaid unacceptable areas.

7. The supervisors responded or failed to respond as is set forth in Appellant's Exhibit 2, affidavit dated October 19, 1979, paragraphs 6-11, which paragraphs are incorporated by reference as if fully set forth herein. A copy of this exhibit is attached hereto.

8. The appellant was notified on or about March 27, 1979, by a letter dated March 27, 1978, from the appointing authority and institution director, Dr. Scheerenberger, as follows (Respondent's Exhibit 1):

> "This is to inform you of my intent to terminate your probationary employment effective March 31, 1978, because your overall work performance is unsatisfactory.
> If you wish to discuss this matter further, Ms. Duffield Lomas and Dr. Song will be available to see you at 3:00 p.m. on Wednesday, March 29, 1978 in Dr. Song's office."

9. The appellant did meet as aforesaid with Ms. Lomas and Dr. Song and requested specific reasons for his termination.

10. While the supervisors indicated that they were not required to give specific reasons, they proceeded to discuss with the appellant, indicating they were a basis for termination, some of the points of perceived inadequate performance which were discussed on March 13, 1979.

11. In addition, several new reasons, as set forth in paragraph 15 of Appellant's Exhibit 2, which are incorporated by reference as if fully set forth, were raised by the supervisors. The appellant had had no previous notice of these matters.

12. A probationary service report, Respondent's Exhibit 3, listing areas of unsatisfactory performance and indicating that the appellant's employment would be terminated, was prepared and copies were given to the appellant and the Division of Personnel, prior to the effective date of termination of appellant's probationary employment.

13. Prior to the hearing in this matter, which was held on October 26, 1979, an investigator for appellant's attorney as part of her attempt to investigate this matter attempted to interview Ms. Lomas on October 22, 1979. Ms. Lomas stated that she could not talk to her unless she first received approval from Dr. Scheerenberger.

14. On October 23, 1979, the investigator called Dr. Scheerenberger who informed her that she would not be able to discuss the case with Ms. Lomas and Dr. Song before the hearing and that he had so informed the witnesses.

15. Ms. Lomas herself had not wished to voluntarily discuss the case with the investigator.

16. The investigator did not interview Ms. Lomas or Dr. Song.

17. The appellant's attorney did not attempt any formal discovery (e.g., depositions or interrogatories) with respect to Ms. Lomas or Dr. Song, nor was contact made with respondent's attorney in an attempt to work out formal or informal discovery procedures with respect to these witnesses.

CONCLUSIONS OF LAW

1. The Commission has the authority to determine the issues raised by the appellant's motion for reinstatement on the grounds of interference with his investigation or preparations for hearing.

2. The respondent's actions prohibiting their employes from engaging in oral interviews with the appellant's attorney's investigator constituted an inappropriate interference with appellant's hearing preparations.

3. The appellant is not entitled to reinstatement as a consequence of the immediately preceding conclusion.

4. The respondent in its handling of appellant's termination has not failed to comply with § Pers. 13.09, WAC.

5. The respondent in its handling of appellant's termination has not failed to provide adequate notice of the reasons for termination and is not estopped from presenting proof with respect to any of the matters set forth in appellant's affidavit dated October 19, 1979, Appellant's Exhibit 2.

OPINION

I. FIRST MOTION

By motion dated October 22, 1979, and filed October 24, 1979, the appellant moved for:

> " ... an Order directing his immediate reinstatement because of the intentional interference with the investigation being conducted by the appellant, through counsel ..."

In Basinas v. DHSS, Case No. 77-121 (6/16/78) the Personnel Board dealt with a somewhat similar factual situation. There the

agency had instructed its employes not to participate in prehearing oral interviews with the appellant's attorney prior to the hearing. In that case there was no indication that the employes in question were supervisory or were unwilling personally to submit to interviews. The Board held that the availability of formal discovery procedures did not support the conclusion that an agency could prevent its employes from participating in informal discovery procedures such as oral interviews. The Board also held that it had the authority to regulate this facet of prehearing procedure under §§16.05 and 227.09(1), Stats. (1975). This holding was confirmed by the Commission in Jensen v. UW, Case No. 78-48-PC (7/5/79).

The facts of this case are somewhat different from the facts in Basinas in that here one of the prospective witnesses stated that she herself had not wished voluntarily to discuss the case with the investigator. However, this distinction is not determinative. This circumstance undoubtedly is present in many cases with respect to supervisory employes, particularly in cases such as this where there is or is likely to be what amounts to an adversary relationship with the terminated employe/appellant. While the fact that the employes/ witnesses were not unwilling was mentioned in the Basinas decision, this was pointed out to underscore that unwillingness was not a potential argument rather than to indicate that the employes' willingness to cooperate was an absolute criterion. If anything, the factor of voluntariness would be more significant with respect to a non-supervisory employe.

As was pointed out in both the Basinas and the Jensen decisions, there are strong policy factors favoring a decision which facilitates informal discovery procedures. In the Basinas case, the Personnel Board noted:

> " ... the prohibition on oral interviews imposes an additional burden and expense on the appellant. Further, the policy impact beyond the confines of this case of such a restriction is substantial. There are no provisions under current law for the reimbursement of legal fees and expense to appellants with cases before this board. Many appellants pursue their appeals without the aid of counsel. Under these circumstances, a blanket prohibition by the employer of all informal interviews with its employes would seriously handicap the ability of many people to prepare for hearing."

The power to regulate this aspect of practice before the Commission is, as was pointed out by the Board in the Basinas case, conferred by Chapter 227 of the Statutes. A hearing examiner has the authority pursuant to §227.09(1)(e), to "Regulate the course of the hearing," and, pursuant to §227.09(1)(g) to "Dispose of procedural requests or similar matters."

While in the view of the Commission the authority to decide issues relating to disputes over the interviewing of prospective witnesses is subsumed within this general language, such authority also could be considered to be within the implied powers of the Commission. As a general rule, administrative agencies:

> " ... in addition to the powers expressly conferred on them by organic or legislative enactment, such officials and bodies, in the absence of restricting limitations of public policy or express prohibitions, or express provision as to the manner of exercise of the powers given, have such implied powers, and only such implied powers, as are necessarily inferred or implied from, or incident to, or reasonably necessary and fairly appropriate to make effective the express powers granted to, or duties imposed on, them."
> 73 CJS, Public Administrative Bodies and Procedure §50.

The authority to decide the kind of dispute presented by this motion is integral to the Commission's conduct of hearings of contested cases.

There is no basis for appellant's request for immediate reinstatement, particularly considering that the hearing on the merits has yet to be held. However, the Commission does feel it is appropriate to make it clear its opinion that the respondent should make its employes available for oral interviews with the appellant's attorney's investigator, upon reasonable notice and under reasonable conditions.

II. SECOND MOTION

By motion dated and filed October 24, 1979, the appellant moved for an Order as follows:

> " ... directing his immediate reinstatement because of the Respondent's failure to comply with Wis. Adm. Code section Pers. 13.09.
>
> Said provision requires written 'reasons' to be provided at the time of dismissal. It requires, further, that a copy of said dismissal notice be sent to the Director. Neither was done in the case at bar."

In the opinion of the Commission the findings support a conclusion that the respondent complied with § Pers. 13.09, WAC. The appellant was informed on March 13, 1978, that his two-month probationary evaluation rated his job performance as unacceptable, and he was given a copy of a written evaluation. He further was notified by letter, Respondent's Exhibit 1, that his probationary employment would be terminated because "your overall work performance is unsatisfactory." Finally a probationary service report, Respondent's Exhibit 3, which listed areas of unsatisfactory performance and indicated that the

appellant's probationary employment would be terminated, was prepared. While there was no direct testimony that the appellant did or did not receive a copy of the latter document, or that it was sent to the Division of Personnel, it shows on its face distribution both to the employe and the State Bureau (now Division) of Personnel. This gives rise to an inference, which was unrebutted, that the document was distributed as indicated. Furthermore, there is a presumption of administrative regularity, see, e.g., 73 C.J.S. Public Administrative Bodies and Procedures §63, that copies of the form were distributed in accordance with legal requirements, and there was no evidence presented to rebut this presumption.

III. THIRD MOTION

In a motion dated October 17, 1979, and filed October 19, 1979, the appellant moved for an Order:

> " ... directing his immediate reinstatement or, alternatively, to limit the proof in light of the considerations raised by the "AFFIDAVIT" of Gregory M. Dziadosz ...."

The essence of the grounds for this motion is that the reasons given for termination were not presented in sufficient detail and that at the time of termination, at the meeting on March 29, 1978, certain specific reasons for termination were advanced which were in addition to any specific reasons that had been raised theretofore.

With respect to a statement of reasons for probationary termination, state law only requires that the appointing authority notify the employe "of the reasons for dismissal," § Pers. 13.09(2), W.A.C. The Personnel Board held in Corcoran v. UW, Case No. 76-174 (6/16/78), that

constitutional due process does not require in probationary employment termination proceedings as detailed notice as is required in permanent employment termination proceedings. This holding was affirmed on appeal, see Corcoran v. Wisconsin State Personnel Commission, Dane County Circuit Court No. 164-166 (11/6/79).

In the opinion of the Commission, the written documentation furnished the appellant (evaluation, Respondent's Exhibit 2; Probationary Service Report, Respondent's Exhibit 3; and the letter of termination, Respondent's Exhibit 1), constitute sufficient notice of the reasons for termination under both state law and constitutional guarantees of due process.

The appellant's position in connection with this motion would require an agency to provide a probationary employe a detailed set of specific reasons for termination which would include all of the specific instances of poor performance upon which the respondent bases his or her decision to terminate. This is at least as much and possibly more, in some cases, than is required in a "just cause," permanent employment termination. As is set forth in the Corcoran decisions cited above, the nature of the probationary period of employment and the limited nature of the substantive rights afforded a terminated probationary employe before the Commission are such that the full scope of notice requirements for permanent employes is not required in the case of probationary employes. This is particularly so in cases like this where the employe was not discharged for particular acts of misconduct such as absenteeism.

The appellant asked for, and to some extent was given, some specific details of the areas of poor performance at the meetings with his supervisors on March 13th and 29th, 1978. That the respondent supplied additional details or examples at the second meeting neither constitutes defective notice nor estops the respondent from presenting evidence on these additional matters at the hearing on the merits. If the details were not required as part of the notice in the first instance, the provision of additional reasons cannot be considered improper.

Parenthetically, it would appear that the appellant could utilize discovery to ascertain in advance of hearing what details or examples of allegedly poor performance the respondent intends to utilize at the hearing on the merits.

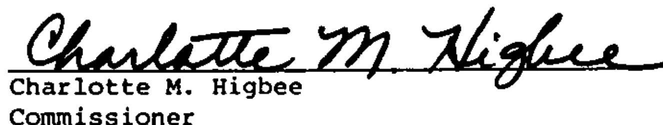
ORDER

I. The appellant's motion for an Order directing immediate reinstatement, which was dated October 22, 1979, and filed October 24, 1979 is denied.

II. The appellant's motion for an Order directing immediate reinstatement, dated and filed October 24, 1979, is denied.

III. The appellant's motion for an Order directing immediate reinstatement or in the alternative to limit the respondent's proof dated October 17, 1979, and filed October 19, 1979, is denied.

Dated: Feb. 15, 1980. STATE PERSONNEL COMMISSION



Charlotte M. Higbee
Commissioner

AJT:jmg
1/8/80