STATE OF WISCONSIN PERSONNEL COMMISSION

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*
ROBERT PHELPS, *
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Appellant, *
*
v. *
*
Secretary, DEPARTMENT OF *
HEALTH AND SOCIAL SERVICES, *
*
Respondent. *
*
Case No. 85-0193-PC *
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* * * * * * * * * * * * * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal of a probationary termination. By letter of November 11, 1985, the Commission advised Mr. Phelps that there appeared to be no jurisdictional basis for his appeal, but afforded him the opportunity to submit arguments with respect to jurisdiction. The appellant submitted his arguments with respect to jurisdiction in a letter filed December 3, 1985.

DISCUSSION

It appears to be undisputed, based on the appellant's appeal letter and attached documents, that while he was holding an Officer 2 position at Dodge Correctional Institution (DCI), he accepted a promotion to an Officer 3 position at the Wisconsin Correctional Center System (WCCS). Before the completion of his probationary period in the latter position, his employment at WCCS was terminated and he was restored as an Officer 2 at DCI.

The appellant attempts to distinguish Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981), wherein the Court of Appeals held that this Commission lacks the authority to review terminations of probationary employment. He points out that the employes in that case were in either trainee or original probation status, whereas he had

attained permanent status in class as an Officer 2 before his promotion. He also argues that, because of that status:

> "... I would not fall under the provisions of 230.28(5).
>
> 2. As a permanently classed employe, I still maintain my rights under that class, as specified under section 230.28(1)(d), including the right to appeal."

However, the Supreme Court rejected similar contentions in DHSS v. State Personnel Board, 84 Wis. 2d 675, 267 N.W. 2d 644 (1978). The Court pointed out that in order to have "permanent status in class" for an appeal of a discharge under §16.05(1)(e), Stats., (1975) (this was the predecessor to §230.44(1)(c)), the employe must have permanent status in the class in which the employe is then serving, not one in which the employe served in the past.

Section 230.28(1)(d) (then §16.22(1)(d)), Stats., provides that:

> "A promotion or other change in job status within an agency shall not affect the permanent status in class and rights, previously acquired ... (emphasis supplied).

The reference to permanent status in class "previously acquired" clearly means that the appellant retained his permanent status in the Officer 2 classification and is not required to serve an additional probationary period on restoration to that level, not that he had permanent status in the Officer 3 classification.

Regardless of whether an employe is in trainee status, on original probation, or on promotional probation, he or she doe not have permanent status in class in the classification from which he or she is terminated, and therefore, there can be no jurisdiction for an appeal pursuant to §230.44(1)(c), Stats.

Finally, §ER Pers. 14.03(1), Wis. Adm. Code, specifically provides that upon promotion within the same agency, as here, the promoted employe may be removed from the position to which he or she was promoted "without the right

of appeal ..." The Supreme Court specifically upheld the validity of this rule in DHSS v. State Personnel Board, 84 Wis. 2d at 683.

The appellant also argues that since the Board of Regents v. Wisconsin Personnel Commission decision, the language in the contract permitting the appeal of probationary terminations has remained in two successive contracts, both of which have been approved by the legislature. However, the Court specifically held that ratification of the contract without express modification of the civil service statutes deemed in conflict with the notion of probationary termination appeal rights was ineffective to confer such appeal rights:

> "... if the legislature has failed to comply with its express approval procedure, one must conclude that the legislature did not intend a change for which it did not expressly provide.
>
> * * *
>
> Neither the 1977-79 agreement applicable to Dropik and Miller, nor the 1975-77 agreement also applicable to Miller was accompanied by subsequently adopted companion bills that in any respect modified the conflicting provisions of ch. 230. Stats., to which we have referred. Although Dropik and Miller contend that the legislature enactments which approved the labor agreement fulfill compliance with sec. 111.92(1), we conclude that the absence of specific companion legislation modifying the conflicting provisions of ch. 230 compels a contrary determination." 103 Wis. 2d at 556-557.

Inasmuch as the legislature still has not enacted the specific legislation which the Court held was required, the subsequent legislative ratification of the contract is of little or no significance in the context of the issues in this case.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: December 19, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jgf
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