



these run to the characterization of appellant's work performance, these disputes are not material to the issue of subject matter jurisdiction.

Appellant also states:

"... Respondent asserts with some finality that Appellant was, necessarily, on probation during the time of his constructive discharge. Appellant, of course, has contested the validity of the University's assignment to him of an additional probationary period through his appeal to the Personnel Commission. (emphasis added)

There is no question but that respondent in fact established a 12 month probationary period for appellant. Appellant's contesting of the "validity" of this action is a dispute of law, not fact.

It has been established that this Commission has no subject matter jurisdiction over an appeal of a probationary termination. Board of Regents v. Wis. Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. App. 1981). The only possible way the Commission could assert jurisdiction over this appeal would be pursuant to appellant's theory that the 12 month probation (versus a 6 month probation) imposed by respondent was illegal and void, and hence his status at the time of the termination of his employment was legally that of a permanent employe. This raises the question of whether the Commission has the authority on an appeal of this nature to rule on the validity of respondent's assignment of a 12 month, rather than a 6 month, probationary period to appellant.

Respondent argues that because appellant did not appeal the determination to require a 12 month probationary period when it was made and communicated to him in November, 1987, he can not question this transaction now as an adjunct to his attempt to appeal what is at least a de facto probationary termination. While appellant disagrees with this contention, it is unnecessary to address this issue because the appellant cannot prevail in any event.

In addition to arguing that appellant could not contest respondent's assertion he lacked permanent status in class because he had not earlier tried to challenge respondent's decision to make his probationary period 12 months instead of 6 months, respondent also argued that the 12 month probationary period was required as a matter of law. Appellant addressed this point in his brief, contending the 12 month probation was improper as a matter of law. In light of this, because there do not appear to be any material facts in dispute, and because it is dispositive as to subject matter jurisdiction, the Commission will address this issue.

Section 230.28(1)(am), Stats., provides, inter alia:

"All probationary periods for employes in supervisory or management positions are for one year unless waived after 6 months ... However, persons who ... are reinstated to supervisory or management positions consistent with conditions under sub. (4) and who had previously obtained permanent status in class in a supervisory ... position prior to the ... reinstatement shall serve a probationary period in accordance with sub. (4)."

Section 230.28(4), Stats., provides, inter alia:

"A person reinstated in an employing unit other than one in which the person previously served in permanent status in the class in which the person is being reinstated ... may be required by the appointing authority to serve a probationary period. Provisions for the duration of such probationary period shall be provided by rules of the administrator.

Since appellant was in a supervisory position, §230.28(1)(am), Stats., required that he serve a one year probationary period unless either that period was waived after 6 months, or unless he had been reinstated after having "previously obtained permanent status in class in a supervisory ... position prior to the ... reinstatement...." It is undisputed that respondent did not waive the remainder of the probationary period after 6 months. As to the second exception, appellant stated in his appeal that he was laid off from a Research Analyst 3 position at DILHR, and he has not asserted that he ever had permanent status in class in a supervisory

position prior to his reinstatement. Therefore, it appears that a 12 month probationary period was required, and, therefore, appellant did not have permanent status in class at the time of this termination.

Appellant argues as follows:

Respondent cites sec. 230.28(1)(a), Wis. Stats., for the proposition that Appellant was required to undergo a one-year probationary period. Respondent's reliance upon sec. 230.28(1)(a) is misplaced. In order to understand sec. 230.28(1)(am), it is necessary to examine sec. 230.28(1)(a), which provides, in relevant part, "all original and all promotional appointments to permanent, sessional and seasonal positions, with the exception of those positions designated as supervisor or management under s. 111.81, in the classified service shall be for a probationary period of 6 months,...." Thus, prior to becoming subject to section (am), an employee must fall under the provisions of section (a) as a member of "all original and all promotional appointments." Appellant does not fall into the category either of an original or a promotional appointment. Rather, as his letter of appointment sets forth, Appellant was reinstated. As a reinstated employee, Appellant fell under the provisions of sec. 230.28(4), Wis. Stats.,....

There is nothing in §230.28(1)(a), which would limit §230.28(1)(am) in the manner appellant asserts. Section 230.28(1)(am) simply provides, inter alia: "All probationary periods for employes in supervisory ... positions are for one year...." (emphasis added). Thus the subsection starts out by encompassing all probationary employes in supervisory positions, regardless of whether their appointments came as the result of promotion, original appointment from outside state service, reinstatement, etc. The only exceptions to this requirement are in case of waiver, which is inapplicable here, and in the case of employes who attained permanent status in class in a supervisory position prior to reinstatement. It is only as to the latter that §230.28(1)(am) provides that §230.28(4), which adverts to the personnel rules to determine length of probation, comes into play. That is, §238.28(1)(am), Stats., provides, inter alia:

... However, persons who ... are reinstated to supervisory or management positions with conditions under sub. (4) and who had previously obtained permanent status in class in a supervisory or

management position prior to the ... reinstatement shall serve a probationary period in accordance with sub. (4).

Therefore, the statutes themselves provide for a 12 month probationary period for an employe in appellant's situation, and there is no need to attempt to interpret the rules, which by explicit statutory command are only to provide guidance as to employes who, unlike appellant, attained permanent status in class in a supervisory position prior to reinstatement.

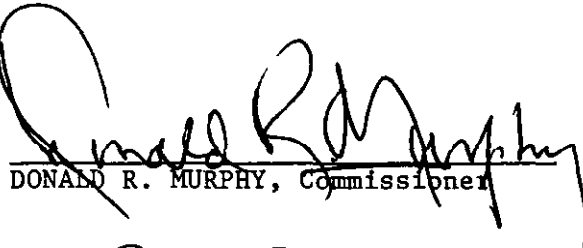
In conclusion, since on the basis of the undisputed material facts the appellant as a matter of law was required to have served a 12 month probationary period, and therefore he did not have permanent status in class at the time of his termination effective February 12, 1988, the Commission lacks subject matter jurisdiction over this appeal and it must be dismissed.

ORDER

Respondent's objection to subject matter jurisdiction is sustained and this appeal is dismissed.

Dated: August 2, 1988 STATE PERSONNEL COMMISSION

AJT:rcr  
DPM/3

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

Parties:

Robert Janeck  
4815 Comanche Way  
Madison, WI 53704

Kenneth Shaw  
President, UW  
1700 Van Hise Hall  
1220 Linden Drive  
Madison, WI 53706