

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

TERRY FRANK, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

HEALTH AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 83-0173-PC \*

\* \* \* \* \*

INTERIM  
DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal of the denial of a reinstatement, which is before the Commission on the respondent's objections to the appellant's proposed issues for hearing. In the course of their briefs with respect to these objections, the parties have made certain arguments relating to the Commission's subject matter jurisdiction.

The findings which follow are taken in part from a decision of the Wisconsin Employment Relations Commission (WERC) in a case involving the same parties, Frank v. State of Wisconsin (Department of Health and Social Services, Case CXC No. 31647 PP (S) - 97, Decision No. 20830 - A (December 19, 1983) of which this Commission shall take official notice. These findings are set forth in quotes. The Commission deems these quoted findings to be binding on the parties pursuant to the principle of collateral estoppel.

FINDINGS OF FACT

A. The Commission adopts the following findings from the aforesaid WERC decision:

1. That Terry Frank, hereinafter referred to as the complainant 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 on April 18, 1980.  
\* \* \*
5. That Frank suffered a job-related injury on April 29, 1979, and was on paid leave status until August 31, 1979; that she continued on unpaid leave from that date until April 18, 1980; that 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; that 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.
6. That Frank applied for reinstatement in June and August of 1980, in February of 1981, and in April of 1983; and that her requests for reinstatement were denied.
7. That Frank knew or should have known that her employment was terminated by April of 1981 at the latest because Fancher, in the summer or fall of 1980, had explained to Frank in telephone conversations that she was in fact terminated, because she withdrew vested benefits from her retirement account in October of 1980, such withdrawal only being possible after severance of employment, and because she had received a letter in April of 1981 unequivocally informing her that her request for reinstatement had been denied and would not be considered further.
8. That WSEU filed a grievance at the third step of the parties' grievance procedure as a "Union grievance" which stated in relevant part: "This grievance is being filed to protect contract rights. This involves Terry Frank's letter from Brian Fancher dated April 3, 1981"; that said grievance was processed through November 24, 1982, in which he held the grievance relating to Frank's discharge to be untimely and refused to consider the grievance on its merits; that said award further stated, in pertinent part, as follows: ". . . the letter (of April 3, 1981) dealt with a denial of reinstatement to Frank who had previously been terminated for reasons which were, in the Employer's view 'without any delinquency or misconduct' within the meaning of Section 230.31(1) of the Wisconsin Statutes. The Employer has consistently taken the position that such a denial is not arbitrable under the provisions of the agreement and the Union disclaims any intent to arbitrate that question in

this case"; and that the grievance was denied for lack of arbitrability."

B. The Commission assumes, for the sole purpose of resolving the issues raised by the parties' briefs, the following factual matter which was alleged in her appeal that was filed, through counsel, on August 5, 1983:

On April 14, 1983, Terry Frank submitted another application for reinstatement as an Institution Aide to the Central Wisconsin Center. Sometime after July 7, 1983, Terry Frank received a letter which is attached hereto and made a part hereof as Exhibit C.

[The relevant part of this letter is 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 ...."]

#### CONCLUSIONS OF LAW

1. So much of this matter as is set forth in the following statement of issue is properly before this Commission pursuant to §230.44(1)(d), Stats.:

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.

2. This Commission lacks the authority to review the respondent's termination of the appellant's employment effective April 18, 1980.

3. This Commission lacks the authority to review the denials of reinstatement which occurred prior to 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.

4. The appellant's eligibility for reappointment without competition was solely that of permissive reinstatement as set forth in §§ER-Pers 16.01 and 16.035(1), Wis. Adm. Code.

OPINION

The issues for hearing proposed by the appellant were as follows:

1. Was the appellant eligible for reinstatement to her position as Institution Aide for the Central Wisconsin Center from June 3, 1980, or from any time thereafter?
2. Did the appellant possess a mandatory right to reinstatement from June 3, 1980 or from any time thereafter?
3. Whether the respondent's denials of reinstatement were illegal or abuse of discretion or without just cause. Prehearing Conference Report dated May 16, 1984.

The respondent's proposal was as follows:

For the reasons set forth above, the Respondent requests that the Commission issue an order concluding:

1. That Frank does not and never had any mandatory reinstatement rights;
2. That Frank had reinstatement eligibility from April 19, 1980 to April 18, 1983 inclusive;
3. That to the extent that the August 5, 1984, appeal purports to appeal any action or decision of an appointing authority, that was taken or made prior to July 7, 1984 (in particular the denial of Frank's request for reinstatement) that the appeal be dismissed on the grounds that it is untimely filed; and
4. That to the extent that the August 5, 1984, appeal is an appeal of the action of the appointing authority requiring Frank to write an examination for the August 1983 vacancies that the appeal be dismissed for lack of subject matter jurisdiction.

In the alternative, the Respondent requests that the Commission issue an order declaring that the issue for hearing is as follows:

Whether the decision of the Respondent to require the Appellant to write an examination in order to be considered for appointment to Institution Aide vacancies was illegal or an abuse of discretion.

The Commission will first address the question of whether the appropriate standard of review is "just cause" or "illegal or abuse of discretion."

The only possible basis of jurisdiction for this appeal is pursuant to §230.44(1)(d), Stats., which provides as follows:

(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.

This subsection contains on its face a statement of the standard of review to be applied: "Illegal action or abuse of discretion." See also, Jacobson v. DILHR, Wis. Pers. Commn. No. 79-28-PC (4/10/81). The only reference in the statutes concerning the Commission's authority to utilize a "just cause" standard is found in §230.44(1)(c), Stats.:

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

However, appeals under this section are limited to unrepresented employes. See §111.93(3), Stats.:

(3) ... [I]f 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.

The Commission has no jurisdiction over appeals of discharges of represented employes. See Walsh v. UW, Wis. Pers. Commn. No. 80-109-PC (8/18/80).

The operation of §111.93(3), Stats., has the same superseding effect as to constructive discharges. See Matulle v. UW, Wis. Pers. Commn. No.

81-433-PC, (1/27/82), affirmed, Winnebago County Circuit Court No. 82CV207 (11/19/82). Therefore, even if the Commission were to accept the

appellant's argument that the scenario that ensued after the termination of her employment constituted a constructive discharge, this would not provide a basis for the application of a "just cause" standard.

The appellant makes a number of what amount to policy or equitable arguments why the Commission should apply a "just cause" or "reasonable cause" standard. However, when the statute (§230.44(1)(d)) which confers jurisdiction on the Commission to hear the appeal contains on its face the standard of "illegal action or abuse of discretion," there simply is no way that this explicit language can be ignored based on considerations of perceived equity or policy.

The next question is whether the Commission has the authority, as asserted by the appellant, to consider the various denials of reinstatement which occurred before the appellant's request for reinstatement of April 14, 1983. The respondent argues that the Commission lacks such authority because no timely appeals pursuant to §230.44(3), Stats., were taken of those denials.

In her brief, the appellant argues not only that the Commission can consider the prior denials of reinstatement, but also that it can consider her discharge. With respect to the failure to file timely appeals of these transactions, the appellant argued as follows:

Significantly, Terry Frank was never notified by the employer of either her discharge or its response to her request for reinstatement dated June 3, 1980. Terry Frank never received the letter dated April 18, 1980 and never received any response to her reinstatement request dated June 3, 1980.

In addition to the Department's failure to provide adequate notice, the Department misled Terry Frank as to her actual employment status. The Department prompted Ms. Frank to wait for a year, establish a good work record, and then apply for reinstatement. The Department denied her applications a year later and continued to deny her reinstatement for different reasons than her physical condition. This confused Terry Frank as to her actual employment rights and status. Appellant's brief, p. 14.

However, as set forth in finding #7 of the WERC, above, the appellant certainly knew not later than April of 1981 that she had been discharged and that her requests for reinstatement were denied. Furthermore, and contrary to the appellant's arguments, her failure to appeal is more than a "waiver" of her right to appeal; it deprives the Commission of subject matter jurisdiction. See, Richter v. DP, Wis. Pers. Commn. No. 78-261-PC (1/30/79); State ex rel DOA v. Personnel Board, Dane County Circuit Court No. 149-295 (1976).

Finally, the appellant makes the following argument at p. 15 of her brief:

The actions of the Department must be viewed in the present case as a series of steps designed to achieve the goal of discharge of Terry Frank without any determination or review as to the merits. The final step in this process was the latest denial of reinstatement in 1983. Terry Frank had no further rights to continued employment as of the final denial of reinstatement. Since this latest denial of reinstatement was the last act in a process which discharged Terry Frank, the appropriate review of the "action" pursuant to sec. 230.44(3) includes a review of the prior action of the Department in discharging and refusing to reinstate Terry Frank. Therefore, the Personnel Commission may consider these actions as part of its review.

In the Commission's view, these conclusions simply do not follow. It is unquestioned that the respondent terminated Ms. Frank's employment as of April 18, 1980. Denying her requests for reinstatement denied her re-employment with the respondent. It did not constitute a discharge, either actually, effectively, or constructively.

Furthermore, even if the appellant had filed a timely appeal with this Commission of her termination of April 18, 1980, the appellant's status as a represented employe and the operation of §111.93(3), Stats., would supplant any possible Commission jurisdiction under §230.44(1)(c), Stats.

In their briefs, the parties have addressed the question of whether the appellant had "a mandatory right to reinstatement," as is implied by the appellant's statement of the issues.

Any right or privilege of reappointment without competition the appellant has had is based on §ER-Pers 16.035(1), Wis. Adm. Code:

(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.

The reason for this conclusion is that there are only two categories of eligibility for re-appointment without competition -- restoration and reinstatement -- and the appellant's circumstances do not fall within any of the restoration categories, §ER-Pers 16.03(1) - (7), Wis. Adm. Code, or any of the other reinstatement categories, §ER-Pers 16.035(2) -(4), Wis. Adm. Code.

Reinstatement and restoration are defined in §ER-Pers 16.01, Wis. Adm. Code, as follows:

- (1) Reinstatement and restoration mean the act of re-appointment without competition of an employe or former employe....
- (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)

Since the appellant's eligibility was for reinstatement pursuant to §ER-Pers 16.035(1), Wis. Adm. Code, she had no mandatory right to reappointment. She could have been reappointed without having to pass an



examination if the appointing authority so chose, but whether or not to have done so was discretionary with the appointing authority.

The last matter the Commission must address in this interim decision is the respondent's contention, as summarized on page five of its brief:

That to the extent that the August 5, 1983, appeal is an appeal of the action of the appointing authority requiring Frank to write an examination for the August 1983 vacancies that the appeal be dismissed for lack of subject matter jurisdiction.

On page four of its brief, the respondent makes the following argument:

The action appealed from in this case is the decision requiring Frank to write an examination to be considered for an Institution Aide position. This decision is not an action under any provision of sec. 230.44(1), Stats. In particular this decision does not come within the meaning of the above-quoted subsection (d) ["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."] for the reasons that the decision was obviously made prior to and not after certification, 'after' being a necessary condition for jurisdiction under this subsection.

However, in the present posture of the case, the Commission must view the subject matter of this case as concerning the respondent's failure or refusal to reinstate the appellant following her request therefore of April 14, 1983. This is certainly the main thrust of the appeal -- see, e.g., appeal dated August 5, 1983, p.2:

This appeal involves a single issue: the failure to reinstate Terry Frank to her position as an Institution Aide 1 - Technical....

The significance of the appointing authority's requirement that appellant be examined was that it served notice that the respondent would not, in the exercise of its discretion, reinstate appellant to her old, or a similar job, without competition, pursuant to §§ER-Pers 16.01(1) and 16.035(1), Wis. Adm. Code.

The respondent argues that the examination process is precertification. Viewed in the abstract, this is correct, with respect to a subsequent appointment. However, in the context of the circumstances of this case, requiring the appellant to take an examination occurred either at or after the denial of permissive reinstatement, since it constituted notice to the appellant that she would have to be examined, as opposed to being reinstated without competition as she had requested on April 14, 1983. The Commission already had decided in its interim decision of March 14, 1984, in this matter, that it has jurisdiction over a denial of reinstatement in accordance with §230.44(1)(d), Stats. See also Seep v. DHSS, Wis. Pers. Commn. No. 83-0032-PC (9/ /84):

The main jurisdictional question is whether the denial of Ms. Seep's application for reinstatement constituted a personnel action "after certification," inasmuch as Ms. Seep herself was not certified for the position.

To begin with, §230.44(1)(d) uses the term "after certification". It does not say "after a certification" or "after certification of the appellant." This statutory language refers not to a specific event, but rather to a point in the selection process "after certification."

This particular line of demarcation has substantial significance, as can be seen from the roles of the administrator and the appointing authorities in the selection process.

The administrator is responsible for recruitment, §230.14, Stats., examination, §230.16, Stats., and the certification<sup>2</sup> of eligibles to the appointing authorities, §230.25, Stats.

The appointing authorities have the authority to appoint persons to vacancies, see §230.06(1)(b), 230.25(2), Stats.

The point of certification marks the extent of the administrator's legal authority in the selection process. The appointing authority is generally responsible for actions in the selection process which occur after the point of certification. Actions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to §230.44(1)(a) or (b) as actions of the administrator. Actions

---

<sup>2</sup> These functions may be delegated to the appointing authorities, see §230.05(2)(a), Stats.

which occur after the point of certification (and which meet the other criteria set forth in §230.44(1)(d) are appealable pursuant to §230.44(1)(d), Stats.

A reinstatement is a form of appointment. §ER-Pers 16.01(1), Wis. Adm. Code. It is a permissive act at the discretion of the appointing authority. §ER-Pers 26.01(2), Wis. Adm. Code. An original appointment also is a discretionary act, as the appointing authority has the discretion to choose from among those certified. See Jacobson v. DILHR, Wis. Pers. Commn. No. 79-28-PC (4/10/81):

In such a post-certification hiring decision, it is a deeply-rooted principle of the Wisconsin Civil Service that the appointing authority does have considerable discretion as to whom to appoint. See, e.g., State ex rel Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911). p. 25.

An appointing authority, in considering whom to appoint to a vacancy, can choose from among those certified following examination, and from among those eligible for reinstatement. While applicants for reinstatement are not themselves certified, their names may be submitted to the appointing authority in conjunction with a certification, See §ER-Pers 12.02(3), Wis. Adm. Code:

The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

From a purely statutory standpoint, it would appear that a decision by the appointing authority on reinstatement is a "personnel action," that it is "related to the hiring process in the classified service," and that it is "after certification" in the sense, discussed above, that certification refers to a point in the staffing process... Finally, the statute does not by its terms require that the appellant be actually certified as a prerequisite for appeal pursuant to §230.44(1)(d), Stats., and the Commission can discern no reason for finding such a requirement by implication.

From a policy standpoint, there is a good deal of similarity between decisions on reinstatements and on original appointments. The major point of similarity is that both decisions are committed to the sound exercise of the appointing authority's discretion. The Commission cannot discern any substantial policy reason why the legislature would not want a decision on reinstatement to be appealable under §230.44(1)(d), Stats.

In conclusion, the Commission lacks the authority to review the respondent's termination of the appellant's employment effective April 18, 1980, and the denials of reinstatement which occurred prior to the failure or refusal to reinstate the appellant in response to her request for reinstatement dated April 14, 1983. Furthermore, it must be concluded that the appellant's eligibility for reappointment without competition was solely that of permissive reinstatement as set forth in §§ER-Pers. 16.01 and ER-Pers 16.035(1), Wis. Adm. Code.

The sole issue for hearing is:

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.

ORDER

The parties' contentions concerning the nature of the issues properly before this Commission on this appeal are disposed of as set forth above. The Commission rejects both parties' statements of issue and orders 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."

So much of this appeal as may not be encompassed within this statement of issue is dismissed for lack of subject matter jurisdiction.

Dated: Sept 28, 1984 STATE PERSONNEL COMMISSION

AJT:jmf  
JPDO6

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

Parties:

Terry Frank  
c/o Steven J. Schooler  
P. O. Box 1767  
Madison, WI 53701-1767

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