



Appellant had arrived late for work that night and was informed by telephone that the individuals in question were run-away risks.

At approximately 12:05 a.m. January 3, 1976, Appellant let one of the run-away risks out of his room to go to the bathroom. After letting the individual out of his room, Appellant proceeded to go to the laundry and complete his work there. Appellant did not stay with the individual while he went to the bathroom.

Appellant was in the laundry for approximately five minutes. After he left the laundry, he got another boy some aspirin. He then noticed that everything was unusually quiet and went to check on the situation. He discovered that the individual he let go to the bathroom had escaped with the other boy identified as a run-away risk. Approximately twenty minutes had elapsed from the time Appellant let the boy out to go to the bathroom to the time he discovered that the boys were missing.

Subsequently, following a disciplinary hearing at which Appellant was present, he received written notice that his probationary period was terminated. The reason for the termination was stated to have been Appellant's negligence and failure to follow through on procedures which would have prevented the escape.

Appellant was further notified that he was entitled to return to his former position at Wales with no loss in pay.

At the prehearing conference, Respondent raised an objection to the Board's jurisdiction to hear this case. The following issues were propounded:

- 1.) Whether the Personnel Board has jurisdiction to hear this appeal.
- 2.) Whether the Department of Health and Social Services had just cause to terminate the permissive probationary status of Appellant.

On August 27, 1976, the Board issued an Interim Order denying Respondent's objection to the jurisdiction of the Board to hear this appeal, stating that the

Board could, within its discretion entertain appeals such as this one. The Order limited the scope of review in such cases to a determination of whether or not the action appealed from was arbitrary and capricious.

Based upon the Interim Order, Respondent moved to amend the second issue to read:

Whether or not Respondent's action to terminate Appellant's probationary period was arbitrary and capricious.

#### Conclusions of Law

Respondent's motion to dismiss for lack of jurisdiction, renewed at the hearing, is denied. The Interim Order fully discussed and disposed of Respondent's claim. The Board has jurisdiction to hear cases concerning the termination of probation in its discretion, pursuant to Article IV, Section 10 of the Agreement between the State of Wisconsin and AFSCME, Council 24, WSEU, AFL-CIO, and to Section 111.91, stats. The reasoning behind this determination is fully set out in the Interim Order, and no further discussion is required here.

Turning to the merits of this case, the burden is on Appellant to prove that the termination of his probation was an arbitrary and capricious act. See In re: Request of AFSCME, Council 24, WSEU, AFL-CIO for a Declaratory Ruling, Pers. Bd. No. 75-206, (August 24, 1976).

"Arbitrary and capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis . . . and (is) not the result of the 'winnowing and sifting' process." Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 NW 2d 86 (1965)

Appellant has failed to sustain his burden in this case. From the facts adduced at the hearing, it cannot be said that the decision to terminate Appellant's probation lacked a rational basis. Appellant admitted to having been late for work on two occasions within his probationary period. On the night of

the escapes, Appellant could have taken steps such as remaining with the boy in the bathroom, which would have prevented the escape on January 2, 1976. This is especially true since Appellant was warned beforehand that the boy involved was a risk.

The question presented in this case is not whether Appellant was negligent nor whether Appellant committed any wrong or violated any work rule.

The question presented is not whether or not the actions of the Respondent were correct nor whether the Board agrees with the actions taken. The sole question on this appeal is whether the actions constituted arbitrary or capricious action.

In light of Appellant's tardiness, and in light of Appellant's failure to take precautions which could have been taken, it cannot be said that Respondent's action was arbitrary or capricious.

The facts referred to above concerning Appellant's tardiness and the escape provide a rational basis for Respondent's action. Further, Appellant was not summarily dismissed. A hearing was held prior to terminating Appellant's probation, at which time Appellant appeared and was represented by his union. The actions of Respondent were taken after consideration of the circumstances surrounding the escape.<sup>1</sup>

Accordingly, Appellant has failed to sustain his burden of proving the action of Respondent arbitrary and capricious, and the action will be affirmed.

#### Order

The action of Respondent in terminating Appellant's probationary period is hereby affirmed and this appeal is dismissed.

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<sup>1</sup>This should not be read to imply that such a hearing was or is required by law. However, the fact that the agency did conduct such a hearing supports the conclusion that the agency action was not arbitrary and capricious.

Dated July 22, 1977

STATE PERSONNEL BOARD

  
Laurene DeWitt, Chairperson