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STAN MADAY, JR.,

Appellant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 92-0838-PC

* * * * *

RULING
ON
MOTION
TO DISMISS
AS MOOT

This appeal of the effective date of a reclassification from CO 1 (Correctional Officer 1) to CO 2 is before the Commission on respondent's motion to dismiss on the ground of mootness, filed May 10, 1993.

The appeal alleges that the effective date of appellant's reclassification to CO 2 was delayed because of 59.45 hours leave in connection with a hazardous employment injury, pursuant to §230.36, Stats. The issue for hearing was stipulated to be: "Whether respondent's decision to establish October 26, 1992, as the effective date for reclassification of appellant's position from Officer 1 to Officer 2 was correct." (Conference report dated April 9, 1993). In a letter filed may 10, 1993, respondent asserts:

The Department of Corrections has determined that, given the facts in this case, the hours of leave taken by Appellant under s. 230.36, Stats should not have delayed his reclassification to Officer 2.

Accordingly, the Department will credit the Appellant with 59.45 hours and correct the effective date of his reclassification.

Since the issue raised by Appellant's appeal is now moot, the Respondents, by copy of this letter to the Personnel Commission, move to dismiss the above captioned appeal.

In response to the motion to dismiss, appellant asserts he "has the right to know whether the Civil Service Act was violated," and "in light of the decision in the Supreme Court in Watkins v. ILHR Department, 69 Wis. 2d 782 (1975), mootness is no longer a viable basis for dismissal before Administrative agencies."

This case is essentially controlled by Parrish v. UWM, 84-0163-PC (12/6/84), which involved an appeal of a grievance concerning the denial of representation at the third step in the grievance process. The appellant had since left employment by the respondent. The Commission discussed the issue of mootness as follows:

The definition of mootness to be applied in this case is as set forth in Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union, 252 Wis. 436, 440, 31 NW 2d 772, 32 NW 2d 190 (1948):

A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

The respondent in the present case presumably is claiming that a determination of the appellant's grievance "cannot have any practical legal effect upon the existing controversy."

In Watkins v. ILHR Department, 69 Wis. 2d 782, 233 NW 2d 360 (1975), the Court held that a discrimination complaint filed against complainant's employer and union was not moot. Ms. Watkins, who is black, was hired in 1968 as a "basic zone case worker" for Milwaukee County. In 1969, Ms. Watkins and her co-workers were asked if they wished to become "service zone caseworkers" which involved a reduced caseload but no change in pay. Ms. Watkins indicated that she was interested in such a position. After not being appointed to any of several service zone vacancies, Ms. Watkins filed a racial discrimination complaint in 1971 and five months later, before a hearing on the complaint had been held, she was transferred to a service zone position. The Court reasoned:

Watkins is still employed by the same employer that had allegedly discriminated against her on the basis of race, and she is also still a member of the same union. It cannot be said that, if discrimination is found, an order of DILHR would be useless. DILHR can order, as the hearing examiner recommended, that Watkins be considered for all future transfers on the basis of her qualifications and ability, and without regard to race. A similar order can be made requiring the union to process Watkins' grievances without regard to her race, if it is found that the union has discriminated. Such orders would have a practical, legal effect upon the relation of the parties to this case. 69 Wis. 2d 782, 796.

In the subsequent case of State ex rel. Ellenburg v. Gagnon, 76 Wis. 2d 532, 251 NW 2d 773 (1977), the Court applied the definition of mootness to facts analogous to those before the Commission. Mr.

Ellenburg, while an inmate at a state prison, had alleged wrongdoing by certain prison employees and filed a complaint with the warden. After a staff investigation had concluded that the allegations were unfounded, Mr. Ellenburg was found to have violated an institution rule stating: "No man shall in any way communicate false information to anyone knowing the same to be untrue." As a result, Mr. Ellenburg was given seven days of isolation confinement and lost three days of good time. He sought to have the rule, the discipline and the disciplinary procedure reviewed. The Supreme Court held:

We conclude that all issues are now moot and that the appeal should be dismissed.

At the time of oral argument the appellant, Paul R. Ellenburg, was no longer an inmate of any Wisconsin correctional institution and not subject to institutional disciplinary rules. He had been released on parole. Because he is on parole, a decision of this court could in no manner affect the provision for institutionalized isolation. At this stage nothing this court could do would affect the isolation one way or the other. As to the loss of three days good time, whether it was taken or not, is de minimis. Ellenburg was serving an eleven-year sentence -- three days is de minimus. 76 Wis. 2d 532, 535.

In the present case, the appellant is no longer employed by respondent UW-Milwaukee. Any ruling by the Commission at the fourth step of the grievance procedure could not affect the appellant's current or past working conditions. Unless the appellant was to be reemployed by the respondent sometime in the future, the circumstances that generated the appeal could not recur. These facts are readily distinguishable from those in Watkins (supra), where the complainant was still employed by the same employer, still represented by the same union and in a position to be affected by future transfer decisions. In State ex rel. Ellenburg (supra), the mere possibility that Mr. Ellenburg would again be incarcerated and again be disciplined for violating the false communication rule was apparently not enough for the Court to change its conclusion. For the same reason, the instant case meets the definition of mootness. (footnote omitted)

In the instant case, appellant apparently will be granted the effective date he is seeking. Since he is already at the CO 2 class level, there is no reason to think he will ever encounter this issue again. Therefore, a Commission ruling, as in Parrish, could not affect appellant's working conditions in any way, now or in the future. In Watkins, the Court noted that DILHR could issue orders that would affect complainant's treatment in the future. The Commission also observes that Watkins involved a race discrimination charge under the Fair Employment Act (FEA). The Watkins decision rests to some extent on policy factors concerning the FEA that are not equivalent here, a case involving a personnel transaction that turns on a more or less technical

question of an employe's status for reclassification purposes while on §230.36 leave.

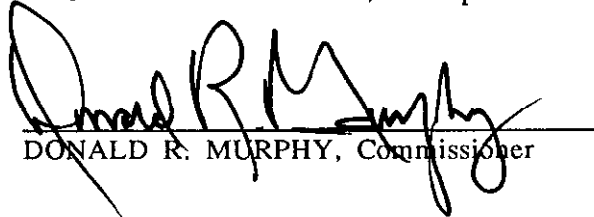
ORDER

Respondent's motion to dismiss is granted based on the conclusion that this case is moot. The Commission will retain jurisdiction over this matter pending receipt of copies of the paperwork involved in the reclassification transaction. Appellant will have 20 days to raise any objection after such filing by respondent. If there is no meritorious objection, the Commission then will enter a final order dismissing this appeal.

Dated: June 23, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner