STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT PEDERSEN,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 79-300-PC

FINAL ORDER

The Commission has considered the Proposed Decision of the hearing examiner and the appellant's objections thereto, heard the parties' oral argument, and consulted with the hearing examiner. It is ordered that the Proposed Decision of the hearing examiner, a copy of which is attached, is modified by changing Finding of Fact no. 7 to read as follows:

"7. On November 14, 1978, the appellant called Mr. May and stated that he was having personal problems and probably would return to work on November 15, 1978."

This change is to correct what appears to be a typographical error in the latter date and is concurred in by both parties and the hearing examiner.

The remainder of the Proposed Decision is adopted as the final decision of the Commission and the action of the respondent is affirmed and this appeal is dismissed.

Dated: March 24, 1980. STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Commissioner

Donald R. Murphy
Commissioner

CONCURRING OPINION (HIGBEE)

I concur in the final result. I do not believe that it was appropriate for the employing agency, in evaluating an employe's probation and determining whether to grant permanent status, to have considered matters which occurred while the employe was employed on a limited term basis prior to his original, non-limited-term, appointment. See Findings 4-8. However, even without these findings, the matters which occurred after his appointment in my opinion would support the termination as against the arbitrary and capricious standard of review which applies here.

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PROPOSED DECISION

NATURE OF THE CASE

This is an appeal pursuant to §§230.45(1)(f) and 111.91(3), Stats., of the termination of probationary employment.

FINDINGS OF FACT

1. The appellant began employment at the Beloit Job Service office as a limited term employe on June 19, 1978, and continued on this basis through April 22, 1979.

2. The appellant was appointed to a permanent position classified as Job Service Specialist 1 on or about April 22, 1979, with a six-month probation. This position at all times was subject to the labor agreement between the state and AFSCME, Council 24, WSEU, of which the Commission takes official notice.

3. At all times the appellant was under the direct supervision of Bernard May, supervisor of the Beloit Job Service office.

4. On November 8, 1978, the appellant left work early and did not return to work until November 17, 1978.

5. The appellant did not notify the office in advance that he would be absent nor did he contact them in any regard until November 14, 1978.

6. On November 9, 1978, Mr. May sent the appellant a letter (Respondent's Exhibit 1) informing him that office policy required informing the supervisor in advance of absences except in the case of illness in which case notice must be within an hour of starting time, and that failure to comply could be cause for termination.

7. On November 14, 1978, the appellant called Mr. May and stated that he was having personal problems and probably would return to work on November 14, 1978.

8. On November 20, 1978, Mr. May verbally reprimanded the appellant and told him he would be terminated in the event of another such occurrence.

9. On June 22, 1979, the appellant was approximately 35 minutes late returning from lunch due to personal business he had been transacting. Mr. May verbally reprimanded him when he returned to work.

10. The appellant was absent from work on July 9, 10, and 12, 1979, due to an injury to his knee.

11. The appellant had called the office before work started on July 9, 1979, and left a message for the acting supervisor that he had an injury to his knee and could not report to work but would come to work when he was better.

12. The appellant had worked on July 11, 1979, but could not come to work on July 12th due to further problems with his knee. He did not give notice to the office on July 11th or 12th that he would

not be to work the 12th. He assumed the acting supervisor was aware of his problem based on his earlier notice.

13. On July 25th or 26th, 1979, the appellant inquired of Mr. May if he could have leave with pay for an employment interview on July 30th. Mr. May responded that pursuant to the administrative procedures manual and the union contract he could not have paid leave for this purpose.

14. The appellant did not definitely make up his mind whether or not to go to the interview until the morning of July 30th. He had another employe verbally inform Mr. May of his absence that morning, but the appellant did not submit a leave slip in advance of his absence.

15. On July 31, 1979, Mr. May sent the appellant a memo with the subject "violations of Work Rules" regarding the two previous incidents (the memo mistakenly referred to July 9th rather than July 12th with respect to the first incident). The text of the memo was as follows:

> "July 9, 1979, failure to notify the Job Service Office that you were ill and would not be in.
>
> July 30, 1979, failure to receive written permission to be absent from work. The proper procedure is to submit a leave slip for approval."

16. On September 25 and 26, 1979, the appellant did not report to work because of illness. He notified the office that he would not be coming in to work on this occasion.

17. The appellant did not feel well the evening of October 8, 1979, and went to bed without setting his alarm. He did not wake up until 10:30 the following morning and at this point was too ill to go to work.

He did not call in then because he felt it was too late.

18. The appellant's employment was terminated effective the close of business on October 12, 1979.

19. The appellant's work performance, aside from the attendance matters set forth above, was satisfactory.

20. Another Beloit Job Service employe, one David Beebe, was employed on a limited term non-renewable Title VI CETA program basis in 1978.

21. Mr. Beebe was absent without approval or without proper notice having been given approximately 4 or 5 times. He initially was verbally reprimanded and then received two written reprimands but was not discharged or otherwise disciplined with respect to these infractions.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §§111.91(3) and 230.45(1)(f), Stats. (1977).[1]

2. The burden of proof is on the appellant to establish that the termination of his probationary employment was arbitrary and capricious. See Dziadosz v. DHSS, Wis. Pers. Commn. 78-32-PC (10/9/78).

3. The appellant has not met that burden.

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

OPINION

A legal standard of "arbitrary and capricious" action is far less

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[1] An alternative basis of jurisdiction is §230.44(1)(d), Stats. See Beer v. DHSS, No. 79-213-PC (12/13/79). However, the burden of proof would be the same and the standard of review ("illegal or an abuse of discretion") is the substantial equivalent of that found in §111.91(3) ("arbitrary and capricious").

rigorous than the "just cause" standard applied in disciplinary appeals of permanent employes. Arbitrary and capricious action has been defined by the Wisconsin Supreme Court as: "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 245, 251 (1967). Thus the question in these probationary termination cases is not whether the Commission agrees or disagrees with the decision as a matter of personnel administration but whether there is determined to be any rational basis for the decision.

In this case the Commission cannot conclude that the decision to terminate the appellant's employment was arbitrary and capricious. There were extenuating circumstances in connection with some of the incidents of absenteeism, but these still were matters upon which the respondent legitimately could rely. Specifically, the appellant did call in at the beginning of the week of July 9, 1978, and indicate he would be out with an injured knee. He returned to work on July 11th but did not come back on the 12th, without again providing notice. On the one hand, the appellant knew that the acting supervisor was aware in a general sense of his medical problem and might have inferred when he was absent on the 12th that it was due to the same problem. On the other hand, it was not a continuous absence and the acting supervisor, in the absence of further notice from the appellant, could reasonably have planned on the appellant's presence on the 12th following his working on the 11th.

Also, with respect to the July 30th absence, the appellant may well have interpreted his conversation with Mr. May as approving leave

without pay. However, the appellant testified that he did not make up his mind whether he in fact would take the day off for the interview until the morning of the 30th, and he then had a co-employe inform Mr. May of this. This did not give Mr. May advance notice of the absence, which obviously would have been helpful in planning the office workload and work assignments.

The appellant objected to any consideration of the November 1978 incident, which occurred during his limited term employment prior to his appointment to the permanent position. In the opinion of the Commission, the respondent appropriately considered this incident in light of the facts that he was under the same supervision and the incident related to a pattern of conduct. A similar approach was followed in Chiat v. WCCJ, Wis. Pers. Commn. 78-152-PC (6/5/79). It is not unreasonable for an employer to consider previous similar employe behavior or performance when evaluating continuing or a pattern of conduct occurring during a probationary period.

The appellant also pointed to allegedly unequal treatment of Mr. Beebe. In the Commission's opinion, a meaningful comparison could not be drawn because of the difference in the two employes' status. Whereas Mr. Pedersen was in a probationary status which would lead to permanent employment unless terminated, Mr. Beebe's employment was on a one-year non-renewable basis.

ORDER

The action of the respondent is affirmed and this appeal is dismissed.

Dated: _____, 1980. STATE PERSONNEL COMMISSION

AJT:jmg
1/3/80

_____
Charlotte M. Higbee
Commissioner