STATE OF WISCONSIN PERSONNEL COMMISSION

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KENNETH BJORKLUND,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 79-327-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Wis. Stats., of a layoff. A hearing on this appeal was held by Commissioner Gordon H. Brehm on July 8-9, 1980, and briefs were subsequently filed by both parties.

FINDINGS OF FACT

1. Appellant began employment with the Department of Health and Social Services (DHSS) in January, 1966. From April, 1970 until September 28, 1979, appellant served as a District Administrative Officer for the DHSS Division of Health District 2 headquarters in Milwaukee, and had permanent status in the classified civil service.

2. Sometime in 1978, it became apparent that some positions in the Division of Health would have to be eliminated in 1979 due to 1979-81 budget considerations and that appellant's position was one of those planned to be eliminated (test. Robert Durkin, Tr. 19).

3. On March 28, 1979, Robert Durkin, administrator for the

Division of Health, sent a memorandum to Ken De Prey, director of the DHSS Bureau of Personnel and Employment Relations. In the memo, Durkin asked that De Prey work with the Department of Employment Relations to "honor the employment rights of current permanent employees" who were slated for layoff or redeployment. He also stated, "I would hope this department would be planning ahead for making smooth transfer opportunities for affected personnel." (Appellant's Exh. 1).

4. On April 18, 1979, Durkin circulated a memo to Division of Health employes concerning the pending layoffs and redeployments. In this memo, Durkin stated, "although legislative action could bring about some last minute changes, it is my preference that employes not be asked to remain in limbo until after budget passage. Therefore, we will provide assistance in identifying optional positions before actual layoff notices are in order." (Appellant's Exh. 2).

5. After becoming aware early in 1979 that his position was going to be eliminated, appellant applied for a number of other positions with the State of Wisconsin. Among these, Bjorkland applied for the position of Supervisor, Long-term Care Facilities Section, Bureau of Quality Compliance, Division of Health. This position was classified as Administrative Officer 2 (PR01-17), the same pay range appellant held as an Environmental Engineer 6.

6. Appellant was one of six persons certified for the position of Chief of the Long-term Care Section on July 18, 1979. Bjorklund was one of three persons on the certification list eligible for the

position as a lateral transfer (Appellant's Exh. 12).

7. On July 31, 1979, appellant was interviewed for the position of Chief of the Long-term Care Section by Charles J. Fiss Jr., director of Bureau of Quality Compliance, Division of Health, and Louis E. Remily, assistant bureau director for field operations of the Bureau of Quality Compliance.

8. Some time prior to August 27, 1979, the position of Chief of the Long-term Care Section was offered to Charles Kirk and Shirley Warpinski but both declined. Kirk and Warpinski had been ranked as the top two candidates on the certification list by Fiss and Remily. The position would have been a promotion for both of them.

9. Fiss and Remily both agreed that appellant was the only remaining candidate on the certification list who was qualified to fill the position of chief of the Long-term Care Section after Kirk and Warpinski turned the job down. (test. Louis Remily, Tr. 116).

10. Durkin, who was the appointing authority for the position of chief of the Long-term Care Section met with Fiss in late August or early September, 1979, and told Fiss that he thought appellant "was too meek and indecisive to be successful in that position." (Tr. 34). It was decided to seek permission to recruit for the position again (Tr. 37).

11. In a letter dated August 23, 1979 and signed by Durkin, appellant was notified he was to be laid off from his position as district administrative officer effective September 28, 1979 (Appellant's Exh. 3).

12. In a letter dated September 5, 1979, Charles Grapentine,

administrator of the Division of Personnel approved the layoff plan submitted by DHSS which eliminated appellant's position in the Division of Health, effective September 28, 1979 (Appellant's Exh. 11).

13. Permission to again announce and recruit for the position of chief of the Long-term Care Section was denied before appellant was laid off. Durkin was subsequently ordered by Terry Willkom, deputy secretary of DHSS, to appoint appellant to the position (Tr. 40).

14. Donald Percy, secretary of DHSS, had given the DHSS Bureau of Personnel, standing instructions to make every effort to find positions within DHSS for the persons who were slated to be laid off. Percy had ordered long before Bjorklund was laid off that no person could be appointed to the position of chief of the Long-term Care Section unless he approved appellant's non-appointment to this position (Kuntz test., Tr. 143).

15. By letter dated October 31, 1979, appellant was appointed to the position of Administrative Officer 2-Chief, Long-term Care Facilities Section in the DHSS Division of Health, effective October 23, 1979 (Appellant's Exh. 10).

16. Appellant was laid off for 18 work days during the period between September 29, 1979 to October 23, 1979. He was paid $1,472.94 at a rate of 15.03 per hour for 98 hours of unused vacation time he had coming when he was laid off which meant that he lost $450.90 in wages during the time he was laid off (30 hours of work at a rate of $15.03 per hour).

17. In an Order dated June 3, 1980, the Commission set the issue and sub-issues in this case as follows:

> ISSUE Whether the decision to lay off the appellant was based on just cause.
>
> SUBISSUES 1. Whether the respondent's alleged delay in working on appellant's redeployment and whether respondent's alleged requirement that appellant use accumulated vacation and holiday time, constituted action involved in the effectuation of the personnel transaction in question and, if so, whether such action was arbitrary and capricious.
>
> 2. Whether the department had failed to provide either transfer or bumping opportunities to appellant in contravention of Wis. Adm. Code Section Pers. 22.04(1) and (2) respectively despite his being qualified for said consideration and treatment.
>
> 3. Whether the layoff of appellant is improper in that the department has failed to provide for a comprehensive plan for layoff prior to implementation as required by Wis. Adm. Code Section Pers. 22.09.

18. The Commission finds that the decision to layoff appellant was not for just cause because the respondent's action in not appointing appellant to the position of Administrative Officer 2-Chief, Long-term Care Facilities Section before he was laid off was arbitrary and capricious.

19. The Commission finds that respondent failed to obtain approval of the administrator of the Division of Personnel before it began implementation of the plan to lay off appellant.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the subject matter of this appeal pursuant to §230.44(1)(c), Wis. Stats.

2. The burden of proof is on the respondent to show just cause

for the layoff of appellant.

3. The respondent has not met its burden of proof and has not shown just cause for the layoff.

4. Respondent violated Pers. 22.09 by not obtaining approval of its layoff plan before notifying appellant of his impending layoff.

5. Respondent did not violate any statute or administrative rule in paying appellant for his unused authorized leave at the time he was laid off.

6. Appellant should be made whole for the 30 hours of wages he lost while he was unjustly laid off, pursuant to §230.43(4), Wis. Stats.

OPINION

It became known to respondent late in 1978 that some positions in the agency would have to be eliminated during 1979 because of pending cuts in the department's 1979-81 budget. Among the positions under consideration to be eliminated was the position of appellant.

By at least March, 1979, respondent had identified the positions in the Division of Health which were to be eliminated, including appellant's (Appellant's Exh. 1). Robert Durkin, administrator of the division urged the DHSS Bureau of Personnel and Employment Relations to plan "ahead for making smooth transfer opportunities for our affected personnel."

On April 18, 1979, Durkin instructed supervisors in the Division of Health "to assume lead responsibilities for notifying and assisting individuals who at this time, can expect their position to be redeployed

once the Governor signs a budget." He ordered Kaye Exo of his staff and Jerry Jensen of the office of Operations and Management to work with William Kuntz of the DHSS Bureau of Personnel "to clarify other positions within the division and the department that are available to our people."

Durkin went on to state that, "although legislative action could bring about some last minute changes, it is my preference that employes not be asked to remain in limbo until after budget passage. Therefore, we will provide assistance in identifying optional positions before actual layoff notices are in order." (Appellant's Exh. 2).

On July 28, 1979, the 1979-81 budget bill was published which effectively eliminated appellant's position by not funding for this position after September, 1979.

Despite Durkin's earlierinstructions that planning for the layoffs and redeployments should provide "smooth transfer opportunities "for the affected personnel, confusion seemed to be the order of the day. Jensen testified that "all of us were new in this whole area of lay-offs and redeployments. I could find no one around who had ever been through this before." (Tr. 93).

Despite the pending layoffs and redeployments, it was decided some time after April, 1979 to announce and recruit for the position of chief of the Long-term Care Section in the Division of Health, a position which had been vacant for nearly two years. This was done despite the fact that Kuntz testified that, "Once we have people on

the layoff referral, at the time the position clears and is ready for staffing, the layoff persons are informed and the position is not announced until those positions are either employed or an exemption is made." (Tr. 138).

When appellant became aware the position was being recruited for, he applied for the job and was placed on the certification list. He interviewed for the position on July 31, 1979. Despite the fact that Kuntz had informed Durkin and Jensen that Percy had ordered that every effort should be made to find positions within DHSS for the personnel being redeployed and that Percy had issued instructions that no one could be appointed to the Long-term Care position unless he (Percy) approved the non-appointment of appellant, this position was offered to two other people on the certification list during August, 1979. Both of them rejected the position prior to August 27, 1979.

In a letter dated August 23, 1979, Durkin notified appellant he was being laid off effective September 28, 1979. In a letter dated October 31, 1979, appellant was notified he was to be appointed to the Long-term Care position, retroactive to October 23, 1979.

Kuntz testified in response to questions by appellant's counsel:

> "Mr. Maroni: Isn't it true that the standard policy is to make a decision concerning the redeployment or the transferring of a to be laid off employee is to be done prior to the time of layoff?
>
> Mr. Kuntz: If possible, yes.
>
> Mr. Maroni: Well, prior to September twenty-eight, 1979, was it possible to put Mr. Bjorklund in this particular job?

Mr. Kuntz: Yes."

There is no dispute that the position vacancy existed and appellant had been certified as qualified for the position some two months before he was laid off. There is also no dispute that Percy, the top supervisor in DHSS, had ordered that he would have to approve the non-appointment of appellant before anyone else could be appointed to the position.

There is also no dispute that appellant remained the only qualified person left on the certification list in the minds of the two persons who did the interviewing when the two people on the list who were offered the position turned it down at least a month before appellant was laid off. (It is important to note that Percy would have had to approve the non-appointment of appellant if either of these two persons had accepted the position in August, 1979).

The pertinent statutes and portions of the Wisconsin Administrative Code are as follows:

Section 230.35(1)(m):

> "Payment for any unused authorized leave to which an employe is entitled upon termination, shall be made in a separate and distinct amount."

Section 230.34(2):

> "Employes with permanent status in class in permanent, sessional and seasonal positions in the classified service and employes serving a probationary period in such positions after promotion or transfer may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

(a) The order of layoff of such employes may be determined by seniority or performance or a combination thereof or by other factors.

(b) The administrator shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employe right of reinstatement."

Section 230.34(3):

"The appointing authority shall confer with the administrator relative to a proposed layoff a reasonable time before the effective date thereof in order to assure compliance with the rules."

Wis. Adm. Code, Pers. 22:

"Pers. 22.01 Purpose. This layoff procedure is adopted pursuant to section 16.28(2), Wis. Stats., and is intended to be fair to and understandable by all employes; and to retain for the state service its most effective and efficient personnel; and to insure that all layoff actions are appropriately and systematically administered."

"Pers. 22.03 Qualifying conditions. (1) LAYOFFS BY CLASS. Whenever it becomes necessary for an appointing authority to lay off an employe as a result of a shortage or stoppage of work or funds, functional reorganizations, or the abolishing of a position, he/she shall do so by classes, or recognized options within the class as approved by the director, within an employing unit."

"Pers. 22.04 Alternatives in lieu of separation. In the event that the services of an employe with permanent status in class are about to be terminated by layoff in a given class as a result of a reduction in force, these alternatives shall be available, in the order listed below, in lieu of separation, provided that the order of layoff as set forth in the law and these rules permit:

(1) TRANSFER. The employe shall have the right to move to a vacancy in the same class and approved option within the agency. The employe may also be considered for other vacancies within the agency in a class, for which he or she meets the necessary education, experience, capacity, knowledge and skill, and that has the same pay rate or range maxium.

(2) BUMPING. Where no vacancy exists, the employe identified for layoff shall be entitled to exercise bumping rights within the employing unit. This right entitles the employe to induce the layoff process in a lower class or approved option in the same series or in a class or approved option in a series having the same or lower pay rate or pay range maximum within the employing unit in which he/she had previously obtained permanent status in class. However, exercising such bumping rights does not guarantee the employe a position in the class or option selected; it only requires the employe to be included along with the other employes in the class or option when the layoff process as provided in Pers. 22.035, is applied to determine which employe is laid off as a result of the bumping. An employe electing to bump shall have 5 calendar days from the date of written notification of impending layoff or receipt of such written notification, whichever is later, to exercise that option."

"Pers. 22.05 Notice prior to layoff; appeal notice; limitations. Any employe affected by such layoff or reduction in pay or position shall be given written notice of such action, not less than 15 calendar days prior to the effective date thereof. The employe shall be entitled to appeal such action to the board upon filing a written request with the board within 15 calendar days of the effective date of the decision or within 15 calendar days after receipt of notice of the action, whichever is later. Such notice of appeal and any pending litigation as a result thereof, shall in no way affect determinations previously or subsequently made, until an order is entered by the state personnel board, unless such order is stayed by a court of competent jurisdiction."

Pers. 22.09 Layoff plan subject to approval. Whenever it becomes necessary for an agency to layoff employes, the appointing authority shall prepare a comprehensive written plan for layoff and submit it to the director for his review and approval prior to implementation."

In Weaver v. Wisconsin Personnel Board, (1976) 71 Wis. 2d 46, 237 NW 2d 183, the Wisconsin Supreme Court said:

"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." (Emphasis supplied).

The court went on to explain:

> "We have said that, for administrative action to avoid the label of 'capricious and arbitrary,' it must have a rational basis. In Olson v. Rothwell (1965), 28 Wis. 2d 233, 239, 137 NW 2d 86, this court said: 'arbitrary and 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."

In the instant case, respondent properly began preparing early in 1979 for the layoff of personnel within the agency when it became apparent that such layoffs would become necessary due to budgetary cutbacks in the agency's 1979-81 budget. Despite this preparation, confusion seemed to reign regarding respondent properly informing the affected employes of their rights regarding the upcoming layoffs and redeployments.

A layoff plan was not approved by the administrator of the State Division of Personnel until September 5, 1979, some two weeks after appellant was notified of his layoff effective September 28, 1979. In his letter of approval, the administrator stated:

> "In discussing the plan with your staff member, Bill Kuntz, it was determined that there are some options available to the layoff affected employes. He assured Dale Bruhn of my staff that the two employes who will be laid off; i.e., Harold Johnson and Kenneth Bjorklund, will continue to be certified for any other positions at the same salary level which may become available in the next month for which they qualify. In addition, any bumping opportunities or opportunities to remain employed by acceptance of a voluntary demotion to a lower-level position have also been discussed with the employer."

This letter was written three weeks before appellant was actually laid off and some six weeks after he had been certified for the position

he was subsequently appointed to. Also, at this point in time, he was the only remaining person left on the certification list for the position who was qualified for the position in the minds of the interviewing panel.

In the opinion of the Commission, it was patently arbitrary and capricious not to appoint appellant to this position before he was laid off on September 28, 1979 and forced to endure the mental anguish of being without a job for a month.

Respondent argues in its brief that "neither the rule [Pers. 22.04 (1)] nor the administrator's instructions give Mr. Bjorklund mandatory rights to positions outside the Environmental Engineer classification." This argument is correct as far as it goes but ignores the requirement set forth in Weaver that the exercise of the authority to effect a layoff not be arbitrary and capricious. As discussed above, the appellant was the only remaining qualified person on the certification list for this position a month prior to his lay off and the chief executive officer of the agency had issued an order that no one else could be appointed to the position other than appellant without his specific approval.

Under these circumstances, Durkin had an obligation to either appoint appellant to the position before he was laid off or at least obtain approval from Percy to not appoint him. He did neither until appellant had been laid off about a month which caused appellant unnecessary grief and suffering in addition to his monetary losses.

Furthermore, under the circumstances outlined earlier in this decision there is no excuse for respondent not to have received approval of its layoff plan prior to giving notice to appellant of his impending layoff. Pers. 22.09 states that "the appointing authority shall prepare a comprehensive written plan for layoff and submit it to the director (administrator) for his review prior to implementation." (Emphasis supplied).

In the instant case, the implementation of the layoff plan certainly began when the layoff notice was sent to appellant on August 23, 1979, some two weeks before the administrator gave respondent his approval of the plan. It seems obvious that the framers of this rule meant "prior to implementation" to mean receiving approval of a layoff plan prior to the actual sending out of layoff notices to affected employes.

Once the decision was made to layoff appellant, even though incorrectly, respondent acted properly in paying appellant for his unused authorized annual leave.

Appellant should be compensated for the 30 hours of wages he lost while he was unjustly laid off in accordance with §230.43(4). Appellant, in his brief, has requested the Commission to award him his attorney's fees but the Commission has no statutory authority to grant this request.

At the conclusion of the hearing on this matter, respondent moved to dismiss this appeal "for failure to establish the actions of the department were arbitrary and capricious." This motion is denied.

ORDER

The respondent's action in laying off appellant effective September 28, 1979 is reversed and this matter is remanded to respondent for action in accordance with this decision.

Dated: Feb. 13, 1981. STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Chairperson

Donald R. Murphy
Commissioner

Gordon H. Brehm
Commissioner

GHB:jmg