

3. As a result of the reorganization it was anticipated by DOT management that efficiencies would result and would permit the reduction in staff of approximately 37 positions. Of these, 17 were vacant as of January 10, 1979, and it was anticipated that the remainder of the reductions could be accomplished by attrition over the period of time the merger was expected to take place. See memorandum dated January 10, 1979, from Milwaukee Metropolitan District Director Shebesta, Appellant's Exhibit 2.

4. As a result of the reorganization, appellant was informed by letter dated January 9, 1980, from the Administrator, Division of Highways and Transportation Facilities, that he was to be reassigned from his prior position (District Chief Freeway Engineer, District 2-Milwaukee) to a position as Development Engineer Supervisor, Methods Development Unit, Central Office Design Section, located in Madison. Both positions were classified as Civil Engineer 7, Transportation Supervisor (CE-7). It was indicated that the appellant was to assume his new duties effective January 28, 1980, but that there would be a delayed "effective date" of July 28, 1980. See Respondent's Exhibit 1.

5. Prior to the reorganization, there were 11 CE-7 positions within the two transportation districts. Six of the approximately 37 positions slated for elimination were CE-7 positions. Of the 11 employees classified as CE-7 prior to the reorganization, appellant had the second most seniority.

6. Appellant had been informed by management in 1979 that if he did not voluntarily seek a transfer he would be transferred involuntarily. He declined to transfer voluntarily and subsequently received the aforesaid

Respondent's Exhibit 1.

7. On January 23, 1980, the appellant submitted a non-contractual grievance in which he alleged, in part, as follows:

I contend that my involuntary transfer, which is a direct result of the method by which the reduction in force and reorganization of Transportation Districts 2 and 9 was completed by the Department, is illegal, in violation of applicable Civil Service statutes and guidelines, arbitrary, inequitable, and an abuse of discretion. The method utilized by the Department to accomplish the reorganization and reduction of staff in District 2, and the resultant transfer order, denies me certain rights granted by Section 230.34(2)(b) of the Wisconsin Statutes and Chapter Pers. 22 of the Wisconsin Administrative Code. Further, the transfer is in violation of Sections 230.15(3), 230.29 and 230.06(1) of the Wisconsin Statutes. In addition, the transfer imposes considerable inequitable and unreasonable hardships upon myself and my immediate family.

Issue Presented: Whether the Department of Transportation, through either incorrect interpretation or unfair application, has violated the guidelines and procedures set forth in the Civil Service statutes or the Administrative Code of the State of Wisconsin, in carrying out the reorganization of Transportation Districts 2 and 9 and in issuing the aforementioned transfer order.

8. This grievance was denied by the respondent at the third step and the appellant appealed to the Commission.

CONCLUSIONS OF LAW

The Commission has jurisdiction over the subject-matter of this appeal.

OPINION

The respondent's motion to dismiss is based on a number of grounds which will be discussed in the order in which they have been raised in respondent's brief.

(1) In the absence of promulgation of rules of the Secretary

of the Department of Employment Relations pursuant to §230.45(1)(c), Stats., the Commission lacks subject matter jurisdiction over this appeal.

The Commission has held that in the absence of the promulgation of these rules there is a jurisdictional basis for appeals of denials of non-contractual grievances under §230.45(1)(c), stats. The transition provisions of Chapter 196, Laws of 1977, §129 (4g) provide for the continuation of the rules of the Director until modified, and Pers. 25.01 and the derivative APM and departmental procedures remain in effect. See Gohl v. DOR, Wis. Pers. Commn. 79-67 -PC (11/22/77).

In this case the respondent also argues that there is a defect in the pre-existing scheme contained in §Pers. 25.01 and the APM. It is argued that §Pers. 25.01 only provides that grievance procedures comply with "standards established by the director," and since such standards are contained in the APM and have not been published as rules they are in violation of the rule-making requirements of Chapter 227, stats.

In enacting §230.45(1)(c), the legislature imposed an explicit requirement that the non-contractual grievance procedure be governed by rules, which must be published in the administrative code and which take time to promulgate. Prior to §230.45(1)(c), there was no such explicit requirement. See §16.05(7), stats. (1975). The failure of §Pers. 25.01 to contain standards for the non-contractual grievance procedure is apparent from the face of §Pers. 25.01. However, the legislature chose to enact a transitional provision in Chapter 196 continuing in effect the rules of the director. In the opinion of the Commission, the legislature acted to continue in force and effect

the pre-existing rules and regulations, including §Pers. 25.01 and the APM, until the new rules could be promulgated.

Respondent also argues that in the absence of rules of the Secretary of DER, there is no authority for the Commission to conduct hearings and issue decisions under §230.45(1)(C), stats.: "The procedure set out in the statute [§230.44(4)] for holding hearings, however, is limited to civil service appeals under §230.44."

While the provisions of §230.44(4) apply only to hearings under §230.44, the statutory authority to conduct hearings, subpoena witnesses, and issue decisions on appeals under §230.45(1)(c), is implicit in the language "Serve as final step arbiter" and also is set forth in the general provisions of Chapter 227.

(2) The transfer of employes is a management right and therefore, not within the scope of the state grievance procedure, which is limited to conditions of employment.

In response to this argument the appellant contends in his brief:

The appellant's involuntary transfer is, as admitted by respondent, a direct result of the reorganization and material changes in organization (lay-off) which were caused by the consolidation of Transportation Districts 2 and 9. The appellant's grievance is directly concerned with the seniority provisions of and the procedures to be followed in lieu of layoff, which are contained within Pers. 22 WAC and clearly are related to a subject which is mandatorily bargainable.

The appellant's analysis may or may not be sustainable, but it relates directly to and is intertwined with the substantive merits of this appeal. Consideration of this ground is best left until after the parties have presented their cases on the merits.

(3) The Department of Transportation's grievance procedure provides that the third step decision is final for those matters which are within the discretion of the Department of Transportation.

The grievance procedure uses the term "wholly within the discretion of the Department of Transportation" (emphasis added). The Commission cannot agree that the grieved decision is wholly within the discretion of the agency.

(4) The grievance does not allege even a colorable claim of violation of a civil service statute or rule.

The DOT grievance procedure provides the following criteria for appeal to the fourth step:

b. If dissatisfied and subject meets one of the following criteria:

(1) Department of Transportation's application and interpretation of rules of Personnel Board,

(2) Department of Transportation's application and interpretation of the Civil Service Statutes ...

The appellant's grievance certainly meets these criteria. In Wing v. UW, No. 78-137-PC (4/19/79), the subject matter of appellant's grievance was that "he was not receiving from UW-Stout administrators cooperative and confidential assistance regarding his rights and alternatives in his employment" The Commission held that the appellant was unable to allege even an arguable violation of a civil service rule or statute with respect to this subject matter.

In the instant case, respondent cited several cases interpreting civil service layoff provisions, and also argues that there was no "reduction in force" as contemplated by the statute.

These arguments of course run to the merits. The Commission cannot conclude at this point that the appellant's claims of civil service violations are not at least arguable.

(5) The subject matter of this grievance is the location of

or headquarters of a position which is a program management decision and not a grievable personnel action subject to review by the Personnel Commission.

The Commission agrees that the location of a position is a program management decision which is not a grievable personnel action subject to review by the Commission. However, it cannot agree with this characterization of the subject matter of this grievance. The subject matter of the grievance has to do with the agency action requiring the appellant to accept reassignment or transfer rather than to initiate layoff procedures.

For the aforesaid reasons the Commission will deny the respondent's motion to dismiss.

It is noted that a hearing has been scheduled for May 27, 1980. At this time, notice is provided that this will be a class 3 proceeding with jurisdiction pursuant to §§230.44(1)(a), (b), and 230.45(1)(c), stats. The matters asserted are as set forth in the appellant's "Notice of Appeal" dated March 6, 1980, and filed March 10, 1980.

It is further noted that in Kennel, Brauer, and Murphy v. DOT, Wis. Pers. Commn. No. 78-263, 265, 266-PC, (2/15/79), the Commission applied, in an appeal of grievances related to transfer, a legal standard of review of whether the respondent had violated the civil service code or rules through their incorrect interpretation or "unfair application." This was in connection with a stipulated issue of "whether the Department of Transportation, through incorrect interpretation or unfair application, has violated the Civil Service Statutes or Administrative Rules." While the Commission wishes to hear from the parties before determining what legal standard to apply in this case,

in light of the impending dates of both the previously scheduled hearing and the "effective date" of appellant's transfer or reassignment, it does not wish to delay these proceedings. Therefore, the parties should be ready to proceed at the hearing under the legal standard utilized in Kennel Brauer & Murphy with the understanding that argument may be presented on the appropriate legal standard and the Commission ultimately may decide to use a narrower standard.

ORDER

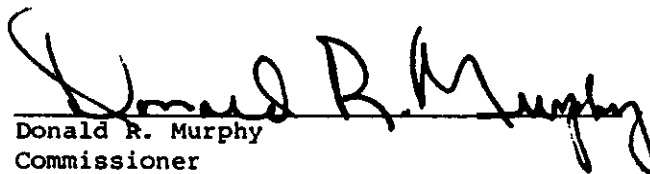
The respondent's motion to dismiss set forth in the letter from counsel dated March 20, 1980, is denied, and this matter is to proceed to hearing on May 27, 1980, pursuant to notice as aforesaid.

Dated: May 15, 1980.

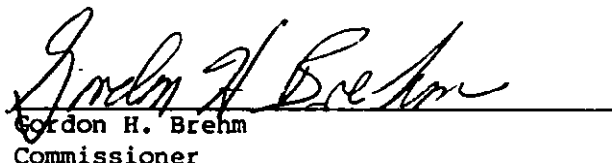
STATE PERSONNEL COMMISSION



Charlotte M. Higbee
Commissioner



Donald R. Murphy
Commissioner



Gordon H. Brehm
Commissioner