STATE OF WISCONSIN STATE PERSONNEL BOARD

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BARBARA MCMANUS,

Appellant,

v.

JOHN C. WEAVER, President,
University of Wisconsin,

Respondent.

Case No. 74-32

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OFFICIAL

OPINION AND ORDER
ON MOTION OF APPELLANT FOR ORDER
DIRECTING THE RESPONDENT TO
OFFER APPELLANT REINSTATEMENT

Before: JULIAN, STEININGER and WILSON

OPINION

I. Facts

The background of this case involves an earlier appeal with the same parties concerning a November 3, 1973, discharge. Appellant was employed as a Typist III at the Biophysics Laboratory, University of Wisconsin-Madison. She had permanent status in the classified service.

Appellant was discharged effective November 3, 1973 by letter signed by Professor Paul Kaesberg. The alleged misconduct covered a period beginning May 3, 1973, and ending October 18, 1973, and involved deficiencies in typing, preparation of manuscripts, proof-reading, arranging travel accommodations for a professor, failure to complete assigned tasks on time and an unsatisfactory attendance record.

Timely appeal was made to the State Personnel Board which held a hearing. The case was entitled McManus v. Weaver, Case No. 73-171. At the hearing, counsel for Appellant moved

was not signed by the appointing authority or his registered delegatee. After evidence and argument were presented, the hearing was recessed and the Board members polled for a decision on the matter. No evidence on whether the employee did in fact commit the acts cited as grounds for discharge was heard.

This Board found that Paul Kaesberg was not an appointing authority and did not have power to discharge Appellant and concluded that Appellant's discharge was ineffective and void because the statutory procedure for dismissal was not followed. The Order of the Board, dated March 29, 1974, provided:

> IT IS HEREWITH ORDERED that the Respondent immediately reinstate the Appellant to her former position, without any loss of seniority or other benefits and with full back pay, from the date of her discharge to the date of her receipt of Respondent's written unconditional offer of reinstatement.

The Opinion and Order in Case No. 73-171 was duly served on the parties involved and no review was sought in Dane County Circuit Court within the thirty days prescribed in sec. 227.16, Stats.

The records before the Board in Case Nos. 73-171, 74-32, do not presently show that Appellant offered to present herself at her former place of employment ready for work or that any action in mandamus was brought for enforcement of the Board's Order within sixty days after service as permitted under sec. 16.05 (1) (e), 16.38 (4), Stats. Counsel for Appellant states that she did "at no time . . . return to work . . . ." (Appellant's Motion for Order Directing the Respondent to Offer Appellant Reinstatement, dated 11-15-74, page 2.)

The appointing authority did not issue Appellant an unconditional offer of reinstatement. However, there is evidence to indicate that

Appellant was reimbursed fully for all backpay and fringe benefits from the date of receipt of the first notice of dismissal (October 28, 1973) to the date of receipt of the second notice (April 13, 1974).

By letter, dated April 2, 1974, Barbara McManus was again discharged from her position as Typist III in the Biophysics Laboratory at the University of Wisconsin-Madison. The discharge letter was signed by Paul Kaesberg and by the Dean of the Graduate School, Robert M. Bock. The misconduct alleged was substantially the same as set forth in the October 18, 1973 letter and covered the same period of time. The letter stated that "your employment with the Biophysics Laboratory is being terminated immediately upon your receipt of this letter."

The employee took this appeal of the discharge to the State Personnel Board. On September 5, 1974, counsel for Appellant forwarded a copy of a death certificate of Appellant showing the date of death to be May 25, 1974, and advising that such counsel had authority from the Personal Representative of the Estate to proceed through the motion stage and that a motion with supporting brief would be filed. Motion for Order Directing the Respondent to Offer Appellant Reinstatement was filed with the Board on November 18, 1974, together with Memorandum of Supporting Authorities.

II. Conclusions

Under Section 16.05 (1) (e), Wisconsin Statutes, this Board has jurisdiction over appeals from dismissals. Furthermore, this appeal was timely filed since Appellant received notice of her dismissal on April 13, 1974, and the appeal letter was received by this Board's office on April 24, 1974.

This Appeal Proceeding Survives the Death of Appellant

The Circuit Court held in Marlett v. State of Wisconsin Personnel Board, #137-216 (November 30, 1973), that an appeal from dismissal from state employment survived the death of the employee to the benefit of his estate. The Court found that the relation between the state as employer and the employee was a contract. Usually an employment contract is a contract at will and, therefore, not assignable. However, if the employee in addition to his personal services brings something more into the employment relation, then a contract action is assignable. Since no state employee who reaches permanent status can be terminated except for just cause. (Section 16.28 (1) (a), Wis. Stats.), the legislature has placed the civil service employee on exactly the same basis as the employee who has brought more than his personal services into the employment relation. Any action arising from such an employment contract is assignable. Therefore, it survives the death of the employee.

The Doctrine of Double Jeopardy Does Not Apply to This Appeal

Appellant contends that the concept of double jeopardy should be applied in a case like the instant one and that the Board decision voiding Appellant's first discharge bars the reimposition of the second discharge that is the subject of this appeal. We find no merit in this contention.

Jeopardy is defined as by Black's Law Dictionary, revised 4th Edition, as:

> The danger of conviction and punishment which the defendant in a criminal action incurs when a valid indictment has been found, and a petit jury has been impaneled and sworn to try the case and give a verdict in a court of competent jurisdiction. (Cases cited.) (Black's Law Dictionary 969 (4th Ed. Rev. 1968).)

Former jeopardy is the doctrine whereby a person cannot be placed in jeopardy more than once for the same offense. (Black's Law Dictionary 781.) The bases of this doctrine are found rooted both in the common law and in constitutional protections.

The Wisconsin Constitution, Article I, Section 8, states in pertinent part that ". . . no person for the same offense shall be put twice in jeopardy of punishment . . . ." This constitutional provision and the doctrine of former jeopardy have been held by the courts of this State to apply only to criminal proceedings. State v. Lewis, 159 N.W. 746, 164 Wis. 363 (1916); State v. Little, 159 N.W. 747, 164 Wis. 367 (1916).

However, in Section 29.65 (3), Wis. Stats. 1973, the legislature has extended the application of the concept. A civil action which is brought under this section of the Fish and Game Act acts as a bar to a criminal prosecution for the same offense, and vice versa. Quite obviously this is a very narrow extension of the theory.

The more common rule in this type of situation was well stated in State v. Roggensack, 15 Wis. 2d 625, 633, 113, N.W. 2d 389, 394, relv. den. 15 Wis. 2d 625, 114 N.W. 2d 459 (1961), where the Court said:

> It has been generally held that the double jeopardy clause prohibits punishing criminally twice or attempting to do so and does not apply to prosecution both of a civil sanction and a criminal one. 22 C.J.S., Criminal Law, p. 633, sec. 2406; Helvering v. Michael (1938), 303 U.S. 391, 58 Sup. Ct. 630, 82L. Ed. 917; Kuder v. State (1920), 172 Wis. 141, 178 N.W. 249.

Therefore, except for one small extension, Wisconsin has in the past applied this doctrine only to criminal cases. The exception is a legislative one, not one of judicial interpretation.

However, Appellant contends that since the concept of double jeopardy has been used in Labor Arbitration cases, the Board can and should apply it in the instant case. In Pfankuch v. Schmidt, Case No. 73-45, December 20, 1973, this Board did recognize that such a concept has been developed and used in that field. The theory as used is "that once discipline for a given offense has been imposed and accepted it cannot be increased." Elkouri and Elkouri, How Arbitration Works, 3rd Ed. (1973), pg. 636-637.

Counsel for Appellant in his brief cites several arbitration cases which have applied the doctrine of double jeopardy. Even assuming the doctrine could be applied we find the Labor Arbitration cases to be distinguishable from the present one. Each case cited in Appellant's brief involves this following basic situation. The employee was disciplined for improper or offensive conduct. Then although there was no further offense, the employer increased the amount or gravity of the punishment.

In the instant case, Respondent did not increase or impose a greater penalty on Appellant through the second dismissal. It was the same discipline reimposed. The first attempt to discharge failed because proper procedures were not followed.

The first dismissal in this case was voided on a technical ground, not because of any decision on the merits. Appellant was never in effect discharged under the first dismissal letter, as that letter was void from the start. She was then reinstated with back pay. She was never placed in jeopardy.

In Jenkins v. Macy, 357 F. 2d 62 (8th Cir. 1966), a federal employee was first discharged by a letter which failed to give him the thirty day required notice. A second letter of discharge was issued shortly after the Civil Service Commission determined the defect in the

first letter. The Court after discussing the employee's argument of res judicata went on to speak on the possible application of the doctrine of double jeopardy. It stated:

> If anything, Appellant's contention sounds more of 'double jeopardy' rather than of res judicata. But the criminal concept of double jeopardy clearly is not applicable herein. At a minimum, appellant was not being punished twice for the same offense, for he never was punished after his first removal, having been fully reimbursed for his time lost on that occasion. This might be likened to the retrial of a criminal case where error in the 1st trial necessitates its being tried again. No double jeopardy results. (357 F. 2d. 62, 67.)

To recapitulate, the instant appeal does not fall within the scope of the doctrine of double jeopardy. The doctrine as applied in Wisconsin appears to apply only to criminal cases except for one narrow legislative extension.

However, even using the same reasoning as is used in the Labor Arbitration cases, we conclude that the concept does not require reversal of the second discharge. There was no imposition of a greater punishment by Respondent. His first attempt to terminate Appellant was a nullity. Appellant like the employee in Jenkins (supra) was reimbursed for lost wages. She was not, however, offered reinstatement which now would be impossible because of her death.

This Board's Order Of March 29, 1974 Is Not Res Judicata As To The Second Letter of Dismissal Dated April 2, 1974

Res Judicata as a rule of civil law is defined by Black's Law Dictionary (supra) as the:

> Rule that final judgment or decree on the merits by a court of competent jurisdiction is conclusion of rights of parties or their privies in all later suits on points and matters determined in the former suit.

Respondent contends that this rule is not applicable to administrative agency decisions under present Wisconsin law. We do not agree. It is true that the language of the cases cited in Respondent's brief is very broad but closer scrutiny of the facts shows that they are distinguishable from the present appeal.

In Duel v. State Farm Mutual Automobile Ins. Co., 240 Wis. 161, 1 N.W. 2d 887 (1942), an insurance commissioner issued a license to a foreign corporation to do business in the state. A year later when the license came up for renewal, it was cancelled by another insurance commissioner. It was held that the first decision was not res judicata as to the second one. It is elementary that each time a license is issued or renewed that scrutiny of present and past operating procedures should occur. Any other result would defeat the purpose of the licensing process. There could be no real control or regulation of relicensing if the doctrine applied.

The same reasoning applies to Fond du Lac v. Dept. of Natural Resources, 45 Wis. 2d 620, 173 N.W. 2d 605 (1970) which cites Duel v. State Farm Mutual Automobile Ins. Co. (supra). In that case the respondent gave notice of a second hearing on the sewer system and pollution problems of the appellant. The claim that res judicata barred a second hearing would be clearly erroneous. The order which was issued after the first hearing did not require a specific solution but did direct the appellant to proceed with the preparation of plans for the abatement of the pollution. The appellant apparently did not meet the deadline in the order. Furthermore, a solution proposed by citizens of the city over the objections of the appellant failed for being unconstitutional. Pollution is an ongoing problem. No solution had apparently been found. The respondent obviously should not be barred by res judicata from holding a new hearing on this continuing nuisance.

The instant case, however, involves more than the legislative powers of an administrative agency. Appeals from personnel decisions taken under Section 16.05 (1) (e) and (f) are heard by this Board in its judicial function.

The U.S. Supreme Court in US v. Utah Construction and Mining Co., 384 U.S. 394, 421-422, 86 S. Ct. 1545, 1559-60, 16 L. Ed. 2d 642 (1962) stated:

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Therefore the doctrine can apply to administrative decision arising out of a hearing conducted like a judicial one. Wisconsin is in accord with this application of the doctrine. In Sheehan v. Industrial Commission, 272 Wis. 595, 76 N.W. 2d 343, (1956), a hearing on the merits was held which awarded compensation for injuries sustained by an employee while working. Then a hearing for additional compensation was held. From the award of additional compensation, the appeal was taken. The Court in denying the additional compensation stated:

> The examiner's order of December 20, 1949, was a final one. The Commission did not within twenty days, as permitted by statute, set aside the order for the reason of the discovery of a mistake or upon the ground of newly discovered evidence; nor was review sought. . . . The order of December 20, 1949, was res judicata in relation to all issues between the employee on one side, and the employer and the carrier on the other, arising out of the injury to the employee. (272 Wis. 595, 604-5, 76 N.W. 2d 343, 348-9.) (Emphasis added.)

However, we conclude that the doctrine of res judicata cannot be applied to the instant appeal. For the doctrine to come into play a hearing on the merits must be had. In O'Brien v. Hessman, 16 Wis. 2d 455-458, 114 N.W. 2d 834, 836 (1962), the Court stated:

> The Restatement, Judgements, pg. 197, sec. 50, states the general rule:
>
> 'Where a valid and final personal judgment in favor of the defendant is rendered on the ground that the complaint is insufficient in law, the judgment is conclusive as to the matters determined, and the plaintiff cannot thereafter maintain an action on the original cause of action.'
>
> Wisconsin is in accord with this general rule. (See also A.C. Storage Co. v. Madison Moving and W. Corp., 38 Wis. 2d 15, 155 N.W. 2d 567 (1968).)

The hearing that was held on the first dismissal never reached the merits of the case. We simply determined that the first letter of dismissal was fatally defective because it was not signed by an appointing authority.

Jenkins v. Macy, 357 F. 2d 62 (8th Cir. 1966), which is discussed above, reached a similar conclusion. There a federal employee was discharged by letter which failed to give him the statutorily required thirty days notice of his proposed removal. The employee was restored to his position and paid in full for his time. Within two weeks he was discharged again, this time by proper notice. The employee appealed the Civil Service Commission decision to sustain the second discharge action. The Court rejected the employee's argument that the first determination was res judicata as to the second. It stated:

> Res judicata refers to the thing adjudicated. The adjudication at the time of both appellant's first and second removals from the government service herein was that he was guilty of the conduct charged. In other words, whether or not we grant appellant's contention, he is not benefitted since the facts never were adjudicated in his favor. His removal was postponed because of procedural fault, but this fault was corrected. Appellant, who in effect got a second chance, cannot now complain. Unlike the typical res judicata situation, appellant never prevailed on the merits. (357 F. 2d 62, 67.)

Therefore, we conclude that the doctrine of res judicata does not apply to the instant appeal. The second letter of dismissal corrected the technical difficulty of the first. The appeal is now ready for hearing on the merits of the charges contained within the second letter.

ORDER

IT IS HEREBY ORDERED, that the motion of Appellant for Order directing Respondent to offer Appellant reinstatement is denied.

Further IT IS ORDERED that a hearing on the merits be scheduled.

Dated July 30, 1975.

STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson