

THOMAS A. FISCHER,

Appellant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case No. 96-0131-PC

DECISION AND ORDER

Appellant filed an appeal on August 30, 1996, the text of which is shown below in pertinent part:

It is the intention of this letter to express my interest in appealing my termination from Kettle Moraine Correctional Institution on the 25th of August 1996. My last physical day of work was on the 20th of August. It is my position that Kettle Moraine Correctional covertly and blatantly violated Personnel Rules ER-MRS 13.09. I am also to inform you that although the termination is dated the 23rd of August, I was legally on permanent status as an employee of the State of Wisconsin, Division of Adult Institution, Department of Corrections.

It is also my position that a combination of factors did lead to the decision of termination. Discrimination¹, abuse of discretion, lack of just cause, and a blatant lack of due process. As an example of this, Kettle Moraine Correctional paid me the wages for the 23rd of August as a regular on-the-job duty pay even though I was never at the Institution that day. I believe that incident in itself shows a clear violation of payroll procedure with the intent to deceive interested parties.

Finally, it is also my position to express my interest in the options that are or could become available to me rather than final termination from state service.

The Commission sent the parties a letter on September 3, 1996, which provided respondent with an opportunity to determine if any jurisdictional issue would be raised and, if so, to provide all parties an opportunity to submit written arguments. DOC filed a motion to dismiss and appellant submitted written arguments on October 28, 1996².

¹ Appellant also filed a discrimination complaint over the probationary termination, which was assigned case number 96-0118-PC-ER. This decision does not affect the discrimination complaint.

² Appellant's written arguments were received by the Commission on October 28, 1996. He erroneously included the same as part of the documentation for his "perfected complaint".

BACKGROUND³

Appellant began his employment as an Officer 1 at Kettle Moraine Correctional Institute (KMCI) on January 8, 1996, being required to serve a probationary period of six months plus seven weeks. The last day of the six months plus seven week period was Sunday, August 24, 1996.

Respondent decided to terminate appellant for failure to meet probationary standards. Such decision was made on Friday, August 23, 1996, a day when appellant was off work due to illness. The Personnel Manager at KMCI, Mr. Thurmer, telephoned appellant's residence on Friday, August 23, 1996, in an attempt to call him to KMCI for a termination meeting. At about 4:00 p.m., Mr. Thurmer left a message on appellant's answering machine informing him that a decision had been made to terminate his probationary employment. Mr. Thurmer further asked appellant to return his call as he needed to speak with appellant as soon as possible. Appellant did not answer the phone or return the call.

It is important to note that appellant does not refute the information recited in the prior paragraph. He does dispute the number of calls which Mr. Thurmer attempted on Friday, August 23, 1996. Specifically, appellant contended as noted below:

The respondent cites the affidavit from Art Thurmer as to how KMCI made every effort to contact me. They made no attempt to contact me Wednesday 21st, Thursday 22nd, or the mid-morning of the 23rd. . . . I have a copy of the answering machine tape and their (sic) are fewer messages than is lead to imply.

Appellant was not scheduled to work on August 24, 1996. Mr. Thurmer telephoned appellant at home several times, but no one answered. He left another message on appellant's answering machine to repeat the same information as he had left on the machine the prior day.

Appellant did not return Mr. Thurmer's call until about 2:30 p.m. on August 25, 1996, at which time Mr. Thurmer repeated the information that a decision had been made to terminate his employment. Mr. Thurmer then met with appellant at his home at which time he provided written notice of the termination.

OPINION

The Commission's jurisdiction is governed by statute. Section 230.44(1)(c), Stats., provides as shown below in relevant part:

³ The information recited as background is undisputed except as expressly noted to the contrary.

Demotion, layoff, suspension or discharge. If an employe has permanent status in class . . . the employe may appeal a . . . discharge . . . to the commission, if the appeal alleges that the decision was not based on just cause.

In the case of Board of Regents v. Wis. Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981), the Court of Appeals ruled that the Commission lacks the authority to hear an appeal arising from the termination of probationary employment. Such ruling is consistent with the plain language of the statute.

Appellant mentioned §ER-MRS 13.09, Wis. Adm. Code, in his appeal letter in an attempt to contest the conclusion that he was terminated while on probation. Respondent referred to §ER-MRS 13.08, Wis. Adm. Code, to dispel appellant's argument. Each code provision is shown below in relevant part.

ER-MRS 13.08 Dismissal. (1) ACTION BY APPOINTING AUTHORITY. The appointing authority may dismiss any employe without the right of appeal during the employe's probationary period. . . .

(2) DISMISSAL NOTICE REQUIRED. When a probationary employe is to be dismissed, the appointing authority shall immediately provide written notice to the employe to be dismissed of the reasons for dismissal, the date on which dismissal is to occur, and . . .

ER-MRS 13.09 Attainment of permanent status in class. Permanent status in class is attained immediately upon completion of the last work period to which the employe was assigned to work during his or her probationary period regardless of whether it falls on or before the last day of the probationary period. Prior to the end of the probationary period, the appointing authority shall notify the employe in writing that the employe will attain permanent status in class. No employe may be denied permanent status in class after successfully completing a probationary period because an appointing authority fails to submit notice.

The appellant was assigned to work on August 23, 1996, but did not because he called work saying he was sick. August 23, 1996, was the "last assigned work period" prior to the last day of appellant's probationary period, within the meaning of §ER-MRS 13.09, Wis. Adm. Code.⁴ Accordingly, he was eligible to achieve attainment of permanent status on that date even absent written notification to that effect if he successfully completed his

⁴ Appellant said in his written arguments of October 28, 1996, that "[t]he respondent contends that work period in this case is August 24th, 1996, or the end of the current pay period." He is mistaken. As noted on page 4 of respondent's brief: "Respondent attempted to give appellant written notice prior to the completion of the last work period to which the employee was assigned work. However, due to appellant's paid sick leave status on that day and the fact that appellant did not return respondent's telephone calls and did not answer his door, respondent was unable to give appellant written notice on that day." It is undisputed that Appellant's sick day was August 23, 1996. Accordingly, respondent contends the appellant's last assigned work period was August 23, 1996, and appellant is mistaken in his contention that respondent argued for a later date.

probationary period which is the prerequisite noted in the last sentence of §ER-MRS 13.09, Wis. Adm. Code.

The Commission concludes that appellant did not successfully complete his probationary period and, accordingly, did not attain permanent status in class. It is undisputed that respondent provided oral notice of the termination by telephone answering machine prior to the close of appellant's "last assigned work period". Respondent could have provided written notice of the termination decision to appellant on August 23, 1996, but for appellant's own actions of being absent and failing to reply to the telephone messages from Mr. Thurmer. Under the circumstances present in this case, the failure to provide advance written notice does not operate to defeat the conclusion under §13.09, Wis. Adm. Code, that the appellant did not successfully complete his probationary period. Accordingly, the Commission lacks jurisdiction over the matters raised in his appeal letter.

The appellant argued that the conclusion reached above is erroneous because he did not receive written notice "immediately", as required under §ER-MRS 13.08(2), Wis. Adm. Code. The Commission disagrees. Again, it was the appellant's own actions which prevented respondent from providing written notice on August 23, 1996. Respondent did provide written notice after appellant complied with Mr. Thurmer's request for a return call. Respondent met the written notice requirements of §ER-MRS 13.08(2), Wis. Adm. Code under these circumstances.⁵

ORDER

That this case be dismissed for lack of subject matter jurisdiction.

Dated November 22, 1996.

STATE PERSONNEL COMMISSION


LAURIE R. MCCANNUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

JMR
960131Adec1

Parties:

Thomas A. Fischer
175 S. National Ave., #9
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Secretary, DOC
149 E. Wilson St., 3rd Fl., P. O. Box 7925
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NOTICE

⁵ Respondent asserted that Mr. Thurman went to appellant's apartment on August 23, 1996, to attempt delivery of the termination letter and its attachments but was unable to do so because the mailboxes were locked, appellant failed to respond to knocks on his door and Mr. Thurman was unable to slide the materials under appellant's apartment door. The appellant disputes that Mr. Thurman came to home on August 23, 1996. The legal basis for the ruling does not depend on resolution of this disputed fact.

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

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