

KAREN L. MORSCHAUSER,
Appellant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING
ON MOTION
TO DISMISS**

Case No. 98-0175-PC

This matter is before the Personnel Commission on respondent's motion to dismiss for lack of subject matter jurisdiction. Respondent's motion is premised on the factual conclusion that the appellant's employment was terminated while the appellant was serving an initial probationary period. Appellant disputed this conclusion and respondent replied by submitting an affidavit from the appointing authority. Appellant was provided an opportunity to reply.

FINDINGS OF FACT

1. Appellant commenced employment at respondent's Dodge Correctional Institution effective June 8, 1998, as a Program Assistant 1. The letter of appointment stated, in part:

Your pay rate will be \$9.118 per hour and you will be required to serve a six-month probationary period. Upon successful completion of your probationary period, you will attain permanent status in your new classification. Any further pay adjustments will be in accordance with provisions set forth in Appendix 5 of the WSEU agreement.

Your position is included in the Administrative Support bargaining unit.

The appointment letter bears a signature identified as that of Steven B. Casperson, Warden and appointing authority of Dodge Correctional Institution (DCI).

2. Prior to December 2, 1998, Mr. Casperson met with Rene Marquardt, Human Resources Director, and Kathy Nagle, Security Director, to discuss appellant's

employment status. Mr. Casperson agreed with recommendations made to terminate, and directed that the termination proceed unless information that would substantially affect the decision was disclosed at the "intent to terminate" meeting.

3. Warden Casperson was not at DCI on December 2nd. Ms. Nagle was the administrator in charge of the institution on that date.

4. By letter dated December 2, 1998, appellant was informed as follows:

This letter is to inform you of our intention to terminate your employment as Program Assistant 1 effective December 2, 1998 due to your failure to meet probationary standards. Expectations that are not being met include

This action is being taken pursuant to Section ER-Pers 13.08, Wis. Adm. Code and Section 230.28 of the Wisconsin Statutes which provides that you be informed of the reason for our decision to terminate your employment during your probationary period.

You are being afforded the opportunity to respond to the reason for termination at a meeting with Kathy Nagel, Security Director, which has been scheduled for 2:00 p.m. on Wednesday, December 2, 1998. You may have a representative of your choice at this meeting. If you fail to appear at this meeting, we will assume you do not wish to have a meeting and your employment will be terminated on December 2, 1998.

5. Appellant, a union official, Ms. Nagle and Ms. Maquardt were all present at the "intent to terminate" meeting on December 2nd. No information was disclosed at the meeting that substantially affected the decision to terminate appellant's employment.

6. By another letter dated December 2, 1998, appellant was informed as follows:

This letter will confirm the meeting held on December 2, 1998, which was conducted by Kathy Nagle and Rene Marquardt. In addition to you, Mel Elgersma, Local 178 President, was also present.

The information discussed at the meeting has been given careful consideration. The decision to terminate your employment, based upon your failure to meet probationary standards, is justified in my judgment.

Therefore, your employment as Program Assistant 1 will be terminated effective December 4, 1998.

Attached is a Performance Planning and Development Report, which is your official notice of termination.

Both this letter and the attached Performance Planning and Development (PPD) report bear a signature identified as that of Steven B. Casperson. The signature on the PPD is in a box marked as "signature of appointing authority/designated representative." These documents were hand-delivered to the appellant on December 2nd.

7. Ms. Nagle signed Mr. Casperson's name on the PPD and on both letters dated December 2, 1998.

8. Appellant's employment at DCI was terminated within her 6 month probationary period.

CONCLUSIONS OF LAW

1. The appellant has the burden of establishing that the Commission has jurisdiction over this matter.
2. The appellant has failed to sustain her burden.
3. The Personnel Commission lacks subject matter jurisdiction over this appeal.

OPINION

The Personnel Commission may review decisions to discharge employees that have "permanent status in class" under §230.44(1)(c), Wis. Stats. However, in *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 309 N.W.2d 366 (1981), the Court of Appeals held that the Commission lacks subject matter jurisdiction over an appeal of the termination of probationary employment.

In her written arguments, appellant contends that respondent "failed to properly terminate Ms. Morschauser's probationary employment in December 1998":

[T]estimony in this case will show that the signature on the [termination or second December 2nd] letter is not Warden Casperson's and that he was unaware of the fact that this letter had been given to Ms. Morschauser until a date more than six months after her date of hire. Therefore, there was no effective termination of Ms. Morschauser's employment in December of 1998 and she became a permanent employee after the passage of six months of employment. Therefore, there was no effective termination of Ms. Morschauser's employment in December of 1998 and she became a permanent employee after the passage of six months of employment[. Should DOC dispute the above-stated assertions, this factual issue can be resolved at the same time as the just cause issue.

Respondent subsequently filed an affidavit by Mr. Casperson. The affidavit serves as the basis for Findings 3, 5 and 7. The affidavit reads:

1. I am the Warden and appointing authority of Dodge Correctional Institution (DCI).
2. I met with Rene Marquardt, Human Resources Director, and Kathy Nagle, Security Director, prior to December 2, 1998, to discuss the appellant's employment status. I agreed with the recommendations made to terminate, and directed that the termination proceed unless information was disclosed at the intent to terminate meeting that would substantially affect this decision. No such information was disclosed.
3. On December 2, 1998, I was not in the institution and Kathy Nagle was the administrator in charge. Ms. Nagle had full authority to sign the termination letter dated December 2, 1998.

The Commission notes that the appellant was required to serve a six month probationary period that began on June 8, 1998. She was notified by letter on December 2, 1998, that her employment would be terminated effective December 4, 1998. It is undisputed that Ms. Nagle signed Mr. Casperson's name on the December 2nd termination letter, as well as on the accompanying PPD. It is also undisputed that Mr. Casperson, the Warden and appointing authority for DCI, was away from the institution on December 2nd.

Pursuant to §§ER-MRS 13.08 and 13.09, Wis. Adm. Code:

ER-MRS 13.08 Dismissal. (1) Action by appointing authority. The appointing authority may dismiss any employe without the right of appeal during the employe's probationary period. . . .

(2) Dismissal notice required. When a probationary employe is to be dismissed, the appointing authority shall immediately provide written notice to the employe to be dismissed of the reasons for dismissal, the date on which dismissal is to occur. . . .

ER-MRS 13.09 Attainment of permanent status in class. Permanent status in class is attained immediately upon completion of the last work period to which the employe was assigned to work during his or her probationary period regardless of whether it falls on or before the last day of the probationary period. Prior to the end of the probationary period, the appointing authority shall notify the employe in writing that the employe will attain permanent status in class. No employe may be denied permanent status in class after successfully completing a probationary period because an appointing authority fails to submit notice..

The term "appointing authority" is defined in § 230.03(4), Stats., as "the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes." Pursuant to § 230.06(2), Stats., "[a]n appointing authority may delegate in writing part or all of his or her power of appointment, including discipline and removal."

In light of appellant's contention and respondent's affidavit there is a dispute between the parties as to whether the respondent took the steps necessary to effectuate the termination of appellant's employment during her probationary period. As a consequence, the respondent's motion must be reviewed in the context of a motion for summary judgment.¹ In other words, only if there is no genuine dispute of fact with respect to those points necessary to determine whether the appellant's employment was termi-

¹ Summary judgment should only be granted if the moving party establishes there is no genuine dispute of material fact and that, as a matter of law, it is entitled to judgment. *Heinz-Breitenfeld v. DOC*, 95-0153, 0155-PC-ER, 5/6/98; citing *Grams v. Boss*, 97 Wis. 2d 332,

nated while she was serving a probationary period, can the jurisdictional issue raised by respondent be resolved.

It should be noted both that the appellant is represented in this matter by an attorney and that appellant did not file a response to Warden Casperson's affidavit.

Accepting as true that the signature on the termination letter is not Warden Casperson's, accepting as true that the warden was not aware the termination letter had been given to appellant until more than six months after her hire, given no dispute that the warden had directed "the termination proceed unless information was disclosed at the intent to terminate meeting that would substantially affect" that decision, and given no dispute that no such information was disclosed, can it still be said that the termination letter, bearing the warden's name signed by Ms. Nagle, did not constitute the requisite dismissal notice under § ER-MRS 13.08(2)? The answer is "no."

The Commission has previously held that actual delivery of the dismissal notice is not required in order for the action to take effect. In *Fischer v. DOC*, 96-0131-PC, 11/22/96, the Commission dismissed a case for lack of subject matter jurisdiction where appellant sought to appeal a probationary termination. In that case, the appellant's probationary period ended on Saturday, August 24th, but he was not scheduled to work that day.² On August 23rd, when appellant was off work due to illness, and after leaving a message for appellant to attend a termination meeting, respondent's personnel manager left another telephone message that a decision had been made to terminate his probationary employment. The appellant did not respond to the request to return that call. Respondent left similar messages on appellant's phone on August 24th. Appellant did not return the call until the afternoon of August 25th, after which respondent's personnel manager met with appellant at his home and provided appellant with written notice of his termination. In other words, the appellant in *Fischer* did not receive written

294 N.W.2d 473 (1980). Also see *Balele v. Wis. Pers. Comm., et al.*, Wis. Court of Appeals, 98-1432, 12/23/98.

² The Commission's ruling in *Fischer* recites certain dates that are inconsistent: Sunday, August 24, 1996 and Friday, August 23, 1996. Upon reviewing the entire decision, it appears

notice of his termination until after his probationary period had ended. In concluding that appellant did not successfully complete his probationary period, the Commission noted:

It is undisputed that respondent provided oral notice of the termination by telephone answering machine prior to the close of appellant's "last assigned work period." Respondent could have provided written notice of the termination decision to appellant on August 23, 1996, but for appellant's own actions of being absent and failing to reply to the telephone messages from [the personnel director]. Under the circumstances of this case, the failure to provide advance written notice does not operate to defeat the conclusion under §13.09, Wis. Adm. Code, that the appellant did not successfully complete his probationary period.

In the present case, the termination notice was clearly delivered to the appellant within the probationary period. The warden may not have known until sometime later that the notice had been delivered, but that has no effect on the consequence of the notice. Warden Casperson left the institution having provided specific direction that appellant's probationary employment was to be terminated absent some new information obtained at the pre-termination meeting. No such information was forthcoming and the warden's previous directive took effect. There is no assertion that Ms. Nagle was not properly acting on behalf of Warden Casperson when she signed the December 2nd termination letter for him. The fact that Ms. Nagle signed the warden's name to the letter is of no significance. The action by Ms. Nagle is akin to a secretary signing a document on behalf of a supervisor:

It is not ordinarily essential to the existence of an agent's authority that there be a writing, since for most purposes, although not all, an agent may be appointed and authorized verbally. . . . Furthermore, one may, by parol, and whether he himself can write his name or not, authorize another to sign his name to an instrument. 3 Am. Jur. 2d *Agency* §74, 577 (footnotes omitted)

that the reference in line 4 of page 2 of the decision should have been to *Saturday*, August 24, 1996.

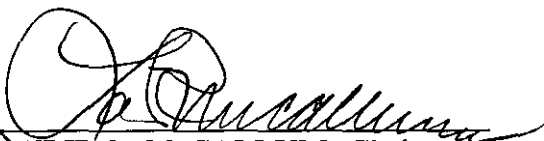
Because there is no dispute of material fact and because the appellant's employment was terminated during her probationary period, this matter must be dismissed for lack of subject matter jurisdiction.


ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: March 10, 1999 STATE PERSONNEL COMMISSION

KMS: 980175Arul1


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95