STATE OF WISCONSIN PERSONNEL COMMISSION

ROSELYN WENDT,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 81-110-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This matter is before the Commission on respondent's jurisdictional objections, which were set forth in the prehearing Conference Report dated June 8, 1981, as follows:

> "(1) At time of injury, appellant was represented employe and should have pursued remedy through grievance procedure.
>
> (2) Appeal is untimely, if there is Commission jurisdiction otherwise."

The parties were given an opportunity to submit arguments on these 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that "Employes who voluntarily terminate their employment will have any grievances pending at the time immediately withdrawn and will not benefit from any later settlement."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 of December 1, 1980, through December 6, 1980, and from December 12, 1980, and thereafter, under §230.36, Stats., 30 days or less 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.

CONCLUSIONS OF LAW

1. This appeal was timely filed pursuant to §230.44(3), Stats.

2. This appeal is not barred by the effect of §111.93(3), Stats.

3. The Commission has jurisdiction over the subject matter of this appeal.

OPINION

The appellant stated in her argument on timeliness dated June 2, 1981, that it was likely that she received this notice a week after March 13, or 14, 1981. Although the respondent has objected on timeliness grounds, he has 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.

The other objection is that the appellant should have pursued a contractual grievance because at the time of her injury she was a represented employe. Again, the respondent has not submitted any argument or evidentiary material with respect to this objection. The Commission's findings are based on assertions and documentary materials submitted by the appellant.

Section 111.93, Stats., provides:

> 111.93 Effect of labor organization: status of existing benefits and rights. (1) If no labor agreement exists between the state and a union representing a certified bargaining unit, employes in the unit shall retain the right of appeal under §230.44.
>
> (2) All civil service and other applicable statutes concerning wages, hours and conditions of employment shall apply to employes not included in certified bargaining units.
>
> (3) 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 related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

The effect of this statute 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.

There is no question that there was in fact a labor agreement existing between the state and the union representing the certified bargaining unit involved. The central question is whether the subject matter of this appeal is related to "wages, hours, and conditions of employment "as that term is used in §111.93(3), Stats.

One of the key purposes of §111.93 is to give effect to the legislative

intent that represented employes be given the right to negotiate their own terms with the state as to wages, hours and conditions of employment. The civil service and related statutes provide a relatively comprehensive coverage of a broad range of personnel matters, including many that traditionally are the subject of bargaining. Section 111.93 avoids conflicts between the statutes and the collective bargaining process by giving primacy to the labor agreement. Without this kind of statute, presumably either the many statutes in this area would render the collective bargaining process a nullity as the statutory provisions would override contract clauses, or the legislature constantly would have to amend the statutes to harmonize them with the many labor agreements negotiated by the various unions biennium after biennium.

While a purpose of §111.93 is to facilitate the collective bargaining process, it is unlikely that the legislature intended that the labor agreement was to supersede all state laws having any remote connection to "wages, hours, and conditions of employment" in a literal sense. For example, the provisions of the state workers compensation law, Chapter 102, Stats., are related in a literal sense to "wages, hours, and conditions of employment." Yet it could not be argued that §111.93(3) could be interpreted to apply to workers compensation and to cut off an employe's rights in this area.

This general area was discussed in a recent decision of the United States Supreme Court, Barrentine v. Arkansas -- Best Frieght Systems,

Inc., 101 S. Ct. 1437 (1981). In that case, the employes brought a federal action alleging a violation of the Fair Labor Standard Act (FLSA), 29 U.S.C. §201 et seq., after having received a negative result on a wage claim based on the same underlying facts through the grievance procedure provided by the collective bargaining agreement. The lower courts held that the FLSA claim was barred because the employes had voluntarily submitted their grievances to arbitration. The Supreme Court reversed and included this following language in its opinion:

> "Two aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective bargaining process. The second, reflected in statutes governing relationships between employers and their individual employes, guarantees covered employes specific substantive rights. A tension arises between these policies when the parties to a collective-bargaining agreement make an employe's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures.
>
> * * *
>
> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers. [Emphasis added].
>
> * * *
>
> In contrast to the Labor-Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employes to promote their interests collectively, the FLSA was designed to give specific minimum protections to individual workers ...." 101 S. Ct. at 1441, 1443, 1444.

The court also held that it was immaterial whether the grievances presented a claim under the FLSA in addition to the claim under the collective-bargaining agreement, or whether the collective bargaining agreement incorporates the statutory language, see notes 4 and 23, 101 S. Ct. at 1440, 1447.

In the instant case, §230.36 Stats., provides that certain state employes such as conservation wardens, state patrol officers, etc., who are injured in the performance of their duties, shall continue to receive full pay while unable to return to work or until the termination of employment. This statute is similar in kind to the workers compensation law, Chapter 102, which covers both state and other employes. Section 230.36, however applies to state workers in what may be described as hazardous occupations and provides more liberal benefits than does the workers compensation law.

In the opinion of the Commission, hazardous employment benefits under §230.36, Stats., fall within the category of "specific substantive rights" of the kind referred to in Barrentine. In the opinion of the Commission, the legislature did not intend that §111.93(3), Stats., would have the effect of eliminating an employe's rights to seek review of the denial of hazardous employment benefits. Therefore, respondent's objection on this ground also will be overruled.

ORDER

The respondent's objections to subject-matter jurisdiction as set forth in the prehearing Conference Report dated June 8, 1981, are overruled. This matter is to proceed to hearing on the issue of whether the respondent's denial of appellant's hazardous employment benefits was proper under §230.36, Stats. This will be a class 3 proceeding pursuant to §230.45(1)(d), Stats.

Dated: June 30, 1981.

STATE PERSONNEL COMMISSION

Gordon H. Brehm
Chairperson

Donald R. Murphy
Commissioner

AJT:jmg

PARTIES

Roselyn Wendt
1534 Plank Road
Menasha, WI 54952

Donald Percy
DHSS, RM 663
1 W. Wilson St.
Madison, WI, 53702