STATE OF WISCONSIN PERSONNEL COMMISSION

ALICE LIPFORD,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent,

and

President, UNIVERSITY OF WISCONSIN SYSTEM (LaCrosse),

Disputed Respondent.

Case No. 91-0118-PC

INTERIM DECISION AND ORDER

This matter is before the Commission with respect to the question of whether appellant should be allowed to amend a discrimination complaint to state a civil service appeal that would run against a party not named in the original complaint, and to have that amendment relate back to the date of filing of the original complaint.

By way of background, complainant filed a pro se complaint on April 24, 1990, that was assigned Case No. 90-0065-PC-ER. This complaint named UW-LaCrosse as the respondent, and makes at least twelve allegations of gender discrimination and sexual harassment, commencing in 1980. One of the allegations is that a reclassification request was denied and that a "reallocation, that I did not have the opportunity to appeal," was based on a misperception about changes in her job, and that "I wish the reallocation to be reconsidered."

On July 3, 1991, appellant through counsel filed a "Request to Open Civil Service Appeal on Reallocation Issue." Attached to this document is a copy of a non-delegated reallocation notice dated May 24, 1989, reflecting a reallocation of appellant's position from Stock Clerk 1 to Library Services Assistant 2 with an effective date of November 20, 1988, and no change in base salary. As part

of her request to open a civil service appeal, appellant's assertions included the following:

1) The reallocation should have been a reclassification, with an accompanying pay raise;

2) There should have been a pay raise even under the reallocation, inasmuch as she previously had taken a voluntary demotion and therefore should have been restored to her previous pay range pursuant to §29.03(3), Wis. Adm. Code;

3) DER should be included as a named party-respondent as it was responsible for the reallocation.

In an interim decision and order dated December 23, 1991, the Commission granted appellant's request to amend her complaint to include a civil service appeal and denied without prejudice respondent DER's motion to dismiss for untimely filing.[1] Respondent DER now contends that the amendment should not be allowed to relate back to the original filing date because not only does the amendment add a new claim, it also attempts to add a new party.

Section PC 2.02(3), Wis. Adm. Code, provides as follows:

> (3) AMENDMENT. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint 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.

Since the proposed amendment added new allegations concerning the appropriateness of the reallocation and the related salary adjustment under the civil service code, it would appear to be an appropriate amendment, and one that

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[1] The Commission noted that there were facts in dispute with respect to the question of when appellant received the written notice of reallocation. Therefore, even based on the relation back of the amendment to the original April 24, 1990, filing date, there remained an issue of timeliness that could not be resolved without some kind of fact-finding proceeding.

would relate back under §PC 2.02(3). However, respondent DER argues that this rule only addresses amendments which add new allegations or claims and does "not address the issue of whether an amendment can add a new claim against a new party and relate back to the original filing date." (emphasis in original) Respondent goes on to argue that the Commission should look to §802.09(3), Stats.,[2] albeit it does not apply per se to administrative proceedings, for "guidance" as to whether to permit this type of amendment with relation back. The main barrier asserted to relation back under the §802.09(3), Stats., requirements is that respondent apparently did not have direct notice of the filing of the appeal within the 30 day filing period set forth by §230.44(3), Stats.[3]

In the Commission's opinion, it is unwarranted to engraft onto the Commission's processes the requirements of §802.09(3), Stats. A good general statement of the principles governing pleadings in administrative proceedings is set forth in 73A C.J.S. Administrative Law and Procedure §122:

> The pleadings required in an administrative proceeding are governed by statutes, and by the rules and regulations of the administrative body. As a general rule, the pleadings are liberally construed . . . . The rules, including the technical rules, governing pleadings in a judicial proceeding do not apply. (Footnotes omitted)

Section PC 2.02(3), Wis. Adm. Code, permits the amendment and relation back of complaints under certain circumstances, and does not impose any particular requirements with respect to amendments that add claims that run against

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[2] "RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have been brought against such party."

[3] Appellant contends respondent had sufficient notice through its agent at UW-LaCrosse. It is unnecessary to resolve this dispute in light of the conclusion reached below of the inapplicability of the §802.09(3) requirements.

new parties. Furthermore, all that is necessary to satisfy the requirement of the 30 day time limit governing the initiation of appeals set forth at §230.44(3), Stats., is that the appellant file a written appeal with the Commission during that time frame. Section PC 3.02(1), Wis. Adm. Code, simply requires that appeals be in writing and:

> Otherwise, there is no form that is to be used for filing an appeal. Appeals are not required to conform to any technical requirements except they shall identify the appellant.

This rule goes on to provide that appeals "should also contain" (emphasis added) several other items, including "(b) The name of the state agency that took the personnel action being appealed." In this case, the initial complaint specifically stated the appellant's disagreement with the denial of a reclassification and the concomitant reallocation, and that "I wish the reallocation to be reconsidered." Under the liberal rules of pleading governing Commission proceedings, if appellant had filed only this part of her complaint it would have been adequate to have commenced an appeal of the reallocation, notwithstanding it named UW-LaCrosse instead of DER as the respondent. Even if DER were not identified as a party for a period of several months after filing, and thus had no notice of the appeal until then, this would not render the appeal untimely, because there is no requirement that the respondent be served within the 30 day filing period established by §230.44(3), Stats.

In light of the liberal pleading requirements governing this proceeding, the absence of a provision in §PC 2.02(3), Wis. Adm. Code, paralleling the "new party" relation back provision in §802.09(3), Stats., the resulting conclusion that §PC 2.02(3) by its terms would permit the proposed amendment with relation back, and the lack of a requirement under §230.44(3), Stats., or elsewhere that a respondent must be served within the 30 day period for filing an appeal, or any other specific time, the Commission declines to utilize the requirements of §802.09(3), Stats. Under §PC 2.02(3), the decision whether to permit amendment of a complaint is discretionary with the Commission. In the exercise of that discretion, certainly the Commission can consider the potential unfairness that could ensue from permitting an amendment that would bring in a new party who would be prejudiced by an absence of notice at the time the original complaint had been filed. However, this does not

justify a blanket approach that would prevent an amendment from relating back in the absence either of a specific showing of prejudice to a respondent or of circumstances from which prejudice could be inferred. In the instant case, there has been no such showing and the amendment will be permitted, with relation back effect.

ORDER

Respondent DER's objection to appellant's requested amendment and to its relation back to the date of filing of the original complaint (April 24, 1990) is overruled.

Dated: July 22, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

AJT/gdt/2

GERALD F. HODDINOTT, Commissioner