STATE OF WISCONSIN PERSONNEL COMMISSION

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PATRICIA LUCHSINGER,

Appellant,

v.

Chairperson, PUBLIC SERVICE COMMISSION,

Respondent.

Case No. 82-192-PC

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INTERIM DECISION AND ORDER

This is an appeal pursuant to §230.45(1)(c), stats., of the respondent's decision of a noncontractual grievance. This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction, and the appellant's motion filed December 24, 1982, to amend her appeal. The latter motion has not been opposed and will be granted.

The amended appeal filed December 24, 1982, alleges, in part, as follows:

> "Appellant received a written reprimand affecting conditions of employment on July 19, 1982. This discipline was for a violation 'of the State Code of Ethics.'
>
> The State Code of Ethics, Pers 24.01 et. seq, is 'a rule of the Director' within the meaning of the Administrative Practices manual and within the meaning of Wisconsin Statutes, §230.45(1)(c).
>
> The disciplinary action appealed from was without just cause, and was clearly an incorrect interpretation or unfair application of the Pers rules, and within appellant's conditions of employment.
>
> The specific rule which was incorrectly interpreted and/or unfairly applied against appellant was Pers 24.04(2)(a), covering improper use of state property, a telephone.
>
> Appellant also asserts her rights to appeal this discipline under Pers 24.04(2)(c)2.
>
> The discipline was given by Mr. Jim McKennon. Prior to this appellant had reported what she considered to be mismanagement and abuses of authority by Mr. McKennon. Those disclosures were made to the head of the agency, and also to the agency personnel staff.

> Mr. McKennon was then informed of these reports. From that point on the treatment of appellant changed for the worse. This discipline is but one of the reprisals for the disclosures, and is within the protection of Pers 24.04(2)(c)(2).
>
> Appellant pursued her grievance rights, and presented clear evidence of the injustice and unfair application of the discipline to her situation. The Public Service Commission took the action of upholding the discipline.
>
> This action was without just cause, and was in itself an unfair application of the Pers 25.01 grievance process."

The appellant through counsel presents several arguments in support of jurisdiction.

First, it is argued that this matter is cognizable under §230.44(1)(b), stats., as an "appeal of an action delegated by the administrator to an appointing authority under §230.05(2) ..." Appellant contends that the grievance process for non-represented employes is a personnel management function delegated by the administrator to the respondent-appointing authority.

Section 230.05(2)(a), stats., provides in part:

> "Except as provided under par. (b), the administrator may delegate, in writing, any of his or her functions set forth in this subchapter to an appointing authority ..."

The function of administering a noncontractual grievance procedure is nowhere set forth as a function of the administrator in Subchapter II of Chapter 230. The appellant cites § Pers 25.01, Wis. Adm. Code, which provides that:

> "Recognizing the value of a formal grievance procedure in a sound management program, each department shall, as required by the director, establish a written grievance procedure. Such procedure shall meet standards established by the director."

This rule does not have the effect of delegating a statutory function of the administrator; rather, it is a directive to appointing authorities concerning one phase of their personnel management program.

The appellant's second argument is that this matter is cognizable pursuant to §230.45(1)(c), stats., as an appeal of the respondent's decision of her noncontractual grievance.

Section 230.45(1)(c), stats., provides that the Commission shall "serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary [DER] providing the minimum requirements and scope of such grievance procedure." In DOT v. Wis. Personnel Commission (Kennel, Brauer, and Murphy), No. 79 CV 1312, Dane Co. Circuit Court (7/21/80), the court held that in the absence of the promulgation of these rules, the Commission, pursuant to §129(49), Chapter 196, Laws of 1977, was to look to the Administrative Procedures Manual (APM) provision setting forth the noncontractual grievance procedure.

This APM, "State of Wisconsin, Department of Administration, Subject: Non-contractual Employe Grievance Procedures, effective 8/24/66, revised 10/1/74," permits appeals of:

> "... those complaints which allege that an agency has violated, through incorrect interpretation or unfair application,
>
> 1) a rule of the Director, State Bureau of Personnel [now Administrator, Division of Personnel] or Civil Service Statute ..."

The rule of the director (now administrator) which the appellant alleges has been violated is §Pers 24.04(2)(a), Wis. Adm. Code, which reads in part:

> "No employe may use or attempt to use his or her public position or state property, including property leased by this state ... to influence or gain financial or other benefits, advantages or privileges for the private benefit of the employe ..."

In this case, the appellant apparently grieved a reprimand for alleged improper use of a state phone, which the respondent originally cited as an ethics code (ch. Pers 24, Wis. Adm. Code) violation, but then amended to charge a work rule violation.

In the opinion of the Commission, the most immediate question is whether on these facts it can possibly be alleged, as required by the APM, that the respondent violated a rule, here, §Pers 24.04(2), Wis. Adm. Code. There is nothing in that section which prohibits or proscribes any action by the appointing authority or employing agency. Rather, the rule speaks solely to employe misconduct. If the employer misinterpreted this rule in reprimanding an employe, could it be said that the employer violated the rule? By way of analogy, a district attorney who filed a complaint charging criminal embezzlement would not be considered to have violated the embezzlement statute if it subsequently were determined that the complaint was based on a misinterpretation of the statute. Therefore, the second argument also does not state a basis for Commission jurisdiction.

The appellant's third argument was stated, in part, as follows:

> "Another ground upon which the appeal stands is Pers 24.04(2)(c)2. This, also, is a 'rule of the director,' within the meaning of the APM and §230.45(1), Wis. Stats.
>
> Appellant alleges that she is suffering reprisal for disclosures of information which she believed evidenced mismanagement and abuse of authority by the person who issued the discipline ..."

The appellant alleges that on several occasions she complained to Chairman York and Executive Assistant Dubé about abuse of authority by her supervisor Mr. McKennon, and that: "The current discipline and other unfair treatment of appellant stems from, and are in retribution for, these disclosures and are within the scope of Pers 24(2)(c)2."

The respondent contends that the appellant has not stated an arguable violation of §Pers 24.04(2)(c)2, Wis. Adm. Code, because there has been no allegation of public disclosure, the disclosure allegedly having been made within the agency. The appellant in turn argues that §Pers 24.04(2)(c) 2 does not require public disclosure.

This provision contains the following language:

> (c) No employe may intentionally use or disclose information gained in the course of or by reason of the employe's official position or activities in any way that could result in the receipt of anything of value for himself or herself, for his or her immediate family, or for any other person or organization, if the information has not been communicated to the public or is not public information. However, no reprisal may be taken against an employe for the lawful disclosure of information which the employe reasonably believes evidences:
>
> 1. A violation of any law, rule or regulation, or
>
> 2. Mismanagement, a gross waste of funds, an abuse of authority, enforcement of unreasonable agency work rules, or a substantial and specific danger to public health or safety." (emphasis supplied)

By its terms, this rule is not limited to public disclosure. The word "disclose" is defined by Webster's New World Dictionary, Second College Edition (1970) as:

"1. to bring into view; uncover; 2. to reveal, make known ..."

This definition would be consistent with a utilization of the word "disclosure" in this rule as applying to the provision of information to anyone who previously had not been aware of it. The only basis for reading in a requirement of public disclosures is to imply the same from this language in §Pers 24.04(2)(c),: "... if the information has not been communicated to the public or is not public information." However, this language must be read in the context of the thrust of the first sentence of subsection (c), which is to prohibit use or disclosure of information for the "receipt of anything of value ..." if the information is not already public informantion. It would seem unlikely that a state employe could realize something of value for the disclosure of information, unless that disclosure is to someone in the private sector outside of state government - e.g., the media or a publisher. Therefore, the exception for information which previously had been made

public or which constitutes public information is perhaps to be expected in this context. The apparent intent of the language which follows, "However, no reprisal may be taken against an employe for the lawful disclosure of information which the employe reasonably believes evidences ...," is to shield a conscientious employe from "reprisal" for revealing information about problems in the workplace of which he or she perceives. The limitation of such protection to disclosures to the public would remove protection for disclosures to non-public organizations or officers who might be best-situated to take action with respect to the problem, such as legislators, district attorneys, the Justice Department, and of course, higher authority within the employing agency. It would seem incongruous for an employe to be protected from reprisal for disclosing a perceived problem in his or her shop or office to a newspaper, but not for disclosing it to his or her agency head.

For these reasons, the Commission concludes that the appellant has alleged a violation of a rule of the administrator and that it cannot be said as a matter of law that said allegation fails to state a claim upon which relief can be granted, and that therefore this Commission has jurisdiction over this matter pursuant to §230.45(1)(c), stats.

ORDER

The respondent's motion to dismiss filed November 30, 1982, is denied. The appellant's motion filed December 24, 1982, to amend her appeal is granted.

Dated: January 31, 1983

STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

AJT:ers

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