STATE OF WISCONSIN PERSONNEL COMMISSION

JAN PETRUS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 81-86-PC

INTERIM DECISION AND ORDER

This is an appeal of a decision of the respondent to consider appellant's position as abandoned and to treat appellant as having resigned. The respondent objects to the Commission's jurisdiction to hear the appeal. A hearing was held on July 28, 1981 for the sole purpose of establishing sufficient facts to allow the Commission to determine whether it has subject matter jurisdiction over appellant's case. At the hearing, respondent sought to establish that the requirements of s.230.34(1)(am), Wis. Stats., had been met and that the transa-action constituted an abandonment. Respondent argues that once the statutory requirements had been met, any resignation that was deemed to result therefrom is beyond the Commission's power to review. Appellant argues that she was actually discharged, a discharge being an employment action that is within the Commission's jurisdiction.

Jurisdiction

The initial question raised by this appeal is whether the Commission has jurisdiction to hear appeals regarding the abandonment of a position.

The statutory provisions for abandonment are found in s.230.34(1), Wis. Stats:

> (a) An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

(am) If an employe fails to report for work as scheduled or to contact his or her supervisor, the appointing authority may discipline the employe. If an employe fails to report for work as scheduled, or to contact his or her supervisor for a minimum of 5 consecutive working days, the appointing authority shall consider the employe's position abandoned and may discipline the employe or treat the employe as having resigned his or her position. If the appointing authority decides to treat the position abandonment as a resignation, the appointing authority shall notify the employe in writing that the employe is being treated as having effectively resigned as of the end of the last day worked.

(ar) Paragraphs (a) and (am) apply to all employes with permanent status in class in the classified service, except that for employes in a certified bargaining unit covered by a collective bargaining agreement, the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.

(b) No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employe in writing the reasons for the action.

(c) The administrator shall establish guidelines for uniform application of this authority among the various agencies.

On its face, the statute provides the appointing authority with substantial discretion in dealing with an employe who fails to report to work for at least five consecutive working days. The appointing authority may choose to discipline the employe or to treat the employe as having resigned. It is undisputed that the respondent intended to treat the appellant as having resigned her position.

There is no express grant of jurisdiction to the Commission under s.230.34, Wis. Stats., for appeals brought by employes under that section. However, it is clear from the language of s.230.34(1)(ar), Wis. Stats., that some type of "appeal procedure" for actions taken under subdivision (am) is provided. An analysis of the various bases for its jurisdiction indicates that the Commission does have jurisdiction over appeals arising under s.230.34(1)(am), Wis. Stats.

As a general matter, the Commission derives its jurisdiction from the provisions of s.230.45(1), Wis. Stats., which in turn makes reference to s.230.44, Wis. Stats. The latter section establishes four specific classes of actions that may be appealed to the Commission. Only one of those four is relevant to the present appeal.

> (c) Demotion, lay-off, suspension or discharge. If an employe has permanent status in class, the employe may appeal a demotion, lay-off, suspension, discharge or reduction in pay to the commission, if the appeal alleges that the decision was not based on just cause.

The various actions that are enumerated in s.230.44(1)(c), Wis. Stats., correspond closely with the forms of discipline described in s.230.34(1)(a), Wis. Stats.: "removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause." Such disciplinary actions are clearly within the Commission's jurisdiction.

While resignations are not expressly found among the enumerated transactions that are directly appealable to the Commission pursuant to ss.230.44 and 230.45, Wis. Stats., the Supreme Court of Wisconsin has construed a coerced resignation as a form of discharge, Watkins v. Milwaukee County Civil Service Commission, 88 Wis 2d 411, 420, 276 N.W. 2d 775 (1979), making the resignation subject to the same review mechanisms as a discharge. In Watkins, the petitioner had alleged that he had been forced to resign from his position as ambulance driver when his supervisor had threatened to seek criminal charges of theft against him. Petitioner was employed by Milwaukee County and was subject to the provisions of ch. 63., Wis. Stats. In particular, s.63.10, Wis. Stats., provided that the civil service commission of Milwaukee County had the authority to review decisions by the appointing power to demote, dismiss, discharge and

in some cases suspend the employe. Despite the absence of any express grant of authority over appeals from resignations, the court in Watkins ruled that the civil service commission could hear appeals from coerced resignations:

> Sec. 63.10, Stats., provides procedures designed to ascertain through an impartial hearing whether the accusations brought against an employe demonstrate his unfitness for employment. The statute reflects the legislature's determination that the employe has a legitimate interest in not being "wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded." Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 573, 263 N.W. 2d 214 (1978).
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> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency." (Emphasis in original.) Dabney v. Freeman, 358 F.2d 533, 535 (D.C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. The strength of this policy is underscored by the language of sec. 63.04, Stats., which provides that "no person shall be ... removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [secs. 63.01 to 63.16, inclusive]." Watkins, 88 Wis. 2d 411, 418.

The present case raises very similar concerns to those considered in Watkins. Resignation by abandonment, under the terms of s.230.34(1)(am), Wis. Stats., can be invoked whenever an employe fails to report for five days. The statute serves a useful purpose when it is carefully applied to an employe who decides to quit work and fails to tell anyone of his or her decision. At the same time, the statute is readily subject to abuse, if invoked as a retaliatory means of discipline. The likelihood of such abuse is magnified if no method for administrative review is provided.

The Watkins case was decided by the Supreme Court on March 27, 1979. On April 30, 1980, section 740, Chapter 221 of the laws of 1979 went into effect, thereby creating s.230.34(1)(am), Wis. Stats. When the legislature enacted the provision for job abandonment found in s.230.34(1)(am), Wis. Stats., the

presumption is that "it did so with knowledge of existing laws, including both the statutes and the court decisions interpreting it." State ex rel. Klinger and Schilling v. Baird, 56 Wis. 2d 460, 468, 202 N.W. 2d 31 (1972). See also Kindy v. Hayes, 44 Wis. 2d 301, 314, 171 N.W. 2d 324 (1969); Town of Madison v. City of Madison, 269 Wis. 609, 614, 70 N.W. 2d 249 (1955).

Therefore, the Commission concludes that the legislature intended the Commission to have jurisdiction over involuntary resignations under s.230.34(1)(am), Wis. Stats., just as the Supreme Court had construed s.63.10, Wis. Stats., as granting the Milwaukee County Civil Service Commission jurisdiction over coerced resignations.[1]

Standard to be Applied

As a logical consequence of finding jurisdiction, the Commission must also determine the appropriate standard to be applied in reviewing the appointing authority's actions. Once again, the language of s.230.34(1)(ar), Wis. Stats., provides assistance by referring to "the determination of just cause."

The just cause standard as applied to disciplinary actions is different from the just cause standard applied to a non-disciplinary lay-off. The standard of review in a non-disciplinary lay-off situation is whether the appointing authority has "acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious." Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 237 N.W. 2d 183. In contrast, disciplinary appeals are subject to a just cause

[1] This result is consistent with several prior cases in which the Commission has ruled that it has jurisdiction over appeals that meet the "legal standards of a coerced resignation as a constructive discharge." Biesel v. Commissioner of Securities, Wis. Pers. Bd., 77-115 (9/15/77). Evrard v. DNR, 79-251-PC, (2/19/80). In those cases, the Commission found it appropriate to look beyond the specific language of a resignation letter.

determination as described in <u>Safransky v. Personnel Board</u>,62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974):

> "[O]ne appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works."

The <u>Safransky</u> test is generally regarded as embodying a two-part analysis; whether the basic facts are proven, and whether these facts "can reasonably be said to have a tendency to impair" performance or efficiency. Legal developments subsequent to the <u>Safransky</u> case also require the Commission to determine whether the discipline that was imposed by the appointing authority was excessive. <u>Hess v. DNR</u>, Wis. Pers. Comm., 79-203-PC (8/19/80).

The Commission concludes that the just cause standard for lay-off situations is the proper standard to be applied in the review of an abandonment/resignation. This result is consistent with the Wisconsin Supreme Court's decision in <u>Weaver</u>, supra, where the Court relied upon the existence of detailed lay-off procedures within the statutes and administrative code. In the present case, the language of s.230.34(1)(am), Wis. Stats., establishes precise procedural requirements that must be followed before an employe may be considered as having resigned his or her position. The existence of the five day statutory requirement must be contrasted with the unspecific statutory standard of "just cause" that is to be applied to disciplinary actions.

<u>Further Proceedings</u>

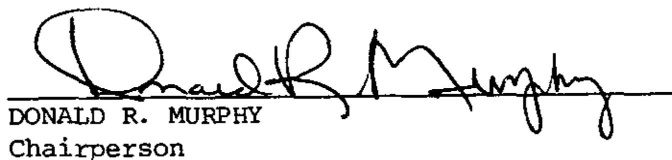
Unless the parties indicate that they are willing to rely upon the record of the jurisdictional hearing, the next step in this appeal is a hearing on the merits, applying the appropriate "just cause" standard.

ORDER

The respondent's motion to dismiss this appeal for lack of subject matter jurisdiction is denied, and the appeal may proceed to a hearing on the merits.

Dated: Dec. 3, 1981

STATE PERSONNEL COMMISSION



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