

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ELIZABETH A. SCHMID, *
 *
 Appellant, *
 *
 v. *
 *
 UNIVERSITY OF WISCONSIN, *
 *
 Respondent. *
 *
 Case No. 78-19 *
 *
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

This case is before the Commission on review of a Proposed Decision, a copy of which is attached. This is an appeal of the termination of probationary employment. The Proposed Decision addressed appellant's motion for immediate reinstatement on the grounds that the termination of appellant's employment was not done by an appointing authority and that the appellant was not notified in writing at or prior to her appointment of her alleged permissive probationary status.

The Commission adopts and incorporates by reference the Proposed Findings of Fact. The Commission adopts and incorporates by reference the proposed Conclusions of Law numbered 1 through 3 and the following parts of the proposed Opinion: that part found on page 4; page 5, except for the second full paragraph; page 6; the first paragraph on page 7; that part found on page 9, commencing with the second full paragraph; and page 10. The Commission rejects the remainder of the proposed Opinion and proposed Conclusions of Law numbered 4 through 7. The Commission also rejects the proposed Order. The following Conclusions, Opinion and Order are substituted for the language rejected above. The substitute Opinion language is to be inserted following the first paragraph on page 7 of the proposed Opinion.

CONCLUSIONS OF LAW

4. Section Pers. 1.02(1), Wis. Adm. Code, provided for the delegation of the power conferred by §Pers. 13.05, Wis. Adm. Code., to require a permissive probationary period.

5. The imposition of a permissive probationary period on appellant's employment with the respondent was done in accordance with §Pers. 13.05(2), Wis. Adm. Code, and accordingly the probationary period was effective.

OPINION

The requirement that the appointing authority "specify upon appointment and notify the director and report to the employe his determination to require the employe to serve a [permissive] probationary period" is provided by the Wisconsin Administrative Code, §Pers. 13.05(2). In the opinion of the Commission it is not necessary that a statute specifically authorize the delegation of this power or function that is provided for by rule. Section Pers. 1.02(1), Wis. Adm. Code, provides an adequate basis for the delegation.

Also, the error perceived by the Proposed Decision is that the notice of permissive probation came after the appointment. Yet if the supervisor did not have effective delegated authority from the appointing authority, it could not be said that there was an effective appointment when Ms. Dalman made the commitment to place the appellant in the position.

Section Pers. 1.02(1), Wis. Adm. Code, requires that "the delegated authority is in writing and a copy is filed with the director." The Proposed Decision did mention in the opinion, p. 8, that "there was no evidence of any written delegation to Ms. Dalman on this record."

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However, there is a presumption of official regularity, and in the absence of evidence to the contrary it may be presumed that the delegation was effected in accordance with the Administrative Code requirements.

ORDER

The appellant's motion for immediate reinstatement is denied.

Dated:

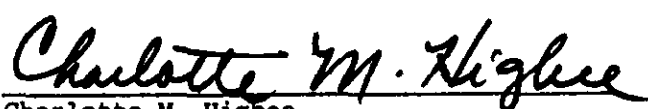
Sept 5

, 1979.

STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commissioner

AJT:jmg

8/31/79

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 ELIZABETH A. SCHMID,
 Appellant,
 v.
 UNIVERSITY OF WISCONSIN,
 Respondent.
 Case No. 78-19
 * * * * *

PROPOSED
DECISION

NATURE OF THE CASE

This is an appeal of the termination of probationary employment. A hearing has been held on a motion filed by the attorney for the appellant dated July 20, 1978, for immediate reinstatement on the grounds that the termination of appellant's employment was not done by an appointing authority and the appellant was not notified in writing at or prior to her appointment of her alleged permissive probationary status.

FINDINGS OF FACT

1. Prior to the commencement of her employment with the respondent the appellant had permanent status in class as an administrative secretary with the Department of Transportation.
2. On or about August 1 or 2, 1977, the appellant was offered and accepted employment on a transfer basis to an administrative secretary 1 position at the School of Education, Department of Studies in Behavioral Disabilities, U.W. - Madison.
3. On the date of the acceptance of the offer of employment the appellant was informed verbally by the departmental secretary and her

immediate supervisor, Helen Dalman, who was not an appointing authority, that she would be required to serve a six month probationary period.

4. At the time of the transaction set forth in the preceding paragraph the authority to make tentative offers of employment, including certain aspects of the offer including the nature of any probationary period, was delegated generally to first-line supervisors on the U.W. - Madison campus, subject to final review by the campus personnel office, for, as to any probationary period, compliance with the requirements of the Wisconsin Administrative Code.

5. The appellant began the performance of her duties in her new employment on or about August 15, 1977.

6. The appellant received written notification that she would be required to serve a six month permissive probationary period on or about October 25, 1977, see Respondent's Exhibit 1, letter to appellant dated October 24, 1977, following review and final approval of her appointment and probationary period by campus personnel officer who was an appointing authority and who signed the letter.

7. In late September or early October, 1977, Ms. Dalman spoke to Robert Pound regarding concerns she had about the appellant's work performance.

8. Mr. Pound at that time was U.W. - Madison personnel manager and a campus-wide appointing authority.

9. Mr. Pound advised Ms. Dalman that if Ms. Dalman was having problems with the appellant's work performance and these continued and were not resolved before the completion of appellant's probation, her probationary employment should be terminated.

10. The appellant's probationary employment with respondent subsequently was terminated effective February 3, 1978, by a letter to her dated January 23, 1978, Appellant's Exhibit 2, which was signed by, among others, Ms. Dalman but not by an appointing authority.

11. The appellant subsequently was sent a letter dated January 31, 1978, signed by John Palmer, Dean of the school of education and an appointing authority. See Board's Exhibit 3.

12. This letter stated: "I concur in the action taken by the Department of Studies in Behavioral Disabilities to terminate your employment."

13. The commission takes official notice that the appellant filed an appeal with the state personnel board on January 26, 1978.

14. The commission takes official notice that during the period of her employment with the respondent she was subject to the collective bargaining agreement between the State of Wisconsin and the AFSCME, Council 24, WSEU, AFL-CIO, clerical and related classifications.

CONCLUSIONS OF LAW

1. This appeal must be decided under the law as it existed prior to February 16, 1978, the effective date of Chapter 196, Laws of 1977. See §129(5), Chapter 196.

2. The conference between Mr. Pound and Ms. Dalman as set forth in findings 7-9 did not constitute an effectuation of the termination of appellant's probationary employment by an appointing authority, to the extent that appellant's probation was effective.

3. The letter to appellant dated January 31, 1978, from Mr. Palmer (Board's Exhibit 3), in conjunction with the letter to the appellant

dated January 23, 1978 (Appellant's Exhibit 2), did constitute an effectuation of the termination appellant's probationary employment by an appointing authority, to the extent that the appellant's probation was effective.

4. There was no statutory basis for the delegation of the discretionary power conferred by §Pers. 13.05, WAC, from the appointing authority to Ms. Dalman.

5. The requirements of §Pers. 13.05(2), WAC, are mandatory and not directory.

6. The imposition of a permissive probationary period on appellant's employment with the respondent was not done in accordance with §Pers. 13.05(2), WAC, and was null and void.

7. Any recourse appellant might have with respect to her termination would be pursuant to contract. See §111.93(3), Stats.

OPINION

The material statutory and administrative code provisions are as follows:

Section 16.22, Wis. Stats. (1975);

"(1) (a) Dismissal may be made at any time during such [probationary] periods. Upon such dismissal, the appointing authority shall forthwith report to the director and to the employe removed, his action and the reasons therefor.

* * *

(2) ... An employe gains permanent status unless terminated by the appointing authority prior to the completion of his probationary period."

Section Pers. 13.09, WAC;

"(2) ... When a dismissal is to be effected, the appointing authority shall immediately notify in writing the person to

be dismissed of the reasons for dismissal and the date of such notice to the director."

Section Pers. 13.05(2), WAC;

"The appointing authority shall specify upon appointment and notify the director and report to the employe his determination to require the employe to serve a [permissive] probationary period."

The first issue that will be discussed in this opinion is whether the termination of appellant's probationary employment was effected by the appointing authority as required by the foregoing statutory and administrative code requirements.

Given the conclusion on the second issue there was not an effective imposition of a probationary period to begin with, it is not absolutely necessary to the disposition of this case to resolve the first issue. However, the parties did address this issue, and the conclusions and comments related to it will at least serve as dicta.

It is necessary that the appointing authority terminate the probationary employe. In Tealey v. Lehrmann, 75-12, 16, Wis. Pers. Bd. (10/1/76), the appointing authority had not signed the letter of suspension. However, the appellant's supervisor conferred with the appointing authority prior to signing the letter. The supervisor recommended a two week suspension but this was reduced to two days by the appointing authority. The board held that on these facts the appointing authority had exercised power, despite the fact that he had not signed the letter of suspension.

There is a significant difference between this case and the Tealey case. Here, the appointing authority discussed the situation with the supervisor approximately four months before the actual termination. He advised the supervisor that if the appellant's work performance did not

improve then the appellant's employment should be terminated prior to the end of the probationary period. This kind of contingent and general advice given so far in advance of the event cannot constitute termination by the appointing authority.

However, the letter of January 31, 1978, concurring in the termination, was signed by the appointing authority. In the opinion of the Commission the fact that the appointing authority's concurrence was contained in a separate document from the first letter of termination dated January 23, 1978, does not negate the required statutory participation in the transaction by the appointing authority. This is not a situation such as was presented in Hulko v. U.W., Wis. Pers. Bd. No. 76-118 (6/16/78).

In the Hulko case, the probationary employe first was informed verbally of his discharge by his supervisor, who was not an appointing authority. Two weeks thereafter the appointing authority sent a letter of termination which did not specify an effective date of termination. The board held that the termination could not be effective on a retroactive basis, citing State ex rel Tracy v. Henry, 219 Wis. 53, 61 (935).

In the instant case, the letter of concurrence by the appointing authority was dated January 31, 1978, which was prior to the effective date of termination of February 3, 1978. Therefore, the appointing authority's letter was not an attempt to effect termination retroactively. In the opinion of the Commission it had the same effect as if it had been part of the January 23, 1978, letter.

The appellant objected to receipt in evidence of the January 23, 1978, letter, Board's Exhibit 3, on the grounds that it was not authenticated and there was no foundation. This objection was overruled.

Administrative agencies are not bound by common law or statutory rules of evidence. See §227.08(1), Wis. Stats. See also §PB 3.03(1), WAC, and 73 CJS Public Administrative Bodies and Procedure §122. Even in judicial proceedings the requirements for identification and authentication have been relaxed considerable of late. See, e.g., Ch. 909, Wis. Stats. In the opinion of the Commission most documents offered in hearings before the Commission should not require extrinsic authentication or foundation unless a genuine question as to authenticity or foundation as opposed to merely an objection, is raised by the opponent. With respect to the Board's Exhibit 3, there was evidence as to who the apparent signer was and no questions were raised as to the authenticity of the signature or the document.

The second issue raised by the appellant's motion is whether there was compliance with §Pers. 13.05(2), WAC, which requires that the appointing authority specify on appointment and provide appropriate notice of a permissive probationary period.

The only notice the appellant received of the permissive probationary period, other than the October 24, 1977, letter, which was over two months after she started working for respondent, was in her conversation with her supervisor Ms. Dalman around August 1, 1977.

The respondent argues in his brief that "There is no requirement ... that the function is nondelegable." However, in Steele v. Gray, 64 Wis. 2d 422, 430, 219 NW 2d 312 (1974), the supreme court held that "... an officer in whom discretionary power is vested cannot delegate that power without statutory authority to do so." A permissive probationary period on transfer is explicitly "at the discretion of the appointing authority ...,"

see § Pers. 13.05(1), WAC, emphasis added.

The Commission is unable to find any statutory authority in the laws that were in effect during the period in question and which must be applied here, see §129(5), Chapter 196, Laws of 1977, for the respondent's act of delegation. Section 106, Chapter 196, Laws of 1977, created a new subsection, 230.06(2) that provides that "An appointing authority may delegate in writing part or all of his or her power of appointment, including discipline and removal." However, this provision was not effective until February 16, 1978, and, parenthetically, there was no evidence of any written delegation to Ms. Dalman on this record.

In Basch v. U.W., Wis. Pers. Bd., 77-86 (5/18/78), the Personnel Board concluded that the provision of § Pers. 13.05(2), WAC, "The appointing authority shall specify upon appointment and notify the Director and report to the employe his determination to require the employe to serve a probationary period," was mandatory and not directory. The Commission agrees with this conclusion. This leads to the conclusion that the failure of compliance with § Pers. 13.05(2) rendered void the attempt to impose a permissive probationary period. See Basch, supra, which cites 82 CJS Statutes §374:

"A failure to follow a mandatory statutory provision renders the proceeding to which it relates illegal and void, while a failure to follow a directory provision does not necessarily invalidate the proceeding."

Furthermore, it would appear to the Commission that since the delegation in question was lacking in authority and ineffective under the rule of Steele v. Gray, the action of the subordinate could not be effective regardless of whether § Pers. 13.05(2) is considered as mandatory

or directory.

As to the disposition of this matter, the Commission can not grant the requested remedy of reinstatement. Since the appellant was not legally required to have served a probationary period, her employment tenure is subject to the union contract and she must look to the contract with respect to her rights and remedies with regard to her termination.

A number of collateral evidentiary issues arose at the hearing in addition to the dispute over the Board's Exhibit 3, discussed above. The appellant objected to the examiner hearing any testimony from Mr. Pound for failure of compliance with the disclosure requirements of § PB 2.01, WAC:

PB 2.01 Mandatory disclosure. At the prehearing conference, the parties shall file and exchange lists of their witnesses, and the originals or copies of the documentary and other physical evidence which they intend to utilize at the hearing. If the prehearing conference is conducted by conference telephone call, filing and exchange of these materials will be by mail. Following the prehearing conference, or if no prehearing conference is held, the parties are under a continuing obligation to file and exchange lists of further witnesses and further evidentiary matter which they intend to utilize at the hearing. With the exception of rebuttal matter, witnesses or evidence not so submitted prior to three working days before the hearing will not be permitted to testify or be received at the hearing, unless good cause for the failure of submission is shown.

Evidence relative to appellant's motion was heard on December 6, 1978. The respondent's attorney represented that he was served with a list of witnesses and copies of documents by appellant's attorney on November 30, 1978, which would have been the last day for compliance with the aforesaid rule. The respondent's attorney then sent a letter dated November 30, 1978, to the Commission and the appellant's attorney providing notice that Mr. Pound might be called as a witness. This letter was received by

the Commission on December 1, 1978, and appellant's counsel represented that he also received his copy on December 1, 1978.

In the opinion of the Commission the respondent had "good cause" for not complying literally with § PB 2.01. The Commission believes that this rule must be given a reasonably liberal and flexible interpretation. While Mr. Pound could not be categorized as a rebuttal witness and the respondent had been served with a copy of appellant's motion many months before the hearing date, the facts remain that he did not get disclosure of the moving party's evidence until the last possible day and that he promptly provided notice of this additional witness.

The appellant also objected to the receipt in evidence of Respondent's Exhibits 1 and 2. These objections are overruled for the same reasons set forth in the preceding paragraph and, as to authentication and foundation, for the same reasons set forth above in the discussion of the Board's Exhibit 3.

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ORDER

The action of the respondent attempting to place appellant on permissive probation is determined to be null and void and is rejected. The remainder of the appeal is dismissed.

Dated: _____, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson

Charlotte M. Higbee
Commissioner

AJT:jmg

3/21/79