STATE OF WISCONSIN PERSONNEL COMMISSION

TERESSA LAWLESS,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON

Respondent.

Case No. 90-0023-PC-ER

RULING ON PETITION FOR REHEARING

This matter is before the Commission on a petition for rehearing filed on May 2, 1990, by the Secretary of the Department of Employment Relations. On April 12, 1990, the Commission issued a decision and order affirming the decision of the University of Wisconsin - Madison regarding the complainant's request for leave upon the birth of her child and dismissing the complaint which had been filed under the family leave and medical leave act, §103.10, Stats. Complainant had alleged the respondent had denied her leave to which she was entitled under the law by denying her request to substitute accrued paid leave for family leave and medical leave in a particular sequence. More specifically, the complainant sought to use accrued sick leave commencing with the 14th week of her leave. The respondent refused to grant sick leave unless the complainant was actually ill at that time.

Both the complainant and the respondent University of Wisconsin - Madison oppose DER's petition and contend that DER lacks standing because it is not an aggrieved party as required by §227.49, Stats. The test for standing is set forth in Wisconsin's Environmental Decade, Inc. v. Public Service Comm., 69 Wis. 2d 1, 10, 230 N.W. 2d 243 (1975):

> The Wisconsin rule of standing envisions a two-step analysis conceptually similar to the analysis required by the federal rule. The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law. This approach is similar to the two-pronged standing analysis outlined by the United States Supreme Court ... as follows: (1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of

> interests to be protected or regulated by the statute or constitutional guarantee in question?

DER's petition includes the following language in support of its contention that it was aggrieved by the Commission's April 12th decision:

> 2. DER is an employer within the meaning of s. 103.10(1)(c), Stats. and as the state agency responsible for administering ch. 230, Stats., has an interest in trying to ensure uniform interpretation and application of the family/medical leave law, s. 103.10, Stats., by the various state agencies and departments.
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> 3. On March 1, 1990, DER published ch. 724 of the Wisconsin Personnel Manual to advise state agencies on how to implement the new law for state employees.

DER's role under the family leave and medical leave law is not clearly identified in the law itself. The operative administrative rules interpreting the law were issued by the Department of Industry, Labor and Human Relations. Pursuant to §230.35(2), Stats., DER is prohibited from issuing rules to regulate family leave and medical leave:

> Leave of absence with pay owing to sickness and leave of absence without pay, other than annual leave and leave under s. 103.10, shall be regulated by rules of the secretary ....(emphasis supplied)

At the same time, DER clearly has a statutory function under this subsection relating to other types of leave which may be affected by the statutory leave available under the family/medical leave law (hereafter referred to as statutory leave). DER also fulfills a collective bargaining role for the state as provided in §230.04(4), Stats., and the various forms of leave are bargainable subjects under §111.91(1)(a), Stats. A significant part of the family leave and medical leave law involves the interrelationship of the benefits supplied by the employer and the venefits covered by the law. Section 103.10(5), Stats., provides: "An employe may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer." Section Ind 86.01(6), Wis. Adm. Code, provides:

> (6) To the extent that an employer grants leave to an employe for the birth of the employe's natural child in a manner which is no more restrictive than the leave available to that employe under s. 103.10(3)(b)1., Stats., the leave granted by the

> employer shall be deemed to be leave available to that employe under s. 103.10(3)(b)1., Stats.

In light of these factors, it can be concluded that the Commission's legal conclusions regarding the law directly cause injury to DER's interests in the bargaining and administration of the state's leave benefit provisions, that DER's interest is recognized by the family leave and medical leave act, and that DER is a "person aggrieved" under §227.49(1), Stats.

DER's petition contends that the following sentence in the Commission's April 12th decision constitutes a material error of law: "When complainant commenced her leave, she commenced not only her 6 month contractual leave but also her 6 week family leave ...." The petition identifies two ways in which this sentence is in error:

> Ch. 724 of the Wisconsin Personnel Manual interprets sec. 103.10, Stats., differently than does the commission in terms of [1] whether an employee's 6 week family leave must commence simultaneously with the beginning of the employee's contractual maternity leave, and [2] whether the substitution provision applies after the first six or eight weeks of leave taken for maternity purposes. (See memorandum from Jessica O'Donnell, attached as Exhibit B.)

The Commission's April 12th Decision was based upon a limited factual record and on the briefs of the complainant and the University of Wisconsin - Madison. There is no record on which the Commission can conclude that the complainant's physical condition during the weeks after the birth of her child 1) would have qualified her to use sick leave under the contract because she had to be confined, she was unable to perform her work or because work would have jeopardized her health or recovery,[1] or 2) would have qualified her for statutory medical leave because her condition required "[i]npatient care in a hospital ... [or o]utpatient care that requires continuing treatment or supervision by a health care provider." §103.10(1)(g), Stats. In the memo which was attached to DER's petition for rehearing, the following statement appears:

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[1]These qualifications are found in Article VI, Section 4 of the collective bargaining agreement, set out in finding 6 of the Commission's Decision.

> For purposes of the Income Continuation Insurance program administered by the Department of Employe Trust Funds, an employe's absence for up to six weeks after the birth of a child due to medical disability is unchallenged.

This statement, appearing as it does in an attachment to a petition for rehearing, cannot serve as the basis for a Commission finding that the complainant was entitled under her bargaining agreement to six weeks of sick leave immediately after the birth of her child due to her physical condition. In its April 12th decision, the Commission could not and therefore did not make any finding of medical disability associated with the birth. Instead the Commission focused on the family leave dispute and included the following footnote on page 5 of the decision:

> In her reply brief, complainant contends that she has a
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> > right to eight weeks of leave. Two weeks of [medical] leave depend on her medical condition after the birth and therefore must begin with the birth. Six more weeks--full-or part-time--[of family leave] must begin within sixteen weeks of the birth of the child.
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> Even if the complainant were found to qualify for 2 full weeks of medical leave commencing with the date of the birth of her son, the total of 8 weeks of statutory leave would be completed before the June 3rd date for substituting sick leave.

Even if the record in the instant dispute showed that the complainant was unable to return to work for a period of six weeks after the delivery date due to medical disability, the result reached in the April 12th decision would not be altered.[2] The period of disability plus the six weeks of family leave would end

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[2]The resulting facts would be similar to those described in an example set forth on page 10 of Ch. 724 of the Wisconsin Personnel Manual which was appended to the DER's Petition:

> EXAMPLE: During a 6 month maternity leave, an employe may take a two week medical leave following the birth of a child (during which the employe uses accrued sick leave.) The employe may then continue using sick leave, in accordance with the provisions of ER 18.03(4), Wis. Adm. Code or the applicable collective bargaining agreement, for that period during which the employe is physically unable to work. Upon recovery (and within 16 weeks of the birth), the employe may commence up to

before the 14th week of leave that served as the earliest period of dispute in the instant proceeding.

DER's petition specifically indicates that its disagreement with the Commission's Decision "does not affect the end result in the complainant's case." Likewise, the memorandum attached to the petition indicates that the Commission's "conclusion that Ms. Lawless is ineligible to use accrued sick leave during week 15 of her absence would be unchanged" if the Commission were to adopt DER's arguments. However, the memorandum also makes the observation that the Commission erred in its implicit conclusion that the maternity leave provisions of the collective bargaining agreement are more restrictive than the family leave provided by statute:

> On page 5 of the Commission's Decision it states, "When complainant commenced her leave, she commenced not only her 6 month contractual leave but also her 6 week family leave. This conclusion is dictated by the language of IND 86.01(6), Wis. Adm. Code:
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> > To the extent that an employer grants leave to an employe for the birth of the employe's natural child in a manner which is no more restrictive than the leave available to that employe under s. 103.10(3)(b)[1]., Stats., the leave granted by the employer shall be deemed to be leave available to that employe under s. 103.10(3)(b)1., Stats."
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> Maternity leave, as provided in Article VI, Section 6 of the collective bargaining agreement with the United Professionals for Quality Health Care is more restrictive than the family leave available to an employe under s. 103.10(3)(b)(2), Stats. The contractual maternity leave policies permit use of sick leave only as provided in Article VI, Section 4 of the agreement,
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> > "Employees may use accrued sick leave for ... maternity ...: (a) which require the employe's confinement; or (b) which render the employe unable to perform assigned duties; or (c) where performance of assigned duties would jeopardize the employe's health or recovery ..."
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> S. 103.10(5), Stats., provides, "An employe may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer."

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six weeks of family leave, during which the employe may choose to use accrued sick leave.

In its April 12th decision, the Commission's conclusion on this point reflected the absence of any dispute between the complainant and the respondent. The respondent's brief stated that the contractual leave was "no more restrictive" than the statutory leave. The complainant's briefs never addressed the point. Therefore, neither party is on the record as having suggested that the contractual leave was more restrictive than the family leave law. The absence of any dispute on this point between the parties is inconsistent with the notion that the Commission's conclusion as to the relative restrictiveness of the contractual leave provisions was erroneous.

However, the fact that the parties were not in dispute does not compel the conclusion that the Commission's decision on this point was correct. The operative language that must be interpreted is found in §Ind 86.01(6), Wis. Adm. Code:

> (6) To the extent that an employer grants leave to an employe for the birth of the employe's natural child in a manner which is no more restrictive than the leave available to that employe under s. 103.10(3)(b)1., Stats., the leave granted by the employer shall be deemed to be leave available to that employe under s. 103.10(3)(b)1., Stats.

The rule could have been phrased in terms such as contractual leave "no shorter than" the statutory leave. Given the language used in the rule, the Commission has no other choice than to look at all elements of the statutory leave, compare each of those elements to the corresponding elements of the contractual[3] leave provided by the employer and determine whether, in terms of any of those elements, the contractual leave is more restrictive[4]. One basis for comparison is whether the employe is permitted to substitute other leave. Pursuant to §103.10(5)(b), Stats:

> (b) An employe may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer.

The rules further explain the scope of the substitution provision in §Ind 86.03:

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[3]For those employes not covered by a collective bargaining agreement, the non-statutory leave is derived from the provisions of the administrative code.
[4]This result is reached despite contrary public policy considerations.

> (1) At the option of the employe, an employe entitled to family or medical leave under the act may substitute, for any leave requested under the act, any other paid or unpaid leave which has accrued to the employe.
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> (2) Leave substituted for leave available under the act will be credited, for purposes of using up the leave available under the act, to the extent the substituted leave is actually used by the employe calculated in no less than the increments available pursuant to s. Ind 86.02(1).
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> (3) The employer may not require an employe to substitute any other paid or unpaid leave available to the employe for either family or medical leave under the act.

Under the applicable contract, it appears that the complainant is precluded from substituting various forms of paid leave for her maternity leave. According to Article VI, Section 6 of the collective bargaining agreement:

> (c) Except as provided under Article VI, Section 4 of this Agreement (sick leave), all periods of leave related to maternity shall be leaves of absence without pay.

The sick leave provisions only permit the use of accrued sick leave for conditions which require confinement or render the employe unable to work or where work would jeopardize the employe's health or recovery. None of these limitations exist when the complainant invokes the statutory family leave provisions.

An employe's ability to substitute one form of leave for another is a significant part of any leave benefit plan, and a legitimate factor to be considered in determining whether an employer's maternity leave plan is more or less restrictive than the childbirth leave available under the act. The Commission suspects there are few employer childbirth leave plans that have as liberal a substitution provision as is found in §103.10(5), Stats., but this would not lead to a different result. It remains that the employer's or contract's policy of substitution of one form of leave for another is an element of the leave program for childbirth, and that the provisions of the contract here result in a more restrictive leave than is available under §103.10(3)(b)1., Stats.

If the Commission concludes that the contract's maternity leave provisions are "more restrictive" than the statutory leave, it appears that the period of contractual leave would not be "deemed" to be leave available under the statute as provided in §Ind 86.01(6), Wis. Adm. Code, and this raises the question of whether complainant would be entitled to commence her statutory leave during the 14th week of her absence and to substitute her accrued sick leave for her six weeks of unpaid family leave, pursuant to §103.10(4)(b), Stats. That is, a different conclusion by the Commission on the question of whether the contractual leave was "more restrictive" could generate a different result in terms of whether the respondent violated the family leave law.[5] Therefore, the Commission will order a rehearing of this matter to be held as soon as possible to permit the parties an opportunity to address whether the Commission's conclusions that respondent did not violate the act, and its final order dismissing this appeal, should be changed.

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[5]Section 227.49(6), Stats., provides, inter alia:

> If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. (emphasis added)

ORDER

1. The petition for rehearing filed on May 2, 1990, by the Secretary of the Department of Employment Relations is granted, the Commission having concluded that said Secretary is a "person aggrieved" within the meaning of §227.49(1), Stats, and that, as contended in Exhibit B attached to said petition, the Commission's implicit conclusion in its April 12, 1990, decision and order that the leave granted by respondent for the birth of an employe's natural child is no more restrictive than the leave available under §103.10(3)(b), Stats., constituted a material error of law, or material error of mixed fact and law;

2. This matter is to be rescheduled for rehearing as soon as possible. The rehearing will permit the parties an opportunity to address the effect of the foregoing conclusions on the ultimate conclusions and order entered by the Commission on April 12, 1990.

Dated: June 1, 1990 STATE PERSONNEL COMMISSION

Laurie R. McCallum

LAURIE R. MCCALLUM, Chairperson

KMS/AJT:kms

Gerald F. Hoddinott

GERALD F. HODDINOTT, Commissioner