

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JEANNE DUPUIS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Respondent.

Case No. 90-0219-PC

* * * * *

RULING ON
MOTION TO
DISMISS

This appeal is before the Commission on respondent's motion to dismiss for lack of timeliness filed August 20, 1990. Both parties have filed briefs. Based on review of the briefs and the documents that have been submitted, it does not appear there is any dispute as to the underlying facts material to the motion to dismiss, which are set forth hereafter. These findings are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. Appellant attained permanent status in the classified civil service as a Nurse Clinician III in 1985.
2. Appellant transferred from the Wisconsin Resource Center (WRC) to the Fox Lake Correctional Institution (FLCI) effective September 28, 1989.
3. On the effective date of the transfer, both FLCI and WRC were in the same agency, the Department of Health and Social Services (DHSS).
4. Following this transfer, appellant began a permissive probation.
5. Effective January 1, 1990, FLCI became part of the newly-created Department of Corrections (DOC). WRC remained part of DHSS.

6. Appellant did not pass her permissive probation and her employment was terminated effective February 9, 1990.

7. After certain verbal communications with her former supervisor at WRC, Robert Wagner, appellant sent him the following letter dated March 14, 1990:

Since my permissive probationary period has ended at Fox Lake Correctional Institute, I request reinstatement at WRC as an NC2. A month has passed since I initially submitted for the position and I am inquiring why I have not yet been reinstated. If my request for reinstatement is denied, I would like the reason for your decision in writing.

8. Mr. Wagner replied by letter dated March 23, 1990, as follows:

This is to inform you that your application and transfer forms are on file at the Wisconsin Resource Center. As you know, your transfer is discretionary.

9. Appellant contacted Ruth Robarts, Executive Director, District 1199W/United Professionals for Quality Health Care. Ms. Robarts wrote to respondent Secretary, DHSS, by letter dated April 16, 1990, which included the following:

As Executive Director of this union, I represent Jeanne Dupuis. . . .

Unfortunately, her termination at FLCI has not resulted in return to WRC. Since the termination of her appointment, Ms. Dupuis has been unemployed and has been unable to exercise her transfer rights to return to WRC.

Because the record strongly suggests that her termination resulted from her supervisor's anti-union animus, we have filed a Personnel Commission action, a prohibited practice complaint and a grievance on behalf of Ms. Dupuis. My contacts with the attorney for the Department of Corrections and with the Department of Employment Relations suggest that both may be willing to settle these claims by returning Ms. Dupuis to a position at the WRC, providing appropriate backpay and expunging of her personnel file. However, the WRC refuses to permit the return. Therefore, settlement discussions have stopped. . . .

I am writing to ask you to intervene to deal with the obvious inequity of Ms. Dupuis' situation.

The Secretary replied by letter dated May 3, 1990, as follows:

This letter is in response to yours of April 16, 1990 concerning Jeanne DuPuis. I have reviewed Ms. DuPuis' situation with staff and have determined that nothing inappropriate occurred.

Ms. DuPuis accepted a promotion¹ to the Division of Corrections from the Division of Care and Treatment Facilities in September, 1989. The legislation which created the Department of Corrections passed in August, 1989, with an effective date of January 1, 1990. The change from a division to a department affected all of the employees in the newly created Department of Corrections. Written notice of the change was given to affected employees in December, 1989. The particular effect on Ms. DuPuis is consistent with the civil service statutes and rules and the relevant labor agreement.

In light of this, no further action will be taken by the Department of Health and Social Services.

10. The appeal in this matter was filed with the Commission on June 6, 1990. It states, in part: "We wish to appeal the Decision of the Secretary of Health and Social Services, as expressed in the attached letter [referred to in the foregoing finding], that Ms. DuPuis has no right to be restored to a position with that Department."

DISCUSSION

The decision of this motion turns on the question of when appellant received notice that she would not be rehired at WRC, so as to commence the running of the 30 day time period for appeal under §230.44(3), stats., which provides, as relevant:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later

Assuming arguendo that the action (non-hire) which is the subject of this appeal occurred prior to April 16, 1990, the question is at what point appellant had notice of that action.

¹Respondent in another letter dated July 10, 1990, provided a correction that this transaction was actually a transfer.

Respondent argues that appellant must have had notice no later than April 16, 1990, when her representative wrote to respondent. This letter included the following:

Unfortunately, her termination at FLCI has not resulted in return to WRC. Since the termination of her appointment, Ms. Dupuis has been unemployed and has been unable to exercise her transfer rights to return to WRC.

Because the record strongly suggests that her termination resulted from her supervisor's anti-union animus, we have filed a Personnel Commission action, a prohibited practice complaint and a grievance on behalf of Ms. Dupuis. My contacts with the attorney for the Department of Corrections and with the Department of Relations suggest that both may be willing to settle these claims by returning Ms. Dupuis to a position at the WRC, providing appropriate backpay and expunging of her personnel file. However, the WRC refuses to permit the return. Therefore, settlement discussions have stopped. . . .

I am writing to ask you to intervene to deal with the obvious inequity of Ms. Dupuis' situation. (emphasis added)

The question before the Commission is when appellant received effective notice of the underlying transaction (nonreinstatement). Respondent's position focuses on the statements of appellant's representative as evidence of what notice appellant had, and when she had it. While these statements do have some probative value to this end, they fall short of establishing that appellant had effective notice of nonreinstatement on or before April 16, 1990, when the statements were made in this letter.

While it is obvious from this language in the aforesaid letter that appellant's representative, and presumably appellant, were aware that as of that time she had been unable to effect reemployment at WRC, it can not be concluded from this language that appellant was aware that respondent actually had made a decision to deny her reemployment. The letter is equally consistent with appellant's awareness of the following:

- 1) She had been attempting to obtain reemployment at WRC;
- 2) WRC to date had not reemployed her;
- 3) WRC to date had not provided any clear statement of its intent with respect to reemployment.

The part of this letter that most supports respondent's contention is in the section discussing settlement negotiations:

My contacts with the attorney for the Department of Corrections and with the Department of Employment Relations suggest that both may be willing to settle these claims by returning Ms. Dupuis to a position at the WRC, providing appropriate back-pay and expunging of her personnel file. However, the WRC refuses to permit the return. (emphasis added)

The underscored language suggests that WRC made a definite decision to deny reemployment. However, the language is also consistent with respondent not having made any definite decision, but at the same time not having taken action to have effected reinstatement. The latter interpretation is consistent with previous correspondence between appellant and WRC.

In her letter to her former supervisor at WRC dated March 14, 1990, she inquired as follows:

Since my permissive probationary period has ended at Fox Lake Correctional Institute, I request reinstatement at WRC as an NC2. A month has passed since I initially submitted for the position and I am inquiring why I have not yet been reinstated. If my request for reinstatement is denied, I would like the reason for your decision in writing.

Appellant by this letter apparently was attempting to determine the status of her request for reinstatement, and specifically was trying to find out if this request had been denied. In response, her former supervisor stated in a letter dated March 23, 1990, as follows:

This is to inform you that your application and transfer forms are on file at the Wisconsin Resource Center. As you know, your transfer is discretionary.

This brief and cryptic statement did not provide notice to appellant that she had been denied reemployment. It is more consistent with the notion that appellant's application was on file, that respondent had taken no action on it, and that reemployment was conceivable should respondent decide at some point to exercise its discretion to this end.

Looking at all the correspondence the parties have submitted on this motion, there is some evidence in the April 16, 1990, letter to the Secretary that appellant had reached the conclusion that respondent had decided against reemploying her at WRC. However, it is also possible, and this alternative is buttressed by some of the other correspondence, that appellant at that time was reacting to respondent's continuing refusal to say yes or no. Furthermore, consideration must be given to the context of the statement in the April 16, 1990, letter that "the WRC refuses to permit the return." This refusal was with respect to an attempt to settle not only this case, but also appellant's grievance and her prohibited practice complaint with the Wisconsin Employment Relations Commission (WERC), both related to her termination at KMCI. It is difficult to equate respondent's refusal to agree to reinstatement as part of a plenary settlement of these matters to actual notice of the personnel transaction. The general rule is that in order to be sufficient, notice must be "clear, definite, explicit and unambiguous." 58 Am Jur 2d NOTICE 32. On the basis of the record before it, the Commission concludes that appellant did not have notice of respondent's decision not to rehire her at WRC sufficient to commence the running of the 30 day period for appeal under §230.44(3), stats., prior to her receipt of the May 3, 1990, letter signed by the Secretary².

²Respondent has not argued that the appeal was not filed within 30 days of receipt of this letter.

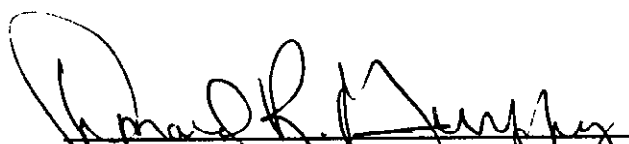
ORDER

Respondent's motion to dismiss this appeal as untimely filed is denied.

Dated: October 18, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner