STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES O. EVRARD,

Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 79-251-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This matter was filed as an appeal of a discharge pursuant to s.230.44(1)(c), Stats. At the prehearing conference the respondent objected to subject-matter jurisdiction on the ground that there was no discharge but rather that the appellant resigned. A hearing was held on the sole question of jurisdiction and this decision addresses that question.

FINDINGS OF FACT

1. At all relevant times prior to August 23, 1979, the appellant was employed in the classified service with permanent status in class as, most recently, Natural Resources Supervisor 2, supervising the Crex Meadows Complex.

2. On August 13, 1979, the appellant met with his immediate and two other supervisors.

3. At this meeting the appellant was informed that an investigation had been commenced regarding the Crex Meadows Complex, specific allegations

were discussed, and the appellant was informed that the allegations involved extremely serious matters and that there was the possibility of strong disciplinary action involving him and others.

4. Prior to this meeting the appellant's work record over about 10 years with DNR had been good.

5. On August 22, 1979, the appellant was directed by his immediate supervisor to report to Spooner District Headquarters the following morning. The appellant was not told the purpose underlying the direction to report.

6. On August 23, 1979, at 8:30 a.m., appellant met with several supervisors.

7. The appellant was informed that the investigation had been completed and that the matter was extremely serious. The charges against him were read to him and it was indicated that they might involve felonious conduct by him.

8. The appellant then was told that if he did not sign a letter of resignation which had been prepared that he would be terminated.

9. At this point the appellant became faint and nearly fainted. He was dizzy, his heart was beating rapidly, he broke into a cold sweat, he had to lower his head between his knees, and he was unable to talk. This occurred about 5-10 minutes after the commencement of the meeting.

10. After a period of time some of these reactions ceased and he was able to talk and he inquired as to what his rights would be under these circumstances.

11. At first the appellant was told that he did have appeal rights if he resigned, but after some discussion among his supervisors a telephone call was made to DNR personnel in Madison and the appellant then was informed that if he were to resign he would not have appeal rights.

12. The appellant asked for more time to make his decision but was informed that he had to make a decision immediately.

13. The appellant then stated that he would accept the termination and appeal it.

14. One of his supervisors then began reading the termination letter.

15. After he had read approximately one paragraph, the appellant told him to stop and that he would resign.

16. The appellant then signed the resignation letter and left the meeting. The meeting lasted about 30 minutes from beginning to end.

17. At no time during the meeting did any of appellant's supervisors raise their voices, threaten the appellant, or suggest or state that he should take one course of action over another, or, with respect to their demeanor, act other than in a business-like manner.

18. Following the meeting the appellant waited for about an hour for two passengers and then tried to drive his car on the return trip, but due to his mental and physical condition, was unable to drive and relinquished the wheel after driving about one half mile.

19. The appellant's resignation as aforesaid was not voluntary but the result of coercion and duress.

CONCLUSIONS OF LAW

1. The appellant's "resignation" was coerced and was not legally effective.

2. The respondent constructively discharged appellant on August 23, 1979.

3. The Commission has jurisdiction over the subject matter of this appeal pursuant to s.230.44(1)(c), Stats.

4. The DILHR unemployment compensation decision submitted by the appellant on January 23, 1980, is inadmissible in evidence as hearsay.

OPINION

In Biesel v. Commnr. of Securities, Wis. Pers. Bd. 77-115 (9/15/77), the Personnel Board discussed the definition of "coercion" and the effect of a finding of coercion on an apparent resignation:

> "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 reviewing 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 word "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."

With respect to the meeting of August 23, 1979, in the Commission's opinion it is very significant that the appellant asked for more time to make his decision and was told that he had to make an immediate decision. It is clear that at the time the appellant was under great mental and emotional stress. It must be concluded under all these circumstances that the appellant's decision to resign indeed was an "overriding of his judgment and will."

The Commission wishes to emphasize that in reaching this conclusion it is not deviating from the holding in the Biesel case that the offer to an employe of an option of resignation in lieu of termination does not constitute coercion. In the Biesel case the employe understood that if he did not resign he would be terminated, but while faced with this ultimatum, there is no indication from the findings that he had to make an immediate decision. In fact, he was given the ultimatum on July 23, 1976, and did not submit his letter of resignation until July 30, 1976. In the instant case there probably would have been a different result on the issue of coercion if the appellant had been given a little longer time, perhaps as

little as 24 hours, in which to consider his decision whether to resign from state service.

The appellant has offered as evidence a decision by the Department of Industry, Labor and Human Relations on his unemployment compensation claim on the question of whether he voluntarily terminated his employment. The respondent objects. Because of the different statutes and legal standards governing these proceedings, such a decision cannot have a res judicata or collateral estoppel effect and otherwise constitutes hearsay. Therefore, the decision will not be accepted as evidence.

Inasmuch as the Commission has concluded that there has not been, in legal effect, a resignation, and that there has been a constructive discharge, jurisdiction exists under s. 230.44(1)(c), Stats. This matter should proceed to hearing on the issue of whether there was just cause for the constructive discharge which occurred August 23, 1979. The question of whether the appellant is entitled to back pay from August 23, 1979, will be deferred until the final decision and may be argued further by the parties.

ORDER

The respondent's objection to subject matter jurisdiction on the ground that the appellant was not discharged but resigned is overruled and this matter is to be scheduled for hearing as set forth above.

Dated Feb. 19, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Commissioner

CMH:AJT:mgd