STATE OF WISCONSIN PERSONNEL COMMISSION

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GERALDINE CROSS-MADSEN et al.,

Appellants,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison), and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 92-0828-PC

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RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss on the grounds of lack of subject matter jurisdiction generally, the supersedance of subject matter jurisdiction pursuant to §111.93(3), Stats., and untimely filing. The parties have filed briefs.

In deciding a motion of this nature, the factual allegations of appellants' appeal must be accepted as true, and the appeal must be liberally construed. However, the Commission need not accept either legal conclusions or unreasonable inferences. See Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89; affirmed, Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205 482 N.W. 2d 121 (Ct. App. 1992). Therefore, for purposes of deciding this motion, the Commission will accept the following allegations from the appeal, which was filed on November 19, 1992, along with certain other underlying factual matters that do not appear to be in dispute.

> 1. Geraldine Cross-Madsen ("Cross") is currently employed at University of Wisconsin Hospital and Clinics ("UWHC") in Madison, Wisconsin. She holds the position of Nurse-Clinician 2.
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> 2. Cross had permanent status in class as a Nurse-Clinician II when she voluntarily left state service in 1989. Cross subsequently was employed by St. Mary's Hospital in Madison, Wisconsin.
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> 3. Late in 1991, Cross had discussions with Alice Ann Friedrichs, a Nurse Recruiter for UWHC about being reinstated to service at UWHC. Friedrichs urged Cross to return to employment at the UW Hospital System, and promised her that her rate of pay would be as though she had had no break in state employment, and would include all pay adjustments, including all increases resulting from past or on-going collective bargaining.

4. In reliance upon these assurances, Cross was induced to leave her employment at St. Mary's and to ask to be reinstated at UWHC.

5. Cross was reinstated to employment at UWHC on or about January 6, 1992.

6. In approximately April of 1992, Cross contacted the Personnel office at UWHC to complain that her pay check apparently did not include all intervening pay adjustments since her severance from state employment, including negotiated increases. Cross was assured that an error had been made and that she would be receiving all pay adjustments, including negotiated pay adjustments.

7. For the next several months, Cross continued to contact various agents of the UW Hospital to correct the error in pay rate. She was repeatedly assured by hospital agents, including Becky Murphy, Joan Provencher, Phil Moss, Sharon Trimborn, and Renae Bugee, that the low pay rate was an error and would be corrected.

8. Ruth Robarts, the Executive Director of 1199W/United Professionals for Quality Health Care ("1199W/UP"), the collective bargaining agent for patient care employees, also contacted hospital agents and the Department of Employment Relations (DER) to correct the problem of an erroneous rate of pay. Robarts was also assured by agents of UWHC that the lower rate of pay was an error that would be corrected.

9. On or about October 19, 1992, Renae Bugee informed Robarts that DER had informed Bugge that the UW Systems could not increase the base pay rate of Cross and other employees reinstated about 6/30/91 to include negotiated pay increases, and that the UW Systems would not correct the pay rate of Cross and other employees reinstated after 6/30/91.

10. This appeal affects a number of other employees at UWHC, including, but not limited to, Jacalyn Friar, Lowell Anderson-Reitz, Patricia Harrsch, Susan Payne-Smith, Carmen E. Gale, Penney L.M. Wetherbee, Annette C. Henry, Janis J. Boxwell, Lisa M. Rogers, Jane M. Cornwall, Mary T. Ross, Dorothy M. Givneski, Sherry A. Holden, Janet K. Kohnke, Deborah R. Anderson, Sandra L. Norton, Kathleen A. Drake, Michael R. Garske, Tina M. King, Jamie L. Young, Mary J. Edge, Lori Jo Donovan, Teresa Cramer-McDonald, Maureen E. Midthun, Susan L. Adib, Wendolyn L. Mutunhu, Cheryl E. Hansell, Julie A. Haas, and Susan R. Seidenberg.

11. Upon information and belief, each of the employees noted in the above paragraph share the following common characteristics:

a. Each had permanent status as either a Nurse-Clinicians 1, 2 or 3 when she/he voluntarily left state employment;

b. Each requested and was granted reinstatement by the University of Wisconsin System between 6/30/91 and the date of this complaint;

c. Agents of the UWHC informed these individuals that their pay on reinstatement would be equal to the last rate of pay they received plus all intervening compensation adjustments, including those reached in collective bargaining;

d. Each relied on the assurances made by the UWHC agent in deciding to return to employment with the UWHC;

> e. Since being reinstated, each has been paid at a rate which does not reflect all rate increases generally implemented since their initial severance from employment; and
> f. Each has suffered monetary damages because of the above-described actions.

In addition to the foregoing allegations from the appeal, the Commission also will consider the collective bargaining agreement between the United Professionals for Quality Health Care and the State, effective April 4, 1992, to June 30, 1993, which was submitted as an attachment to respondent's brief.[1]

The first issue presented by this motion is whether the subject matter of this appeal falls within the Commission's jurisdiction under §230.44(1)(d), Stats., which makes appealable a: "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion." Respondent contends that this case does not involve subject matter appealable pursuant to §230.44(1)(d) because the appeal does not involve pay on appointment, which is cognizable, see Taddey v. DHSS, 86-0156-PC (6/11/87), but rather it involves an adjustment to salary which occurred (or should have occurred) several months after the initial appointment, and hence was not "related to the hiring process," §230.44(1)(d).

Before addressing this issue, it must be noted this appeal is on behalf of multiple appellants, all of whom are not similarly situated. Appellants assert in their brief at page five, note one:

> Contrary to respondent's assertion that there is no dispute over appellants' starting rate of pay, there is a major dispute over the appellants' rate of pay, which falls into two categories. The appeal identifies 29 named appellants who were reinstated at various points between June 30, 1991 through November 12, 1992, the date the appeal was filed. Thus, some appellants were reinstated with the promise of future increases to their reinstatement wage, and some were promised that their immediate reinstatement wage would include the negotiated increases. For those employees who were reinstated prior to the final negotiated increases negotiated in February, 1992 and implemented in April, 1992, there is a dispute because they were promised that their starting rate was only a tentative, interim rate that would be adjusted as

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[1] Article V, Section 1 ("Wage Adjustment") of the agreement includes certain adjustments to the June 30, 1991, base wage rates of certain employes, a market adjustment to the base wage rates for certain employes, and a step adjustment to base wage rates for all covered employes all effective the first day of the pay period following the effective date of the agreement (April 4, 1992), and a one-time lump sum payment calculated on the basis of the eligible employe's base wage rate on June 30, 1991, and the number of hours in pay status between June 30, 1991, and the effective date of the agreement.

> soon as the negotiated wage adjustments were known. For those employees who were reinstated after the negotiated wage increases were known, the dispute involves their actual starting rate upon reinstatement.

Therefore, there are two categories of appellants. Some appellants, like Ms. Cross-Madsen, were reinstated pursuant to the representation that their salary eventually "would be adjusted as soon as the negotiated wage adjustments were known." The other appellants were reinstated after the negotiated increases, and pursuant to the employer's representation that their actual salary on reinstatement would include the wage increases that already had been negotiated. Respondent's initial ground (that there is no jurisdiction over a salary transaction which occurred after the determination and implementation of starting salary) does not run to the second group of appellants (who actually were promised the negotiated increase as part of their starting salary on reinstatement).

With respect to the first group of employees, there is a substantial question whether the Commission has subject matter jurisdiction under §230.44(1)(d). See Board of Regents v. Wis. Pers. Commn., 103 Wis. 2d 545, 558-60, 309 N.W. 2d 366 (Ct. App. 1981) (hiring process for purposes of §230.44(1)(d) has been completed once the employe has been hired and thereby attains probationary status); Meschefske v. DHSS, 88-0057-PC (7/13/88) (letter of appointment referred to both starting salary and salary upon completion of probation; while Commission has §230.44(1)(d) jurisdiction over starting salary, it has no jurisdiction over salary on completion of probation, which is not related to the hiring process). However, this issue does not need to be addressed because any jurisdiction the Commission might have over the transaction in question is superseded by operation of §111.93(3), Stats. This subsection provides in pertinent part:

> [I]f a collective bargaining agreement exists ... the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes ... related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes ... are set forth in the collective bargaining agreement.

Looking first at Ms. Cross-Madsen and the other employes who are similarly situated, applicability of §111.93(3) turns on how the transaction in question in this case is conceptualized. If the employer's action in this case is characterized as a promise made during the hiring process about a future

personnel transaction concerning salary that would occur once the then-ongoing negotiations were completed and the collective bargaining agreement effectuated, it seems clear that §111.93(3) would have an overriding effect. The collective bargaining agreement sets forth both the amounts of the adjustments in question and the conditions under which they are applicable. These matters involve wage rates, a mandatory subject of bargaining, §111.93(1)(a), Stats. Therefore, even assuming, arguendo, that the subject matter of this appeal constitutes a "personnel action after certification related to the hiring process in the classified service," §230.44(1)(d), and that the Commission would have subject matter jurisdiction in the first instance, then the use of §230.44(1)(d) in this manner would relate to "wages," as used in §111.93(3), because this appeal then would be used as a vehicle for Commission review of a decision made by the employer as to the applicability of a wage adjustment provision contained in a collective bargaining agreement to an employe covered by that collective bargaining agreement. However, the exclusive means of reviewing this kind of salary decision is statutorily lodged in the contractual grievance/arbitration procedure. §§111.86, 111.91, Stats.

Appellant contends that §111.93(3) does not control this appeal because it involves the question of starting salary upon reinstatement, which is not a bargainable matter, and which is not covered by the collective bargaining agreement. Ms. Cross-Madsen was reinstated on January 6, 1992. However, management's salary representation at issue here did not concern Ms. Cross-Madsen's salary upon her January 6, 1992, reinstatement, but her future salary as would be effected by then ongoing negotiations.[2] The only way that management's representations regarding negotiated salary increases could be viewed as concerning appellant's starting salary is that it appears from the collective bargaining agreement that it contains a provision for retroactivity to the date of the expiration of the prior agreement (June 30, 1991) via a lump sum payment.[3] However, it would take an overly-strained interpretation of the notion of starting salary to view management's representation prior to reinstatement that her salary would include "all increases resulting from past

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[2] It is undisputed that the effective date of the collective bargaining agreement was April 4, 1992. Appellant asserts in her brief (page five, note one) that the provisions in question were negotiated in February 1992.

[3] Some of the provisions for the "lump sum wage payment," Art. V, Sec. 1.C., could be interpreted as applying only to employes who were employed on June 30, 1991, which could explain at least part of the source of this dispute concerning eligibility for payment.

or on-going collective bargaining" (appeal, paragraph three) (emphasis added) as a representation as to starting salary, when at the time of this representation negotiations were ongoing, and the collective bargaining agreement, which contained the aforesaid provision concerning a lump-sum payment, had been neither finalized nor effectuated. Therefore, the Commission concludes that §111.93(3) supersedes any possible §230.44(1)(d) jurisdiction over so much of this appeal as relates to Ms. Cross-Madsen and the other employes in the first group who are similarly-situated -- i.e., those who were reinstated without a representation that their actually starting salaries on the effective date of reinstatement would include the already negotiated increases. However, this appeal is not precluded by §111.93(3) as to the second group of employes.

As noted above, §ER 29.03(6)(c)1. gives the appointing authority a certain amount of discretion with respect to the establishment of salary on reinstatement, and the relevant collective bargaining agreement does not cover this subject. That the employer may have utilized the compensation provisions of the UPQHC/State collective bargaining agreement for a representation as to starting salary as part of a job offer does not change this result. In the context of the facts the Commission must assume in deciding this motion, the employer's action of utilizing the salary amount contained in this contract provision in its job offers is no different for purposes of §111.93(3) preclusivity from a situation where the employer bases an employment offer on a wage rate established by a contract between a union and a private sector employer competitive in the same labor market.

Finally, as to respondent's arguments on untimely filing, the Commission does not have an adequate factual basis for addressing this issue. With respect to Ms. Cross-Madsen and the other appellants in the first group whose appeals are not cognizable by this Commission in any event, there is no need to address this issue further. However, as to the other appellants, it will be necessary either to develop a factual stipulation or to convene an evidentiary hearing to provide an appropriate record for this part of respondent's motion.

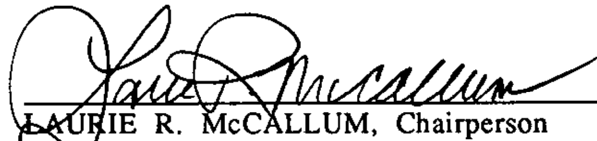
ORDER

Respondent's motion to dismiss will be granted in part and denied in part, and the appeal of Ms. Cross-Madsen will be dismissed pursuant to

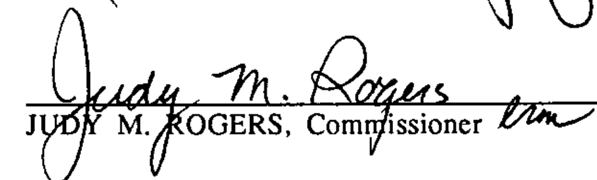
§111.93(3), Stats., for lack of subject matter jurisdiction.[4] Inasmuch as the factual record before the Commission is inadequate to determine whether the Commission has subject matter jurisdiction with respect to the remaining appellants, and whether the appeal was timely as to them, further proceedings will be held to develop such a record. Opposing counsel are directed to consult to determine whether some or all of these facts can be stipulated, and to advise the Commission within 30 days of the date of service of this order as to the status of these consultations. The Commission then will entertain further proceedings to resolve the remaining issues presented by this motion and not resolved by this ruling.

Dated: July 30, 1993

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

AJT:rcr

Cross-Madsen Ruling/2

[4] In order to avoid the potential for piecemeal litigation, the Commission will not dismiss Ms. Cross-Madsen's appeal at this time, but will defer doing so until all of the appellants similarly situated have been identified, at which time all will be dismissed.