STATE OF WISCONSIN PERSONNEL COMMISSION

LEONARD PFLUGRAD, Appellant, v. Administrator, DIVISION OF PERSONNEL, Respondent. Case No. 82-207-PC	DECISION AND ORDER

NATURE OF THE CASE

This is an appeal from a decision by respondent to remove appellant's name from a register of eligible candidates for a certain classification due to an unsatisfactory work record.

FINDINGS OF FACT

1. On August 24, 1977, appellant was hired by the Wisconsin Higher Educational Aids Board (HEAB) to fill a permanent position as a Management Information Technician 2 (MIT 2). On October 11, 1977, while appellant was still serving a probationary employment period, HEAB terminated his employment. Appellant appealed this termination to the Personnel Board and, on June 16, 1978, the Board decided that HEAB's action had not been arbitrary and capricious but that appellant's work record, including tardiness, failure to follow instructions and procedures, failure to complete assigned tasks on time, need for close supervision and excessive and unnecessary absences from assigned work area, provided a rational basis for the termination.

2. In December of 1977, appellant was hired by the Wisconsin Department of Revenue (DOR) to fill an LTE position as a Management Information Technician 2 (MIT 2). On June 19, 1978, DOR appointed appellant to a position as a Management Information Specialist 1 (MIS 1). Appellant resigned from this position

effective August 19, 1978, in order to assume a position in another state agency. Appellant's work record with DOR indicates a satisfactory work performance with no problems completing work assignments on time.

3. On August 21, 1978, appellant was hired by the Wisconsin Board of Vocational, Technical, and Adult Education (BVTAE) to fill a permanent position as a MIS 2. On February 6, 1979, BVTAE advised appellant that he had completed six months of satisfactory service in his position and, accordingly, his employment would be of a permanent status as of February 21, 1979.

4. A performance evaluation of appellant completed by BVTAE in June of 1979 indicated that, within a subrange of 7 through 12 (total range: 1 through 18) used to identify a performance which "meets requirements," appellant's performance was rated a "7." Appellant's completion of assignments in a timely manner, ability to get along with others, creativeness, quantity of work, public relations, and management orientation were evaluated as less than satisfactory; appellant's quality of work, knowledge, communications and adaptability were evaluated as satisfactory.

5. A performance evaluation of appellant completed by BVTAE in June of 1980 indicated that appellant's performance was rated as a "6" which was within the subrange of 1 through 6 used to identify a less than satisfactory performance. Appellant's completion of assignments in a timely manner, creativeness, quantity of work, public relations, management orientation, and organization were evaluated as less than satisfactory; appellant's quality of work, knowledge, and adaptability were evaluated as satisfactory.

6. On June 16, 1980, the BVTAE issued a formal written reprimand of appellant for his failure to meet established job deadlines and advised appellant that the reprimand would become part of his personnel record and that future

actions of a similar nature could result in more severe disciplinary action or termination.

7. On August 22, 1980, the BVTAE notified appellant that he was being suspended without pay for one working day due to his negligence in meeting written assigned job deadlines.

8. Appellant resigned from his position with the BVTAE effective November 14, 1980.

9. On November 17, 1980, the University of Wisconsin System (UW) hired appellant to fill a position as an MIS 4. On December 3, 1980, while appellant was still serving a probationary employment period, the UW terminated his employment for failing or refusing to carry out assignments or instructions, arguing with and intimidating a fellow employe regarding appellant's failure to complete a required form, spending time on low priority tasks to the detriment of the completion of priority work, and criticizing the work of the former EDP auditor and the Internal Audit systems and methods without attempting to first work with what resources were available.

10. On February 6, 1981, the Wisconsin Court Information System of the Office of the Director of State Courts hired appellant to fill an unclassified position as Lead Programmer. Appellant was terminated from this position on February 10, 1981.

11. In 1982, appellant took the MIS 4 examination prepared and administered by respondent and appellant's name was included on the MIS 4 register.

12. The written application submitted by appellant as part of the procedure he followed in order to be included on the MIS 4 register lists only the following under work experience: BVTAE, DOR, UW, and a 3-month position with the Chicago Miniature Lamp Works.

13. In September of 1982, Alan Ferguson, the BVTAE Personnel Manager, in reference to an MIS 4 vacancy at BVTAE, contacted Dan Wallock of respondent Division of Personnel by Phone, summarized appellant's work record with the State of Wisconsin, including the three terminations and the reprimand, suspension, and unsatisfactory performance evaluation at BVTAE and requested that, for these reasons, respnodent remove appellant's name from the MIS 4 register certified to BVTAE. On September 28, 1982, Mr. Ferguson confirmed this request in a written memorandum to respondent.

14. On October 7, 1982, respondent removed appellant's name from the register of eligible candidates for the classification of MIS 4.

15. Appellant filed a timely appeal of this action by respondent with the Commission on October 21, 1982.

16. It was reasonable for respondent, on the basis of the information available at the time, to regard appellant's work record as unsatisfactory.

CONCLUSIONS OF LAW

1. This appeal is appropriately before the Commission pursuant to §230.44(1)(a), Stats., (this citation has been changed in order to properly reflect the jurisdictional basis for this case as stated in the prehearing conference report) as a personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal.

2. Section Pers. 6.10 Wis. Adm. Code, provides in pertinent part that the Administrator of the Division of Personnel may remove the name of an individual from a register of eligible candidates for a certain classification "whose work record or employment references are unsatisfactory."

3. Appellant has the burden of proving that respondent did not comply with this provision of §6.10, Wis. Adm. Code.

4. Appellant has not sustained his burden of proof.

OPINION

The Prehearing Conference Report issued by the Commission on January 28, 1983, included the following:

"This case involves an appeal pursuant to s.230.44(1)(a), Stats., of a decision of the Administrator, Division of Personnel, to remove the appellant's name from a certification list for employment as a Management Information Specialist 4, pursuant to s.Pers 6.10, Wis. Adm. Code:

> "... the administrator may refuse to examine or certify an applicant, or may remove an applicant from certification:
>
> * * *
>
> (8) Whose work record or employment references are unsatisfactory."

The issue for hearing, as set forth in the prehearing conference report dated December 16, 1982, is: "... whether the removal of the appellant's name from the register in question was in violation of the civil service code (Subchapter II of Chapter 230, Stats., ch. PERS, Wis. Adm. Code)." Given the nature of this appeal and the Commission's program responsibilities under s.15.801, Stats., there is no way that the scope of this issue could be stated any more broadly. Section 15.801 limits the Commission's program responsibilities to Subchapter II of chapter 230, and ss.49.50, 111.33(2), and 111.91(3). Clearly, the latter three sections, dealing respectively with county merit system appeals, complaints of discrimination on the basis of age, race, sex, etc., and the review of hearing examiners' decisions of certain actions taken by the employer pursuant to prohibited subjects of bargaining, have no application to this appeal. Furthermore, the only provision in the civil service code that governs the decision to remove a name from a certification is contained in s.Pers 6.10, Wis. Adm. Code, and the Commission must look to this rule to determine whether the administrator erred in taking the action in question.

Pursuant to this rule, the administrator may remove an applicant from certification "whose work record or employment references are unsatisfactory." This rule clearly permits the administrator to make the decision on the basis of the applicant's work record or employment references. This rule does not provide for the administrator to go beyond the work record or employment references to hold a hearing to determine whether the actual facts concerning the employment of an applicant are as reflected in his or her record or by his or her references. The policy reasons behind this are obvious. A contrary approach could require for example, that the administrator conduct evidentiary hearings concerning whether there was proper cause for an applicant's discharge by one employer, poor evaluations by a second, and unsatisfactory references by a third, when the employment in question may have occurred years ago and involved various employers who might be outside of state service and, for that matter, outside of the State of Wisconsin altogether.

The essential problem with many of the thirty witnesses which had been proposed to be called by the appellant to testify at this hearing is that the appellant had been attempting to show that the facts concerning his employment at BVTAE, the Director of State Courts and the UW were not as reflected in his work record. If this line of testimony were permitted, the appellant essentially would be litigating the issues, for example, of whether there was a proper basis for certain of his evaluations at BVTAE, and whether there was proper cause for the termination of his employment at the latter two agencies. Such inquiry goes beyond what is set forth in s.Pers 6.10(8), Wis. Adm. Code, and should not be permitted in an appeal of an action by the administrator acting pursuant to that rule. Also beyond the scope of the hearing is evidence as to the motives of the BVTAE in providing information regarding the appellant's work record to the

administrator. Such motivation is not material to the question of whether the administrator had an appropriate basis for removing the appellant's name from the certification because of unsatisfactory work record or employment references.

It might be suggested that there was an element of unfairness in not permitting the appellant to litigate before this Commission the merits of the termination of his employment at the Director of State Courts and the UW, where these transactions were not reviewable by the Commission at the time they occurred, due to the fact that there is no statutory authority for such appeals, see Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 3d 545, 309 N.W. 2d 366 (1981), and that the former position apparently was unclassified, see ss.230.08(2)(h), (i), 230.44(1)(c), Stats. However, this is a policy argument, and cannot change the language of the rule, s.Pers 6.10(8), Wis. Adm. Code. Furthermore, even from a policy standpoint, the legislature's refusal to extend civil service appeal protection to employes in probationary status and in the unclassified service must be considered to have been with awareness of the implications of so doing - that such employes could be terminated at will and thus severed from their salary, benefits, and other rights and privileges attendant to state employment. It can not be argued that it was intended that all these interests could be severed without the right of review but that before the fact of termination could be considered in connection with another personnel transaction, that the employe, perhaps years later, would be entitled to a full review of that termination.

Finally, it is noted that it might be argued that the administrator, when acting under s.Pers 6.10(8), Wis. Adm. Code, impliedly is required to consider the applicant's constitutional rights to due process of law secured by the Fourteenth Amendment to the United States Constitution. However, the Commission need not decide this issue because even under constitutional analysis, there is

no requirement for the type of hearing sought by the appellant. Before a person has a right to a hearing, he or she must have a recognized property interest in something that is threatened by state action. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972):

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it ... Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

An applicant for employment does not have more than a "unilateral expectation" of employment with the state. If a non-tenured faculty member who is not rehired is not entitled to a hearing, certainly an applicant for employment who is removed from consideration because of his unsatisfactory work record or employment references has no greater claim to a hearing.

Other than a 3-month employment in 1977 with a private company, the written job application prepared by appellant in May of 1982 indicated that all of appellant's work experience in the management information field had been with the State of Wisconsin. It was, therefore, reasonable for respondent to rely on appellant's work record with the State of Wisconsin in assessing whether appellant's work record was unsatisfactory within the meaning of s.Pers 6.10, Wis. Adm. Code.

Although appellant's work record with the State of Wisconsin includes a satisfactory performance during his 8 months with the Department of Revenue and a satisfactory performance during his first ten months at BVTAE, this work record also includes three terminations for unsatisfactory performance

from three different state agencies and a reprimand, suspension, and unsatisfactory performance evaluation during appellant's second year of employment with BVTAE. It was clearly not unreasonable for respondent to conclude, on the basis of this record, that appellant's work record was unsatisfactory within the meaning of s.Pers 6.10, Wis. Adm. Code.

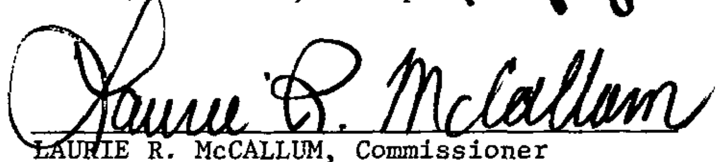
ORDER

The action of the respondent removing the appellant's name from the register in question is affirmed and this appeal is dismissed.

Dated: March 17, 1983

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson



LAURIE R. McCALLUM, Commissioner

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LRM:ers

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