
 *
 JEANIE MARSHALL et al, *
 *
 Appellants, *
 *
 v. *
 *
 Administrator, DIVISION OF *
 PERSONNEL, and Secretary, *
 DEPARTMENT OF HEALTH AND *
 SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case Nos. 79-136, 169-PC *
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DECISION
AND
ORDER

NATURE OF THE CASE

These matters are before the Commission on respondent's various objections to the Commission's authority to hear these appeals. The parties have filed written arguments and various documents relating to the administrative background of these cases involving the respondent agencies. The following Findings of Fact are based in part on these documents.

FINDINGS OF FACT

79-169-PC

1. This appeal involves a non-contractual grievance (DHSS #202-5-79) which was filed on March 13, 1979, with DHSS, by Jeanie Marshall, an unrepresented Supervising Therapist 2 employed at Winnebago Mental Health Institue (WMHI).

2. The grievance contained, in part, the following statement:

"This grievance relates to the misuse of the Therapist Consultant position at Mendota, and to the serious and other obvious errors which were made in announcing and filling that position. The job was announced as a Therapy Consultant position in the Current Opportunities Bulletin on April 19, 1976."

3. The grievance went on to register concerns regarding the classification that had been assigned to the position, that the position was being supervised

by Mendota Mental Health Institute despite the position's statewide responsibilities, that the position functioned in a management role although classified as a consultant and in the same bargaining unit as therapists, and that the person selected was not qualified to be certified and still did not meet the qualifications for the position.

4. Prior to having filed this grievance, Ms. Marshall had raised these concerns with DHSS management on an ongoing basis, commencing with a memo to the then head of WMHI dated January 18, 1977, but had not received a final disposition from management.

5. The grievance was denied as "not timely" on May 5, 1979, but it was noted that DHSS had made a recommendation to the Division of Personnel to reallocate the position in question to Supervising Therapist 2.

6. Following an appeal by Ms. Marshall to the Personnel Commission, a prehearing conference was held on July 18, 1979, at which DHSS objected on the grounds of timeliness and standing.

7. The parties agreed that the appeal would be held in abeyance pending determination of the recommended reallocation referred to above.

8. In response to a request from the Commission for a status report, Ms. Marshall, in a memo dated June 19, 1979, indicated that the position in question had been reclassified to Administrative Assistant 5-Confidential and was no longer the state consultant for activity therapy matters, and that she was willing to drop the matter.

9. In a subsequent memo dated June 25, 1980, she stated that she had just learned that even though the position was no longer an Activity Therapy Consultant, it functionally was continuing as the Division of Community Services' Activity Therapy Resource person, and that she wished to continue the appeal with respect to that matter.

10. Following another conference, a briefing schedule was established and the parties submitted written arguments on the respondent's objections.

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11. This appeal involves a non-contractual grievance (DHSS #202-6-79) filed in February, 1979, with DHSS by Ms. Marshall, (a Supervisory Therapist 2), Nancy Norgard, Veronica Janecek, and Charles Radtke (Supervisory Therapists 1), all unrepresented employes at WMHI.

12. This grievance contained, in part, the following:

"This grievance results from a reclass or resurvey request which was submitted on January 26, 1977. This request has not been approved or denied..."

RELIEF SOUGHT

1. Immediate survey of Therapist, Supervisory Therapist, and Consultant classifications with resultant pay-range changes for Supervising Therapist 1 and 2...

2. Development of mechanism to ensure in the future that the pay differential between Therapists, Supervisors, and Consultant salaries remains fair and equitable and that the Division of Personnel, rather than the institutes, be responsible for doing this on a continuous basis.

3. That grievants be directly involved with the survey."

13. Prior to having filed this grievance, the grievants had raised these concerns with DHSS management on an ongoing basis, commencing in early 1977, without a final resolution.

14. The grievance was denied by DHSS on May 7, 1979, as "not timely." However, it was noted that DHSS had recommended to the Department of Employment Relations (DER), certain changes in the pay plan for Supervising Therapists.

15. Following an appeal to the Personnel Commission, a prehearing conference was held on July 17, 1979, at which time it was agreed to hold the appeal in abeyance "while the appellants submit to the administrator, State Division of Personnel, a request for a survey as set forth in the grievance,

with the expectation that the appellants could appeal any unfavorable decision by the administrator."

16. On July 30, 1979, the appellants in a letter to the administrator stated in part as follows:

"We request prompt action to alleviate our concerns which are as follows:

With the larger guaranteed pay raises collective bargaining has won over the years, inequities have resulted for the Supervising Therapist whose salary ranges are sandwiched in between bargaining unit personnel in the Therapy Series.

* * *

Relief Sought:

1. Establish a minimum of one pay range differential between the Therapist 3 and the Supervising Therapist 1.
2. Establish a mechanism to insure that this 'compression' between supervisors and therapists they supervise does not reoccur.
3. Establish a mechanism to insure that the therapies Consultant, which has become a vestigial classification, either be eliminated or that the Supervising Therapist 2 become an equivalent range.
4. Make retroactive pay adjustments based on what the signers of this group grievance have lost (back to April, 1977) due to delays in attention to the original request.
5. In addition, establish the signer's present salaries at the level they would have been had the original request been acted upon in a timely manner.:

17. By letter dated August 14, 1979, the administrator responded to the appellants that he was aware of the "pay compression problem" to which they referred:

"The basic problem which you describe, wherein the pay of your subordinates is nearing or surpassing your own, is referred to as pay compression. It is a problem which is becoming more and more pronounced as collective bargaining establishes itself within our personnel system. It is not unique to your situation, but rather occurs in other occupational areas as well.

Since pay compression is a widespread issue crossing occupational and agency lines, the Division of Personnel sent out a letter last May to all appointing authorities asking that they identify all pay compression problems within their respective agencies. We are currently analyzing those problems including the problem you have cited in order to determine the appropriate corrective action(s). This could mean the recommendation of classification pay range reassignments; the creation/abolishment of classifications to the Personnel Board; or the reallocation of positions to more appropriate classifications. We intend to have this study completed sometime in September of this year so that our recommendations can be submitted to the Personnel Board if necessary.

18. At a meeting of the Personnel Board held February 7, 1980, the board approved a recommendation by the administrator to reassign certain classifications to new pay ranges in response to the pay compression problem. This included reassignment of Supervising Therapist 1 from range 1-13 to range 1-14 and Supervising Therapist 2 from range 1-14 to 1-15.

19. Ms. Marshall having indicated by memo of June 19, 1980, that the aforesaid action, although a "step in the right direction," did not satisfy all of the appellant's concerns and therefore they wished to proceed with the appeal, a prehearing conference was held, a briefing schedule was established, and the parties submitted written arguments on the respondent's objections that the subject matter of #79-136-PC was not grievable and also did not involve an appealable decision of the administrator.

OPINION

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Since the appellant stated in her memo of June 25, 1980, that her only continuing area of concern had to do with the fact that the position in question was continuing to serve as the Division of Community Services' "Activity Therapy Resource person," the Commission will address only this aspect of the appeal.

The scope of the Commission's authority to hear appeals of non-contractual grievances is subject to certain rules of the secretary (DER) pursuant to s.230.45(1)(c), Stats. Such rules have not yet been promulgated, and in their absence the Commission has looked to the pre-existing rules, in accordance with s.129, Chapter 196, Laws of 1977. Pursuant to s.Pers 25.01, Wis. Adm. Code, the Director, Bureau of Personnel, issued an Administrative Practices Manual (Bulletin number 1, subject, non-contractual Employee Grievance Procedure, effective 8/24/66, revised 10/1/74), which contains the statewide standards for non-contractual grievance procedures. This APM sets forth as s. A.D.I.b. the kinds of grievances that can be heard at the fourth step (now this Commission). These are grievances which 1) allege that an agency has violated, through incorrect interpretation or unfair application, a civil service rule or statute, or 2) involve a function where the head of the Bureau of Personnel, (now Division of Personnel) has expressly delegated authority to the appointing authority.

The decision as to what position or employee to use as the "Activity Therapy Resource person" clearly does not involve the expressly delegated authority of the administrator of the Division of Personnel.

As to the question of a violation of the civil service code, it has been held that a specific violation of a specific provision need not be alleged, so long as the grievance involves subject matter which is covered by the civil service code. See Graham v. Weaver, Wis. Pers. Bd. No. 75-124, (3/11/76).

However, the intent of the APM is to limit matters appealable to the Commission at the fourth step to those matters which could involve a violation of the civil service code. See Wing v. UW, Wis. Pers. Commn., 78-137-PC,

(4/19/79). The question of whether it is appropriate for an agency to decide to use a particular position or person as an "activity Therapy Resource person" is not something the Commission can review because it is not a decision that is governed by the civil service code or that could violate it. Such a decision is a prerogative of the appointing authority and is regulated neither by subchapter II of chapter 230, Statutes, nor the personnel rules in the Wisconsin Administrative Code.

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Section 230.09(2)(b), Stats., provides in part: "...upon subsequent review, the administrator with approval of the board may reassign classes to different pay rates or ranges." In this case, the administrator, with the approval of the board in response to the kinds of concerns raised by the appellants regarding pay compression, reassigned several classifications, including the supervising therapists, to higher pay ranges. The appellants state in their brief:

"The administrator of the Division of Personnel must have made the decision to speak to this problem by re-assigning certain classifications to different pay ranges, rather than by conducting a survey...we're not appealing the fact that the survey wasn't conducted, but rather the fact that the problem wasn't really corrected. Someone made the decision not to make pay adjustments and not to introduce a preventative mechanism, at this time. Those were the things we requested - those are the things which someone made the decision not to address, and consequently which we are appealing."

Therefore, the Commission will address those matters the appellants assert they still are attempting to raise.

The above-quoted section from the appellant's brief underscores a problem that seems to have pervaded the appellant's pursuit of both of these matters - uncertainty as to the response of the various agencies to their requests. In their letter to the administrator dated July 30, 1979, they listed

five specific items under "relief sought." At least on this record, there is no indication that there were specific decisions made on all these points or that the appellants were notified of those decisions. (For that matter, there is nothing which indicates what notice, if any, the appellants were given of the administrator's request for, and the personnel board's approval of, the reassignment of classifications to new pay ranges to alleviate the pay compression problem.)

However, the appellants have suggested that the administrator's handling of the matter he interpreted as denials of the elements of relief cited above in the excerpt from their brief, the respondents have not objected to this, and therefore the Commission will approach the question of its jurisdiction on the theory that these items have been denied.

It is not certain what would be required to establish a preventative mechanism "to insure that this 'compression' between supervisors and therapists they supervise does not reoccur." Presumably, this would require changes in the classification plan which would require initiation by the administrator and approval by the personnel board before it could be effective.

In Ziegler & Hilton v. DP, 80-34-PC, 79-358-PC, (12/8/80), the Commission determined that it lacked jurisdiction over a challenge to the failure of certain position standards to include "administrative elements." The Commission expressed the opinion that the legislature, by creating a system whereby changes in the classification system were specifically subject to review by the personnel board, did not intend that the Commission have further review authority under the general appeal provisions of s.230.44(1)(a), Stats.: "In the opinion of the Commission it is more likely that the legislature intended that more general questions about the position standards be handled in a quasi-legislative setting before the Personnel Board..." See also, 73 Am Jur 2d

Statutes, s.257.

In this case although we have a constructive refusal by the administrator to establish a "preventative mechanism," the general question of the problem of pay compression as it relates to the Supervising Therapist classifications was before the personnel board. This situation is somewhat comparable to the Ziegler & Hilton v. DP case in that there the appellants' basic attack on the position standards was related to a matter of omission. In the opinion of the Commission the rationale of the Ziegler & Hilton decision applies here and is a bar to the Commission's jurisdiction.

With respect to the question of back pay, the appellants' request is based on the theory that they would have been paid at a higher rate had their original grievance addressing the problem of pay compression received more prompt attention.

The Commission only has the authority to require back pay in certain limited situations. See, e.g., s.230.43(4), Stats., (e.g., reinstatement of unlawfully removed employe). It may be argued that the Commission has the authority to require back pay in an appeal of a reclassification denial by "modifying" the decision appealed pursuant to s.230.44(4)(c), Stats., under certain circumstances. Compare, s. Pers 5.037, Wis. Adm. Code.: "Except... to correct an error, no pay increases or decreases shall be retroactive." In the case of a denial of a reclassification determined to have been incorrect, it at least can be argued that the employe had been working at a higher classification level, and that the back is necessary to correct an error. However, in this case, the matter of whether it is appropriate to reassign classifications to new pay ranges involves broad policy questions. The appellants cannot argue that they were working out of classification while their grievance and requests were pending. Under these circumstances, there is no conceivable basis by which

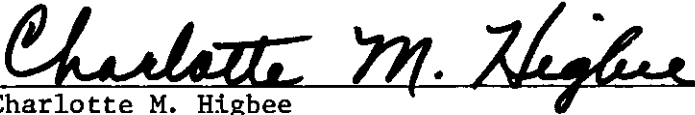
the Commission would have the authority to award back pay.

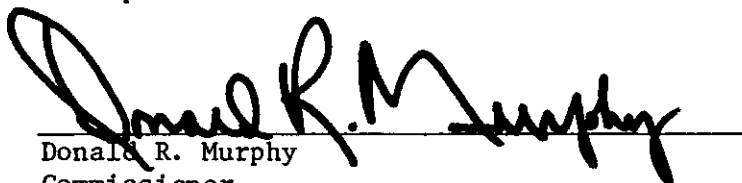
CONCLUSIONS OF LAW

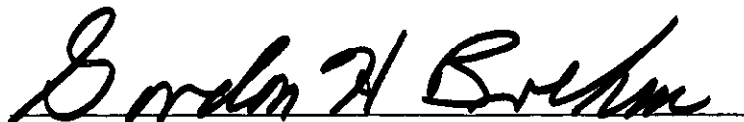
These appeals are dismissed for lack of subject-matter jurisdiction.

Dated March 6, 1981

STATE PERSONNEL COMMISSION


Charlotte M. Higbee
Chairperson


Donald R. Murphy
Commissioner


Gordon H. Brehm
Commissioner

AJT:mgd

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