

OFFICIAL

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

DENISE LYNNE BOKATH, \*

Appellant, \*

v. \*

STATE FAIR PARKS BOARD, \*

Respondent, \*

Case No. 78-PC-ER-44 \*

\* \* \* \* \*

DECISION AND ORDER

NATURE OF THE CASE

This case was originally filed on August 8, 1978, as an allegation that the Wisconsin State Fair Parks Board had discriminated against the Appellant because of her sex (female) when it discharged her from her position as a Probationary Stenographer 2, and that such discrimination was a violation of Sections 111.31 to 111.37 Stats. On February 16, 1979, a Personnel Commission Equal Rights Officer concluded that there was probable cause to believe that Ms. Bokath was discriminated against because of her sex. At a prehearing conference on March 16, 1979, the parties agreed that this matter would be handled as an appeal of probationary employee termination pursuant to Article IV, Section 10, of the WSEU/State of Wisconsin Collective Bargaining Agreement, and Sections 111.91(3) and 230.45(1)(f), Stats., and that any objection to a possible problem with time limits for such an appeal would be waived. The evidentiary hearing was held on July 3, 1979 before then Chairperson of the Commission, Joseph W. Wiley.

FINDINGS OF FACT

1. The Appellant was hired by the respondent as a Probationary Stenographer 2 on May 31, 1978. Her job consisted substantially of duties as a switchboard operator and receptionist.

2. On June 8, 1978 she was discharged from this employment by her Supervisor, Walter Rueckert, Operations Manager for the Wisconsin State Fair Park.

3. Mr. Rueckert informed the Appellant that she was being dismissed because she didn't answer the telephone properly. He acknowledged that her typing and shorthand were satisfactory, but declined to discuss in detail what her shortcomings were.

4. Appellant was given about four hours of instruction on her first day at work and subsequently was given assistance on a day-to-day basis as the need arose and informed of her mistakes as they occurred.

5. Appellant had no prior experience as a receptionist and switchboard operator 1/ and had considerable difficulty with this aspect of the work.

Footnote: 1/ Respondent did not actually use a switchboard, but rather a six-line centrex phone from which calls were routed by dialing the transferee.

6. Telephone traffic at Respondent's office was quite heavy during the season Appellant was hired, and there were some 50 or so potential transferees of incoming calls.

7. Appellant in some instances forwarded calls to the wrong office by mistake.

8. Appellant had been instructed not to take messages but to let the transferee offices handle this function. However, she did not always comply with this instruction.

9. Mr. Rueckert attributes the loss of a contract for an important performing act to the appellant's failure to comply with the instruction cited in finding 8 above.

10. Appellant sometimes used informal responses such as "Hang in there" when talking to callers. She persisted in this informality after having been instructed that it was not acceptable.

11. Appellant sometimes projected a poor image in that she leaned on the reception room counter while talking to official visitors to the Respondent's offices.

12. Mr. Rueckert believed that four hours of training and eight days on the job were sufficient for learning the fundamentals of the appellant's position based on his past experience that approximately 16 predecessors had mastered the duties with similar training and within that time frame.

OPINIONS

The question before the Commission in this case is whether or not the respondent's precipitate discharge of the Appellant was "arbitrary and capricious" within the meaning Section 111.91 Stats. This statute provides in pertinent part that those actions which the employer is prohibited from bargaining on (including probationary terminations) may be the subject of appeals before an impartial hearing officer whose decision may be reviewed by the Personnel Board (now Personnel Commission) provided that:

Nothing in this subsection shall empower the Hearing Officer to expand the basis of adjudication beyond the test of "arbitrary and capricious action . . .

In Jabs v State Board of Personnel, 34 Wis. 2d 343, 251 (1967), the Wisconsin Supreme Court defined "arbitrary and capricious action" as:

. . .either so unreasonable as to be without rational basis or the result of an unconsidered, wilful, and irrational choice of conduct.

The Appellant in her arguments has contended that the discharge was arbitrary and capricious on the grounds that: (a) the eight-day duration of her employment was an insufficient trial period for a position as complex as the one from which she was dismissed and (b) adequate training to do the job was not provided by the Respondent.

Neither court nor Personnel Commission precedent will support a conclusion that inadequate training and insufficient trial period in and of themselves constitute arbitrary and capricious action either separately or collectively.

The Commission did conclude in Heller v. University of Wisconsin 77-207, October 12, 1979, that it was "arbitrary and capricious" to discharge the probationary employee in that case after only 15 days, but that case is clearly distinguishable from the instant appeal. Heller's performance had been satisfactory except for two relatively minor infractions: one (leaving a door unlocked) could not be definitely attributed to him; and the other (leaving the grounds without his supervisor's prior permission) was, in the Commission's judgment, excusable because appellant did seek permission from the person in charge and there was legitimate ground for his not being clear as to the rule. In Heller, the employer suffered no serious detriment from either infraction.

The Commission has also found "arbitrary and capricious action" in a probationary discharge case in which inadequate training was alleged (See Wilson v. University of Wisconsin, 79-17-PC, January 22, 1980), but that case too is distinguishable from the instant appeal. In that case the Commission concluded:

. . .the supervisor, herself, unwittingly contributed to whatever shortcomings appellant may have had by not providing the training which had been promised, by not being available for the regularly scheduled meetings, by not communicating her dissatisfactions constructively, or by simply not communicating her expectations at all.

The evidence in this case indicates that unlike Heller, the Appellant's shortcomings were not minor, she was performing unsatisfactorily in substantive aspects of the job. (See findings 7 through 10). Moreover,

the consequence of Appellant's subnominal performance was of serious detriment to the Respondent (Finding 9).

The preponderance of credible evidence in this case also indicates that, unlike Wilson, the training provided was sufficient (See finding 12) and there was no failure of communications which contributed to her unsatisfactory performance.

CONCLUSION OF LAW

1. The Commission has jurisdiction to hear this appeal pursuant to Sections 230.45(1)(f) and 111.91(3), Stats. and pursuant to Article IV, Section 10 of the Collective Bargaining Agreement between State of Wisconsin and American Federation of State, County, and Municipal Employees Council 24, WSEU, AFL-CIO.

2. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of credible evidence, that the Respondent's action was arbitrary and capricious.

3. The Appellant has failed to carry the burden of proof.

4. The action of the respondent in discharging the Appellant was not arbitrary and capricious.

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ORDER

IT IS HEREBY ORDERED that the action of the respondent in discharging  
the Appellant is sustained and this appeal is dismissed.

Dated June 27, 1980      STATE PERSONNEL COMMISSION

Charlotte M. Higgins  
Commissioner

Borden H. Brennan  
Commissioner

Donald R. Murphy  
Commissioner

JWW/lfd

5/19/80