STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TODD LEWIS PETERSON, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case 15
No. 68070
PA(adv)-140

Decision No. 32605

Appearances:

Todd Lewis Peterson, appearing on his own behalf.

Daniel Graff, Attorney, P. O. Box 7921, Madison, Wisconsin 53707-7921, appearing on behalf of the Department of Natural Resources.

ORDER GRANTING MOTION TO DISMISS

This matter, which arises from the imposition of discipline, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. No hearing was held. The final submission relating to the motion was received on October 1, 2008. The facts set forth below are undisputed.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Prior to the actions that form the basis of this appeal, Todd Lewis Peterson, the Appellant in this matter, had been employed by the Department of Natural Resources (Respondent) for approximately 20 years. He was reassigned from the position of Public Service Section Chief in the Bureau of Wildlife Management in early 2007 but continued working in that bureau on a temporary assignment. Appellant was a Career Executive with permanent status in class. During the relevant time period, he was supervised by JoAnne Farnsworth.

2. Respondent issued letters of suspension to Appellant on February 26, 2007 and December 5, 2007.

3. Respondent conducted a pre-disciplinary hearing on March 14, 2008. Appellant was represented by an attorney.

4. At 2:30 p.m. on Wednesday, April 23, Farnsworth and Barb Zelmer, Acting Director of DNR's Bureau of Wildlife Management, delivered a letter from DNR's Deputy Secretary informing Appellant that his employment would be terminated at the close of business on Friday, April 25. The letter was dated April 22.

5. Upon receiving the April 22 letter, Appellant asked Farnsworth and/or Zelmer if he could still resign. He was directed to speak with Roy Pedretti, chief of the Payroll and Benefits Section in Respondent's Bureau of Human Resources. He was also informed that he was on administrative leave, effective immediately, through April 25.

6. Appellant promptly met with Mr. Pedretti and again asked if he could resign rather than be terminated. After checking with his supervisor, Pedretti informed Appellant that Respondent would accept his resignation.

7. Ms. Farnsworth made arrangements so that Appellant's access to DNR email, his computer and voicemail all ended at the close of business on April 23. His building access card was disabled at the same time.

8. On April 24, Appellant attempted to log onto his work computer but access was denied and IT staff indicated he was no longer in the system. Later that day, Appellant met again with Mr. Pedretti and presented him with the following list of questions:

I have the following questions:
1. Can I resign by 4:30 on April 25, 2008?
2. Do I retain my seniority?
3. " " my sick leave?
4. Do I retain my state contribution to my retirement?
5. Do I have reinstatement rights?
6. What is the status of my application for income continuation insurance [?]
7. What is the status of my request for reasonable accommodation filed on April 3, 2008?

9. When Appellant mentioned to Pedretti that access to the computer had been denied, Pedretti said, "It must be because of the termination." Appellant requested a written response to the questions and Pedretti agreed to respond by the morning of April 25.

10. Pedretti prepared written responses and they were faxed to Appellant's attorney during the morning of April 25.

11. Appellant submitted the following statement to Respondent on April 25:

> I hereby voluntarily resign my position with the Wisconsin Department of Natural Resources effective at the close of business today. The Department has stipulated the conditions of retaining my seniority, sick leave, retirement and reinstatement eligibility in a memorandum to [my attorney] from [Respondent's attorney] dated April 25, 2008.

12. Respondent accepted the resignation at approximately 2:30 p.m. on April 25.

13. In an undated letter that was received on May 22, 2008, Appellant filed a "Personnel Appeal" with the Commission that included the following:

> On April 23, 2008, I received a letter dated April 22, 2008, from DNR Deputy Secretary Pat Henderson indicating that I was to be terminated on April 25, 2008. I resigned my position effective April 25, 2008. My resignation was not voluntary. Mr. Roy Pedretti (DNR-HR) instructed me to write that I "voluntarily resign" in my resignation letter. I was terminated, and my resignation was in response to that termination. I resigned solely for the purpose of preserving certain benefits and rights as a state employee. . . .
>
> The remedy that I seek is reinstatement to my position or a similar one with any back pay and restoration of benefits, which may be required; and any other remedies available through the appeal process.

Appellant also contended that during his employment, Respondent did not properly accommodate his disability.

14. Because the State considered Appellant to have resigned from his position, his accumulated leave balance was converted to approximately $70,000 in offsets to future health insurance premiums.

15. During the week of April 28, Appellant received a note from Bill Vander Zouwen, Section Chief for Wildlife and Landscape Ecology, that read, in part: "I was so sad to hear of your termination." Vander Zouwen neither directly nor indirectly supervised Appellant during his employment at DNR.

16. By email dated April 29, the Director of the Wildlife Bureau informed bureau staff that Appellant had "resigned his employment with the Department."

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Where a State employee 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 Sec. 230.44(1)(c), Stats..

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

3. Appellant's resignation was not coerced.

4. The Commission lacks jurisdiction over this matter.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER[1]

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

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of November, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[1] Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

Department of Natural Resources (Peterson)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

The issue in this matter is whether Mr. Petersen voluntarily resigned from his Career Executive position with the Department of Natural Resources (DNR), or whether his resignation was coerced. Discharge decisions, including constructive discharges or coerced resignations, are subject to the Commission's review pursuant to Sec. 230.44(1)(c), Stats. Voluntary (rather than coerced) resignations are not. WACHTEL V. DOC, CASE NO. 99-0037-PC (PERS. COMM. 11/19/1999). The requisites for a coerced resignation were addressed in BIESEL V. COMMISSIONER OF SECURITIES, CASE NO. 77-115 (PERS. BD. 9/15/1977):

> See DABNEY V. FREEMAN, 358 F.2D 533, 535 (DC CIR. 1965):
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> > . . . 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 employee'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.
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> 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 (PERS. BD. 11/19/1963] 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 employee to give the employee an opportunity to resign rather than be discharged . . . . This is indulging a kindness to the employee in protecting him and his work record. It would be a dangerous doctrine to hold that to offer an employee his choice of resigning or accepting a discharge would amount to such compulsion that the employee would avoid his resignation for duress. If such were the law, then anytime an employer mentioned the subject of discharge to this employee, 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.

The undisputed facts in the present matter establish that Appellant was not coerced and there was no "actual overruling of [his] judgment and will" when he chose to submit a written resignation rather than be discharged on April 25, 2008.[2]

By handing him a discharge letter at 2:30 p.m. on Wednesday, April 23, Respondent had made it clear to Appellant that his employment was going to end at the close of business on April 25. Had the Appellant not initiated and pursued the resignation alternative, he would have been discharged and would have been entitled to obtain a just cause review of the Respondent's discharge decision.

Appellant proposed the resignation alternative immediately upon receiving the discharge letter. After he was told that he would be allowed to resign rather than to be discharged, he had the opportunity to submit seven written questions to Respondent so he could fully understand the various benefits he would accrue by exercising the resignation option. At Appellant's specific request, the Respondent prepared a written response to the questions and then faxed the response to Appellant's attorney who had been representing the Appellant during the disciplinary process. Appellant had an opportunity to confer with his attorney before he submitted a letter on April 25 that stated he "voluntarily resign[ed his] position . . . effective at the close of business." Appellant had two full days between the time he received the discharge letter and when he submitted his resignation. Nearly four weeks later, after he had gained very significant financial benefits because he had chosen to resign rather than be discharged, he filed an appeal with the Commission stating that he had "resigned solely for the purpose of preserving certain benefits and rights as a state employee" and that his resignation "was not voluntary." The letter of appeal appears to be premised on the assumption that because Appellant would not have asked to resign if DNR had not prepared the April 22 discharge letter, Appellant's resignation was not "voluntary." This cause and effect relationship is simply not enough to meet the standard for a coerced resignation.

Appellant chose to resign after carefully weighing the benefits of preempting the discharge. He argues that a couple of references by DNR employees to Appellant's "termination" indicate the Respondent considered him to have been discharged even after his resignation had been accepted. However, the obviously inadvertent or unknowing references to Appellant's "termination" were not made by persons who had been his supervisor. They are not indicative of the action actually taken by the Respondent, which was to accept the Appellant's April 25th resignation rather than to discharge him.

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[2] This conclusion is consistent with the facts established in WACHTEL v. DOC, CASE NO. 99-0037-PC (PERS. COMM. 11/19/1999) and HARRIS v. DPI, CASE NO. 99-0052-PC (PERS. COMM. 3/10/2000). The facts in the present matter do not approach those in EVRARD v. DNR, CASE NO. 79-251-PC (PERS. COMM. 2/19/1980), where the employee was called into a meeting with his supervisors at 8:30 a.m., and was told that if he did not sign a letter of resignation which had been prepared for him, his employment would be terminated. Evrard broke into a cold sweat, was incapable of speaking, had to lower his head between his knees to avoid fainting, and was told he had to make a decision immediately. The charges that served as the basis for the discharge letter could have also served as the basis for the imposition of criminal penalties.

Because the Appellant voluntarily resigned and was not discharged within the meaning of Sec. 230.44(1)(c), Stats., his appeal is dismissed for lack of subject matter jurisdiction.[3]

Dated at Madison, Wisconsin, this 3rd day of November, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[3] Appellant also contends that Respondent "failed to meet its obligations" under Sec. 230.37(2), Stats., which provides, in part: "When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demote the employee, place the employee on a part-time service basis and a part-time rate of pay or as a last resort, dismiss the employee from the service." The Commission's authority to determine whether an appointing authority has complied with Sec. 230.37(2), Stats., arises solely in the context of an appeal of a personnel action encompassed by Sec. 230.45(1), Stats. For example, in an appeal of a discharge decision, an appellant could argue that the employer lacked just cause because of a failure to comply with Sec. 230.37(2), Stats. But because a resignation is not one of the personnel transactions described in subsection (1), Appellant's contention is immaterial to the resolution of Respondent's motion to dismiss.