STATE OF WISCONSIN PERSONNEL COMMISSION

PETITION FOR DECLARATORY RULING (Ronald L. Paul)

Case No. 84-0158-PC

RONALD L. PAUL,

Complainant/Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 82-PC-ER-69 and 82-156-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This petition for declaratory ruling was filed on August 2, 1984, with a request that it be consolidated with Case Nos. 82-PC-ER-69 and 82-156-PC. The latter matters are a charge of discrimination and a civil service appeal arising out of the complainant/appellant's non-appointment to the position of Institution Security Director 1 at Mendota Mental Health Institution (MMHI). The parties have filed briefs. The matter is before the Commission on the initial question of whether to entertain the petition for declaratory ruling.

DISCUSSION

The petition for declaratory ruling recites inter alia, that §ER-Pers 12.05, Wis. Adm. Code, provides for expanded certification when necessary

to achieve a balanced work force, that on or about April 23, 1982, the appointing authority at MMHI used the expanded certification process to effect the appointment of a black male applicant to the position of Institution Security Director 1[1], and that "[t]he promulgation, development, use and/or application of WAC ER-PERS 12.05 was/is unlawful." The movant requests the entry of a declaratory ruling "holding the promulgation development use and/or application of WAC ER-PERS 12.05 unlawful, null and void."

DHSS in its brief filed August 24, 1984, takes the position that "... the Commission should not entertain the appellant's request and should dismiss the proceeding." The department argues in support of its position that there is no express grant of statutory authority to the Commission to declare another agency's administrative rules unlawful, and that such authority cannot be inferred, in part because pursuant to an attorney general's opinion:

> ... the Attorney General also concluded that although declaring an administrative rule invalid is a judicial act, the legislature could by law duly enacted provide that it or its committees or by necessary implication administrative agencies could declare administrative rules invalid but only if "a) the delegation restricts the legislature [or its committees or administrative agencies] to the application of the standards already established by the relevant enabling law, and (b)..." [63 O.A.G. 159, 164-168 (1974)]
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> On the face of sec. 230.45, Stats., the legislature clearly has not granted or delegated the Commission the authority to declare D.E.R.'s administrative rules invalid... Alternatively, if the Commission is to conclude that such authority is somehow granted or delegated by implication, to lawfully exercise that implied

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[1] This is the position for which Mr. Paul competed.

> authority it must also [be] concluded that the implication carries with it a specific legislative restriction that the authority must only be exercised according to the standards already established in the enabling legislation. There is no basis for such a conclusion. pp. 9-10.

In evaluating these arguments, it is helpful to look to some relatively recent decisions of the Wisconsin appellate courts. In Phillips Plastics Corp. v. Natural Resources Dept., 98 Wis. 2d 524, 531-532, 297 N.W. 7d 69 (1980), the Court of Appeals considered the question of whether the DNR was authorized to determine the validity of its rules in an administrative proceeding under §147.20, Stats.

The Court held as follows:

> The parties disagree as to whether judicial review was available to the plaintiff by other statutory provisions to determine the validity of sec. NR 260.12, Wis. Adm. Code. The defendant contends that review was available pursuant to sec. 147.20, Stats. The plaintiff claims that sec. 147.20 allows for review of "the reasonableness of or necessity for any term or condition of any issued or modified permit," and that this scope of review does not encompass challenges to the validity of administrative rules. Thus, the plaintiff argues that administrative review of sec. NR 260.12 is available only through sec. 227.05, Stats.
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> Section 147.20, Stats., provides in pertinent part:
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> > (1) Any permit applicant, permittee, affected state or 5 or more persons may secure a review by the department of any permit denial, modification, suspension or revocation, the reasonableness of or necessity for any term or condition of any issued or modified permit, ...
> >
> > (2) The decisions of the department issued under this section shall be subject to judicial review as provided in ss. 227.15 to 227.21.
>
> These provisions limit review of permit terms to a determination of whether the terms are reasonable and necessary. They do not authorize the DNR to determine whether its rules are valid. Nor would the scope of review be greater in the reviewing court under sec. 227.15 Stats., since the exclusive means of judicial review of the validity of a rule is provided in sec. 227.05. Thus, the plaintiff had no right to administrative or judicial review of the validity of the rule other than by commencing an action under sec. 227.05. (emphasis added)

However, in a subsequent case, the Supreme Court reached a completely opposite conclusion and expressly disavowed the foregoing holding. See, Sewerage Commission of Milwaukee v. DNR, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981):

> To the extent that a different result was reached by the court of appeals in Phillips Plastic Corp. v. Natural Resources Department, 98 Wis. 2d 524, 531-532, 297 N.W. 2d 69 (Ct. App. 1980), we disavow that conclusion. 102 Wis. 2d at 628.

The analysis followed by the Supreme Court in reaching its holding included the following:

> Section 147.20(1), Stats., uses the words "reasonableness" and "necessity" of the terms and conditions of permits as bases for administrative and judicial review -- terms which might be viewed as importing, for the purposes of scope of such review, only questions of fact, policy, or administrative discretion, rather than legality in the sense of statutory authority to take a particular action. But sec. 147.20(2) clearly states that the department's decisions on permit disputes are subject to judicial review under secs. 227.15 to 227.21. The scope of such review includes inquiry as to whether the department's action was "[i]n excess of ... statutory authority or jurisdiction ..., or affected by other error of law; ...." Sec. 227.20(1)(b), Stats. 1973.[4]
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> We think it clear that excess of administrative authority is a proper ground of challenge to a permit under sec. 147.20....
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> * * *
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> Beyond the fact that sec. 147.20, Stats., on its face encompasses a legal challenge to permits such as that raised by the commissions in the present case, there are sound [policy] reasons for so construing the statute in the particular light of the ch. 147 permit program...
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> * * *
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> Regardless of how the DNR's exercise of its asserted authority to require early compliance is characterized, however -- as being done via "permit," "rule," or both -- the commissions, had they wished, could also have posed a timely declaratory challenge to the rule itself, had they followed the review prescribed in sec. 147.20, Stats. The means for doing so would have been sec. 227.05(2)(e), Stats. 1973. That section provides:

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[4] This basis of review appears in the 1975, and subsequent statutes, in sec. 227.20(5), (8).

> 227.05 Declaratory judgment proceedings.
> "(2) the validity of a rule may be determined in any of the following judicial proceedings when material therein:
> "(e) Proceedings under ss. 227.15 to 227.21 ... for review of decisions and orders of administrative agencies provided the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered."
>
> Under sec. 147.20(2), Stats., the DNR's ruling on a challenge by a permit holder to the reasonableness or necessity of terms or conditions of the permit is expressly characterized as a "decision" judicially reviewable under secs. 227.15 to 227.21. Therefore, a declaratory challenge to the validity of the rule (NR 210.10) underlying such decision was available under the clear and unambiguous terms of sec. 227.05(2)(e). Under that statute, the only prerequisites for such a challenge would be that the validity of the rule first be raised before the agency, and that judicial review thereof be undertaken within thirty days of the DNR's decision on the permit review (sec. 227.16(1), Stats.).
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> In other words, a declaratory challenge to the validity of a rule on which a permit is based is available under sec. 147.20, Stats., in joint operation with ch. 227. The only requirements are that such a challenge raised pursuant to the procedural dictates of sec. 147.20 must first be sought at the agency level within sixty days of issuance of the permit; the underlying rule must be challenged at that time; and within thirty days of the department's decision thereon, judicial review may be sought, including the raising of a declaratory challenge to the rule. (emphasis added) 102 Wis. 2d at 624, 626-627.

While in the instant case, respondent DHSS has argued that the Commission's enabling statutes do not give it the authority to declare a rule invalid, the foregoing decision suggests otherwise.

The source of commission jurisdiction over No. 82-156-PC is §230.44(1)(d), Stats., which provides for appeal of a "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion...." (emphasis added). This may be compared with the language of §147.20(1), Stats.: "... reasonableness of or necessity for any term or condition of any issued or modified permit..." (emphasis supplied). Just

as administrative decisions under §147.20 are judicially reviewable under §§227.15 - 227.21, so also are those of this Commission. If the Supreme Court is of the opinion that the "reasonableness" and "necessity" language of §147.20(1) combined with the availability of Chapter 227 judicial review authorizes an initial administrative determination of the validity of a rule, it seems likely that it would reach a similar conclusion with respect to the term "illegal" found in §230.44(1)(d).

The court did not mention the attorney general's opinion cited by the respondent. In the Commission's view, this opinion is probably consistent with the Supreme Court decision in the Sewerage Commission case.

The attorney general stressed the necessity for the availability of judicial review of a legislative determination of the invalidity of an administrative rule. In the Sewerage Commission case, Chapter 227 judicial review of the DNR decision was available. The reference in the opinion to restricting the legislature "to application of the standards already established by the relevant enabling law...," 63 O.A.G. at 166, must be read in the context of the entire opinion and the much broader possible role for the legislature that was being discussed. Without such explicit guidelines on its role, there would be a danger that the legislature would be acting not in a quasi-administrative capacity but would be repealing an enabling statute pro tanto or otherwise acting in an unconstitutional manner. Such similar explicit restrictions would not appear to be necessary in the case of an administrative agency which would be determining the validity of an administrative rule in a contested case proceeding properly before it, and subject to judicial review.

The respondent DHSS has raised a number of additional questions about whether the language of §227.06, Stats., would permit the Commission to

entertain this particular petition for a declaratory ruling. For a number of reasons, the Commission will not reach this issue. First, the Sewerage Commission case provides reasonably clear authority for the Commission to consider the validity of the rule in question in the context of Case No. 82-156-PC. Second, even if this Commission decided that it had the authority to hear this petition on the merits under §227.06, it would be discretionary whether to actually do so.[2] Third, the appellant has not made any argument why the question of the validity of the rule should be considered in the context of a declaratory ruling proceeding rather than in the context of the civil service appeal arising from the transaction that gives rise to the rule challenge, and, indeed, has indicated in his reply brief that if the petition is denied, "... a Motion seeking the same result will be filed within the parameters of the case(s) now pending." The appellant will be directed to file an appropriate motion to seek a determination of the validity of §ER-Pers 12.05, Wis. Adm. Code in the context of Case No. 82-156-PC.

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[2] Sec. 227.06(1) provides "Any agency may ... issue a declaratory ruling .... (emphasis added).

ORDER

The "REQUEST/MOTION FOR DECLARATORY RULING" filed August 3, 1984, No. 84-0158-PC, is denied and dismissed without prejudice. The appellant is directed to serve and file a motion (a brief in support of the invalidity of the rule has already been filed) in No. 82-156-PC, within 14 days of the date of this order, requesting a determination by the Commission of the validity of §ER-Pers 12.05, Wis. Adm. Code. The respondents are to respond within 20 days thereafter, and the appellant may reply within 10 days thereafter. Inasmuch as there appears to be no dispute that the Administrator, DMRS, and not the Secretary, DER, has responsibility for the rule in question, the former will be substituted for the latter as a party-respondent.

Dated: Oct. 11, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

KMS:jmf
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LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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