STATE OF WISCONSIN STATE PERSONNEL BOARD

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MARVIN KAUKL,

Appellant,

v.

ANTHONY EARL, Secretary,
Department of Natural Resources,

Respondent.

Case No. 74-127

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OFFICIAL

OPINION
AND
ORDER

Before: DEWITT, Chairperson, WILSON, MORGAN, WARREN and HESSERT, Members.

Nature of Case

This is an appeal of a grievance to the Personnel Board as the final step in the State's grievance procedure as authorized by Section 16.05(7), Wis. Stats. The Appellant is the Treasurer-Secretary of the union which represents the interests of the union members included in Respondent's classified employes. The Respondent's motion to dismiss the appeal was denied in an Interim Opinion and Order entered February 23, 1976.

Findings of Fact

The Respondent at various times from 1968 to 1976 hired non-union members James Mente, Wayne Francois and Carl Francois to work as limited term employes (L.T.E.'s) at Devils Lake State Park. Respondent's policy was to hire each of these individuals as a limited term employe - recurring (L.T.E.-Recurring) and to terminate and reclassify each as a limited term employe - project (L.T.E - Project) if his total work hours approached the 1044 maximum allowable work hours in any one year period for an L.T.E.-Recurring. Respondent admits and we find that this approach did not prevent these three employes from exceeding the 1044 hour maximum. James Mente exceeded the maximum in 1970, 1971, 1973 and 1974. Wayne Francois exceeded the maximum in 1973 and Carl Francois

exceeded it in 1974. The violations ranged from 33 hours to more than 400 hours over the 1044 hour maximum.

Respondent's reclassification approach required in theory a change in each position's duties from general park maintenance to construction of permanent park improvements. In practice, no such change in duties occurred. Before and after the reclassification, each position performed a mixture of general park maintenance and construction of permanent improvements for the park.

After the presentation of Appellant's grievance, Respondent voluntarily moved to forestall future violations by implementing a system of computerized review of L.T.E. work hours designed to provide adequate advance notice of any L.T.E. whose total work hours approach the 1044 hour maximum. With this advance notice, Respondent has had ample time to terminate any such employe before the 1044 hour maximum is exceeded. Respondent has also discontinued its program of reclassifying such employes as L.T.E.-Project. These changes have successfully prevented the occurence of any similar violations.

Conclusions of Law

Appellant charges the Respondent with violations of Section 16.21, Wis. Stats. and Chapter Pers. 10, Wis. Adm. Code. Respondent concedes it violated the 1044 maximum hour provision of Wis. Adm. Code, Section Pers. 10.03. Respondent has not, however, conceded any other violation with which it is charged. We conclude that the Appellant has successfully discharged his burden of proof in showing violations of Wis. Adm. Code Sections Pers. 10.03 and

Pers. 10.08 but has failed to meet that burden with respect to all other charges.

Appellant contends that the Respondent hired the three employes in question as L.T.E.'s to fill vacancies in de facto permanent or seasonal positions. Wis. Adm. Code Section Pers. 10.02 provides:

> "Prohibitions on the use of limited term employment. Limited term employment shall not be used to fill vacancies in permanent, seasonal or sessional positions in the classified service, except as provided in sections 16.21(2) and (3), Wis. Stats."[1]

Respondent does not suggest literal compliance with the provisions of this section or with Section 16.21(2) or (3) Wis. Stats. Rather Respondent's argument is that the sections do not apply since none of the vacancies in this case were permanent or seasonal positions and could, therefore, be filled by L.T.E.'s.

Wis. Adm. Code Section Pers. 8.02(1) defines the primary characteristics of permanent employment as follows:

> "Permanent. Employment of a career nature that requires the continuous services of an employe half-time or more on an annual basis . . . ."

None of the L.T.E. positions involved here fulfill the requirements of this definition. If all the employment periods for each employe as an L.T.E.-Recurring and as an L.T.E.-Project are combined for each year, no employment extends for more than nine months which is substantially less than the required twelve months.

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[1]The facts of this case overlap a change in Wis. Adm. Code Section Pers. 10.02 which before October, 1972, imposed the same prohibition as the current section but allowed the director in exceptional circumstances to authorize the use of L.T.E.'s to fill vacancies in permanent or seasonal positions. Since Respondent's argument that the positions are neither permanent nor seasonal renders either section inapplicable, we need concern ourselves only with the provisions of the present situation.

Wis. Adm. Code Section Pers. 8.02(2)(a) defines the primary characteristics of seasonal employment as follows:

> "Seasonal. (a) Employment requiring the services of an employe on an intermittent and recurring basis for more than half-time on a daily, weekly or monthly basis, and which normally leads to a career through successive reinstatements . . . ."[2]

Respondent relies on an exception to this section contained in Wis. Adm. Code Section Pers. 8.02(2)(b) which provides:

> "Recurring employment of extremely short duration which does not normally lead to a career and which does not normally total 6 months in any 12 month period shall be designated as limited term employment."

This Code Section did not become effective until October 1, 1975, and does not apply to all the incidents in this case. Its predecessor was Wis. Adm. Code Section Pers. 8.02(2)(c) which provided:

> "Exception. The director may designate positions which recur and are of extremely short duration and lack career possibilities as limited term."

The record indicates that the director's authority to designate L.T.E. positions was delegated and that that delegated authority was used in hiring the L.T.E.'s involved in this case.

The language limiting such designated positions to ones of "extremely short duration" is quite similar to the current provision restricting its designated positions to ones which do not "normally total 6 months in any 12 month period." This equivalency is demonstrated by the prior history of the L.T.E.-Recurring classification under the Personnel rules which specifically included L.T.E.-Recurring positions under the short term sub-category of limited term employment. Wis. Adm. Code Section Pers. 10.06(1). Short term employment,

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[2]The facts of this case overlap several changes in the wording of Wis. Adm. Code Section Pers. 8.02(2). Despite the different phrasing, the earlier versions assigned the same primary characteristics to seasonal employment. We, therefore, confine our attention to the provisions of the current section.

including L.T.E.-Recurring positions, were then subjected to a maximum work period which was not to exceed "the equivalent of 6 work months of employment in any 12 month period." Wis. Adm. Code Pers. 10.08.

These provisions were in effect until October 1972. At that time Wis. Adm. Code Section Pers. 10.06 was renumbered and changed in such a manner that it was unclear whether the L.T.E.-Recurring exception to seasonal employment was still included in the short term category and thus subject to the indicated maximum work section. The current section clarifies the situation by specifically subjecting the L.T.E.-Recurring positions to their own "6 month" restriction.

This exception provides the basis for distinguishing L.T.E.-Recurring from seasonal employment. Both positions involve recurring employment and virtually identical duties; but, unlike seasonal employment, the L.T.E.-Recurring exception does not normally lead to a career through successive appointments and is normally employment for 6 months or less in any 12 month period.

The positions in this case, as demonstrated by their designation as limited term positions, are not considered by the Respondent to possess career potential through successive appointments. Appellant has provided no evidence that these positions do in fact possess career potential, but he, nonetheless, concludes that the positions are seasonal positions because on several occasions the positions lasted longer than 6 months. The definition of recurring limited term employment does not support Appellant's position. It does not provide that positions lasting longer than 6 months can not be recurring limited term employment.

The definition simply requires that normally the employment lasts for 6 months or less. The record indicates that in the vast majority of employment

periods, the employment terminated well within the 6 month requirement even if employment periods as L.T.E.-Recurring and L.T.E.-Project are combined. This is sufficient to meet the definitional requirement for an L.T.E.-Recurring which requires only that the positions normally involve employment for 6 months or less. Consistent with this view, we conclude that the positions are not seasonal positions but instead are L.T.E.-Recurring positions which the Respondent properly filled with L.T.E.'s.

Appellant charges Respondent with violating what is now Wis. Adm. Code Section Pers. 10.05 which provides:

> "(1) Except when delegated by the director, prior approval is required for the use of limited term employment including titles, pay, duration, procedures, records, etc."[3]

Appellant has shown both that the prior approval of the Director of the Bureau of Personnel was not obtained and that one method of written delegation of authority, i.e. a letter by the Director to the Respondent, was not utilized. Respondent has shown that the L.T.E.'s were hired through the Bureau of Personnel's program of delegated authority. Appellant has not shown that the delegation of authority through that program required a letter to the Respondent or that the delegation of authority under that program was in any way improper. We, therefore, conclude that the Appellant has failed to carry his burden of proof on this charge.

Appellant also charges Respondent with violating Wis. Adm. Code Section Pers. 10.08 which provides:

> "Renewals, extensions, change of categories and classification. Renewal of employment, extension of time duration, change in category or classification for any employe on a limited term employment shall not be permitted except for unusual unforseeable circumstances. Justification is required for any such renewal, extension, change in category, or classification, and each case will be determined on its own merits."

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[3] Wis. Adm. Code Section Pers. 10.03(1), the predecessor to this section, was in effect until November of 1972 and covers some of the incidents of this case. It, too, allows the director to delegate his authority to designate the positions as L.T.E. positions. Our analysis is, therefore, equally applicable to this earlier version of the current section.

We agree with the Appellant that the violation did occur. Without the appropriate change in duties, Respondent's reclassification of these employes as L.T.E.-Project when their work hours neared the 1044 hour maximum was nothing more than a renewal of employment or an extension of time in their L.T.E.-Recurring positions. Respondent's actions lack justification since the record indicates no unusual circumstances which the Respondent could not forsee.

Remedies

Appellant requests an order directing that when and if Respondent fills the vacancies created by the termination of James Mente, Wayne Francois and Carl Francois, it be with permanent employes or that we confer permanent status on and award backpay to those three individuals. Our conclusion that the positions were neither seasonal nor permanent positions precludes either alternative. Furthermore, Appellant does not represent these three individuals and, according to the Interim Opinion and Order, Appellant lacks standing to assert their interests.

Appellant seeks attorney fees of $1.00 as a reasonable cost incurred in this appeal while acting as "mini-guardian" of the civil service system of the State of Wisconsin. We decline to award Appellant his attorney's fees. The prevailing view is that, unless a statute provides otherwise or unless certain limited exceptions apply, each party involved in litigation bears the expense of their own attorney's fees. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). No such statute or exception covers the facts of this case and, in addition, the "private Attorney General" or "mini-guardian" theory on which Appellant relies was rejected by the Supreme Court in the Alyeska case.

Given the changes effectuated by the Respondent, it appears that the only remedy to which Appellant is entitled is the determination of the issues as set forth in the conclusions of law. C.F. Watkins v. Department of Industry, Labor and Human Relations, 69 Wis. 2d 782, 233 N.W. 2d 360 (1975).

Order

This grievance is resolved by determination of the legal issues as set forth in the conclusions of law.

Dated June 16, 1977. STATE PERSONNEL BOARD

Laurene DeWitt, Chairperson