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(DEANNA)
DONNA L. WILSON,

Appellant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case Nos. 94-0065-PC

* * * * *

DECISION
AND
ORDER

The Department of Corrections (DOC) filed a Motion to Dismiss with written arguments on May 24, 1994. DOC claimed in the motion that the Commission lacked jurisdiction to hear the above-noted appeal which DOC contends involves the discharge of a probationary employe.

The Commission, by memo dated May 26, 1994, established a briefing schedule. Ms. Wilson's brief was filed by her attorney on June 20, 1994, by letter dated June 16, 1994. DOC, by letter dated June 17, 1994, informed the Commission that respondent chose not to file a response brief.

BACKGROUND INFORMATION

- 1. Ms. Wilson filed her appeal on May 6, 1994, by letter dated May 5, 1994, stating in pertinent part as follows:

... I was a Correctional Officer 1 at Racine Correction Institution, date hired by the Department of Corrections was August 23, 1993. I was discharged on April 7, 1994.

I am appealing this discharge action of April 7, 1994.

I was wrongly accused of violating the "Fraternization Policy" and unjustifiably discharged. According to my discharge paper they claimed to have discharged me for failing to meet probationary standards. They also claim that I violated the "Fraternization Policy" by willfully participating in inappropriate behavior with two inmates in the Washington unit at Racine Correctional Institution. Those accusations are 100% untrue.

* * *

Under the direction of my unit Sergeant and the third shift Captain, I wrote an incident report detailing comments made by two inmates and a conversation they were having together that I walked in on. That conversation pertained to claims by them that they supposedly had relationships in the past with female officers. ...

Over a week after writing this incident report, I was served a letter stating I was to participate in an investigatory interview. I assumed it was in regards to the incident report I had filed, but to my surprise the investigation turned out to be for charge against me for violation of work rules. Prior to this time, I was never informed that I was doing anything wrong, and suddenly "I" was accused of violating the "Fraternization Policy" and I was discharged.

I believe that both inmates in question were found to have lied about me in the incident resulting in my termination.

...I am formally appealing Racine Correctional Institution's decision to discharge me. I was discharged without just cause and in violation of my due process rights.

The Commission assigned Case number 94-0065-PC to this allegation, which is the subject of DOC's current Motion to Dismiss.

2. Ms. Wilson's appeal letter referenced in the prior paragraph also included allegations that her discharge was "discriminatory as well as simply wrong". She goes on to describe allegations of discrimination based on gender, retaliation for taking leave under the Family Medical Leave Act¹ and handicap. The Commission assigned case number 94-0079-PC-ER to these claims. These claims are not included in DOC's present Motion to Dismiss.
3. DOC alleged in its Answer to the charge of discrimination filed in case number 94-0079-PC-ER, as follows:

The termination letter, dated April 7, 1994 correctly identifies the conduct which resulted in termination. Witness statements establish that the Complainant discussed her personal

¹ By letter dated June 16, 1994, Ms. Wilson's attorney notified the Commission that Ms. Wilson "concedes that the FMLA is not applicable to her situation. She formally confirms her withdrawal of that aspect of her complaint."

finances with inmates and failed to report inmate misconduct, including requests or solicitations for sexual favors. Witness statements also establish that [Ms. Wilson] met with inmates in a laundry room with the lights out and lied about having done it.

4. Ms. Wilson was hired by DOC as an Officer 1, starting on August 23, 1993.
5. Ms. Wilson received formal notice of her hire by letter dated August 5, 1993. The letter was signed by Pamela J. Brandon, Administrator of DOC's Division of Management Services. The letter included the following information:

When an employe is hired into State Civil Service, his/her salary is set at the minimum of the pay range in which he/she is hired. Your salary will be \$8.763 per hour with a \$.264 increase after six months. After completion of the seven-week preservice training program, you will be required to complete an additional six month probationary period. Upon successful completion of your probationary period, you will attain permanent status in your classification. ...

6. Based on the information in the letter of hire (as noted in the prior paragraph) the following timetables would be expected. The seven week preservice training program would start on August 23, 1993 (a Monday) and end on October 8, 1993 (a Friday). The 6-month probationary period would start on 10/11/94 (a Monday) and end on 4/11/94 (a Monday).
7. Ms. Wilson was discharged by DOC on April 7, 1994.
8. Formal notice of the discharge was provided to Ms. Wilson by letter dated April 7, 1994. A copy of the letter was attached to the charge of discrimination filed in case number 94-0079-PC-ER. The letter provides, in pertinent part, as follows:

This letter is formal notification of your official discharge as Correctional Officer 1 at the Racine Correctional Institution effective immediately due to your failure to meet probationary standards.

This action is being taken pursuant to section ER-Pers. 13.08, Wisconsin Administrative Code and with 230.08 of the Wisconsin Statutes which provides that you be informed of the reason for our decision to terminate your employment during your probationary period.

Specifically, you willingly engaged in inappropriate conversations with inmates regarding your personal life and financial matters. You failed to report to your supervisor misconduct, requests, and solicitation by inmates for sexual favors for over a month after these incidents. Investigation revealed that you were found in the Washington Unit Laundry with two inmates with the lights off during the 3rd shift. You failed to give accurate and complete information as required during an investigatory interview in regards to this by denying that you were ever in the laundry room with inmates with the lights off. The conversations you had with two inmates in question as reported by you were inappropriate and sexual in nature, yet during investigatory interview, you denied these types of conversations ever took place.

Your willful participation and inappropriate behavior with inmates violates the Departmental Policy of Fraternalization. Your serious actions severely impact on the security of institution and your safety as well as the safety of other inmates and staff. I conclude that this action is warranted. . . .

9. Ms. Wilson alleged in her appeal letter that she had passed probation prior to her discharge. Her specific arguments are shown below:

I had completed my probation. I received my permanent pay increase in late February, consistent with the notification of transfer letter I received on 8 November 1993 and with my start in the academy on 23 August 1993. ...

... My check stubs and a letter of November 9, (sic) 1993 both demonstrate that my probation period was over.

10. The letter of November 8, 1993, referenced in the prior paragraph was attached to Ms. Wilson's charge of discrimination filed in case number 94-0079-PC-ER. The letter was signed by Dan A. Buchler, Acting Warden of the Racine Correctional Institution and provided, in pertinent part, as follows:

This letter will serve as formal notification of your transfer to the Officer I position at Racine Correctional Institution. your (sic) transfer will be effective November 14, 1993. . . .

Your base rate of \$8.895 per hour will remain the same. You will be required to serve the remainder of your six-month probationary period. Upon completion of your probationary

period your pay will be adjusted to meet PSICM (Permanent Status in Class Minimum) of your pay range.

11. Copies of the check stubs referenced in paragraph 7 above, were attached to Ms. Wilson's charge of discrimination. Specifically, two check stubs were included. The first check stub was for her paycheck dated 3/17/94 (for pay period 06), showing an hourly base salary of \$9.162. The second stub was for her next paycheck dated 3/31/94 (for pay period 07), showing an hourly wage of \$9.162
12. DOC's position regarding Ms. Wilson's probationary status was contained in its Answer to Ms. Wilson's charge of discrimination filed in case number 94-0079-PC-ER, as follows:

Deny that she completed probation and assert that [Ms. Wilson's] probation end date was April 11, 1994. Documents regarding probation end date were provided with the motion to dismiss in case No. 94-0064-PC.

13. The documents provided by DOC with its motion to dismiss which relate to the question of Ms. Wilson's probationary status at the time of discharge include the following: a) 8/5/93 hire letter noted in par. 5 above, b) a Personnel Turnaround Document which shows a probationary end date of 4/11/94, c) affidavit of Wayne Cina, Personnel Manager of Racine Correctional Institution, stating that Ms. Wilson's probation ended on 4/11/94, and d) a memo dated 1/18/84, to P. Stephen Christenson, Director of the Bureau of Personnel and Employment Relations, of the Department of Health and Social Services (DHSS)², from Glen D. Blahnik, Acting Administrator of the Division of Merit Recruitment and Selection of the Department of Employment Relations (DER).
14. Mr. Blahnik's memo dated 1/18/84 (referenced in the prior paragraph), provided as follows:

² Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the Officer 1 positions which are the subject of this proceeding is now held by the Secretary of the Department of Corrections.

Your request for a lengthened probationary period for the Officer 1 classification is approved based on your rationale that the positions in this classification can be characterized as technical.³

The lengthened probationary period authority for this classification will become effective with the next group of appointments to the preservice training program currently scheduled for February 20, 1984; and conditional on the requirement that each person appointed be informed of this lengthened probationary period prior to appointment.

This approval of a lengthened probationary period provides for a six-month probationary period which begins for each Officer 1 on the first day after completion of the preservice training program for correctional officers.

DISCUSSION

Commission Jurisdiction

The Commission has jurisdiction to consider whether just cause existed for the discharge of a state employe who has achieved permanent status in class, pursuant to s. 230.44(1)(c), Stats. The statutory provision does not apply to a state employe who is discharged while on probation.

Ms. Wilson contends her position was covered by a union contract which provided for discretionary review by the Personnel Commission of an appeal filed by a probationary employe regarding his/her termination. Her attorney argues that the union contract provision expands the Commission's jurisdiction to include Ms. Wilson's appeal even if she were considered as a probationary employe. Specifically, Ms. Wilson argues that specific provisions of the State Employment Labor Relations statute, Subchapter V of Chapter 111, ss. 111.80 et. seq., mandates such a result.

Ms. Wilson's argument that the Commission's jurisdiction is expanded here due to provisions of the State Employment Labor Relations statute, was specifically rejected by the Wisconsin Court of Appeals in Board of Regents v.

³ The reference here to "technical" refers to s. 230.28(1)(b), Stats., which allows extension of the probationary period beyond six months for technical (and other) positions.

Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. App. 1981).

Ms. Wilson concedes on page 3 of her brief, that "the rationale of Board of Regents would seem to conclude this matter". She contends on page 4 of her brief that the "Court of Appeals decision is in error ...".

The Commission reviewed the Court of Appeals' rationale in the Board of Regents decision, which was based on the laws of 1977. The Commission further researched whether the 1977 text of laws had changed in a manner which would substantively impact of the rationale used in the Board of Regents. No such significant law changes were found. Therefore, it appears that the rationale remains applicable to current statutes.

Probationary Status

Ms. Wilson's appeal should be dismissed under the Board of Regents rationale if Ms. Wilson was discharged while she was on probation. Her status at the time of discharge is disputed.

Ms. Wilson offered check stubs as evidence to support her contention that she had achieved permanent status in class prior to her discharge. The checks, at most, show a wage raise granted at about 6 months after her first day of work. Her first day of work was on August 23, 1993. Six months from this date would be on or about February 23, 1994. The pay check stubs pertain to checks issued after February 23, 1994, and show a pay increase from her starting wage of \$8.763 to \$9.162. The problem with her argument is that the letter promised a raise after 6 months of work and the raise evidenced by the paycheck stubs is consistent with the promise. The promise was not to provide the pay raise after completion of probation. Under these circumstances, the evidence is insufficient to show that the wage raise signified permanent status.

Ms. Wilson also argued, in essence, that the transfer letter she received dated November 8, 1993, changed the probationary terms contained in the hiring letter of August 5, 1993. The specific language she relies upon is shown below.

You will be required to serve the remainder of your six-month probationary period. Upon completion of your probationary

period your pay will be adjusted to meet PSICM (Permanent Status In Class Minimum) of your pay range.

The letter does not mention specifically that the "remainder of your six-month probationary period" means the six-month probationary period which started after the seven-week training program, as was specified in the hiring letter of August 5, 1993. However, the reference to the "remainder of your six-month probationary period" does not conflict with the information contained in the hiring letter. Accordingly, the Commission disagrees with Ms. Wilson's legal conclusion that the letter of November 8, 1993, somehow changed the terms of her initial hire.

In summary, Ms. Wilson has not alleged sufficient argument to refute the contention that she was on probation at the time of her discharge. This conclusion is reached as a matter of law, even when all facts (but not legal conclusions) alleged by Ms. Wilson are accepted as true.

ORDER

DOC's motion to dismiss is granted and Ms. Wilson's appeal in case number 94-0065-PC is dismissed for lack of subject matter jurisdiction.

Dated July 7, 1994.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

^{Pa}
Donna L. Wilson
8617 Buckingham Dr., Apt. #1
Sturtevant, WI 53177

Patrick J. Fiedler
Secretary, DOC
P.O. Box 7925
Madison, WI 53707-7925

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW

OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)