STATE OF WISCONSIN PERSONNEL COMMISSION

GARY E. WHITLEY,

Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 92-0080-PC-ER

RULING ON MOTION

This matter is before the Commission on respondent's motion, filed June 30, 1993, to give preclusive effect to a recent arbitration award concerning the contractual grievance of complainant's discharge. The Commission previously ruled on respondent's earlier motions in limine which had been based on the same ground. At the time of that decision, the arbitration had been held, but the award had not yet been issued. In its decision, the Commission stated that because "the arbitrator has not yet issued his findings and award, there is no way the Commission can determine whether the prerequisites for the application of collateral estoppel to any extent is appropriate, and this part of the motion must be denied." The Commission will not reiterate the background material set forth in its earlier decision, but will address the issue of collateral estoppel in the context of the now available arbitration award.

The arbitrator discusses at length the credibility of the complainant and the complaining witness against him with respect to the incident for which he was arrested and charged, and concludes that her testimony was more credible and that the event occurred as she testified. The arbitrator further concluded that there was a sufficient nexus between complainant's conduct on the night in question and the nature of his work as a probation and parole agent to provide a basis in just cause for the discharge. The arbitrator addressed complainant's argument that he was treated more severely than other employes as follows:

> The Union argues that the severity of discipline against the Grievant was extreme, citing numerous cases where other State of Wisconsin employees were found guilty of violating Work Rule #5 and were not discharged. The Arbitrator has reviewed all of those cases in detail, and finds that none of them are persuasive. None of them involved conduct as severe as that displayed by the Grievant on the morning in question. Most of them did not involve Probation and Parole Agents. Some of them did not meet the "nexus" test. And some of them presented mitigating circumstances (mental illness, for example) which justified a penalty less than discharge. There were no mitigating circumstances in the instant case.

Pursuant to the doctrine of collateral estoppel, a decision on the merits in a prior proceeding between the same parties[1] "precludes litigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." Crowall v. Heritage Mut. Ins. Co., 118 Wis. 2d 120, 123, n. 1, 346 N.W. 2d 327 (Ct. App. 1984), citing Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955). Collateral estoppel only applies "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." Crowall, 118 Wis. 2d at 125-126 (citations and footnote omitted). Also, the party against whom collateral estoppel is applied must have had "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time," Crowall, 118 Wis. 2d at 126 (citations omitted), which includes a reasonable incentive to have litigated the issues in question in the first proceeding.

Respondent's renewed motion initially: "asks the Commission to find that the findings of the arbitrator superseded the need for a hearing." This must be denied because of the requirement that "the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." Crowall, 118 Wis. 2d at 125-126.[2] The award did not address the issue of race or arrest record discrimination, and there is nothing to suggest

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[1] In certain circumstances, the parties do not need to be identical, see Kichefski v. American Fam. Mut. Inc., 132 Wis. 2d 74, 78-79, 390 N.W. 2d 76 (Ct. App 1986).

[2] To the extent that this part of the motion is premised on the related doctrine of res judicata rather than collateral estoppel, it also would be denied.

that this would have even been possible under the contract in question.[3]

Respondent, in the alternative, seeks a determination that the arbitrator's findings "have preclusive effect upon the commission based on he doctrine of issue preclusion." The problem with applying issue preclusion to the arbitrator's more general findings, i.e., that there was just cause for the discharge, that there was a nexus between complainant's actions and the demands of his job, and that the discipline was not excessive when compared to other employes, is that it is not possible, at least on this record, to disentangle these more or less general findings from the ground that complainant presumably will be trying to cover in attempting to prove that his discharge involved discrimination on the basis of race and arrest record, issues which were not involved in the arbitration. The Commission addressed a similar point in Keller v. UWM, 90-0140-PC-ER (3/19/93), where it declined to give preclusive effect to an arbitrator's just cause conclusion, in reliance on Becton v. Detroit Terminal, 687 F. 2d 140, 29 FEP Cases 1078 (6th Cir. 1982):

> This is an impractical and excessively narrow application of Gardner-Denver. The District Court's distinction between the plaintiff's discharge on the one hand and his discrimination claim on the other attempts to draw a bright line in an area where there is actually considerable overlap. There is no realistic way to sever the discharge from the claim of discrimination because, according to the plaintiff, the discharge is the discrimination. An analysis of one must include consideration of the other because both involve the same operative facts. They cannot be considered in isolation from one another. Inasmuch as "just cause" or similar contract questions are an integral part of many discrimination claims, the better rule avoids judicial efforts to separate and classify evidence offered by the plaintiff under the heading of "discrimination" or "just cause." In our view, Gardner-Denver should not be read as a restriction on the extent to which a Title VII or section 1983 claimant is entitled to develop his evidence of discrimination. (footnote omitted)

29 FEP Cases at 1079-80. Similarly, in the instant case, it can be said that, from complainant's perspective, "the discharge is the discrimination." id.

With respect to the arbitrator's more specific findings apart from the findings as to the personnel transaction per se, e.g., what happened during the early morning hours of October 4, 1991, there is some question as to the

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[3] None of the contract provisions cited by the arbitrator involved discrimination on the basis of race or arrest record.

applicability of collateral estoppel. In Crowall, the Court referred to "the generally stated rule" that "collateral estoppel precludes relitigation of any issue of ultimate fact previously determined . . . " (emphasis added, citation omitted).[4] The Commission does not need to attempt to resolve this question, because it essentially has been rendered moot by the Commission's earlier ruling on respondent's motion in limine.

Finally it should be noted that the arbitration award and record may be used in evidence pursuant to the holding of Dohve v. DOT, 84-0100-PC-ER (11/3/88), citing Becton v. Detroit Terminal, 687 F. 2d 140, 29 FEP Cases 1078, 1080 (6th Cir. 1982):

> We do not hold that the arbitration decision is without significance. Certainly the court may consider the arbitration decision as persuasive evidence that the grounds found by the arbitrator to be just cause for discharge under the collective bargaining agreement are sufficient to amount to just cause. The court should defer to the arbitrator's construction of the contract. Moreover, an arbitration decision in favor of the employer is sufficient to carry the employer's burden of articulating "some legitimate, nondiscriminatory reason for the employee's rejection." However, to allow that decision to answer conclusively questions raised in the final step of the McDonnel Douglas analysis unnecessarily limits the plaintiff's opportunity to vindicate his statutory and constitutional rights. (citations omitted)

ORDER

Respondent's motion filed June 30, 1993, is denied.

Dated: July 9, 1993 STATE PERSONNEL COMMISSION

Laurie R McCallum/jms
LAURIE R. McCALLUM, Chairperson

AJT:rcr

Judy M Rogers
JUDY M. ROGERS, Commissioner

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[4] In 46 Am Jur 2d Judgments §425, it is noted that "difficulty is experienced in attempting to define the exact meaning of what is an ultimate, as distinguished from an evidentiary fact, for the purposes of the rule ... There is . . . a line of cases in which . . . the courts treat as an ultimate fact only what was, in fact, the final issue between the parties, as ascertained from their pleadings . . . treating as evidentiary any fact from which the ultimate fact is derived. (footnotes omitted)