

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LORI WEISSE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0037

Case Type: PA

DECISION NO. 36949

Appearances:

Lori Weisse, 811 South Buchanan Street, Appleton, Wisconsin, appearing on her own behalf.

Cara J. Larson, Wisconsin Department of Administration, 101 East Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Health Services.

On April 12, 2017, Lori Weisse, an employee of the State of Wisconsin Department of Health Services, was advised in writing that on Friday, April 14, she was to appear at a pre-termination meeting. Weisse had begun her employment with DHS on April 18, 2016. Following the meeting on April 14, Weisse was placed on paid administrative leave and advised that she would be informed of the outcome of the meeting. The purpose of the meeting was to “explain the reason for the intent to terminate and to provide you the opportunity to respond prior to a final decision.” According to DHS, Weisse was called on the afternoon of April 14 and a voicemail message was left informing her of the decision to terminate her employment. Weisse’s one-year probationary period was up on Monday, April 17, 2017. DHS states that it mailed a letter to Weisse on April 14 advising her of the decision and further placed two calls to her on April 17 but failed to reach her.

Weisse’s version is that she received the letter postmarked April 18 on April 19. Weisse seeks to appeal her termination decision and DHS has moved to dismiss asserting that Weisse was a probationer and therefore not an employee with permanent status in class who would otherwise enjoy the right to appeal a termination decision.

DECISION AND ORDER DENYING MOTION TO DISMISS

This matter presents the issue of when and what type of notice is necessary to terminate an employee during an initial one-year probationary period. We know that a probationary employee gains permanent status unless terminated by the appointing authority “prior to the

completion of his or her probationary period.” § 230.28(2), Stats. There is no dispute here that April 17, 2017, was the last day of Weisse’s probationary period.

While Chapter 230 is silent as to the manner and means of providing notice, the administrative code specifies that written notice is required. Wisconsin Admin. Code § ER-MRS 13.08(2) provides in part that:

When a probationary employee is to be dismissed, the appointing authority shall immediately provide written notice to the employee to be dismissed of the reasons for dismissal, the date on which dismissal is to occur ...

DHS does not contend nor should it that the April 12, 2017, letter qualifies as the required notice. In fact, that letter would correctly be used to notify someone with permanent status in class of the potential for discharge and allowing them to tell their side of the story. That pre-termination notice is required only for those with a property interest in continued employment and of course probationers lack such interest. *Board of Regents v. Personnel Commission*, 2002 WI 79, ¶ 33, 254 Wis.2d 148, 646 N.W.2d 759. Why DHS chose to go through the pre-termination process rather than simply discharge Weisse is a mystery. Certainly, the April 12 letter informing Weisse that she was terminated does not satisfy the requirement of Wis. Admin. Code § ER-MRS 13.08(2). Given that fact, we are left with the question of when Weisse received the letter and, if the receipt occurred after April 17, does the attempted oral notification satisfy the required notice provisions.

DHS argues that the decision in *Fischer v. DOC*, 96-0131-PC (1996), resolves the issue in its favor. The decision in *Fischer* is limited to its specific facts and does not stand for the proposition that leaving oral notice on a telephone answering machine constitutes compliance with Wis. Admin. Code § ER-MRS 13.08(2). In *Fischer*, the employer made the decision to terminate on the last day of the probationary period but was prevented from providing written notice by the employee’s decision to call in sick that day. Although disputed by the employee, the agency sent a representative to the employee’s home in an attempt to provide written notice. The decision clearly turns on the fact that the employee’s “own actions” prevented the delivery of the notice. Here, Weisse was absent from work because DHS made the decision to place her on administrative leave. We do not believe that attempted oral notice satisfies DHS’s obligation to provide “immediate” written notice of the reasons for and the date of the dismissal.

Weisse in her response provides us with an unsworn statement from a representative of Verizon that no cell phone message was left by anyone on April 14. She also provides copies of what she says are the envelopes from DHS postmarked April 18.

The affidavit submitted by Michelle Doro also represents that she orally informed Weisse of her termination on April 17. Weisse has provided transcripts of the April 17 voicemails and those transcripts contain no reference to termination.¹

¹ Weisse was directed to turn in all equipment prior to the April 14 meeting. The transcripts of the two April 17 calls concern the equipment that was turned in. Because the equipment turnover directive occurred before a final decision, no inference that Weisse was aware of the final decision arises.

The submissions from Weisse unequivocally contradict several assertions in the Doro affidavit creating a significant factual dispute. We draw no conclusions as to who is telling the truth, however, we have no alternative but to remand this matter for hearing on the limited issue.

If Weisse received written notice on or before April 17, the termination would be effective as a probationary discharge over which we have no jurisdiction. On the other hand, if the notice was received after April 17, Weisse would enjoy permanent status in class and DHS would be required to establish just cause for the termination decision. This decision should not be read as precluding DHS from proving that assertion.

Of course, all of this could have been avoided had DHS on April 14 simply handed Weisse a short letter indicating that her employment was terminated because her performance was ineffective. Probation after all is simply an extension of the hiring process and that has been the case in state employment since 1905. *Kraus v. City of Waukesha Fire and Police Commission*, 2003 WI 51, fn.11, 261 Wis.2d 485, 662 N.W.2d 294. DHS had a period of one year to evaluate Weisse's employment performance and measure her progress. According to the April 12 letter, she failed to meet "minimum performance standards" after one year on the job. Based upon that determination, the decision should have been simple and straight forward but it was not. Accordingly, we enter the following:

ORDER

This matter is remanded for hearing on the issue of whether Lori Weisse received timely written notice of the decision to discharge her from employment.

Signed at the City of Madison, Wisconsin, this 7th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner