STATE OF WISCONSIN PERSONNEL COMMISSION

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CARL MARTIN, *
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Appellant, *
*
v. * DECISION
* AND
Chairperson, TRANSPORTATION * ORDER
COMMISSION, *
*
Respondent. *
*
Case No. 80-366-PC *
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* * * * * * * * * * * * * * * * *

OPINION

This is an appeal pursuant to §230.44(1)(c), Stats., of a layoff. This matter is before this Commission on a proposed decision of the hearing examiner, (copy attached). The Commission has considered the objections and arguments with respect thereto and has consulted with the hearing examiner.

In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 NW 2d 183 (1976), the Supreme Court set forth the basis for decision of such an appeal:

> 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 sec. Pers 22.03 of the Administrative Code and when the layoff is not the result of arbitrary or capricious action.
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> * * *
>
> While the appointing authority indeed hears 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 at 49, 52.

The record in this case, including the stipulation between the parties, establishes that the respondent prepared a layoff plan which was approved by the Administrator, Division of Personnel, in accordance with §Pers. 22.09, Wis. Adm. Code (1975), which was in effect at the time of the layoff. The procedure for making layoffs is set forth in §Pers. 22.035, Wis. Adm. Code (1975):

> Employes within the class or approved option within the class in which layoff is to occur shall be laid off by seniority.... Employes shall be laid off according to their seniority ranking with the lowest ranked (least senior) employe laid off first, except that up to 2 employes or 20% (whichever is greater) of the number of employes within the class or approved class option identified for layoff may be exempt from the procedure at the discretion of the appointing authority. Exemptions may be used to retain employes having special or superior skills; for affirmative action purposes; for such other purposes as may be determined by the appointing authority.

The basic issue in this case is whether appointing authority's decision to exempt a female AA4 with less seniority than the appellant was "arbitrary and capricious."

Arbitrary or capricious action has been defined as follows:

> '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.' Weaver v. Wisconsin Personnel Board, 71 Wis. 2d at 54, quoting Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W. 2d 86 (1965).

See also, United States v. Carmack, 329 U.S. 230, 243, 67 S.Ct. 252, 258, 91 L.Ed. 209 (1946), n.14:

> 'Arbitrary' is defined by Funk and Wagnalls New Standard Dictionary of the English Language (1944) as '1 ..., without adequate determining principle;...' and by Webster's New International Dictionary, 2d Ed. (1945), as '2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance... decisive but unreasoned;...'

At this point, it is important to examine what the record shows regarding the basis for the respondent's decision, keeping in mind that pursuant to the Weaver decision the respondent has the burden of proving that its layoff decision was not arbitrary and capricious.

None of the members of the Transportation Commission testified. Therefore, the evidentiary basis for their decision is the stipulation, the relevant documents setting forth their decision, and the testimony of their agent, the DOT Affirmative Action/Equal Opportunity Officer, Ms. Biermeier.

Essentially all that the stipulation establishes is that the respondent determined to lay off the appellant and to exempt Ms. De Zonia for affirmative action reasons.

The documents setting forth the respondent's exemption decision are Respondent's Exhibits 4 and 5. Respondent's Exhibit 4 is the layoff plan which was prepared by the respondent. On page 2 of that document it states: "One Safety Responsibility Examiner (AA04) position will be eliminated due to reduced hearing volume and scheduling more hearings per day for the two remaining examiners." On page 3 it sets forth the layoff groups, civil service classifications, and names and seniority dates of the employes. It further states: "Exemptions for affirmative action purposes have been exercised by the employer according to the Rules of the Director (Pers 22.035) in the case of the Auditor II and the Administrative Assistant 4 positions." In Respondent's Exhibit 5, the letter to the appellant containing the formal notice of the layoff, the respondent states: "We realize that you are senior to another employee in this classification. However, the affirmative action exemption of Sec. PERS 22.035, Wisconsin Administrative Code has been exercised."

The statements in these documents are conclusory in nature and simply say that an affirmative action exemption has been exercised in lieu of a strict seniority layoff.

Looking to Ms. Biermeier's statements, her rationale for recommending the exemption in question was set forth in Respondent's Exhibit 3, a memo to the Commissioners dated September 18, 1980, entitled "Layoffs and Affirmative Action." In this memo, she recommends exemptions "in order to maintain a reasonable affirmative action program within the Transportation Commission." The "Rationale" was stated as follows:

> The exemptions are allowed under both the Civil Service Rules and Union Contracts. Both the Governor and the Secretary of the Department of Employment Relations have voiced a concern that affirmative action be part of the layoff process.
>
> Furthermore, both the background on the Commission and the projections for hiring in the future indicate that affirmative action during layoffs may be the only opportunity for affirmative action that the Commission will have.

Attached to this memorandum was a "Work force Analysis" which included the following relevant data regarding "Professionals":

EEOC Category	Parity	Current Work Force	Layoffs in Time of Seniority	Layoffs Using Exemptions
Professionals				
Females	20%	3/17(17.65%)	0/14(00.00%)	3/14(21.42%)

It was established by Ms. Biermeier's testimony at the hearing that her role with respect to the respondent was to "...provide affirmative action consultation assistance -- report writing, whatever...." T, p.14. After the need for a reduction in force was recognized, she "...sat down with the Commissioners and discussed the status of affirmative action; the

basis for making an exemption during a work force reduction and a lay-off and... made a recommendation regarding the lay-off; the recommendation that is in the memo." T., p. 16.

Her testimony regarding the basis for her recommendation included the following:

> I made that recommendation, first of all, upon a present analysis, or analysis of the current work force of the Transportation Commission -- sent back to look at who was at the Transportation Commission, what kind of positions -- it was a work force analysis. Then I looked at what areas were underutilized -- the under utilization was compared with parity figures developed by the Department of Employment Relations under, and in accordance with an Executive Order of the Governor. T. p. 17.

She further testified that the parity figures she used came from the DOT Affirmative Action plan and that these in turn came from the "Guidelines for the Implementation or Executive Order 26 -- Section IV -- Parity" issued by the Department of Employment Relations, Affirmative Action Office. (Respondent's Exhibit 7). She further testified with respect to her reliance on the DOT Affirmative Action Plan (Respondent's Exhibit 8) as follows:

> Q. Can you refer me specifically within that plan what parts mandated the affirmative action you believed necessary?
>
> A. Two very specific areas: on page one is the Department's affirmative action equal opportunity policy which states that the Department's full commitment to the concept of affirmative action as a means to correct the imbalances and to eliminate the present affects [sic] of past discrimination. An exemption was recommended based upon that because women in state service, as a present affect [sic] of past discrimination have less seniority, on the average, than males in state service. So, the first lines in the affirmative action statement.
>
> Q. And where else in that plan?
>
> A. Certainly the other part of the policy clearly is that the policy of the affirmative action equal employment opportunity policy is the policy that effects all personnel transactions, not simply hiring.

> Q. Where do you find that?
>
> A. It's in the statement that -- it starts-- the sentence starts -- it is also reaffirmed here that it is the continued policy of the Department of Transportation, and specifically in line seven, to provide employment training, promotion opportunity, and other conditions of employment -- again, the other conditions of employment refers to the fact that affirmative action and equal opportunity are not limited to hiring but are involved in all personnel transactions -- consideration in all personnel transactions. T. pp. 20-21.

She further testified that she considered, as part of the basis for her recommendation, Executive Order 26 (Respondent's Exhibit 10), the administrative code (i.e., §Pers. 22.06), and state statutes:

> In Chapter 230, state agencies are required to move toward balancing the work force, or having a work force that is representative of the entire population. Another part of the responsibilities are that state agencies are to eliminate present affect [sic] of past discrimination.
>
> * * *
>
> ...if the parity figures had not been there, there still would have been an obligation for the state agency to take into consideration affirmative action during lay-off because the state statute specifically says, in the beginning of Chapter 230, that state agencies have a responsibility to balance the work force, that a balanced work force means that the work force is representative of the general population of the state. T. pp. 23, 28-29.

Ms. Biermeier also testified on cross-examination that when she did the "work force analysis" of the Transportation Commission that she did not review particular civil service classifications against the parity figures; rather, she utilized the EEO category of "professionals," which was interpreted as including the classifications of Administrative Assistant 4, Auditor II and Transportation Rate Analysts. See T., pp. 30-31.

She also testified on cross-examination as follows:

> Q. In the course of your lay-off analysis you did not check the past employment history did you, of the

> individuals who filled that position of Administrative Assistant IV?
>
> A. It would have been inappropriate; no, I did not.
>
> Q. So it is fair to say that your purpose in performing the lay-off study was simply to ensure that affirmative action principles were followed?
>
> A. That's correct. T., pp. 39-40.

On recross, Ms. Biermeier provided additional testimony regarding her "work force analysis":

> Q. ...In reference to the imbalances, you have indicated existed in the professional categories, what did you use to come to the conclusion that these imbalances existed?
>
> A. In the professional category I used two or three different kinds of documentation: One is that I did a work force analysis which was a comparison of the current work force at the agency with parity figures found in the Department of Transportation plan and developed by the Department of Employment Relations Guidelines; secondly -- these are really two different sources -- secondly I did a work force analysis that compared the current work force with the requirement, in essence, of the state statute for a balanced work force. T., p. 50.

Having reviewed the individual bases for the respondent's layoff/exemption decision, it is now necessary to review the process as a whole.

One significant fact that comes into focus when this entire process is reviewed is that there is no evidence on this record of the extent, if any, that the respondent, in making its decision, considered factors other than the affirmative action implications of the layoff. As was noted above, the Commission's statements of its decision were conclusory, stating only that an affirmative action exemption had been exercised. The only representative or agent of the Commission to testify stated that her responsibility was limited to the provision of affirmative action input.

Section Pers. 22.035, Wis. Adm. Code (1975), states that employes will be laid off in order of seniority, except that a certain number "may be exempt from the procedure at the discretion of the appointing authority." (emphasis supplied). Clearly this rule requires that before an exemption is granted that discretion be exercised. The rule identifies several factors for consideration in making this decision: seniority, special or superior skills, affirmative action, and "other purposes as may be determined by the appointing authority." On this record, the only information provided with respect to the respondent's evaluation of these factors is as to the affirmative action exemption. While it is clear that the respondent was aware of the appellant's seniority, the record does not reveal what weight, if any, the appointing authority gave to this factor. On this record, there is no evidence that the respondent did more than simply apply the affirmative action exception in a completely mechanistic fashion once it was determined that the failure to do so would reduce the percentage of professional females below the parity figure established by the Affirmative Action Office for Category Agencies.

It might be argued that the exercise of discretion is implicit under the facts of this case. That is, the employer in the first instance either had to lay off the appellant for affirmative action purposes or not lay him off as the more senior employe. It can be argued that the respondent had to have evaluated the seniority factor against the affirmative action factor and decided in favor of the latter.

However, this ignores the point that the respondent had the burden of proof and was required to have established on the record by a preponderance of the evidence that it did not act in an arbitrary and capricious manner

in making its layoff/exemption decision. Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 237 N.W. 2d 183 (1976). Also, it must be kept in mind that the record does reflect (see Respondent's Exhibit 4, layoff plan) that three affirmative action exemptions were exercised. As was pointed out in the memo setting forth the DOT affirmative Action Officer's recommendation on layoffs (Respondent's Exhibit 3), the percentage of female professionals following the layoffs would have been 21.42% with three exemptions exercised. What is not set forth in this memo nor addressed anywhere in this record is the fact that if only two exemptions had been exercised, the percentage of female professionals would have been 14.29%. There is nothing in this record that explains why the respondent chose to exercise three rather than two affirmative action exemptions (in which case the appellant, with his 22 years of seniority, conceivably might have been chosen for retention), other than the fact that the use of three exemptions kept the agency above the parity figure (20%) for group C agencies while two exemptions would have kept them below that figure.[1] It is noteworthy in this respect that the Affirmative Action Office guidelines on parity, Respondent's Exhibit 7, specifically states that:

> The standards [parity figures] should not be used for personnel transactions, such as layoff or hiring. They are intended merely to assist the agencies, the Council, and DER by providing a reasoned set of consistent data toward which to strive. p. 1. (emphasis supplied)

On redirect examination, the DOT Affirmative Action Officer testified as follows:

> Q. What do you understand that statement to mean, the statement that 'the standard should not be used for personnel transactions such as lay-offs or hirings?

[1] As is discussed below, the DOT affirmative action plan, upon which the respondent relied, has a "goal" of 5.76% female professionals.

> THE WITNESS: I understand that parity figures as defined here are the figures toward which an agency is to be striving as a short term goal and that the sentence "the standards should not be used for personnel transactions such as lay-offs or hiring" mean if one were to use parity as a percentage in hiring, for example in the State Patrol where you have forty positions -- if we use parity, the six percent or the ten percent as the hiring percentage we would never arrive at parity in the State Patrol if we hired a strict six percent or ten percent. We need, in fact to hire at a higher rate in order to achieve parity. Parity is a short term goal for the Department a long term goal is balancing the work force. T., pp. 43-44.

Whatever the merits of this statement as an abstract proposition, it is contradictory to the plain language of the guidelines:

> Parity is a percentage expression of equitable representation for protected groups as a long-term goal for the classified state work force. Respondent's Exhibit 7, p. 1 (emphasis supplied)

At this point, the Commission will examine the specific reasons advanced by the respondent for its layoff/exemption decision.

As set forth above, Ms. Biermeier indicated that she relied on §230.01(2), Stats. This subsection provides in part as follows:

> If there are substantial disparities between the proportions of members of racial, ethnic, gender or handicap groups in a classified civil service classification in an agency and the proportions of such groups in the state, it is the policy of this state to take affirmative action which is not in conflict with other provisions of this subchapter to correct the imbalances and to eliminate the present effects of past discrimination.

It appears to be quite clear that the work force analysis set forth in Respondent's Exhibit 3 was not done in accordance with this subsection, since there was no "disparity" analysis of each "classified civil service classification" as is set forth. Rather, the "professional" classifications were grouped together for purposes of analysis. The significance of this can be seen in the AA4 classification. Taken

separately, there were 33.33% females which was in excess of the "parity" figure of 20%. It was only when all of the professional work force was added together was a disparity (17.65% vs. 20%) found.

No explanation was offered at the hearing for this approach other than to state that the "EEO" grouping was derived from the DOT affirmative action plan, which, in turn, utilized the Affirmative Action Office guidelines (Respondent's Exhibit 7). However, there is nothing in those guidelines which precludes comparing the work force in each civil service classification with the parity figures for the EEO groupings, pursuant to §230.01(2), stats., or that would require ignoring the statutory language. In its posthearing brief, the respondent argues in part as follows:

> ...appellant fails to recognize that if the policy statement [§230.01(2)] were to be rigidly construed, appellant would have a much more difficult task. Wisconsin statutes §230.01(2) provides that the substantial disparity should be measured to 'the proportions of such groups in this state.' In other words, if the policy statement is to be rigidly construed, the parity figures used by the Transportation Commission would have to be adjusted to in excess of fifty percent for women. Thus, in the classification of Administrative Assistant 4 the state would have mandated that one woman remain and therefore the layoff plan would only have been in compliance if the affirmative action exemption were used.
>
> Admittedly, respondent has approached the policy statement contained in Wisconsin Statues §230.01 as being a more generalized requirement that affirmative action must be considered and this is precisely what respondent has done. Respondent's brief, pp. 9-10.

There are certain basic difficulties with this argument. First, it fails to address the question of why the statutory admonition to determine disparity on the basis of each civil service classification was not followed; rather, it argues essentially that the failure constitutes harmless error since if the remainder of the statutory admonition to

compare the work force utilization within the civil service classification to the population as a whole had been followed, there still would have been an underutilization.

One problem with this contention is that it seems clear from the cases applying the arbitrary and capricious standard above-cited that the focus must be on whether the process, as a whole, was arbitrary and capricious, not on whether the end result might have been reached in any event had a different analysis been followed by the agency. Compare, Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196-197 S.Ct. 1575, 1577, 91 L.Ed. 1975 (1947):

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.
>
> We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023.

Furthermore, the recommendation to the Commission (Respondent's Exhibit 3) contained no reference to other than the DOT parity figure of 20%. To argue that the failure to have adhered to the statute with respect to analysis of individual civil service classifications should be ignored

because, if that had been done, and the remainder of the statute defining parity had been adhered to as well, the same result would have been reached, strikes the Commission as speculative.

Second, to admit that the respondent "approached" §230.01(2) "...as being a more generalized requirement that affirmative action must be considered..." is essentially to admit that the respondent ignored the very specific language of that subsection. The subsection does not say that "...affirmative action must be considered...." It very specifically says

> If there are substantial disparities between the proportions of members of racial, ethnic, gender, or handicap groups in a classified civil service classification in agency and the proportions of such groups in this state, it is the policy of this state to take affirmative action ... to correct the imbalances.... (emphasis supplied)

The legislature very clearly and specifically stated that only after certain prerequisites were present was the state's policy to take affirmative action to correct the imbalances and to eliminate the present effects of past discrimination operative. This is not a "generalized requirement that affirmative action be considered."

The argument might also be made that §230.01(2) is only a statement of policy. However, it is a statement of policy upon which the respondent repeatedly stressed its reliance, and a statement of policy which is very specific as to the conditions under which it is operative.

The respondent also asserts reliance on Executive Order 26 (Respondent's Exhibit 10) in making its decision on exemption. Language in this document refers to the state's commitment to affirmative action, e.g.,:

> WHEREAS, the State of Wisconsin has the responsibility to ensure equality of employment opportunity within state government for all persons; and

> WHEREAS, these responsibilities can be met only by aggressive affirmative efforts to recruit, hire, train, promote, and retain persons historically excluded from the full range of employment opportunities and responsibilities within state government;....

However, the order itself requires that agencies develop affirmative action plans and ties affirmative action efforts to the plan:

> (3) The head of each state department, board, commission, agency and educational institution shall be responsible for preparing an affirmative action plan. The Secretary of the Department of Employment Relations shall review, comment, and approve or disapprove agency plans and forward them with commentary to the Governor. Agency plans shall set goals and outline steps for incorporating affirmative action principles into agency policy and procedures.
>
> (4) The head of each state department, board, commission, agency and educational institution shall be responsible for effective compliance with their affirmative action plan so that equal employment opportunity may become a reality in this state. Equal employment opportunity includes affirmative action policies and practices dealing with, but not limited to the following areas: recruitment, selection, hiring, training, transfer, layoff, return from layoff, compensation and fringe benefits, promotion and retention of ethnic and racial minority persons, women and persons with disabilities.

It is clear from the record in this case that the Transportation Commission itself never adopted an affirmative action plan; rather Ms. Biermeir relied on certain parts of the DOT affirmative action plan in developing her layoff exemption recommendations. In addition to the parity figures, she relied on certain general language in the plan:

> ...on page one in the Department's affirmative action equal employment opportunity policy which states that the Department's full commitment to he concept of affirmative action as a means to correct the imbalances and to eliminate the present affects [sic] of past discrimination....

This general language is similar to the language contained in the Governor's Executive Order 26. The Commission cannot conclude that the utilization of some general statements and a parity figure (which, as will be discussed below, was of dubious application to the respondent) from the

DOT plan constituted the adoption by the respondent of an affirmative action plan.

The next question is, what is the significance with respect to the issue of arbitrary and capricious action of the failure to have adopted an affirmative action plan.

It is correct, as pointed out in the proposed decision, that there is no requirement under the rules or the statutes that agencies have affirmative action plans. However, it seems somewhat contradictory for the respondent to rely on Executive Order 26 as support for its decision yet to suggest that its disregard of the requirement, imposed by that order, of the preparation of an affirmative action plan, is meaningless.

The respondent seems to imply that even if it had adopted its own affirmative action plan, it would not have reached any different result. This ignores the fact that the DOT plan deals in detail with a member of specific problem areas in that agency and that presumably a Transportation Commission plan could have done the same. It also ignores the fact that the DOT plan includes, in addition to parity figures and current staff characteristics, fiscal year 1981 goals. With respect to female professionals, the DOT figures were parity 20%, current staff characteristics 4.9%, and fiscal year 1981 goals of 5.76%. See Respondent's exhibit 8, p. 5. The respondent, while it "adopted" parts of the DOT plan, chose to exempt all three female professionals to reach a utilization of 21.42% in this category. If it had adopted a goal which, like DOT, was less than full parity, conceivably it might have chosen to exempt less than three female professionals.

Another source that the respondent relied on in making its layoff/exemption decision was a memo dated August 29, 1980, from the

Secretary of DER to all agency heads (Respondent's Exhibit 2). This document reiterates the general state policies on equal employment and affirmative action. It expresses the secretary's concern about "the potential impact of layoffs on affirmative action programming," and points out that "...the likely effects of strict seniority layoffs would be a disproportionate treatment of females and minorities." The memo goes on to say:

> Certainly there are numerous factors which must be taken into consideration when preparing a reduction in programs and staff. I feel strongly, however, that agency affirmative action officers have a legitimate role to play in the planning process by advising you of the affirmative action impact and possible alternatives.
>
> If your agency is contemplating layoff or permanent employes, I am requesting that serious consideration be given to the rules and contract provisions permitting you to take affirmative action through the exemption of females and minorities as necessary to ensure equal employment opportunity, help balance your agency's work force, and contribute to the elimination of the present effects of past discrimination.

This memorandum served to remind agencies of the state's policies on affirmative action found in other sources, and urged consideration of the affirmative action implications of layoffs. This document did not provide any independent source of authority for an agency to take any particular approach to a layoff. Indeed, it is noteworthy that the document includes this language: "certainly there are <u>numerous factors</u> which must be taken into consideration when preparing for a reduction in programs and staff."

Another source which the respondent has asserted as a basis for its decision is the DOT affirmative action plan (Respondent's Exhibit 8). Respondent states in its post-hearing brief:

> Appellant has correctly pointed out that the Transportation Commission did not have its own affirmative action

> plan. Nonetheless, the record is clear that the Transportation Commission did rely upon the Department of Transportation for its personnel function including affirmative action. Therefore, reliance upon the affirmative action plan of the Department of Transportation is not unreasonable.

One problem with this contention is that the DOT plan was not merely a statement of abstract principles. Abstract principles could be obtained from the statutes and Executive Order 26. Rather, the plan dealt with the specific attributes and problem areas of the agency, and contained particular approaches to deal with these problems.

The parity figures which the respondent adopted from the DOT plan were derived from the parity guidelines published by the DER Affirmative Action Office (Respondent's Exhibit 7). On page 4 of that document, DOT is identified as a category "C" (natural resource group) agency. At page 3, this group is described as follows:

> The occupations from which these agencies draw their work force include engineering, life and physical sciences, mathematics, and agriculture. Slightly lower parity figures for these agencies will reflect the lesser availability of target group members in these fields.

The other two groups are (A) educational and social service agencies, and (B) general executive services, which "encompasses the technical, analytical, research, planning, business, legal and fiscal operations." How the Transportation Commission, an independent agency whose work force is comprised of administrative assistants, auditors, an attorney, a clerical assistant, typists, and transportation rate analysts, could be categorized as a "natural resource" agency rather than a "general executive services" agency is a question that has not really been addressed, although again it is implied that the layoff exemption decision would have been the same regardless of what parity figure was used. Respondent's post-hearing brief, p. 12.

Another inconsistency with the respondent's assertion of reliance on the DOT plan is that, as discussed above, the respondent certainly did not "adopt" the DOT goal of 5.76% for female professionals; rather, the 20% parity figure became the goal.

Having examined the respondent's decisional process in its entirety, the Commission cannot conclude that it was not arbitrary and capricious. In large measure, the respondent's position on this appeal can be reduced to the assertion that since the administrative code provides for affirmative action exemptions and the State has set forth in a number of places its commitment to affirmative action, the decision must have a rational basis. However, the State's commitment to affirmative action, as contained in the sources relied on by the respondent, is set forth in specific terms and contains specific requirements. There are too many inconsistencies and contradictions in the process followed by the respondent, on this record, to be able to conclude that the process was not arbitrary and capricious.

It might perhaps be argued that there are inherent inconsistencies and contradictions between §230.01(2), Stats., and the Affirmative Action Office Guidelines (Respondent's Exhibit 7) which might present difficulties to an appointing authority. However, even if this were the case, the Supreme Court has made it clear that the employe is not to suffer as a result. See Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 56, 237 N.W. 2d 183 (1976):

> The Administrative Regulation PERS 22.03(4) specifically states that, when layoff is necessitated as a result of an employe exercising his 'bumping rights', 'all employes in the resulting layoff group shall be ranked according to their relative performance on a man-to-man comparison basis.' These regulations are deficient because apparently they do not contemplate that a laid-off employe from one

> group would be immediately relegated to the layoff group of the lower class by virtue of his lack of seniority, but this is what happened here.
>
> Under the circumstances, it was probably impossible for the appointing authority to make a rational judgment of Mayes' performance in comparison to other employes in the layoff group of the lower category. Mayes, however, should not be penalized for this. Mayes was not laid off from the security officer's position as the result of the exercise of any rational discretion.

Also, it might be the case with respect to possible contradictions between §230.01(2), Stats., and the Affirmative Action Office guidelines, that an appointing authority could inure itself against a determination of arbitrary and capricious action by demonstrating, at an appeal hearing, a rational decision-making process wherein on the basis of stated, reasonable grounds, it chose to follow one criterion over another. However, the Commission does not need to reach this question because it does not have this type of process before it.

As a final note, the Commission wishes to emphasize that nothing in this decision is intended to suggest any restriction on affirmative action layoff exemptions, beyond the parameters of the arbitrary and capricious action standard. Clearly, under state law, affirmative action is an important part of the civil service system.

This Commission has upheld, for example, a hiring decision which considered the race of the applicants for a position as an Inmate Complaint Investigator at the Wisconsin State Prison-Waupun, where the basis for the decision included a detailed affirmative action plan which contained specific findings concerning the small percentage of minority employes at the prison, the reasons for that percentage, and the adverse effects this situation was having on the prison programs. See Christensen v. DHSS, No.

77-62 (9/13/78). This is of course not to suggest that these are the only circumstances under which affirmative action is warranted; it is cited simply as an example.

For these reasons, the Commission must reject the proposed decision and the action of the appointing authority laying off the appellant. The proposed findings of fact will be adopted as the findings of the Commission, with the following exception.

Proposed Finding No. 8 reads as follows:

> The affirmative action officer's recommendation was based upon affirmative action work force priority figures developed by the Department of Employment Relations (DER), DOT's affirmative action (AA) plan and an analysis of respondent's work force. The respondent had no affirmative action plan separate and distinct from DOT's plan.

The word "priority" should be changed to "parity." The DER Affirmative Action Office guidelines (Respondent's Exhibit 7) are labeled "PARITY," and the use in the proposed finding of the word "priority" is apparently an error.

In order to more fully reflect the record, the following should be added to proposed Finding #8:

"The affirmative action officer's analysis of respondent's work force was as set forth on page 2 of Respondent's Exhibit 3, and was based on an analysis of the EEO category of "professionals" as opposed to individual classified civil service classifications. The makeup of the respondent's work force by classified civil service classifications prior to the reduction in force was as set forth in Respondent's Exhibit 4 at page 3. In making her recommendation regarding the layoff/exemption, the affirmative action officer relied on her interpretation of §Pers. 22.035,

Wis. Adm. Code (1975), Chapter 230, statutes, and Executive Order 26 in addition to the materials set forth above."

ORDER

As its final decision of this matter, the Commission adopts as its findings the proposed findings of the examiner, as set forth in the proposed decision and order, a copy of which is attached hereto, except that finding #8 is modified by replacing the word "priority" with the word "parity," and the following material is added to said finding:

> The affirmative action officer's analysis of respondent's work force was as set forth on page 2 of Respondent's Exhibit 3, and was based on an analysis of the EEO category of "professionals" as opposed to individual classified civil service classifications. The makeup of the respondent's work force by classified civil service classifications prior to the reduction in force was as set forth in Respondent's Exhibit 4, page 3. In making her recommendation regarding the layoff/exemption, the affirmative action officer relied on her interpretation of §Pers. 22.035, Wis. Adm. Code (1975), Chapter 230, statutes, Executive Order 26 in addition to the material set forth above.

The Commission, in lieu of the proposed Conclusions of Law, enters the following as its Conclusions of Law:

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. The respondent has the burden of proof to show just cause for the layoff of the appellant, and it sustains its burden of proof when it shows by a preponderance of the evidence that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious.

3. The respondent has not sustained its burden of proof.

4. There was not just cause for the layoff of the appellant.

The Commission, in lieu of of the proposed order, rejects the action of the respondent of laying off the appellant, and remands this matter to the respondent for action in accordance with this decision.

Dated: March 21, 1983 STATE PERSONNEL COMMISSION

Laurie R. McCallum

LAURIE R. McCALLUM, Commissioner

AJT:jmf

James W. Phillips

JAMES W. PHILLIPS, Commissioner

DISSENTING OPINION

I agree with the majority that, on the basis of the evidentiary facts, the issue in this case is whether the Department of Transportation's decision to retain a female employe by exercising an exemption under §Pers 22.09, Wis. Adm. Code (1975), instead of the appellant, an employe with seniority, was arbitrary and capricious. I also agree that Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), defined arbitrary and capricious as, "... [an] action [which] is unreasonable or does not have a rational basis ... and [is] not the result of the 'winnowing and sifting' process." While the facts and law in the Weaver case and the present case may, in some instance, be parallel, they are distinctly different.

Weaver involved a University of Wisconsin employe, who, for economic reasons was laid off from his position as a police officer. He attempted to exercise his "bumping rights" to the position of security officer, however,

he was also laid off from that position. The only question was whether the lay off followed the procedure outlined in §16.28(2), Stats. and Code ch. Pers 22. Section 22.03(5), Wis. Adm. Code, mandated relative ranking according to job performance of employes exercising bumping rights. The court found that the original lay off was procedurally correct, but that the appointing authority had failed to rank as a security officer, the appellant, who was attempting to exercise bumping rights into that position, as required by §22.04(4) of Wis. Adm. Code; thereby causing his subsequent lay off to be arbitrary and capricious.

In the present case the controlling rule is §Pers 22.03(5), Wis. Adm. Code, which in pertinent part is as follows:

> "... Employes shall be laid off according to their seniority ranking with the lowest ranked (least senior) employe laid off first, except that up to 2 employes within the class or approved class option identified for lay off may be exempt from the procedure at the discretion of the appointing authority. Exemptions may be used to retain employes having special or superior skills; for affirmative action purposes; for such other purposes as may be determined by the appointing authority." (emphasis added)

Similar to Weaver where the appointing authority was required to rank an employe according to job performance and execute lay off in accordance with such ranking, the legislature, in the present case gave the respondent authority to exempt from lay off and retain employes for affirmative action purposes. In Weaver the court held that the lay off performance rating scale was conclusive in a lay off case unless "proved to be arbitrary, capricious or in bad faith." Similarly, in the present case, respondent's discretionary exemption is conclusive unless the exemption is arbitrary and capricious. Again, in Weaver the legislature provided in §Pers 22.03(5), Wis. Adm. Code, a specific method or manner for rating, and ranking the employes. In

contrast, in the present case, §Pers 22.03(5), Wis. Adm. Code, provides no method or manner for determining "affirmative action purposes."

As shown, the present case is clearly distinguishable from Weaver, but the majority, in order to conform to Weaver, infers that respondent was not in compliance with some controlling rule or statute, which set conditions or standards for the use of the affirmative action exemption authorized under §Pers 22.03(5), Wis. Adm. Code.

Distilled, the majority's rationale is that respondent failed to comply with §230.01(2), Stats., and Executive Order 26. They also write that respondent's actions were inconsistent with DER Affirmative Action Office Guidelines and the DOT Affirmative Action Plan, and conclude that these failures and inconsistencies caused respondent's decision to exercise the affirmative action exemption to be arbitrary and capricious.

Even if it could be said that this premise is correct, the majority fails to show that respondent was in non-compliance with §Pers 22.03(5), Wis. Adm. Code, which, similar to Weaver, is the controlling law in this case. However, in reviewing the statutes and rules stated by the majority to be the law in this case, there is no legal connection between the majority's statement of respondent's alleged failures and the authority given the respondent under §Pers 22.03(5), Adm. Code, to exempt an employe from lay-off for affirmative action purposes. The majority, with little hesitation, admits there is no requirement under state rules or statutes that requires respondent to have an affirmative action plan as referenced in Executive Order 26. Second, the majority also acknowledges that §230.01(2), Stats., is a statement of policy and not substantive law.

Even assuming that §230.01(2) provides a prerequisite for application of an affirmative action lay-off exemption, the evidence is undisputed that, had

the respondent conformed to each letter of §230.01(2), the parity figure would have been in excess of fifty percent for females instead of the twenty percent figure implemented by the respondent and the same conclusion could have been reached. Clearly, respondent was in general compliance with the state policy provisions of Wisconsin Statute §230.01.

The approach taken by the majority blurs the fact that respondent's decision to retain a female employe by exercising authority to exempt from layoff an employe for affirmative action purposes, must be considered on its own merits. This case has nothing to do with whether or not the respondent's affirmative action consultant's assertions of "reliance" totally or in part upon DER affirmative action guidelines or the DOT affirmative action plan were technically correct. To pursue this line of reasoning is to follow a false path. There is no legal requirement for the respondent to adhere to such guideline or plan and the majority has cited none.

The validity of the administrative rule is not in question. Restated, the issue is whether the affirmative action exemption was exercised on the basis of rational reason and not in bad faith. We have observed there is no language in the rule which prohibits exercise of the exemption. The controlling words of the rule are "lay-offs may be exempt . . . at the discretion of the appointing authority." The rule does not otherwise establish the manner in which the exemption is to be exercised.

The only question to be answered in this case before the Commission is whether the respondent, in exercising its authorized power to exempt a person from lay off for affirmative action purposes, based its decision to employ the exemption upon reason or rational judgment.

The undisputed evidence shows that respondent's rationale for using the affirmative action exemption provided in §Pers 22.03(5), Wis. Adm. Code was as follows:

* Prior to the decision in question, respondent, in response to mandated budget reductions, began preparing an employe lay off plan.

* The affirmative action officer from DOT who also performed such services for the respondent, had several discussions with the respondent about affirmative action responsibilities relative to the lay off.

* The affirmative action officer recommended that three women in the professional category, including an Administrative Assistant 4 (AA4), be exempt from lay off.

* The affirmative action officer's recommendation was based upon work force parity figures developed by the Department of Employment Relations (DER), job categories established by the Equal Employment Opportunity Commission, the long term goal (parity figure) from the DOT affirmative action plan and an analysis of respondent's work force.

* Respondent's decision to exercise the lay off exemption was based on the following:

  1. The state parity figure for professional females was 20.00%.

  2. The current female work force in the professional category was 17.65%.

  3. Lay off based on seniority would result in a female work force in the professional category of 00.00%.

  4. Lay off using the exemption would result in a female work force in the professional category of 21.42%.

  5. The appellant had 22 years of seniority.

  6. The female AA4 employe had 2 years of seniority.

  7. Lay off based on seniority in the AA4 job category would result in a female work force of 00.00%.

  8. Additional lay offs were projected for the respondent agency.

  9. No new hires were projected for the respondent agency.

While the respondent has the burden of proving that its decision to exercise the lay off exemption was not arbitrary or capricious, it is undisputed that it acted in accordance with §Pers 22.03(5), Wis. Adm. Code. It is also clear that respondent, in contrast to Weaver, had no administrative or statutory requirements for determining lay off affirmative action exemptions, except the inherent reasons for exercising discretionary power.

It is apparent from the foregoing analysis that the majority opinion is in error. The respondent produced uncontroverted evidence showing that it followed the requirements of §Pers 22.03(5) of the Wis. Adm. Code and that its decision to exercise the layoff exemption was not arbitrary and capricious. The respondent's decision should be affirmed.

Dated: March 21, 1983 STATE PERSONNEL COMMISSION

DRM:ers

DONALD R. MURPHY, Chairperson

Parties:

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c/o Attorney Lawrence E. Bechler
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STATE OF WISCONSIN PERSONNEL COMMISSION

CARL MARTIN,

Appellant,

v.

Chairperson, TRANSPORTATION COMMISSION,

Respondent.

Case No. 80-366-PC

PROPOSED DECISION AND ORDER

This case involves an appeal by the appellant, Carl Martin, of his lay-off from his position, as an Administrative Assistant 4, with respondent Transportation Commission. The following determinations were made based upon a stipulation entered into by the parties and upon evidence presented at a hearing on this matter.

FINDINGS OF FACT

1. At all relevant times prior to his lay-off, the appellant, Carl Martin, was employed by the respondent Transportation Commission as an Administrative Assistant 4.

2. The Transportation Commission is an independent state agency. However, since its beginning, certain personnel functions, including employe recruitment, payroll processing and affirmative action activities have been performed by the Department of Transportation's personnel office and affirmative action officer. This procedure by smaller state agencies of using services of larger state agencies is a common and acceptable practice within Wisconsin state government and, in this instance, is based on statute.

3. In 1980, all state agencies were directed to implement a 4.4% reduction of state-funded expenditures. This budget reduction mandate necessitated the reduction of many state services and programs.

4. Respondent, in response to these mandated budget reductions, began preparing an employe lay-off plan. The lay-off plan included non-retention of limited term employes, lay-offs based upon seniority, and affirmative action exemptions pursuant to §Pers. 22.035, Wis. Adm. Code.

5. In September, 1980, DOT's affirmative action officer had several meetings with the Transportation Commission. Discussions in these meetings centered upon affirmative action responsibilities relative to staff reductions.

6. The DOT affirmative action officer recommended that three women in the professional category (an Administrative Assistant 4, Transportation Rate Analyst, and Auditor 2) be exempted from lay-off.

7. If respondent had carried out the requisite work force reduction based only on line seniority, it would have resulted in the lay-off of the only female employes in the professional category.

8. The affirmative action officer's recommendation was based upon affirmative action work force priority figures developed by the Department of Employment Relations (DER), DOT's affirmative action (AA) plan and an analysis of respondent's work force. The respondent had no affirmative action plan separate and distinct from DOT's plan.

9. Respondent submitted a lay-off plan to DER for approval. The plan proposed to lay off the appellant, who had a seniority date of July 7, 1958, but to exempt from layoff a female AA4, whose seniority date was December 4, 1978. The plan was approved.

10. Respondent informed appellant by letter dated October 10, 1980 that he would be laid-off effective November 15, 1980. The letter also included the statement that another employe in his classification--Administrative Assistant 4--with less seniority was being retained by operation of the affirmative action exemption.

11. On October 27, 1980, appellant filed an appeal with the Personnel Commission, alleging that respondent failed to have just cause for his lay-off.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. The respondent has the burden of proof to show just cause for the layoff of the appellant, and sustains that burden by showing that it has acted in accordance with administrative and statutory guidelines and that the exercise of that authority has not been arbitrary and capricious.

3. The respondent has sustained its burden of proof.

4. The respondent acted in accordance with the administrative and statutory guidelines in its layoff of the appellant, and the exercise of that authority was not arbitrary and capricious.

5. There was just cause for the appellant's layoff.

OPINION

Appellant does not dispute that respondent followed the procedural steps of implementing his lay-off, but questions whether his lay-off was not arbitrary and capricious. Weaver v. Wisconsin Personnel Board, 71 Wis 2d 46, 237 N.W. 2d 183 (1976). He contends that it was irrational and capricious conduct to lay-off an employe with 22 years of seniority and retain a female employe with 2 years seniority by operation of the

affirmative action exemption in §Pers. 22.035, Wis. Adm. Code. In support of this contention, appellant argues that respondent had no affirmative action plan as required by Executive Order 26, improperly applied affirmative action work force parity figures and offered no justifications for using the affirmative action exemptions except that it is permitted by the administrative code.

The evidence shows that appellant was laid off as the result of employment of §Pers. 22.035, Wis. Adm. Code. That section provides:

> Employes shall be laid off according to their seniority ranking with the lowest ranked (least senior) employe laid off first, except that up to two employes or 20% (whichever is greater) of the number of employes within the class or approved class option identified for layoff may be exempt from the procedure at the discretion of the appointing authority. Exemptions may be used to retain employes having special or superior skills; for affirmative action purposes; or for such other purposes as may be determined by the appointing authority.

The above rule does not contain any specific requirements for use of the affirmative action exemption, nor does any other portion of Pers. Chapter 22, Wis. Adm. Code establish any such requirements. Neither Executive Order 26 nor the guidelines issued by DER require that an agency must develop its own individual affirmative action plan in order to utilize §Pers. 22.035, Wis. Adm. Code, It would appear that the use of the affirmative action exemption is a matter of appointing authority discretion. It is within that context that the question of whether appellant's lay-off was arbitrary or capricious must be considered. Respondent's rationale for using the affirmative action exemption was that there was a disparity between the proportion of females in its professional category, including the Administrative Assistant 4 positions, and the proportion of females in the work force. Work force parity figures from the adopted DOT affirmative action plan were used.

Appellant cites Executive Order 26 Guidelines in support of his argument that it was illegal for respondent to use state work force parity figures in making its lay-off decisions. The Guidelines provide, in part:

> The standards should not be used for personnel transactions, such as layoff or hiring. They are intended merely to assist the agencies, the Council, and DER by providing a reasoned set of consistent date toward which to strive.

However, the Guidelines also provide:

> Parity figures are used for planning and monitoring purposes. The Council adopted current parity levels during May 1979 with the following declaration:
>
> > "The goal of affirmative action programs in state government shall be the achievement of genuine equal employment opportunity for all persons. The proof of this achievement is parity."
>
> Parity provides a set of consistent state standards against which agencies are reviewed, and toward which agencies are asked to plan. There is no requirement to reach parity, nor are sanctions imposed if parity is not achieved; however, agencies are encouraged to strive toward parity.

It is clear that the intent of this portion of the Guidelines is to caution agencies against using parity figures as rigid quotas, but to suggest their use as a method for planning, measuring and monitoring affirmative action programs. Respondent's actions were well within the intent of these guidelines. Had respondent failed to exercise the exemption, its professional category after lay-off would have been comprised entirely of white males.

It would appear from all the evidence that respondent's decision to exempt a female with 2 years seniority and to lay-off the appellant despite his 22 years seniority was based upon a rational effort to strive toward genuine equal employment opportunities for all people. For these reasons, respondent's decision was neither arbitrary nor capricious and should be affirmed.

ORDER

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

Dated _____, 1982 STATE PERSONNEL COMMISSION

_____
DONALD R. MURPHY, Chairperson

_____
LAURIE R. McCALLUM, Commissioner

_____
JAMES W. PHILLIPS, Commissioner

DRM:jmf

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