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JOHN MADDEN, Appellant,

v.

UNIVERSITY OF WISCONSIN, Respondent.

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RESPONSE TO  
 RESPONDENT'S OBJECTIONS  
 AND ORDER  
 Case No. 78-124-PC

The Commission amends the Hearing Examiner's Findings of Fact #2 and #21. Review of the exhibits indicates that while this classification could be entry or objective level in appellant's case, it was primarily objective. Further, these deletions place better emphasis on the basic personnel error of respondent, namely Supervisor King's evaluation of the appellant without being knowledgeable about the job description which he testified he had not even seen.

The second point raised by respondent's brief objects to the Hearing Examiner's findings that respondent's principal witness's testimony was debilitated by "inconsistencies." Respondent further complains that King was not allowed to use his notes by the Hearing Examiner.

In regard to the "inconsistencies," the Hearing Examiner did not label them as inconsistencies; the Proposed Opinion points out that King had weakened his statements considerably by listing student employees who were not even on campus at the time he allegedly had interviewed them. "Inconsistencies" is too mild a term to apply to testimony wherein King had stated that he interviewed student employees before making his evaluation to terminate appellant when, in fact, two of the four students he named were not even on campus; and wherein he subsequently interviewed those two students two months later in an apparent attempt to justify his recommendation to discharge appellant and wherein, in fact, King was given the benefit of the doubt on the other two when he said he interviewed them in "July," since the only possible day in July that he could have interviewed them, consistent with his other testimony, was July 10, 1978, and yet his only answer under cross examination was "in July." (Fact #19)

To the point King was not allowed to use his notes, respondent's brief is in basic error. King did not ask if he should use his notes until after he had named the four student employees he said he had interviewed before making his termination. Therefore, he had already testified as to the identity of the students before he asked if he should use his notes. Furthermore, he only wanted to check his notes for what the people had said, not when he interviewed them.

Although irrelevant to the decision itself, respondent's reference to the Hearing Examiner's prohibitions of Mr. King's use of his notes is premised on an erroneous understanding of what occurred at the hearing. King had already testified both under direct and cross examination that he had interviewed student employees about their feelings toward appellant. Under cross examination he had listed four names. The tape of the hearing reflects that then under cross examination he was asked: "What did Barnard have to say about appellant?" [First student employee listed by King.]

King - "Should I refer to my notes?"

Attorney Murphy - "Well let me say first, I think you'd have to try to remember if you can and if you have notes of what he said, I suspect you'd be allowed to look at them if you can't independently remember."

Commissioner Durkin - "Before he looks at the notes, he'd have to get them qualified, but let's try his memory first."

Attorney Murphy - "Let me instruct you (King) if you can't recall specifically what the conversation was - state you can't recall without looking at your notes."

King then went on to testify on what he remembered of those statements. All these statements were hearsay, whether from notes or not. Neither

King nor respondent's attorney repeated the request to permit King to refer to notes during the hearing. No attempt was ever made to qualify them.

The University has also raised an interesting, but unconvincing argument on whether Olson v. Rothwell, supra, or Jabs v. State Board of Personnel, supra, has the more pertinent definition of arbitrary and capricious.

The University is objecting to Olson because of inclusion of the "winnowing and sifting" process, found in Olson, but not in Jabs. The Commission disagrees. Respondent did not contravene testimony that never once was the appellant given the slightest indication that his work was unsatisfactory until the decision to terminate had been made and affirmed by both his most immediate supervisors. Manifestly even by the Jabs standard, it is "either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful, and irrational choice of conduct" for a supervisor who is not satisfied with the performance of a probationary employee to fail to advise and counsel that employee as to his deficiencies and inform him wherein improvement must be made.

Finally, the record in this case is quite clear when viewed on the whole. Uncontroverted evidence reveals an employee known by his employer to be somewhat lacking in training when hired, but who was not given any training in that area by his employer; an employee who never had to be re-corrected on any assignment; and an employee who in his first 5 months had three letters of commendation from users of his department's service.

The appellant probationary employee made a statement at the end of a staff meeting which would have corrected an improper method of operation, apparently unaware of the author of the procedure. The statement was prompted by a user complaint. However, the improper method had been determined by the employee's supervisor, and the record establishes that the supervisor was upset with the employee for making the recommendation on how to improve the service provided by the University because it pointed out his own poor judgement.

The supervisor went on vacation and, upon returning, made out an evaluation on the employee, recommending termination. The brief by the respondent is in error in concluding "Where there is basis for the employee's termination in the record, any inquiry as to other 'secret motives' of discharge is extraneous and should not be considered." The evidence in this case supports the conclusion that there was no proper basis for employee's termination and the action of the supervisor was arbitrary and capricious.

ORDER

The Proposed Decision of the examiner, attached hereto, is adopted as the Final Decision of the Commission of this appeal with the following amendments:

Finding #2 is amended by the deletion of the second sentence.

Finding #21 is amended by the deletion of the words following "specifications.

The action of respondent terminating appellant's probationary employment is rejected and the appellant is ordered reinstated with back pay and benefits, subject to mitigation as set forth in §230.43(4), Wis. Stats.

Dated: June 14, 1978.

Edward D. Durkin  
Edward D. Durkin, Commissioner

Joseph W. Wiley  
Joseph W. Wiley, Chairperson

Charlotte M. Hughes  
Charlotte M. Hughes, Commissioner

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JOHN MADDEN,

Appellant,

v.

UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 78-124-PC

\* \* \* \* \*

PROPOSED OPINION  
AND ORDER

NATURE OF CASE

This is an appeal from the termination of a probationary employee pursuant to Section 230.45(1)(f).

FINDING OF FACT

1. Appellant began working for University of Wisconsin Parkside on January 30, 1978 in the position of Electronics Technician I. The job was assigned to the Library/Learning Center.

2. Appellant's job, is entry level. It is the trainee level for other positions wherein the assignments can become increasing difficult. (Respondent Exhibit 4B, 4C)

3. Appellant's job description listed maintenance as 80%, record keeping as 13% and supervision of student employees as 7%. (Respondent Exhibit 5B, 5C), and the Commission so finds.

4. Appellant was terminated July 21, 1978.

5. During appellant's 5½ months on the job he used one sick day. Appellant was never late.

6. Appellant's immediate supervisor during his 5½ months of employment

was Dale King.

7. Dale King's immediate supervisor is Joseph Boisse. Boisse's title is Director of Library/Learning Center.

8. Appellant's background was weak in the area of television at the time of hire. This subject was discussed during the pre-appointment interview. Appellant agreed to training in the area.

9. Respondent provided no video training during appellant's 5½ months on the job.

10. Appellant did not take any video training on his own during his 5½ months employment. However he did check out correspondence courses by N.R.I. and Bell and Howell in June. His question to Personnel Officer, James LeMack, of who would pay the tuition was never answered.

11. Appellant's weakness in video training caused no problems for the Library/Learning Center during his 5½ months on the job.

12. Appellant received a commendation letter dated March 20, 1978, for the manner he assisted "Capsule College" during their one week workshop on how to use audio/visual equipment. (Appellant Exhibit #2)

13. Supervisor King during a counseling conference on April 8, 1978, told appellant that he should improve eye contact when talking to people. King also told appellant that appellant needed to attend seminars on audio-visual equipment.

14. Appellant and two student employees he supervised received a letter of commendation dated April 14, 1978, from an University Instructor for help on workshop which taught students the use of audio-visual equipment. (Appellant Exhibit #3)

15. On May 2, 1978, Supervisor King executed a progress report which

covered five categories. These categories and their definition were: QUALITY - thoroughness, accuracy and neatness; QUANTITY - volume of acceptable work under normal conditions; KNOWLEDGE OF JOB - a clear understanding of facts or factors pertinent to the job; ability to retain the knowledge; ATTITUDE - work interest, cooperativeness, reaction to criticism, tact and courtesy; MANAGEMENT SKILL - ability to plan, organize, direct and control programs and personnel, ability to delegate, motivate fairness. The three choices on each of the five categories were: Very good, Satisfactory, or Needs Improvement. Supervisor King graded appellant Satisfactory in all five categories. In other areas of the report, King marked appellant as "knowing his job well", "well suited for the type of work", and that appellant "seemed to like present work". King's answer to how the employee can increase his value to the service was "needs to attend audio-visual equipment seminars". (Respondent Exhibit #1)

16. On June 22, 1978, Supervisor King received a letter from adjunct instructor Quintin W. Guerin stating how much he "appreciated the excellent service from the Audio-visual Staff". Appellant and the students he supervised were singled out for special attention. (Appellant Exhibit #1)

17. During the 5½ month period appellant was employed he never had to be told twice how to do something correctly.

18. In June (exact date undetermined) a staff meeting for members of the Library/Learning Center was held. Appellant, Supervisor King, and King's supervisor Boisse along with others were present. As the meeting was breaking up, a faculty member returned a piece of equipment labeled L.L.C. That particular piece of equipment should have been returned to audio-visual. Appellant stated he thought the stencil was mis-leading.

Appellant's supervisor, Mr. King took personal affront to the statement because he had made the decision to label that equipment L.L.C.

19. Supervisor King went on vacation the last week of June, returning July 10. Upon returning he interviewed office employees and students under the supervision of appellant as to their feelings towards appellant.

20. On July 11, supervisor King prepared the final probationary report on appellant. King never had any instructions on how to fill out an evaluation report. King rated appellant good on dependability, average on quality of work, quantity of work, and initiative. Appellant was rated poor on judgement, rate of learning, and work habits. Appellant was rated as unsatisfactory on ability to get along with others. King's recommendation was to terminate appellant. (Respondent Exhibit #2)

21. As no time prior to appellant's termination was Mr. King familiar with the Electronics Technician class specifications and he did not recognize this as a trainee level classification.

22. On July 12, 1978, King met with his supervisor Boisse, and Mr. James LeMack of the personnel office, to discuss the report made out by King.

23. Shortly after the meeting, Boisse made the determination to terminate appellant based on King's recommendations.

24. Later on July 12, 1978, appellant was called into a meeting with his supervisors King and Boisse. Appellant was shown the report made out by King and notified by Boisse that he was to be terminated effective July 21.

25. The termination meeting of July 12 was the first time that appellant had been notified his performance was below standard or that



his job might be terminated.

26. Appellant was given a copy of King's report sometime between July 12 and July 18.

27. On July 18, 1978, appellant was sent an official letter of termination from Joseph Boisse and David Holle, Controller. The letter included reasons of inattentiveness, know it all attitude, and failing to exercise good judgement in dealings with fellow employees as well as University Staff. (Respondent Exhibit #3)

28. The appellant had in fact performed at a satisfactory level in discharging the duties and responsibilities of his position, including judgement, work habits, ability to get along with others. While his attentiveness and rate of learning were marginal, this did not impair substantially his overall performance.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45 and 111.91(3), Stats.
2. Review of the respondent's action is limited by §111.91(3) to the test of "arbitrary and capricious" action. The definition of arbitrary and capricious action is found in Olson v. Rothwell, 28 Wis. 2d 233, 239 (1965). "Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis. Arbitrary action is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process."
3. The burden of proof is on the appellant to establish to a reasonable certainty by the greater weight or clear preponderance of the evidence that the respondent's actions were arbitrary and capricious.
4. The appellant here has met that burden of proof.
5. The discharge of the appellant was arbitrary and capricious.
6. The appellant must be reinstated to his job as Electronics Technician I with full back pay and benefits to July 21, 1978.

OPINION

The hearing held for the record was conducted under the guidelines of 227.08. The parties were permitted to lead witnesses and hearsay evidence by both parties was admitted. However, both parties were informed that the weight given such evidence could vary from minute to substantial depending on the evaluation of probative value by the examiner.

The record establishes that appellant was in fact qualified to do the job for which he was hired by the University.. It is an entry level job. Appellant was new to the job and made some mistakes although respondent did not cite any specific examples during the hearing. Appellant's supervisor did say, "appellant's mistakes never had to be re-corrected."

Further, on both progress reports in the record, appellant was graded as average on quality and quantity of work. His dependability is reported as good on his final termination report which reflects his lack of tardiness and only being off sick one day during the five months.

While the three letters of commendation were objected to because the writers could not be cross examined, they can not be ignored. These letters were not solicited and they were received before anyone spoke of terminating the appellant. The mere fact three letters of appreciation were received concerning appellant lends doubt to the accuracy of the statement made in the termination letter that appellant "failed to exercise good judgement with ... other members of the University staff".

There was some evidence, also hearsay, that appellant was not thought of in good terms by some of the students he supervised and some co-workers. However, the principal witness, supervisor King, weakened his statements considerably by listing students who were not even on campus at the time

he first testified he had interviewed them.

This debilitated testimony had been given by Mr. King as the reason he had marked appellant unsatisfactory in his "ability to get along with others". Since King's supervisor, Boisse, used King's evaluation to terminate appellant, it was based on a weak foundation. In the Commission's opinion, the preponderance of the evidence supported a finding that the appellant was not unsatisfactory in this regard.

The other critical evaluation of appellant by his supervisors was his judgement. Uncontroverted testimony at the hearing brought out that their feeling towards appellant's judgement related to the incident surrounding the equipment marked L.L.C. It is in the opinion of the Commission that this incident is the fulcrum that this case rests on.

The record shows that when supervisor King testified about the incident, he stated appellant showed poor judgement by making such a statement in front of King's supervisor. However, Mr. King failed to mention that all three were together because of a staff meeting and the stenciled equipment just happened to be brought back to the wrong place at that time. These facts were brought into the record by Mr. Boisse, King's supervisor. King admitted he was highly displeased with appellant's remarks and marked him down for it.

Inability to get along with a supervisor is a reason for discharge of a probationary employee, provided, however, that the problem is caused by the employee. This is not the situation in this instant case. Appellant was not even aware that the supervisor was highly upset by his suggestion in regard to the stenciled equipment. Based on the circumstances in which the incident happened, the supervisor should have accepted the remark as

a constructive suggestion.

This incident happened in June. Mr. King then went on vacation. On the second day of his return, he filled out the evaluation report that would be the basis for terminating appellant. He gave appellant no chance to give his side or his opinion on any of the things said about him until the process was passed the point of no return and Mr. Boisse had agreed to terminate appellant.

Not once in the 5½ months on the job had appellant ever been told that his work, his attitude, or his judgement was of the manner that had to be improved or his job would be terminated. Only after the decision to discharge had been made was he so notified. If in fact, appellant had been guilty of any of the charges made against him, then the supervisor was "silent, when he had a duty to speak."

Based on the entire record the Commission concludes that the termination was not the result of the "winnowing and sifting" process but rather was unreasonable and without a rational basis. While appellant was marginal in the areas of attentiveness and rate of learning, his overall performance was satisfactory. Furthermore, the Commission has to discount the weight of these factors because his supervisor who evaluated these areas was not familiar with the Electronics Technician I specifications and was not aware that this was a trainee level classification.

As an addendum to this decision, both the motion to dismiss by respondent and the motion by the appellant that by virtue of his 5 days sick leave he had completed his six months are denied as lacking merit.

Dated: \_\_\_\_\_, 1978

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Edward D. Durkin, Commissioner

Dated: \_\_\_\_\_, 1978

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Charlotte Higbee, Commissioner

Dated: \_\_\_\_\_, 1978

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Joseph W. Wiley, Chairperson