STATE OF WISCONSIN PERSONNEL COMMISSION

MARGARET E. DAVIS,

Appellant,

v.

Executive Director, EDUCATIONAL COMMUNICATION BOARD,

Respondent.

Case No. 91-0214-PC

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for failure to state a claim upon which relief can be granted, filed February 10, 1992. Both parties have filed briefs.

In Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89); affirmed, Phillips v. Wisconsin Personnel Commission, Dane Co. Circuit Court No. 89CV5680 (11/8/90); Court of Appeals, District IV, No. 90-2929 (2/13/92), the Commission applied the principles enunciated in Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979) in addressing this kind of motion:

> For the purposes of testing whether a claim has been stated ... the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer -- to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
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> ... A claim should not be dismissed ... unless it appears to be a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted) p.7.

In the instant case, the factual allegations of the appeal may be summarized as follows:

Appellant alleges in her appeal that she was employed by the ECB since 1978 in various positions. Until October 1, 1991, she was in a 75% Administrative Assistant 3 (AA 3) position in which she had permanent status in class. She alleges that effective October 1, 1991, she was subjected to a constructive demotion, a discharge and a layoff for which there was no just cause. She asserts that her position was reduced from a 75% to a 50% time position and that her position had its "functions ... restricted and reduced to those of a ... lower classification" because of changes in level of supervision, responsibility, etc. She further alleges that another position is being created "which would perform publicist functions, including functions which were within the scope of [her] 75% Administrative Assistant 3 position." The Commission will discuss separately the legal validity of appellant's claims of constructive demotion, discharge and layoff

Initially, the fact that the employer has not formally denominated a personnel transaction as a disciplinary action does not mean that under certain circumstances it could not be cognizable as a constructive disciplinary action under §230.44(1)(c), Stats.,[1] see Watkins v. Milwaukee Co. Civil Service Comm., 88 Wis. 2d 411, 276 N.W. 2d 775 (1979); Mirandilla v. DVA, 82-189-PC (7/2183); Cohen v. DHSS, 84-0072-PC etc. (2/5/87).

In Cohen, the Commission held that the elements of a constructive demotion are:

> 1) "[A constructive] demotion does not occur unless the employe is assigned responsibilities that cause his (new) position to be classified at a lower level than the position he had held previously "
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> 2) "There also must be an intent by the appointing authority to cause this result and to effectively discipline the employe."

In the instant case, appellant alleges that her position was reduced from a 75% to a 50% position and its duties and responsibilities were substantially

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[1] "If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause."

reduced in terms of its supervision, difficulty and responsibility of its functions, the level of initiative and independent judgment required to perform the functions, and the scope or impact of those functions. She further alleges that as a result of those changes the effective classification level of the position has been reduced.

Section 230.03(11), Stats., defines "position" as "a group of duties and responsibilities ... which require the services of an employe on a part-time or full-time basis." If the duties and responsibilities of a position are changed substantially enough, this can result in the creation of a new position. See Chase v. DER, 85-0033-PC (3/13/86) (if there is more than a 50% change in the duties or responsibilities of a position under certain circumstances, this is considered the creation of a new position). Thus it would appear that there is present the first element of a constructive demotion under Cohen.

Respondent contends in this regard that the "appeal plainly fails to allege either (a) that Davis was moved to a different position as opposed to having her hours reduced in the same position — (b) that there was an ultimate determination that a position to which she was moved was different." However, appellant is asserting not only that her position was reduced from 75% time to 50%, but also that its duties and responsibilities were significantly changed. If she can make the appropriate showing at hearing, this could be equivalent to the creation of a new position to which she was moved. With respect to respondent's second point, it is not necessary that the appeal allege "there was an ultimate determination that a position to which she was moved was different." (emphasis supplied) Rather, this is something which appellant will attempt to establish at hearing — i.e., to try to persuade the Commission to make such a determination.

As to the second element, respondent contends that the appeal fails to allege any intent to discipline. Appellant takes the position that:

> The appeal repeatedly refers to the appellant's "demotion." It used the term of art defined by the Personnel Commission in Cohen, supra, to incorporate the concept and criteria articulated in that case of "constructive demotion" (paragraph 6). It also notes that the appellant had not been previously disciplined in any manner The clear implication is that the events and reduction in classification of her position described in the appeal were intended, although never clearly stated, as a disciplinary measure for performance deficits.

The Commission agrees that there is a sufficient allegation to satisfy the second element of Cohen, particularly given the liberality of pleading requirements in administrative proceedings of this nature. See, e.g., Oakley v. Comms. Securities, 78-66-PC (10/10/78).

Appellant's theory that this case involves a layoff has two bases. The first is the reduction in her position's hours from 75% to 50% of full time. Section ER-Pers 1.02(11), Wis. Adm. Code, defines "layoff" as: "the termination of services of an employe with permanent status in class from a position in a layoff group approved under s. ER-Pers 22.05, in which a reduction in force is to be accomplished." While appellant's position was not in an approved layoff group, this is not fatal to her contention that she was subjected to a de facto layoff. At the very least she has alleged a constructive layoff. If this rule were interpreted to require the existence of a layoff plan and the creation of a layoff group as an absolute requirement before a termination in services or the basis of a reduction in force could be considered a layoff, this would lead to the manifestly absurd result that an agency could eviscerate an employe's rights in a layoff situation under §§230.34, 230.44(1)(c), Stats., and Ch. ER-Pers 22, Wis. Adm. Code, by failing to comply with the requirement set forth in §ER-Pers 22.05 of preparing and obtaining approval for a layoff plan, and then arguing that there was no layoff because no layoff group had been established.

The more significant question is whether a permanent reduction in hours from 75% of full time to 50% of full time can be considered a "termination of services of an employe ... from a position." §ER-Pers 1.02(11), Wis. Adm. Code. "Terminate" is defined as "to end formally and definitely ... to discontinue the employment of." Webster's Third New International Dictionary, 2359 (1981). Since after such a reduction in hours as occurred here, the employe's services in the position have not been "terminated" but only reduced, it is difficult to perceive how this transaction satisfies the definition of a layoff.

Appellant argues that such a result "creates a second class civil service status for part-time permanent classified employes. The legislature cannot have intended or permitted the creation of such a status for part-time employes." However, general expressions of legislative policy are insufficient

to overcome the barrier erected by the plain language of §ER-Pers 1.02(11). Furthermore, this rule impacts not only part time positions, but also full time positions which might be reduced from 100% to 75%, for example. Also, part-time employes subject to layoff are covered by the layoff rules. See §ER-Pers 22.06(1), Wis. Adm. Code.

An additional difficulty with appellant's contention is that it would lead to questionable results in the context of a layoff situation governed by Ch. ER-Pers 22, Wis. Adm. Code, "LAYOFF PROCEDURE." For example, §ER-Pers 22.08(3), Wis. Adm. Code, provides: "Displacement. (a) If there is no position obtainable under subs. (1) and (2) at the same or higher level than any position obtainable under this subsection, an employe may exercise a right of displacement within the employing unit." There is nothing in the rules that would prevent an employe whose position is being reduced from 75% to 50% like appellant's, to exercise under certain circumstances the right of displacement to a position funded at a 100% level. This would lead to the anomalous result that an employe hired into a 75% position that is being reduced to 50% could obtain a 100% position by displacing or bumping an employe who had been hired on a full-time basis. Finally, the Commission notes that appellant has not cited any precedent for the proposition that the reduction from 75% to 50% employment amounts to a layoff, and the Commission is aware of none.

In addition to arguing that the reduction in hours constituted a layoff, appellant also contends that a new position actually was created and therefore a layoff would have been appropriate:

> Finally, the appeal does not allege merely that the appellant's position was reduced from 75 percent to 50 percent time. It also alleges that the position itself was eliminated by demoting it to a lower classification when responsible functions of the position were eliminated.
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> The only vacancy in the administrative assistant 3 classification when the appellant's position was reduced in hours and demoted was the half-time administrative assistant 3 position in the Wisconsin Public Telecommunications for Education Division. The respondent refused to transfer the appellant to that position.
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> "(A)n employee may not be involuntarily demoted or reduced in pay or position in lieu of layoff" Juech v. Weaver, 1/13/72, page 4

> In Oakley v. Commissioner of Securities, 78-66-PC, 4/19/79 the director of the bureau of personnel determined that a position was reduced in classification from securities examiner 4 to security examiner 3 because of a reorganization and ordered that the reallocation of the position to security examiner 3 be rescinded and that the position be restored to security examiner 4. The director required the agency to accomplish the elimination of the security examiner 4 position by following the layoff procedure. That is precisely what the appellant alleges should have been done in this case.

If, as appellant alleges, the duties and responsibilities of her position were changed so drastically that in effect her position was eliminated and a new position was created at a lower classification level, then it apparently would follow that she would have been a surplus AA 3 subject to layoff and to the exercise of her transfer rights to the AA 3 vacancy pursuant to §ER-Pers 22.08(1), Wis. Adm. Code. Under such circumstances, a reallocation would not be appropriate because presumably there would have been neither "[a] logical change in the duties and responsibilities of a position," §ER 3.01(2)(f), Wis. Adm. Code, nor any of the other bases for a reallocation under that subsection. Also, a reclassification would not have been appropriate because presumably there would not have been "a logical and gradual change to the duties and responsibilities of a position," §ER 3.01(3), Wis. Adm. Code. Rather, there would have been a "reduction in work force," §ER-Pers 22.03(1), Wis. Adm. Code, at the AA 3 level. Therefore, appellant alleges what could be characterized as a constructive demotion in lieu of layoff which was without just cause — i.e., that respondent did not follow the layoff procedures required by Ch. ER-Pers 22, Wis. Adm. Code. See Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 237 N.W 2d 183(1976).[2]

Finally, appellant alleges she was discharged without just cause. Since respondent did not terminate her employment entirely, there is no basis to characterize the transaction as some form of discharge.

ORDER

Respondent's motion to dismiss for failure to state a claim, filed February 10, 1992, is granted in part and denied in part. So much of this

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[2] This type of constructive demotion is distinguishable from the Cohen type, which is a constructive demotion of a disciplinary nature.

appeal as purports to be with respect to a discharge and with respect to a layoff based on a reduction in her employment from 75% to 50%, is dismissed for failure to state a claim. The Commission will retain jurisdiction over this appeal with respect to the allegations that appellant was constructively disciplinarily demoted without just cause and that she was constructively demoted in lieu of layoff without just cause.

Dated: May 14, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner