

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 TERRY FRANK,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case No. 83-0173-PC
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FINAL
 DECISION
 AND
 ORDER

This matter is before the Commission on consideration of the attached proposed decision and order. The Commission has considered the complainant's objections thereto, heard the parties' oral arguments, and consulted with the examiner. As its final disposition of this matter, the Commission adopts and incorporates by reference the proposed decision and order, and adds the following to the opinion:

This case involves an application of §230.31(1)(a), Stats., and §ER-Pers 16.035(1), Wis. Adm. Code. These provide respectively as follows:

230.31(1) Any person who has held a position and obtained permanent status in a class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations for a 3-year period from the date of such separation:

(a) Such person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

ER-Pers 16.035 Types and conditions of reinstatement
 (1) GENERAL. An employe who has terminated from the classified service without misconduct or delinquency or

who has accepted a voluntary demotion for personal reasons shall be eligible for reinstatement in any agency for 3 years from the date of such resignation or demotion.

"Reinstatement" is the "act of re-appointment without competition," §ER-Pers 16.01(1), Wis. Adm. Code, on a basis which is "permissive at the discretion of the appointing authority," §ER-Pers 16.01(2), Wis. Adm. Code.

The main thrust of the appellant's argument is that these provisions mean that so long as a request for reinstatement is submitted within the three year period, reinstatement can be accomplished at some point after the expiration of the three year period. The Commission, however, can simply find no basis in the plain language of these provisions to reach such a result.

For example, appellant argues as follows: "The conclusion that the presentation of a reinstatement application is not sufficient to toll the statute is contrary to the clear statutory and regulatory language...." To the contrary, there is nothing in this language which would provide for such tolling.

The appellant further argues:

Based upon the dictionary definitions of "eligibility" and "eligible," appellant was fitted, qualified or entitled to consideration for reinstatement at any time within three years after her employment was terminated. The language of the statute and regulation cannot be read to impose additional requirements that the reinstatement application be filed some indefinite period of time before the three-year period expires.

The statutory and regulatory languages says nothing about when the employe must apply for reinstatement; it only restricts eligibility for reinstatement for a period of three years.

It further should be emphasized that the Commission in this case does not hold, as argued by appellant, that "appellant's reinstatement application was untimely because it was not filed sufficiently prior to the

three-year expiration period to permit consideration by the Department." (emphasis added). Rather, the Commission holds, inter alia, that the failure or refusal of the respondent to have reinstated the appellant following her request for reinstatement filed April 14, 1985, two working days prior to the expiration of her reinstatement eligibility, based not only on the conclusion that there was insufficient time to have pursued the normal procedure for processing a request for reinstatement, but also on concerns about prior attendance and temper problems, was neither illegal nor an abuse of discretion. Even if the respondent's interpretation of the rules and statutes relating to reinstatement eligibility had been incorrect, its concerns about the appellant's past performance provided an independent and sustainable basis for not reinstating her.

Once the appellant's period of reinstatement eligibility had expired, she was no longer entitled to reappointment without competition. That the respondent notified her in July 1983 of the aide examination cannot possibly render its failure or refusal to have reinstated her illegal or an abuse of discretion.

Dated: October 1, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

AJT:jmf
ID5/2


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal of the denial of a reinstatement. This matter was held in abeyance for a period of time pending proceedings in another forum. By Interim Decision and Order dated March 14, 1984, the Commission overruled respondent's objection to subject matter jurisdiction. A prehearing conference was held on May 16, 1984, before Donald R. Murphy, Chairperson, at which time the parties agreed to a hearing on October 9, 1984. At the prehearing conference the parties were unable to agree upon the issues for hearing. The parties submitted briefs on the matter. On September 28, 1984, the Commission issued an Interim Decision and Order which directed that the hearing be held on the following issue:

Whether the failure or refusal of the respondent to reinstate the appellant pursuant to ER-Pers 16.035(1), Wis. Adm. Code, following her request for reinstatement dated April 14, 1983, was illegal or an abuse of discretion.

At the beginning of the hearing on Tuesday, October 9, 1984, respondent moved that the Commission dismiss the case on the grounds that appellant failed to provide respondent with a list of witnesses or copies of exhibits more than 2 working days prior to the date of the hearing as

required by section PC 2.01, Wis. Adm. Code. That motion was granted by the hearing examiner, thereby concluding the administrative hearing, although the parties were then permitted to reargue the matter by brief. The examiner subsequently issued a proposed decision and order on January 3, 1985, that again would have granted the motion. The appellant filed written objections to the proposed decision and the Commission also heard oral arguments from the parties. Based on those arguments and the entire record before it, the Commission granted appellant's motion for reconsideration of the examiner's order dismissing the appeal and vacated the examiner's aforesaid order by Interim Decision and Order dated March 13, 1985. Hearing in the matter was reconvened on April 17, 1985. The parties did not file written arguments on the merits of the dispute.

FINDINGS OF FACT

1. Terry Frank, hereinafter referred to as the appellant or Frank, was employed by the State of Wisconsin as an Institutional Aide at the Central Wisconsin Center (CWC) for the Developmentally Disabled from October 24, 1977 until her termination by letter dated April 18, 1980 as follows:

In view of your continued inability to return to work and in view of the fact that you are employed elsewhere, your employment here is being terminated effective this date.

You will retain reinstatement eligibility for three years from this date. Should your health improve during that time so that you are able for and should you be interested in employment here again, we will consider your application for reinstatement.

2. Frank suffered a job-related injury on April 29, 1979, and was on paid leave status until August 31, 1979; she continued on unpaid leave from that date until April 18, 1980; on or about April 18, 1980, the State, by its agent, Brian Fancher, mailed Frank a letter advising her that her employment would be terminated on April 18, 1980, and further advising her

that she retained reinstatement eligibility for three years from the date of termination; Frank did not receive a copy of this letter at that time but did receive a copy of the letter two weeks prior to the arbitration hearing which was held on October 26, 1982.

3. Frank applied for reinstatement in June and August of 1980 and in February of 1981 but her requests for reinstatement were denied.

4. On April 14, 1983, Frank submitted another application for reinstatement as an Institution Aide to the CWC.

5. Sometime after July 7, 1983, Frank received a letter from respondent, in relevant part, as follows:

Dear Aide Applicant:

We are happy to inform you that we anticipate having an Institution Aide exam in August. The application we have on file for you is no longer used as all applications are now computerized. If you are interested in taking the Aide exam please fill out the enclosed application and return as soon as possible....

Said letter effectively denied Frank's request to be reinstated with the CWC.

6. It normally takes the respondent approximately two weeks to process a request for reinstatement. If someone's eligibility for reinstatement runs out during this period of time, respondent refuses to consider the request for reinstatement any further. This happened at least several times before the appellant's request for reinstatement was received.

7. Respondent did not process appellant's April 14th request for reinstatement because her 3 year period of eligibility for reinstatement would have run out during this period and because respondent did not feel appellant would make a good employe due to previous attendance and temper

problems. Respondent did not treat appellant's request for reinstatement any differently than other similar requests.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.
2. The appellant has the burden of proving that the reinstatement decision made by respondent was an illegal act or an abuse of discretion.
3. The appellant has failed to sustain her burden of proof.
4. Respondent's decision not to reinstate appellant was neither illegal nor an abuse of discretion.

OPINION

This is an appeal pursuant to §230.44(1)(d), Stats. The issue, pursuant to the Commission's aforesaid Interim Order and Decision dated September 28, 1984, is whether respondent's refusal to reinstate the appellant following her request for reinstatement was illegal or an abuse of discretion.

Appellant argues that respondent's refusal to reinstate her without a competitive exam violated the applicable statute. Section 230.31, Stats and Chapter ER-Pers 16, Wis. Adm. Code govern Frank's reinstatement rights. ER-Pers 16.035, Wis. Adm. Code, repeating the language of sec. 230.31, Stats., provides in effect that employes such as appellant have reinstatement eligibility for three years from April 18, 1980. Appellant's termination letter stated that Frank would "retain reinstatement eligibility for three years from this date." (emphasis added) ER-Pers 16.01(2), Wis. Adm. Code, provides specifically that appellant's reinstatement eligibility is

permissive and not mandatory.¹ Therefore, respondent had the discretion to re-appoint appellant without competitive exam but was not required to do so. The record indicates respondent chose not to re-appoint appellant per her request but instead treated her as a new employe by requiring her to take an exam for Institution Aide. Respondent did not violate the applicable statute and rules by this action. In conclusion, contrary to appellant's assertion, Frank did not have a mandatory right to be restored to her previous position without competition but rather appellant's eligibility for reinstatement was permissive in nature as noted above.

Appellant also argues that respondent should have processed her request for reinstatement because it was submitted with the three year period noted above wherein she was eligible for reinstatement. However, appellant offered no persuasive evidence or argument in support of her position. Based on same, the Commission rejects this argument.

Appellant has alleged no other illegality and none can be reasonably inferred from the record in this proceeding. A question remains as to whether respondent properly exercised its discretion.

The term "abuse of discretion" has been defined as "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with

¹ (2) Re-appointment under sub. (1) may be either permissive at the discretion of the appointing authority or mandatory as required by the law or rule of the administrator. In those instances where an employe or former employe has "eligibility" for reinstatement, the action is permissive. In those instances where an employe or former employe has the "right" of restoration, the action is mandatory. In these rules of the administrator, "reinstatement" refers to a permissive act and "restoration" refers to a mandatory right. (emphasis added)

the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 81-74-PC (1982).

Respondent, in effect, denied appellant's request for reinstatement because of her prior work record (poor attendance and temper problems) and because appellant's request could not be processed within the time period allowed. It seems reasonable for respondent to consider appellant's prior record in deciding whether it wished to reinstate her. Respondent did this for other potential employes in a similar position. Likewise, respondent did not process other applicants for reinstatement where their eligibility ran out during the time in question.

On the basis of the record before the Commission, it is clear that the respondent properly exercised its discretion -- it considered various factors before making its final decision, these factors (poor work record and expiration of the three year eligibility period for reinstatement) were reasonable in view of the nature of the decision to be made, and the conclusion reached after application of the factors to the facts under consideration was reasonable, i.e., it was reasonable for respondent to conclude that it did not want to reinstate appellant.

ORDER

The decision by respondent not to reinstate appellant is affirmed and this appeal is dismissed.

Dated: _____, 1985 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DPM:jmf
JEN/1

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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