STATE OF WISCONSIN PERSONNEL COMMISSION

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JOHN FULLER,

Appellant,

v.

UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 78-47-PC

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DECISION
AND
ORDER

This matter is before the commission for review of a Proposed Opinion and Order of a hearing examiner pursuant to §227.09(2), Stats. The commission has reviewed the objections and arguments of the respondent. A copy of the Proposed Opinion and Order is attached hereto. The commission adopts as its Findings of Fact the findings contained in the Proposed Opinion and Order. The commission adopts the Proposed Conclusion of Law numbered one and rejects the Proposed Conclusions numbered two through eight, rejects the Proposed Opinion, rejects the Proposed Order, and substitutes the following in their place. The reasons for this action by the commission are set forth in the Opinion.

CONCLUSIONS OF LAW

1. This case is properly before the commission pursuant to §§230.45 and 111.91(3), Stats.

2. Appellant, as a probationary employe, is not an "employe" within the meaning of §230.37(2), Stats.

3. Section 230.37(2), Stats. does not apply to the appellant's termination.

4. The appellant has not met his burden of proving that his termination

was arbitrary and capricious.

5. The termination of appellant's probationary employment was not arbitrary and capricious.

OPINION

As pointed out by the Proposed Opinion, the "decision of this case hinges on whether appellant is covered by §230.37(2), Stats.," as there was no question that the appellant was unable to perform the duties and responsibilities of his job. This would provide a basis for termination of probationary employment in the absence of a restriction imposed on the employer by §230.37(2).

The Proposed Opinion and the Conclusion that §230.37(2) applies to probationary employes is based primarily on the definition of "employe" in the Wisconsin Administrative Code, § Pers. 1.02(6):

> "Except as provided in Wis. Adm. Code Chapter Pers. 24 and Subsection (6n) "employe" means any person holding a position in the classified service."

However, it should be noted that the initial section of § Pers. 1.02 states that the definitions found thereunder "are definitions for terms used in these rules." (Emphasis supplied). There are other definitions in chapter Pers. which are not so limited and which clearly provide definitions for terms referred to in the statutes but not therein defined. See, e.g., the definition of "transfer" set forth at § Pers. 15.01. Therefore, the definition of "employe" contained at § Pers. 1.02(6) should be applied only very cautiously to statutory uses of the term, and not where the statutes, while not providing an explicit definition, are inconsistent with the administrative code definition.

Prior to the amendments contained in Chapter 196, Laws of 1977,

the statutory subsection in question [§230.37(2)] was part of §16.32, Stats. (1975). Section 16.32(1) provided as follows:

> "In cooperation with appointing authorities the director shall establish a uniform employe work planning and progress evaluation program, incorporating the principles of management by objectives, to provide a continuing record of employe development and, when applicable, to serve as a basis for decision-making on employe pay increases and decreases, potential for promotion, order of layoff and for other personnel actions."

Like Subsection (2), this provision does not contain a definition of "employe" and the omission creates at least a potential for ambiguity.

With the enactment of Chapter 196, Laws of 1977, Section 16.32 was renumbered and the following language was added to §230.37(1) by §59, Chapter 196:

> "Similar evaluations shall be conducted during the probationary period but may not infringe upon the authority of the appointing authority to retain or dismiss employes during the probationary period."

Thus the legislature amended §16.32(1), Stats. (1975), to explicitly include probationary employes, while not so amending §16.32(2). Given the conjunction of these provisions in the same section of the statutes and their original usage of the undefined term "employe," this amendment of (1) but not (2) is significant and supports a conclusion that (2) does not include probationary employes.

There are other factors which support this conclusion. In §230.28, Stats. (1975), "probationary period," §230.28(1)(a), provides in part "Dismissal may be made at any time during such period." This is not made conditional on a determination that there is no incapacity under §230.37(2), nor is there any cross reference to that subsection. On the other hand, there is specific reference in §230.28(2) to the completion

of a performance evaluation under §230.37. The significance of the absence of a cross-reference or conditional statement in §230.28(1)(a) is underlined by the fact that this provision has long been interpreted as authorizing discharge at will during the probationary period. See, e.g., 28 Opinions of the Attorney General 34 (1939).

A third factor weighing against the proposed conclusion is the reference in §230.37(2) to a number of alternative transactions to be used in lieu of dismissal from employment. These alternatives, transfer, demotion, or placement on a part-time service basis, are not statutorily defined but under the administrative code provisions, chapter Pers., are not all available options for probationary employes. See §§ Pers. 15.01, 13.07, 17.01, for transfer and demotion. Presumably an employe could be placed on a part-time service basis with the restructuring of his or her own position and thus not require a movement to another position in a manner that is restricted to permanent employes. However, the commission is of the opinion that the substantial limitation of options open in the case of probationary employes under this section, while not conclusive of legislative intent to exclude probationary employes, is at least some indication of such a legislative intent.

For these reasons the commission rejects the Proposed Opinion and Conclusions two through eight, which rest on the determination that §230.37(2), applies to appellant's probationary discharge.

The commission would like to add that it disagrees with the respondent's contention that the appellant did not become incapable of performing his duties after he commenced his employment with the state. This argument is based on the theory that his incapacity was based on a congenital eye

problem. The findings are quite clear, and the commission believes they are amply supported by the record, that the incapacity was due to neck and back injuries suffered on the job. While the commission does not believe that §230.37(2) Stats. applies to probationary employes, it also is of the opinion that equitable factors would support consideration by the respondent of reemployment of the appellant in a capacity where he is capable of working.

ORDER

The respondent's action terminating appellant's probationary employment is affirmed and this appeal is dismissed.

Dated: Feb 14, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

Charlotte M. Higbee
Commissioner

AJT:jmg

2/6/79

STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN FULLER,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 78-47-PC

PROPOSED OPINION AND ORDER

NATURE OF THE CASE

This is an appeal from the termination of a probationary employee pursuant to Section 230.45(1)(f), Wis. Stats.

FINDING OF FACT

1. Appellant began working for University of Wisconsin - Madison on October 23, 1977.

2. Appellant's job classification was Building Maintenance Helper 2, a classified position, and had the working title and duties of a janitor.

3. Appellant slipped on a wet floor while checking lights during the shift starting at 10:30 PM on January 18, 1978. The time of the accident was 1:30 AM, January 19, 1978.

4. The reason the floor was wet was because of a leak in the roof of the building.

5. Appellant told a co-worker shortly thereafter that he was hurting quite bad from his neck down to his lower back. He did very little work the rest of the shift.

6. Appellant called in sick the next day, had two regular days off, and reported in sick from the injury the next scheduled work days.

7. Appellant was informed by supervisor Bender to get a doctor's slip. The doctors slip was obtained by appellant which stated appellant could not come back to work until after February 6, 1978.

8. Appellant returned to work on February 6, but left work after four hours due to pain in his lower back and neck. Appellant returned to work February 7, 1978 and left work after 3½ hours due to pain in his lower back and neck.

9. Appellant kept respondent informed of his condition by personal phone calls, letters and calls to a Code-A-Phone set up for that purpose during the period between February 27th and April 3rd.

10. In early April, the "suspense" file reminded supervisors that appellant's probation was in its final month.

11. In a letter dated April 7th, respondent notified appellant that he should furnish medical evidence of his disability or his employment would be terminated.

12. In a letter dated April 10, 1978, appellant reminded respondent of the phone calls and letters, further pointed out that he "was doubtful he would be able to do the tasks in the future since the damage is permanent." He informed respondent that if they needed more information, they should call his doctor and he furnished the phone number and name of the doctor.

13. On April 12, appellant's immediate supervisor made out his probationary report. His report recommended termination. Termination was based on appellants injury and on his quality of work. Appellant's poor quality of work was directly attributed to a congenital eyesight problem.

No other reasons except problems relating to eyesight and the injury were used in recommendation for termination.

14. In a letter dated April 18, 1978, appellant was notified that he was being terminated effective April 19, 1978, as a Building Maintenance Helper 2 because of his poor quality of work and his physical inability to perform the required duties.

15. At this time appellant was unable to perform the duties and responsibilities of his job due to the physical impairment caused by his neck and back injuries which occurred January 19, 1978, as aforesaid.

16. At no time prior to appellant's termination did the respondent attempt or make any effort to transfer the appellant to a position which required less arduous duties, to demote him, or to place him on a part-time service basis.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45 and 111.91(3) Stats.

2. Appellant is an employee under §237.37(2) Stats.

3. Respondent did not comply with §230.37(2) Stats.

4. The burden of proof is on the appellant to establish to a reasonable certainty by the greater weight or clear preponderance of the evidence that the respondent's actions were arbitrary and capricious.

5. The appellant here has met that burden of proof.

6. The discharge of the appellant was arbitrary and capricious.

7. Respondent must exercise its options under §230.37(2), Stats.

8. This transaction should be modified to rescind the termination and require respondent to attempt to exercise its options pursuant to

§230.37(2), Stats., and transfer, demote, find part-time employment or as a last resort dismiss the employee, and to make the appellant whole with respect to back pay and benefits from April 19, 1978, to the date there is final action under §230.37(2) and appellant either begins work on a new job or is dismissed. Such sum should be reduced by earnings or amounts earnable with reasonable diligence, §230.43(4), Stats., and with appellant's sick leave credits reduced in accordance with the amount of back pay received.

OPINION

The decision of this case hinges on whether appellant is covered by §230.37(2), Stats. That subsection provides:

> "When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demote the employee, place the employee on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employee from the service. The appointing authority may require the employee to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions effect pensions or other retirement benefits for which the employee may otherwise be eligible."

The key word here is "employee" and the question is whether "employee" includes "probationary employee."

Section Pers. 1.02(6), WAC, defines employee as follows:

> "Except as provided in Wis. Adm. Code chapter Pers. 24 and subsection (6n) "Employee" means any person holding a position in the classified Civil Service."

This definition by its terms would include someone like the appellant who was serving a probationary period. Chapter Pers. 24 is the code of ethics. The other provision referred to subsection (6n), relates to "temporary interchange of employees" pursuant to chapter Pers. 31. Sub-

section (6n) certainly reinforces this construction. Subsection (6n) provides:

> "In ... chapter Pers. 31 ... The term employee shall mean any person holding a position in the classified or reclassified Civil Service except those persons in the classified service who are serving on a limited term basis or who are serving an original probationary period."

This specific exclusion of probationary employees from coverage is consistent only with an interpretation of "employee" in (6) as including a probationary employee. The specific exclusion in (6n) is not consistent with an implicit exclusion in (6). The Commission must conclude that §230.37(2), Stats., is applicable to probationary employees.

With respect to the question of whether the appellant was "physically or mentally incapable of or unfit for the efficient and effective duties of his ... position." There was no dispute that the appellant was unable to perform his job due to health reasons.

Although the respondent took the position that even if §230.37(2), Stats., applies, it was complied with, it is clear that the respondent handled this transaction on the theory that §230.37(2) did not apply. The agency made no attempt to transfer or demote the appellant or place him on a part-time basis. These options were not even considered. It must be concluded that §230.37(2) was not complied with and that the termination was arbitrary and capricious.

Pursuant to §230.44(4)(c), Stats., it is appropriate to modify this transaction to comply with §230.37(2), Stats. The termination must be rescinded and the respondent must attempt to exercise the options in §230.37(2) of transfer, demotion, part-time employment or as a last resort dismiss the employee. Respondent must also make the appellant whole with

respect to back pay and benefits from April 19, 1978, to the date there is final action under §230.37(2), Stats., and appellant either begins work on a new job or is dismissed, less workers compensation and interim earnings or amounts earnable with reasonable diligence, §230.43(4), Stats., and with appellant's sick leave credits reduced in accordance with the amount of back pay received.

ORDER

The termination of appellant's probationary employment is modified and this matter is remanded to the respondent for action in accordance with this decision.

Dated: _____, 1978.

Edward D. Durkin
Commissioner

Dated: _____, 1978.

Charlotte M. Higbee
Commissioner

Dated: _____, 1978.

Joseph W. Wiley
Chairperson