

\*\*\*\*\*  
 \* \* \* \* \*  
 BETTY J. MALZAHN,  
 \*  
 \*  
 Appellant,  
 \*  
 \*  
 v. \*  
 \*  
 \*  
 MANUEL CARBALLO, Secretary,  
 Department of Health & Social Services, and \*  
 VERNE KNOLL, Deputy Director, \*  
 State Bureau of Personnel, \*  
 \*  
 Respondents. \*  
 \*  
 Case No. 75-39 \*  
 \*  
 \*\*\*\*\*

**OFFICIAL**

ORDER

Before: DEWITT, Chairperson, MORGAN, WARREN, HESSERT, Board Members.

ORDER

The attached proposed opinion and order is incorporated by reference as the final disposition of this appeal with the addition of the following language to the conclusions of which we feel is necessary to clarify the extent of the holding:

"It is appropriate to point out that the decision of this appeal is based on the record before the board in this case. The agreement which was in effect at the time of the transaction (appellant's Exhibit 4) contained the following language with regard to wages: "Employes hired on or after the effective date of this agreement shall be compensated according to the schedules contained in Appendix A of this agreement." (Art. V, Sec. 1) There is no basis on this record for a conclusion that as part of the agreement this provision was not the subject of bargaining. In his objections to the proposed decision respondent Knoll points to certain disclaimer language in a subsequent contract (appellant's Exhibit 3): "These attachments [schedules] are not a part of the agreement and their

inclusion should not be construed as having been a subject of negotiations by the parties." This contract was not in existence at the time of the transaction in question and its language is not material to this issue."

Dated June 16, 1977.

STATE PERSONNEL BOARD

  
\_\_\_\_\_  
Laurene DeWitt, Chairperson

\*\*\*\*\*  
 \* \* \* \* \*  
 BETTY J. MALZAHN,  
 \*  
 \*  
 Appellant,  
 \*  
 \*  
 v.  
 \*  
 MANUEL CARBALLO, Secretary,  
 \*  
 Department of Health & Social Services,  
 \*  
 VERNE KNOLL, Deputy Director,  
 \*  
 State Bureau of Personnel,  
 \*  
 \*  
 Respondents.  
 \*  
 \*  
 Case No. 75-39  
 \*  
 \*  
 \*\*\*\*\*

PROPOSED  
OPINION AND ORDER

Before:

NATURE OF THE CASE

This is an appeal from a decision of the Director of the Bureau of Personnel upholding a decision of an appointing authority with respect to appellant's salary rate. An interim opinion and order entered February 23, 1976, denied the respondents' motion to dismiss for failure of subject matter jurisdiction that was based on the theory that the appellant's original appeal to the director was untimely pursuant to Section 16.03(4)(d), stats.

FINDINGS OF FACT

At all relevant times herein appellant has been employed at the Southern Wisconsin Colony and Training School, Division of Mental Hygiene, Department of Health and Social Services. Prior to the personnel transaction in question here she was classified as a Nursing Supervisor 1. In November, 1974, she applied for a position as a teacher at the institution which was announced in the Wisconsin Career Candidate Bulletin on a nonpromotional basis. She was appointed, effective February 16, 1975, to the position at a monthly salary of \$1084, which was the appropriate figure set forth in the salary schedule in the contract between the State of Wisconsin and the Wisconsin Federation of

Teachers (Appellant's Exhibit 4), which covered the position in question at the time. Shortly thereafter, the agency determined that the correct salary for her position should be \$1039/month. The agency based this determination on the theory that the transaction was a promotion, since the Teacher 5 level to which she was appointed had a higher maximum than the Nursing Supervisor 1 classification, and under the director's rules, Section Pers 14.04, W.A.C., her salary on promotion would be limited to one step.

CONCLUSIONS OF LAW

It is clear that if Ms. Malzahn had been a non-state employe when she received her appointment to this position, her salary would have been \$1084/month pursuant to the salary schedule in the contract. It is also clear that her appointment to the position involved a promotion. See Section Pers 14.01, W.A.C. The question then is whether Section Pers 14.04, W.A.C., "pay rate on promotion," applies and limits the appellant's salary to an effective one step increase (\$1039/month) or whether the figure set forth in the contract schedule (\$1084/month) controls.

Section 111.93(3), Stats., provides:

"If a labor agreement exists between the state and a union... 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."

Bargaining is prohibited on, among other things:

"Policies, practices and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments..."  
Section 111.91(2)(b)1, stats.

We conclude that the question of Ms. Molzahn's salary rate is covered by the former rather than the latter provision, and that the provisions of Section Pers 14.04, W.A.C., do not apply. If the appeal were concerned with

the selection process or the certification or appointment, then the rules of the director would apply. However, here the appointment had been made and the only question was that of salary. The personnel rule (Section 14.04) invoked by the agency is not concerned with civil service policy as it relates to selection, certification or appointment in the promotional process, but solely the means of establishing salary following promotion to a position. In this case, the union and the state had bargained for and reached agreement on a detailed salary schedule which establishes specific rates of pay depending on training and experience. This type of situation falls within the terms of Section 111.93(3), stats., and the personnel rules are accordingly superseded.

Respondent raised the question for the first time at the hearing whether or not this matter should have been heard under the contractual grievance procedure. In this regard, we note that this case is before the board as an appeal of a decision of the director pursuant to Section 16.05(1)(f), stats. The director in his decision relied on the opinion of the Bureau of Employment Relations that "this is not a grievable issue under the Wisconsin Federation of Teachers Contract," and decided the issue on the merits. Board's Exhibit 2. When the appellant appealed the director's determination to the board, the respondent did not cross appeal the determination that the matter was not grievable. The respondent did file an initial objection to subject matter jurisdiction which was briefed and the subject of an interim decision, but this objection was limited to the argument that the initial appeal to the director was untimely.

Assuming that the respondent has not waived his right to raise this question, we conclude that the subject matter of this appeal has not been processed in the wrong forum. The issue on the merits in this case does not involve a contract interpretation as such but rather a basic question of whether a contractual salary schedule or a rule of the director should control an

employee's salary rate in a given personnel transaction. The appellant characterized the determination by the agency that the transaction should be governed by the director's rule as opposed to the contract as illegal or an abuse of discretion and appealed to the director. The question before the director was not one of contract interpretation but a threshold question of whether the transaction in fact was covered by the contract or by the rules, and a question of whether Section 111.93(3), stats., may have been violated. It may be that in such a situation there is concurrent jurisdiction, under both the rules and the contractual grievance procedure. In any event, we perceive no error in processing the matter outside the contractual grievance procedure in this case.

For all the above reasons, we conclude that the director erred and that the appellant is entitled to the difference in salary she would have received had she been appointed at the correct contractual salary of \$1084/month. This should be retroactive to May 11, 1975. See Van Laanen v. Wettengel, Wis. Pers. Bd. No. 74-17 (3/19/76 & 3/23/76).

ORDER

The decision of the director is rejected and this appeal is remanded for actions not inconsistent with this decision.

Dated \_\_\_\_\_, 1977. STATE PERSONNEL BOARD

\_\_\_\_\_  
Laurene DeWitt, Chairperson