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CHESTER MILLER,

Appellant,

v.

THE UNIVERSITY OF WISCONSIN,

Respondent.

Case No. 76-238

* * * * *

INTERIM
DECISION
AND
ORDER

NATURE OF THE CASE

The appellant has filed on Novemeber 2, 1978, a motion for an "Order allowing all of the testimony and documentary evidence presented at the evidentiary hearing held on November 17, 1977, together with the applicable Findings of Fact, Conclusions of Law, and Opinion in the Opinion and Order of the State Personnel Board, dated May 18, 1978, to be considered as evidence of the appellant for decision on any and all other substantive issues raised by the parties." The attorneys for the parties argued this motion before the full Commission.

The findings which follow are based on matter which appears to be undisputed.

FINDINGS OF FACT

1. The original notice for the hearing held November 17, 1977, contained, in pertinent part, the following:

"(b) The legal authority and jurisdiction under which the hearing is to be held is §16.05(1)(e), Stats. (Please note that this is a preliminary hearing to determine if jurisdiction is present.)"

2. The hearing was held on November 17, 1977, pursuant to the aforesaid notice, and a decision on jurisdiction was entered May 18, 1978.

CONCLUSIONS OF LAW

1. The determination contained in the Personnel Board decision dated May 18, 1978, that the Board had jurisdiction over this appeal as against the respondent's motion to dismiss set forth in the prehearing conference report dated January 20, 1977, is binding and conclusive on the parties in further proceedings in this appeal.

2. The findings of fact contained in the aforesaid May 18, 1978, decision are binding and conclusive on the parties, on the basis of collateral estoppel, in further proceedings in this appeal, to the extent that those findings are material to the substantive issues.

3. The transcript of the hearing of November 17, 1977, constitutes hearsay.

4. There having been no suggestion of the unavailability of the witnesses who testified at that hearing, the transcript of the hearing does not fall within an exception of the hearsay rule.

5. Hearsay testimony not within an exception to the hearsay rule should not be received over objection.

OPINION

This opinion will first address the second part of the appellant's motion which requests that the Commission consider as evidence in further proceedings on this appeal the findings, conclusions, and opinion issued by the Personnel Board on May 18, 1978. This material includes legal reasoning and the "ultimate conclusions upon each material issue of fact . . .," §227.10, Wis. Stats. In the opinion of the Commission this material can only be considered by the Commission to the extent that it might bind the parties as to any matters in dispute.

The appellant's motion thus raises the questions of what effect the May 18, 1978, decision on jurisdiction has on further proceedings in this matter. Clearly the decision itself that jurisdiction is present as against the respondent's motion to dismiss is binding on these parties in this proceeding. Furthermore, principles of collateral estoppel may result in a conclusion that some of the findings of fact are binding on the parties.

Under principles of collateral estoppel the parties are bound as to "matters or points which were in issue or controverted and upon which the initial judgement necessarily depended." See Tipler v. E. J. du Pont de Nemours & Co., 443 F. 2d 125, 128 (6th Cir. 1971). The application of collateral estoppel in administrative proceedings is based on relatively flexible concepts. See International Wire v. Local 38, Int. Bro. of Elec. Workers, 357 F. Supp. 1018, 1023 (N. D. Ohio 1972):

"In Tipler, the rule which was adopted was a flexible one, proceeding from the premise that neither collateral estoppel nor res judicata is rigidly applied ... a party's right to relitigate issues previously determined in an administrative proceeding must be determined upon analysis of the factors relating to the nature and extent of the administrative proceeding."

In this case the notice was given and the hearing held pursuant to the contested case provisions of Chapter 227 and was held before the predecessor agency to this Commission and pursuant to the same administrative rules of procedure, see §127(1)(b) and 129(4 m), Chapter 196, Laws of 1977. In the Commission's opinion, based on the foregoing principles, the findings of fact contained in the May 18, 1978, decision, should be binding on the parties in further proceedings in this appeal, to the extent that those findings are material to the substantive issues.

However, the parties should be allowed to present evidence to add to or augment the findings as to substantive matters in issue.

The Commission wishes to point out the distinction between its decision of the instant motion and the Personnel Board's decision of June 16, 1978. In the latter situation the appellant's motion filed June 1, 1978, requested:

" ... an order determining that he was illegally terminated ... immediate reinstatement, termination of his probation, and for back pay

This motion is being brought because the evidentiary hearing held on November 17, 1977, provided both parties to present a full and adequate presentation or defense of our cases and further evidentiary hearing would produce no evidence that would help the board with its decision in this case."

By this motion, the appellant was asking for final disposition of this case. The Board denied the motion on the basis that the only hearing had been limited to subject matter jurisdiction and the respondent should be allowed to be heard on the substantive issues before final disposition.

By decision of the instant motion the Commission is not directing a final decision in this case as was requested by the appellant's June 1, 1978, motion, but rather it is indicating which issues of fact and law have been resolved by the proceedings to date. The respondent is not foreclosed from presenting evidence on factual issues that relate to substantive matters so long as those issues have not been fully resolved by the May 18, 1978, decision.

By way of example, the Board found that the "appellant began employment with the respondent as an employe in the classified service, building maintenance helper 2, on September 27, 1976." This finding is binding

on the parties with respect to the question of subject matter jurisdiction and also, to the extent that it is material, to the substantive issues. While the parties may not now present evidence to controvert this finding, they may present evidence that would augment the finding to the extent the augmentation is material to the substantive issues.

The use of the testimony given at the November 17, 1977, hearing is governed by somewhat different principles. In court proceedings, the use of former testimony of this nature would be permitted if the witnesses were unavailable. See §908.045(1), Wis. Stats. It is true that administrative proceedings are not bound by this requirement. See §227.08(1), Wis. Stats.:

"Agencies shall not be bound by common law or statutory rules or evidence. They shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony. They shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact."

However, the Wisconsin Supreme Court has held:

"Testimony of a former proceeding is hearsay, although an exception exists where the declarant at the previous hearing is unavailable to testify. While administrative proceedings are not bound by the same strict rules of evidence as govern trials this court has held that hearsay evidence not within another exception should not be received at an administrative hearing over objection where direct testimony as to the same facts is available. Absent a showing that the witnesses at the earlier trial were "unavailable" it would have been error for the examiner to consider any prior testimony over the department's objections. State v. McFarren, 62 Wis. 2d 492, 506, 215 N.W. 2d 459 (1974) "

See also City of Superior v. ILHR Dept., 84 Wis. 2d 663, 672, 267 N.W. 2d 637 (1978).

Therefore, the record of the November 17, 1977, hearing will not be received in evidence. It should be noted that the May 18, 1978,

Personnel Board decision is not subject to the foregoing authorities because it falls within a recognized exception to the hearsay rule as a decision in a previous proceeding used to establish a collateral estoppel, McCormick, Evidence (2d Ed.), §318.

ORDER

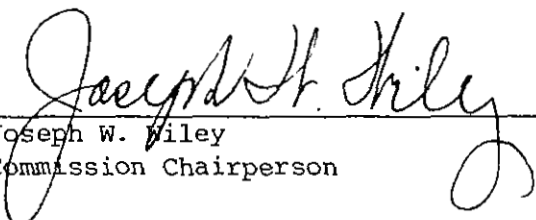
The appellant's motion filed on November 2, 1978, is granted in part and denied in part. The Commission will take official notice of the decision of the Personnel Board dated May 18, 1978, in a manner not inconsistent with this decision. The determination in that decision that the Commission has jurisdiction over this appeal as against the respondent's motion to dismiss referred to in the conference report dated January 20, 1977, is binding and conclusive on the parties. The findings of fact set forth in the May 18, 1978, decision are binding and conclusive on the parties in further proceedings to the extent that the findings are material to the substantive issues in this case, subject to the right of both parties to present additional material evidence not to contravene but to augment said findings. The transcript of the November 17, 1977, hearing will not be admitted in evidence. Any documentary evidence presented at that hearing may be presented again at the hearing on the merits and will be subject to a ruling on admissibility at that time.

This appeal will be scheduled for hearing as soon as possible and notice of the time, date and place will be provided. This will be a class 3 proceeding pursuant to §16.05(1)(h), Wis. Stats. (1975). The issue is: was Mr. Miller wrongfully terminated under the provisions of Subchapter II, Chapter 16, Stats. (1975), by the University of Wisconsin - Madison on or about November 23,

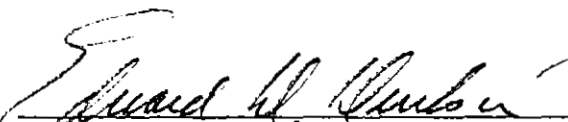
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1976, in the manner set forth in the findings of fact contained in the
Personnel Board decision dated May 18, 1978.

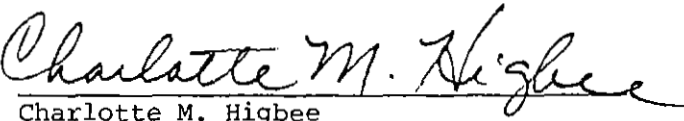
Dated: 3/9, 1979. State Personnel Commission



Joseph W. Wiley
Commission Chairperson



Edward D. Durkin
Commissioner



Charlotte M. Higbee
Commissioner