STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VIVIAN GABOWER, Appellant,

v.

Secretary, WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 26
No. 68172
PA(adv)-145

Decision No. 32898

Appearances:

Peter J. Fox, Attorney, Fox & Fox, 124 West Broadway, Monona, Wisconsin 53716, appearing on behalf of Vivian Gabower.

Paul Harris, Attorney, Office of Legal Counsel, P. O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Department of Health Services.

ORDER DENYING, IN PART, MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal for lack of subject matter jurisdiction. The final written argument was received on September 30, 2008. The facts set forth below appear to be undisputed but are set forth solely for the purpose of deciding this motion.

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

FINDINGS OF FACT

1. Vivian Gabower, the Appellant in this matter, began working at the Sand Ridge Secure Treatment Center (Sand Ridge) in 2003. Sand Ridge is a mental health facility operated by the Department of Health Services (DHS)[1] for the detention and treatment of sexually violent persons.

2. During her employment at Sand Ridge, Gabower was a member of the Wisconsin State Employees Union and was covered by a collective bargaining agreement. Gabower attained permanent status in class.

[1] Prior to the July 1, 2008 reorganization of the Department of Health and Family Services into the Department of Children and Families and DHS, Sand Ridge was operated by the Department of Health and Family Services. For reasons of clarity, this decision only refers to the Respondent as DHS.

3. In June 2008, Respondent began an investigation of Gabower for a possible violation of its fraternization policy. She was placed on administrative leave.

4. At approximately 11:00 a.m. on June 23, 2008, a DHS investigator informed Gabower that a pre-termination hearing would be scheduled.

5. Gabower consulted a union representative who advised her regarding the different effects that resignation and discharge might have on her employment benefits.

6. On June 23, 2008, Gabower submitted a hand-written letter of resignation to Steve Watters, Chapter 980 Program Director at Sand Ridge, which included the following: "Effective today, I am resigning my position as Therapy Assistant . . . due to personal reasons."

7. Program Director Watters signed a letter that was hand-delivered to Gabower later on June 23. The letter read, in part: "This letter is to confirm receipt and acceptance of your letter of resignation dated June 23, 2008 and made effective June 23, 2008 from the Sand Ridge Secure Treatment Center."

8. Gabower did not work at Sand Ridge after June 23.

9. Gabower's attorney sent a letter on July 9, 2008 to Director Watters seeking to rescind the resignation and requesting reinstatement. The letter read, in part:

> [T]his letter advises you that Ms. Gabower hereby rescinds her resignation dated June 23, 2008 and demands that she be immediately reinstated to her position at Sand Ridge and that all of her benefits be restored. The resignation was submitted under duress, as she was threatened with termination if she did not resign. Therefore, we declare the resignation to be null and void.
>
> Please advise me in writing within seven (7) days from today as to when Ms. Gabower is able to return to work under her previous schedule. If Sand Ridge refuses to reinstate her, please advise me in writing within seven (7) days from today of its specific reasons for doing so.

10. Director Watters responded to Appellant's attorney by letter dated July 11, 2008, that read in part:

> [Gabower] voluntarily chose to resign. Her resignation was officially accepted, and consistent with ER 21.02, [Sand Ridge] will not reinstate her employment as you requested.

11. Gabower filed the instant appeal with the Commission on July 23, 2008.

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

CONCLUSIONS OF LAW

1. The Appellant has the burden to show that the Commission has subject matter jurisdiction over this appeal.

2. The Commission lacks subject matter jurisdiction over Appellant's allegations relating to discharge, coerced resignation, and refusal to rescind the resignation.

3. Pursuant to Sec. 230.44(1)(d), Stats., the Commission has subject matter jurisdiction to review Appellant's contention that Respondent's refusal to reinstate her, as reflected in Mr. Watters' letter dated July 9, 2009, was illegal or an abuse of discretion.

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

ORDER

Respondent's motion to dismiss is granted except as to Appellant's claim that Respondent's decision not to reinstate her was illegal or an abuse of discretion.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of November, 2009.

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

Department of Health Services (Gabower)

MEMORANDUM ACCOMPANYING ORDER DENYING, IN PART, MOTION TO DISMISS

Appellant Vivian Gabower seeks review of various actions relating to the end of her employment at Sand Ridge Secure Treatment Center. Her position at Sand Ridge had been within a collective bargaining unit. She described her allegations in her letter of appeal as follows:

> Ms. Gabower alleges a) that the threat of termination was an abuse of discretion, contrary to Wis. Stats. § 230.44, and unlawfully coerced her into an involuntary resignation; b) that she was terminated from her permanent position with [Sand Ridge] without just cause and without the due process to which she was entitled; and c) that the refusal to accept her rescinding of the June 23, 2008 resignation and reinstate her was an abuse of discretion contrary to Wis. Stats. § 230.44.

In her brief opposing the motion by the Department of Health Services to dismiss her appeal for lack of subject matter jurisdiction, Appellant clarified her claims by asking the Commission to return her to employment status so that if the Respondent still wished to discharge her, the discharge decision could then be reviewed pursuant to the grievance procedure established by the collective bargaining agreement.

Discharge/coerced resignation

Section 230.44(1)(c), Stats.,[2] authorizes the Commission to review certain disciplinary actions, including discharges, taken with respect to State civil service employees with permanent status in class. "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." DNR (PETERSON) DEC. NO. 32605 (WERC, 11/08); CITING WACHTEL V. DOC, CASE NO. 99-0037-PC (PERS. COMM. 11/19/1999).[3]

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[2] "If an employee has permanent status in class . . . the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause."

[3] This authority does not extend to aspects of the process followed by the employer that may result in the imposition of discipline. In DOC (ALT), DEC. NO. 31795 (WERC, 9/2006), the Commission held that it lacked authority under Sec. 230.44 and .45, Stats., to review an employer's actions of investigating allegations of misconduct by the appellant and deciding to place the appellant on paid administrative leave during the investigation.

However, the Commission's authority under paragraph (c) is limited by Sec. 230.34(1), Stats., which provides, in part:

> (a) An employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause. . . (ar) Paragraphs (a) and (am) apply to all employees with permanent status in class in the classified service . . . except that for employees specified in s. 111.81(7)(a) in a collective bargaining unit for which a representative is recognized or certified . . . the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.[4]

In her written argument, Appellant correctly concludes that to the extent there may ever be a determination of whether the Respondent would have had just cause to discharge the Appellant, the determination will not arise under Sec. 230.44(1)(c), Stats. Similarly, any determination of whether the resignation was coerced would have to be made as provided in the bargaining agreement, not under paragraph (c). *See* KRUEGER V. DHSS, CASE NO. 92-0068-PC-ER (PERS. COMM. 7/23/1996) (noting that the Commission's (1)(c) jurisdiction over constructive discharge claims is superseded by the collective bargaining agreement for positions covered by the agreement); MATULLE V. UW, CASE NO. 81-433-PC (PERS. COMM. 1/27/1982); *aff'd*, MATULLE V. STATE PERS. COMM., No. 82-CV-207 (Wis. Cir. Ct. Winnebago County, Nov. 19, 1982).

Threat to Terminate

Gabower contends that the threat to terminate her employment was an abuse of discretion. The allegation invokes language found in Sec. 230.44(1)(d), Stats., which grants the Commission's jurisdiction to review a "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion. . . ." The "hiring process" includes "the appointing authority's decision as to whom to appoint to a vacancy and the determination of the employee's initial incidents of employment, e.g., starting salary." STATE PUBLIC DEFENDER (HARRSCH), DEC. NOS. 32375, 32376 (WERC, 3/2008) (quoting DEPPEN V. DILHR & DER, CASE NO. 91-0083-PC (PERS. COMM. 3/5/1992).

However, paragraph (d) does not extend to every personnel action taken after an employee has been hired. ARENZ, ET AL. V. DOT & DER, CASE NO. 98-0073 (PERS. COMM. 2/10/1999). It does not extend to personnel actions relating to the termination of employment. *See* BOARD OF REGENTS V. WIS. PERS. COMM., 103 WIS. 2D 545, 558-9, 309 N.W.2D 366 (CT. APP. 1981) ("We decline to equate the hiring process by which one's employment is engaged to the firing process by which one is discharged from employment because to do so would not employ the common and approved usage (sec. 990.01(1)) of the term 'hiring process.'") Gabower's allegation arising from the alleged threat to terminate her employment is not encompassed by Sec. 230.44, Stats.

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[4] Section 111.81(7)(a), Stats., defines "employee" to include "any state employee in the classified service of the state" with specified exceptions that are not material to the present appeal.

Refusal to rescind

Once the employer has received an employee's resignation, the State civil service rules limit unilateral revisions:

> After an employee submits a resignation letter, neither the employee nor the appointing authority can withdraw, stop or change the resignation date or other terms of the resignation except by mutual written agreement.

Sec. ER 21.02(2), Wis. Adm. Code. Nevertheless, Gabower asserts that DHS should have allowed her to rescind the June 23rd resignation on July 9.

An appointing authority's decision to decline an employee's request to withdraw a resignation is not one of the disciplinary actions listed in Sec. 230.44(1)(c), Stats., and, as already explained above, cannot be considered to comprise a part of the hiring process. Even if the decision to refuse an employee's request to rescind a resignation could be equated to a discharge decision under (1)(c), any jurisdiction the Commission might otherwise have would be superseded by Gabower's inclusion in a collective bargaining unit, as provided by Sec. 230.34(1)(ar), Stats.

Failure to reinstate

"Reinstatement" is defined in Sec. ER-MRS 1.02(29), Wis. Adm. Code, as "the act of permissive re-appointment without competition of an employee or former employee. . . ." Pursuant to Sec. 230.31(1), Stats.:

> Any person who has held a position and obtained permanent status in a class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations:
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> (a) For a 5-year period from the date of separation, the person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

Appellant's July 9 letter describes itself as a reinstatement demand[5] and Respondent's July 11 reply[6] refuses the request. Appellant contends that the refusal to reinstate was an abuse of

[5] The letter provides, in part:

> [T]his letter advises you that Ms. Gabower hereby rescinds her resignation dated June 23, 2008 and demands that she be immediately reinstated to her position at Sand Ridge and that all of her benefits be restored. . . . If Sand Ridge refuses to reinstate her, please advise me in writing within seven (7) days from today of its specific reasons for doing so.

[6] Program Director Watters wrote that Sand Ridge "will not reinstate her employment as you requested."

discretion. The question of whether paragraph (d) of 230.44(1) encompasses a decision denying a request to reinstate was addressed in SEEP V. DHSS, CASE NOS. 83-0032-PC and 83-0017-PC-ER (PERS. COMM. 10/10/1984). Ms. Seep had requested reinstatement and submitted her request five days before the scheduled end of what was then a 3-year period of reinstatement eligibility. The Commission analyzed the jurisdictional question as follows:

> A reinstatement is a form of appointment. Sec. ER-Pers 16.01(1), Wis. Adm. Code. It is a permissive act at the discretion of the appointing authority. Sec. ER-Pers 16.01(2), Wis. Adm. Code. An original appointment also is a discretionary act, as the appointing authority has the discretion to choose from among those certified. *See* JACOBSON V. DILHR, CASE NO. 79-28-PC (PERS. COMM. 4/10/1981):
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> > In such a post-certification hiring decision, it is a deeply-rooted principle of the Wisconsin Civil Service that the appointing authority does have considerable discretion as to whom to appoint. *See, e.g.,* STATE EX REL. BUELL V. FREAR, 146 WIS. 291, 131 N.W. 832 (1911). P. 25.
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> An appointing authority, in considering whom to appoint to a vacancy, can choose from among those certified following examination, and from among those eligible for reinstatement. While applicants for reinstatement are not themselves certified, their names may be submitted to the appointing authority in conjunction with a certification. *See* Sec. ER-Pers 12.02(3), Wis. Adm. Code:
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> > The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.
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> From a purely statutory standpoint, it would appear that a decision by the appointing authority on reinstatement is a "personnel action," that it is "related to the hiring process in the classified service," and that it is "after certification" in the sense, discussed above, that certification refers to a point in the staffing process. Even if "after certification" were interpreted as a reference to a particular certification, the record in this case shows that the denial of reinstatement occurred after a certification related to the position in question. Finally, the statute does not by its terms require that the appellant be actually certified as a prerequisite for appeal pursuant to Sec. 230.44(1)(d), Stats., and the commission can discern no reason for finding such a requirement by implication.
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> From a policy standpoint, there is a good deal of similarity between decisions on reinstatements and on original appointments. The major point of similarity is that both decisions are committed to the sound exercise of the appointing authority's discretion. The commission cannot discern any substantial policy

> reason why the legislature would not want a decision on reinstatement to be appealable under Sec. 230.44(1)(d), Stats.

The subsequent decision in PETTAWAY V. DPI, CASE NO. 01-0013-PC (PERS. COMM. 9/23/2001)[7] clarified that a certification of eligibles is not required for (1)(d) jurisdiction:

> For purposes of addressing the respondent's jurisdictional objection, the Commission assumes that respondent's first action not to reinstate the appellant occurred *before* the certification.
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> The respondent's jurisdictional objection (i.e. its reliance on the particular date of the certification) fails to recognize prior decisions of the Commission explaining that the reference to "certification" is simply to the stage in the appointment process after which the appointing authority has the authority to make an appointment decision. . . .
>
> In the present case, the facts recited by respondent show that it first decided not to reinstate appellant to the vacant Education Consultant position without considering other candidates, and that it subsequently considered appellant along with other candidates who had been certified as eligible for the vacancy, but decided to hire someone other than the appellant for the position.
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> While the respondent may have actually made two decisions at two different times in this matter, the net effect of its conduct was to not select the appellant for the vacancy even though respondent had the discretion, at either point in the process, to so employ her. Consistent with its previous rulings, the Commission's authority under Sec. 230.44(1)(d), Stats., extends to the action not to reinstate the appellant without considering additional candidates. The fact that this action occurred before the names of other candidates had been certified is irrelevant. Section 230.44(1)(d) encompasses decisions by an appointing authority not to hire someone to fill a vacant position. That is precisely what respondent did when it rejected appellant's reinstatement request in October of 2000 and decided merely to consider her along with an as yet undetermined list of additional candidates. (Emphasis in original).

For the same reasons provided in both SEEP and PETTAWAY, the Commission has authority to review the July 11 decision by DHS not to reinstate Gabower.[8] The Commission's jurisdiction is limited to the question of whether Respondent acted illegally or

[7] Pettaway had taken disability retirement from a position as an Education Consultant. About six months later, she applied for permissive reinstatement to a vacant Education Consultant position. Respondent first decided not to simply hire appellant off the reinstate list and opened the vacancy for competition.

[8] The Commission's authority to review the denial of a reinstatement is unaffected by requester's status inside or outside of a collective bargaining unit. SEEP V. DHSS, CASE NO. 83-0032-PC (PERS. COMM. 7/7/1983).

abused its discretion by declining to reinstate the Appellant when she requested it. The Commission's role will be to review the decision not to re-hire the Appellant rather than any of the other decisions by Respondent that are discussed above.[9]

A representative of the Commission will contact the parties for the purpose of scheduling a prehearing conference.

Dated at Madison, Wisconsin, this 5th day of November, 2009.

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

[9] The present case contrasts with the facts in SCHMIT V. DHSS, CASE NO. 83-0234-PC (PERS. COMM. 4/25/1984). Schmit's position was included in a collective bargaining unit, her employer discharged her for cause, and, after she later requested reinstatement, she appealed the reinstatement denial:

> In summary, what happened here is that after the appellant was discharged for misconduct, she pursued a contractual grievance, which was the exclusive means of litigating whether there was just cause for her discharge. Once that matter was not pursued beyond the third step it became a final determination on the merits of her discharge. If this Commission were to consider this appeal on the merits and to rule that her separation was without delinquency or misconduct, which would be the only circumstances under which she would have any reinstatement [eligibility] under §230.31(1), Stats., this would have the effect of nullifying the final resolution of the grievance. While the final decision of the grievance is undoubtedly *res judicata*, the difficulty with the Commission proceeding with this appeal goes beyond *res judicata*. The superseding effect of §111.93(3), Stats., acts to deprive the Commission of subject matter jurisdiction over bargainable subjects such as a review of the discharge.
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> Even if it could be conceptualized that the Commission had jurisdiction over the appeal in the first instance, the respondent would be entitled to prevail as a matter of law, as the appellant would have had no reinstatement rights unless she separated from state service ". . . without any delinquency or misconduct . . . ," §230.31(1), Stats., and this subject has been irrevocably settled against the appellant in the contractual grievance procedure.