

**OFFICIAL**

STATE OF WISCONSIN

PERSONNEL BOARD

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DONALD R. FERGUSON,	*
	*
Appellant,	*
	*
v.	*
WILBUR J. SCHMIDT, Secretary,	*
Department of Health and Social	*
Services,	*
	*
Respondent.	*
	*
Case No. 73-161	*
	*

\* \* \* \* \*

OPINION  
AND  
ORDER

Before AHRENS, Chairman, JULIAN, STEININGER, and WILSON.

OPINION

Facts

On August 14, 1970, the Appellant, Donald R. Ferguson, commenced his employment with the State of Wisconsin as a Management Information Specialist 2 with the University of Wisconsin. He satisfactorily completed an original probationary period, and, thereby, acquired permanent status in class in the classified service of the State. On April 23, 1973, Appellant received a promotional appointment to Information Specialist 3 position with the Department of Health and Social Services. On October 8, 1973, approximately five and one half months later, the Appellant was advised that his employment with the Department was terminated, as of October 19, 1973, a few days before the end of his probationary period of six months. The letter notifying him of such action stated the reasons to be as follows:

1. Failure to handle assignments at a level required for a Management Information Specialist 3.

2. Lack of initiative in learning the scope of the job.
3. Failure to follow directions in carrying out assignments or asking for clarification when assignments aren't clear.
4. A continued tardiness, including tardiness when working with the counties.

Appellant's discharge from the Department was, in practical effect, discharge from State employment.

The Appellant filed an appeal for a hearing and a determination whether he was discharged for just cause. At a prehearing conference, the Respondent appeared specially to challenge the Board's jurisdiction on the grounds that the Appellant is not a permanent employee. The parties by their counsel stipulated to the facts as herein set forth, which are not in dispute.

#### Appellant Is a Tenured State Employee

After a State employee in the classified State service completes a probationary period in his initial assignment, he or she acquires tenure. Section 16.01(2), Wis. Stats., 1971 provides as follows:

"It is the policy of the state to maintain a strong coordinated personnel management program and to assure that positions in the classified service are filled through methods which apply the merit principle, with adequate civil service safeguards. To these ends the bureau of personnel with advice and quasi-judicial assistance by the personnel board shall develop, improve and protect a state-wide personnel management program which assures that the state hires the best qualified persons available and bases the treatment of its employees upon the relative value of each employee's services and his demonstrated competence and fitness. (Emphasis added.)

The statement of policy makes clear that while positions are to be filled on a merit basis that adequate civil service safeguards must appertain. It further makes clear that the treatment of an employee shall be on the basis of the employee's demonstrated competence and fitness. The civil

service safeguard for any employee of demonstrated competence and fitness is tenure. Section 16.28(1)(a), Wis. Stats., 1971, provides:

"An employee with permanent status in class may be removed, suspended without pay, discharged, or reduced in pay or position only for just cause. This paragraph shall apply to all employees with permanent status in class in the classified service."

We read these statutory provisions as mandating the conclusion that once an employee has successfully completed a probationary period he or she acquires tenure or "permanent status in class" and may not be removed from State employment except for just cause.

In the instant case, the Appellant had acquired permanent status in the Management Information Specialist 2 class. He had demonstrated his competence and fitness to perform such position and applied for and received a promotion to Management Information Specialist 3, the next higher class. At no time did he leave the classified service of the State nor did he cease to perform work in a classified position for the State.

Respondent contends that Appellant was a probationary employee and, therefore, might be discharged without a hearing. He relies on Section 16.22(1)(a), Wis. Stats., 1971, which provides:

"All original and all promotional appointments to permanent sessional and seasonal positions in the classified service shall be for a probationary period of 6 months,... Dismissal may be made at any time during such periods...."

This section is in apparent conflict with the aforementioned provisions of Sections 16.01 and 16.28. Respondent argues that the Appellant entered upon a promotional appointment and that during his probationary period he was subject to dismissal without just cause. We regard such interpretation as fundamentally at odds with the purposes of the civil service law, which is to protect tenured employees against unjustified discharge. Rather, we

interpret these various positions to be in a basic harmony. They both apply. Section 16.22(1)(a) applies to dismissal only from the higher position that the employee was promoted to, but does not apply to the employee's right to retention in the State service in the lower position in which he has demonstrated his competence. We believe that such an interpretation is imperative where the reason for dismissal from the higher position is alleged incompetence to perform the higher level position, which is the case here.

The right to retain tenure rights during promotional probationary periods is recognized in the statutes and in the Director's Rules in instances where the promotion is to a higher position within the same State agency. Section 16.22(1)(d), Wis. Stats., 1971 provides:

"A promotion or other change in job status within a department shall not affect the permanent status in class and rights, previously acquired by an employee within such department...."

Pers 14.03(1), Wis. Adm. Code, October, 1972, provides:

"In accordance with Section 16.22(1), Wis. Stats., the employee shall be required to serve a probationary period. At any time during this period the appointing authority may remove and shall restore the employee to his or her former position or a similar position and former pay rate without the right of appeal. Any other removal, suspension without pay, or discharge during the probationary period shall be subject to section 16.28(1), Wis. Stats."

In such cases, the concept of the employee being on probation in the higher position is preserved. In other words, the appointing authority might dismiss him from that position; the rule use the term "remove" the employee without the right of appeal. However, the appointing authority must restore the employee to his or her lower position or a similar position. The rule further provides that any discharge from State employment during the probationary period must be for just cause.

Appellant cites the rule of the director, which by title, is stated to be applicable to promotions between State agencies. Pers. 14.03(2), Wis. Adm. Code, October, 1972, provides:

"In accordance with section 16.22(1), Wis. Stats., the employee shall be required to serve a probationary period. At any time during this period, the appointing authority may dismiss the promoted employee from the service without the right of appeal. See section 16.22(3), Wis. Stats., for provisions relating to reinstatement eligibility of an employee so dismissed."

This rule interprets the probationary period provision of the statute to cause a forfeiture of a permanent employee's tenure rights, when he accepts a promotion to another agency within State employment. We know of no sound reason for such a result. Employees who do not seek promotions have their full tenure rights. Those who seek to advance themselves are penalized for doing so by jeopardizing their livelihood. We see no reason why a competent employee, who does not satisfactorily pass probation in a higher job should not be welcomed back to his old job or some similar job, where he has demonstrated his competence. If he is promoted within one particular agency this is his right; but if he goes to a department across the hall, he risks being discharged without cause. We cannot conclude that the Legislature intended such an irrational result. We, therefore, conclude that Pers. 14.03(2) is invalid as contrary to a proper interpretation of Section 16.01, 16.28, and 16.22.

We conclude that any other interpretation of those statutes and rules would be a violation of Appellant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and we must interpret these statutes and regulations so as to preserve their constitutionality. When statutes are susceptible to two different interpretations, one of which is consistent with the Constitution

of the United States and one which is at odds with the Constitution, we are obliged to support that interpretation which is consistent with the Constitution.<sup>1</sup>

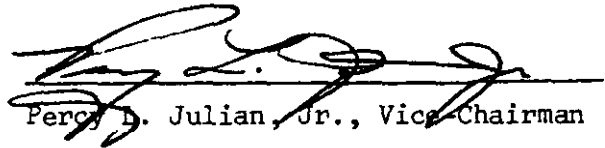
ORDER

IT IS ORDERED that this matter be scheduled forthwith for hearing on the question whether the allegations contained in the discharge letter are true; and, if they are, whether they constitute just cause for discharge from the State service. The case will be treated as any other contested case on an appeal by a permanent employee under Section 16.05 of the Statutes. Counsel for both parties will exchange exhibits and lists of witnesses one week in advance of the date of hearing, and are under a continuing obligation to immediately notify the other counsel of any additions or amendments up to the time of hearing.

Dated July 3, 1974.

STATE PERSONNEL BOARD

BY

  
Percy D. Julian, Jr., Vice Chairman

<sup>1</sup>Just v. Marinette County, 56 Wis 2d 7, 26 (1972).