STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT ZECHNICH,

Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and DIVISION OF PERSONNEL,

Respondent.

Case No. 79-4-PC

INTERIM DECISION AND ORDER

This case, filed pursuant to §230.44(1)(a) and (b) Stats., is an appeal from a decision not to award the appellant an addition to his base pay under the provisions of Pay Schedule #1, Section D of the State Classification and Compensation Plan for 1978-79. Following a prehearing conference on January 31, 1979, the parties filed written arguments on a motion by the respondent that this case be dismissed on the ground that the appeal was not timely filed. In an Order dated March 13, 1979, the Commission designated its chairperson, Joseph W. Wiley, hearing examiner in the case and authorized him to make a final decision on the timeliness issue prior to commencing a hearing on the merits. This Interim Decision addresses only the timeliness issue and is based upon oral testimony at a July 19 hearing and upon written briefs filed by the parties on July 23.

FINDINGS OF FACT

1. On November 17, 1977, appellant was hired by the respondent as a Physician-Management (Clinical Services Director), Division of Community

Services, Bureau of Mental Health.

2. Some time after he was hired, appellant reviewed the State's Classification and Compensation Plan and inquired of the Deputy Director of his bureau whether or not he was underpaid considering that his pay was lower than that of certain superintendents he supervised.

3. The matter of appellant's pay was discussed by various DHSS officials but the consensus was that the respondent could not correct whatever underpayment may have occurred because there was no add-on category in the pay plan which precisely fitted appellant's situation. His responsibility level was higher than Level 2 (Superintendent), but lower than Level 3 (Bureau Director).

4. The question of appellant's pay was ultimately referred to James Stratton, Division of Management Services, Bureau of Personnel, DHSS, who on November 22, 1978, met with the appellant and Mark Hoover, Division of Community Services, Office of Operations and Management.

5. At the November 22 meeting, Stratton agreed to confer with officials in the Division of Personnel, DER, and to report back to the appellant and Hoover. Appellant asked that Stratton find out what correction was possible under the current pay plan and whether appellant could be paid at the Superintendent's rate pending development of the pay plan for 1979-80.

6. At Hoover's suggestion appellant held off any formal appeal regarding his pay pending the outcome of Stratton's efforts to obtain clarification or resolve the matter internally.

7. On some date subsequent to the November 22 meeting, Stratton

discussed the matter with Steve Christenson, Chief, Classification and Surveys Unit, Division of Personnel, and thereafter advised the appellant and Hoover by telephone that it did not appear that anything could be done about the apparent pay disparity. Stratton did not discuss the issue of interim pay at the superintendent's rate.

8. A day or two after the call from Stratton the appellant received a copy of a December 8 memo to file from Hoover entitled "Dr. Zechnich's Salary." The memo, which was received by the appellant not earlier than December 8, 1978, read as follows:

> "Dr. Zechnich, Jim Stratton and I met to review the request by Dr. Zechnich to have more adequate compensation. Jim Stratton indicated he would review the matter and at least give a final decision and the rationale to Dr. Zechnich. Jim called back recently and indicated that he had met with the Division of Personnel who indicated that no immediate changes were possible due to the current definitions in the Classification and Compensation Plan. It was indicated that the Classification and Compensation Plan had to be revised and that this would have to take place as part of the 79-81 Class and Comp Plan. Jim Stratton shared this information with Dr. Zechnich who, I understand, plans to proceed to grieve the decision. (Respondent's Exhibit 2).

9. Because the communication was not definite, and did not address both questions he had raised, the appellant did not perceive the telephone call from Stratton to be a notice that the attempts to resolve the pay issue internally had been concluded.

10. The appellant considered Hoover's memo to be a signal that he should file an appeal with the Commission because it was Hoover who suggested that the appeal be held in abeyance.

11. Appellant's appeal was filed with the Commission on January 7, 1979.

OPINION

The respondent's motion to dismiss for lack of timeliness is based on its assertion that the telephone conversation Mr. Stratton made on December 1, 1978 was effective notice, and was received more than 30 days prior to appellant's appeal on January 7, 1979.[1] The appellant in his brief argues, inter alia, that the phone call from Stratton was "insufficient as a matter of law to serve as effective notice." The Commission agrees.

This case is an appeal from "a personnel decision of the administrator" and the sequence of events leading up to the December 1 telephone call fairly well define what the matter is that the administrator was to decide. He was to decide:

> - whether or not under the present classification plan, there was any provision for paying the appellant a compensation add-on which was commensurate with his level of responsibility; and failing that,
>
> - whether or not the appellant could be compensated at the add-on rate appropriate for superintendents, pending development of the new compensation plan. (finding 5 above).

It is uncontroverted that the second part of the question was not addressed in Mr. Stratton's telephone call. Even if it had been, the Commission does not find that the communication otherwise was sufficiently definite to be characterized as "notice" that the personnel administrator had rendered a negative decision on the two-part question raised by the appellant. Stratton, in direct testimony, described the telephone call

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[1] The Commission in its March 13, 1979 Order has already ruled that if notice was received on December 8 (or later), the appeal would be timely as a matter of law.

as follows:

> "I briefly explained to him that the State Division of Personnel had confirmed my own impressions of the compensation plan -- that we would not be able to do anything salarywise for him at this time and that they were agreeable to looking at it in the new compensation plan for the '79-81 biennium."

If there was any message at all from the administrator described here, it was not "no," but "wait;" not "I decide," but "I think so too." For instance, an alternative to the inference the respondent would have us draw might well be this: a specialist in the Division of Personnel agrees with my (Stratton's) "impression" that DHSS can't do anything now; However, Division of Personnel can do something about the situation later. In the absence of some clear indication that appellant knew that Stratton was soliciting a decision, and that the December 1 telephone call was in fact the notice as to what that decision was, the Commission cannot agree that the 30-day statutory filing period commenced with that call. For all the appellant knew, Stratton had merely corroborated his impressions by telephoning someone more expert than himself.

Our conclusion above is in accordance with that reached in Lucy Van Laanen v. State Personnel Board, 145-395 (8/26/75). In that case, the circuit court concluded that a letter containing the language "Mr. Szymanski ... indicated to me that his position of October 1972 remains unchanged ..." was not effective notice because it was " ... consistent with the possibility that the matter was still pending, and that the final decision would come directly from Mr. Szymanski ..."

We can also apply the Van Laanen rationale to the December 8, 1978

memorandum to the file. In so doing, we would have to conclude that that communication (set forth in full in finding 8 above) is likewise insufficient notice that the administrator had made a decision. It is susceptable of the same misconstruction as the December 1 telephone call. Thus, we agree with the assertion of the appellant that effective notice was never received in this case. However, the failure of notice is of no consequence since the respondent, by its post appeal contention that the December 1 phone call was legally sufficient notice, provided constructive notice that there had been a decision by the administrator.

One question in this case deals with evidence and is probably moot in light of the foregoing conclusion that neither the December 1 telephone call nor the December 8 memo was effective notice. However, the Commission believes its decision may be of future benefit to the parties, and will issue its ruling nevertheless.

During the hearing, appellant introduced Respondent's Exhibit 2 (see finding 8) to establish date of notice. The respondent sought to admit this same document in evidence as corroboration of statements made by Stratton, including the statement that Stratton had notified appellant of the decision of the administrator prior to December 8. Appellant objected to the memo being used for respondent's purpose on the grounds it was a "hearsay document." The respondent then objected to the document being admitted for any purpose.

The Commission agrees that a document may be introduced for a limited purpose and that it is appropriate to allow the December 8 memo to be introduced by the appellant in this case solely for the

purpose of establishing date of notice. The Commission also agrees that, as a general rule, a memo to file written by a party not present ought not be admissible to corroborate communications between two other parties, even though the other two parties are present. However, in the instant case, Mark Hoover, the person who wrote and could authenticate the December 8 memo, had been supoenaed as a witness. While he was not in the hearing room, he was, by agreement of the parties, available by telephone if needed. At the election of either party, the document could have been authenticated or challenged through cross examination of its author. Since that recourse was available, they cannot contend that it was a hearsay document. The objections of both parties are overruled and Respondent's Exhibit 2 is admitted without limitation of purpose.

CONCLUSIONS OF LAW

1. Neither of the communications received by the appellant was legally effective notice of a decision by the administrator.

2. The respondent's position and arguments provided constructive post appeal notice of a decision by the administrator within the meaning of §230.44(1)(a), Stats.

3. The appeal by Dr. Zechnich is not untimely. See Hoeft v. Carballo, Wis. Pers. Board 74-37 (5/24/76).

4. The Commission has subject-matter jurisdiction over this appeal.

ORDER

The respondent's motion to dismiss is DENIED and the matter is set for hearing on the merits on October 4, 1979, at 9:00 a.m., in Room 202, 131 West Wilson Street, Madison, Wisconsin.

Dated: Aug 8, 1979. STATE PERSONNEL COMMISSION

Joseph W. Wiley
Chairperson