

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 VICTORIA WINKLER, *
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 Appellant, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF HEALTH *
 & SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 80-166-PC *
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 * * * * *

INTERIM
 DECISION
 AND
 ORDER

OFFICIAL

NATURE OF THE CASE

This is an appeal of the dismissal of a probationary employe from probationary employment in a position classified as Program Assistant 4, and part of a recognized or certified bargaining unit subject to a bargaining agreement between the State and the union representing the unit. Further proceedings in this matter had been suspended as a result of a Dane County Circuit Court decision in Board of Regents v. Wisconsin Personnel Commission (Dropik), No. 79-CV-5100 (7/7/80). In that case, the court held that this Commission lacked subject matter jurisdiction pursuant to §§230.45(1)(f) and 111.91(3), Wis. Stats., and Art. IV, §10 of the WSEU contract, over an appeal of the termination of probationary employment. However, the appellant petitioned the Commission to proceed with the processing of this matter, relying on a decision by a different branch of that court in State ex rel. DHSS v. Wisconsin Personnel Commission (Wagaman), No. 80-CV-0687 (8/14/80), that the Commission did have jurisdiction over an appeal of a termination of probationary employment pursuant to §230.44(1)(d), Wis. Stats. The appellant's request was

not opposed by the respondent and the Commission agreed to move ahead with the matter and as a first step take up the respondent's pending jurisdictional objection. The parties through counsel have submitted briefs on this issue. This decision also will address the respondent's refusal to answer the appellant's interrogatories, which refusal was posited on the Commission's alleged lack of subject matter jurisdiction.

OPINION

The appellant has stated that she relies solely on §230.44(1)(d), Stats., as a basis for subject matter jurisdiction. The respondent, as might be expected, contests this jurisdictional basis for the same reasons that it did in State ex rel. DHSS v. Wisconsin Personnel Commission (Wagaman), supra, where it sought a writ of prohibition against the Commission's proceeding with an appeal such as this. As noted above, the court in denying the writ held that the Commission did have jurisdiction pursuant to §230.44(1)(d), Stats.

In Board of Regents v. Wisconsin Personnel Commission (Dropik), the Court did not consider the question of whether §230.44(1)(d) might provide an alternative basis of jurisdiction. The Wagaman decision is the only court decision on the question of the Commission's jurisdiction pursuant to §230.44(1)(d). That decision was consonant with an earlier decision by the Commission in the Wagaman matter denying respondent's motion to dismiss for lack of subject matter jurisdiction. The Commission is of the opinion that the Wagaman circuit court holding should be followed.

Therefore, the Commission is of the opinion that §230.44(1)(d), Stats., does provide a jurisdictional basis for this appeal.

The respondent also argues that the Commission lacks jurisdiction over this matter because of the operation of §111.93(3), Wis. Stats.:

"If a labor agreement exists between the State and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes relating to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."

It is argued, in essence, that the dismissal of a probationary employe is a transaction that falls within the definition of "wages, hours, and conditions of employment," and therefore §111.93(3) supercedes, as to represented employes, §230.44(1)(d).

However, the Dane County Circuit Court, in Miller v. President, University of Wisconsin, No. 79-CV-4717, 79-CV-4797 (9/2/80), a case decided subsequent to, and which followed the precedent established in Dropik, supra, held that the right to terminate a probationary employe is a prohibited subject of bargaining and that the attempt through Article IV, §10, of the WSEU contract to give the Commission the authority to review such terminations was invalid. While the Commission entertains some doubts as to the correctness of the court's conclusion on this point, it apparently is the only court decision on this point, and the Commission is of the opinion that it should be followed pending a final decision of the appeal of the circuit court's decision.*

* All of the circuit court decisions cited herein have been appealed and are pending before the Court of Appeals.

If, then, the termination of probationary employment is deemed a prohibited subject of bargaining, it certainly cannot fall within the heading of "wages, hours and conditions of employment," and the provisions of §230.44(1)(d), Wis. Stats., are not superseded by the operation of §111.93(3), Stats.

ORDER

The respondent's objection to subject matter jurisdiction is overruled. The respondent is directed to answer appellant's outstanding interrogatories within 30 days of the date of this order. The appellant's request for expenses and fees in connection with respondent's initial refusal to answer is denied. This appeal will be scheduled for hearing within 60 days of the date of this order.


Dated Feb. 16, 1981

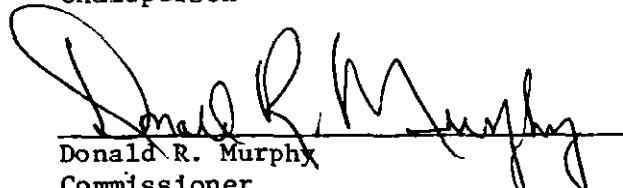
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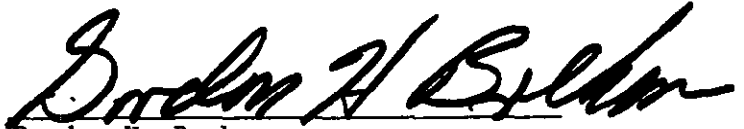
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