STATE OF WISCONSIN CIRCUIT COURT WIS DEPT. OF JUSTICE DANE COUNTY

WISCONSIN DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

PERSONNEL COMMISSION, (Jansen)

Respondent.

OPINION

Case No. 81-CV-0648

We see no need as an introduction to recite all of the facts. The preliminary facts are clearly stated in the findings of fact of respondent in paragraphs 1 to 9 inclusive. The primary issue on this review relates to Conclusion of Law, No. 5 "that denial of their classification based solely on their failure to comply with the MSA criterion was a violation of Pers. 3.02(4)(b), WAC." And No. 8: "Denial of the various reclassification requests on the basis of failure to comply with a pre-determined measurable standard of activity (MSA) as an absolute criterion was unlawful."

It is the position of respondent: that it would not be improper for the appointing authority to use the MSA in evaluating the trooper's performance record. But it is neither correct or lawful to reclassify the trooper solely because his MSA did not reach the adopted standard.

The Commission in its decision summarized its conclusion: "In classification series differentiated on the basis of performance, the Commission must determine whether 'demonstrated performance' has been evaluated correctly. It has made this determination and has concluded that respondent's sole reliance on the MSA criterion fails to take into consideration all relevant factors and is therefore likely to result in incorrect determinations of demonstrated performance." And: "In the opinion of both the Examiner and the Commission, based upon the evidence presented in this case, the MSA was not a sufficiently accurate measurement of performance to lead to correct classification decisions when used as an absolute criterion....The Commission...is reviewing the accuracy of the MSA as a measuring device for reclassification purposes."

The Commission has rejected the MSA as a complete standard of performance for "Initiative and Performance Duties." It points out in its revised finding that the reclassification to Trooper 3 as developed by the Department pursuant to the Division of Personnel's delegation involves not only passing the examinations but five different rating factors as a basis for the recommendation of the trooper's supervision. One of the factors was "Initiative and Performance of Duties" which was defined as "Wise use of time, punctual, willingness to carry out assignments as directed and on own initiative, performs well under limited supervision, demonstrates leadership capabilities, diversification of enforcement activities, ability to assume responsibility." To say that a failure to meet the MSA standard alone represents a failure of the class 2 trooper to meet the requirement of "Initiative and Performance," with its many defined facets, is to ignore the many questions for inquiry.

The authority for classification of State Trooper 3 was delegated to the Secretary of the Department of Transportation to continue "until otherwise modified or withdrawn by action of the Administrator, Division of Personnel..." The provisions of Sec. 230.05(2 permit the delegation and those of Secs. 230.44 and 230.45 clearly permit review by the Commission of the delegated action. The hearing before the Commission involves the finding of facts by the Commission, since no other tribunal has the authority to conduct such hearings. The authority of the Commission after hearing is to "affirm, modify or reject the action which is the subject of the appeal." Sec. 230.44(4)(c).

The standard for classification is given the Administrator by Sec. 230.09(1), which also says: "He or she shall use job evaluation methods which in his or her judgment are appropriate to the class or occupational groups."

Since the Commission has the power to accept, reject or modify the act of the Secretary of the Department of Transportation to whom the duty of classification was delegated, it chose to modify it by refusing to permit the MSA test to be an exclusive measure of Initiative and Performance, but did permit its use so long as it was not an exclusive measure. This is essentially a modification of the act of the petitioner, not a rejection, because it did not totally reject the use of MSA, but only held that it was not to be used as an exclusive test. On that basis the Commission directed that petitioner reevaluate the applications for reclassification in the light of the Commission's findings and conclusions.

The Commission's evaluation of the role of MSA in reclassification was clearly based on a determination that the petitioner's action was "incorrect on the basis of the class specifications." Pers. 3.05, Wis. Adm. Code. The Commission in its opinion distinguished "incorrect" from unlawful, arbitrary or unreasonable. The Commission's opinion states it has concluded that respondent's (here, petitioner) sole reliance on the MSA criterion fails to take into consideration all relevant factors and is therefore likely to result in incorrect determinations of demonstrated performance.

The conclusion of the Commission not to permit the use of MSA as the sole criterion for Initiative and Performance need not be based upon a finding that such use is arbitrary or unreasonable, but rather upon the considerations of public policy and fairness. In other words, the Commission used its considered judgment in determining that the petitioner's choice of the test should not exclude other considerations of the candidate's qualifications. The Commission is the ultimate authority. Its delegation to the Secretary of the Department of Transportation, as well as the statute, retains the power in the respondent to modify the acts of the Secretary in the process of reclassification if in the Commission's judgment those acts do not express the judgment of the Commission.

The Commission was clearly not acting in the capacity of a reviewing tribunal limited to the question of whether the Department of Transportation or its secretary acted arbitrarily. The review power is set forth in Sec. 230.44(4)(c) and is not limited, as is the power of the court in this case. Cf. Sec. 227.20. The Commission, having the ultimate authority to provide the method of classification, has the power to modify the delegated act to meet its view of a proper or correct method. There are matters of policy involved. For instance: shall the trooper 2 be rewarded for the number of arrests he makes and denied the higher classification because he does not make enough arrests, regardless of the circumstances? As pointed out in finding 18: "The exercise of discretion is an important part of the state trooper's law enforcement responsibility.. While Sec. 345.55 may not be technically violated by the use of MSA as the sole basis for a promotion, the policy there expressed that traffic officers be not rewarded for the number of arrests made is an expression of a policy which the Commission could and did recognize.

The Commission was careful not to prohibit the use of MSA in evaluating "Initiative and Performance." It only outlawed its use as a sole basis for evaluating initiative and performance and considered such use as an inaccurate and incorrect measurement as a sole basis for denial of reclassification.

We must conclude that the Commission's conclusion and disposition of this controversy was within its authority and was proper and correct.

We see no reason, in the light of our conclusion, to investigate whether the petitioner had authority to request a judicial review and the contention that only its Secretary had that authority. In any event we have disposed of the matter on its merits.

We cannot close without commenting that the Attorney General, by different assistants, has appeared on both sides of this controversy, as representative of both litigants. We have never been alerted to any law or rule which permits the same person or law firm to appear on both sides of a case. This is the second time recently that this has occurred and we believe it is wrong and should cease.

The attorney for respondent will prepare the proper order affirming the order of the respondent.

Dated September 30, 1981

By the Court:

/s/ L. Edward Hanson

Reserve Judge