STATE OF WISCONSIN PERSONNEL COMMISSION

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ELIZABETH DELANEY,

Appellant,

v.

INVESTMENT BOARD,

Respondent.

Case No. 79-21-PC

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DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §§230.45(1)(f) and 111.91(3), Stats. of a probationary termination. The Commission entered an Interim Order on June 12, 1979, denying the respondent's motion to dismiss for lack of subject-matter jurisdiction. A hearing was held on September 7, 1979, before hearing examiner Anthony J. Theodore.

FINDINGS OF FACT

1. The appellant was appointed by the respondent to a position classified as a Cashier 1, commencing employment July 31, 1978, on a lateral transfer basis with a six-month permissive probation.

2. The appellant at all relevant times was subject to a collective bargaining agreement between the State of Wisconsin and AFSCME, Council 24, Wisconsin State Employes Union, AFL-CIO (clerical bargaining unit), effective September 11, 1977 - June 30, 1979.

3. The duties and responsibilities assigned to the appellant included assisting in the preparation of an office procedures manual and filling in as a backup for another Cashier 1.

4. The appellant had difficulty in learning the office procedures utilized by the Investment Board.

5. When the appellant filled in for the other Cashier 1 she was slow in learning the job, made some mistakes over and over again, and had to be told how to do things a number of times before she could grasp the procedures.

6. The appellant at times initiated non-work-related talking and laughing with a co-employe.

7. The appellant's work on the office procedures manual was deficient in quality in some respects.

8. The appellant's immediate supervisor gave the appellant some feedback on a continuing basis regarding errors or deficiencies in her work on the manual as he reveiwed the parts that she turned in from time to time.

9. The appellant's immediate supervisor conducted an oral evaluation session with her in December 1978 in which he reviewed his perceptions of her work and behavior.

10. The respondent never prepared any written performance evaluations or a probationary service report.

11. The appellant's probationery employment was terminated effective January 26, 1979, by a letter from the appointing authority dated January 15, 1979, Appellant's Exhibit 7, which stated that the reason for the termination was that: " ... you have not exhibited a satisfactory knowledge of the basic operating functions of the Board and your performance has not measured up to the standard required by the

Employer."

CONCLUSIONS OF LAW

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

2. The burden is on the appellant to prove that the termination of her probationary employment was arbitrary and capricious.

3. The statutory provision for a written performance evaluation pursuant to §§230.28(2) and 230.37(1), Stats., is directory and not mandatory.

4. The appellant has not established that her termination was arbitrary and capricious and the respondent's action must be affirmed.

OPINION

Section 111.91(3), Stats., provides a legal standard of review limited to the test of arbitrary and capricious action. The burden of proof is on the appellant. See Dziadosz v. DHSS, Case No. 78-32-PC (10/9/78), Declaratory Ruling, No. 75-206 (8/24/76).

Arbitrary and capricious action has been defined by the Supreme Court as action which is "either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful, and irrational choice of conduct." Jabs v. State Board of Personnel, 34 Wis. 2d 243, 251 (1967).

It cannot be concluded that the action of the respondent was so unreasonable as to be without a rational basis. The appellant was deficient with respect to some aspects of her work. While there was a conflict in testimony between the appellant and her supervisor, one

of the appellant's former co-workers testified as to the appellant's inability to master procedures despite repeated instructions and inappropriate behavior in the workplace. This witness was no longer employed by the respondent at the time of the hearing and had no apparent interest in testifying against the appellant.

It was established that there was no written performance evaluation of the appellant. Section 230.28(2), Stats., provides in part:

> "A probationary employe's supervisor shall complete a performance evaluation under §230.37 of the employe's work. The evaluation shall be in writing and shall indicate whether or not the employe's services have been satisfactory and whether or not the employe will be retained in his or her position."

Section 230.37, to which §230.28(2) specifically refers, contains in part the following:

> "(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 <u>may not infringe</u> upon the authority of the appointing authority to retain or dismiss employes during the probationary period." (Emphasis added).

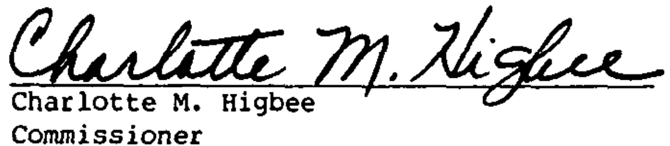
By including the underlined language in §230.37(1) and making the specific cross reference to §230.37 in §230.28(2), the legislature made it very clear that the failure to complete a written performance evaluation on a probationary employe cannot interfere with the dismissal of the employe. Thus, while the failure to prepare written evaluations cannot be condoned, such failure under these statutes cannot lead to a reversal of the probationary termination.

It is noted that the appellant received a verbal evaluation, although it occurred rather late in the game, and some continuing feedback on her performance. Thus there was not a situation such as existed in Madden v. UW, Case No. 78-124-PC (12/20/78), where the employe had received no communications that his work was considered unsatisfactory in any regard, until he received his termination notice.

ORDER

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

Dated: Nov. 8, 1979. STATE PERSONNEL COMMISSION



Charlotte M. Higbee
Commissioner

AJT:jmg

10/9/79