STATE OF WISCONSIN PERSONNEL COMMISSION

JONATHAN KEUL,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0052-PC-ER

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This matter was initiated on May 13, 1987, when complainant filed a charge of discrimination under the Wisconsin FEA (Fair Employment Act, Subchapter II, Chapter 111, stats.), alleging that he had been discriminated against based on handicap in connection with his discharge from his Correctional Officer 3 (CO3) position at Oakhill Correctional Institution, and also alleging a violation of §230.37(2) stats. On February 24, 1988, the Commission entered an initial determination finding no probable cause to believe complainant had been discriminated against on the basis of handicap. It was noted that complainant also contended respondent had failed to comply with §230.37(2), stats., which requires the state to take certain action when an employe becomes unfit for duty. The initial determination concluded that because this provision was outside the FEA and there was no cross-reference in either enactment to the other, the requirements of §230.37(2) were outside the scope of an FEA complaint and could not be considered.

Subsequently, by letter dated March 1, 1988, and filed March 2, 1988, and entitled "Appeal of Termination of Employment," complainant's attorney stated:

> Hearing Examiner Kurt Stege has investigated the Chapter 111 charge and made an initial determination of no probable cause. Mr. Stege did not issue any opinion regarding the Chapter 230 charge except to state that this provision cannot be enforced under the Fair Employment Act.
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> Mr. Keul has no argument with the latter conclusion. However, he did file a timely written appeal of his employer's inaction, which can

> be said to have continued until Mr. Keul's discharge on May 4, 1987. He therefore requests that the Commission process his complaint of violation of sec. 230.37(2) and set up the pre-hearing conference that is the usual first step in an appeal of administrative action.

Thereafter, the parties were involved in attempts to resolve this matter through negotiation, which proved to be unsuccessful.

This matter is now before the Commission on respondent's motion to dismiss and complainant's motion to amend the March 1, 1988, letter cited above, and for reconsideration of the initial determination. Both parties have filed briefs. The underlying facts necessary to a determination of these motions do not appear to be in dispute and are set forth below. These findings are taken largely from respondent's brief. They are made solely for the purpose of resolving these motions.

FINDINGS OF FACT

1. In April, 1984, Complainant was working as a Correctional Officer 3 (CO3) at Oakhill Correctional Institution (OCI).

2. The CO3 classification is included within a collective bargaining unit and at all relevant times a collective bargaining agreement was in effect for that unit.

3. Complainant was placed on a medical leave of absence from employment on May 4, 1984, due to injuries he sustained in a non-work related auto accident.

4. Complainant's medical leave was extended by respondent six times.

5. Complainant was on medical leave continuously from May 4, 1984 until May 4, 1987.

6. Respondent refused complainant's request to extend his medical leave beyond a 3 year period.

7. Complainant's employment was terminated for medical reasons on May 4, 1987.

8. At the time of his discharge complainant was unable to perform the duties required of a CO3.

9. On May 13, 1987, complainant filed this complaint with the Personnel Commission alleging handicap discrimination with regard to his discharge. His complaint alleged violations of "both secs. 111.34(b) and 230.37(2)," Stats.

10. The Initial Determination, issued on February 24, 1988, found no probable cause to believe that handicap discrimination occurred with regard to complainant's discharge, and that complainant's allegation of a violation of §230.37(2), stats., was outside the scope of the FEA complaint.

11. By letter to the Commission dated March 1, 1988 (quoted above), counsel for complainant did not request a hearing on the issue of no probable cause. Instead, complainant alleged that "he did file a timely written appeal of his employer's inaction" and requested that the Commission "process his complaint of violation of sec. 230.37(2) and set up a prehearing conference that is the usual first step in an appeal of administrative action."

DISCUSSION

MOTION TO DISMISS

The letter of March 1, 1988, from complainant's attorney states, in part:

> [H]e [complainant] did file a timely written appeal of his employer's motion, which can be said to have continued until Mr. Keul's discharge on May 4, 1987. He therefore requests that the Commission process his complaint of violation of sec. 230.37(2) and set up the prehearing conference that is the usual first step in an appeal of administrative action. (emphasis added)

In order for the Commission to have jurisdiction over this matter as an appeal, there must be some provision in §§230.44 or 230.45, stats., which gives the Commission the authority to hear such an appeal. There is no provision in these sections giving the Commission the authority to hear a failure to make an "accommodation" as required by §230.37(2), stats. The only conceivable jurisdictional basis for an appeal of the subject matter raised by complainant's charge of discrimination would be as an appeal of a discharge pursuant to §230.44(1)(c), stats.,[1] which is basically how complainant's attorney denominated the March 1, 1988, letter ("appeal of termination of employment"). However, as respondent contends, since appellant was in a classification within a collective bargaining unit, with respect to which a collective bargaining agreement was in effect, the Commission's jurisdiction over an appeal of a

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[1] In such an appeal, §230.37(2) would be a basis for arguing there was no just cause for the discharge, see Smith v. DHSS, No. 88-0063-PC 92/9/89) (appeal of discharge by unrepresented employe).

discharge is superseded by the operation of §111.93(3), stats.[2] Inasmuch as there is no provision for an appeal of a failure of compliance of §230.37(2) per se, and jurisdiction over an appeal of a discharge is supplanted by operation of §111.93(3), the Commission has no occasion to address the dispute between the parties over whether the provisions of §230.37(2) are bargainable and subject to the superseding effect of §111.93(3).

MOTION TO AMEND

By motion filed March 12, 1990, complainant seeks leave to amend his March 1, 1988, letter quoted above, as follows:

> [T]hat he be allowed to amend his attorney's letter to the Commission dated March 1, 1988 to ask [sic] include a request for reconsideration and specifically, for consideration of complainant's §230.37(2) — based claim for accommodation. Such consideration would involve further investigation since Mr. Stege did not address the facts of this case in light of the §230.37(2) accommodations set forth in McMullen.

The Commission's rules do not address the amendment of pleadings other than original complaints and appeals, but the Commission has implied power to permit the amendment of other pleadings, see 2 Am Jur 2d Administrative Law §374. Also, "it is recognized that pleadings are to be treated as flexible, and that they are to be liberally construed in administrative proceedings. . . ." General Electric Co. v. Wisconsin E.R. Board, 3 Wis. 2d 227, 245, 88 N.W. 2d 591 (1958).

Complainant contends essentially that at the time the initial determination was issued on February 24, 1988, there was no basis to question its conclusion that the requirements of §230.37(2) were outside the scope of the accommodation requirements of the FEA. He points out that on December 20, 1988, the Court of Appeals issued a decision, McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W. 2d 830, which held that the FEA duty of accommodation can include a transfer of the handicapped employe to a different position with the employer and in an initial determination in Shevlin v. Public Defender, Wis. Pers.

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[2] (3) Except as provided in ss. 40.05, 40.80(3) and 230.88(2)(b), if a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes, as well as rules and policies of the board of regents of the University of Wisconsin system, related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statues, rules and policies are set forth in the collective bargaining agreement. (emphasis added)

Commn. No. 87-0101-PC-ER (2/24/89) it was concluded, in light of McMullen, that the FEA's duty of accommodation is coextensive at least with the requirement of §230.37(2) that an unfit employe be transferred if possible rather than dismissed.

Respondent argues that McMullen and the Shevlin initial determination are not dispositive on the question of whether the FEA duty of handicap accommodation and the employer's obligations under §230.37(2) are coextensive, and that there is no reason why complainant could not have made this argument in connection with an appeal of the adverse part of the initial determination after it was issued on February 24, 1988. While this contention has some force, it is not materially dispositive. Leave to amend does not require a showing akin to "good cause." See Oakley v. Bartell, Wis Pers. Commn. 78-66-PC (10/10/78); Huesman v. St. Hist. Society, Wis. Pers. Commn. 82-67-PC (8/5/82).

Complainant's motion to amend must be viewed in the context of how the issue he seeks to keep alive was raised and what happened to it subsequently. After complainant was discharged he filed a complaint of handicap discrimination which alleged as follows:

> My employer knew I wanted to return [from medical leave] but did not inform me of vacant positions that I could take. My employer has never offered any accommodation so that I could resume my old positions, although accommodations have been made for others. Neither the Oakhill personnel manager nor the DHSS Division of Management has made any attempt to find me a position, besides sending me routine job announcements, in violation of both secs. 111.34(b) and 230.37(2).

While complainant in his complaint alleged violations of both the FEA and §230.37(2), when the initial determination concluded that there had been no failure of accommodation under the FEA and that the alleged violations of §230.37(2) were outside the scope of a proceeding under FEA, complainant in his letter of March 1, 1988, declined to appeal the initial determination but in effect requested that the allegation of the §230.37(2) violation be processed as an appeal.

Following the filing of the aforesaid letter of March 1, 1988, a prehearing conference was held on March 28, 1988, at which time settlement was discussed and it was agreed that the parties would continue settlement discussion and "assess the possible affects of complainant's impending operation and possible job offer." No action was taken then, or has been since, with regard to complainant's March 1, 1988, letter. Under these circumstances, the Commission can perceive of no reason why complainant should not be allowed

either to amend the March 1, 1988, letter to constitute an appeal of so much of the initial determination of no probable cause as concluded the allegations of violation of §230.37(2) were outside the scope of this proceeding, or to construe that letter in this fashion. To deny complainant the opportunity to do this would be to elevate form over substance. By his March 1, 1988, letter, complainant advised that the only part of this matter he wanted to continue to pursue was the allegation that respondent had violated the requirements of §230.37(2). This is what complainant continues to attempt to pursue. The only difference between the situation now and then is that at that time he denominated his attempt to prosecute those allegations as a civil service appeal, and he now seeks to demoninate this subject matter as part of his FEA complaint. Respondent has not alleged that any prejudice would result from allowing complainant to proceed in this fashion, and it is difficult to see how any prejudice would be possible since respondent has always known complainant has been alleging a violation of §230.37(2), and due to the parties' attempts to settle this case there has never been any action taken either to grant or deny complainant's original request in his March 1, 1988, letter to proceed with this aspect of the case as an appeal.

MOTION FOR RECONSIDERATION

Complainant also asks that the initial determination be reconsidered and the case remanded to the investigator to investigate the question of whether respondent complied with the accommodation requirements set forth in §230.37(2), and arguably also required by the FEA. This request is premature inasmuch as the Commission has yet to issue a definitive ruling on the interrelationship of the FEA duty of handicap accommodation and the requirements of §230.37(2) in light of McMullen. The initial determination apparently ruled out the possibility of transfer as an option prior to discharge. In light of the amount of time this case has been pending, the parties are urged to discuss the possibility of reaching agreement concerning the facts relating to complainant's allegations of failure of accommodation so the matter could be submitted on briefs rather than to require a remand for investigation or other proceedings.

ORDER

Respondent's motion to dismiss filed on March 12, 1990, is granted in part and denied in part, and so much of this matter as has been denominated a civil service appeal of respondent's failure to have complied with §230.37(2), stats., and/or of the termination of employment or discharge of complainant is dismissed for lack of subject matter jurisdiction. Complainant's motion to amend response to initial determination, filed March 12, 1990, is granted, and said response, filed March 2, 1988, is deemed amended to appeal the conclusion set forth in the initial determination that complainant's contention that respondent failed to comply with the accommodation requirements set forth in §230.37(2), stats., was outside the scope of this proceeding. Complainant's motion for reconsideration filed March 12, 1990, is denied. This matter is to be scheduled for a prehearing conference.

Dated: June 1, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:gdt/2

GERALD F. HODDINOTT, Commissioner