STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN G. BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES

Respondent.

Case No. 90-0097-PC-ER

DECISION AND ORDER

On June 15, 1990, the complainant filed a charge of discrimination with the Commission alleging the respondent had violated the family leave/medical leave act with respect to certain conditions of employment and the decision to terminate his employment. The respondent filed a jurisdictional objection and agreed to a briefing schedule. The facts set out below appear to be undisputed.

FINDINGS OF FACT

1. Complainant was employed by the University of Wisconsin-Madison Police and Security Department as a Security Officer II from November, 1984, to September, 1988, and as a Security Officer III-Lead from September, 1988 until July, 1989.

2. Effective July 16, 1989, complainant terminated his employment with the University of Wisconsin to accept a position as Deputy Sheriff with the Dane County Sheriff's Department.

3. In September of 1989, the complainant left his position with the Sheriff's Department and accepted a position as a stonecutter with Quarra Stone. He worked there until at least January 18, 1990.

4. Effective January 29, 1990, respondent hired the complainant as a Security Officer III at Mendota Mental Health Institute based on complainant's reinstatement eligibility arising from his past employment with the University of Wisconsin-Madison. Complainant's sick leave and other benefits which had accrued to him while employed by the University of Wisconsin-Madison were reinstated as well.

5. Respondent terminated the complainant's employment on May 2, 1990.

6. Complainant's employment with the University of Wisconsin-Madison was for more than 200 consecutive weeks.

7. Complainant's employment with the respondent was for fewer than 50 consecutive weeks.

DISCUSSION

The respondent's motion to dismiss is based on the contention that the complainant fails to meet the more than 52 consecutive weeks of employment requirement found in §103.10(2)(c), Stats:

> This section only applies to an employe who has been employed by the same employer for more than 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the preceding 52-week period.

The facts set out above clearly indicate that the complainant was not employed by the respondent Department of Health and Social Services for more than 52 consecutive weeks. However, the complainant contends that the term "employer" as used in §103.10(2)(c), Stats., should be read to refer to the State of Wisconsin, rather than to any one state agency, and that the more than 52 consecutive weeks of employment do not have to be the weeks immediately preceding the disputed action. Each of these contentions is discussed separately, below.

The family leave/medical leave act defines the term "employer" in §103.10(1)(c), Stats., in relevant part as follows:

> "Employer" includes the state and any office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

This language does not exclude the state from the definition of "employer" and include the state agencies. Instead, it lists the state <u>and</u> the various agencies of the state as falling within the scope of the definition. If the legislature had intended to establish each agency of the state as a separate employer for the

purpose of the act, the legislature would have deleted the reference to "the state" from the definition. The specific reference to the state in the definition indicates that the legislature intended for the state to be considered as one employer for the purposes of the act.[1] In the present case, the facts show that the benefits earned while the complainant worked for the University of Wisconsin-Madison accompanied him when he was reinstated to the position at the Mendota Mental Health Institute. This factual record also supports the conclusion that the complainant's employment at the University of Wisconsin-Madison and at the Mendota Mental Health Institute should be considered as work for the state and, therefore, work for one employer for the purposes of the family leave/medical leave act.

The second leg to the complainant's contention that his employment with the University of Wisconsin-Madison meets the more than 52 consecutive week requirement because the statute does not require the consecutive week period to immediately precede the disputed action:

> [T]he clear and express language of this provision does not require that the employment take place in the 52 consecutive weeks immediately receding the employee's eligibility. This interpretation is supported by the notable absence of commas or parentheses before and after the phrase "and who worked for the employer for at least 1,000 hours." Such punctuation would ordinarily work to set off the words "during the preceding 52 week period" which follow the former phrase. Under well-established

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[1]The family leave/medical leave act definition follows the definition of "employer" used in §111.32(6)(a), Stats., for the Fair Employment Act:

> "Employer" means the state and each agency of the state .... In this subsection, "agency" means an office, department, independent agency, authority, institution, asociation, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

However, in contrast to the family leave law which in §103.10(12)(a)1., Stats., grants to the Personnel Commission the authority to review complaints filed by employes who are employed by "the state <u>or</u> any office ... or other body in state government," the comparable language establishing the Commission's authority under the FEA provides in §111.375(2), Stats., that the "subchapter applies to each agency of the state" without making a separate reference to employment by the state rather than by an agency of the state.

> principles of legal drafting, as well as ordinary rules of grammar, it would be appropriate to place commas (or parentheses) in the aforementioned locations if the intended effect of the provision were to require that the 52 consecutive weeks take place in the <u>preceding</u> 52 week period. With such punctuation supplied, the provision would read as follows:
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> > [the Act] applies to an employee who has been employed by the same employer for more than 52 consecutive weeks, and who worked for the employer for at least 1,000 hours, during the preceding 52 week period.
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> This construction would have the effect of making the words "during the preceding 52 week period" modify both the "consecutive weeks" clause and the "1,000 hours" clause. As it stands, however, the absence of such punctuation leaves only one reasonable interpretation: that the phrase "during the preceding 52 week period" modifies only the 1,000 hour requirement....
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> Had the legislature intended to make the "preceding 52 week period" requirement applicable to both the 1,000 hour element <u>and</u> the 52 consecutive week element, adding commas or parentheses would have been only one method of achieving the purpose. Alternatively, it could have drafted the provision as follows:
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> > [the Act] applies to an employee who has been employed by the same employer for the preceding 52 consecutive weeks, and has worked at least 1,000 hours during this period.
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> Further, the well-established maxim of statutory interpretation, expressio unius est exclusio alterius ("the expression of one thing is the exclusion of another") requires that since the legislature expressly required that the employee work "at least 1,000 hours during the <u>preceding</u> 52 week period," (emphasis added), the exclusion of the word "preceding" as a modifying adjective for the phrase "52 consecutive weeks" is significant and should serve as convincing evidence that the legislature did not intend to require that the employment take place in the 52 consecutive weeks immediately preceding the employee's eligibility. (citations omitted)

In the portion of his brief set out above, complainant raises three separate arguments in support of his reading of the statute. The first arises from the absence of a comma or other punctuation which would make it clear that the phrase "during the preceding 52 week period" also refers to the clause "who has been employed by the same employer for more than 52 consecutive weeks." The problem with this argument is that little can be read into the ab-

sence of a comma when the presence of the comma would result in a nonsensical phrase: "[The act] applies to an employe who has been employed by the same employer for more than 52 consecutive weeks ... during the preceding 52 week period."

The complainant's second proposal for rewriting the statute so that it would more clearly conform with the respondent's interpretation reads:

> [the Act] applies to an employee who has been employed by the same employer for the preceding 52 consecutive weeks, and has worked at least 1,000 hours during this period.

However, this proposal would make an important change in the duration of the continuous employment required by the statute from "more than 52 weeks" to simply 52 weeks. This modification undercuts the complainant's suggestion that this was a more logical way to draft the statute if the legislative intent had been as contended by the respondent.

The complainant's third argument is that the inclusion of the word "preceding" in one part of §103.10(2)(c), Stats., and its absence in the phrase which reads "more than 52 consecutive weeks" indicates that the legislature intended there be no restriction on the end date of the more than 52 consecutive weeks of employment. Complainant's argument is that the respondent's reading of the statute would be supported if the statute had been written as follows:

> This section only applies to an employe who has been employed by the same employer for more than the preceding 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the preceding 52-week period.

The Commission agrees that had the underlined language been included, the statute would have clearly required the period of continuous employment to have run to the date of the disputed action.

However, the question before the Commission is not whether the statute could have been drafted differently. The Commission must interpret the language already in the statute in order to determine the legislative intent. Respondent's brief points out that the verb tense used in the statute provides a basis

for interpreting the statute to require the period of more than 52 consecutive weeks of employment to run through the date of the disputed action.

> In the Wisconsin Statutes, "all words and phrases shall be construed according to common and approved usage." Section 990.01(1), Stats. In all problems of statutory construction, courts derive legislative intent by giving language its ordinary and accepted meaning. Bingenheimer v. DHSS, 129 Wis.2d 100, 108, 383 N.W.2d 898 [1986].
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> The verb phrase "has been employed" represents a use of the present perfect tense. The present perfect tense
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>> indicates that an action or condition was begun in the past and is completed at the present time. The time is passed but it is connected with the present, and the action or condition may possibly still be going on. The present perfect tense presupposes something in the present. Errors in the English and Ways to Correct Them, Harry Shaw, Barnes and Noble, 1962, at page 349.
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> "The present perfect tense expresses action completed at the present time or continuing into the present." Plain English Handbook, Martyn Walsh, McCormick-Mathers, 1966, at page 27.
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> It is significant that the legislature here chose the present perfect tense ("has been employed...") rather than the past tense ("was employed...") or the past perfect tense ("had been employed..."). The past tense "indicates that an action or condition took place or existed at some definite time in the past," while the past perfect tense
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>> ...indicates that an action or condition was completed at a time now past... That is the past perfect tense presupposes some action or condition expressed in the past tense, to which it is related." Errors in English, Supra, at 349.
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> The use of the language "has been employed" thus requires that the 52 consecutive weeks of past employment be connected to the present time. To be eligible for coverage under the Family Leave Act, therefore, an employee must have been employed by the same employer for more than the 52 consecutive weeks immediately preceding the date of eligibility.

Support for the respondent's argument arises from the contrast between the statutory reference to an employe "who has been employed" with the reference later in the same sentence to an employe "who worked" for at least 1,000 hours during a specific period. Had the legislature intended to create a one-

time requirement that the employe work more than 52 consecutive weeks with the same employer, that could have been clearly accomplished by using the past tense ("who worked") instead of the present perfect tense ("who has been employed").

The facts of this case resemble those in Payne v. State, 396 N.E.2d 439 (Ind. App., 1979). In Payne, the court overturned a conviction which was based on the violation of a Ind. Code 9-1-5-3, which read, in relevant part:

> Any person who shall sell or offer for sale in this state a motor vehicle, the original or special identification number of which has been destroyed, removed, altered covered or defaced shall for the first offense be deemed guilty of a misdemeanor.

The defendant had removed the VIN tag from a vehicle for the purpose of repairing the vehicle and had replaced the tag prior to selling or offering to sell the vehicle. The court explained its ruling as follows:

> The issue in the case at bar rests on the phrase "has been removed".... The State argues that the mere removal of a VIN tag, regardless of its presence at the time of sale, or offer for sale, constitutes a violation of the statute. We do not agree.
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> We interpret "has been removed" as meaning that there is a violation if the VIN tag is missing at the time of sale, or offer of sale, but that there is no violation if the tag was removed and replaced during the ownership of the vehicle. "Has been removed" has a sense of permanency attached to it which would indicate the legislature's intent to focus on the existence of the VIN tag when the vehicle changes hands.
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> We recognize that the purpose of this statue is to develop a system by which stolen vehicles can be more easily identified. However, rather than reading "had been removed" which would address an act in the past, Ind. Code 9-1-5-3 only considers a vehicle whose VIN tag is still removed at the time of sale or offer for sale.
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> It is our opinion that the legislature did not intend this statute to apply to a situation such as the one in the case at bar. The record does not indicate that Payne had any criminal intent when he removed the VIN tag since he was following the normal procedure of his trade.

The rationale relied upon in Payne supports the respondent's contention that the present perfect verb tense used by the legislature is key when interpreting the statute.

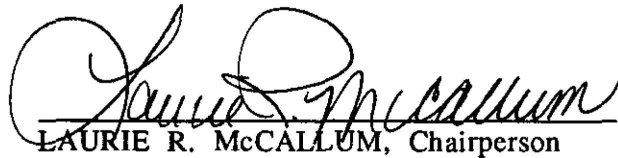
A review of the legislative history of the family leave/medical leave act fails to offer any additional information which would support a particular interpretation of the statute. There is also no specific "liberal construction clause" in the family leave/medical leave law which might have an effect on the interpretation made.

The Commission concludes, based predominantly on the use of the present perfect tense, that the legislature intended for employes to be eligible for the benefits supplied by the statute if they have been employed by the same employer for more than 52 consecutive weeks of employment immediately preceding the disputed action. Here, the complainant did not have such a period of continuous employment so his complaint must be dismissed.

ORDER

This complaint is dismissed for lack of jurisdiction.

Dated: Sept 19, 1990 STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

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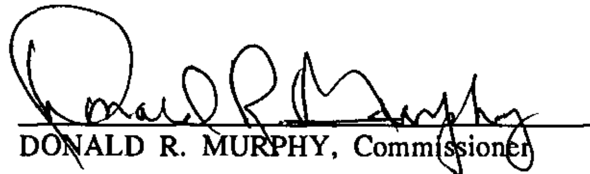
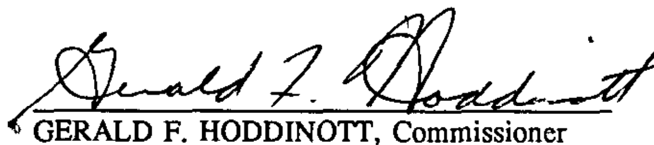


DONALD R. MURPHY, Commissioner



GERALD F. HODDINOTT, Commissioner

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