STATE OF WISCONSIN PERSONNEL COMMISSION

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*
GARY CRAVILLION, *
*
Appellant, *
*
v. * RULING ON
* MOTION TO
Chairperson, WISCONSIN * DISMISS
GAMING COMMISSION, *
*
Respondent. *
*
Case Nos. 91-0213-PC *
92-0004-PC *
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This matter is before the Commission on respondent's motion to dismiss these appeals for lack of subject matter jurisdiction. The parties have filed briefs.

These cases involve appeals pursuant to §230.44(1)(c), Stats, of a suspension[1] and a subsequent discharge. Respondent's motion to dismiss is essentially summarized in its brief as follows:

> Neither letter [of appeal] alleged that the respondent's actions were "not based on good [sic] cause" as required by sec. 230.44(1)(c), Wis. Stats.[2] Consequently, the Personnel Commission should dismiss these cases because appellant has not complied with the jurisdictional requirements to challenge these personnel actions.

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1 The parties appear to disagree as to whether the suspension was with or without pay. To the extent that it was with pay, the Commission presumably would lack subject matter jurisdiction over this appeal, see Passer v. DHSS, 90-0003-PC (5/16/90) (Commission has no jurisdiction over suspension with pay in absence of allegation that employe lost any overtime or any pay increase as a result). For purposes of deciding the instant motion, the Commission will assume that the suspension was without pay.

2 Section 230.44(1)(c), Stats., provides that an employe with permanent status in class may appeal a suspension or discharge "if the appeal alleges that the decision was not based on just cause."

Appellant's letter filed October 24, 1991, appealing his suspension, includes the following:

> The purpose of this letter is to initiate a civil service appeal pursuant to §230.44 Wis. Stats....
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> * * *
>
> I believe that Mr. Walsh's actions relative to my employment were motivated by considerations that are improper to a personnel action, and that he was therefore acting unlawfully and/or abused his discretion in seeking to implement the changed terms of my employment that are reflected in his letter of September 24, 1991. Specifically, I believe that Mr. Walsh's actions were taken in response to my exercise of protected speech on issues of public importance relating to the management and operation of the Wisconsin Lottery.
>
> * * *
>
> The reasons cited by Mr. Walsh for his suspension and/or demotion of my employment are demonstrably untrue. Moreover, even if they were true, they are patently insignificant and provide no legitimate basis for the employment action that he has sought to implement. They are especially insignificant in view of far greater "infraction" of lottery employees that Mr. Walsh has allowed to go unaddressed -- despite repeated requests for action. It is my belief that the reasons cited by Mr. Walsh are pretextual only, and are an effort to cover up his retaliatory motives for seeking to suspend -- or silence -- my professional involvement in the daily operations of the Wisconsin Lottery.

Appellant's letter filed January 3, 1992, appealing his discharge, includes allegations virtually identical to the above-quoted language. Neither letter explicitly states that the disciplinary action "was not based on just cause." Counsel for appellant has declined to seek leave to amend the appeals, but rather stands on the appeals as written.

The initial question is whether the statute requires recitation of the phrase "the decision was not based on just cause" in haec verba (or at least something similar to the statutory wording). The second question is whether the statute is mandatory or directory.

The operative language in §230.44(1)(c) is: "if the appeal alleges that the decision was not based on just cause." (emphasis added) Webster's Third New International Dictionary (1981) defines "allege" as: "to state or declare as if under oath positively and assuredly but without offering complete proof...to assert, affirm, state without proof or before proving." p. 55. Based on this definition, it does not appear that the term "alleges" carries the connotation of the verbatim recital of the concept or subject being asserted. Furthermore, it is black letter law that pleadings in administrative proceedings are to be liberally construed and are not subject to the standards that are applicable to a judicial proceeding. 73A CJS Public Administration Law and Proceedings §122. While statutory requirements must be met, these considerations suggest that if the legislature had intended that in order to perfect an appeal under §230.44(1)(c), Stats., an employe has to include in the appeal the words "the decision was not based on just cause," it would have made this requirement explicit. Compare, for example, Combined Investigative v. Scottsdale Ins., 165 Wis. 2d 262, 477 N.W. 2d 82 (Ct. App. 1991), which involved the construction of the following language from §618.41(9)(a), Stats.:

> "Every new or renewal insurance policy procured and delivered under this section shall bear the name and address of the insurance agent or broker who procured it and...shall have stamped or affixed upon it [emphasis in statute] the following: 'This insurance contract is with an insurer which has not obtained a certificate of authority....'"

165 Wis. 2d at 272. This provision makes it clear that certain specific language must be explicitly set forth in the document, and can be contrasted with the more general language of §230.44(1)(c) that a disciplinary action may be appealed if the appeal "alleges that the decision was not based on just cause."

Even if §230.44(1)(c) were construed as requiring an explicit statement of absence of just cause, the question would remain whether the requirement is mandatory or directory. "If the statute is merely directory in nature, rather than mandatory...substantial compliance with its terms would be sufficient." Combined Investigative v. Scottsdale Ins., 165 Wis. 2d at 273. The factors which

must be considered in determining whether a statutory provision should be construed as mandatory or directory include: "'the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation.'" State v. R.R.E., 162 Wis. 2d 698, 708, 470 N.W. 2d 283 (1991) (citations omitted). Since an employe with permanent status in class can be disciplined "only for just cause," §230.34(1), Stats., there is an apparent correlation between that provision and the requirement in §230.44(1)(c) that an employe with permanent status in class who is disciplined can appeal that disciplinary action, only "if the appeal alleges that the decision was not based on just cause." The purpose of the latter requirement involves the restriction of the right to appeal to cases where the employe is raising a just cause issue, and not, for example, issues concerning equity, personal hardship, program priorities, etc. See Safransky v. Personnel Board, 62 Wis. 2d 464, 472, 215 N.W. 2d 379 (1974), where the Supreme Court held that §16.05(1)(e), Stats.(1973)[3]: "states that jurisdiction lies with the State Personnel Board to determine whether the actions of the appointing authority terminating an employee of permanent status is based on just cause." Therefore, assuming that §230.44(1)(c) is intended to require a verbatim statement in the appeal that the "decision was not based on just cause," it is unlikely that the legislature intended this to be a mandatory versus a directory requirement. Appeals can be confined to the issue of just cause without requiring a verbatim pleading of absence of just cause. In this case, for example, appellant has set forth in his appeal specific facts and arguments in opposition to the disciplinary action, and these points fall under the general rubric of the absence of just cause.

Finally, since the parties have been unable to agree on a statement of issues for hearing, the Commission will provide the following statement:

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[3] Section 16.05(1)(e), the predecessor to §230.44(1)(c), provided, inter alia, for the personnel board to: "[h]ear appeals of employes with permanent status in class from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions or discharges but only when it is alleged that such decision was not based on just cause."

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1) Whether appellant was suspended without pay.

2) If so, whether respondent violated appellant's right to procedural due process with respect to predisciplinary proceedings.[4]

3) If not, whether there was just cause for the imposition of discipline.

4) If so, whether the discipline imposed was excessive.

92-0004-PC

1) Whether respondent violated appellant's right to procedural due process with respect to predisciplinary proceedings.

2) If not, whether there was just cause for the imposition of discipline.

3) If so, whether the discipline imposed was excessive.

Notice of the time and dates of hearing was provided in a conference report dated February 19, 1993. This will be a Class III proceeding with jurisdiction pursuant to §§230.44(1)(c) and 230.45(1)(a), Stats. Notice of the

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[4] Appellant raises a number of issues concerning respondent's investigation and other predisciplinary proceedings. The hearing before the Commission in matters of this nature is de novo in nature. See Reinke v. Personnel Board, 53 Wis. 2d 123, 132, 191, N.W. 2d 833 (1971) ("after the employee has appealed to the board, the appointing officer must present evidence to sustain the discharge and has the burden of proving that the discharge was for just cause." (footnote omitted) Therefore, evidence concerning the employer's investigative and predisciplinary processes normally is not material except with respect to the question of due process, see, e.g., Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); McReady & Paul v. DHSS, 85-0216, 0217-PC (5/28/87).

exact hearing locations in Madison will be provided in separate correspondence.

ORDER

Respondent's motion to dismiss for lack of subject matter jurisdiction, filed March 3, 1993, is denied. This matter will proceed to hearing pursuant to the foregoing notice.

Dated: May 7, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:dkd

DONALD R. MURPHY, Commissioner