

STATE OF WISCONSIN

PERSONNEL COMMISSION

LILLIAN J. WALES,
Appellant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

DECISION
AND
ORDER

Case No. 98-0020-PC

This appeal arises from the respondent's decision to terminate the appellant's employment while serving a permissive probationary period upon transfer. The following facts appear to be undisputed.

FINDINGS OF FACT

1. Effective September 14, 1997, appellant transferred into a Payroll & Benefits Specialist 2 - Confidential position at respondent's Oakhill Correctional Institution. She was required to serve a six month permissive probationary period.

2. By letter dated March 10, 1998, the Warden of Oakhill notified appellant that she was being removed from her position for "failure to meet probationary standards." Appellant was also notified that she was being restored to her "former position or a similar position."

3. By letter dated March 12, 1998, respondent confirmed that appellant was being restored to a "Payroll and Benefits Specialist 2 - Confidential position" in respondent's Division of Management Services, Bureau of Personnel and Human Resources, effective March 13, 1998.

CONCLUSION OF LAW

The Commission lacks subject matter jurisdiction over this matter.

OPINION

After receiving the appeal, a member of the Commission's staff advised the appellant that her case raised certain jurisdictional issues and provided her an opportunity to file jurisdictional arguments. In response, appellant noted that her position was outside the scope of a bargaining agreement and included the following arguments:

[T]he Commission does have jurisdiction over discharges as found in 230.44(1)(c), Stats:

“if an employe *has permanent status in class . . .* the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.”

I did have permanent status in class. I had already *served and passed* probation as a Payroll & Benefits Specialist 2 and went to Oakhill Correctional as same. I feel that the issues raised and documented in my initial letter clearly indicated that I was not discharged for cause, and in addition that I was **denied due process**. . . . Represented employees are protected by their respective union contracts from the injustices I was subjected to at Oakhill. It is my understanding that the Personnel Commission is there to protect the rights of non-represented employees. (Emphasis in original)

The relevant facts in this case are analogous to those before the Commission in *Schmidt v. DOC*, 91-0253-PC, 2/21/92. In *Schmidt*, the Commission dismissed an appeal from a decision to terminate the appellant's employment while he was serving a permissive probation after being reinstated as a Correctional Officer 2 at the Racine Correctional Institute. The appellant in *Schmidt* had previously attained permanent status in class as a Correctional Officer 2 at the Green Bay Correctional Institute before he resigned from that position approximately two years before his reinstatement at Racine Correctional Institute. The Commission held:

An employe who once held permanent status in class as a Correctional Officer 2 cannot be said to have permanent status in class during a subsequent probationary period imposed upon his reinstatement to another Correctional Officer 2 position. The appellant's status is described in §ER-Pers 16.04(1)(b), Wis. Adm. Code:

A person who is reinstated to a different employing unit in the same agency from which the person earned reinstatement eligibility may be required by the appointing authority to serve a probationary period. If not required to serve a probationary period, the employe shall immediately attain permanent status in class. If required to serve a probationary period, the employe may be terminated from the service by the appointing authority during the probationary period without the right of appeal.

Because the appellant was serving a probationary period upon reinstatement, he did not have permanent status in class and the Commission lacks the authority to hear an appeal under §230.44(1)(c), Stats., from the termination of his employment. *Janeck v. UW*, 88-0035-PC, 8/2/88.

The imposition of probation upon reinstatement or transfer is described in §230.28(4), Stats., which provides:

A person reinstated in an employing unit other than one in which the person previously served in permanent status in the class in which the person is being reinstated, or an employe who transfers from one employing unit to another or an employe who moves to a different employing unit in conjunction with a voluntary demotion, may be required by the appointing authority to serve a probationary period. Provisions for the duration of such probationary period shall be provided in the rules of the administrator.

The Administrator of the Division of Merit Recruitment and Selection, Department of Employment Relations, has promulgated administrative rules relating to the imposition of probation upon transfer and the result it has on the transferring employe:

ER-MRS 15.04 Transfer between different employing units of the same agency. An employe who transfers between different employing units of the same agency may be required by the appointing authority to serve a probationary period, except that a probationary period shall be required upon a transfer to a trainee position. If the transfer is to a position in a different class and no probationary period is required, the employe shall immediately attain permanent status in class. An employe who transfers or who is transferred while serving a probationary period may continue in the probationary status being served prior to transfer or begin a new probationary period under s. ER-MRS 15.07.

ER-MRS 15.055 Employee removal; status and rights. If a probationary period resulting from a transfer under s. ER-MRS 15.04 or 15.05 is required, the appointing authority, at any time during this period, may remove the employe from the position to which the employe transferred, without the right of appeal. An employe so removed shall be restored to the employe's previous position or transferred to a position for which the employe is qualified in the same pay range or pay rate or a counterpart pay range or pay rate without a break in employment. Any other removal, suspension without pay, or discharge during a probationary period resulting from transfer shall be subject to s. 230.34, Stats.

Here, appellant, who transferred from one employing unit in the Department of Corrections to another employing unit in the same department, was required to serve a probationary period when she began working at Oakhill. Before she completed the 6 month probationary period, her employment there was terminated and she was reinstated to a position in her previous employment unit, the Bureau of Personnel and Human Resources. Her removal from the position at Oakhill was, therefore, "without the right of appeal." §ER-MRS 15.055, Wis. Adm. Code. While it is true that appellant held permanent status in class when she was at the Bureau of Personnel and Human Resources, she no longer maintained that status when she was placed on probation upon her transfer to Oakhill. There is no indication that her subsequent removal and reinstatement did not meet the requirements set forth in §ER-MRS 15.055, Wis. Adm. Code. Both §§230.34 and .44(1)(c), Stats., are inapplicable to the probationary termination decision.

This result is consistent with the ruling of the Wisconsin Supreme Court in *DHSS V. State Personnel Board*, 84 Wis. 2d 675, (1978). In that case, Donald Ferguson had attained permanent status in class while employed as a Management Information Specialist 2 (MIS2) with the University of Wisconsin. He took a promotion to a MIS 3 position at the Department of Health and Social Services but his employment was terminated while he was serving probation in that position. The Court's decision included the following language:

Mr. Ferguson's argument that he still retains permanent status in class in his old position of Information Specialist 2 is also undercut by sec.

16.22(4), Stats. 1975. That section provides in pertinent part that, “. . . an employee who transfers from one employing unit to another. . . may be required by the appointing authority to serve a probationary period. . . .” This subsection further demonstrates that a state employe does not, in all circumstances, retain job security following the six month probationary period. This is especially true where the employe has transferred from one department to another.

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: April 23, 1998 STATE PERSONNEL COMMISSION

KMS:980020Adec1.doc


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Lillian J. Wales
411 Iroquois Court
DeForest, WI 53532

Michael J. Sullivan
Secretary, DOC
149 E. Wilson St., 3rd floor
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 (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.)

2/3/95