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M. P. RASMUSSEN,
Appellant,

v.
Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
Respondent.

Case No. 81-434-PC

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DECISION
AND
ORDER

In an appeal filed with the Commission on November 16, 1981, the appellant sought review of a demotion. The Commission advised the appellant that his appeal raised a jurisdictional problem:

The Commission lacks the authority to hear appeals from demotion[s] and various disciplinary matters when the appellant is within a collective bargaining unit. Pursuant to §.111.93(3), Wis. Stats., the provisions of the labor agreement supersede the statutory appeal procedures for these types of appeals. Because it would appear that you are within a collective bargaining unit, the Commission apparently lacks the authority to hear your appeal.

In reply, appellant, by his representative, argued that non-disciplinary demotions are not treated by the applicable labor agreement, and that the appeal involves the "resignation from a position."

Based upon the correspondence in this matter, this appeal is properly described as an appeal from a voluntary demotion within an agency.

This particular type of demotion is described at length in §.Pers 17.04(3), Wis. Adm. Code:

(3) VOLUNTARY DEMOTION WITHIN AN AGENCY. An employe may request and with approval of the appointing authority may accept a voluntary demotion within the agency either to a position in the same employing unit, or to a position in a different employing unit. Acceptance of such voluntary demotion shall be furnished the administrator in writing by the employe.

(a) The employe shall have no restoration rights to the previously held position or class.

(b) If the demotion is to a position in the same employing unit, a probationary period for employment in the lower class of position shall not be required. The employe immediately attains permanent status in class in the class to which demoted.

(c) If the demotion is to a position in a different employing unit, the employe may be required to serve a probationary period at the discretion of the appointing authority. During such period, the employe may be removed from the position without the right of appeal and reinstated to his or her previous position or transferred to another position at the discretion of the appointing authority. If the employe is not required to serve a probationary period, the employe shall be immediately granted permanent status in class in the class to which demoted.

The Commission derives its jurisdiction over personnel matters from §§230.44 and 230.45, Wis. Stats.

Pursuant to §230.44(1)(a) and (b), Wis. Stats., the Commission can hear appeals of personnel decisions of the administrator or actions delegated by the administrator to an appointing authority. The authority to accept a voluntary demotion is referred to in §. Pers. 17.04(3), Wis. Adm. Code, as a power of the appointing authority. An analysis of §230.06(1)(b) and (d), Wis. Stats., also supports the conclusion that the authority to accept voluntary demotion is a power granted directly to the appointing authority rather than delegated by the administrator. Because the action appealed from is neither an action of the administrator nor a delegated action, the Commission cannot derive jurisdiction from §230.44(1)(a) and (b), Wis. Stats.

The Commission is specifically granted the authority to hear an appeal from a demotion, layoff, suspension or discharge:

If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in pay to the Commission, if the appeal alleges that the decision was not based upon just cause.
§230.44(1)(c), Wis. Stats.

This wording closely tracks the language of §230.34(1)(a), Wis. Stats., which provides:

An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

For employes subject to a collective bargaining agreement, the procedures for appealing the enumerated actions are governed by the provisions of the agreement:

Paragraphs (a) and (am) apply to all employes with permanent status in class in the classified service, except that for employes in a certified bargaining unit covered by a collective bargaining agreement, the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement. §230.34(1)(ar), Wis. Stats. (Emphasis Supplied)

When read together, the provisions of §§230.34(1)(a) and (ar) and 230.44(1)(c), Wis. Stats., indicate that the Commission may not rely on §230.44(1)(c), Wis. Stats., to establish its jurisdiction over the instant appeal. It is apparent from the correspondence in this matter that the appellant is in a certified bargaining unit that is covered by a collective bargaining agreement. Therefore, the provisions of the contract must be applied, whether or not the contract sets forth procedures for appealing a specific action. See Matulle v. UW, Case No. 81-433-PC (1/27/82). This result is also consistent with the provision of §111.93(3), Wis. Stats:

If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

None of the other possible bases for the exercise of jurisdiction by the Commission apply to the case. The instant appeal is not a complaint of discrimination, was not processed as a non-contractual grievance, does not involve an allegation of hazardous employment nor seeks review of a decision by an impartial hearing examiner. §230.45, Wis. Stats.

The appellant also argues that the real issue in the instant appeal involves a "resignation from a position and the acceptance or non-acceptance of a resignation letter," which the appellant suggests are matters within the Commission's jurisdiction. However, in recent cases the Commission has ruled that it lacks jurisdiction over appeals from resignations unless there is a showing of constructive discharge, Kemp v. DHSS, Case No. 81-370-PC(11/19/81) and that it lacks jurisdiction over a resignation/constructive discharge when the appellant is within a collective bargaining unit that has a contract in effect. Fukushima v. DOATCP, 81,426-PC (12/16/81). Even if the appellant had alleged that he had been constructively discharged, the Commission could not hear the appeal because the appellant is within a collective bargaining unit.

Therefore, the Commission must conclude that it lacks subject matter jurisdiction over this appeal.

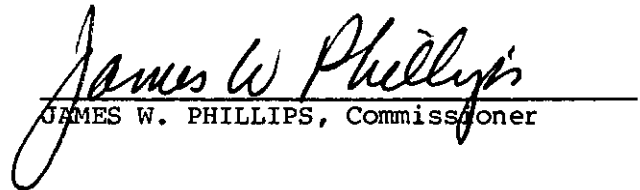
ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: Feb 9, 1982 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

Parties

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