

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

JOYCE R. SEEP, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 83-0032-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission as an appeal of a decision to deny the appellant's request for reinstatement. In a letter of appeal received by the Commission on February 10, 1983, the appellant stated, in part:

On January 3 I contacted Mr. Thomas J. Wall and reactivated my status under the terms of our union agreement quoted to me before I retired on January 8, 1982. Two weeks later, a follow-up telephone call revealed Mr. Wall had refused my request to return to Southern Center for Disabled. Knowing I had always been reviewed above the satisfactory levels--most often as "above average", I asked for an explanation. I was told my file had been reviewed and I was rejected due to a low level of accrued sick leave remaining in my reserve account.

In a subsequent letter, the appellant stated:

I am appealing on the grounds that they were considering my recertification when they checked my file as there were several positions available. My recertification is a simple review process within 3 years of my original termination. It is important to note that within thirty days they hired 10 new people to fill those positions.

At the prehearing conference, the respondent moved to dismiss the appeal due to lack of subject matter jurisdiction. Both parties have been provided an opportunity to file briefs.

The respondent offers two arguments in support of its motion to dismiss. The first argument is that decisions for an appointing authority not to reinstate an employe simply do not fall within the terms of the statutory provisions setting out the Commission's jurisdiction over appeals.

The Commission has previously ruled that it has the authority to hear certain appeals from reinstatement decisions. In Lundeen v. DOA, 79-208-PC (6/3/81) the Commission interpreted §230.44(1)(d), Stats., which provides:

(d) Illegal action or abuse of discretion. 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 may be appealed to the Commission.

In Lundeen, the Commission specifically rejected the contention that the appellant him/herself must have been certified as a precondition to establishing jurisdiction. As long as someone has been certified for appointment to the position(s) in question, a subsequent reinstatement decision qualifies as a post-certification action related to the hiring process.

In the present case, the language found within the appellant's letters suggests that persons other than the appellant were certified for the position before the decision was made to deny the appellant's reinstatement request. If, after this interim decision and order is issued, the respondent is able to establish that no certification had occurred at the time of the reinstatement decision, a different conclusion with respect to the Commission's jurisdiction to hear this case may be dictated.

The second jurisdictional argument raised by the respondent is that the appellant is covered by the terms of a collective bargaining agreement with the State. Pursuant to §111.93(3), Stats.:

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.

It appears to be undisputed that the classification in question in the present case (Institutional Aide 2) is covered by a collective bargaining agreement. The respondent points out that the subject of reinstatement is covered by Article VIII, Section 7 of the agreement. However, Article VIII is entitled "Layoff Procedure" and there is no indication that it is applicable to reinstatements following retirement. The provisions of Section 7 clearly relate to persons who have been laid off:

Any employe who is laid off may file a request within the department for which he/she worked to file a permanent vacancy in an employing unit other than that from which he/she was laid off.

A review of the other articles in the bargaining agreement indicates that, other than in the layoff provisions, reinstatement is not discussed within the contract.

Reinstatement is also not one of the decisions or procedures specified in either §111.91(1) or (2), Stats., as a mandatory or prohibited subject of bargaining, respectively. Only original appointments are established as a prohibited subject under §111.91(2)(b) 1, Stats.

The reinstatement decisions made outside the scope of the layoff procedures are best described as management rights as set out in §111.90, Stats.:

Nothing in this subchapter shall interfere with the right of the employer, in accordance with this subchapter to:

* * *

(2) Manage the employes of the agency; hire, promote, transfer, assign or retain employes in positions within the agency; and in that regard establish reasonable work rules.

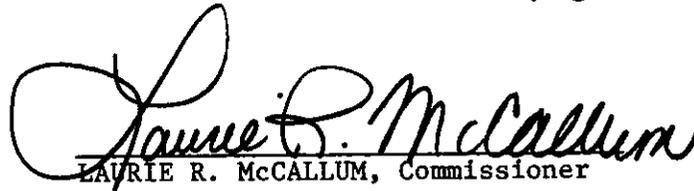
The absence of any contract provisions regarding reinstatements outside of the layoff setting and the fact that this area is not a mandatory subject of bargaining but is within the scope of management rights, indicates that §111.93(3), Stats., does not act to supersede the Commission's jurisdiction in this case.

ORDER

The respondent's motion to dismiss is denied. The parties will be contacted to schedule a second prehearing conference.

Dated: July 7, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner

KMS:jmf


DENNIS P. MCGILLIGAN, Commissioner

Parties:

Joyce R. Seep
2032 N. Main Street
Racine, WI 53402

Linda Reivitz, Secretary
DHSS
1 W. Wilson Street
Madison, WI 53702