

STATE OF WISCONSIN

PERSONNEL COMMISSION

 *
 WILLIAM C. RUFF, *
 *
 Appellant, *
 *
 v. *
 *
 WISCONSIN INVESTMENT BOARD, *
 *
 Respondent. *
 *
 Case No. 78-30-PC *
 *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Wis. Stats. (1977) of a layoff. (The appellant was reinstated to a different position after the filing of this appeal.) The appeal was heard before the full Commission on October 4, 5 and 6, 1978. The final posthearing brief was filed February 14, 1979.

FINDINGS OF FACT

1. The appellant was employed by the respondent as a Mortgage Officer from December 26, 1973 to March 31, 1978.
2. The appellant was hired following an October 1973 announcement for an Administrative Officer 2 - Mortgage Officer. His duties were to assist the Mortgage Investment Director in managing the respondent's real estate portfolio with emphasis on expanding the portfolio (Respondent's Exhibit 38).
3. From appellant's hire until approximately November 1975 when Mortgage Officer Donald Loose was hired, the appellant worked about half his time on new mortgage activities and the other half on servicing existing mortgages.

4. The hiring of Mr. Loose, whose position was classified Administrative Assistant 5, resulted in appellant working on new mortgages about 70% and on servicing about 30%, with Mr. Loose working 70% on servicing and 30% on new mortgages.

5. In June 1976, Mr. LaFleur became Executive Director and cut back on new mortgage activity pending the issuance of new guidelines. During this period, appellant worked on other projects and was only minimally involved in new mortgages.

6. In April 1977, the trustees issued new real estate guidelines which, either by themselves or through their interpretation by the then Mortgage and Real Estate Investment Director, resulted in a further reduction in real estate investment activity and a concomitant further reduction in the amount of time appellant devoted to new mortgage activity to about one telephone call per week.¹

7. The appellant's position description executed March 2, 1978 was not reflective of the correct percentage of time appellant actually devoted to new mortgages during the period June 1976 to March 1978, but the appellant believed his being asked to sign the form signalled the respondent's intention to get back into new mortgage investments as had been indicated by Mr. LaFleur (see finding 5).

8. On the same date appellant's new position description was signed, respondent submitted to the Division of Personnel a proposed layoff plan identifying appellant as likely to be laid off because of the expectation that the Board would "eliminate all new investments in mortgages and real estate" leaving him as the only person "actively engaged in new mortgage and real estate" production. (Respondent's Exhibit 20)

¹Also, in November 1977, new business solicitation was halted pending the development of a procedures manual, following criticism by the legislative audit bureau.

9. The aforesaid layoff plan identified the following proposed layoff class (Administrative Officer 2) and options within the class:

"Rank	Cont. Service Date	Name	Class Option
1	12/4/67	G.T. Mahaffey	Administrative Services
2	10/8/73	J.J. Zwadzich	Ass't. Inv. Dir. for Public Bonds
3	12/26/73	W.C. Ruff	Mortgage Officer
4	3/15/76	M.G. Ulevich	Ass't. Inv. Dir. for Priv. Placements
5	5/3/76	M.J. Busby	Ass't. Inv. Dir. for Stocks
6	6/1/76	R.L. Niedziela	Director of Research
7	vacant		Ass't. Inv. Dir., Short-Term Investment

Job duties, together with training and experience requirements, are very distinct for each of these positions. We therefore ask that you approve the above options as recognized options within this class for the Investment Board."

10. The administrator, State Division of Personnel approved the layoff plan and the six Administrative Officer 2 positions as options within the class on the grounds that "there appears to be a specialized area of investment or administration which requires specialized knowledge," should the plan "become a necessity as a result of Investment Board action." (Respondent's Exhibit 22)

11. In their meeting of March 15, 1978, the trustees of the Investment Board adopted a March 9 staff recommendation that the Board cease the solicitation of new, non-insured commercial and industrial mortgage loans (Respondent's Exhibit 11).

12. Among the reasons for the March 9 staff recommendation were (a) lack of new proposals which satisfied the revised criteria the Board had adopted in April 1977; (b) other investment opportunities

provided less risk, greater liquidity and less administrative expense; and (c) difficulty in effectively competing against the large domestic life insurance companies which dominated the commercial and industrial mortgage loan field. (Respondent's Exhibit 17)

13. The question of whether the Investment Board should remain in this area of investment had been under consideration by the trustees for a number of months and their decision took into account, in addition to the staff recommendation, other judgements both for and against the cessation, including the appellants strong recommendation against. (Respondent's Exhibit 19)

14. The members of the investment board as a group have substantial collective training and experience in investments, although they have little specific background in the field of real estate mortgages as investments.

15. The appellant was laid off effective March 31, 1978, following notice from respondent dated March 15, 1978 (Respondent's Exhibit 25).

16. At the time of the layoff, the respondent was aware that certain analyst positions would be open in the future.

17. At the time of the layoff, these positions were being surveyed or studied by the Division of Personnel and the appellant was not aware of what final qualifications would be established for these positions.

18. The Division of Personnel eventually completed this work and the appellant applied for and eventually was offered and did accept a position as analyst 4.

OPINION

The applicable standard for review of this type of transaction is set forth in Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N. W. 2d 183 (1975). In that case an employe was laid off for economic reasons and appealed to the Personnel Board under §16.05(1)(e), Stats. (1975), the predecessor statute to §230.44(1)(c), Stats. (1977). The court stated:

"The principal question on this appeal is what is meant by 'just cause' in a layoff situation.

* * *

The circuit judge, on review, correctly held that an appointing authority acts with 'just cause' in a layoff situation when it demonstrates that it has followed the personnel statutes and administrative standards set forth in ... the Administrative Code and when the layoff is not the result of arbitrary or capricious action.

* * *

While the appointing authority indeed bears the burden of proof to show 'just cause' for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious." 71 Wis. 2d @ 49, 52.

The respondent introduced evidence on how the decision was made to change the investment policy with respect to uninsured mortgages, the content of the plan that was prepared by the respondent and ultimately approved by the Division of Personnel, and how the appellant was laid off.

The appellant argues that the respondent should have provided him with an opportunity for a voluntary demotion to another position within the agency in lieu of layoff. However, the evidence supports the finding that as of the time of the layoff a final decision had not

been made on the final qualifications of the position in question.

The appellant argues in his post-hearing brief:

"Certainly, knowing that the analyst position would be opening up in the relative near future, this fact should have been included in the layoff plan, and the agency should have attempted to make some provision where Mr. Ruff could have done some type of work within the agency until the actual analyst position became available."

The Commission does not agree that pursuant to the authority of the Weaver case and on this record such action would have been required.

The appellant also argues that the decision by the Board to discontinue the initiation of new, non-insured mortgage loans, was unreasonable.

One of the issues the parties agreed to at the prehearing conference held in this matter was as follows:

"Whether the decision not to invest in real estate and mortgages was arbitrary and capricious or made in bad faith."

Although the Commission has some doubt whether under the authority of the Weaver case it is appropriate to review this non-personnel policy decision that preceded the layoff, see Oakley v. Commissioner of Securities, Wis. Pers. Commn. no. 78-66-PC (4/19/79), it will address the issue since it was the subject of stipulation.

In the Weaver case the court cited the definition of arbitrary and capricious action contained in Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N. W. 2d 86 (1965):

"Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis ... and is not the result of the 'winnowing and sifting' process."

The Commission heard a great deal of testimony on the pros and cons

of non-insured mortgages as an investment vehicle, both in a general sense and for a body such as the respondent. The question for this Commission is not whether as a matter of investment policy the trustees reached the best decision, but whether there was a rational basis for the decision. There was such a rational basis and the decision was neither arbitrary and capricious nor made in bad faith.

The appellant also attacks the layoff plan with the argument that he did very little work in the area of new mortgage and real estate loans following Mr. LaFleur's appointment, and that the position description submitted immediately prior to the layoff was inaccurate.

It is accurate that there was little new business in the area of mortgages and real estate loans following the decision to put this category of investment in a "holding pattern" pending further study, and, subsequently, under the revised more rigid guidelines. It is also accurate that during this period most of appellant's work was servicing existing mortgages and doing other things such as working on the development of a manual of operations for the mortgage and real estate department. However, it does not follow that the layoff plan erred, in identifying class options, in looking to the duties and responsibilities of the position as were identified at the time appellant was hired and which he performed until the agency decided to suspend operations temporarily pending further study. The appellant was hired with primary duties and responsibilities being to expand the mortgage loan and real estate

portfolio - i.e., to work with new business. When these activities were suspended temporarily he was given a temporary assignment primarily servicing existing mortgages. When the new guidelines were implemented and resulted in very little new mortgage related activity, the appellant continued to be assigned duties in other areas.

Although these changed duties continued for a number of months, the changes were tied to the study of and changes in the investment policies of the Board and cannot be characterized as permanent changed duties. Furthermore, even if the changed duties were characterized as permanent and, taken as a whole, would be considered to have been at the classification level of Administrative Officer 2, it does not follow that the final decision on layoff should have been any different. The class options which ultimately were approved would still appear to have been appropriate, and it still would appear to have been appropriate to have laid off the position most associated with mortgages, whether or not it was solely involved in generating new mortgage investments.

Under the just cause standard for layoffs outlined in the Weaver case, an agency need only show that it complied with the requirements set forth in the statutes and personnel rules, and in so doing did not act in an arbitrary and capricious manner. For example, in Weaver the agency was required to lay off by a performance evaluation ranking. In determining whether that was done properly, the agency only needed to demonstrate that the action was not arbitrary and capricious. As pointed out by the court, this is a lesser test than applied in disciplinary proceedings involving alleged misconduct.

While in the Commission's opinion the respondent has met its burden

under the Weaver test, the Commission is concerned about some facets of the respondent's handling of this matter. The appellant was not given any indication at the time he signed his position description on March 2, 1978, that this document which did not accurately reflect the work he had been doing for in excess of the previous one and one-half years, was going to be submitted to the Division of Personnel in support of his proposed layoff. Also, although it was not inappropriate for the respondent to have relied on in its layoff plan the work appellant was doing before Mr. LaFleur placed a hold on new business in this area in 1976, it would have been preferable to have given the Division of Personnel the complete picture of appellant's activities, including those of more recent date. Finally, handing the appellant his layoff notice even before the end of the trustees' meeting in which they voted to change the Board investment policy was an unnecessary gesture that could only have served to make bad feelings worse.

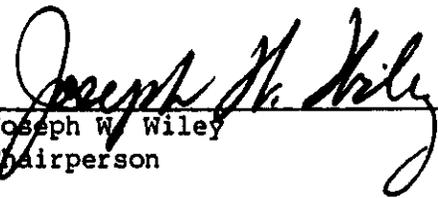
CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to §230.44(1)(c), Wis. Stats. (1977).
2. The burden of proof is on the respondent to show that it has acted in accordance with the administrative and statutory guidelines for layoff and that the exercise of that authority has not been arbitrary and capricious.
3. The respondent has satisfied its burden of proof.

ORDER

The action of the respondent is affirmed and this appeal is dismissed.

Dated: May 15, 1979. STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Edward D. Durkin
Commissioner

JWW:AJT:jmg

5/14/79