STATE OF WISCONSIN PERSONNEL COMMISSION

GEORGE KRASNY,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 94-0036-PC

RULING ON MOTION TO DISMISS

This §230.44(1)(c), stats., appeal of a suspension is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction.

The file reflects that Mr. Krasny was suspended for three days -- March 23, 24 and 25, 1994 -- via a letter dated March 8, 1994. The specifications against Mr. Krasny were summarized in the letter imposing the suspension as follows: "you are found to be negligent in the handling of important documents associated with your area of responsibility during the time you were there." (emphasis added).

The underscored language runs to the basis of respondent's motion. It appears to be undisputed that, as the Institution Registrar when the alleged negligence occurred, Mr. Krasny was a represented employe. However, he (apparently voluntarily) demoted to an unrepresented position on or about October 16, 1993, which was prior to the imposition of the discipline. The Commission's jurisdiction pursuant to §230.44(1)(c), stats., over disciplinary actions, is supplanted with respect to represented employes pursuant to §111.93(3), stats., which provides, inter alia:

> [I]f a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service...statutes...related to wages, fringe benefits, hours and conditions of employment.

Respondent contends that because appellant was represented at the time of the alleged performance deficiencies, §111.93(3) operates to supersede the Commission's jurisdiction.

It is undisputed that at the time the subject personnel transaction was effected by the employer, complainant was unrepresented -- i.e., he was not a member of a collective bargaining unit with respect to which a collective bargaining agreement was in existence, as set forth in §111.93(3), stats. Appellant's statutory right to appeal runs to the occurrence of the personnel transaction. Section 230.44(1)(c), stats., provides: "the employe may appeal a... suspension... to the Commission." (emphasis added). Section 230.44 (3), stats., provides that appeals must be filed "within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action." (emphasis added). There is no reference to the occurrence of the underlying misconduct, and the employe has no right to appeal until the personnel transaction occurs.

The structure that §111.93(3), stats., provides is that the "provisions of that [collective bargaining] agreement shall supersede the provisions of civil service...statutes... related to wages, fringe benefits, hours and conditions of employment." (emphasis added). The "condition of employment" involved in this case is the suspension. This personnel transaction was effectuated when appellant was not subject to a collective bargaining agreement. For these reasons, it appears the motion must be denied on the basis of the plain language of the statutes involved.

Furthermore this conclusion is consistent with somewhat similar results reached in labor law disputes over arbitrability. For example, in General Telephone Co. of Cal. v. Communications Workers of America, 402 F.2d 255, 256 (9th Cir. 1968) (per curiam), the court addressed the question of whether the employer was required to submit to arbitration a grievance concerning the discharge of a supervisor for misconduct occurring both before and after his promotion from the rank and file to a position in management. The Court held that:

> [A] party cannot be compelled to arbitrate a dispute which is outside the area encompassed by the arbitration agreement. Here, the agreement to arbitrate did not include disciplinary procedures against a supervisory employe for acts after he became part of management. As stated, at least one of the reasons given for the employe's discharge was in this category. The fact that another reason involved conduct prior to his elevation to management is of no significance. To hold otherwise, would be to rewrite the contract between the parties.

C.f. Boeing Co. v. Intl. Assn. of Machinists and Aerospace Workers, AFL-CIO, 381 F.2d 119 (5th Cir. 1967) (arbitration of discharges required notwithstanding

that underlying misconduct occurred during a strike subsequent to the expiration of the old contract and prior to the effective date of the new contract; focus was on when the act (discharge) which is the basis for the grievance occurred, not the underlying misconduct). Also, in the instant case, the dispute concerns the question of which forum will consider the issue of just cause for appellant's suspension. There has been no contention that this case involves a right that vested under the contract. C.f. General Drivers and Helpers Union, Local 662 v. Wisconsin Employment Relations Board, 21 Wis. 2d 242, 124 N.W. 2d 123 (1963) (where right to earned vacation pay under the contract had vested when the contract expired, right of employes to their vacation pay survived expiration of contract).

Respondent contends that the resolution of this motion is affected by a letter dated May 31, 1995, in which, respondent argues, appellant's counsel in essence admitted the contract was controlling when he requested that the disciplinary letter be removed from appellant's personnel file pursuant to a provision in the WSEU contract. Alternatively respondent asserts that this contention estops appellant from arguing that the contract does not apply with respect to the instant appeal.

Appellant's contention that the contract applies with respect to the removal of the disciplinary letter from his file may be inconsistent with his contention before this Commission that the contract does not apply with respect to his suspension. However, it does not follow that this should lead to the dismissal of this appeal. Based on the undisputed facts and the Commission's view of the law, this agency has subject matter jurisdiction over this appeal of the suspension. That appellant made a contention to his employer regarding the bearing of the contract on a different subject matter (the removal of the disciplinary letter form his personnel file) is not an appropriate basis for dismissing this appeal. Even in a civil judicial proceeding "[a] party may also state as many separate claims or defenses as the party has regardless of consistency." §802.02(5), stats. The Commission can not perceive how an appellant could be barred from proceeding with an appeal before this agency because of a potentially inconsistent legal assertion made to the employer, and not before this Commission.[1] C.f. State v. Fleming,

---

[1] The Commission notes in this regard that the employer's letter imposing the suspension instructed appellant that "Sections 230.44(1) and (3) Wisconsin Statutes provides that you are entitled to appeal this action to the State Personnel Commission." That position is of course exactly the opposite of respondent's position on this motion.

181 Wis. 2d 546, 558, 510 N.W. 2d 837 (Ct. App. 1993) ("judicial estoppel is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution from the perversion of judicial machinery").

ORDER

Respondent's motion to dismiss based upon lack of jurisdiction is denied.

Dated: November 17, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:bjn

JUDY M. ROGERS, Commissioner