STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MARTHAJO KLUTTERMANN, DARLENE RATZLAFF, KATHRYN ULEKOWSKI, MARY YURGS, RAYMOND DECKER and DALE F. GAUERKE,

Petitioners, DECISION ON REVIEW

vs.

STATE PERSONNEL COMMISSION,

Respondent. Case No. 80 CV 5546

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This action is brought under ch. 227, Stats., by certain teachers (hereinafter petitioners) employed by the Department of Health and Social Services (hereinafter the Department) to review a decision of the State Personnel Commission (hereinafter the Commission) which denied the appeals of petitioners from decisions of the Secretary of the Department and the Administrator of the Division of Personnel of the Department of Employment Relations (hereinafter the Administrator).

Petitioners are classified state employees whose employment is governed by ch. 230, Stats. The decisions appealed to the Commission denied petitioners promotions during their probationary periods. Such promotions were from the teacher classifications they held at the time of their permanent hire to higher teacher classifications to which they claim they became entitled upon acquiring the experience or academic credits required for the higher classifications.

Prior to May, 1977, there was one teacher classification with six pay levels. Teachers advanced upward through pay levels by acquiring experience or further education. The single classification structure was presumably based on the similarity of all teacher positions with respect to duties and responsibilities. In May, 1977, a new position standard for teachers became effective. Under the new standard, each of the six pay levels is a separate classification. Allocation to a teacher classification is based

on training and experience rather than on the duties and responsibilities of the position, and progression through the series is by reclassification as incumbents obtain specific training and experience. The Administrator is responsible for reclassifying positions pursuant to s. 230.09 (2), Stats.

After the May, 1977 changes became effective and before petitioners' probationary periods had run, petitioners became eligible for higher classifications, and they requested the promotions. Petitioners were eventually reclassified, but the reclassifications were postponed until each teacher had completed his or her probationary period. The basis of the refusal by the Department and the Administrator to promote petitioners during their probationary periods was Pers. 13.06 (5), Wis. Adm. Code, which at that time provided: "Regrade...No employee shall be regraded as defined under Wis. Adm. Code section Pers. 3.02 (3) during the time the employee is serving a probationary period." (Emphasis added.) "Regrade" was defined by Pers. 3.02 (3) as "the action...following the reallocation of a filled position, which results in the determination that consideration of other employees to fill the position is not necessary, and therefore the incumbent remains in the position." Pers. 3.02 (2) defined "reallocation" as "the assignment of a position to a different class..."

It is clear that Pers. 13.06 (5) applies to the personnel action sought by petitioners. Since the May, 1977 changes promotions have required reclassifications. Reclassification involves "reallocation" and "regrading". See Pers. 3.02 (4), Wis. Adm. Code (now Pers. 3.01 (3) and (4)). Petitioners sought such regrading during their probationary periods. Regrading during the time the employee is serving a probationary period is prohibited by Pers. 13.06 (5).

Petitioners contend that application of Pers. 13.06 (5) to the facts of this case violates s. 230.09 (1), Stats., and the 14th Amendment to the U. S. Constitution. We cannot agree. Sec. 230.09 (1) provides in pertinent part:

> "Each classification...shall include all positions which are comparable with respect to authority, responsibility and nature of work required...In addition, each class shall: ...Be so constituted that the same evaluated grade level within a pay schedule can be applied to all positions in the class under similar working conditions."

While s. 230.09 (1), Stats., may reflect a principle of equal pay for equal work, that statute pertains only to the proper structuring of classifications in order to effectuate that principle. Petitioners do not challenge the new classification structure. They do not, for instance, contend that positions which involve the same duties and responsibilities may not be classified separately on the basis of differences in training and experience. The statute cannot be construed to prescribe the way in which reclassifications of incumbent employees should be handled. It does not conflict with the rule which prohibits reclassification during periods of probation.

Petitioners' argument that the rule violates the equal protection clause of the U. S. Constitution by discriminating between teachers who acquire the prerequisites for a higher classification during probation and teachers who do so prior to their hire is without merit. Petitioners give the following example: an applicant with 9 months experience is hired as a Teacher-1. To become a Teacher-2, that person must have 10 months experience. He or she will have acquired that experience after working 1 month, however, because the rule prohibits re-grading during the 6-month probationary period, that teacher will have gained 15 months experience before being reclassified to a Teacher-2. On the other hand, a new teacher with 10 months experience at the time of hire is hired as a Teacher-2. One teacher becomes a Teacher-2 after 10 months teaching experience, the other only after 15 months teaching experience.

The interplay between the rule and the classification structure may have a discriminatory effect on certain assumed facts, as is clear from the above example. (We note, however, in the example given, that a teacher hired as a Teacher-2 because he or she has acquired 10 months experience prior to hire would not be entitled to a reclassification to a Teacher-3 or other

higher classification during probation any more than is the Teacher-1 hired with 9 months experience entitled to be reclassified to a Teacher-2 after 1 month.) However, the difference in treatment which results here does not rise to the level of a constitutional violation. Where the discrimination does not involve a "fundamental right" or a "suspect classification", as here, legislation for which there is a rational basis will withstand a constitutional challenge. Wisconsin Bingo Supply and Equipment Co., Inc. v. Wisconsin Bingo Control Bd., 88 Wis. 2d 298 (1979). Omernik v. State, 64 Wis. 2d 6 (1974).

Administrative convenience is a rational basis for the differences in treatment here. While a fairer result might be reached by permitting exceptions to the rule against regrading during probation on a case by case basis, the Constitution does not require such exactitude. The argument for individualized treatment should be directed to the rule-making authorities.

The decision of the State Personnel Commission is affirmed. Counsel for the Commission may prepare the formal judgment, a copy of which should be submitted to counsel for petitioners before submission to the Court for signature.

Dated March 2, 1982.

BY THE COURT:

Richard W. Bardwell
Circuit Judge