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BRIAN POSTER,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin System,

Respondent.

Case No. 76-205

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OFFICIAL

OPINION
AND
ORDER

Before: DEWITT, Chairperson, MORGAN, WARREN and HESSERT, Board Members.

This matter is before the board as a request for investigation pursuant to Section 16.05(4), stats. It involves the termination of the appellant, a part time LTE student employe, by the respondent.

Section 16.21(4), stats., provides: "Employes in these positions (LTE's) are not considered career employes and do not qualify for tenure, vacation, paid holidays, sick leave, merit increases, or the right to compete in promotional examinations." The legislature clearly has elected to place LTE's outside the mainstream of the civil service, and to withhold the tenure protection provided by the requirement that there be cause for termination and the rights to a hearing provided by Sections 16.28(1) and 16.05(1)(e), stats. However, appellant makes a number of arguments that the board should take jurisdiction pursuant to the discretionary power conferred by Section 16.05(4), stats.:

"The board may make investigations and hold hearings on its own motion or at the request of interested persons and issue recommendations concerning all matters touching the enforcement and effect of this subchapter and rules prescribed thereunder. If the results of an investigation disclose that the director, appointing authority or any other person acted illegally or to circumvent the intent and spirit of the law the board may issue an enforceable order to remand the action to the director or appointing authority for appropriate action within the law."

The appellant argues that Board of Regents of State Colleges v. Roth, 406 U.S. 564, 92 S. Ct. 2701 (1972), supports a claim of protection under the due process clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court in Roth held that the property interests cognizable under the due process clause did not have an independent derivation from the constitution but rather derived from "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 entitlements to those benefits." 408 U.S. at 577, 92 S. Ct. at 2709. The court could find no such interest in Roth's case, who was employed under a contract that had a termination date and no terms for renewal, and who was not covered by any "state statute or University rule or policy that secured his interest in re-employment or created any legitimate claim to it." 408 U.S. at 578, 92 S. Ct. at 2710.

In the case before us the appellant is neither covered by a contract nor by statute, rule or regulation which confers "tenure" or a property interest. To the contrary, Section 16.21(4), stats., explicitly denies him tenure.

The court in Roth also held that under certain conditions a person's liberty protected by the due process clause could be denied by the state's termination or failure to re-employ.

"The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case.

* * *

Similarly, there is no suggestion that the State in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from any other employment in state universities." 408 U.S. at 573, 92 S. Ct. at 2707.

While the appellant alleges that the termination seriously impaired his ability to seek other similar employment, we note that the respondent permitted him to resign and predate a notice of intention to resign so that the transaction would appear to have been handled by a normal two week notice to quit tendered by the employe (the appellant). We further note that the basis for the termination as set forth by the appellant (failure to mop floor adequately, did not change apron often enough, had changed his schedule of hours, talked too much to other employes, did not wear steel-toed safety shoes) does not contain the kind of charges that would "damage his standings and associations in his community" such as a charge that "he had been guilty of dishonesty, or immorality." While it may be that any work-related discharge has the potential to impair future employability, only charges of the nature set forth in quotes are cognizable under the theory of infringement of liberty set forth by the court.

This board has previously held that the decision whether to proceed in an investigation under Section 16.05(4), stats., is discretionary with the board, and the "the purpose of the section seems to be directed to broad policy matters related to the 'enforcement and effect' of the civil service law." Schwartz v. Schmidt, No. 74-18 (1/17/75). The only "broad policy matters" present in this case is the failure of the state to afford job security and tenure to limited term employes. However, this represents a conscious policy decision of the legislature as reflected in Section 16.21(4), stats. We are aware that the Employment Relations Study Commission (Stevens/Offner) has conducted extensive public hearings and surveyed state employes on all phases of the civil service. It is anticipated that this commission will make recommendations regarding any new legislation perceived desirable. We will take no further action on this request for investigation but we will forward copies of this decision to the study commission and to the appropriate committees of the legislature.

ORDER

It is ordered that this file be closed and that copies of this decision be distributed to the Employment Relations Study Commission and the appropriate committees of the legislature.

Dated June 13, 1977

STATE PERSONNEL BOARD

LS
Laurene DeWitt, Chairperson