STATE OF WISCONSIN PERSONNEL COMMISSION

JEANNE DUPUIS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0219-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats., of respondent's refusal to reinstate or restore appellant to employment following a probationary termination. The Commission previously issued decisions in this matter on October 18, 1990, denying respondent's motion to dismiss the appeal as untimely filed, and on July 25, 1991, resolving a dispute between the parties as to the appropriate issue for hearing, and establishing it as: "whether appellant was wrongfully denied her right to restoration and/or reinstatement."

FINDINGS OF FACT

1. Appellant transferred from a Nursing Clinician 2 (NC2) position at the Wisconsin Resource Center (WRC) to a NC2 position at the Fox Lake Correctional Institution (FLCI), effective September 25, 1989. Both positions were in the classified civil service.

2. At the time of the transfer, both institutions were within DHSS (Department of Health and Social Services). WRC was in the Division of Care and Treatment Facilities, and KMCI was in the Division of Corrections.

3. Immediately prior to her transfer, appellant had permanent status in class. She was placed on permissive probation at FLCI.

4. Pursuant to 1989 Wis. Act 31, the Division of Corrections became the Department of Corrections (DOC) effective January 1, 1990.

5. As a result of this reorganization, KMCI, appellant's position, and appellant became part of the new DOC effective January 1, 1990. Appellant's

time served on probation at KMCI prior to January 1, 1990, was carried over; i.e., she was not required to commence a new probationary period beginning January 1, 1990.

6. Appellant's probationary employment was terminated effective February 9, 1990. Notice of this action was contained in a letter dated January 29, 1990 (Appellant's Exhibit 4), which provided as follows:

> This is to inform you that your permissive probation is being terminated at Fox Lake Correctional Institution and your employment there will not be continued. Your supervisor believes that your job performance is poor and that repeated attempts to guide and counsel you have not produced the expected results. Due to these reasons, you will not be passing your probation at Fox Lake Correctional Institution. Your last work day will be February 9, 1990.
>
> If you have specific questions regarding this action you may contact your supervisor.

7. Appellant then sought to be rehired as a NC2 at WRC. She was not so rehired or otherwise restored or reinstated. Respondent's position on this matter was set forth in a letter dated May 3, 1990 (Appellant's Exhibit 7).

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.

2. Appellant has the burden of proof.

3. Based on the facts established by appellant as set forth in the above findings of fact, appellant was entitled pursuant to §ER-Pers 15.055, Wis. Adm. Code, to have been restored to her previous position or another position for which she was qualified in the same or counterpart pay range or pay rate. Therefore, respondent's failure to have restored appellant to such employment was unlawful and wrongful.

4. Appellant is entitled to restoration with back pay pursuant to §230.43(4), Stats., since the failure to afford her restoration rendered her removal from employment unlawful under the circumstances.

DISCUSSION

The findings of fact set forth above are undisputed. Based on these findings it is concluded that as a matter of law, pursuant to §ER-Pers 15.055, Wis. Adm. Code, appellant was entitled to restoration. Because of this conclusion, certain other issues that were tried (whether respondent committed an abuse of discretion in refusing to rehire appellant, whether respondent acted illegally in refusing to rehire appellant because of anti-union animus, and whether respondent is collaterally estopped from refusing to rehire appellant) are unnecessary for decision and will not be addressed.

Section ER-Pers 15.055, Wis. Adm. Code, provides:

> **Employe removal; status and rights.** If a probationary period resulting from a transfer under s. ER-Pers 15.04 or 15.05 is required, the appointing authority, at any time during this period, may remove the employe from the position to which the employe transferred, without the right of appeal. An employe so removed shall be restored to the employe's previous position or transferred to a position for which the employe is qualified in the same pay range or pay rate or counterpart pay range or pay rate without a break in employment. Any other removal, suspension without pay, or discharge during a probationary period resulting from transfer shall be subject to s. 230.34, Stats. (emphasis added)

If, as appears to be the case, appellant was serving at the time of her probationary termination "a probationary period resulting from a transfer under §ER-Pers 15.04" (transfer between different employing units of the same agency),[1] §ER-Pers 15.055 provides only two options with respect to the termination of employment. A termination has to be either "subject to §230.34, Stats." (i.e., discharge for cause of an employe with permanent status in class) or the employe has to be restored to the previous (or like) position. It is undisputed that a just cause discharge procedure was not followed. Therefore, under this rule appellant was entitled to have been restored to her previous position at WRC (or transferred to a like position). This result is reinforced by §230.28(1)(d), Stats., which provides: "a promotion or other change in job status within an agency shall not affect the permanent status in class and rights, previously acquired by an employe within such agency." Since appellant previously had acquired permanent status in class as a NC2 within DHSS, a

[1] Respondent's contention to the contrary will be discussed below.

change in job status (transfer) within that agency should not have affected her tenure in that classification. This is consistent with the workings of §ER-Pers 15.055 which gives the appointing authority of the position in which the transferred employe is serving a probationary period the right to remove the employe from that position without the right of appeal, but protects the employe's right to return to his or her prior (or like) position where the employe had permanent status in class.

This conclusion is not affected by the fact that between the time of the transfer and the time of the termination, KMCI became part of the newly-created DOC. There is nothing in the language of §ER-Pers 15.055 that requires that the position to which the employe is entitled to be restored be in the same agency as the position occupied by the employe at the time his or her probationary employment is terminated. The rule does refer to a "probationary period resulting from a transfer under §ER-Pers 15.04," and §ER-Pers 15.04 involves "transfers between different employing units of the same agency." However, at the time of the transfer, it undisputably was such a transfer, and this would not have been affected by the subsequent creation of a new agency (DOC) and the transfer of KMCI and appellant's position to DOC. The "general rule in Wisconsin is that statutes are presumed to apply prospectively only unless the statute reveals by express language or necessary implication an intention by the legislature for retroactive application." Overlook Farms v. Alternative Living, 143 Wis. 2d 485, 493, 422 N W 2d 131 (Ct. App. 1988). Furthermore, the legislation which created the DOC includes express provisions which are inconsistent with such a result. 1989 Wis. Act 31, §3023 (Nonstatutory provisions; health and social services) at subsection (1)(c) provides that: "employes transferred to the department of corrections . . . have all the rights and the same status under subchapter V of Chapter 111 and Chapter 230 of the statutes in the department of corrections . . . that they enjoyed in the department of health and social services immediately prior to the transfer." Since appellant's status prior to the transfer to DOC was that of a within-agency transferee, §3023(1)(c) had the effect of continuing her in this status.

However, respondent contends that the movement of KMCI from DHSS to the newly-created DOC effective January 1, 1990, resulted in a second transfer of appellant, this time between agencies, and hence her status was no longer controlled by §§ER-Pers 15.04 ("Transfer between different employing units of

the same agency") and ER-Pers 15.055, which sets forth the tenure rights of an employe serving a probationary period under §ER-Pers 15.04. Rather, respondent contends that her status was controlled by §ER-Pers 15.03 ("Transfer between agencies") and ER-Pers 15.07 ("Transfer while serving a probationary period") and therefore appellant's probationary employment could be terminated without the right of restoration.

The essential premise for coverage under §ER-Pers 15.055, Wis. Adm. Code, upon which appellant relies to support her claim for restoration rights is that (as material here) the employe be serving "a probationary period resulting from a transfer under s. ER-Pers 15.04" — i.e., a transfer between employing units within the same agency. The question is whether the probationary period appellant was serving at the time of her probationary termination (effective February 9, 1990) is more appropriately characterized as resulting from a transfer under §ER-Pers 15.04 (between employing units in the same agency) or under §§ER-Pers 15.03 and 15.05 (between agencies while serving a probationary period based on the change in status which occurred when DOC was created). In the Commission's opinion, it is more appropriate to view appellant's probationary status at the time of her termination as resulting from her September 25, 1989, transfer from one employing unit (WRC) within an agency (DHSS) to another employing unit (FLCI) within the same agency.

Appellant's probationary status after January 1, 1990, was merely a continuation of her probationary status that existed because of the initial September 25, 1989, transfer within the same agency. Therefore, from a standpoint of legal causation, appellant's probationary status when her employment was terminated effective February 9, 1990, should be said to have resulted from her September 25, 1989, transfer between employing units in the same agency. This conclusion is buttressed by the fact that if appellant had not been serving a probationary period as of the January 1, 1990 transition to DOC — i.e., if she had had permanent status in class at that time — she would not have been required to have served a probationary period.[2] Therefore, her probationary status as of the date of her probationary termination in

---

[2] This result would have been required by the operation of 1989 Wis. Act 31, §3023(1)(c), which mandates that affected employes have the same status and rights after the transition that they had before, and specifically states that "no employe so transferred who has attained permanent status in class may be required to serve a probationary period."

February, 1990, was not a result of the January 1, 1990, transition from DHSS to DOC, but rather a result of her September 25, 1989, transfer between employing units in the same agency. 1989 Wis. Act 31, §3023(1)(c), which protects the status of employes who went from DHSS to DOC as part of the reorganization, also provides a basis for this conclusion, as it had the effect of continuing appellant's status as a within-agency transferee.

In addition to the foregoing, the Commission questions whether what occurred to appellant's status on January 1, 1990, can be characterized as a "transfer" at all as that term is used in Ch. ER-Pers, Wis. Adm. Code. Section ER-Pers 1.02(33) defines a transfer as "the permanent appointment of an employe to a different position . . . ." (emphasis added). A "position" is "a group of duties and responsibilities . . . ." §230.03(11), Stats. There is no question but that appellant was in the same position on January 1, 1990, as she had been on December 31, 1989. The only difference was that FLCI and her position had been transferred to DOC. However, she was not appointed to a "different position" as is required by §ER-Pers 1.02(33), Wis. Adm. Code, in order for the transaction to be considered a transfer. Certain non-statutory provisions in 1989 Wis. Act 31 refer to the transfer of "positions and the incumbents," see, e.g., §3023(1)(9). However, it is doubtful whether the legislature in these non-statutory provisions meant to utilize the term "transfer" as it is defined in §ER-Pers 1.02(33), Wis. Adm. Code, as opposed to a more generic usage of the term, because of the simultaneous reference to transfer of the positions and the incumbents. If an incumbent is being "transferred" simultaneously with the position he or she occupies, this cannot very well be an appointment to a "different position" under §ER-Pers 1.02(23). Therefore, to interpret the term "transfer" in the nonstatutory provisions in question as being a reference to a "transfer" as defined in §ER-Pers 1.02(33) would result in an absurdity. In any event, even if there were a transfer on January 1, 1990, as contemplated by §ER-Pers 1.02(33), Wis. Adm. Code, for the reasons set forth in the preceding paragraph the Commission would conclude that in the context of §ER-Pers 15.055 the probationary period being served at the time of termination was "resulting from a transfer under §ER-Pers 15.04" — i.e., a transfer between employing units within an agency — and appellant was entitled to restoration following the probationary termination.

With respect to remedy, since respondent acted unlawfully in denying restoration to appellant, its action must be rejected and she is entitled to restoration upon remand. Appellant also has requested back pay. Pursuant to §230.43(4), Stats.:

> If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the commission . . . the employe shall be entitled to compensation therefore from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification. Interim earnings or amounts earnable with reasonable diligence by the employe shall operate to reduce back pay . . . .

In applying this subsection to a case involving a denial of reinstatement, the Court of Appeals held that: "[s]ince the legislature expressly allowed the commission to use the remedy of back pay in civil service cases only when dealing with removal, demotion or reclassification, it implicitly chose not to make the remedy available in reinstatement cases." Seep v. Personnel Commission, 140 Wis. 2d 32, 42, 409 N W 2d 142 (1987).

In Seep, the employe had resigned from state employment and subsequently had been denied permissive reinstatement. Obviously, in such a case there is no room to argue that she had "been removed . . . from . . . employment in contravention or violation of this subchapter," which is a prerequisite to back pay eligibility under §230.43(4), Stats. In the instant case, after appellant, who had permanent status in class, transferred from WRC to FLCI, she retained protection under the civil service law with respect to her tenure or continued employment with the state, notwithstanding that she was required to serve a new probationary period. This protection emanated from three sources:

(1) Section 230.28(1)(d), Stats., provides that: "[a] promotion or other change in job status within an agency shall not affect the permanent status in class and rights, previously acquired by an employe within such agency."

(2) Section ER-Pers 15.055, Wis. Adm. Code, provides that an employe with permanent status in class who is transferred within an agency and is required to serve a new probationary period can only be removed from employment if either he or she is restored to his or her old (or like position) or if the

employer utilizes a just cause discharge process where the employe has a right to contest the discharge in a proceeding where the employer has the burden of proof. This subsection is related to §230.28(1)(d), Stats., as it provides a form of tenure protection for the employe while giving the employer a degree of flexibility if the employe does not work out in the new position.

(3) 1989 Wis. Act 31, §3023(1)(c), provides, with respect to the transition from DHSS to DOC, that: "employes transferred to the [DOC] . . . have all the rights and the same status under subchapter V of Chapter 111 and Chapter 230 . . . in [DOC] . . . that they enjoyed in the [DHSS] immediately prior to the transfer." This provision obviously was intended to preserve employes' status and to protect them from untoward results that might otherwise result from the technical application of personnel laws or rules that might otherwise ensue from the transition from DHSS to DOC.

Because of these provisions, there were only two possible approaches to removing her from her job at FLCI: either a probationary termination followed by restoration to her previous (or like) position at WRC, or a just cause discharge. Since neither one of these options was pursued, it follows that appellant was removed from employment "in contravention or violation of this subchapter," §230.43(4), Stats. That is, even though the decision not to restore appellant was not finally enunciated until some months after the probationary termination, this failure was the "last act" in the unlawful probationary termination of appellant's employment under §ER-Pers 15.055, Wis. Adm. Code, which inextricably linked the legality of appellant's probationary termination to whether she thereafter was granted restoration. Because the elements for a back pay award under §230.43(4), Stats., are present, appellant is entitled to the remedy of back pay[3] as provided therein.[4]

---

[3] Interest on this award is to be computed pursuant to §PC 5.07, Wis. Adm. Code.

[4] Appellant's request for costs will be taken up if and when the Commission adopts this proposed decision and order as its final disposition of this matter on the merits, and pursuant to the procedure set forth at §PC 5.05, Wis. Adm. Code.

ORDER

Respondent's action refusing to restore appellant pursuant to §ER-Pers 15.055, Wis. Adm. Code, is rejected and this matter is remanded for action in accordance with this decision.

Dated: September 3, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

Parties:

Jeanne Dupuis
Route 3 Box 51
Waupun WI 53963

Gerald Whitburn
Secretary DHSS
1 W Wilson St
P O Box 7850
Madison WI 53707