STATE OF WISCONSIN PERSONNEL COMMISSION

JEWEL T. WILSON,

Appellant,

v.

UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 79-17-PC

DECISION
AND
ORDER

NATURE OF THE CASE

This appeal, filed pursuant to Article IV, Section 10 of the contract between the State of Wisconsin and Wisconsin State Employes Union, and §230.45(1)(f), Wis. Stats., concerns the termination of appellant's employment at University of Wisconsin-Stout, Menomonie, Wisconsin, during his probation as a Building Maintenance Helper 3. The matter was heard on May 1, 1979, before Joseph W. Wiley, Chairperson of the Commission. Written closing arguments were filed by the appellant and respondent on June 15 and July 9, 1979, respectively.

FINDINGS OF FACT

1. On July 31, 1978 appellant was hired as a probationary BMH 3 (lead worker) in the classified service at UW-Stout, a University campus operated by the respondent. In this employment, appellant was covered by the bargaining agreement between the State of Wisconsin and WSEU.

2. By letter dated January 10, 1979, (Respondent's Exhibit 17) appellant was notified that he would be terminated effective at the

end of his shift on January 27, 1979. The specific bases for the dismissal were not discussed nor was an attached Probationary Service Report (Respondent's Exhibit 18) discussed with the appellant either before or after they were presented by his supervisor. The letter set forth the following as reasons for the termination:

> 1. The quality of your work has been unacceptable. You do not adequately determine supply needs nor do you follow proper procedures when ordering supplies. Your assigned work areas have often not been cleaned properly.
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> 2. Your use of judgment has not been acceptable for a lead worker, as has been evidenced by assigning a limited term employe to a work station without giving him proper instructions or training, and by being unable to distribute the work between the Commons and Student Center so both are cleaned properly.
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> 3. Although your position description indicates that about half of your time is to be spent assisting custodians with their cleaning tasks, you have often been observed visiting with other employes during working hours rather than helping your crew with their tasks.
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> 4. You have not exercised initiative in identifying work which needs to be done.
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> 5. You have been unable to accept criticism from your supervisor and have refused suggestions intended to help you improve your performance.

3. Appellant was terminated on January 27, 1979, such date being prior to the end of the statutory six-month probationary period.

4. When the appellant was hired, he had had no prior experience as a custodial lead worker, but he had been manager of an auto parts store for a number of years. That position had given him supervisory experience.

5. Respondents knew when he was hired that appellant lacked prior custodial lead worker experience but they hired him because they

believed that he could do the job if given on-the-job training.

6. At the time appellant was interviewed, his supervisor took him around the area he would be responsible for if hired. She also told him she would work with him and train him during the early weeks of his employment.

7. The only "on-the-job training" appellant received was about three weeks of work alongside subordinate (but more experienced) custodians, and one night of work during which the supervisor followed him around for 2½ hours and observed and made suggestions.

8. There were some occasions in which the supervisor perceived and pointed out shortcomings in the appellant's performance, notably:

a. October 5, 1978 - She told him she was "not pleased with the job he was doing as a lead worker;" that he should distribute work more evenly; that he was overlooking work that needed to be done; that she did not appreciate his disagreeing with every suggestion;[1] and, that he should order supplies every other week using a supply form. (Respondent's Exhibit 5).

b. October 25, 1978 - She pointed out that for the past three days dust had collected under the stairwells and that it was the appellant's responsibility to see such things and point them out to the other employes. (Respondent's Exhibit 6).

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[1] Under cross examination the supervisor stated that there were but two suggestions the appellant disagreed with; (1) her recommended change in duty hours for the shift; and (2) her recommendation that he use less soap in the automatic scrubber. In the first instance appellant perceived that the shift change would cause a morale problem and in the second instance, he believed that more soap was necessary in order to get the floors sufficiently clean. (Tr. p. 190-192).

c. November 10, 1978 - She reminded him to order his supplies in advance and submit supply forms in accordance with the above-mentioned procedure. (Tr. p. 159-160).

d. November 28, 1978 - She criticised appellant for assigning a relatively inexperienced LTE to clean the commons, without assisting in performing the work himself or offering instruction on how it should be done. (Tr. p. 166).

e. December 9, 1978 - She pointed out that two rooms in the commons area had not been properly straightened up and cleaned. (Tr. p. 168).

9. There were other instances in which the supervisor was dissatisfied with the appellant's performance but failed to discuss the matter with him or otherwise inform him of her dissatisfaction:

a. On November 22, December 7, and three or four other occasions she did not record, the supervisor observed the appellant talking to Morris Peterson (a day shift employe) while others on his crew were working.[2] To break up the conversation, she would go over to the appellant and suggest other work that needed to be done, but she never informed him that she objected to his having conversations with Peterson nor inquired as to the nature of their discussion.

b. She noted that the appellant continued to use too much soap in the automatic scrubber after her instruction that less soap be used, but she did not inform him that she was still dissatisfied.

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[2]These communications with Peterson were work related. Appellant had not been trained to do certain types of room set ups and he made it a practice to confer with the more experienced Peterson whenever he had a question. (Tr. p. 66 and 89).

c. She allowed spit to remain on a water fountain for two weeks but neglected to inform the appellant that his crew was overlooking it during their cleaning.

10. Appellant's position description (Respondent's Exhibit 2) calls for him to "meet and confer with supervisor on a regular basis." On October 5, 1978, appellant and his supervisor had a meeting and they agreed that they would have their "regular" meetings on Thursday of each week. However, the supervisor did not show up for but two of these meetings. (Tr. p. 148).

11. The appellant was never informed that he was in danger of not passing probation and was not given a written probationary evaluation prior to his January 10 termination letter.

12. The appellant had a position description which spelled out his duties, but the document did not accurately depict the appellant's job. It left the appellant confused as to what proportion of his time was to be spent "leading" as opposed to "working." He never received an adequate clarification of his duties and responsibilities from his supervisor. Despite the respondent's assertions to the contrary, the Commission finds that the appellant was a good worker, a quick learner, and that he got along well with his fellow custodians.

OPINION

The issue in this case is whether or not the respondent's decision to terminate the appellant was "arbitrary and capricious" within the meaning of §111.91, Wis. Stats. This statute provides in pertinent part that those actions which the employer is prohibited from bargaining on

(including probationary terminations) may be the subject of appeals before an impartial hearing officer whose decision may be reviewed by the Personnel Board (now the Personnel Commission) provided that:

> "Nothing in this subsection shall empower the hearing officer to expand the basis of adjudication beyond the test of "arbitrary and capricious action ...."

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."

In determining whether the appellant's termination was "arbitrary and capricious" under the Jabs definition, the Commission has looked first at the basis for termination spelled out in the termination letter. (Finding 2). In our view, two of the statements about appellant's performance, item 3 and item 5, are not supported by the evidence at all, and the testimony as to the other three items is in dispute. As to item 3, it is apparent from the footnote to finding 9a that the conversations between appellant and Peterson were work related and necessary. It was apparent from both men's testimony that the conversations might not have been necessary had the supervisor taken a more responsible role in giving the appellant guidance and training. Moreover, she could have determined the nature of the conversations, or could have directed that they be discontinued if she had elected to. In any event, there was no showing that these conversations were unduly protracted or that they contributed to any specific nonperformance. On the contrary, to the

extent he was getting advice from an experienced custodian, the conversations obviously were a help to his performance.

Item 5 of the termination letter is likewise not supported by the evidence. The supervisor herself could only identify two circumstances in which the appellant disagreed with her. In both cases, he had cogent grounds for having a different opinion and certainly a right, if not a duty, to express it. In being subordinate, employes do not abnegate their right to have and express opinions contrary to those of their superiors. There was no evidence that the appellant's expressions were other than constructive or that his demeanor was arrogant or disrespectful.

Items 1, 2 and 4 of the termination letter all address the quality of appellant's performance as a lead worker and speak to in both general and specific terms the manner in which he carried out his daily activities. Normally, the Commission does not challenge a supervisor's determination that work quality is not up to an acceptable standard; that procedures are not properly followed; that judgment is poor; or that initiative is lacking. However, in this case, there was persuasive testimony to the contrary by a majority of his coworkers whose day to day observations of him were much more extensive than those of the supervisor who was day shift and rarely on campus during appellant's 11:30 p.m. to 8 a.m. shift.[3] Even if we were to reject the coworkers views entirely, the Commission would still be faced with the compelling evidence that the

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[3]Several of appellant's coworkers attested that he was a good worker and that he got along well with his fellow custodians. One said he was surprised to learn appellant was being terminated. None of the four coworker witnesses concurred in the supervisor's assessment that appellant's performance was poor.

supervisor herself unwittingly contributed to whatever shortcomings appellant may have had by not providing the training which had been promised, by not being available for the regularly scheduled meetings, by not communicating her dissatisfactions constructively, or by simply not communicating her expectations at all.

In the Commission's view, the termination of the appellant under the circumstances described in this case was an arbitrary and capricious action which must be rejected. The termination is particularly unfortunate given the fact that the appellant had no idea that termination was being considered. The decision was not discussed with him before or after the letter was presented and he had no opportunity to offer any defense or rebuttal to the charges stated in the letter or the check marks entered on the probationary report.

The weight of the credible evidence in this case clearly supports the conclusion that the respondent's termination of the appellant was arbitrary and capricious, and respondent's action is rejected. It is determined that the appellant should be reinstated with back pay to the date of discharge.

On May 16, 1979, after the close of the hearing, the respondent sought to introduce into evidence an affidavit from the Personnel Director and a copy of the announcement whereby appellant's position was advertised. The appellant objected to the introduction of this document, citing the Commission rules on submission of evidence. The respondent claims that they are rebuttal documents produced in response to appellant's testimony about not having proper training.

The Commission perceives the introduction of this document as an attempt by the respondent to cure its failure to introduce it at the hearing. Respondent offered the document to appellant to introduce and appellant declined. (Tr. p. 261). After the appellant declined to introduce the document as an Appellant's Exhibit, the respondent made no effort to introduce it as a Respondent's Exhibit. The document was abandoned, and the hearing proceeded with other matters. Since the respondent failed to introduce the document during the hearing when the appellant could challenge it, it may not now be introduced as a post hearing submission of evidence. The document will therefore be excluded.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to hear this appeal pursuant to §§ 230.45(1)(f) and 111.91(3), Stats. and pursuant to Article IV, §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-PC, 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 the 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 appellant must be reinstated with back pay to the date of his dismissal.

ORDER

IT IS HEREBY ORDERED that the action of the respondent is REJECTED and the matter is remanded to the University of Wisconsin for action consistent with this opinion.

Dated: Jan. 22, 1980. STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Commissioner

JWW:jmg

10/4/79