STATE OF WISCONSIN PERSONNEL COMMISSION

KARSTEN R. H. SCHILLING,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN-Madison (Hospital),

Respondent.

Case No. 90-0064-PC-ER

RULING ON MOTION TO DISMISS APPEAL AS UNTIMELY FILED

This matter is before the Commission on respondent's motion to dismiss which was made at a prehearing conference report held August 10, 1990. Both parties have filed briefs. The facts material to the motion do not appear to be in dispute and are set forth as follows:

Respondent notified appellant by a letter dated March 24, 1990, that he was discharged from his position as Stores Supervisor I effective March 22, 1990. On April 18, 1990, appellant, who at that time was unrepresented by counsel, filed a complaint with this Commission which alleged that his termination was based on retaliation for health and safety concerns he had raised, and he also checked the box on the form for "sexual orientation" as a basis for discrimination.

By correspondence dated June 25, 1990, and filed June 26, 1990, counsel for complainant filed a notice of appearance and also advised that he wanted to amend the complaint to allege handicap discrimination and requested an additional form. On July 3, 1990, he filed an amended complaint alleging that his termination constituted discrimination on the basis of handicap. By letter dated July 3, 1990, and filed July 5, 1990, complainant's counsel stated, in part,

"we are hereby requesting an appeal of the ...decision to discharge Mr. Schilling in that it is the employe's contention that just cause did not exist for said discharge," and also also stating "[y]ou should be aware that Mr. Schilling previously filed a charge of discrimination ...on April 18, 1990, concerning his discharge."

Respondent argues in support of its motion to dismiss that the appeal was not timely because it was not filed within 30 days of either the effective date of the discharge or the date of notice thereof to appellant, in accordance with §230.44(3), stats. Respondent further argues as follows:

> In this case, the appeal is not an amendment. It refers to one of the earlier two charges filed but it does not incorporate the facts alleged therein to support the allegation of just cause. It alleges no facts to support the appeal; only that the decision to discharge was without just cause. The concept of "just cause" has many facets and the Respondent is given no notice of which, if any, of the elements of just cause are thought to have been violated.
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> The amendment, filed on July 3, 1990, alleging discrimination on the basis of handicap, shows that the Appellant distinguished between an amendment and a separate action. In the cover letter to that amendment, the matter is specifically described as an amendment. In the letter of appeal, no such assertion is made.
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> Even if the Commission were to rule that the appeal is an amendment, it should be limited to the first charge of discrimination only, since that is the only one referenced in the letter of July 3, 1990. Thus, the issue of just cause, if litigated, could only be assessed as it relates to discrimination on the basis of sexual orientation, not handicap.

The Commission's rules provide at §PC 3.02(2), Wis. Adm. Code:

> AMENDMENT. An appeal may be amended, subject to approval by the Commission, to clarify or amplify allegations or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date of the appeal.

The Commission applied this rule in Van Rooy v. DILHR, 84-0253-PC (4/12/85), where the employe was notified on November 12, 1985, that someone else had

been selected for a position for which she had applied. She filed a discrimination complaint on December 7, 1984, and then on December 20, 1984, filed a request to amend the complaint as an appeal under §230.44(1)(c), stats. The Commission held as follows:

> What the appellant is attempting to do with the proffered amendment is to add another legal theory, abuse of discretion, as set forth in §230.44(1)(d), Stats, with respect to the same underlying factual transaction, a failure of appointment, which was originally attacked on a discrimination theory in the original complaint filed December 7, 1984 . . . an amendment relates back to the date of filing of the original pleading if the claim asserted in the amendment arises out of the occurrence or transaction set forth in the original pleading . . . . Since the amendment filed December 20, 1984, should be deemed to relate back to December 7, 1984, when the original appeal or complaint was filed, it is timely, since December 7th is within 30 days of November 12th.
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> In his brief, respondent raises the following concern:
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> "If the filing of a timely discrimination charge could be used to permit the later filing of a civil service appeal 'by amendment,' the 30 day time limit would effectively be interpreted out of the statute."
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> However, in order for the amendment to be timely, the discrimination complaint must have been filed within 30 days of the transaction in question, such as occurred here. The 30 day time limit is still very much a part of the law.

Respondent attempts to distinguish Van Rooy by contending that the appeal in this case does not purport to be a proposed amendment. Although appellant's document filed on July 5, 1990, was not denominated as a proposed amendment of the original complaint, appellant subsequently has clarified that he intends it as such, and there is no reason to deny an amendment on the basis of this omission, see 73A CJS Public Administrative Law and Procedure §115 ("administrative adjudicatory proceedings are generally simple, informal, and direct, and, while the processes of such adjudications should be within the

limits and requirements of the statutes involved, such proceedings are not normally subject to strict and technical rules.")

To the extent respondent is arguing that the proposed amendment should not be permitted because it alleges lack of just cause without providing notice of what particular elements thereof are alleged to have been violated, this conflicts with the concept of just cause which requires respondent carry the burden of proof as to each element. An appellant is not required to specify in the appeal the particular aspects of respondent's case that the appellant believes respondent will be unable to prove.

Since the document filed on July 5, 1990, viewed as a proposed amendment, contains an additional allegation (lack of just cause) which is related to the subject matter of the original charge (the allegedly discriminatory discharge) then pursuant to §PC 3.02(2), it is an appropriate amendment and should relate back to the original date of filing, and therefore is timely.

Respondent further contends that the amendment "should be limited to the first charge of discrimination only, since that is the only one referenced in the letter of July 3, 1990. Thus, the issue of just cause, if litigated, could only be assessed as it relates to discrimination on the basis of sexual orientation, not handicap." The Commission does not understand that appellant is attempting by his July 3d letter to amend the second charge of discrimination, so this apparently is a moot point. However, it should be noted that while the complaint of discrimination and the appeal relate to the same personnel transaction (the discharge), they are governed by different legal principles. The central issue for the appeal hearing would be whether there was just cause for the discharge, and this issue would not be limited to an assessment related to the complaint of sexual orientation discrimination, as respondent seems to imply.

ORDER

Respondent's motion to dismiss set forth in a prehearing conference report dated August 14, 1990, is denied, and appellant's proposed amendment as set forth in his letter of July 3, 1990, filed on July 5, 1990, is granted.

Dated: Sept 19, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner