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JANET O'CONNOR,

Appellant,

v.

WILBUR J. SCHMIDT, Secretary,
Dept. of Health & Social Services,

Respondent.

Case No. 576

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OFFICIAL

OPINION AND ORDER

Before: JULIAN, STEININGER and WILSON

NATURE OF THE CASE

The Appellant is appealing her layoff from her position as a teacher at the Wisconsin School for Boys at Wales.

FINDINGS OF FACT

Appellant was employed at Wales for approximately nine years before her layoff. She was a permanent employee in the classified service. In July, 1972, the Superintendent of the institution received notice that he would have to designate some of his staff for layoffs due to a declining school population. In response to this directive, he created certain layoff groupings, including one of "elementary teachers" that included the Appellant and one other teacher. The Superintendent elected to create such groupings on the basis of certification or specialization rather than on the basis of class or classification such as Teacher 1, Teacher 2, etc., because he wanted to retain a balance according to the subject matter taught among the teachers that would be retained.

After creating this layoff group, the Appellant and the other teacher were ranked on the basis of performance by the Assistant Superintendent for Treatment, the School Principal, and the Assistant Principal. The Appellant ranked second and was notified on October 17, 1972, that she would be laid off effective January 23, 1973. She then appealed to the Board.

CONCLUSIONS OF LAW

Appellant has advanced a number of arguments why her layoff was without just cause. Among other things she contends that her performance ranking was improper and unfair, that probationary employees were improperly retained while she was laid off, and that the Respondent utilized improper procedures in effectuating the layoff.

Layoffs are governed by S. 16.28 (2), Wis. Stats. Rules designed to effectuate this statute are found in Ch. Pers 22. These rules were changed effective November 1, 1972. There has been some question raised as to whether the rules in existence prior to November 1, 1972, or those in effect thereafter, apply to this case. At one point in the hearing, it appeared that the parties agreed the old rules applied:

Mr. Greenwald [for the board]: "It is agreed by counsel that the rules so far as those rules have been published by the Wisconsin Administrative Code that pertain to these layoffs are designated as the rules of the Personnel Board and are those which were in effect prior to November 1, 1972? Is that agreed? ||

Mr. Kozich [for the respondent]: That's true. (July 12, 1974 Tr., p. 143.

However, in his post-hearing brief, counsel for the Respondent cites the new rules and argues they should apply.

Regardless of the effect of the foregoing representation made on the record by Respondent's counsel, we conclude that the old rules apply to this layoff. The Superintendent notified the Appellant prior to November 1, 1972, that she would be laid off after November 1st.

This Board and the Dane County Circuit Court have held that the effective date of such personnel actions is the date of notification.

In Eisenhut v. Schmidt, Wis. Pers. Bd. No. 39, October 10, 1974, the appellant was notified of his layoff on November 14, 1972, effective January 6, 1973. The Board held that the layoff took place for the purpose of the application of the rules on November 14, 1972, and applied the new rules. The holding and decision was affirmed by the Dane County Circuit Court (No. 144-383, April 4, 1975). In Krantz v. Schmidt (Wisconsin State Personnel Board, consolidated cases nos. 8, 35, 38, 41), notification of layoffs on October 26, 1972, effective in 1973, were held covered by the old rule.

The main difference in the old and the new rules for the purpose of this proceeding is in the requirement that the layoffs be by classes. The old rules, S. Pers 22.04 (1), provide in part as follows:

Whenever it becomes necessary for an appointing officer to lay off an employee in the classified service . . . he shall do so by classes in accordance with seniority and efficiency.

Under the new rules, the parallel provision, S. Pers 22.03 (1), provides as follows:

. . . he shall do so by classes or options within the class.
(Emphasis supplied)

In the Eisenhut case, the Kettle Moraine School for Boys did not lay off by classes but by class and option -- i.e., Teacher 6 (Music). We upheld that layoff because we determined that the new rules, which provide for "options within the class," applied:

Under such prior rule, an employe with a Teacher 6 classification would have a right to retention in that class in the face of a layoff, conditioned upon first his seniority and, then if he was placed in the layoff group, upon his efficiency relative to other employes in the group. Mayes v. Weaver, Wis. Pers. Bd., Case No. 73-112, 12-20-73. As amongst teachers, the basic classification scheme was one wherein they were classified as Teacher 1 through 6. Krantz v. Schmidt, Wis. Pers. Bd., Case No. 8, 7-3-74. After November 1,

the layoff rules were changed to permit layoff by classification "or options within the class." Pers 22.03 (1), Wis. Adm. Code, effective 11-1-72. The term option is defined as a position with special character and qualifications which are necessary to be used in recruitment, examination, certification, or layoff. Pers 2.03 (2), Wis. Adm. Code, effective 11-1-72. Within any particular teacher class, be it Teacher 1, 2, or 6, options for recruitment purposes existed in terms of the subject matter to be taught which were special qualifications for the position. Hence, such options were available to the Respondent for layoff purposes. This means that, whereas before November 1, 1972, the State was limited to effecting layoffs by class, after that date it might effect them by class and option within the class.

In the Krantz case, similar layoff groupings were followed at the Oregon School for Girls, and we held this to be improper because the old rules were in effect which required that layoffs be strictly by class:

An employee's right to retention is based upon his seniority and performance in class and not in some identifiable group, which the School or any other State agency, chooses to reduce by layoff. In the instant case, the School identified those teachers certificated in Elementary Education as the teachers, who should be in jeopardy of layoff. Elementary education certificated teachers are not a classification.

In the present case it is undisputed that the layoff was by option within a class and not by class. See Respondent's brief dated April 10, 1975, at p. 7: "As in the Eisenhut matter, options within the class were used in the instant case, in order to keep the program at the Institution as intact as possible."

Because the Respondent used procedures authorized only under the new rules and the layoff was subject to and governed by the old rules, we conclude that the Respondent followed improper procedures in effectuating the layoff.

Appellant further contends that Respondent incorrectly evaluated her performance within her layoff group. Since we have determined

that the layoff group utilized was an improper unit in the first instance, we will not reach that question. For the same reason, we will not reach Appellant's arguments that Respondent improperly kept probationary teachers when she was laid off and that Respondent improperly failed to offer her re-employment when other jobs later opened up at Wales.

ORDER

IT IS ORDERED that Respondent immediately reinstate Appellant to her former position, without loss of seniority or other benefits and with full back pay from the date of January 23, 1973, to the date of her receipt of the Respondent's written unconditional offer of recall to active employment.

IT IS FURTHER ORDERED that, within ten working days of the date of this Order, the Respondent shall advise the Board in writing what steps he has taken to comply with the foregoing Order.

Dated July 30, 1975.

STATE PERSONNEL BOARD


Percy L. Julian, Chairperson