

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELIZABETH BOECK, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 242
No. 72768
PA(adv)-374

DECISION NO. 35039

Appearances:

Sean Heiser, AFSCME Field Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of Appellant Elizabeth Boeck.

Jim Underhill, Director – Bureau of Labor Relations, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent Department of Corrections.

This is an appeal on behalf of Elizabeth Boeck, an employee of the Department of Corrections. Boeck was discharged from her employment by letter dated October 28, 2013. She had twelve years of service with the Department of Corrections and was employed as an Operations Office Associate at the time of her termination. By document received on November 26, 2013, Boeck appealed her discharge directly to the Wisconsin Employment Relations Commission, bypassing the Wisconsin Human Resources Handbook grievance procedure. On December 23, 2013, the Department of Corrections moved to dismiss the appeal based upon the failure to exhaust the prescribed procedure. The matter has been fully briefed and we issue the following:

DECISION AND ORDER DENYING MOTION TO DISMISS

On October 28, 2013, Appellant Elizabeth Boeck (“Boeck”) was discharged from her permanent position with the Department of Corrections (“DOC”). At the time, Boeck, who had twelve years of service, was a permanent employee of the DOC. She filed an appeal with the Wisconsin Employment Relations Commission on November 26, 2013, relying on § 230.44(1)(c), Stats., which read as follows:

Except as provided in par. (e) the following are actions appealable to the commission under 230.45(1)(a): ...

(c) Demotion, layoff, suspension or discharge or reduction in base pay.

This Commission has long interpreted that language as providing for a direct appeal of those adverse actions regardless of the existence of predicate internal grievance steps that the State might utilize.

With the elimination of most state employee collective bargaining agreements following the adoption of Act 10, the State Office of Employment Relations (“OSER”) moved forward with the creation of a revised procedure identified as the Wisconsin Human Resources Handbook (“Handbook”). The document was adopted pursuant to § 230.12(h), Stats., which provides in part that the State “compensation plan may include other provisions relating to pay, benefits and working conditions that shall supersede the provisions of the civil service and other applicable statutes and rules promulgated by the director.” The 2011-2013 Compensation Plan (“Plan”) was adopted by the Joint Committee on Employment Relations of the Wisconsin Legislature (“Joint Committee”). The Plan included the revised Handbook which in turn included a detailed employee grievance procedure. Section 430.060 provided in part that:

Grievances may not be appealed to the WERC without first completing the relevant preceding steps in the grievance procedure.

The practical effect of the new Handbook procedure was to require the exhaustion of its multiple-step procedure as a precondition to appeal to this Commission. Boeck argues that OSER, author of the Handbook, cannot in effect repeal the statutorily-created right to direct appeals to the Commission of the adverse actions identified in § 230.44(1)(c), Stats. As support for the argument, Boeck relies on *Milwaukee Journal Sentinel v. Department of Administration*, 2009 WI 79, 319 Wis.2d 439, 768 N.W.2d 700, for the proposition that a statutory provision may not be repealed by reference, particularly where the change is not directly adopted by the Legislature. The *Milwaukee Journal Sentinel* case provides substantial support for that argument and may well be controlling. In that case, the State and the Wisconsin State Employees Union negotiated a collective bargaining agreement which modified the Public Records Act as it applied in certain aspects to state employees. The Legislature ratified the agreement but did not separately consider the changes in the Public Records Act. The Supreme Court concluded for a variety of reasons that such an attempted repeal was unlawful. Here the State’s argument is even more tenuous as the Plan is only approved by the Joint Committee, not the Legislature as a whole.

Further analysis of the issue is unnecessary because on January 24, 2014, 2013 Wisconsin Act 123 became law. The Act included a provision modifying our jurisdiction by amending § 230.44(1)(c), Stats to read as follows:

Demotion, layoff, suspension or discharge. If an employee has permanent status in class, or an employee has served with the state as an assistant district attorney or an assistant state public defender for a continuous period of 12 months or more, the employee may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission as the final step in the state employee grievance procedure established under s. 230.04(14), if the appeal alleges that the decision was not based on just cause. (amendments underlined)

The practical consequence is the elimination of direct appeals to the Commission of the enumerated adverse actions. That leaves us with the question of whether the legislative change impacts those appeals filed before January 24, 2014.

In Wisconsin, “statutes are presumed to operate prospectively and interpreting a statute to apply retroactively is disfavored.” *Local 321, IAFF v. City of Racine*, 2013 WI App. 149, ¶19, 352 Wis.2d 163, 169, 841 N.W.2d 830. Absent some indication that the Legislature intended to apply the law retroactively, the presumption of prospective application controls. There is no indication within the text of 2013 Wisconsin Act 123 that the Legislature intended any retroactive change. Many of the changes are primarily of a “housekeeping” nature or clarification of existing civil service rules. We will apply the change prospectively to any appeals filed with us after January 24, 2014. In light of the fact that this appeal was received on November 26, 2013, we will accept jurisdiction over it pursuant to the law as it existed then.

ORDER

The motion is denied and the matter will be assigned to an examiner for hearing.

Dated at the City of Madison, Wisconsin, this 19th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner