

J. K. [REDACTED],
Appellant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

Case No. 03-0014-PC

**RULING ON MOTION
TO REINSTATE**

This is an appeal pursuant to s. 230.44(1)(c), Stats., of a discharge. This matter is before the Commission on appellant's motion to reinstate filed April 14, 2003. The parties, through counsel, have filed briefs. The factual matters set forth below appear to be undisputed, except as indicated.

By way of background, this is the second time respondent has discharged appellant. The first discharge occurred effective April 23, 2002. That discharge resulted in an appeal to this commission denominated 02-0027-PC. On October 24, 2002, the commission entered a "RULING ON MOTION AND INTERIM ORDER" in that case granting appellant's motion for reinstatement and rejecting that discharge on the ground that the respondent had failed to provide a pre-discharge process sufficient to satisfy due process requirements. This ruling was followed by further proceedings before the commission.

Following those proceedings, respondent ultimately restored the appellant to his position of employment effective March 24, 2003, by a letter dated March 20, 2003. The respondent placed the appellant on paid administrative leave effectively immediately on said restoration, and notified him there would be a pre-termination meeting held on April 1, 2003. He was not given back pay or benefits. He was informed, in summary, that at that time he would be given the opportunity to address allegations of misconduct regarding excessive and inappropriate use of the respondent's information technology resources (the internet), and regarding the deletion of system files from the computers in his office that he had been using to access the internet. The alleged misconduct was essentially the misconduct for which he had been discharged in 2002, that had been involved in Case No. 02-0027-PC.

Appellant's attorney in a letter dated March 27, 2003, informed the respondent, *inter alia*, as follows:

The Department has unilaterally altered the Commission's orders by requiring that Mr. K█████ be placed on administrative leave pending the outcome of a pre-termination meeting to be conducted April 1, 2003. The purpose of this pre-termination meeting is to allow Mr. K█████ an opportunity to address the allegations previously addressed nearly a year ago. Mr. K█████ addressed these allegations; after which the department terminated his employment. The Department's actions were appealed and overturned by the Commission. Therefore, the Commission's January 6, 2003, ruling currently controls the outcome of these matters.

Additionally, you should also consider and appreciate, with respect to the Department's claim of the destruction of computer system files, that this issue was litigated, with witnesses and evidence presented, before a different tribunal that concluded that no such destruction of system files occurred.¹

I am instructing Mr. K█████ not to attend the April 1, 2003, pre-termination meeting, nor any similar meetings, nor have any prospective discussions regarding the allegations with the Department or any of its employees. These matters have been litigated, considered, and disposed of in their entirety, with the exception of collateral matters now before the Commission.²

As was indicated in this letter, the appellant did not attend the pre-termination meeting. Subsequently, respondent discharged him effective April 10, 2003, as reflected in a letter of that date, and this appeal ensued on April 14, 2003.

In his motion to reinstate, which was filed along with the appeal, the appellant seeks the following orders by the commission:

- (a) Reinstate the appellant to his employment,
- (b) To prohibit the respondent from taking additional disciplinary actions regarding issues and matters previously litigated,
- (c) To find the respondent's actions to be conducted in bad faith,
- (d) To award legal fees and costs related to disciplinary actions the respondent initiated April 10, 2003.

In his brief in support of his motion to reinstate, filed April 23, 2003, the appellant contends that "the facts and transactions surrounding the appellant's April 10, 2003, discharge are identical to the facts and circumstances surrounding appellant's

¹ This refers to an unemployment compensation (UC) tribunal's determination that the appellant was not disqualified from receiving UC benefits because of his activities that figured in his discharge (pursuant to s. 108.101(1), Wis. Stats., such determinations are inadmissible in administrative proceedings except in very limited circumstances).

² This refers to proceedings concerning s. 227.485, Stats., costs in the appellant's first appeal, No. 02-0027-PC.

April 23, 2002, discharge;³ therefore, the respondent is collaterally estopped from discharging appellant." Appellant's April 23, 2003, brief, p. 3.

The criteria for the application of collateral estoppel, or issue preclusion, includes the requirement that "the *issue* [emphasis added] sought to be precluded must have been *actually* [emphasis original] litigated previously." *Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N. W. 2d 458 (1994). See also *Manu-Tronics v. Effective Management System*, 163 Wis. 2d 304, 315, 471 N. W. 2d 263 (Ct. App. 1991) (Issues to be foreclosed may be issues of evidentiary fact, ultimate fact [application of law to facts], or law, but must be identity of issues to apply collateral estoppel)

Respondent asserts in its April 30, 2003, post-hearing brief,⁴ that "[t]he information that the department was prepared to present at the pre-termination meeting scheduled to occur on April 1, 2003, was significantly different than the information that was presented at the final pre-termination meeting that occurred in April of 2002." *Id.*, p. 1. The commission's earlier decision of October 24, 2002, in Case No. 02-0027-PC was premised on the conclusion that the pre-termination process was insufficient to satisfy the respondent's burden of proof to demonstrate compliance with the due process requirements imposed by *Loudermill*⁵ and its progeny. In the instant case, the respondent asserts it was planning⁶ on providing more extensive information about their investigation and the basis for its conclusion than it did in Case No. 02-0027-PC, that persons with technical expertise who had not been present at the April 19, 2002, pre-termination meeting, which the commission concluded had not been adequate, would have presented information, and that the information to have been presented would have included information that already had been presented at the UC hearing (which of course had been held post-termination), as well as other information. Appellant would have had an opportunity to have provided his response to whatever would have been presented at this meeting. There is no basis for the commission to conclude that the pre-termination process would have been deficient, as in the first case.

Since the commission concludes that this essential element of issue preclusion--identity of the issues--is not present, it will not address the "fundamental fairness" criteria that otherwise would have to be evaluated pursuant to *Lindas v. Cady*, 183 Wis. 2d 547, 561, 515 N. W. 2d 458 (1994); see *Henry v. Riverwood Clinic, S. C.*, 209

³ The parties disagree on this assertion.

⁴ This is supported by an attached affidavit.

⁵ *Cleveland Bd. of Education v. Loudermill*, 470 U. S. 532 (1985).

⁶ As indicated above, the appellant declined to attend the proffered meeting of April 1, 2003, on the advice of his attorney.

Wis. 2d 601, n. 8, 568 N. W. 2d 38, 1997 Wisc. App. LEXIS 281 (Ct. App. 1997) (unpublished) (Where no identity of issues, court will not address whether application of issue preclusion would comport with principles of fundamental fairness).

Appellant also argues that the principle of estoppel by record applies in this case. However, there also is a fundamental missing element under this heading--there is no "identity between the causes of action⁷ or the issues sued on." *Acharya v. AFSCME, Council 24, WSEU*, 146 Wis. 2d 693, 432 N. W. 2d 693 (Ct. App. 1988)

While it is not clear whether appellant contends that the commission's earlier rulings in 02-0027-PC have any kind of preclusive effect on the substantive question of whether there is just cause to discharge appellant on the basis of the issues concerning alleged improper computer activities and destruction of system files, it is clear that that issue was never litigated in the former proceeding, which was decided on the basis of an issue concerning procedural due process, and the former decisions could not have any preclusive effect on the issue of just cause.

Because neither estoppel by record nor issue preclusion applies here, complainant's motion for immediate reinstatement must be denied. His request for an order prohibiting the "respondent from taking additional disciplinary actions regarding issues and matters previously litigated" is somewhat amorphous because the commission is in no position to do more than process cognizable claims brought before it and then enter orders based on the findings and conclusions it reaches. The commission does not have the authority in a case of this nature to enter what amounts to a preliminary injunction. *Lyons v. DHSS*, 79-0081-PC, 4/26/79, *aff'd DHSS v. Wis. Pers. Comm.*, 80-CV-4948, Dane Co. Circuit Court, 7/14/81; *Van Rooy v. DILHR & DER*, 87-0117-PC, 87-0134-PC-ER, 10/1/87.

With regard to his request to find the respondent's actions to have been conducted in bad faith, such a finding would not be made until after the conclusion of further proceedings, and then only if it were relevant to the disposition of the case. As to the request for an award of fees and costs, this also is something that would only be addressed after a final decision in this case.

⁷ "The cause of action . . . is the fact situation on which [the first] claim was based." *Marshal-Wisconsin v. Juneau Square*, 130 Wis. 2d 247, 265-66, 387 N. W. 2d 106, 114 (Ct. App. 1986) (footnote omitted), *aff'd in part, rev'd in part*, 139 Wis. 2d 112, 406 N. W. 2d 764 (1987); *Schaeffer v. State Personnel Comm.*, 150 Wis. 2d 132, 141, 441 N. W. 2d 292 (Ct. App. 1989) (brackets, ellipsis and parentheses in original)

ORDER

Appellant's motion to reinstate filed April 14, 2003, is denied.

Dated: May 23, 2003.

STATE PERSONNEL COMMISSION



ANTHONY J. THEODORE, Commissioner
(Commissioner Theodore is the sole sitting
Commissioner; the other two Commissioner
positions are vacant. Therefore, Commis-
sioner Theodore is exercising the authority
of the Commission. See 68 Op. Atty. Gen.
623 (1979))

AJT:020027Arul4

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