

STATE OF WISCONSIN

PERSONNEL COMMISSION

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KATHLEEN ALAGNA,
 Appellant,

v.

THE UNIVERSITY OF WISCONSIN,
 Respondent.

Case No. 78-96-PC

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INTERIM
 OPINION
 AND
 ORDER

The Commission has reconsidered its decision on jurisdiction dated December 20, 1978. That decision was precipitated by respondent's objection to subject-matter jurisdiction, on the ground that the appellant was not discharged but rather resigned.

At this time the Commission overrules and vacates the conclusions, opinion and order contained December 20, 1978, decision. That decision was based on an equitable estoppel theory. Based on the current record, the Commission does not believe there is a basis for the conclusion that the agency action or inaction amounted to fraud or manifest abuse of discretion, which is a necessary element of an equitable estoppel against a state agency. See Surety Savings & Loan Assn. v. State, 54 Wis. 2d 438, 445 (1972).

While the Commission is of the opinion that it does not have jurisdiction over this matter as an appeal of a discharged probationary employee, the transaction is also susceptible of review under s. 111.91(3), Stats., and Art. X of the WSEU contract. Section 111.91(3) provides as follows:

"The employer may bargain and reach agreement with a union representing a certified unit to provide for an impartial hearing officer to hear appeals on differences arising under sub. (2)(b) 1 and 2. The hearing officer shall make a decision accompanied

by findings of fact and conclusions of law. The decision shall be reviewed by the personnel commission under s. 230.45(1)(f) on the record and either affirmed, modified or reversed, and the personnel commission's action shall be subject to review under ch. 227. Nothing in this subsection shall empower the hearing officer to expand the basis of adjudication beyond the test of 'arbitrary and capricious' action, nor shall anything in this subsection diminish the authority of the personnel commission under s. 230.45."

Article X of the current WSEU contract (clerical and related) provides as follows:

ARTICLE X

HEARING OFFICER

148 The Personnel Board may at its discretion appoint an impartial hearing officer to hear appeals from actions taken by the Employer under Section 111.91(2)(b) 1 and 2 Wis. Stats.

"1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments and policies with respect to probationary periods.

2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classification to salary ranges, and allocations and reallocation of positions of classifications, and the determination of an incumbent's status resulting from position reallocations."

149 The hearing officer shall make a decision accompanied by findings of fact and conclusions of law. The decision shall be reviewed by the Personnel Board on the record and either affirmed, modified or reversed, the Personnel Board's action shall be subject to review pursuant to Ch. 227 of the Wisconsin Statutes.

The Wisconsin Administrative Code, s. Pers. 13.01, states in part:

"The probationary period is an integral part of the examination process...."

The appeal letter dated June 17, 1978, complains that the appellant was forced to resign or be terminated. While this is not a "coerced"

resignation (and thus a constructive discharge), as pointed out in the December 20, 1978, decision, the transaction does constitute "action taken" by the employer under the provisions of s. 111.91(2)(b) 1 as set forth in Art. X, above.

The Commission is of the opinion that it should decline to exercise its discretion to appoint a hearing examiner in most cases where an employe is given the choice between resignation and discharge. This does not usually amount to coercion and frequently provides a benefit to the employe. See Biesel v. Commissioner of Securities, Wis. Pers. Bd. No. 77-115 (9/15/77).

In this case, however, the Commission is particularly concerned about the fact that the appellant submitted a letter of resignation which denied any performance deficiency and indicated that she had no further recourse in the matter. The personnel office accepted the resignation without mentioning any possible remedy. While some have raised questions about the legality of the contract provisions providing appeal rights to discharged probationary employes, the fact remains that these clauses, Article IV, s. 10, and Article X, remain in the contract and, in fact, were renegotiated in the same form in the current contract.

Furthermore, the appellant also mentioned in her letter of resignation her lack of recourse with respect to the "Affirmative Action Office" because of her probationary status. This at least raises the question of whether the appellant considered the resignation request to have constituted illegal discrimination. Any rights the appellant might have to have pursued a complaint of employment discrimination under subchapter II of chapter 111, Stats., would not have required permanent status in class.

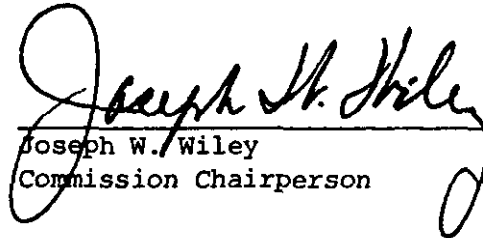
CONCLUSION OF LAW

1. The subject matter of this appeal is properly before the Commission pursuant to s. 111.91(3), Stats., and Article X of the contract between the State of Wisconsin and AFSCME, Council 24, Wisconsin State Employees Union, AFL - CIO (clerical and related), effective September 11, 1977 - June 30, 1979.

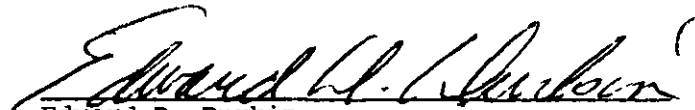
ORDER

It is ordered that this appeal proceed to a hearing before a hearing examiner pursuant to s. 111.91(3), Stats., on the matters set forth in the appeal letter from Ms. Alagna dated June 17, 1978.

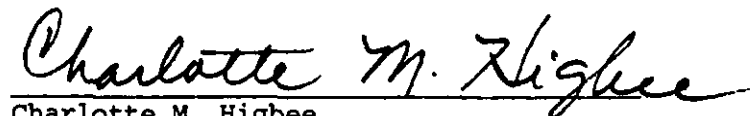
Dated: April 26, 1979. State Personnel Commission



Joseph W. Wiley
Commission Chairperson



Edward D. Durkin
Commissioner



Charlotte M. Higbee
Commissioner