STATE OF WISCONSIN PERSONNEL COMMISSION

JENNY WACHTEL,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 99-0037-PC

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motions to dismiss for lack of subject matter jurisdiction and, in the alternative, for summary judgment. Respondent contends the appellant resigned, voluntarily, from her employment. Respondent also contends the Commission lacks jurisdiction to review resignations that are not coerced and, therefore, are not constructive discharges. The parties filed briefs.

In her brief, complainant offered the following description of the facts in this matter:

> Ms. Wachtel was employed as a Human Resources Specialist for the DOC from April 27, 1998 until March 25, 1999. Prior to that, she had worked at other full and part-time jobs. One of those jobs was at Kitchen Investment Group (KIG) which owns the global franchise rights to "Country Kitchen" restaurants. Ms. Wachtel worked there from May 1997 through August 1997.
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> During Ms. Wachtel's employment at KIG, she observed her employer engage in discriminatory questioning of candidates for employment. In June of 1997, Ms. Wachtel had selected a candidate by the name of Shelly Allette to fill a receptionist position at KIG. . . .
>
> Ms. Allette subsequently filed a lawsuit for discrimination against KIG in federal district court for the Western District of Wisconsin, Case No. 98-C-0614-C. Ms. Wachtel was named a witness and her deposition testimony was taken.
>
> Ms. Wachtel applied for and obtained employment with the DOC as a Human Resource Specialist on April 27, 1998.

On February 8, 1999, Cliff Konkol, the Chief Financial Officer of KIG had a conversation with Attorney Kathryn Anderson of the DOC regarding Ms. Wachtel. . . .

On the evening of February 8, 1999, Konkol complained to Ms. Anderson that Ms. Wachtel was the "human resources director" for KIG, had been fired for poor performance, and was now making false accusations of discrimination against KIG. . . .

Based on the story Konkol relayed to Ms. Anderson, Ms. Wachtel's employment was suspended. On February 15, 1999, Ms. Wachtel received the letter from Cindy Archer suspending her employment pending an investigation. At this point, Ms. Wachtel had no idea what work rule violation could possibly be at issue and was oblivious as to what was transpiring between KIG and DOC.

After Ms. Wachtel's suspension, the DOC investigation revealed that Ms. Wachtel was not the "human resources director" of KIG. . . . The investigation revealed nothing that shows that Ms. Wachtel's duties at KIG were relevant or material to her position with the DOC. Furthermore, the investigation revealed that KIG neither has records documenting any performance problems with Ms. Wachtel nor ever communicated to anyone, including Ms. Wachtel, problems with her performance until after it learned that she was testifying on behalf of the plaintiff in the race discrimination suit filed against it.

Most importantly, the investigation revealed that Ms. Wachtel did not list her job at KIG on her DOC application materials because the application asked only for "relevant" job experience or the job experience that "best qualified her." Ms. Wachtel does not believe that her KIG experience was relevant or material to the DOC position to which she was applying. Significantly, the DOC never asked Ms. Wachtel to provide a complete chronology of her employment history.

After the investigation, the DOC constructively discharged Ms. Wachtel for fraud and falsifying employment records. [DOC attorney] Whitcomb advised Ms. Wachtel on March 23, 1999 through her legal counsel that Cindy Archer had drafted Ms. Wachtel's termination letter and would send it out unless Ms. Wachtel accepted one of the following two options before March 25, 1999.

(1) Transfer to another division of the state by 3/25/99; or
(2) Sign a release of all claims against the DOC, receive a letter of recommendation, and resign.

Ms. Wachtel's family was dependent on the income and the health insurance her employment provided, especially in light of her having just learned that she was pregnant. Prior to the "investigation" of this incident, Ms. Wachtel had already been offered and accepted a transfer to the Department of Agriculture, Trade and Consumer Protection (DATCP). The position, however, was on administrative hold pending approval of funding.

Prior to Ms. Wachtel's constructive discharge, Ms. Wachtel informed the DATCP and its attorney of the details of the DOC investigation and her conduct. She invited the DATCP to contact her attorney or the DOC to verify any questions it had regarding the investigation and her conduct. On March 24, 1999, Ms. Wachtel and her attorney participated in a telephone conference call with DATCP, its attorney, DOC Attorney David Whitcomb, and Director of the Bureau of Personnel and Human Resources Hamdy Ezalarab to answer any questions the DATCP had regarding Ms. Wachtel. Despite learning of Ms. Wachtel's alleged work-rule violation and Ms. Wachtel's pending discharge, DATCP chose not to withdraw its offer to Ms. Wachtel and chose to hire her once funding was approved. Because funding had not yet been approved, it was not possible for Ms. Wachtel to complete the transfer from DOC to DATCP to meet the March 25, 1999 deadline imposed by the DOC.

Mr. Whitcomb gave Ms. Wachtel the option to "quit and release the DOC *or* be discharged." The firing would be noted as a discharge on her record and she would not have been able to maintain reinstatement rights to obtain future employment in other state agencies, including the transfer to DATCP. A discharge on her record may have also prohibited her opportunity to maintain health insurance continuation coverage through federal law. . . . Ms. Wachtel was extremely worried about maintaining health insurance for her and her family and the income to pay for it. This worry was aggravated by her having just learned she was pregnant.

Mr. Whitcomb never presented her with the option of simply "resigning" but rather stated that she could resign if she signed a "release." In fact, when Mr. Whitcomb was informed that Ms. Wachtel was delivering her "resignation" letter to the DOC on March 25, 1999 but refused to sign a release, he said that he did not know if the DOC would accept this since "that had never been discussed."

Eventually, the DOC decided "to accept" Ms. Wachtel's "resignation."

> Ms. Wachtel subsequently began employment with DATCP on April 19, 1999 where she continues to work. . . .

CONCLUSION

> The DOC constructive discharged Ms. Wachtel's employment from the DOC by threatening to discharge her unless she did one of the following within forty-eight hours: (1) transfer to another agency or (2) sign a release and resign.

It is undisputed that respondent conducted a pre-disciplinary meeting with appellant on March 18, 1999. Appellant's attorney was also present.

As noted above, the appellant filed a letter of resignation with respondent on March 25th. The resignation letter read:

> As of today, I am resigning from my position as a Human Resources Specialist for the Department of Corrections.
>
> By resigning, I am not admitting to or agreeing with any of the pending allegations against me regarding the administrative code or work rule violations. I have denied them in the past and my denials remain steadfast. I understand that the Department of Corrections will discharge me later today if I do not resign and sign a release of my claims immediately. I am resigning solely to lessen the damages which the Department of Correction's decision identified above and its conduct up to the present time has cause me. I refuse to sign any release.
>
> I believe that the Department of Corrections has acted unlawfully and in violation of my civil rights.

The events of March 23rd are also described in a letter from appellant's attorney to respondent's attorney, dated April 1, 1999:

> I am not aware of the Department of Corrections ever "offering" Ms. Wachtel the option of a "simple resignation." I am only aware of the conversations between you and me. You presented to me three options on March 23, 1999: Ms. Wachtel could (1) transfer, if she could do so by the morning of March 25, 1999; (2) sign a release, receive a recommendation and resign; or (3) be discharged.
>
> When I spoke to you on March 25, 1999 and informed you that I had just sent to you by facsimile transmission a copy of Ms. Wachtel's resig-

> nation letter, you stated to me that you did not know if the Department would accept such a resignation since "you had never discussed that option." You stated that you had a boilerplate release on your desk, but I again told you that Ms. Wachtel was not interested in signing such a release. The conversation ended with you telling me that you would let me know the Department's decision. Your letter [dated March 24 and received on March 31st] was the first news I received that your Department had decided to "accept" Ms. Wachtel's resignation.
>
> I appreciate your communicating that decision to me, although I question when your Department reached that decision since your letter is curiously dated prior to Ms. Wachtel communicating to you and the Department her decision to resign.

CONCLUSIONS OF LAW

1. Where the employe has permanent status in class in a position that is outside of a bargaining unit, the Commission has jurisdiction over a discharge decision, as described in §230.44(1)(c), Stats.

2. The Commission's authority under §230.44(1)(c), Stats., extends to constructive discharges but not to voluntary resignations.

3. Complainant was not constructively discharged.

4. The Personnel Commission lacks jurisdiction over this matter.

OPINION

Since its predecessor, the Personnel Board, issued its decision in *Biesel v. Commissioner of Securities*, 77-115, 9/15/77, the Personnel Commission has consistently held it has subject matter jurisdiction over constructive discharge decisions.[1] *Evrard v. DNR*, 79-251-PC, 2/19/80; *Petrus v. DHSS*, 81-86-PC, 12/3/81; *Smith v.*

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[1] The Commission notes that its analysis of this matter is in terms of the jurisdictional authority granted the Commission in §230.44(1)(c), Stats., to review certain specified personnel transactions. This analysis must be differentiated from that employed when reviewing the merits of a constructive discharge allegation filed under the Fair Employment Act, subch. II, ch. 111, Stats.

DHSS, 88-0063-PC, 2/9/89. The basis for that authority was described in *Biesel* as follows:

> See *Dabney v. Freeman*, 358 F. 2d 533, 535 (DC Cir. 1965):
>
> > . . . a separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency. If and when the Commission's relieving authority is invoked by nonfrivolous allegations of coercion, the Commission should entertain the appeal and hear and determine the allegations. If they are sustained, the Commission presumably must find that the particular separation has not been effected in the manner required by law and must reinstate the employment, subject to the employe's continuing discretion to initiate discharge proceedings in the prescribed manner. If they are not sustained, the appeal is to be dismissed as outside the limits of the Commission's jurisdiction.
>
> See also *Kiethley v. Civil Service Board of City of Oakland*, 89 Ca. Reptr. 809, 812, 11 Cal. App.3d 443 (1970): "although plaintiff, as City Manager, did not actually discharge Liquori in the usual meaning of the word 'discharge,' we observe that a coerced resignation is tantamount to a discharge." While the meaning of "coercion" may differ depending on the setting in which it is used, in this context it is concluded that it means "an actual overriding of the judgment and will," 14 C.J.S Coercion, p. 1307. While the holding of [*Appeal of Lindow*, Personnel Board, 11/19/63] that the personnel board has no jurisdiction obtained by duress, is overruled, dictum set forth in that case is repeated here:
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> > It is not uncommon for an administrative officer who finds it necessary to remove an employe to give the employe an opportunity to resign rather than be discharged. . . . This is indulging a kindness to the employe in protecting him and his work record. It would be a dangerous doctrine to hold that to offer an employe his choice of resigning or accepting a discharge would amount to such compulsion that the employe would avoid his resignation for duress. If such were the law, then anytime an employer mentioned the subject of discharge to his employe, he would have to go ahead and discharge him and could not give the latter the choice of resigning because the resignation would be voidable.

While the Commission has the authority to review a constructive discharge, it does not have the authority to hear an appeal of a voluntary resignation. *Kemp v. DHSS*, 81-370-PC, 11/19/81; *Stauffacher v. DILHR*, 81-403-PC, 12/16/81. The respondent

moves to dismiss this matter, contending that based upon the undisputed facts, appellant's resignation was voluntary, rather than coerced.

The Commission uses the following standard in reviewing a motion for summary judgment:

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
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> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Grams v. Boss, 97 Wis.2d 332, 338-339, 294 N.W.2d 473 (1980), citations omitted.

Appellant's version of relevant events is set forth, at length, above. The questions before the Commission are whether there are genuine issues of material fact, or whether, based on the events as described by complainant, she was not coerced into resigning and was not constructively discharged.

In *Biesel v. Commissioner of Securities*, the appellant was called into a meeting on July 23, 1976, and told that he would be discharged forthwith if he did not comply with the appointing authority's demand to set a date on which he would end his employment. According to the appellant in that case:

> I had no choice: it was either suffer discharge on [the day of the meeting], or comply with the Commissioner's demand.

> 6. The specter of immediate unemployment, loss of the primary source of my income, and searching for new employment with a discharge from my most recent job on record convinced me, as I am sure the Commissioner intended it to convince me, that I had no choice other than to comply with his demand.

Mr. Biesel submitted a resignation memo on July 30, 1976. The Personnel Commission rejected the appellant's claim that he was constructively discharged:

> [T]he appellant's separation from state service, while it was not voluntary in the sense of having been the course of action most preferred by appellant, was not involuntary in the sense of having been coerced. . . .
>
> The factors cited by appellant are not unlike those which must be considered by any employe forced with an imminent discharge, who must decide whether to fight the discharge or to pursue a course that will result in a separation from employment under different circumstances. . . . [T]he appellant has not alleged facts which would amount as a matter of law to coercion or duress.

The situation confronting the appellant in *Bissel* is comparable to the one presented to the appellant in the instant case. Respondent's attorney advised appellant on March 23, 1999, through her legal counsel, that the appointing authority had drafted a termination letter and would issue it unless appellant took certain actions within 48 hours. Appellant's attorney faxed the resignation letter two days later, on March 25th. Appellant had the benefit of consulting with an attorney throughout the investigation/disciplinary process to help insure her final decision was the best one. Respondent provided appellant 48 hours to confer and make a decision. Appellant chose to resign in order to preserve the opportunity of employment with the Department of Agriculture Trade and Consumer Protection.

The fact that appellant's family was "dependent on the income and the health insurance her employment provided" does not make this a constructive discharge. These were simply factors to be considered by the complainant when choosing her course of action. Appellant may have been "extremely worried" about maintaining health insurance and her income, but there is no allegation that this worry "overrode" her judgment and will. There is no suggestion that appellant did something other than

reach a rational conclusion that it was preferable to resign so as to not jeopardize her job with DATCP, than to be discharged so that she could contest that discharge decision via an appeal to the Personnel Commission.

These facts may be contrasted to those recited in *Evrard v. DNR*, 79-251-PC, 2/19/80:

> 6. On August 23, 1979, at 8:30 a.m., appellant met with several supervisors.
>
> 7. The appellant was informed that the investigation had been completed and that the matter was extremely serious. The charges against him were read to him and it was indicated that they might involve felonious conduct by him.
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> 8. The appellant then was told that if he did not sign a letter of resignation which had been prepared that he would be terminated.
>
> 9. At this point the appellant became faint and nearly fainted. He was dizzy, his heart was beating rapidly, he broke into a cold sweat, he had to lower his head between his knees, and he was unable to talk. This occurred about 5-10 minutes after the commencement of the meeting.
>
> 10. After a period of time some of these reactions ceased and he was able to talk and he inquired as to what his rights would be under these circumstances.
>
> 11. At first the appellant was told that he did have appeal rights if he resigned, but after some discussion among his supervisors a telephone call was made to DNR personnel in Madison and the appellant then was informed that if he were to resign the would not have appeal rights.
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> 12. The appellant asked for more time to make his decision but was informed that he had to make a decision immediately.
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> 13. The appellant then stated that he would accept the termination and appeal it.
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> 14. One of his supervisors then began reading the termination letter.
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> 15. After he had read approximately one paragraph, the appellant told him to stop and that he would resign.
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> 16. The appellant then signed the resignation letter and left the meeting. The meeting lasted about 30 minutes from beginning to end.
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> 17. At no time during the meeting did any of appellant's supervisors raise their voices, threaten the appellant, or suggest or state that he should take one course of action over another, or, with respect ot their demeanor, act other than in a business-like manner.

> 18. Following the meeting the appellant waited for about an hour for two passengers and then tried to drive his car on the return trip, but due to his mental and physical condition, was unable to drive and relinquished the wheel after driving about one half mile.

The Commission concluded that the appellant in *Evrard* was "under great mental and emotional stress" and that his decision to resign was an overriding of his judgment and will. The Commission noted:

> [I]t is very significant that the appellant asked for more time to make his decision and was told that he had to make an immediate decision. . . . In the instant case there probably would have been a different result on the issue of coercion if the appellant had been given a little longer time, perhaps as little as 24 hours, in which to consider his decision whether to resign from state service.

Even when the materials in the present case are viewed in a light most favorable to the appellant, there was no requirement that appellant make her decision immediately and there has been no suggestion that appellant's mental and physical conditions approached those extant in *Evrard*.

In her brief, appellant also argues that a ruling by the Commission to dismiss this case

> would be giving the respondent and other state employers a way to circumvent the necessary due process required by Wisconsin Statute. Rather than having the requisite "just cause" necessary to take disciplinary action and/or discharge a state employee, the employer need only threaten to discharge the employee for any reason and allow him or her the option of resigning to avoid the loss of benefits and the stigma of a discharge on his or her state employment record. By requiring the release, the State employer protects itself from liability and conceals its coercive tactics. The release serves to deny further the employee of the protection of the Wisconsin Statutes by depriving the employee of the Personnel Commission's review.

This argument fails to recognize that a discharged employe whose former position was outside of a bargaining unit and who held permanent status in class may appeal the discharge decision to the Personnel Commission. In that proceeding, the burden of proof is on the employing agency to establish "just cause" for the discharge decision. *Reinke v. Personnel Board*, 53 Wis. 2d 123, 191 N.W.2d 833 (1971). If the agency fails to

sustain its burden, the appellant is entitled to elimination or reduction of the discipline, along with appropriate back-pay. Sections 230.43(4), .44(4)(c), Stats. It is the employe's decision to resign that eliminates the possibility of obtaining a "just cause" review of the threatened discharge, rather than the agency's posture of requesting that the employe execute a release in addition to the resignation.

In her arguments on respondent's motion, appellant also contends that there was no "just cause" for the respondent's action of constructively discharging the appellant. Because the Commission concludes the appellant voluntarily resigned and was not constructively discharged, it does not address this argument.

ORDER

Respondent's motion to dismiss for lack of subject matter jurisdiction is granted and this appeal is dismissed.

Dated: November 19, 1999 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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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.