STATE OF WISCONSIN PERSONNEL COMMISSION

RANDOLPH HARRIS,
Appellant,

v.

State Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION,
Respondent.

Case No. 99-0052-PC

DECISION AND ORDER[1]

NATURE OF THE CASE

This is an appeal of an allegedly constructive discharge. A hearing was held on October 27, 1999, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on January 18, 2000.

FINDINGS OF FACT

1. At all times relevant to this matter, appellant was employed by respondent as the Superintendent of Buildings and Grounds at the Wisconsin School for the Deaf (WSD) in Delavan, Wisconsin. In this position, appellant was responsible for supervising a staff of sixteen employees.

2. On March 29, 1999, appellant was advised by his supervisor Alex Slappey, Superintendent of WSD, that he was being placed on administrative leave pending the results of the investigation of a sexual harassment complaint filed against appellant.

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[1] After reviewing the Proposed Decision and Order (PD&O) and consulting with the hearing examiner, the Commission has adopted the PD&O with certain minor modifications which are explained in those footnotes marked by the letters of the alphabet None of these modifications disturbed in any way the credibility determinations made by the hearing examiner.

During their discussion in Mr. Slappey's office, Mr. Slappey also informed appellant that he was to turn in all his keys and access cards, that he was not to come on campus during this administrative leave, that a pager would be ordered for him, and that he would be advised when this pager arrived.

3. Also during this meeting of March 29, 1999, Mr. Slappey handed appellant a letter addressed to him dated March 30, 1999, from Juanita S. Pawlisch, an Assistant State Superintendent. In this letter Ms. Pawlisch stated as follows, in pertinent part:

> You are directed to attend an investigatory interview on March 31, 1999, at 11:30 am in the Superintendent's conference room. The purpose of this interview is to determine the facts relevant to possible violation of policy bulletin 3.115 Sexual Harassment and the following work rules found in policy bulletin 3.105:
>
> 17. Threatening, intimidating, abusing, striking, or deliberately causing mental anguish or physical injury to supervisors, other employees, students, or the general public.
> 18. Failure to exercise cooperative, courteous personal relationships in dealing with supervisors, other employees, students, or the general public.
> 19. Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; making false or malicious statements concerning other employees or students; or other behavior unbecoming a state employee.
>
> The policies and work rules may have been violated when you allegedly sexually harassed a subordinate employee. You may have representation of your choice at this meeting.
>
> Effective immediately, you are placed on paid administrative leave. This leave will continue until the investigation into the alleged sexual harassment has been completed. You are directed to give all keys and other access cards to your supervisor, Alex Slappey, prior to leaving campus.
>
> Because you are on paid administrative leave, you are expected to be available to management during your normal work hours. In addition, you are expected to return phone calls from department managers within

> fifteen (15) minutes of receipt. Failure to be available or to return calls may be grounds for disciplinary action.

4. Appellant attended the meeting of March 31, 1999. Also present at this meeting were Kathy Knudson, respondent's Human Resources Director, and Theresa Roherty. During this meeting, Ms. Knudson informed appellant that she would be conducting the investigation of the sexual harassment complaint and that he should remain off campus until the investigation was complete.

5. Appellant came on campus on April 22 and April 23, 1999.

6. In a memo dated April 27, 1999, Mr. Slappey advised appellant as follows:

> You are directed to attend a pre-disciplinary hearing on Tuesday, April 27, 1999, at 2:15 p.m. in my office at the Wisconsin School for the Deaf. The purpose of this meeting is to provide you an opportunity to explain your refusal of a direct order issued to you on March 30, 1999. Refusing direct order is a violation of the following portion of bulletin 3.105.
>
> 1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions by officers or superiors.
>
> You have a right to have a representative present at our meeting. The meeting will be conducted by Alan Beeler and myself.

This notice was hand-delivered to appellant's home on or before April 26, 1999.

7. Mr. Beeler was respondent's Director of State Schools and Mr. Slappey's first-line supervisor.

8. The meeting was held on April 27, 1999, and appellant subsequently received a five-day suspension without pay for violating the order not to come on campus during his administrative leave.

9. Ms. Knudson was not in appellant's chain of command. Ms. Knudson and Mr. Beeler were in different supervisory chains.

10. During Ms. Knudson's investigation of the sexual harassment complaint filed against appellant, she had numerous conversations with appellant, some of which she initiated and some of which he requested.

11. In a memo dated April 28, 1999, Mr. Slappey directed appellant to attend a predisciplinary hearing on April 29, 1999, relating to respondent's investigation of the sexual harassment charges filed against him. Appellant received this letter on April 28, 1999. This letter advised appellant that he could have representation of his choice present during the hearing.

12. Present at the April 29 hearing were Mr. Beeler; Mr. Slappey; Sara Benton, Mr. Slappey's administrative assistant, and appellant. At this meeting, Mr. Slappey handed appellant a document and asked him to read it. This document stated as follows:

> RANDOLPH HARRIS - Pre-disciplinary hearing - April 29, 1999
>
> Charges of sexual harassment have been filed against you by two employees. These charges and other incidents have been investigated and we have found that you have violated policy bulletin 3.115 work rules 1, 17, 18 and 19 from policy bulletin 3.105. We found the following occurred while at the Wisconsin School for the Deaf during work hours:
>
> a) You made inappropriate comments with sexual innuendo and vulgar language to three female employees which the employees found unwelcome
> b) Four female employees reported you asked for dates and persisted to ask when they told you they did not want to date you
> c) You kissed a female subordinate employee
> d) You touched a female employee on the buttocks and used inappropriate vulgar language and the employee found the conduct unwelcome
> e) You threatened to commit bodily harm towards another staff member
> f) You had knowledge of and approved employees' inaccurately reported hours and days of work
> g) You misused the Internet when you accessed inappropriate Internet sites which included sexual content
> h) You were told on at least two occasions that you could not be on the WSD campus during your administrative leave, but you did come on campus
>
> The harassing activities range from minor to severe and cover a period of time from March 1997 through March 1999. Based upon these facts

> and the fact that you have previously been counseled regarding violations of the agency sexual harassment policy, we are considering serious disciplinary action which may include termination.

13. In his response to the allegations at the hearing of April 29, appellant indicated that it could be true that he came on campus even though he was told not to because he had been confused and had a lot on his mind at the time; that he admitted kissing a female subordinate employee; and that all the other charges were false. He also responded to the effect that, "Tell me who these people are that are making these charges and I can answer each one of them. I cannot answer if I don't know who they are. They lied whoever they are."

14. Appellant was advised at this April 29 hearing of his five-day suspension without pay for coming on campus during his administrative leave.

15. At the time of the April 29 hearing, appellant was aware, primarily through his discussions with Ms. Knudson, of the circumstances underlying allegations (See Finding of Fact 12, above) a, b, c, d, e, f, g, and h, and the identity of the individuals involved in allegations a, b, c, d, e, and f.

16. On April 30, 1999, around 9:00 or 9:30 a.m., appellant telephoned WSD and asked to speak to Mr. Slappey. Mr. Slappey was not available so appellant's call was forwarded to Mr. Beeler who happened to be present at WSD that morning. Appellant requested a face-to-face man-to-man meeting with Mr. Beeler. Appellant and Mr. Beeler had always had a cordial and collegial working relationship and appellant trusted Mr. Beeler. Mr. Beeler suggested they meet at a local park.

17. During their meeting in the park, which lasted between 30 and 40 minutes, appellant was the first to mention a possible resignation from his position. Mr. Beeler told appellant, in response to his inquiries, that appellant could be terminated as the result of the sexual harassment allegations, and that, were appellant to resign, Mr. Beeler did not believe, based on past practice,[A] that respondent would challenge his unemployment compensation and Mr. Beeler would prepare a positive reference letter

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[A] This phrase was added for purposes of clarification.

for him. Mr. Beeler did not tell appellant that Ms. Knudson had decided to terminate him at noon that day. Mr. Beeler did tell appellant that he was scheduled to leave WSD for Madison around noon that day.

18. When Mr. Beeler got back to his office, he telephoned Ms. Knudson and told her that appellant had decided to resign.

19. Later that morning, appellant came to WSD and asked to meet with Mr. Beeler. Appellant indicated to Mr. Beeler that he was resigning and handed Mr. Beeler a letter of resignation and a completed termination form. In order to complete this form, appellant filled in his last day of work as 4/30/99 and his termination date as 5/26/99. The determination of the termination date required appellant to take into account his remaining leave balance. Appellant had probably completed this letter or this form or both prior to his park bench meeting with Mr. Beeler.[B]

20. After appellant left WSD, Mr. Beeler contacted Ms. Knudson and told her that appellant had submitted his resignation.

21. Mr. Slappey signed appellant's termination form on April 30, 1999.

22. After submitting his resignation documents, appellant spoke to his girlfriend. She suggested he contact Ms. Knudson. Appellant contacted Ms. Knudson by phone around 1:00 p.m. on April 30. Ms. Knudson told appellant that no decision had yet been made on his discipline. Appellant told Ms. Knudson that he could understand how violence such as that which occurred at Columbine High School in Colorado happens, and then started crying. Ms. Knudson suggested that appellant get in touch with Michael Kern with respondent's Employee Assistance Program. Appellant did not indicate to Ms. Knudson during this conversation that he wanted to withdraw his resignation.

23. Appellant contacted Mr. Kern by phone on April 30 and told Mr. Kern that Mr. Beeler had told him that he would be fired as the result of the sexual harassment investigation, and that he had felt pressured as a result to resign from his position at WSD. After further discussion with Mr. Kern, appellant decided that he wanted to

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[B] This sentence was added to reconcile the conclusions in the Opinion section with the Findings of Fact.

withdraw his resignation. Mr. Kern agreed to facilitate a three-way conference call with appellant, Ms. Knudson, and Mr. Kern to discuss this. This conference call took place on the afternoon of April 30. During the conference, Ms. Knudson indicated that she didn't know if appellant's resignation could be rescinded, but she would look into it, and suggested that appellant put his rescission request in writing.

24. In a letter to Ms. Knudson dated April 30, 1999, appellant stated as follows:

> I am writing to inform you I do not wish to resign from my position as Superintendent of Buildings & Grounds at Wisconsin School for the Deaf. I wish to rescind the resignation letter I submitted earlier today to Alan Beeler.
>
> I am withdrawing my resignation due to misinformation presented to me by Alan Beeler, Director of State Schools.

This letter was faxed to Ms. Knudson at respondent's central office and she received it around 3:27 p.m. on April 30, 1999. Around 4:30 p.m. on April 30, Ms. Knudson advised appellant that his resignation had been accepted.

25. In a memo to all WSD staff dated April 30, 1999, Mr. Slappey stated as follows:

> Randy Harris has resigned from his position as Superintendent of Buildings and Grounds effective today. Rich Williams will be the acting lead worker in the interim. Any questions or requests related to the maintenance and grounds should be directed to Rich.
>
> We will be proceeding to fill the vacant position in a timely manner.

26. In a letter to appellant dated May 3, 1999, Faye J. Stark, an Assistant State Superintendent, stated as follows, in pertinent part:

> We have received and accepted your letter of resignation effective April 30, 1999. Please contact the WSD payroll office to make arrangements for your final paycheck. In addition, please contact Alex Slappey to arrange a time when he can escort you to your office to pack any personal belongings. You are not to return to campus except with the express permission of Mr. Slappey.

CONCLUSIONS OF LAW

1. The appellant's resignation was not the result of coercion or duress and did not constitute a constructive discharge.

2. The Commission does not have jurisdiction over a voluntary resignation.

OPINION

The following was established as the statement of the hearing issue:

Whether respondent coerced the resignation tendered by the appellant on April 30, 1999.

A resignation is coerced if there is "an actual overruling of the judgment and will." *Lindas v. DHSS*, 80-231-PC, 10/2/81. In *Evrard v. DNR,* 79-251-PC, it was concluded that the appellant had been informed by his supervisors, with no prior warning, that he faced criminal charges as the result of actions he had taken in the course of his employment; that, if he did not sign the letter of resignation they had prepared, he would be terminated; and that he would not be allowed any time to consider his options but had to make an immediate decision. The Commission concluded that these circumstances rendered the resignation a constructive discharge. The circumstances under consideration here are not equivalent to those in *Evrard.*

Here, appellant's theory of coercion rests on his assertion that Mr. Beeler, during their meeting in the park, told him that he was going to be terminated at noon that day as the result of the investigation of the sexual harassment complaints filed against him and that, as a result, appellant concluded he would have to submit his resignation before noon to avoid termination. It should first be noted in this regard that, even if Mr. Beeler had told appellant that he was going to be terminated at noon, this circumstance does not compare to that concluded to be coercive in *Evrard.* Unlike the factual underpinning in *Evrard,* here, the employee had known for over four weeks that he faced serious discipline for employment-related charges; these charges, unlike those in *Evrard*, did not involve the potential for the imposition of criminal penalties; and complainant was made aware the day before, and should have been aware due to his

status as a supervisor prior to that, that termination was being considered by his employer.

However, even if Mr. Beeler's alleged actions could support a finding of coercion, the record does not support appellant's version of events in this regard. Mr. Beeler denies that he told appellant that he was going to be terminated at noon, and instead asserts that he told appellant, in response to appellant's inquiry, that he could be terminated as the result of the sexual harassment complaints and should consider all options. Although there were inconsistencies in both appellant's and Mr. Beeler's testimony, the facts of record here more strongly suggest that appellant had realized, as the result of the predisciplinary hearing on April 29, that he was probably going to be terminated for allegedly engaging in sexual harassment; that, as a result, he had essentially decided, prior to his park bench meeting with Mr. Beeler, to resign and had prepared and signed his letter of resignation or his termination form or both prior to that meeting; and that he initiated both the phone call to WSD and the discussion of resignation with Mr. Beeler to determine what the ramifications of his resignation would be on his ability to draw unemployment compensation and on the type of employment reference he would receive from WSD.

Appellant argues, however, that the totality of the circumstances of record tend to support his contention that respondent was determined to separate him from his employment without the hassle of completing the sexual harassment investigation and terminating him, and support a finding, as a result, that Mr. Beeler coerced his resignation. Appellant points, for example, to the five-day suspension without pay that he claims was imposed despite the fact that he was never told not to come on campus. However, the record here shows that interviews were conducted with those present at the meetings with appellant which occurred at the time he was placed on administrative leaves and that each of those present at these meetings confirmed that appellant had been specifically instructed during these meetings not to come on campus during this leave. Appellant even admitted at the hearing on April 29 that, ". . . coming on

campus could be true. . if someone did tell me I was confused and had a lot on my mind and I didn't hear that. I was in a state of confusion and did not hear that."

Appellant further argues that the fact that he wasn't given sufficient time to obtain representation for the April 27 and 29 predisciplinary hearings also supports his theory here. However, the notices for both these hearings provided appellant an opportunity to have a representative of his choice and appellant never requested additional time to obtain one.

Appellant also contends that his theory is further supported by the fact that certain conduct was mentioned at the predisciplinary hearing but that he had been given no information about the identity of the individuals involved in, or the circumstances of, these incidents in which he was alleged to have exhibited this conduct. However, appellant is not credible in this regard. He claimed in his direct examination at hearing that he was unaware of the identity of the females to whom he allegedly made inappropriate comments, asked for dates, and against whom he threatened to commit bodily harm, but was essentially aware of the individuals and circumstances involved in regard to the other allegations. Upon further examination, appellant admitted that he had been questioned about asking particular named females for dates, about making comments to particular named females, and about an alleged threat he made to a particular named female. Although we do not reach the question here of whether the information provided to appellant was sufficient to satisfy due process requirements had discipline actually been imposed, appellant's contention in this regard is not supported by the facts of record.

Appellant also argues that his theory is further supported by the fact that Mr. Beeler was sent to WSD on April 30 to obtain appellant's resignation. However, appellant acknowledges that he initiated the contact with WSD and Mr. Beeler on the morning of April 30 and he initiated the discussion of a possible resignation during his meeting with Mr. Beeler. These facts do not support appellant's argument.

Finally in this regard, appellant argues that respondent was highly motivated to have him resign because this would obviate the necessity of pursuing the results of the

sexual harassment investigation. This is not particularly persuasive since it would have to be assumed that the majority of the work in this regard had already been completed by respondent.[C] In addition, it could also be assumed under the circumstances here that appellant was highly motivated to act quickly to avoid the possibility of termination by tendering his resignation.

It should also be noted that, in support of the Commission's conclusion that Mr. Beeler did not tell appellant that he was going to be terminated at noon, the record shows that, if appellant had a question regarding the substance or progress of the sexual harassment investigation, he did not hesitate to contact Ms. Knudson. In fact, she was the first person he contacted when he started having second thoughts about his resignation. It would have to be assumed, therefore, that, if Mr. Beeler had indicated to him that Ms. Knudson was going to fire him at noon that day, appellant would have called Ms. Knudson to verify that fact. Appellant never made that call. In addition in this regard and contrary to appellant's characterization of Mr. Kern's testimony in his post-hearing brief, the record does not show that appellant indicated to Mr. Kern during their conversations on April 30 that Mr. Beeler had told him that he was going to be terminated at noon that day. Mr. Kern's testimony indicated instead that appellant told him that Mr. Beeler had said during their meeting in the park that appellant was about to be fired, a conclusion appellant himself probably would have drawn as the result of the predisciplinary hearing the day before.

The facts of record here tend to show that appellant actually felt pressured to resign as the direct result of the sexual harassment investigation and predisciplinary hearing of April 29, not his conversation with Mr. Beeler. This would not be cognizable as coercion or duress within the meaning of the constructive discharge construct. If it were, it would have broad potential application to every situation where an employee felt vulnerable to discipline as the result of an investigation.

[C] This sentence was added to clarify the Commission's rationale.

As an alternative theory, appellant contends that the resignation should not have been effected since he made an effort to rescind it within a few hours after tendering it. This is not considered further here because it is outside the scope of the hearing issue.[D]

ORDER

This appeal is dismissed.

Dated: March 10, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:990052Adec1

Parties:

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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

[D] The final phrase in this sentence was deleted because it was not necessary for the decision of this matter

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