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 DONALD GREEN, et al.,
 Appellant,
 v. .
 SECRETARY, Department of Industry,
 Labor and Human Relations,
 Respondent,
 Case No. 77-112
 * * * * *

OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This case is before the Board as a constructive appeal of a decision of the Director pursuant to § 16.05(1)(f), Wis. Stats., and to a stipulation reached at a prehearing conference. See prehearing conference report dated December 7, 1977. The appeal concerns the assignment of appellants on an acting basis to certain supervisory positions in excess of 6 months (see chapter pers. 32, W.A.C.) and without pay increase or reclassification. In a proposed interim opinion and order submitted to the parties on February 9, 1978, (copy attached), the hearing examiner made certain proposed findings of fact but deferred any conclusions of law. In the proposed opinion it was pointed out:

". . . it appears that the bureau affirmed the respondent in a determination that there was and is no statutory authority for reclassification or salary supplement based on the performance of additional work in an acting capacity. The question presented then, on this appeal, is whether that conclusion is correct.

* * *

The Board does not have before it the articulated basis for the Director's decision in this matter. Therefore, while it has held an evidentiary hearing and entered the foregoing findings of fact, it does not feel that it is appropriate to enter

conclusions of law until it has an opportunity to review the fully articulated decision of the Director. Therefore, this case will be held in abeyance and the Director will be requested to file a written statement setting forth his analysis of the question relating to salary and classification discussed above, as well as on any other relevant matters."

By letter of February 9, 1978, the hearing examiner suggested to the parties that they reserve filing any objections they might have with respect to the proposed interim opinion and order while the matter was referred to the Director. It was indicated that following receipt of the Director's statement proposed conclusions of law and an additional opinion could be prepared and the parties would then have an opportunity to file objections and arguments with respect to the entire decision.

There were no objections to this manner of proceeding and accordingly the matter was remanded to the Director who filed a statement of position (letter of March 22, 1978) a copy of which is attached. The parties have filed comments on the Director's statement.

FINDINGS OF FACT

The Board incorporates by reference as if fully set forth the findings contained in the proposed interim opinion and order, a copy of which is attached hereto.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of this appeal pursuant to § 16.05(1)(f), stats., as an appeal from a decision of the Director.

2. There is no permissible legal basis for the appellants' reclassification during the period of their acting assignments under the circumstances set forth in the findings of fact.

3. There is no permissible legal basis for the augmentation of appellants' salaries during the period of their acting assignments under the circumstances set forth in the findings of fact.

OPINION

The Board reiterates its statement in the interim opinion and order that in its opinion appellants should be compensated for the difference in salary between their permanent and acting classifications if there is a statutory basis for doing so and regardless of the reason for the length of their assignments.

The Director has determined that there is no statutory basis for a temporary reclassification under the circumstances of this case. The appellants have not identified such authority, and the board can discern none. A reclassification is based on "a logical and gradual change to the duties and responsibilities of a position" or the "attainment of specified training and experience, and demonstrated performance by an incumbent in a position identified in a classification series where the class levels are differentiated on this basis." See § Pers 3.02(4)(a) and (b), W.A.C. Neither circumstance is applicable here. As pointed out by the Director, what has happened to the appellants is:

"In effect, the employes have been moved from one position to a different position in a class having a greater pay rate or pay range maximum. This is defined as a promotion under Wis. Adm. Code section Pers. 14.01. Promotions are accomplished through the competitive examination process to insure the rights of other qualified and interested applicants."
Letter dated March 22, 1978.

The appellants' movement into these positions was under the authority of Pers. 32.01, W.A.C., as acting assignments, and thus there was no promotional process involved. There are no provisions for temporary reclassifications or temporary promotions which would provide a vehicle for payment at the higher classification during the term of the acting assignment.

With respect to the possibility of a salary augmentation the Director said:

"The Board has also determined in their findings of fact that the appellants at all relevant times have been state employes with permanent status in Job Service Specialist 4 or 5 position classifications. As such, these employes at all relevant times were covered under the provisions of a collective bargaining agreement between the State of Wisconsin and the employer and the AFSCME, Council 24 as the representative of the employes. This agreement was made pursuant to the provisions of §§ 111.80-97 of the Wisconsin statutes.

Section 111.91, Wis. Stats., states in part:

'Matters subject to collective bargaining to the point of impasse are . . .

(2) . . . salary adjustments upon temporary assignments of employes to duties of a higher classification . . .'

Therefore, it appears that the salary adjustment you question in the instant case would be a subject of bargaining. However, there are no provisions of the contract which provide for such salary adjustments." Letter of March 22, 1978.

Section 111.93(3), stats., provides:

"If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, 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."

Since there is no contractual provision relating to salary adjustments for temporary assignments of the kind involved here it does not appear to the Board

that there is any remedy available to the appellants for the time they served in their acting assignments. Therefore, the decision of the Director must be sustained and these appeals dismissed.

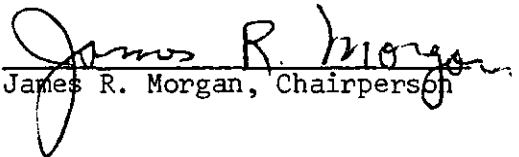
The Board notes that the respondent failed to obtain, pursuant to § Pers. 32.01, W.A.C., the approval of the Director for these acting assignments, and that the assignments exceeded in length the 6 month normal maximum as set forth in § Pers. 32.01(3), W.A.C. Even though the Board can ascertain no remedy for these employees, it does urge the respondent to carefully review the procedures followed in this case to attempt to ensure this situation does not reoccur.

ORDER

The decision of the Director is sustained and these appeals are dismissed.

Dated: May 18, 1978

STATE PERSONNEL BOARD


James R. Morgan, Chairperson

* * * * *
 DONALD GREEN, et al.
 Appellant,
 v.
 SECRETARY, Department of Industry,
 Labor and Human Relations,
 Respondent.
 Case No. 77-112
 * * * * *

PROPOSED
 INTERIM OPINION
 AND ORDER

Before:

NATURE OF THE CASE

This case is before the Board as a constructive appeal of a decision of the Director pursuant to §16.05(1)(f), Wis. stats., and to a stipulation reached at a prehearing conference. See prehearing conference report dated December 7, 1977. The appeal concerns the assignment of appellants on an acting basis to certain supervisory positions in excess of 6 months (see ch. pers. 32, W.A.C.) and without pay increase or reclassification.

FINDINGS OF FACT

1. The appellants have at all relevant times been state employes with permanent status in class as follows:

- (a) Green: Job Service Specialist 5
- (b) O'Neill: Job Service Specialist 5
- (c) Jerdee: Job Service Specialist 4

2. The appellants were assigned on an acting basis to certain supervisory positions by the director, bureau of coverage and contributions, as follows:

- (a) Green: successorship unit, February 2, 1976 - June 20, 1977
- (b) O'Neil: experience rating, adjustments, and refunds unit, February 2, 1976 - June 20, 1976 (note: these 2 units comprised the successorship and experience rating section.)
- (c) Jerdee: delinquency section March 1, 1976 - June 20, 1977.

3. These acting appointments were made to fill vacancies until they could be filled on a permanent basis by competitive examination.

4. An examination for Job Service Supervisor 5 - Madison Area - CP - DILHR - successorship and experience rating section was announced January 16, 1976.

5. At least partly as a result of complaints from appellants O'Neill and Green about the examination announcement and the organizational structure of the successorship and experience rating section, the respondent halted the aforesaid process.

6. On or about April 27, 1976, the respondent determined to suspend the examination pending the completion of a study of the organizational structure by the management analysis staff.

7. The management analysis staff recommended on May 7, 1976, that the Job Service Supervisor 5 vacancy not be filled, and that appellants Green and O'Neill be made supervisors of their respective units reporting directly to the Bureau Director.

8. The Bureau Director disagreed with this report and on May 11, 1976, recommended to the Job Service Division administrator that the vacancy be filled.

9. However, the respondent determined on May 11, 1976, to request further study by management analysis staff and to continue to hold the Job Service Supervisor 5 exam process in abeyance.

10. The final management analysis study and recommendation was completed on or about June 29, 1976.

11. This study recommended as one alternative the creation of a new section, status and compliance, which would include 4 units including the successorship and experience rating units, which would be created from the previous successorship and experience unit.

12. This reorganization alternative in its essence was approved by the division administrator on July 20, 1976.

13. The formal certification request for the Job Service Supervisor 5 position was cancelled on July 22, 1976.

14. A selection process for the Job Service Supervisor 4 position heading the delinquency unit was also halted as a result of the reorganization study and implementation.

15. The Department of Administration formally approved the reorganization on August 9, 1976.

16. The DILHR personnel office received certification requests for status and compliance section chief, delinquency unit supervisor, successorship unit supervisor, and experience rating unit supervisor on September 9, 1976.

17. Approvals of the classifications for these positions were received from the Bureau of Personnel in February, 1977.

18. The respondent had made the decision to fill the section chief before the unit supervisor positions because it was desired that the chief have some input into the selection of the supervisors, and the supervisor positions were similar and would involve common elements on the exam.

19. The position analysis for the positions was completed by February 8, 1977.

20. The examinations were announced on March 4, 1977.

21. The Job Service Supervisor 6 (section chief) exam was held April 19, 1977, a register was established on April 27, 1977, and an appointment was made May 8, 1977.

22. The Job Service Supervisor 4 (unit supervisors) examination was held on April 28 and 29, 1977, registers were established May 10, 1977, and all appointments were made not later than July 17, 1977.

23. During the period between its receipt of these certification requests and the establishment of the registers, the DILHR Personnel Office had a large backlog of other vacancies to be filled through examination, had new staff and new examination procedures, all of which contributed to a longer period of time needed to fill positions generally.

24. The respondent never sought or obtained the approval of the Director pursuant to § Pers. 32.01 for the acting assignment of the appellants. See post-hearing letter from Attorney Levenson dated January 30, 1978.

25. The appellants were never reclassified or paid additional salary in connection with their work in these acting positions which were at a higher salary range than their permanent classifications.

OPINION

In the prehearing conference report dated December 7, 1977, it was noted under the heading of "Jurisdiction":

"The bureau indicated that as a practical matter the director has reviewed the merits of the appellants' complaint and has affirmed the decision of DILHR ..."

It is unclear exactly what "decision" is referred to. Reference is made to the appellants' "complaint". The appellants originally had submitted grievances which in part read:

" ... I should not have been required to serve in this supervisor capacity beyond [the end of the 6 months period] without an appropriate pay increase commensurate with the added responsibilities which were assigned to me ..."

* * *

Relief sought

Appropriate monetary compensation based on the added duties and responsibilities of unit supervisor which were assigned and assumed by me ... plus reclassification to the position and pay level at which I actually have been working."

After this grievance was denied as non-grievable under the contract the appellants filed an appeal with the Board which contained, in part, the following:

According to Ch. Pers. 32 - "Acting Assignments" of the Personnel Rules of the Administrative Code, we should not have been required to serve in these acting supervisory capacities for more than six months.

Since no effort was made by management to fill these three positions within the normal maximum recruitment period of six months, we wish to appeal that our employer had no just cause for arbitrarily retaining us in these acting capacities for fifteen months without an appropriate pay increase and/or reclassification commensurate with the added responsibilities assigned to us. We hereby request that we be reclassified to the positions and pay level that we have unofficially been employed at for the last fifteen months, and we request a retroactive payment of the increased salaries that were due us throughout this time period.

Thus it appears that the bureau affirmed the respondent in a determination that there was and is no statutory authority for reclassification or salary supplement based on the performance of additional work in an acting capacity. The question presented then, on this appeal, is whether that conclusion is correct. In the Board's opinion, the question of whether the delay in filling these positions on a permanent basis was unreasonable, and if so, whether the delay was attributable to the agency or to forces beyond its control, is not material to the question of whether the appellants are entitled to the relief they seek.¹ In the Board's opinion the appellants should be compensated in some manner, either through reclassification or some other device, for the difference in salary between their permanent and acting classifications, if there is a statutory basis for doing so and regardless of the reason for the length of their assignments. If there is not statutory basis for reclassification and/or salary augmentation, then this relief could not be provided, regardless of the reasons for the length of their assignments.

1. This might not be the case in another forum such as the claims Board.

The Board does not have before it the articulated basis for the Director's decision in this matter. Therefore, while it has held on evidentiary hearing and entered the foregoing findings of fact, it does not feel that it is appropriate to enter conclusions of law until it has an opportunity to review the fully articulated decision of the Director. Therefore, this case will be held in abeyance and the Director will be requested to file a written statement setting forth his analysis of the questions relating to salary and classification discussed above, as well as on any other relevant matters.

ORDER

This case will be held in abeyance. The Director is requested to file within 30 days of the entry of this order a written statement as set forth above.

Dated: _____, 1978

STATE PERSONNEL BOARD

James R. Morgan, Chairperson