STATE OF WISCONSIN PERSONNEL COMMISSION

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*
WILLIAM F. SCHMALTZ, *
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Appellant, *
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v. *
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Secretary, DEPARTMENT OF *
HEALTH AND SOCIAL SERVICES, *
and Secretary, DEPARTMENT *
EMPLOYMENT RELATIONS, *
*
Respondents. *
*
Case No. 85-0067-PC *
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INTERIM
DECISION

At various times, this appeal has been characterized as an appeal of a layoff decision and as an appeal of a decision not to restore fringe benefits.

This matter is now before the Commission on respondent DER's motion to dismiss dated November 18, 1985. The parties have filed written arguments on said motion.

In an interim decision and order dated September 19, 1985, the Commission denied jurisdictional objections raised by the respondents. That decision relied on an interim decision issued one week earlier (September 13, 1985) in the case of Buechner & Koberle v. UW & DER, 85-0089-PC (9/13/85) which involved the identical subject matter as the instant appeal, but which had reached the Commission in a different manner. On November 22, 1985, the Commission granted DER's motion to dismiss Buechner & Koberle, thereby essentially overturning the result of the September 13th interim order. A copy of the November 22nd decision is attached hereto.

The instant case was filed with the Commission as the final step in the non-contractual grievance procedure as provided in §230.45(1)(c), Stats.:

> (1) The Commission shall:
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> * * *
>
> (c) Serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure.

In its September 19th interim decision in this matter, the Commission construed the appeal as an appeal under §230.44(1)(c), Stats., which grants the Commission the authority to hear appeals from layoffs of employes outside of a bargaining unit and found jurisdiction for the same reasons as expressed in the September 13th decision in Buechner & Koberle. The Commission held that if the finding of jurisdiction under §230.44(1)(c), Stats., was incorrect, then jurisdiction would exist under §230.45(1)(c), Stats.

The November 22nd decision in Buechner & Koberle concluded that the subject of that appeal was the failure to restore fringe benefits rather than a layoff decision and, as a consequence, there was no jurisdiction under §230.44(1)(c), Stats. The Commission adopts the same conclusion as to the instant appeal but must now consider whether jurisdiction exists under §230.45(1)(c), Stats.

From February of 1978 until February of 1984, there were no administrative rules "providing the minimum requirements and scope" of the grievance procedure for which the Commission served as the final step arbiter under s. 230.45(1)(c), Stats. During this period, the Commission construed the reference in that provision to "conditions of employment" to mean that matters relating to wages or hours could not be grieved. In DHSS v. Pers. Comm. (Hovel), (Dane County Circuit Court) 79CV630 (1/29/81), the court held that the Commission could not review a grievance because it concerned the grievant's wage or salary:

> [T]he terms "wages," "hours" and "conditions of employment" have come to be considered as distinct "terms of art" in the field of labor-management relations. The instant statute, however, employs only the broad language "conditions of employment," with no clarifying language. The statute itself being unclear on this point, the court will accord great weight to the interpretation placed upon it by the agency charged with its administration. (citations omitted)

In February of 1984, the Secretary of the Department of Employment Relations promulgated the rules that were specifically provided for in s. 230.45(1)(c), Stats. Several provisions within those rules indicate that a broader definition of the term "conditions of employment" has been utilized.

The scope of the grievance procedure is limited by numerous provisions within the rules. Many of those limitations are found within s. ER 46.03, Wis. Adm. Code, which is entitled "Scope" and which provides in part:

> (1) Under this chapter, an employe may grieve issues which affect an individual's ability to perform assigned responsibilities satisfactorily and effectively, including any matter on which the employe alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

None of the exceptions listed in sub. (2) relate to wages or hours except that s. ER 46.03(2)(c), Wis. Adm. Code, provides that a reduction in base pay should be appealed directly to the Commission under s. 230.44(1)(c), Stats. The term "retaliation" is defined in s. ER 46.02(8), Wis. Adm. Code, as:

> any action taken by an appointing authority in order to adversely affect the employe's pay, classification level, or conditions of employment, when such action is taken because of the employe's exercise of rights under this chapter. (emphasis added)

The general and specific language in ss. ER 46.02(8) and .03(1), Wis. Adm. Code indicates that matters affecting an employe's pay are, as a general matter, grievable. This conclusion is supported by other provisions within ch. ER 46, Wis. Adm. Code. For example, additional limitations as to scope

are placed on grievances moving from the third to the fourth step of the grievance procedure. Pursuant to s. ER 46.07(1)(c), Wis. Adm. Code, decisions involving the "evaluation methodology used by an employe (sic) to determine a discretionary pay award or the amount of the award" may not be grieved to the Commission. Although such decisions may not be grieved from the third to the fourth step, they can, by necessary implication, be grieved to the third step. The language of s. 46.11, Wis. Adm. Code also indicates that wage matters may be grieved:

> Except for administrative errors relating to the payment of wages, no employer may grant any relief retroactive to more than 30 calendar days prior to the filing of the grievance at the first step under s. ER 46.06(2)(a).

These provisions establish that the scope of the grievance procedure created by the rules does not exclude wages and hours per se. The language of ch. 46, Wis. Adm. Code, is broader than the interpretation developed by the Commission of the naked statute. The rules interpret the term "conditions of employment" as that phrase is used in the statute. The general statement of scope in s. ER 46.03(1), Wis. Adm. Code, is certainly broad enough to include matters relating to wages and hours, there is nothing within the various exceptions to the general provision that would exclude wages and hours, and there are three separate references that indicate some wage matters are grievable.

Another requirement in ch. 46, Wis. Adm. Code, is found in the definitions in s. ER 46.02, Wis. Adm. Code:

> (3) "employer" means an agency defined under s. 230.03(3), Stats., in which the employe is or has been employed.
> (4) "Grievance" means a written complaint by one or more employes acting as individuals, requesting relief in a matter of concern or dissatisfaction relating to their employment which matter is subject to the control of the employer and within the limitations of this chapter. (Emphasis added).

The definition of "grievance" raises the question as to whether the subject of the instant case is "subject to the control" of appellant's "employer," the Department of Health and Social Services. It is logical that a grievance would not permit an employe to grieve a matter that is, for example, controlled by another agency or other third party.

The benefits at issue in the present case are sick leave, length of service pay and vacation benefits. Various statutory provisions including ss. 230.06(1)(b), .12(2)(a), .35(1) and (2), Stats., as well as s. ER-Pers 18.02 and .03, Wis. Adm. Code, arguably relate to the questions of control over awarding these benefits. However, the parties have not addressed this issue in their briefs and the case file fails to include any documents that reflect whether DHSS or some other agency controlled the fringe benefit decisions.

Therefore, the Commission will contact the parties in order to establish a schedule for submitting arguments on this issue. In the interim, a ruling on respondents' November 19th motion to dismiss is held in abeyance.

Dated: February 6, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

Attachment

LAURIE R. McCALLUM, Commissioner

KMS:jgf
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STATE OF WISCONSIN PERSONNEL COMMISSION

TINA BUECHNER,
CONNIE KOBERLE,

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and President, UNIVERSITY OF WISCONSIN SYSTEM (Madison)

Respondents.

Case No. 85-0089-PC

FINAL DECISION AND ORDER

NATURE OF THE CASE

This matter is before the Commission on respondent DER's motion to dismiss filed November 19, 1985.

OPINION

The Commission previously entered an interim decision and order dated September 13, 1985, over-ruling respondents' objection to subject matter jurisdiction. Respondent DER has again raised issues as to subject matter jurisdiction by its motion to dismiss filed November 19, 1985. It is axiomatic that questions as to subject matter jurisdiction can be raised at any time. Morgan v. Knoll, Wis. Pers. Bd. No. 75-204 (5/25/76); 2 Am Jur 2d Administrative Law, §726, p. 627. Therefore, notwithstanding its prior decision, the Commission must again review the question of whether it has jurisdiction over the subject matter of this proceeding.

At the center of the Commission's September 13 1985, interim decision and order was the conclusion that conceptually this matter could be viewed as an appeal of a layoff which could be heard under §230.44(1)(c),

Stats., "notwithstanding its overt focus on the states failure to restore fringe benefits."

On reconsideration of the jurisdictional issue, the Commission is compelled to conclude that this analysis was incorrect.

For obvious reasons, which are discussed in the interim decision, the appellants never appealed the initial layoff action by the state. After the appellants' fringe benefits (sick leave, vacation, length of service payments) were not reinstated, the appellant filed their appeal. In order to conceptualize this as an appeal of a layoff, it is necessary to equate in some fashion the employer's decision not to credit the employes with the prorated fringe benefits lost during the layoff, with a decision to lay them off.

A layoff is defined in the Wisconsin Administrative Code at §ER-Pers 22.02(1) as follows:

> Layoff means the termination of the services of an employe with permanent status in class, in accordance with the procedure specified in this chapter, from a position in the class, class subtitle or progression series in which a reduction in force is to be accomplished."

The employes' lost fringe benefits are part of their damages resulting from the layoff. The employer's decision not to restore these lost fringe benefits simply does not equate with a decision to lay them off, as that term is defined in §ER-Pers 22.02(1).

In its interim decision and order, the Commission analogized to a hypothetical case where the employer rescinds a suspension and restores the lost salary, but not the lost benefits, subsequent to the suspension but prior to filing the appeal. While it is correct that the employer's action would not, in and of itself, prevent the employe from pursuing an appeal

already properly before the Commission, this does not address the question of whether an appeal of the refusal to restore the lost fringe benefits associated with the suspension could be conceptualized as an appeal of the suspension. For example, if the hypothetical employe had let 30 days elapse from the effective date of the suspension without filing an appeal, and subsequently the employer unilaterally rescinded the suspension but refused to restore all of the lost fringe benefits, it could not then be argued that the failure to have restored the fringe benefits could be appealed pursuant to §230.44(1)(c), Stats., as a suspension from employment.

If this case cannot be considered an appeal of a layoff that would be cognizable under §230.44(1)(c), Stats., there is no other basis upon which the Commission can exercise jurisdiction, as there is no statutory provision for an appeal of the denial of fringe benefits. Therefore, the respondent's motion to dismiss for lack of subject matter jurisdiction must be granted and this appeal dismissed.

ORDER

The respondent's motion to dismiss filed November 19, 1985, is granted, and this appeal is dismissed for lack of subject matter jurisdiction.

Dated: November 22, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

AJT:jmf
ID10/1

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