STATE OF WISCONSIN PERSONNEL COMMISSION

MARY BUSCH, Appellant, v. Secretary, HIGHER EDUCATION AIDS BOARD, Respondent. Case No. 82-58-PC	DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a termination of employment. The respondent has objected to subject matter jurisdiction on the ground that the appellant was a project employe and pursuant to §Pers. 34.07(1), Wis. Adm. Code, has no right to appeal a discharge. The findings that follow are based on documents in the file. Inasmuch as the respondent has not filed a brief and neither side has requested an evidentiary hearing or suggested that any jurisdictional facts are in dispute, they have waived any right to a hearing on jurisdictional facts.

FINDINGS OF FACT

1. In a letter dated September 4, 1980, from the respondent to the appellant, she was informed in part as follows:

> This letter confirms in writing your appointment to a project position as a Educational Loan Collector 1 with the Office of Collections. Your position is full-time employment beginning September 7, 1980. Your scheduled ending date is September 6, 1981, however, we may end your appointment earlier, if necessary.
>
> Your official hourly rate of pay is $6.584 upon the completion of a six-month probationary period, your pay will increase to $6.78 per hour... As a project employe of the Higher Educational Aids Board, you are a temporary employe and do not acquire permanent civil service status.

2. On March 10, 1981, the respondent filled out a probationary service report on the appellant, rating her work as average or better, and under the area of "recommendations" at the bottom of the form checked the category "permanent appointment."

3. By letter dated June 18, 1981, the respondent advised the appellant in part as follows:

> The National Direct Student Loan (NDSL) collection function is being phased out effective June 30, 1981. Therefore, effective today we are reassigning you and your position from the NDSL unit to the Default and Legal Unit. Your new supervisor is Michael Tomsyck.
>
> Your classification level and compensation will remain the same. Your fringe benefits will not be effected by this action.

4. On October 15, 1981, and November 23, 1981, the appellant's supervisor advised her that her work was unsatisfactory and that if significant improvement were not shown, disciplinary action, including discharge, might be taken.

5. By letter dated February 5, 1982, the appellant was advised by the respondent in part as follows:

> By this letter we are notifying you that we are terminating your employment effective February 5, 1982.
>
> This decision is based on your unsatisfactory work performance.

CONCLUSIONS OF LAW

1. In legal effect, the appellant's status at all times was that of a project appointee to a project position.

2. Pursuant to §§Pers. 34.07(1), Wis. Adm. Code, and 230.44(1)(c), stats., the appellant has no right to appeal the termination of her unemployment by respondent as aforesaid.

3. The Commission lacks jurisdiction over the subject matter of this appeal.

OPINION

Section Pers. 34.07(1), Wis. Adm. Code, provides that "employes serving a project appointment shall have the same appeal and grievance rights as permanent nonrepresented employes except that termination of the project appointment may not be appealed." Therefore, if the appellant was serving a project appointment, it appears that under this rule she would have no right to appeal a termination.

Section Pers. 34.01(1), Wis. Adm. Code, defines a project appointment as "the appointment of a person to a project position under conditions of employment which do not provide for attainment of permanent status." The appellant's letter of appointment states specifically that her "scheduled ending date is September 6, 1981, "and that as a "project employe of the Higher Educational Aids Board, you are a temporary employe and do not acquire permanent civil service status." This is consistent with a project appointment.

The appellant argues in her brief that since the March 10, 1981, probationary service report has the "permanent appointment" box checked that this constitutes a "permanent appointment of a person to a project position" pursuant to §Pers. 34.02, Wis. Adm. Code:

> The provisions of this chapter do not apply to the permanent appointment of a person to a project position.

However, there is no provision under the statutes or rules for an employe serving in a project appointment to attain permanent status as a result of the satisfactory completion of a six month probationary period.

To the contrary, §Pers. 34.07(3), provides that employes serving a project appointment shall "be ineligible to attain permanent status in class as a result of the project appointment." The Commission cannot conceive how the action of the respondent checking a box on a probationary service form can transform the employe to permanent status in class when there is no authority for such a change and indeed it would be in direct contradiction to §Pers. 34.07(3). The rules do provide for a pay increase after completion of the first 6 months of a project appointment, see §Pers. 34.05(3), and it is likely that the respondent used a probationary service report form in this connection.

The appellant further argues that, as evidenced by the letter to her dated June 18, 1981, she was "transferred" to the Default and Legal Unit. She argues that since the letter states that her classification level would remain the same, and that her "classification level at that point was a permanent project appointment," that §Pers. 34.07 does not apply.

A "transfer" is defined as the "...movement of an employe from one position to a different position assigned to a class having the same pay rate or pay range maximum or to a position in a class assigned to a counterpart pay rate or pay range...." §Pers. 15.01. As was set forth in the June 18, 1981, letter referred to above, the respondent stated that "we are reassigning you and your position from the NSDL Unit to the Default and Legal Unit." (emphasis supplied). Therefore, this letter does not support the theory of a transfer since there was no move to a "different position." In any event, as noted above, the appellant never had attained a permanent appointment or status, and this move could not affect that.

Finally, the reference in the letter to the classification level is not material to the question of her project status. All positions in the classified service have classifications and grade levels based on their authority, responsibility, and nature of work required. §230.09(1), stats. This classification of positions has nothing to do with the status of employes as permanent or project.

The appellant further argues as follows:

> 4. On the other hand, if the Complainant's project appointment ended due to the termination of the project (as indicated by the June 18, 1981 letter), then what was Complainant's status? Her status at the time was a permanent appointment since the June 18 letter indicates : (a) that the project had been terminated, and (b) that her classification, nonetheless, would remain the same. Again, as such, Chapter 34 would not apply to this appeal at all, but appeal rights are granted by sec. 230.44 (1)(c), Wis. Stats.

However, the June 18th letter did not indicate either that the project or the appellant's project appointment was being terminated. Rather, it stated that a particular function was being phased out, and that the appellant and her position was being reassigned. Again, as discussed above, the reference to "classification" has nothing to do with her project status.

The appellant further contends that the detailed notice given to the appellant of the respondent's dissatisfaction with her work was unnecessary if she could be terminated at will. The fact that the respondent may have provided more notice that was legally necessary is also immaterial.

The appellant further argues:

> The Administrative Rules define "project employment" in Pers. 1.02(7)(e) as an undertaking which is not a regular function of the employing agency and which has an established probable date of termination. The Default and Legal Unit, into which Complainant was transferred, is a regular function of the employing agency and it does not

> have an established probable date of termination. Thus, the Respondent was treating Complainant, in her capacity as an employe in the Default and Legal Unit, as a permanent employe and not a project employe. The transfer was effectuated on an involuntary basis since it was done at the request of Respondent, and done pursuant to the provisions of the Code, Chapter Pers. 15, Transfer.

As discussed above, there is no basis on which to conclude that this transaction was a transfer under the civil service code. As to the other aspect of the appellant's argument, if it is assumed that the factual allegations regarding the nature of the Default and Legal Unit are correct, it would not follow that the reassignment of the appellant and her position to this unit constituted a permanent appointment. As has been previously discussed, §Pers. 34.07(3), provides that project appointees are ineligible to attain permanent status in class as a result of the project appointment. There is no provision in the rules or the statutes under which a "reassignment" of a project position and employe can constitute a permanent appointment. Section 230.15(3), stats., provides that "No person shall be appointed, transferred, removed, reinstated, restored, promoted or reduced in the classified service in any manner or by any means except as provided in this subchapter."

Finally, the appellant argues that a statutory interpretation which would deny an appeal of the termination of the appellant's employment "would result in an illogical and nonsensical statutory construction." The appellant's argument is premised on the following:

> Respondent interprets Wis. Admin. Code Pers. 34.07 as providing no right of appeal to a project employe who is discharged without just cause during the term of a "project." Note, however, that the Administrative Code refers to "termination of the project appointment" and recalling the definition of "project" found in 230.27(1) ("a planned undertaking which is not a regular function of the employing agency and which has an established probable date of termination") we see the similarity in use of the word "termination." The appellate rights accorded

> under Wis. Stat. §230.44(c) allow for appeals of demotions, layoffs, suspensions, discharges or reductions in pay. There is no reference to "termination." In short, Adm. Code sec. 34.07(1) means only that a project employe has no right to appeal termination of the project.
>
> Otherwise, if we accept the Respondent's interpretation of Wis. Admin. Code Pers. 34.07, that a project employe has no right to appeal a "discharge" during the term of a project, a project employe would still have the right to appeal a demotion, layoff, suspension or reduction in pay. As such, the employe would have the right to appeal all but the most severe of employer disciplines. This interpretation creates an absurd statutory construction by permitting a situation which makes no sense under any system of employe management, and should be avoided.

Assuming, *arguendo*, the premise of the appellant's argument, it does not follow that this leads to absurd results. Rather, given the limited nature of project employment, it appears quite logical to give project employe protection against less severe forms of discipline, but not "tenure," which would be encompassed in the ability to contest employment termination.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: June 25, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf

JAMES W. PHILLIPS, Commissioner

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