STATE OF WISCONSIN PERSONNEL COMMISSION

TINA BUECHNER and
CONNIE KOBERLE,

Appellants,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 85-0089-PC

INTERIM DECISION AND ORDER

The letter of appeal in this matter stated in relevant part as follows:

> We are writing in regards to the five layoff days that were mandatory between June 1982 and June 1983 and the WSEU Benefit Restoration Agreement. We were WSEU represented employees at the time of mandatory layoffs but have since changed positions and were non-represented at the time of benefit restoration. Therefore, we were not restored our lost benefits and we feel we should have received these benefits.

At a prehearing conference held on July 9, 1985, the respondent DER raised a jurisdictional objection and argued that the subject matter did not fall within the scope of §§230.44 and .45, Stats. The parties were provided an opportunity to file briefs. Respondent's brief described the underlying facts as follows:

> Appellants apparently were represented employes and lost certain wages and benefits as a result of layoffs occasioned by Chapter 317, Laws of 1981 (five day layoffs). Respondent DER and AFSCME Council 24, Wisconsin State Employes Union, in agreeing to resolve certain grievances filed on the implementation of the layoffs agreed to restore sick leave, length of service pay and vacation benefits to employes who were represented by the WSEU as of November 24, 1984 and who lost these benefits. In November, 1984 the Appellants became non-represented employes due to attaining

> confidential status. Appellants feel that they were discriminated against because while they had to take the layoff days, they had to "eat" the lost benefits, i.e., sick leave, vacation, and the length of service pay were not restored to them.

In further amplification of what occurred here, respondent also submitted a copy of the agreement between DER and AFSCME, Council 24, Wisconsin State Employes Union, which was reached "to resolve grievances filed on the implementation of Chapter 317, Laws of 1981 (five day layoffs)...." A key part of this agreement for the issue before the Commission, is as follows:

> 1. The Department of Employment Relations, representing the Employer, will agree to restore the following benefits to WSEU represented employes who are employes as of November 24, 1984 and who lost benefits due to Chapter 317, Laws of 1981 and whose benefits have not previously been restored...." (emphasis supplied)

It appears that DER has interpreted the underscored language to mean that employes who, like the appellants, were represented by Council 24 at the time of the layoffs, but who were unrepresented as of November 24, 1984, were not included in the negotiated benefits restoration, and, further decided that they would not have their benefits restored unilaterally as unrepresented employes. By this appeal, the appellants seek to contest the denial of restoration of benefits.

Since it does not appear that this matter was pursued as a non-contractual grievance, the Commission will not consider whether it has jurisdiction over this matter as a non-contractual grievance at the fourth step of appeal to the Commission pursuant to §230.45(1)(c), Stats.

The respondent also asserts the Commission lacks jurisdiction over this matter as an appeal under §230.44(1), Stats. The only apparent possible basis for appeal under this subsection would be pursuant to §230.44(1)(c),

Stats., which provides for appeals of demotions, layoffs, suspensions, discharges or reductions in base pay.

When one examines the question of whether there could be any jurisdiction under §230.44(1)(c), Stats., it is readily apparent that circumstances place the appellants in a very awkward posture. At the time of the layoffs, they were represented by Council 24, and their sole means of contesting their layoffs was through a contractual grievance. The union in fact pursued a grievance which resulted, at least in part, in the settlement agreement submitted by respondent with its brief. However, prior to the effective date of the agreement (November 24, 1984), appellants moved to different positions that were unrepresented, and on that ground have been denied the restoration of benefits that was negotiated by DER and the union.

At the time of the layoffs, the appellants could not have appealed those transactions to the Commission because of the effect of §111.93(3), Stats., which in effect provides that contract provisions supersede civil service appeal routes. At the present, an attempt to appeal pursuant to §230.44(1)(c), Stats. could possibly be precluded by several jurisdictional questions based on the peculiar circumstances just discussed:

(1) Their appeal may be untimely under §230.44(3), Stats.,[1] because it was not filed within 30 days of the layoffs, which occurred not later than June 1983, according to the appeal letters.

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[1] "Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later...."

(2) Since their appeal focuses on the refusal to restore fringe benefits, it may not be considered an appeal of a layoff.

(3) Even though they are currently unrepresented, their appeal may still be barred by the operation of §111.93(3), Stats., because the contract that was in place at the time of the layoffs arguably controls.

With respect to the question of the timeliness of the appeal, it must be noted that the 30 days time limit does not start to run until the effective date of the transaction or the appellant is notified of the action, whichever is later. Now, the appellants clearly knew of the layoffs no later than 1983 since presumably they would not have been working while in layoff status. The question remains whether, under the circumstances of the case, this was effective notice under §230.44(3), Stats.

At the time of the layoffs, the appellants could not possibly have had appeal rights under §230.44(1)(c), Stats., due to their represented status and the effect of §111.93(3), Stats. At this point, notice of the layoffs was completely meaningless in the context of §§230.44(1)(c) and 230.44(3), Stats. Even if appellants had been prescient enough to have foreseen their subsequent movement to unrepresented positions, and further to have foreseen that this changed circumstance would ultimately be determined to have an effect on their ability to be made whole after the layoffs were rescinded, any attempt to appeal under §230.44(1)(c) would have been barred by the operation of §111.93(3).

This is not a case where the appellants had actual notice of a transaction and only later learned of facts that lead them to believe the transaction was improper and should be challenged. C.f., Bong & Seeman v. DILHR,

Wis. Pers. Commn. No. 79-167-PC (11/8/79). At the time of these layoffs, the appellants simply had no conceivable cognizable right to appeal under §230.44(1)(c), Stats. Thus it cannot be said they had effective notice of their layoffs in the context of §230.44(3), until they learned that despite their represented status at the time of the layoffs, they were not going to have their benefits restored because of a status (that of non-represented employes) that they acquired after they had been subjected to the layoffs.[2]

Once the appeal is put in this context, it also is easier to conceptualize it as an appeal of a layoff, notwithstanding its overt focus on the state's failure to restore fringe benefits. An analogy may be drawn to a hypothetical case involving a suspension where prior to the filing of the appeal, the employer restores the employe's salary but refuses to restore the employe's fringe benefits. In such a case, it would seem the employe ought to be able to proceed with an appeal to contest so much of the effect of the suspension that remains, albeit the employer's salary restoration action could raise a number of collateral issues.

As for the possible effect of §111.93(3), Stats., the Commission cannot ignore the position taken by the respondent DER in connection with their agreement with the union with respect to the subject matter of this appeal. DER's position has been that because the appellants left the represented ranks they are not subject to the agreement for benefits restoration that was worked out by that agency and the union to resolve the contractual grievances

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[2] It is not apparent from the file when this type of notice occurred. The Commission by this decision does not address the question of whether the appeals were timely filed after the appellants had this kind of notice, presumably when they were notifed their benefits would not be restored.

that had been filed by the union. Therefore, it would seem unlikely that the subject matter of this appeal would be affected by the operation of §111.93(3), Stats.

ORDER

The respondents' objection to subject matter jurisdiction is overruled.

Dated: September 13, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf
JGF002/2

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