OFFICIAL

STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES SOMERS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 79-127-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 termination of his probationary employment by the Department of Health and Social Services (DHSS) was arbitrary and capricious. Respondent objected to Commission jurisdiction pursuant to Art. IV, Sec. 10, inasmuch as the contract specifies the right to hearing before the Personnel Board at its discretion and the transition provisions of Ch. 196, Laws of 1977, do not provide that this discretionary jurisdiction be transferred to the Personnel Commission.

In its decision of August 30, 1979, (copy attached), the Commission overruled respondent's objection to subject-matter jurisdiction.

At the prehearing conference held on June 6, 1979, respondent raised two further objections to the Commission's jurisdiction, namely,

1. Article IV, Section 10 of the contract is void as a matter of law inasmuch as it relates to a prohibited subject for bargaining.

2. The language of Article IV, Section 10, namely "the retention or release of probationary employes, "does not apply to a situation where the employe has reinstatement rights.

These objections were held in abeyance pending hearing on the merits, which was held before Charlotte M. Higbee, Commissioner, on Sept. 4, 1979.

FINDINGS OF FACT

1. Appellant was employed by DHSS, Division of Corrections, as a Corrections Officer 1 (C.O.1) at Oakhill Correctional Institution, a minimum security facility, from December 4, 1978, until May 6, 1979. Previously he had been employed by DHSS as a Youth Counselor at the Ethan Allen School at Wales, Wisconsin.

2. By letter dated May 2, 1979, the respondent terminated appellant's probationary employment at Oakhill May 6, 1979, giving the reason that appellant was not officer material, based on an incident which occurred on April 18, 1979. Appellant then returned to his previous position at Wales, based on his reinstatement rights.

3. On April 18, 1979, appellant was working the 3:00 p.m. to 8:00 p.m. shift. He reported to the Security Cottage to get his assignment for the day; his supervisor, Dennis Eschenfeldt, assigned him to the visiting area. Normally there are regular Visiting Officer (V.O.) assignments; however the second shift was short-staffed that day, necessitating appellant's special assignment.

4. Appellant had not worked as a V.O. previously, nor had he ever been given any instructions or training regarding a V.O.'s responsibility. There were no V.O.'s at Ethan Allen School, where the residents are from 12 to 18 years of age and girlfriends who visit residents must be accompanied by an adult.

5. There are no written instructions for V.O.'s. The DHSS work rules (Resp. Exh. 8) prohibit all employes from committing acts of inattentiveness or negligence and refusal to carry out directions or instructions.

6. Appellant had consistently followed orders of his supervisors. His supervisor considered him reliable and progressing satisfactorily and did not recommend his termination.

7. The Guidelines for Inmate Population (Resp. Exh. 7), which are used as the basis for writing up conduct reports on residents, prohibit residents from voluntarily participating in any form of sexual activity with another person.

8. Kyle Davidson, who had been employed as a C.O.1 at Oakhill since February 2, 1978, was the V.O. on April 18, 1979. He directed appellant to go to the downstairs visiting area, advising him to "keep an eye" on two couples (two residents and their visitors) to make sure they did not display an excessive amount of affection.

9. The V.O. is stationed at a table inside and immediately to the left of the door, which is in the center of one side of a room of 30 x 80 feet. Given the size of the area, the placement of tables, and the number of visitors, it is possible for an incident to occur without it being observed by a reasonably diligent V.O.

10. There were from 6 to 16 people in the visiting area at various times during appellant's tour of duty, seated at tables scattered throughout the room.

11. Appellant sat at V.O.'s table some of the time, and he stood and

made rounds of the room periodically. He had a magazine which he pretended to read so as not to be "gawking" at the residents and their visitors.

12. Appellant observed and warned two residents, Kevin Bruce and Fred McDaniels, about their overly-affectionate behavior toward their visitors and subsequently made an entry concerning their conduct in the daily log book where such incidents are recorded. (App. Exh. 5) Appellant also discussed these incidents with V.O. Davidson later that evening.

13. Appellant did not observe resident Thomas Feuersthaler and his vistor engage in any sexual activity; he did walk over toward Feuersthaler because he observed Feuersthaler staring at him and "moving" a great deal.

14. After visiting hours on April 18, 1979, Jerome Fosso, a resident, told appellant he had missed a "good show." On April 19, 1979, at the request of Mike Raymond, assistant security director, Fosso prepared a written statement about the sexual activity of Feuersthaler and his friend. (Resp. Exh. 5)

15. On April 20, 1979, Larry Alberts, Oakhill Security Director, wrote up and signed an incident report citing the extreme negligence of the appellant in permitting sexual activity. Alberts did not discuss the matter with the appellant before preparing the report, which was based on information received in a discussion with V.O. Davidson and residents Fosso and Rische and purportedly, a writtten report from the wife of a resident. The appellant was never given a copy of this report.

16. The written report cited in Albert's incident report of April 20, 1979, was a letter dated April 26, 1979, from Penny D. Fosso, wife of

resident Jerome Fosso. (Resp. Exh. 6). The letter was written at Albert's request, which was transmitted to her via her husband.

17. Sometime after April 20, 1979, Alberts discussed the matter with the appellant at his request. Subsequently, Alberts conducted a pre-disciplinary meeting, the purpose of which was to determine the severity of the situation. Two other supervisors and the appellant were present. Following this meeting Alberts recommended to the Oakhill superintendent that there was gross negligence on the part of the appellant and that he be terminated.

18. On April 21, 1979, residents Bruce and Feuersthaler were given conduct reports concerning the April 18th incidents, signed by V.O. Davidson as complainant. Davidson did not prepare the conduct reports; they were given to him for signature by the second shift supervisor, Pat Arntz, C.O.5, who asked Davidson if they conformed to the information he had been given by others. Although he did not observe the conduct, Davidson signed the reports because there had been previous problems with those two residents.

19. Based on the April 18th incidents, Security Director Alberts intended to have Bruce and Feuersthaler removed from Oakhill. Following hearings before a disciplinary committee, each resident received an "adjustment" discipline. Subsequently they were returned to a maximum security institution.

20. Appellant's conduct on April 18, 1979, conformed to the usual practices and procedures followed by Visiting Officers at Oakhill.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to hear this appeal pursuant to ss. 230.45(1)(f) and 111.9.(3) Stats., and pursuant to Article IV, s. 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-P.B., 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 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 remanded to the respondent agency for action consistent with this decision.

OPINION

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 this standard to the instant case, it must be concluded that

the respondent's action was arbitrary and capricious. The testimony is uncontraverted that the appellant did not observe Feuersthaler engage in any sexual activity; that he did warn Bruce and one other resident about their behavior, recorded the incidents in the daily log book, and discussed them with Davidson, a regular second-shift Visiting Officer; that this was appellant's first assignment as visiting officer; that he had received minimal instructions; and that his conduct was consistent with usual practices and procedures followed by visiting officers at Oakhill. Under all these circumstances it was indeed "so unreasonable as to be without a rational basis" for the respondent to denominate appellant's conduct as gross negligence and to base the decision to terminate his employment on his "failure to meet the standards required for Officers of this institution." (Resp. Exh. 1)

It is true that the possibility that reasonable people may disagree does not render an action arbitrary and capricious. However, the Commission can inquire into the soundness of the reasoning by which an agency reaches its conclusions if only to ascertain that the conclusions are rationally supported. (See Monnier v. US. Dept. of Transp., 465 F. Supp. 718, 7th Circuit, 1979).

To terminate the appellant for failure to observe the surreptitious sexual behaviour of a third resident, when appellant had followed normal procedures for visiting officers as well as the limited instructions he was given, was an irrational action on the part of the respondent.

ORDER

IT IS HEREBY ORDERED that the action of the respondent is rejected and that the appellant be reinstated as a Corrections Officer 1, retroactive to May 6, 1979. The matter is remanded to the Department of Health and Social Services for action consistent with this opinion.

Dated June 27, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee

Charlotte M. Higbee
Commissioner

Gordon H. Brehm

Gordon H. Brehm
Commissioner

CMH:mgd
5/12/80

CONCURRING OPINION

I concur with the result but for reasons not specifically expressed in the majority's findings.

I think it significant that the majority failed to make a finding on the issue of the alleged occurrence of the prohibited sexual activity, but found that appellant did not observe such activity. Further, that appellant's conduct of "keep[ing] an eye" on residents and visitors to prevent sexual misconduct, was found acceptable by the majority. It is inconceivable to me that appellant's conduct could be considered reasonable if in fact he failed to observe an inmate and visitor engaging in the sexual activity of masturbation and fellatio for five to ten minutes while sitting at a table in plain view of the appellant.

I come to the conclusion that the examiner doubted the credibility of respondent's two key witnesses, who allegedly observed the prohibited sexual activity and appellant's conduct during that time.

Dated June 27, 1980

STATE PERSONNEL COMMISSION

Donald R. Murphy
Commissioner

DRM:mew

STATE OF WISCONSIN PERSONNEL COMMISSION

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JAMES SOMERS,

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v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 79-127-PC

INTERIM DECISION AND ORDER

* * * * * * * * * * * * * * * * * *

This matter is before the Commission on the following jurisdictional objection (see conference Report dated June 18, 1979):

> "3. The Personnel Commission does not have jurisdiction under Article IV, Section 10, inasmuch that the contract specifies the right to hearing before the Personnel Board at its discretion and the transition provisions of Chapter 196, Laws of 1977, do not provide that this discretionary jurisdiction be transferred to the Personnel Commission."

In a declaratory ruling dated August 24, 1976, in Case No. 75-206, the Personnel Board held that jurisdiction over this matter was based on §§16.05(1)(h) and 111.91(3), Stats. (1975). The latter subsection provided in part:

> "The employer may bargain and reach agreement with a union ... to provide for an impartial hearing officer to hear appeals ... [which] shall be reviewed by the personnel Board...."

In Chapter 196, Laws of 1977, §16.05(1)(h) was renumbered to §230.45 (1)(h), see §122, Chapter 196, while §111.91(3) was amended so that it now reads "reviewed by the personnel commission under §230.45(1)(f)," See §93, Chapter 196. In the opinion of the Commission it is not significant that the contract, which is for a term of approximately

two years, and which was negotiated before the passage of Chapter 196, refers . in Article IV §10, to the Personnel Board.

ORDER

The respondent's objection to subject-matter jurisdiction set forth above is overruled.

Dated: August 30, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Charlotte M. Higbee
Commissioner

AJT:jmg

8/27/79