

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 DOUGLAS WEGNER,
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 Appellant,
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 v.
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 UNIVERSITY OF WISCONSIN,
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 Respondent.
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 Case No. 79-14-PC
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DECISION
 AND
 ORDER

This matter is before the Commission following the promulgation of a recommended decision by Commissioner Edward Durkin acting as hearing examiner, a copy of which is attached. The Commission has consulted with the hearing examiner.

The Commission adopts and incorporates by reference the proposed findings with the following addition:

12. The appellant was sent a letter dated January 4, 1979, from Mark Rehrauer, UW-Whitewater personnel director and appointing authority, notifying the appellant of the termination of his employment for violation of work rules and including, in part, the following paragraph:

"The violations of work rules during the four months [of probation] on absenteeism are reflected in the time sheets which reflect the use of sick leave as it accrues and additional time off without pay. The poor judgment is reflected in horseplay and other action at work, which has been shown as a lack of interest in quality of your work unless under constant supervision."

Appellant's Exhibit 1, transcript, p.103.

The Commission adopts and incorporates by reference the Conclusions of Law numbered 1 - 5. The Commission rejects Conclusion #6 and the

Opinion and Order and substitutes the following Conclusion, Opinion and Order. The reasons for this change are as set forth in the following Opinion.

CONCLUSIONS OF LAW

6. The appellant has not satisfied his burden of proof.

OPINION

The hearing examiner's analysis is summarized in the last paragraph on page 5:

"In summation, it is clear that appellant's job performance was below the standards required by the University and that the respondent had ample opportunities to bring these deficiencies to the attention of the appellant. Not only did they fail to consult and warn appellant at the time he was performing below par, but respondent even went so far as to ignore and violate the provisions of the state statute found in §230.28(2). This violation of the statute has no reasonable basis and such action must be considered arbitrary and capricious."

Section 230.28(2), Stats. (1977), includes in part, the following:

"A probationary employe's supervisor shall complete a performance evaluation under §230.37 of the employe's work ... a copy of the evaluation shall be given to the employe at a reasonable time before the completion of the employe's probation." (emphasis supplied)

Thus, the performance evaluation required by §230.28(2) is a performance evaluation "under §230.37." Section 230.37 provides in part:

"(1) In cooperation with appointing authorities the secretary shall establish a uniform employe performance evaluation program 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 pertinent personnel actions. 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." (emphasis supplied)

The underlined language was added by the legislature in Chapter 196, Laws of 1977. In the opinion of the Commission this language compels the conclusion that the requirement for such evaluations during the probationary period is directory and not mandatory in the context of a review of a probationary termination. The underlined language would negate a terminated probationary employe's argument that the termination was improper solely because of a favorable evaluation, because no evaluation was done, or because it was not given to the employe before the termination.¹

The Commission notes that, in compliance with § Pers. 13.09(2), Wis. Adm. Code, the appellant was given a written two weeks notice of termination which included a statement of reasons for the termination. Although this statement of reasons was not as detailed as the employe evaluation report, it did outline the highlights of that report.

Although the Commission does not condone the failure of management to have given a copy of the employe evaluation report to the employe, it cannot conclude, in light of all the facts and circumstances of this case, and the specific language of §230.37(1), Stats. (1977), that the termination of appellant's probationary employment was arbitrary and capricious.²

¹The Commission also notes that no rules with respect to a uniform employe performance evaluation program have been promulgated by the DER secretary, which raises a question whether literal compliance with §230.37(1) would be possible in any event.

²Although §230.37(1) is directory in this context, a violation of the statute could be an element of a conclusion of arbitrary and capricious action in a given case if other factors were present.

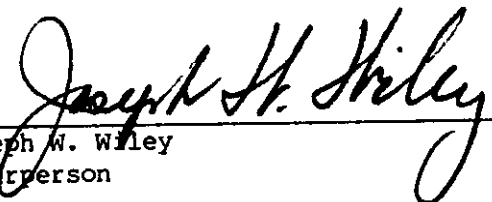
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ORDER

The action of the respondent terminating appellant's probationary employment is sustained and this appeal is dismissed.

Dated: Sept 14, 1979.

STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commissioner

AJT:jmg

9/7/79

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 DOUGLAS WEGNER, *
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 Appellant, *
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 v. *
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 UNIVERSITY OF WISCONSIN, *
 *
 Respondent. *
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 Case No. 79-14-PC *
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PROPOSED
OPINION
AND
ORDER

NATURE OF THE CASE

This is an appeal from the termination of a probationary employe pursuant to §230.45(1)(f).

FINDINGS OF FACT

1. Appellant began working for the University of Wisconsin - Whitewater on August 14, 1978, as a BMH 2.
2. On August 23, 1978, appellant was written up by his immediate supervisor for loafing. This note was not put into appellant's personnel file, nor was appellant notified he was in violation of any rule.
3. Appellant was written up for washrooms not being properly cleaned on September 26, 1978. This note was not put into appellant's file, nor was appellant instructed he was being reprimanded.
4. On October 13, 1978, appellant was written up for not properly cleaning a rug. The note was not put into the file, nor was appellant notified he was reprimanded.
5. On December 1, 1978, appellant was written up for running, yelling, and generally goofing off. The note was not put into his personnel file, nor was appellant notified he was being reprimanded. Appellant's

co-worker at the time who was also running and yelling was not written up.

6. On December 14, 1978, appellant was written up for "horsing around" while moving tables. The note was not put into his personnel file, nor was appellant notified that he was being reprimanded.

7. On December 15, 1979, an EMPLOYEE EVALUATION REPORT was made out on appellant by his immediate supervisor. The overall evaluation was that appellant was unsatisfactory. Included on the form is the following statement: "This form must be discussed with the employee after completion by the supervisor." Also included are the statements for the employee to check if they have reviewed and discussed the information with the supervisor and if they want an appointment with the Personnel Director to discuss the results of the evaluation. The evaluation was not put into appellant's personnel file nor was it discussed with him.

8. Appellant was absent, due to sickness or injury, a total of 76 hours between his appointment date and his termination date of January 19, 1979. 24 hours of those were due to an alleged job incurred injury on December 14, 1979.

9. Appellant did not work December 23rd, and 24th due to a weekend, he was off the 25th and 26th due to holidays, and he was off the 27th, 28th, and the 29th due to an alleged injury. He was off the 30th and 31st because it was a weekend the 1st of January due to holiday. He returned to work on January 2, 1979. He brought with him a doctors slip who he visited on December 27th because of an injury he alleges happened on the job December 12, 1978.

10. On January 2, the same day he returned to work, his immediate supervisor wrote to his supervisor recommending that the appellant be

terminated because of excessive absences. The supervisor pointed out appellant had been off 76 hours since he started work.

11. On January 3, 1979, Mr. Harry Behrens, Housekeeping Services Supervisor recommended to Mark Rehrauer, Personnel Director that appellant be terminated. His termination letter read as follows:

"I am recommending that probationary employee, Douglas Wegner who is presently employed at UW-Whitewater, be terminated for the following reasons: Excessive absenteeism -- he has used all his sick leave, plus 40 hours off the payroll since becoming employed at UW-Whitewater on August 14, 1978. He has a lack of interest in his job performance and will not do quality work without constant supervision.

He does not use good judgement in his dealings with fellow employees. His "horse-play" and other erratic actions while at work, make other employes unwilling to work with him for any length of time.

Mr. Wegner should be given a two weeks notice of termination.

CONCLUSION OF LAW

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

2. Review of the respondent's action is limited by §111.91(3) to the test of "arbitrary and capricious" action. The definition of arbitrary and capricious action is found in Olson v. Rothwell, 28 Wis. 2d 233, 239 (1965). "Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such actions are unreasonable or do not have a rational basis. Arbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process."

3. §230.37(1) mandates a performance evaluation program to provide a continuing record of employe development. "Similar evaluations shall be conducted during the probationary period but may not infringe upon

the authority of the appointing authority to retain or dismiss employees during the probationary period."

4. §238.28(2) reads:

"A probationary employee's supervisor shall complete a performance evaluation under §230.37 of the employee's work. The evaluation shall be in writing and shall indicate whether or not the employee's services have been satisfactory and whether ~~or not the employee will be retained in his or her position.~~ A copy of the evaluation shall be given to the employee at a reasonable time before the completion of the employee's probation. An employee shall gain permanent status unless terminated by the appointing authority prior to the completion of his or her probationary period." (emphasis added)

5. The burden of proof is upon 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.

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

OPINION

It is the opinion of the Commission that respondent's failure to abide by the clear and unambiguous language of §230.28(2) is unreasonable and does not have any rational basis and therefore must be considered arbitrary and capricious.

Respondent did make out an evaluation on appellant dated December 15, 1978. It was their obligation under the Chapter 230.28(2) to present that evaluation to appellant at a reasonable time before the end of his probationary period. Despite having made out the evaluation, it was never given to appellant nor was he made aware of the areas where he was performing in an unsatisfactory manner.

Respondent also made notes concerning some areas of unsatisfactory job performance by appellant. However, the record indicates respondent did not tell appellant about these notes nor did respondent place them

in his personnel file. They were kept in a separate log where appellant did not have knowledge or access to.

The testimony in the record is conflicting as to whether appellant was given any kind of verbal reprimand. When his supervisors cautioned him about his sick leave, it was done in such a way that appellant never realized it could lead to his termination. He was never called into the office to talk about either the usage or the pattern of calling in sick on Fridays and Mondays. He was never told he was being reprimanded.

It is clear from respondent's exhibit 5-E-1, that the absences on December 27th, 28th, and 29th were considered when appellant's immediate supervisor recommended his termination due to excessive use of sick leave. It is also obvious from respondent's exhibit 6 that the Housekeeping Services Supervisor used those same days as part of the reason for appellant's termination, despite his testimony to the contrary. However, one thing not clear in the record is whether appellant actually was injured on the job or not. Therefore, those 3 days carry little weight in this case.

In summation, it is clear that appellant's job performance was below the standards required by the University and that the respondent had ample opportunities to bring these deficiencies to the attention of the appellant. Not only did they fail to consult and warn appellant at the time he was performing below par, but respondent even went so far as to ignore and violate the provisions of the state statute found in §230.28(2). This violation of the statute has no reasonable basis and such action must be considered arbitrary and capricious.

ORDER

The appellant must be reinstated to his job as BMH 2 with back pay and full benefits starting June 3, 1979. He will be required to fulfill his full six months probationary period starting also on June 3, 1979. His personnel file which was clean during his original six months probation shall remain so as of June 3. Deficiencies noted during his original 5½ month period shall not be used as a basis for termination of appellant during this second six months probationary period.

Dated: _____, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Edward D. Durkin
Commissioner

Charlotte M. Higbee
Commissioner

EDD:jmg

5/31/79