STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT RODGERS,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0094-PC

RULING ON RESPONDENT'S MOTION TO DISMISS

NATURE OF THE CASE

This case is before the Commission to resolve respondent's motion to dismiss. Respondent contends the Commission lacks jurisdiction over a disciplinary action, which resulted in no time off from work and no loss of pay. Both parties filed written arguments. The Commission received the final argument on November 18, 1998.

The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. Appellant has worked for respondent as a Corrections Field Supervisor since August 7, 1994 He is in a non-represented position, meaning his position is not covered by a collective bargaining agreement His position also is exempt under the federal Fair Labor Standards Act (FLSA).

2. This appeal was filed with the Commission on July 24, 1998 (by letter dated July 23rd). The action being appealed was described in the letter as noted below:

> On behalf of our client, Robert Rodgers, we wish to file an Appeal of the written reprimand issued by Mickey Thompson, Assistant Administrator of the Division of Community Corrections, dated June 11, 1998, and delivered to Mr. Rodgers on June 26th, 1998 . . .
>
> Facts forming the basis of the Appeal: The work rule allegedly violated had been superseded by a subsequent Order and therefore was no longer a directive that needed to be followed. The language that is claimed to be offensive and demeaning is not offensive and demeaning to a reasonable person in this type of work setting. Additional facts will be brought forth at the hearing which will form the basis for the appeal.

> The reason the Appellant believes the action to be improper. There is no factual basis for the disciplinary action and it is believed that the disciplinary action was taken as a means of retaliation by Mr. Rodger's supervisors. Additional reasons will be brought forth at the hearing on this appeal.
>
> The relief requested: That the disciplinary action be dismissed and removed from Mr. Rodger's Personnel Record.

3. The text of the disciplinary letter dated June 11, 1998, is shown below in relevant part:

> This letter shall serve as your notice of a written reprimand equal to and carrying the weight of a one day suspension under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment.
>
> This disciplinary action is a result of your violation of the following Department Work Rules . . .
>
> Specifically, you violated work rule #1 when you failed to follow directives previously given to you on March 10, 1997, by Regional Chief Sally Tess regarding travel outside of Eau Claire and Clark Counties. On February 11, 1998, you traveled to Douglas County on a transport and did not seek pre-approval from Regional Chief Tess. You violated work rule #13 by using offensive and demeaning language in the office, specifically using the term "mental masturbation" and commenting on a victim of domestic violence "deserving it." Both of these comments were made in front of staff, who found it offensive. In addition, you staffed a case with Agent Kim Hankey on 12/15/97 and discussed a sexual assault scenario using you and Agent Hankey as the involved parties, causing discomfort for Agent Hankey . . .
>
> If you believe this action was taken without just cause, you may appeal through the Personnel Commission.

4. Respondent considers the disciplinary letter to be a one-day suspension for purposes of applying progressive discipline. Further violations of a similar nature, accordingly, would be subject to discipline more severe than a one-day suspension

CONCLUSIONS OF LAW

1. The disciplinary transaction in this case constitutes a constructive suspension.

2. This commission has jurisdiction over the subject matter of this appeal pursuant to §§230.44(1)(c) and 230.45(1)(a), Stats.

OPINION

The appellant asserts the Commission has jurisdiction pursuant to §230 44(1)(c), Stats., the text of which is shown below in relevant part:

> (1) APPEALABLE ACTIONS AND STEPS. (T)he following are actions appealable to the commission under §230.45(1)(a) . .
>
> (c) *Demotion, layoff, suspension or discharge.* 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.

Respondent contends that the discipline imposed was a written reprimand, and, accordingly, asserts that the Commission lacks jurisdiction because written reprimands are not an enumerated discipline in §230.44(1)(c), Stats. (See respondent's brief dated October 5, 1998.) Appellant contends that respondent imposed a suspension and; accordingly, that the Commission has jurisdiction.

The Commission will look beyond an employer's characterization of an action to determine whether it has the legal effect of an action over which the Commission has jurisdiction under §230.44(1)(c), Stats. For example, the Commission considered whether a constructive demotion occurred in *Cohen v. DHSS*, 84-0072-PC, 85-0214-PC, 86-0031-PC & *Cohen v. DHSS & DER*, 84-0094-PC, 2/5/87. The Commission in *Cohen* held as follows:

> In addition to reviewing these disciplinary actions identified (in §230.44(1)(c), Stats.) as demotions, layoffs, suspensions, discharges and reductions in base pay, the Commission may review actions which have the same legal effect as an enumerated disciplinary action even though they may be denominated as something else. P. 3.

The *Cohen* case was before the Commission to resolve respondent's objection to including as an issue for hearing whether Mr. Cohen was demoted "constructively or otherwise."

Mr. Cohen was moved from one position to another at the same classification, a transaction which the employer did not characterize as a "demotion." Mr. Cohen, however, contended that the duties of the new job were such that it fell within a lower classification than his prior position. The Commission allowed the constructive demotion issue to go forward to hearing to determine if the transaction had the legal effect of a demotion. In considering this question, the Commission indicated reliance upon the definition of "demotion" found in §ER-Pers 17.01, Wis. Adm. Code, shown below:

> A demotion means the permanent appointment of an employe with permanent status in one class to a position, for which the employe is qualified to perform the work after customary orientation provided for newly hired workers in such positions, in a lower class than the highest position currently held in which the employe has permanent status in class.

Based on the foregoing definition and upon common sense, the Commission held that Mr. Cohen could attempt to establish at hearing that the transaction had the same legal effect as a demotion by showing that he was moved to a different position which ultimately is determined to be of a lower classification than the prior position, as well as that the employer intended to cause demotion for the purpose of discipline.

The Commission took the same approach in *Davis v. ECB,* 91-0124-PC, 5/14/92, regarding a constructive demotion issue. While in *Davis* the Commission followed *Cohen* in holding that there was a constructive demotion, it rejected appellant's additional contention that she had been subjected to a constructive layoff. The Commission looked to the definition of the term "layoff" in §ER-Pers 1.02(11), Wis. Adm. Code, which includes the "termination of services of an employe . . . from a position." The Commission noted that the transaction involving Ms. Davis was a movement from a full-time to a part-time position which did not have the legal effect of a layoff because Ms. Davis' employment relationship continued, whereas the definition in the administrative code embodied the concept of total cessation of employment.

The Commission addressed the meaning of the term "suspension" as used in §230.44(1)(c), Stats., in *Passer v. DHSS*, 90-0003-PC, 5/16/90. The Commission noted that the statutes did not include a definition of the term "suspension" and, accordingly, the term was ambiguous and it was proper to construe the term in light of related statutes. Specifically, the Commission looked to §230 34(1)(a), Stats., which requires that an employer must have just

cause for suspending an employe without pay. The transaction appealed by Mr. Passer was a suspension with pay pending an investigation The Commission concluded that

> A suspension with pay is not a cognizable transaction under 230.44(1)(c), Stats. . . .
>
> "Statutes must be construed in light of related statutes. When ss. 230.44(1)(c) and 230.34(1)(a) are read in conjunction, it is clear that a 'suspension' for purposes of s. 230.44(1)(c) is a suspension *without pay* as referenced in s. 230.34(1)(a)." P. 2. (citations omitted)

However, the *Passer* case suggests that a cognizable claim of constructive suspension can exist if the employe demonstrates that the disputed transaction had the same legal effect as a suspension, but that the appellant had not made such a showing:

> Appellant's brief contains the following: "It is arguable, however, [that] he did not get paid overtime or an increase in pay " Appellant has not alleged that his suspension caused him to lose any overtime pay or pay increase to which he otherwise would have been entitled. In the absence of such an allegation, there is no basis upon which to treat what on its face is a suspension with pay as a suspension without pay. *Id.*

These and a number of other decisions rendered by this and other bodies, interpreting similar statutes, demonstrate the functional approach that has been taken in determining the appropriate characterization of personnel transactions. *See e. g., Watkins v. Milwaukee Co. Civil Service Commission,* 88 Wis. 2d 411, 420, 276 N. W. 2d 775 (1979), which involved an attempt to appeal as a constructive discharge what was alleged to have been a coerced resignation:

> Petitioner urges the court to construe coerced resignations as a form of discharge, which would invoke the procedural mechanisms of sec. 63.10, Stats. Respondents argue that the provisions of sec. 63.10 apply only where charges are filed and that charges are not required to be filed where, as here, the employee resigned.
>
> Sec. 63.10, Stats., provides procedures designed to ascertain through an impartial hearing whether the accusations brought against an employee demonstrate his unfitness for employment. The statute reflects the legislature's determination that the employee has a legitimate interest in not being "wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded."
>
> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a *coerced* resignation is, in substance, a discharge effected by adverse action of the employing agency." Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which

> underlie the civil service system The strength of this policy is underscored by the language of see. 63.04, Stats.. which provides that "no person shall be . . . removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [sees. 63.01 to 63.16, inclusive]." (citations omitted) (brackets and emphasis in original)

See also Juech v. Weaver, Wis. Pers Bd., 1/13/72 (a nominal reclassification was considered in legal effect a constructive demotion, where the employer first reassigned all of the employe's supervisory duties and then effected a downward classification); *Mirandilla v. DVA,* No. 82-0189-PC, 7/21/83 (reassignment of duties was considered in legal effect a constructive reduction in base pay cognizable under §230.44(1)(c), Stats., where the underlying transaction caused a reduction in the employe's salary and the duties in question were essentially non-existent and always had been a mere ploy respondent had used to augment the employe's salary); *Jacobsen v. DHSS,* 91-0220-PC, 10/16/92 (where respondent told appellant he could not return to work before getting counseling and treatment, and that he would have to utilize accumulated paid leave time until that occurred if he wanted to continue to get paid, the employe was effectively suspended and his appeal was cognizable under §230.44(1)(c), Stats.).

The overriding principle that emerges from these and other cases is that it is not dispositive for appeal purposes whether a personnel transaction fits or does not fit within the definition of a particular type of transaction. The Commission must examine the practical effect the transaction has on the employe's employment status, in the context of the employer's intention in effecting the transaction, and the policy factors which underlie the statutory framework of the civil service, to determine whether the transaction partakes more of the nominal category of personnel transaction—e. g., a reprimand—or more of the more serious category—e. g., a suspension.

When an employe is given a disciplinary suspension per se, there are three obvious impacts. First, the employe is relieved of the performance of his or her duties. Second, he or she loses the opportunity to earn wages during the period of the suspension. Third, the employe's disciplinary record is blemished, and this record may move the employe "up the ladder" in terms of progressive discipline in connection with any future disciplinary action.

In the instant case, the first and second impacts did not occur, but it is uncontroverted that appellant was subject to the third effect. Respondent could hardly have made this clearer in its letter to appellant.

> This letter shall serve as your notice of a written reprimand *equal to and carrying the weight of a one day suspension* under the Fair Labor Standards Act (FLSA). Although these work rule violations warrant a one day suspension, as an FLSA exempt employee, you cannot be suspended for less than a full week, (5 work days), increment. (emphasis added)

The Commission has found, based on respondent's explicit acknowledgement in its brief in support of the motion to dismiss, that: "[r]espondent considered the disciplinary letter to be a one-day suspension for purposes of applying progressive discipline. Further violations of a similar nature, accordingly, would be subject to discipline more severe than a one-day suspension." Finding, #4, p. 2, above. Respondent's obvious intention was to discipline appellant, and to do so in a manner that would be as close as possible to a one day suspension without jeopardizing appellant's exempt status under the FLSA. While the discipline imposed resulted in neither any interruption in appellant's performance of his duties nor any interruption in his salary, it constitutes not only a blemish on his disciplinary record that could negatively affect his career in general,[1] but also a blemish that, in the case of further disciplinary action, predictably will result in an increased disciplinary penalty over what he would receive if respondent were not treating the suspension as equivalent to a one-day suspension. Thus the discipline imposed in this case had a significantly more severe disciplinary impact on appellant's employment status than would have been the case with a mere reprimand. This serves to distinguish this case from others where the Commission has focused on other effects of potential constructive suspensions.

For example, in *Passer* the Commission relied on the fact that the employe was suspended *with pay* in holding that there had been no constructive suspension. However, unlike the instant case, the employe was suspended pending an investigation of alleged misconduct, and respondent did not consider the suspension a disciplinary matter. In *Jacobsen* the Commission relied on the fact that after respondent advised the appellant that he could not

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[1] For example, it could affect his future promotability.

return to work, he was prevented from earning remuneration. However, in that case the employer had never denominated the suspension as disciplinary in nature, unlike this case where respondent has explicitly advised appellant that his reprimand was disciplinary in nature and equivalent for disciplinary purposes to a one day suspension without pay.

From a policy standpoint, allowing an employe situated like appellant to appeal serves:

> [T]he legislature's determination that the employee has a legitimate interest in not being "wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded." . . [and] fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. *Watkins v. Milwaukee Co. Civil Service Commission,* 88 Wis. 2d 411, 420, 276 N. W. 2d 775 (1979).

Allowing such appeals does add a layer of administrative review to the transaction, and requires respondent to reallocate its resources in a way that would not be required with a ruling against the right of appeal. However, it should be kept in mind that if this discipline had occurred prior to the federal FLSA determination that suspensions of less than five days are inconsistent with exempt status, respondent would have proceeded with a one day suspension and would have had to establish just cause on an appeal of that transaction. Thus, a ruling in favor of the right to appeal written reprimands deemed equivalent to suspensions for disciplinary purposes would only restore respondent's administrative burden to what it was prior to the aforesaid federal FLSA ruling.

ORDER

Respondent's motion to dismiss filed on October 5, 1998, is denied, and this case will proceed to a hearing on the merits.

Dated: Jan 27, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JMR/AJT
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Parties:

Robert Rodgers
3622 South Anita Drive
Eau Claire, WI 54701

Jon Litscher
Secretary, DOC
149 E. Wilson St., 3rd Fl.
P.O. Box 7925
Madison, WI 53707-7925