STATE OF WISCONSIN STATE PERSONNEL BOARD × THOMAS KERR, OFFICIAL 2 \* Appellant, \* × v. \* ZEL RICE, Secretary, OPINION Department of Transportation, \* ~ ORDER Respondent. \* Å Case No. 75-67 ÷ .....  $\sim$ MICHAEL MCNAMARA, .... ....  $\sim$ Appellant, ÷ \* v. ZEL RICE, Secretary, \* Department of Transportation, \* × \*\* Respondent. ..... Case No. 75-72 .... \* 

AND

Before: DeWitt, Chairperson, Wilson, Warren and Hessert, Board Members

### Opinion and Order

### Nature of the Case

These cases are the consolidated appeals of Group Union Grievances filed on behalf of Appellants as well as similarily situated employes. Following the hearing, a proposed decision was not served on the parties pursuant to Section 227.09(2), stats., pursuant to a stipulation between counsel waiving service.

## Findings of Fact

Appellants and members of the grieving group (hereafter referred to as Appellants) are all employes in the classified service, assigned to the Department of Transportation, Division of Highways, District 8. Appellant Kerr was a Permanent Employe, Appellant McNamara was a Seasonal Employe, and the remainder of the

group was mixed between Seasonal and Permanent Employes. The Appellants are represented by the Wisconsin State Employees Union and are covered by its Agreement with the State of Wisconsin.

The grievances filed were non-contractual grievances, concerning the legality of the employment of Limited Term Employees while Seasonal Employes were on layoff, and questioning Respondent's use of Seasonal Employes and Limited Term Employes in general. The grievances were denied at the three levels, and then appealed to the Board pursuant to Section 17.05(7), stats.

The parties stipulated to the following statement of issue for resolution by the Board:

"Is the employer violating Chapters 9 or 10 or Section Pers. 22.03(2), Wisconsin Administrative Code, in its existing practice or policies regarding Seasonal Employes and Limited Term Employes?"

The Director of the State Bureau of Personnel delegated classification authority, including authority to hire Limited Term Employes, to the Department of Transportation. The delegation was published in the Administrative Practices Manual in the Personnel part, Classification Plan Section.

The Department of Transportation, Division of Highways, District 5, employed Seasonal Employes as reflected in Appellants' Exhibit 4, which is attached to this opinion and incorporated in these findings of fact as if set forth herein. The period of each Seasonal Employe's layoff is reflected in that Exhibit and is likewise adopted as a part of these findings.

The Department, District 8, also employed Limited Term Employes as reflected in Appellants' Exhibit 3, attached to this opinion and also adopted and incorporated.

The data in Exhibits 3 and 4 establishes that no Seasonal Employe was employed for more than 24 biweekly payperiods in 25 consecutive biweekly pay periods.

The data further establishes that the following Limited Term Employes were employed while the following Seasonal Employes were laid off:

Marvin Bell, a Limited Term Employe classified as Engineering Aid 1 was employed from July 10, 1974, through January 10, 1975, and from May 19, 1975, through November 14, 1975. During Bell's employment, the Seasonal Employes classified Engineering Aid 1 who were laid off are Henry D. Abrahamzon, laid off October 11, 1974, through November 25, 1974; Bruce S. Peterson, laid off August 30, 1974, through September 30, 1974.

David Brenholt, a Limited Term Employe classified as Engineering Aid 2 was employed from January 1, 1974, through February 1, 1974, and June 17, 1974, through November 27, 1974. During Brenholt's employment, the Seasonal Employes classified as Engineering Aid 2 who were laid off were Richard Dahlberg, laid off from January 4, 1974, through March 11, 1974, and Donald Dahle, laid off from January 15, 1974, through April 30, 1974.

Donald Chatfield, a Limited Term Employe classifed as Engineering Technician 1 was employed from January 6, 1974, through December 23, 1974. The Seasonal Employes classified Engineering Technician 1 who were laid off while Chatfield was employed are James Bednar, laid off January 18, 1974, through April 30, 1974; Leroy Hanson, Jr. laid off from February 28, 1974, through April 8, 1974; Helge Johnson, laid off January 31, 1974, through March 6, 1974; Wilbert Kell, laid off January 1, 1974, through May 13, 1974; David Lamont, laid off March 15, 1974, through April 30, 1974; Michael J. McNamara, laid off January 31, 1974, through March 11, 1974; Robert Mertz, laid off January 1, 1974, through June 4, 1974; George Nykanen, laid off March 29, 1974, through May 7, 1974; Jeffrey Plesko, laid off March 15, 1974, through April 15, 1974; Harvey Stodola, laid off January 17, 1974, through April 30, 1974.

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Kenneth Hyde, a limited Term Employe classified as Engineering Aid 1, was employed from August 12, 1974, through December 31, 1974, and Terry White, also a Limited Term Engineering Aid 1 was employed from July 9, 1974, through December 31, 1974. While these Limited Term Employes were employed, Seasonal

In 1975, Seasonal Employe Abrahamzon was reclassified to Engineering Aid 2. He was laid off from October 23, 1975, through November 24, 1975. During the period of his layoff, Limited Term Employes Bruce Germond, Gregory Gokey, Gerard Gouge and JoAnne Rajek, all classified as Engineering Aid 2, were employed.

In addition, Limited Term Employe Brian Richardson, classified as Engineering Aid 2 was employed from May 27, 1975, through November 26, 1975, while Seasonal Employe Randall Nevala, classified Engineering Aid 2 was laid off from February 7, 1975, through May 22, 1975.

The data in Exhibit 4 also indicates that in 1974, eight of the 17 Seasonal Employes employed throughout that year were laid off for less than three biweekly . pay periods. In 1975, seven of the 17 Seasonal Employes employed throughout the year were laid off for less than three biweekly pay periods. Further, in 1974 only seven of the 17 Seasonal Employes were laid off for more than three biweekly pay periods. In 1975, 11 of the 19 were laid off for more than three biweekly periods.

### Conclusions of Law

At the outset, the Board finds that Respondent Employer has not violated Section Pers. 10, W.A.C., with regard to having authorization to use Limited Term Employes. Appellant has asserted Respondent was not authorized by the Director of the Bureau of Personnel to use Limited Term Employes, as required by Section Pers. 10.05. The authority to utilize Limited Term Employes was specifically delegated to the Department of Transportation in the Administrative Practice Manual in Part: Personnel, Section: Classification Plan, Subject: Classification Delegation. That document provides in part I, C that:

"... authority . . . is delegated for reclassification, certification request and limited term employment purposes."

It is concluded that the above document lawfully delegates to Respondent the authority to utilize Limited Term Employes.

Second, it is concluded that Respondent has not violated Section Pers. 9.02(1) by working Seasonal Employes more than 24 biweekly pay period in any 26 consecutive biweekly pay periods.

Appellants' Exhibit 4, attached to this opinion shows that no Seasonal Employe worked more than 24 biweekly periods in any 26 consecutive biweekly periods.

The central issue in this case concerns Respondent's use of Limited Term Employes while Seasonal Employes are on layoff status. Respondent, in its brief has argued that the Board lacks jurisdiction to consider the layoff issue, since the layoff procedure is subject to collective bargaining and is covered by the labor agreement between the State of Wisconsin and AFSCME, Council 24, Wisconsin State Employes Union, AFL-CIO. Respondent also asserts that the various statutes and administrative code provisions governing layoffs are inapplicable to this case, since they are superceded by the above cited Agreement.

Respondent is partially correct in its assertions. The Board does lack jurisdiction to hear appeals of layoffs per se, where layoff procedures have been bargained for and the appealing party is appealing the layoff on procedural or "just cause" ground. See Olbrantz v. Earl, Pers. Bd. 75-9 (March 24, 1975).

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However, in this case Appellants are not appealing the procedures followed by Respondent in effecting their layoff. Nor is the issue whether or not there was "just cause" for the layoff.

Appellants have filed a non-contractual grievance, challenging the scheme by which Seasonal Employes are laid off while Limited Term Employes in the same class continue to work. Respondent recognized this Board's jurisdiction to hear such non-contractual grievances under Section 16.05(7), stats., by not objecting to the Board's jurisdiction to determine the legality of the use of Limited Term Employes and the number of pay periods that Seasonal Employes were employed. In addition, Respondent recognizes the Board's jurisdiction over the question of when layoffs are proper at all. (Respondent's Brief, p. 10) The Board has jurisdiction to examine the overall scheme by which Respondent determines when and if Appellants will be laid off, and further whether Limited Term Employes may be employed while Seasonal Employes are laid off, Under Section 16.05(7), stats.

Furthermore, the discussion and determination of the layoff issue is essential to the resolution of the issues stipulated to by the parties. The question of Respondent Employer's compliance with or violation of Wis. Adm. Code Pers. Sections 9, 10 or 22.03(2) can only be decided by addressing the layoff issue. Finally, the contract in question here was not offered in evidence and is not a part of the record. In light of the above-cited factors and the stipulation as to the issue, it cannot be concluded that there is no jurisdiction. This decision will be limited to the issues stipulated to by the parties. It is re-emphasized that the conclusion on subject matter jurisdiction is based on this record and is not intended to provide a precedent as to what is subject to bargaining.

Wis. Adm. Code Section Pers. 22.03(2) provides in part:

"An employe with permanent status in class in a permanent position shall not be laid off from any position while any Limited Term Employe . . . is continued. . ."

Appellants have failed to establish any violation of Section Pers. 22.03(2) in this case. The Provision speaks only to Permanent Employes, and has no bearing on Seasonal Employes. It is irrelevant to the issue presented in the grievances.

However, there are provisions in Chapter Pers. 9 relating to Seasonal Employes and Chapter Pers. 10 relating to Limited Term Employes which were violated by Respondent Employer prior to the time the grievances were filed.

The primary characteristics of Seasonal Positions are:

"Employment requiring the services of en employe on an intermittent and recurring basis for more than half-time . . . Such employment shall not exceed 24 biweekly payroll periods of any 26 consecutive full biweekly payroll periods." Wis. Adm. Code Section Pers. 8.02(2)

"It is the policy of the state to consider employes of seasonal positions as career employes . . . and to provide, <u>subject to the limitations and</u> <u>fluctuations of the seasonal cycles</u>, a reasonable guarantee of successive reinstatements . . ." Wis. Adm. Code Section Pers. 9.01 (emphasis added)

The courts have defined and interpreted Seasonal Employment as follows:

"Seasonal Employment refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year. It does not include such occupation as may be carried on throughout the entire year. Pettis v. Industrial Commission, 372 P. 2d 72, 75 91 Ariz. 298 (1962)

"The descriptive term used is 'seasonal', which connotes a certain common sense definition. Seasonal has been invariably related to the vagaries of nature. In other words, what is seasonal cannot be controlled by human ingenuity." <u>Application of Racetracks of Ohio</u>, 137 NE 2d 2ll, 2l3, Ct. Cm. Pls. Franklin, Ohio (1956)

See also 99 CJS, Workman's Compensation, Section 294 p. 1018, note "Seasonal

Employment Defined"

Thus, from the Wisconsin Administrative Code provisions, as well as from the cases cited, it is apparent that Seasonal Employment must connote employment which is subject to fluctuation and intermittance which is not directly controllable by either the Employer or the Employe. Wis. Adm. Code Section Pers. 9.02(1) provides:

"When the nature and conditions of employment in a seasonal position approaches year round full time employment (more than 24 biweekly pay periods in any 26 consecutive full biweekly pay periods) the appointing authority shall request establishment of a permanent position and abolish the seasonal position. An employe occupying such abolished seasonal position shall be appointed to the position."

Within the guidelines above, several, and possibly all of the Seasonal Employes involved in this appeal were not properly considered Seasonal Employes at the time of the grievance. It is true that no Seasonal Employe worked more than the maximum permitted 24 biweekly periods. However, there is no basis within the statutory and regulatory scheme for automatically laying off Seasonal Employes for no reason other than the 24 biweekly period rule. As set forth above, the nature of a Seasonal Position is a position where the work fluctuates from Season to Season, or where the work is controlled by Seasonal factors, not within the control of the Employer or Employe.

In this case, the layoffs of Seasonal Employes are not regulated by Seasonal factors. Rather, they are regulated by budgetary considerations or by the 24 biweekly period rule. Respondent in its brief refers to the "mandatory layoff" of Seasonal Employes after 24 biweekly period of work. There is no such "mandatory layoff." To interpret Wis. Adm. Code Section Pers. 8.02(2) and Section 9.02 to permit or require such a "mandatory layoff" period would be to completely disregard the actual intent of Section Pers. 9.02 with regard to making Seasonal positions permanent when there is year round work available.

Seasonal Employes may be laid off at the end of a Seasonal Period. Section Pers. 9.03(1). If there is no actual seasonal period, and if work is available for the Seasonal Employes year round, then the provision of Section Pers. 9.02(1) takes effect. The appointing authority must request that the Seasonal Position be abolished and that Permanent Positions be created.

In this case, there is year round work to be performed by the Seasonal Employes. This is borne out by the fact that Limited Term Employes in the same class as the Seasonal Employes have work to do while the Seasonal Employes are on layoff.

The correct procedure for Respondent to have followed would have been to request that the Seasonal Positions be made Permanent Positions pursuant to Section Pers. 9.02(1) in all cases where there was year round work to be performed. The Seasonal Employes should not have been laid off where there was continuing work for them to do. Seasonal Employes may be laid off only at the end of the Seasonal Period pursuant to Section Pers. 9.03(1) or pursuant to Section 16.28(2), stats., or pursuant to a labor agreement. There is no provision for any mandatory layoff simply because the Seasonal Employe has worked 24 biweekly periods. Wis. Adm. Code Section Pers. 10.02 specifically states that Limited Term Employes may not be used to fill vacancies in Seasonal Positions.

# ORDER

The grievance denied appealed from is affirmed in part and reversed in part and remanded to Respondent for action in conformance with this opinion.

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