STATE OF WISCONSIN PERSONNEL COMMISSION

MARILYN REIT,

Appellant,

v. ORDER

Chairman, WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 81-128-PC

This matter is before the Commission on consideration of a proposed decision and order issued by the hearing examiner following a hearing. The Commission has considered the appellant's objections to the proposed decision and order and the arguments of the parties, and has consulted with the examiner. The Commission hereby adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, as its final decision and order in this matter, subject to the following amendments which are made to conform the decision to the record and in the absence of objection by the parties:

1. Finding of Fact #5 is amended by changing the word "collecting" to collating."

2. Finding of Fact #17 is deleted.

3. Finding of Fact #20 is amended by deletion of the following words: "... except to the extent that she sent some material to Madison for photocopying, as aforesaid."

4. The following sentence is deleted from the opinion, page seven, lines 7-8: "Also, one of the Madison reporters did do some of her copying for her."

Dated: June 25, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

AJT:ers

Parties

Marilyn C. Reit
c/o Attorney Louise A. Ptacek
850 Marine Plaza
111 E. Wisconsin Ave.
Milwaukee, WI 53202

Wisconsin Employment Relations Commission
Gary Covelli, Chairman
Suite 200
14 W. Mifflin St.
Madison, WI 53703

STATE OF WISCONSIN PERSONNEL COMMISSION

MARILYN REIT,

Appellant,

v.

Chairman, WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 81-128-PC

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), stats., of a layoff.

FINDINGS OF FACT

1. The appellant had been employed continuously in the classified service by the respondent from September 3, 1968 (Adjusted Anniversary Date) to her layoff effective June 27, 1981. At the time of her layoff, she had permanent status in class as a Stenographic Reporter II in the respondent's Milwaukee office. This was the only reporter position in the Milwaukee office; there were three in the Madison office, including Mr. Spaeni, the chief reporter.

2. As a result of the Governor's response to the respondent's request for additional budgetary funds to upgrade its word processing equipment, the respondent conducted a study of its stenographic reporting function for the period July 1, 1979 - June 30, 1980.

3. The aforesaid study revealed that the transcript output of the appellant (1569 pages) and Mr. Olson (1244 pages) one of the Madison reporters, was substandard, and that it would have been substantially cheaper to have utilized free lance reporters to have handled their assignments during the period in question.

4. As a result of the survey, Mr. Covelli, WERC Chairman, determined that he could not justify maintaining the reporter position in Milwaukee because of the lack of work there, and that the efficiency and productivity of Mr. Olson and the appellant were so low that he could not justify retaining them, as opposed to using free lance reporters, in the absence of improvement.

5. Mr. Covelli instructed Mr. Spaeni to monitor the output of the appellant and Mr. Olson, and Mr. Spaeni developed a standard of acceptable production, which was approved by the respondent, of 25 pages of transcript typed per day, including proof reading, correcting, copying, and collecting. This standard applied only to days that reporters were engaged in producing transcripts, and was pro-rated for half days.

6. The monitoring of the appellant's production began on October 14, 1980, when she had completed a temporary assignment performing secretarial duties for the Milwaukee office.

7. The appellant was advised formally on November 4, 1980, of the standard and the process by which her production would be monitored. Mr. Spaeni had informed her informally before then that the Commission was dissatisfied with her performance and that her output would have to improve.

8. Prior to the decision to lay off the appellant, her production was monitored from October 14, 1980 through the end of February, 1981. Due to the appellant's sick leave from November 14, 1980 - January 19, 1981, for ear surgery, and other matters such as attendance at hearings, she was engaged in producing transcripts, and her production was evaluated, for only 21 days during the aforesaid period.

9. With respect to the 21 days for which her production was monitored, the appellant was consistently below the prescribed standard set forth above.

10. Mr. Olson's production also was monitored during the period of October 1980 through February 1981. However, he was in the office producing transcripts on more days than was the appellant and was evaluated for a total of 45 days.

11. With respect to the 45 days for which his production was monitored, Mr. Olson met or exceeded the standard every day but one.

12. During the aforesaid monitoring period, the appellant had the use of an IBM Correcting Selectric Typewriter and made copies on a photocopy machine. Mr. Olson during this period used an IBM Mag Card typewriter and made copies on onion skin with carbon papers.

13. The inherent speed of producing transcripts with the aforesaid respective machines and processes is approximately comparable.

14. During the aforesaid period, the appellant had difficulty with her vision due to cataracts, and this had a negative effect on her production.

15. The appellant had mentioned to Mr. Spaeni prior to the monitoring period that she had cataracts, but she never told him or the respondent before or during this period that it affected her vision, and before and during this period neither he nor the respondent knew or should have known that her vision was affecting adversely her production.

16. During the aforesaid monitoring period, the appellant's production was adversely affected by a problem of accessibility to the photocopying machine which was located on a different floor than the WERC office and which sometimes was temporarily unavailable due to its use by other agencies.

17. The appellant did have some help during this period in copying as one of the court reporters in the Madison office copied some of her transcripts for her.

18. While Mr. Spaeni and the respondent were aware that the photocopy machine was on a different floor, the appellant never informed them, before or during the period in question, that she was having a problem of accessibility that was affecting her production, and they neither knew or should have known that this factor was affecting her production.

19. During the aforesaid monitoring period, Mr. Olson had access to the other court reporters in the Madison office for consultation on spelling, grammar, etc. This occurred, on a sporadic basis. On a few occasions, Ms. Paquin ran his completed mag cards for him. The Madison reporters, when they had free time, were in the practice of interleaving bond and onion skin pages so they would be available in sets for typing when needed by any of them.

20. The appellant, as the only reporter in the Milwaukee office, did not have anyone available for such consultation or assistance, except to the extent that she sent some material to Madison for photocopying, as aforesaid.

21. The difference in the working conditions under which the appellant and Mr. Olson produced transcripts was not substantial.

22. As a result of the respondent's decision to eliminate the Milwaukee reporter position, it was not included in the 1981-1983 budget, and a layoff became necessary.

23. Based upon the production statistics of the appellant and Mr. Olson during the monitoring period, as set forth above, the respondent decided to exempt Mr. Olson, who was the least senior reporter with an adjusted anniversary date of September 11, 1972, from layoff pursuant to § Pers 22.06(2), Wis. Adm. Code, and therefore the appellant, as the next least senior employe in the Stenographic Reporter II layoff group, was selected for layoff.

24. After a layoff plan was prepared and approved by the administrator, the respondent caused the appellant to be notified of her layoff, effective June 27, 1981, by letter dated March 25, 1981, (Exhibit 17).

25. The appellant subsequently was laid off with an effective date of June 27, 1981.

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. Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 237 N.W. 2d 183 (1976).

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

The Supreme Court decision of Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), provides the framework for decision of this appeal. In that case, the court held:

> 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 statory guidelines and the exercise of that authority has not been arbitrary and capricious.

* * *

> The circuit judge correctly stated that the layoff performance rating scale was to be conclusive in a layoff case unless 'proved to be arbitrary, capricious, or in bad faith.'
>
> * * *
>
> 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. 71 Wis. 2d at 52-54.

In the instant case, there has been no contention that the respondent did not act in accordance with "administrative and statutory guidelines." The only question is whether the exercise of its authority was arbitrary and capricious, and, in turn, this focuses on its determination of which employe was more productive.

As is apparent from the aforesaid quotation from the Weaver case, action is arbitrary and capricious only if it lacks a rational basis, and is not the result of a reasoned thought process.

In this case, the respondent made an attempt to evaluate the two employes in question under substantially equivalent conditions. While the process employed was not clinically exacting in the elimination of variables, as might be necessary for a valid scientific study, this level of exactitude clearly is not required under the Weaver standard. The variations in the conditions under which each employe worked and was evaluated were not such as would render the respondent's determination arbitrary and capricious.

For example, the employes used different equipment to produce their transcripts. There was considerable testimony from the employes and others regarding the comparability of the various machines with respect to quantitative transcript production. While it could not be said that the two methods

were exactly equivalent, it could be said that they were not so dissimilar as to make their use arbitrary.

Another example is the availability of help from the other court reporters in the Madison office. The assistance to Mr. Olson from this source was sporadic and infrequent. On the other hand, Ms. Reit testified that because of the depth of her knowledge of grammar and syntax, she would have no need to seek consultations on these matters. Also, one of the Madison reporters did do some of her copying for her.

The appellant stressed that her production was negatively affected by a vision problem. However, she never brought this to the respondent's attention during the evaluation period, and therefore the respondent cannot be faulted, in the context of the applicable test on this appeal, for not having taken this into account. An evaluation process is not rendered unreasonable, nor may it be said to be not the result of a reasoned thought process, because the evaluator did not take into account information of which it was not, and could not reasonably have been expected to have been, aware.

The appellant also argued that the respondent should have considered the results of the study of the period from July 1, 1979 - June 30, 1980, wherein her total page production was some 300 pages more than Mr. Olson's. However, this comparison makes no allowance for differences in the number of hearings assigned and other such variables, and is a good deal less "scientific" than the daily production analysis actually relied on by the respondent.

In sum, while the evaluation process relied on by the respondent could have been more precise, it certainly provided a rational basis for the layoff decision.

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

AJT:jmf

JAMES W. PHILLIPS, Commissioner

Parties

Marilyn C. Reit
c/o Attorney Louise A. Ptacek
850 Marine Plaza
111 E. Wisconsin Avenue
Milwaukee, WI 53202

Wisconsin Employment Relations Commission
Gary Covelli, Chairman
Suite 200
14 W. Mifflin Street
Madison, WI 53703