

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 ROSELYN L. WENDT, *
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 Appellant, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF HEALTH *
 AND SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 80-110-PC *
 [81-110-PC] *
 * * * * *

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to ss.230.45(1)(d) and 230.36(4), stats., of the denial of certain hazardous employment injury benefits. In an interim decision and order entered June 30, 1981, the Commission denied respondent's objections to subject matter jurisdiction, which were based on the alleged untimeliness of the appeal and the argument that the appellant was a represented employe at the time of the injury and that the Commission's jurisdiction was superseded by the effect of s.111.93(3), stats. The Commission subsequently held an evidentiary hearing at which the respondent presented evidence on both jurisdictional objections. Following the hearing the parties filed briefs and the respondent again briefed his jurisdictional objections.

FINDINGS OF FACT

1. The appellant was an employe in the classified service employed at Winnebago Mental Health Institute at all relevant times until her resignation effective January 14, 1981.
2. While employed, she was part of a certified or recognized bargaining unit represented by United Professionals for Quality Health Care, and a labor agreement existed between the union and the state.

3. Article IV, Sec. 5 of the aforesaid contract states that "Employees who voluntarily terminate their employment will have any grievances pending at the time immediately withdrawn and will not benefit from any later settlement."

4. The appellant received a notice of a denial of hazardous employment benefits for the period from December 12, 1980, and thereafter, under s.230.36, stats., more than 30 days before her appeal of said denial was received by the Personnel Commission on April 15, 1981.

5. The United Professionals for Quality Health Care declined to file a contractual grievance with respect to this denial in reliance on Article IV, Sec. 5, of the aforesaid labor agreement.

6. Article VI, Sec. 7 ("Hazardous Employment Status"), of the aforesaid labor agreement states in part as follows:

"A. The employer agrees to continue in effect the present provisions and administration of section 230.36 of the 1977 Wisconsin Statutes, which pertain to employer payments to employes who suffer an injury while performing service for the employer and incidental to his/her employment except that in addition Drivers License Examiners and Analysts shall be covered employes while (1) seizing drivers licenses ... 230.36(4) of the 1977 Wisconsin Statutes, concerning appeals ... shall not be applicable...

If an employe's claim for benefits under this section is denied by the appointing authority, the employe may, within thirty (30) calendar days, file an appeal at the third step of the grievance procedure, provided under Article IV of this agreement."

CONCLUSIONS OF LAW

1. This appeal is barred by the effect of s.111.93(3), stats.
2. This appeal was not timely filed pursuant to s.230.44(3), stats.
3. The Commission lacks subject matter jurisdiction over this appeal.

OPINION

It is a familiar principle that questions of subject matter jurisdiction can be raised at any time. See, e.g., 2 Am Jur 2d Administrative Law s.726, Morgan v. Knoll, Wis. Pers. Bd. No. 75-204 (5/25/76). Although the Commission initially determined in its Interim Decision and Order of June 30, 1981, that there was subject matter jurisdiction, this determination is subject to change in light of the additional facts and arguments presented by the respondent. In light of this further evidence and argument, the Commission now concludes that it lacks subject matter jurisdiction.

In the interim decision, it was pointed out that one of the effects of s.111.93(3), stats., "... is to replace employes' rights under the civil service statutes related to wages, hours, and conditions of employment with whatever rights are provided by the collective bargaining agreement." The Commission concluded that hazardous employment benefits under s.230.36, stats., were not subject to the exclusionary or superseding effect of s.111.93(3), stats. Implicit in that conclusion is the determination that hazardous employment benefits do not constitute "wages, hours, and conditions of employment" as set forth in s.111.93(3).

At the evidentiary hearing held in this matter subsequent to the entry of the interim order, the respondent introduced into evidence a copy of Art. VI, Sec. 7, of the labor agreement in question. It is clear from this exhibit that the parties to the agreement in fact bargained for and reached agreement on hazardous employment benefits. This section of the contract specifically provides both that appeals of denials are subject to the contract grievance mechanism and that the s.230.36(4) appeal mechanism does not apply.

It is clear that the parties could not legally have reached agreement on hazardous employment benefits under Art. IV, Sec. 7 of the labor agreement unless this constituted a subject of bargaining under s.111.91, stats., The overriding legislative intent underlying s.111.93(3), stats., is to give primacy to the collective bargaining process over possibly inconsistent statutory provisions, as to matters which are bargainable. The effect of a ruling that s.111.93(3), stats, is not applicable, is to negate this intention. The collective bargaining agreement has altered both the substantive coverage of s.230.36 and the procedural mechanism for reviewing denials of benefits. By its approval of the contract, see s.111.92(1), stats., the legislature has provided a strong indication of legislative understanding that such an agreement was within the appropriate scope of bargaining it has established under s.111.91. For the Commission to hold that s.111.93(3) does not apply is to negate the agreement, because if the provisions of s.230.36 are not superseded by the effect of s.111.93(3), there are irreconcilable conflicts between the contract and the statute. Sec. 230.36 (4) provides for appeals of denials to the Commission. The contract eliminates appeals to the Commission and provides that denials are to be grieved through the contractual grievance mechanism. While the statute limits coverage to certain injuries incurred under specific circumstances, the contract expands the circumstances under which injuries are covered.

In its interim decision finding jurisdiction, the Commission relied heavily on Barrentine v. Arkansas - Best Freight Systems, Inc., 101 S.Ct.1437 (1981), wherein the U.S. Supreme Court held that a federal claim under the Fair Labor Standards Act was not barred because the employees had voluntarily submitted their claims to arbitration. A key feature distinguishing Barrentine

from the instant case is that the Supreme Court was not dealing with a federal counterpart to s.111.93(3), stats. By enacting that statute, the legislature explicitly has provided that the collection bargaining process is to control as to bargainable matters. By approving this contract, the legislature at least impliedly agreed that the subject matter of Art. IV, Sec. 7, [≈] was a proper subject of bargaining.

For these reasons, the Commission is of the opinion that it must at this point determine that it lacks subject matter jurisdiction pursuant to s:111.93(3), stats.

The respondent's second jurisdictional objection is based on the time limits set forth in s.230.44(3), stats. In making the interim decision, the Commission relied on appellant's assertion as to time of receipt, noting that the respondent had "presented neither argument or documentary or other evidence with respect to the date of receipt of notice. Given the appellant's assertion and these circumstances, the Commission cannot find that this appeal was untimely filed." At the subsequent hearing, additional evidence was presented.

Respondent's Exhibit 3 is a letter dated March 26, 1981, from the appellant to the union. This letter includes the following statement:

"Recently, I received a denial of benefits under Statute 230.26 ... According to the s.230.36 request form, I can appeal that denial through my union within 30 days of the decision (March 10, 1981) or of my receiving it (2 or 3 days after) ... (emphasis supplied)

The respondent also presented testimony that at the prehearing conference the appellant initially stated that she was "pretty sure" she received the denial on March 13th, and that after the significance of the 30 day time limit was explained, she said that she was not so sure that she had received it on that date. See transcript, pp. 71-72.

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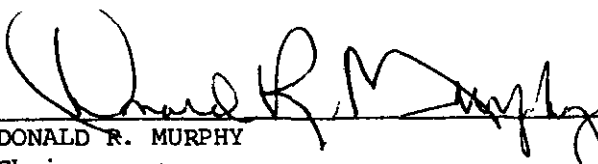
Upon review of all the evidence presented on this point, the Commission is of the opinion that a preponderance of the evidence supports a finding that the appellant in fact received the notice of denial on March 13, 1981, or more than 30 days before the appeal letter was received by the Commission. Therefore, it must be concluded that the appeal was not timely filed and the Commission lacks jurisdiction for this reason as well.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: Dec 3, 1981

STATE PERSONNEL COMMISSION


DONALD R. MURPHY
Chairperson

AJT:ers

Parties

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