STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN DOBBINS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 81-91-PC

DECISION
AND
ORDER

NATURE OF THE CASE

This appeal relates to the respondent's failure to have paid the appellant at higher than the base salary at the time of his appointment. The respondent has filed a motion to dismiss the appeal on the grounds that the Commission lacks jurisdiction because the appeal was not timely filed and does not involve a "condition of employment". The parties have filed written arguments on this motion. The essential facts relating to jurisdiction do not appear to be in dispute and are set forth below.

FINDINGS OF FACT

1. On April 1, 1980, the appellant accepted a position in the classified civil service as a Teacher 6 at the Winnebago Mental Health Institute, DHSS.

2. On April 7, 1981, the appellant filed an appeal with this Commission which stated in part as follows:

> ". . . I am filing an appeal to my appointment at Winnebago Mental Health Institute.
> I am filing this appeal becuase I feel the state's arrival at my starting salary at Winnebago was unjust and arbitrary when compared to past hiring practices."

3. The Commission takes official notice of the fact that the appellant's position at all relevant times has been part of a recognized or certified bargaining unit represented by a union, and that a collective bargaining agreement has been in existence between the union and the state at all relevant times.

OPINION

Section 230.44(3), Wisconsin Statutes, provides in part:

> "Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later . . . (emphasis supplied)"

The Commission's predecessor agency has held that in a case involving an appeal of a salary determination, a continuing violation theory leads to the conclusion that:

> ". . . the "effective date" is a continuing one, subject to the restriction that any recovery of back pay would be limited to, at the most, the period of 15 days before the filing of the appeal. In other words, in the context of a continuing violation theory, the 15 day limitation serves to limit the retroactivity of the recovery, and not to totally extinguish the right to appeal.
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> This is a familiar doctrine in the area of limitations of actions for breach of employment contracts. See, for example, 54 C.J.S Limitations of Actions, s. 133, pp. 49-50:
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> > 'Where a person is hired by the week, month, or year, his right to compensation accrues at the end of each week, month, or year, and the statute begins to run, and he can recover only what has accrued within the statutory period

before the commencement of the action.'"

The board also relied on the application of this continuing violation theory in the federal Title VII context, citing Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763, 790 (D. Colo. 1973); Sciaraffo v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970); Cox v. United States Gypsum Co., 409 F. 2d 289 (7th Cir 1969). The Commission is prepared to apply the same principle in this case and concludes that this appeal is not barred as untimely.

The respondent also argues that this appeal cannot be heard under the authority of §230.45(1)(c), Wis. Stats., because it does not involve "conditions of employment". The Commission agrees with the respondent here, but is of the opinion that §230.44(1)(d), Wis. Stats., provides a basis for jurisdiction. The determination of a starting salary is a "personnel action after certification which is related to the hiring process in the classified service", and the appellant has alleged arbitrary action.

Although this has not been raised by the respondent, in the Commission's opinion there is a serious question as to whether this appeal is barred by §111.93(3), Wisconsin Statutes. The Commission has an independent obligation to determine questions relating to its subject matter jurisdiction, and therfore, must address this issue.

Section 111.93(3), Wis. Stats., provides as follows:

> "If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours, and conditions of employment, whether or not the matters contained in such statutes are set forth in such labor agreement."

Pursuant to ¶Pers 5.02, WAC, the beginning pay on first appointment to a position in a class is the lowest or initial rate in the pay range, unless there is a raised hiring rate approved pursuant to ¶PC 5.02(1)(b), or hiring above the minimum pursuant to ¶Pers 5.02(1)(c). These are the only provisions by which the appellant could have been paid a starting salary above the minimum rate. To the extent that these matters - "raised hiring rate" and "hiring above the minimum" - are considered to be related to "wages, hours, and conditions of employment", the right to appeal these matters to this Commission would be superseded by the collective bargaining agreement pursuant to §111.93(3).

In an opinion issued on September 6, 1978, (OAG 65-78, unpublished), the Attorney General addressed the question of whether the "raised hiring rate" and "hiring above the minimum" practices were prohibited subjects of bargaining, pursuant to §111.91(2)(b)1., Wisconsin Statutes. This opinion stated in part as follows:

"Section 111.91, Wis. Stats., provides in part:

> ' Subjects of bargaining. (1) Matters subject to collective bargaining to the point of impasse are wage rates, as related to to general salary scheduled adjustments consistent with sub. (2) and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment, except as follows:
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> (b) The employer shall be prohibited from bargaining on matters contained in sub. (2), except as provided under sub. (3).

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(2) Except as provided in sub. (3), the employer is prohibited from bargaining on:

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(b) Policies, practices, and procedures of the civil service merit system relating to:

1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.

2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classfications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocations.'

I am of the opinion that the "raised hiring rate" and "hiring above the minimum" practices, as utilized by the administrator in connection with recruitment, are not excluded from the subjects of collective bargaining under §111.91(2)(b)1., Wisconsin Statutes. Whereas such practices are related to "original appointments" and "recruitment", they are primarily concerned with compensation, wage rates, and salary schedule adjustments."

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"The terms of a collective bargaining agreement supersede other civil service laws relating to wages. §111.93(3), Wis. Stats. The right to bargain the minimum is not prohibited from collective bargaining under §111.91(2), Wis. Stats. First, only "policies, practices, and procedures" relating to recruitment are excluded from bargaining. Raising the minimum of a particular position is neither a policy, practice, nor procedure, rather it is an economic adjustment. Second, the power over recruitment primarily relates to locating a fit person by examinations, certification, selection methods, and probationary periods. Third, the qualifications as to the bargainability of wage rates in §111.91(1), Wis. Stats., viz., general salary-scheduled adjustments, must be reconciled with §111.93 (3), Wis. Stats., which gives collective bargaining superseding significance as to "wages" without qualifications. Fourth, raising a minimum is general salary-scheduled adjustment."

The Commission agrees with the analysis set forth in this opinion. Hiring above the minimum and the establishment of raised hiring rates are not prohibited subjects of bargaining, pursuant to §111.91(2), Wis. Stats. These subjects are included in "wages, hours, and conditions of employment" as this term is used in §111.93(3), Wis. Stats., so that the jurisdiction of the Commission is superseded by the collective bargaining agreement "whether or not the matters contained in such statutes are set forth in such labor agreement."

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: June 3, 1981 STATE PERSONNEL COMMISSION

Gordon H. Brehm
Chairperson

Donald R. Murphy
Commissioner

AJT:nwb

Parties

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