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NANCY MARTIN,

Appellant,

v.

MANUEL CARBALLO, Secretary,
Department of Health and Social Services,

Respondent.

Case No. 76-223

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OFFICIAL
INTERIM
OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of the termination of a probationary employe pursuant to Article IV, Sec. 10 of the contract between the State of Wisconsin and the AFSCME. Respondent has objected to personnel board jurisdiction on the grounds that this clause is not applicable to this case, and also argues that the appeal was untimely.

FINDINGS OF FACT

These findings are based on uncontested matter contained in the written arguments filed by the parties. Appellant was promoted from Food Service Worker 2 to Cook 1 effective May 9, 1976, employed at all times at the Central Wisconsin Center. Prior to her promotion she had attained permanent status in class. She was required to serve a six month probationary period on probation. On September 2, 1976, the superintendent signed a probationary service report (Respondent's Exhibit 1) recommending termination, which was eventually effectuated as requested. This document contained the following language: "We are requesting that Nancy be demoted to the FSW II position effective September 12, 1976. . . ." She received notice of this on September 7, 1976, and filed a contractual grievance on September 9, 1976, characterizing the transaction as a grievance. This was denied at the third step on November 30, 1976, with the following decision:

"The grievant was terminated from the Cook 1 position for failure to meet probationary standards and was restored to her Food Service Worker 2 position. The grievant was not demoted and the contract has not been violated. Grievance denied." Respondent's Exhibit 4.

In the meantime, on October 20, 1976, appellant filed an appeal with this board. Board's Exhibit 1.

CONCLUSIONS OF LAW

The respondent argues that the appeal to the board is untimely, citing the thirty day limitation set forth in Article IV, Sec. 1, of the contract, which the board held provided the operative time limit for appeals under Article IV, Sec. 10. See declaratory ruling in case no. 75-206 (8/24/76).

Article IV, Sec. 1, paragraph 36, provides:

"All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance."

In this case the probationary service report which provided initial notice to appellant on September 7, 1976, of the transaction in question, characterized the transaction as a "demotion." In response to this the appellant filed a contractual grievance.¹ The respondent correctly analyzes the transaction as something other than a demotion and acknowledges that its characterization as such in the probationary service report was erroneous:

"Martin incorrectly characterizes the termination of her probation as a 'demotion.' The mistake is understandable in that 'demotion' is used in the PSR. 'Demotion' is defined in the Wisconsin Administrative Code as follows: 'A demotion is the movement of an employe with permanent status in one class to a position in another class that has lower salary rate or pay range maximum.' PERS 17.01, W.A.C. Since Martin did not have permanent status in class in Cook 1 class, termination of her probation and restoration to the Food Service Worker 2 class was not a demotion. The personnel transaction is properly identified by PERS 14.03, W.A.C." (letter dated 2/1/77)

¹If this actually had been a demotion, a contractual grievance would have been the appropriate means of proceeding.

Because of the improper characterization of the transaction supplied to her by management, it is not reasonable to conclude that the appellant "should have become aware of with the exercise of reasonable diligence" the "cause" of the grievance on September 7, 1976. We conclude that the appeal to the board was timely.

The respondent also argues that the board lacks subject matter jurisdiction inasmuch as the language in Article IV, Sec. 10, referring to the "retention or release" of probationary employees only applies to employees actually released from state employment altogether, and does not apply to a situation such as this where the employee is restored to her previous position in a lower salary range. We are unable to find any relevant interpretation of the terms "retention" or "release" by the Wisconsin judiciary. However, it would not be inconsistent with the language of the agreement to interpret "retention or release" to apply to the retention or release of an employee from a position he or she may have attained by a promotion. In any event, Article X provides an independent foundation for review by the board:

"The Personnel Board may at its discretion appoint an impartial hearing officer to hear appeals from actions taken by the employer under Sec. 111.91(2)(b) 1 and 2 Wis. stats.

'1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.'"

Another issue raised at the prehearing was "whether or not appellant received written notice of her termination and whether or not such notice advised her of the reasons for the termination." We conclude that the probationary service report, although it incorrectly characterized the transaction, did give her adequate written notice of her termination and the reasons therefor.

Finally, we conclude that this is an appropriate case for hearing under Article IV, Sec. 10, or alternatively, Article X.

ORDER

It is ordered that this matter be scheduled for hearing before a hearing examiner on issue #3 contained in the prehearing conference report: "whether or not the decision to terminate appellant from her position as Cook 1 was arbitrary and capricious."

Dated April 25, 1977

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson