STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID WING,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN, and Administrator, DIVISION OF PERSONNEL,

Respondents.

Case No. 79-148, 173-PC

INTERIM DECISION AND ORDER

The subject matter of these appeals involves an alleged failure by the appointing authority and the administrator to restore the appellant to his former status following a downward reallocation, as required by §Pers. 5.03(3)(h), Wis. Adm. Code. In its decision of April, 1981, the Commission rejected the arguments as to No. 79-148-PC that it was untimely filed and that there was not a proper basis for subject matter jurisdiction under §230.45(1)(c), stats., and also rejected the arguments as to No. 79-173-PC that it was a duplicate of an earlier appeal (77-63) and that it failed to allege with sufficient specificity a violation of a rule of the administrator or a civil service statute.

On July 2, 1982, the respondent university filed another motion to dismiss on the grounds of mootness which the parties have briefed. The respondent's position is summarized at pp. 16-17 of its initial brief:

> In summary, then, these appeals involve appellant's claims to reinstatement rights following a downward position reallocation, under secs. Pers. 5.03(3)(h) and 16.03(4) and (7). However, these provisions grant no absolute rights of reinstatement, but rather make available opportunities for reinstatement eligibility. Moreover, they impose, by their

> terms, strict time limitations as to when such opportunities are available. In the present cases, these time periods have long ago expired. Moreover, even construing the time periods liberally to appellant to allow for the maximum in terms of extensions and continuations, these time limitations have expired. And, at none of the possibly relevant time periods, have there been any vacancies at UW-Stout or within the UW-System to which the reinstatement opportunity available under the above rules might apply. Accordingly, the issues presented for hearing, and focusing on the respondent UW's alleged failure to use 'every effort' to restore appellant to such a vacancy, are moot and should be dismissed.

The respondents' arguments on mootness are premised in part on the theory that appellant's reinstatement eligibility expired absolutely pursuant to the administrative rules:

> ...any eligibility for reinstatement available to appellant under former sec. Pers. 16.03(4) and (7), and any duty on the part of the UW-Stout to exercise 'every effort' in this connection, under sec. Pers. 5.03(3)(h), have now expired. p. 12.

This argument necessarily rests on the premise that the Commission could not require an extension of eligibility if it were to determine that the appellant's rights had been violated by the respondents. The respondent argues that this result is required by the fact that the period of eligibility is fixed by rule.

The potential effect of the respondent's position is to insulate certain kinds of agency action or inaction, in violation of state law, from any administrative review. It must be questioned whether it was intended that the three year restriction applies to situations where it might be determined on appeal that during the initial period of reinstatement eligibility the employe was denied certain of his or her rights with respect to eligibility for reinstatement. Another possible alternative is that the time period with respect to which it might be determined that the employe's rights to reinstatement eligibility were denied would be considered tolled.

In any event, the Commission is not prepared to conclude at this stage of the proceeding that it lacks any capability to require a reasonable remedy.

Furthermore, the case of Watkins v. DILHR, 69 Wis. 2d 782, 233 N.W. 2d 360 (1975), has a bearing on the question of mootness. In that case, the complainant, who originally had been denied a service zone caseworker position, was appointed to such a position following the filing of her discrimination complaint. In holding that the appointment did not moot the administrative proceeding, the court included the following observations:

> It would be inequitable to hold that a person who must have suffered deep personal frustration over an extended period of time is not entitled to a determination of the cause of that frustration, while a person who failed to receive a minor pay differential because he or she was not transferred is in all cases entitled to a full legal determination.
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> * * *
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> There is another reason why mootness is inappropriate in this case... In the case of discrimination in employment, an employer or union could, if DILHR's view of mootness is accepted, delay compliance until the department was able to hold a hearing (which is sometimes years after the alleged acts of discrimination), then comply and have the complaint dismissed on the ground of mootness. This kind of loophole would have the disastrous effect of encouraging and fostering discrimination, not elimination it. The department argues that this line of cases is distinguishable in that the right of the state to obtain court enforcement of its orders differs from the right of an individual to require a state agency to make legal finding in the first place. Yet the inquiry should be, not whose rights are greater, but whether or not the counter-effect is the same in both situations. In both cases the evil is the same, since in both cases reliance on mootness would circumvent an established policy of the state.
> 69 Wis. 2d at 794-795.

The appellant in this case also is entitled to a determination of whether his civil service rights were violated. There also is a strong policy reason here against a conclusion of mootness, as it theoretically

could encourage delay with respect to an agency's handling of an employe's reinstatement eligibility rights.

Respondent administrator argues that he is not properly a party based on the following argument:

> The second issue questions the duty of the administrator of the Division of Personnel under a rule which requires that he make "every effort" and asks whether or not "every effort" was in fact made. Section 230.44(1)(a), Stats., provides jurisdiction over appeals of ". . . personnel decisions of the Administrator . . ." There is no decision of the Administrator involved in this issue. In fact, there is no action of the Administrator involved in this issue which could possible be construed to be a decision. Further, since there was never a request to take action, there is not even a refusal to take action which might be construed to be a decision.
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> The Appellant may argue that the Respondent Division of Personnel had a duty to act pursuant to Pers 16.03, Wis. Adm. Code. But sec. 230.44(1)(a), Stats., by specifically requiring a decision of the Administrator, manifests the legislative intent to deny jurisdiction based on such an argument.

In the opinion of the Commission, failure or refusal to act or decide can under certain circumstances be considered a constructive action or decision and hence appealable pursuant to §230.44(1)(a), stats. Failure or refusal to act is in many cases functionally identical to denial as far as the employe is concerned. The directive of §Pers 5.03(3)(h), Wis. Adm. Code, is that:

> "In any action resulting in the red circling of an employe pay rate every effort shall be made by the appointing authority and the bureau to restore the employe to a position commensurate to his or her former status."

This rule is unqualified by any requirement that the affected employe make application that "every effort" be made, and such a request cannot be considered a jurisdictional pre-requisite.

The respondent university's argument that there was never an appropriate position available within the UW-System classified service to which the appellant might have been reinstated is disputed by the appellant. The

respondent filed a "notice for more definite statement" on August 27, 1982, requesting more specific identification of the positions alluded to in the appellant's brief. This will be construed as a written interrogatory and the appellant is directed to reply within 14 days of the date of this order.

ORDER

The respondents' motion to dismiss filed July 2, 1982, by the UW-System, and August 17, 1982, by the administrator, are denied. The appellant is directed to respond to the "motion for more definite statement" filed by the UW-System on August 27, 1982, within 14 days of the date of this order.

Dated: October 4, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jmf

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LAURIE R. McCALLUM, Commissioner

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