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ALDEN W. BAHR,

Appellant,

v.

Executive Director,
INVESTMENT BOARD

Respondent,

Case No. 89-0009-PC

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DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of jurisdiction. The parties have filed briefs in support of their positions. The following facts appear to be undisputed.

FINDINGS OF FACT

1. On February 8, 1982, the appellant was hired by the respondent as an Investment Analyst, in a position in the classified state service.
2. On August 7, 1982, the appellant completed his six-month probationary period and attained permanent status in the Investment Analyst classification.
3. Pursuant to 1987 Wisconsin Act 399, effective May 17, 1988, the position of Investment Analyst filled by the appellant was moved from the classified service to the unclassified service. Appellant continued in that position.
4. By letter dated October 10, 1988, respondent informed the appellant as follows:

During the past several months, you have had discussions with your supervisor regarding your work performance. You have also discussed the situation with our Personnel Director. Agreement was mutual, I understand, that your talents would be better utilized in different activities and in a different setting. Since July 1988, I believe, you have been seeking those opportunities, in and out of state service, which have come to your attention. As of the present, you have apparently not found the position you are seeking. It is important for the Investment Board and you

that some definite plans be made and that we reach an early conclusion to this situation.

Therefore, this letter constitutes a 30 day notice of ending employment with the Investment Board. Your last day will be November 11, 1988.

5. Appellant's last day of work as a "permanent employe" was December 30, 1988. However, the appellant continued working for the respondent as a limited term employe for several weeks thereafter.

6. On January 25, 1989, the appellant filed a letter of appeal with the Commission, which read:

Pursuant to Wis. Stats. §230.44(1)(c), I am hereby appealing my discharge from the Investment Board as the decision was not based on just cause. My last day as a permanent employe was December 30, 1988.

DISCUSSION

This case raises the issue of whether the Commission has the authority to hear an appeal from the decision to fire an employe from an unclassified position where the employe had attained permanent status in class in the same position, prior to its movement from the classified to the unclassified service.

The Commission's sole authority to hear an appeal from a discharge decision is found in §230.44(1)(c), Stats.:

If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

The term "permanent status in class" is defined in §ER 1.02(29), Wis. Adm. Code as follows:

"Permanent status in class" means the rights and privileges attained upon successful completion of a probationary period required upon an appointment to a permanent, seasonal or seasonal position.

In DHSS v. State Personnel Board (Ferguson), 84 Wis. 2d 675, 267 N.W.2d 644 (1978), the Wisconsin Supreme Court considered whether under the precedes-

sor statute to §230.44(1)(c), Stats., the Commission's predecessor, the Personnel Board, could review a decision to terminate Mr. Ferguson's employment while he was serving a promotional probationary period:

The facts of this case as set forth in the trial court's decision are undisputed:

"On August 14, 1970, the Appellant, Donald R. Ferguson, commenced his employment with the State of Wisconsin as a Management Information Specialist 2 with the University of Wisconsin. He satisfactorily completed an original probationary period, and, thereby, acquired permanent status in class in the classified service of the State. On April 23, 1973, Appellant received a promotional appointment to Information Specialist 3 position with the Department of Health and Social Services.

"On October 8, 1973, approximately five and one-half months later, the appellant was advised that his employment with the Department was terminated, as of October 19, 1973, a few days before the end of his probationary period of six months.

* * *

The major issue in this case is whether the board had jurisdiction to hear Mr. Ferguson's appeal. The board has authority to,

"Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to . . . discharges, . . . but only when it is alleged that such decision was not based on just cause. . . ." Sec.16.05(1)(e), Stats. 1975.

Sec. 16.28(1)(a), Stats. 1975 provides that,

"An employee with permanent status in class may be . . . discharged . . . only for just cause. This paragraph shall apply to all employes with permanent status in class in the classified service. . . ."

Based on the above two statutes, the board could only hear Mr. Ferguson's appeal if he had "permanent status in class" and if it was alleged that his discharge was not for "just cause." In this case the problem phrase is "permanent status in class."

* * *

The board admits that Mr. Ferguson did not have permanent status in class in his promotional position, but it claims that he did have tenure rights based on his old position. From this fact, the board argues that Mr. Ferguson could only be discharged without cause from his new position with D.H.S.S. and must be

reinstated to a job in his former classification. This argument ignores the requirement of sec. 16.05(1)(e), Stats., that the board can only hear appeals of employes with permanent status in class. Pers. 13.11, Wis. Adm. Code defines permanent status in class as,

" . . . the status of an employe in a position who has served a qualifying period to attain a permanent position for that class."

This definition requires that status in class relate to a class in which the employe is then serving, not a position in which he has served in the past.

Mr. Ferguson did not have permanent status in class as an Information Specialist 3 at the time of his discharge and the board did not have jurisdiction to hear his appeal.

Mr. Ferguson's argument that he still retains permanent status in class in his old position of Information Specialist 2 is also undercut by sec. 16.22(4), Stats. 1975. That section provides in pertinent part that, ". . . an employee who transfers from one employing unit to another. . . may be required by the appointing authority to serve a probationary period. . . ." This subsection further demonstrates that a state employe does not, in all circumstances, retain job security following the six month probationary period. This is especially true where the employe has transferred from one department to another.

More recently, in Phelps v. DHSS, 85-0193-PC, 12/19/85, the Commission reaffirmed the applicability of the Ferguson decision to the current language of ch. 230, Stats.:

Regardless of whether an employe is in trainee status, on original probation, or on promotional probation, he or she doe[s] 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.

In the present case, the facts indicate that the appellant did attain "permanent status in class" in the classification of Investment Analyst before the position filled by the appellant was moved from the classified service to the unclassified service. However, once the position held by the appellant moved into the unclassified service, the appellant no longer had "permanent status in class" with respect to the position in which he was serving. When he was fired from his unclassified position, the appellant was ineligible to obtain review of the action under §230.44(1)(c), Stats.

The movement of the position filled by the appellant from the classified service to the unclassified service occurred as a result of sections 97 and 406, 1987 Wisconsin Act 399. As a result of that act, §230.08, Stats., now reads:

(1) CLASSES. The civil service is divided into the unclassified service and the classified service.

(2) UNCLASSIFIED SERVICE. The unclassified service comprises positions held by:

* * *

(p) All employes of the investment board, except blue collar and clerical employes.

* * *

(3) CLASSIFIED SERVICE. (a) The classified service comprises all positions not included in the unclassified service.

Upon the May 17, 1988 effective date of the relevant provisions of 1987 Wisconsin Act 399, the appellant was appointed to an unclassified position¹ with the respondent agency. Pursuant to §230.33, Stats.:

Employes who have completed an original appointment probationary period in the classified service and are appointed to a position in the unclassified service shall be subject to the following provisions relative to leave of absence, restoration rights, reinstatement privileges and pay:

(1) A person appointed by the governor, elected officer, judicial body or by a legislative body or committee, or by any other appointing authority when both the classified and unclassified positions are within his or her department, shall be granted a leave of absence without pay for the duration of the appointment and for 3 months thereafter, during which time the person has restoration rights to the former position or equivalent position in the department in which last employed without loss of seniority. The person shall also have reinstatement privileges for 3 years following appointment to the unclassified service or for one year after termination of the unclassified appointment whichever is longer. Restoration rights and rein-

¹Finding of fact 5 refers to December 30, 1988 as the appellant's last day of work as a "permanent employe" which reflects the statement made by the appellant in his brief. The respondent accepted this statement of fact. (Letter, dated April 6, 1989) However, the Commission does not interpret this language to mean that the appellant had permanent status in class in the unclassified position from which he was fired.

statement privileges shall be forfeited if the reason for termination of the unclassified appointment would also be reason for discharge from the former position in the classified service.

* * *

(4) This section shall supersede any provision of law in conflict therewith but shall not diminish the rights and privileges of employees appointed to the unclassified service from the classified service prior to April 30, 1972.

This provision makes a distinction between the "termination"² of an unclassified appointment and a "discharge" from a position in the classified service. This distinction is clarified in §230.34(1), Stats., which provides, in part:

(a) An employee with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

* * *

(ar) Paragraphs (a) and (am) apply to all employees with permanent status in class in the classified service, except that for employees in a certified bargaining unit covered by a collective bargaining agreement, the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.

Only civil service employees in the classified service are entitled to the just cause protection provided by §230.34(1)(a), Stats. Subject to the limitations of §230.34(1)(ar), Stats., employees in the classified service may appeal their discharge to the Commission under §230.44(1)(c), Stats. While employees in the unclassified service may be provided with other means for obtaining review of a disciplinary action, they do not have access to Commission review under §230.44(1)(c), Stats.

The Commission recognizes that the current definition of "permanent status in class" is different from the definition which served as a basis for the Court's decision in Ferguson. However, the difference in language does not alter the Court's conclusion:

²Elsewhere in the civil service code, reference is made to the "termination" (rather than "discharge") of civil service employees who have not attained permanent status in class in the classified service. See §230.26(5) and 230.28(2) and (6), Stats.

This definition requires that status in class relate to a class in which the employe is then serving, not a position in which he has served in the past. (Emphasis added)

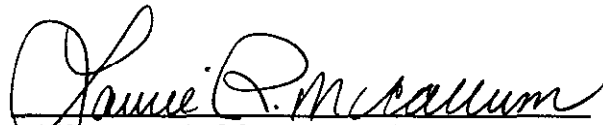
In the instant appeal, the appellant was not serving in a class at the time of his termination. His position was in the unclassified service. His rights upon the termination of his employment in his unclassified position arose from that position, not from his employment in the classified service.³ This conclusion is consistent with the Ferguson decision. In both cases, the appellant had acquired permanent status in class in a position other than the one from which he was terminated. Both appellants argued that they were entitled to Commission review of the termination decision and the application of a just cause standard because they had acquired permanent status in class in a previous position. In Ferguson, the Court held that because the appellant lacked permanent status in class in the Information Specialist 3 position he was filling at the time of his termination, the Commission lacked jurisdiction under §230.44(1)(c), Stats., to review that termination. In this case, the appellant also lacked permanent status in class in the unclassified position he was filling at the time of his termination. Because he lacked permanent status in class in that position, the Commission lacks jurisdiction under §230.44(1)(c), Stats., to review the termination.

³When 1977 Wisconsin Act 196 moved division administrator positions from the classified service to the unclassified service, the incumbents were provided certain additional rights as specified in §230.335, Stats., in the event of a subsequent termination for reasons other than just cause. No comparable rights or citation to a just cause standard were referenced by statute when the Investment Board positions were moved into the unclassified service.

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: April 28, 1989 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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