



securities. On July 23, 1976, the appellant was called into a meeting in the commissioner's office with the respondent and the enforcement supervising attorney. At that time the respondent made a statement in substance as follows:

"If I wanted to I could terminate you right now. You're through. I want you to pick a date by which you feel you can find suitable new employment. I don't want this to run on forever. And I don't want it to run for more than a year. And I want you to report back to me in the next few days and give me a date when you'll be leaving." (Appellant's Affidavit of July 23, 1977, paragraph 4)

The appellant's response to this statement and meeting are set forth in paragraphs 5 and 6 of his affidavit:

"5. These words meant to me then as they mean to me today, that I would be discharged forthwith if I did not comply with the Commissioner's demand for my setting a date on which I would leave State employment. I had no choice: it was either suffer discharge on July 23, 1976, or comply with the Commissioner's demand.

"6. The specter of immediate unemployment, loss of the primary source of my income, and searching for new employment with a discharge from my most recent job on record convinced me, as I am sure the Commissioner intended it to convince me, that I had no choice other than to comply with his demand."

In any event, the appellant submitted to the respondent a memorandum dated July 30, 1976, which contained in part the following language:

"This is in response to your request, made during our meeting in your office on Friday, July 23, 1976. In furnishing you with the requested date for termination of my employment with this office, the date I have selected does not represent the actual date on which I expect to leave. Actually, I intend to leave at the earliest possible date and it is my hope to be resituated with satisfactory new employment well before the terminal date I have selected. The date cited below, instead represents the terminal date on which I will voluntarily sever my employment, whether or not I have successfully secured new employment, and will depart without protest or claim to further employment. The date I have selected is based on a number of considerations . . . "

At no time did the respondent inform the appellant that he had a right to appeal his separation to the personnel board.

The second issue involves an offer of limited term employment which the respondent withdrew when he learned that the appellant had appealed his separation to the board.\*

CONCLUSIONS OF LAW

With regard to the first issue of appellant's separation, respondent argues that it was a resignation and since this is not one of the enumerated transactions directly appealable to the board pursuant to Sec. 16.05(1)(e), Stats., the board lacks subject matter jurisdiction. The appellant argues that the "so-called" resignation was involuntary and that the board has jurisdiction over discharges and jurisdiction to determine if a discharge has taken place.

It is concluded, based on an analysis of these findings, which in turn are based on appellant's own version of the facts, that the appellant's separation from state service, while it was not voluntary in the sense of having been the course of action most preferred by appellant, was not involuntary in the sense of having been coerced. The appellant stated in his July 23, 1977, affidavit:

"The specter of immediate unemployment, loss of the primary source of my income, and searching for new employment with a discharge from my most recent job on record convinced me, as I am sure the Commissioner intended it to convince me, that I had no choice other than to comply with his demand. I did so."

The factors cited by appellant are not unlike those which must be considered by any employe forced with an imminent discharge, who must decide whether to fight the discharge or to pursue a course that will result in a

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\* The appellant filed with the director an appeal of the withdrawal of the employment offer. The director took no action on this appeal but forwarded it directly to the board to accompany his original appeal. See letter of June 9, 1977.

separation from employment under different circumstances. Therefore, while it is concluded that the board would have jurisdiction over a case that met the legal standards of a coerced resignation\* as a constructive discharge and so much of an earlier decision of the personnel board, Appeal of Lindow, November 19, 1963, as holds to the contrary is overruled, the appellant has not alleged facts which would amount as a matter of law to coercion or duress. See Dabney v. Freeman, 358 F. 2d 533, 535 (D.C. Cir. 1965):

" . . . a separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency. If and when the Commission's relieving authority is invoked by nonfrivolous allegations of coercion, the Commission should entertain the appeal and hear and determine the allegations. If they are sustained, the Commission presumably must find that the particular separation has not been effected in the manner required by law and must reinstate the employment, subject to the employe's continuing discretion to initiate discharge proceedings in the prescribed manner. If they are not sustained, the appeal is to be dismissed as outside the limits of the Commission's jurisdiction."

See also Kiethley v. Civil Service Board of City of Oakland, 89 Cal. Rptr. 809, 812, 11 Cal. App. 3rd 443 (1970): "although plaintiff, as City Manager, did not actually discharge Liquori in the usual meaning of the work 'discharge,' we observe that a coerced resignation is tantamount to a discharge." While the meaning of "coercion" may differ depending on the setting in which it is used, in this context it is concluded that it means "an actual overriding of the judgment and will," 14 C.J.S. Coercion, p. 1307. While the holding of the Lindow case that the personnel board has no jurisdiction obtained by duress, is overruled, dictum set forth in that case is repeated here:

"It is not uncommon for an administrative officer who finds it necessary to remove an employe to give the employe an opportunity to resign rather than be discharged, as was stated in the Thompson case just referred to above. This is indulging a kindness to the employe in protecting him and his work record. It would be a dangerous doctrine to hold that to offer an employe his choice of resigning or accepting a discharge would amount to such compulsion that the employe would avoid his resignation for duress. If such were the law, then anytime an employer mentioned the subject of discharge to his employe, he would have to go ahead and discharge him and could not give the latter the choice of resigning because the resignation would be voidable."

\* See 14 C.J.S. Coercion, p. 1307, "an actual overriding of the judgment and will."

With respect to the second issue concerning the withdrawal of an offer of limited term employment, we can discern no provision of the statutes that confer direct appeal rights of such subject matter to the personnel board. The appellant argues that the board has "inherent authority" to ensure that employes may present their appeals to the board without threats of economic loss. However, Wisconsin administrative agencies have relatively limited implied power; see American Brass Co. v. Wisconsin State Board of Health, 245 Wis. 440, 15 N.W. 2d 27 (1945); State ex rel. Farrell v. Schubert, 59 Wis. 2d 351, 190 N.W. 2d 529 (1971). Furthermore, the statutes provide for appeals to the director of personnel decisions of appointing authorities alleged to be illegal or an abuse of discretion, see sec. 16.03(4)(a), Stats., and the board would be particularly reluctant to search for implied jurisdiction where the statutes provide for direct appeal to another forum. As was noted above, the appellant filed an appeal concerning the withdrawal of the employment offer with the director, who took no action on it but forwarded it to the board. It is concluded that that part of this appeal should be remanded to the director for a decision on the merits.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction. So much of this appeal as relates to the withdrawal by respondent of an offer of limited term employment is remanded to the director for determination.

Dated: September 15, 1977. STATE PERSONNEL BOARD

  
Laurene DeWitt, Chairperson