

R. Vergara

STATE OF WISCONSIN                      CIRCUIT COURT                      DANE COUNTY

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ROGER CHAPMAN,

Petitioner,

vs.

MEMORANDUM DECISION  
Case # 80CV5422

STATE OF WISCONSIN  
(PERSONNEL COMMISSION),

Respondent.

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This is a proceeding to review a decision and order of the State Personnel Commission (Commission) dated August 19, 1980, which affirmed the decision of the Department of Industry, Labor and Human Relations (DILHR), denying the petitioner's request for mandatory reinstatement to his former employment with the latter agency.

The petitioner, Roger Chapman, was a DILHR employee with permanent status in class as a Management Information Specialist 4 on July 5, 1975, when he was seriously injured in a motorcycle accident. He was on sick leave until September 2, 1975, and was then granted a one-year leave of absence until September 1, 1976. In January, 1976, petitioner applied to the Department of Employee Trust Funds for a disability annuity pursuant to sec. 41.13, Stats., and the annuity was approved on June 28, 1976 with an effective date of April 12, 1976. In a telephone conversation sometime after this date, Chapman informed DILHR's Personnel Director, Duane

Sallstrom, that he was interested in returning to work, and was informed by Sallstrom that as a prerequisite he would have to provide medical certification of his capacity to return to work. The Commission found that no such certification was ever provided.<sup>1</sup>

DILHR never took any steps to formally discharge Chapman because it considered that his employment had been terminated as of April 12, 1976, the effective date of his disability annuity. The Assistant Administrator of DILHR's Administrative Division informed Chapman of the agency's position on the matter in a letter dated July 29, 1976 which stated in part:

"Correspondence dated April 26 from our Personnel Bureau informed us that your permanent disability would be considered as a termination notice. Attached also is the State of Wisconsin Termination Report submitted April 30, 1976, which indicates the reason for termination as permanent disability.

We have been advised as a result of the indicated actions that reinstatement rights do not apply. As I further advised you, we do not at present have vacancies for which you can be considered. Consequently, I am returning your application since you may wish to submit it to the State Bureau of Personnel."

Chapman never appealed his termination and never was

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<sup>1</sup>The record contained conflicting testimony on this point, petitioner stating that such certification was provided and Sallstrom testifying that it was not. The Commission determined that Sallstrom was the more credible of the two witnesses and because the credibility of the evidence is a matter for the agency, not the reviewing court, to determine, the finding is affirmed. Bucyrus-Erie Co. v. ILHR Dept., 90 Wis.2d 408, 418, 280 N.W.2d 142 (1979).

reinstated by DILHR.<sup>2</sup> By letter dated August 27, 1979, Chapman (through counsel) informed DILHR that he wished to exercise his mandatory reinstatement rights. This request was denied by the agency's Personnel Director in a letter dated September 4, 1979, wherein it was stated that because Chapman had been terminated by medical retirement on April 12, 1976, the three-year mandatory reinstatement period provided by sec. 230.31, Stats., had expired, and he thus had no reinstatement rights. Chapman appealed DILHR's refusal to grant mandatory reinstatement rights to the Personnel Commission on September 10, 1979.

In his appeal to the Commission, Chapman challenged DILHR's refusal to honor his reinstatement rights as unlawful and based on the improper hypothesis that he was terminated from state service on April 12, 1976. He argued that separation from state service is not a prerequisite to, or a necessary outcome of, the receipt of disability benefits, and that he should not, therefore, have been considered terminated as of April 12, 1976. Chapman contends that his mandatory reinstatement rights continued until three years after the expiration of his leave of absence-- that is, until September 1, 1979--and that consequently his August 27, 1979, demand for reinstatement was timely. Chapman

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<sup>2</sup>Subsequently, Chapman was employed by the Department of Health and Social Services as a limited-term Administrative Assistant from November 15, 1977 to February 15, 1978, and by the Department of Administration as an Information Specialist 3 from February 15, 1978, until his resignation on July 14, 1978. It is undisputed that Chapman had a three-year period of permissive reinstatement eligibility from July 14, 1978 until July 14, 1981.

also argued to the Commission that DILHR was estopped from raising jurisdictional issues in the proceeding because it had not raised them during the Commission's pre-hearing conference. Clearly, however, challenges to subject matter jurisdiction may be raised at any level of adjudication, City of Milwaukee v. Saxbe, 546 F.2d 693, 699 (7th Cir., 1976); Kohnke v. ILHR Department, 52 Wis.2d 687, 689, n. 1, 191 N.W.2d 1 (1971).

The Commission had jurisdiction to hear the appeal from the denial of Chapman's reinstatement rights under sec. 230.44(1)(d), Stats., as an appeal "from a personnel action...alleged to be illegal or an abuse of discretion," and, the appeal was timely. See sec. 230.44(3), Stats. The Commission concluded that because Chapman did not file a timely appeal of the DILHR decision to treat his receipt of a disability annuity as a termination of his employment, the Commission lacked jurisdiction to review the termination decision on the appeal from the denial of his reinstatement rights. The Commission further held that DILHR's decision to deny Chapman's reinstatement was neither illegal nor an abuse of discretion.

Chapman claims here that the Commission's findings of fact are unsupported by substantial evidence and that its conclusions of law are erroneous. He has, however, chosen to rely exclusively on the briefs submitted in his appeal to the Commission; and, as a result, his specific challenges to the Commission's decision are not articulated.

I have reviewed the entire record before me and conclude that the Commission properly affirmed the DILHR decision.

Under the statutes in effect at the time, Chapman, as a permanent employee, could have appealed DILHR's action terminating his employment "within fifteen days after the effective date of the decision, or within fifteen days after [notice] of such decision, whichever is later." Sec. 16.03(4)(d), Stats., (1975). He received notice of the termination in late July or early August, 1976, but did not appeal this termination within the required fifteen days. Chapman's present challenge to the termination is also untimely, since sec. 230.44(3), Stats., provides that appeals must be filed within 30 days of the effective date of the action, or the employee's notice thereof, whichever is later.

Chapman obviously has attempted to "bootstrap" jurisdiction over his untimely challenge to DILHR's 1976 determination that his receipt of disability annuities terminated his employment to his timely appeal of the refusal to grant him mandatory reinstatement rights. The Commission correctly rejected this collateral attack on his termination when it reasoned as follows at pages 4-5 of its Opinion:

"A separation from service, be it by discharge, resignation or 'disability retirement,' has certain effects on the rights and interests of the separated employe. It cuts off wages and fringe benefits. It has a direct effect on reinstatement rights. For example, an employe who has separated from service 'without misconduct or delinquency' is eligible for permissive reinstatement for a three-year period. See s. Pers. 16.03(4), Wis. Adm. Code. If an employe ostensibly was discharged for misconduct in 1978

and applied for reinstatement' in 1980, presumably he or she would be denied reinstatement. Could the employe then appeal the denial of reinstatement and in the course of that appeal attack the discharge for failure to have complied with s. 230.34, Wis. Stats., and contend that, therefore, he or she must be considered to have been separated from service without misconduct and, therefore, eligible for reinstatement? To permit this would be to render meaningless the limitation on appeals now imposed by s. 230.44(3), Wis. Stats., and the same principle applies in this case."

The Commission correctly recognized that it was bound to regard as final and conclusive DILHR's decision of July 29, 1976, declaring that Chapman was separated from state service effective April 12, 1976.

Chapman's request for mandatory reinstatement rights is based on sec. 230.31(1), Stats., which provides in relevant part that:

"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... (certain reinstatement)... considerations for a 3-year period from the date of such separation."

As stated above, the Commission was bound to conclude that Chapman was separated from state service as of April 12, 1976, and that he was so notified in early August, 1976. Chapman first demanded mandatory reinstatement on August 27, 1979, several weeks beyond three years from the date of his "separation". Chapman, therefore, was not entitled to mandatory reinstatement rights, and the Commission was correct in affirming DILHR's denial of this request.

Given this conclusion, this court expresses no opinion as to the soundness of the Commission's dictum regarding the propriety of DILHR's determination that receipt of disability annuities necessarily requires termination of employment.

The decision and order of the Commission is affirmed and counsel for the Commission may prepare the appropriate order for the court's signature.

Dated this 8<sup>th</sup> day of September, 1981, at Madison, Wisconsin.

BY THE COURT:

  
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WILLIAM EICH  
CIRCUIT COURT JUDGE

cc: Nadim Sahar, AAG  
Robert Vergeront, AAG ✓  
Richard Graylow