STATE OF WISCONSIN PERSONNEL COMMISSION

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DAVID M. KUTER,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 82-0083-PC

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INTERIM DECISION AND ORDER

This matter is before the Commission following a hearing and the issuance of a proposed decision, a copy of which is attached hereto. The Commission has considered the parties' objections and arguments with respect to the proposed decision, and consulted with the examiner.

Since the proposed decision is attached, the Commission will not attempt to summarize this matter at any length. The Commission must determine the materiality to this §230.44(1)(c) layoff appeal of three categories of evidence:

1) The appellant's challenge to a change in DILHR organization with respect to the makeup of its employing units which occurred in 1981.

2) The appellant's challenge to the respondent's determination of economic necessity for a layoff which precipitated the issuance of his notice of layoff.

3) The effect of certain commitments made to the appellant by the then Job Service Administrator by letter dated December 12, 1979. This included the following:

"The following items are my commitments on your position:

> 1. The organizational structure will remain as it is now. This means that you will remain in the position of a Supervisor 14.
>
> 2. The organizational structure will not change as long as you wish to remain in the Fond du Lac Office or, you fail to perform your duties as directed and evaluated by the Local District Director ..."

In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52-53, 237, N.W. 2d 183 (1976), the Supreme Court discussed the meaning of the "just cause" standard in a layoff appeal as follows:

> "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 statutory guidelines and the exercise of that authority has not been arbitrary and capricious.
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> * * *
>
> 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." (emphasis supplied)

In Oakley v. Commissioner of Securities, 78-66-PC (4/19/79), the Commission held that it was not its province on layoff appeals to review decisions of the employing agency as to matters of program policy, at least as to the substantive correctness of those program policy decisions. However, it would be an overly-broad reading of the Oakley decision to interpret it as a barrier to the Commission ever reviewing such program policy decisions for any purpose whatsoever.

In its opinion in Oakley, the Commission quoted at length from the appellant's brief. It is instructive to examine that language as it sets forth the sweeping reach of the Commission's inquiry urged by the appellant therein:

> "This appeal is the first opportunity for the Appellant to challenge the reorganization which slowly eroded his duties and usurped his responsibilities. The changes began in 1973, but were not formally recognized until the fall of 1977, when the appellant received his reallocation notice. His appeal (77-197)

> led to the involuntary demotion, from which this appeal was pursued.
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> * * *
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> If the parties are limited to the 'just cause' issue, then the appellant's wrongs are not redressed. This ignores the issue of how the respondent could have acted more effectively in his reorganization ... The respondent should be forced to carry the burden of proof in justifying all of his actions affecting the appellant from the commencement of the respondent's term as Commissioner of Securities when he started the reorganization through the involuntary demotion of the appellant. p. 3 (emphasis added)

It is clear from the excerpts from this brief that what the appellant wanted the Commission to do was to review each step of the reorganization which occurred over a period of several years. At each of these steps, the respondent would have the burden of proving that it "could have acted more effectively." Such a review goes far beyond the scope of review set forth in Weaver, as the Commission pointed out: "... the only potential 'arbitrary and capricious action' which properly is subject to Commission consideration is action involved in the effectuation of the personnel transaction in question." p. 4. The Commission refused to assign to the respondent the burden of proving that each step in the extensive reorganization process was the most effective approach available from a standpoint of substantive program policy.

The question not answered by the Oakley case, is the exact extent of the reach of the concept "... action involved in the effectuation of the personnel transaction in question ..."

Clearly the Commission should not review program decisions, that may precipitate personnel actions, solely to determine whether those program decisions were substantively defensible from a program standpoint. However, a different situation is presented where an appellant argues that ostensible program decisions were in fact motivated by an intention to effectuate a

layoff decision that will adversely affect that employe. It seems to the Commission that in such a case the ostensible program decision can be reviewed, not for the purpose of deciding whether it is defensible from a purely policy standpoint, but to determine whether it was a pretext for the underlying purpose of effectuating an adverse personnel action against a particular employe.

If an employer takes what is nominally a program management action for the purpose of triggering a personnel transaction in order to adversely affect a particular employe, the nominal program management action can be conceptualized, to that extent, as a part of, or related to, the ultimate personnel transaction such as a layoff. If the personnel transaction can be reviewed to determine whether it was "arbitrary, capricious, or in bad faith," Weaver, 71 Wis. 2d at 53, part of that review should extend to the allegedly pretextual program management basis.

This is analogous to a decision of the Personnel Board (predecessor body to this Commission) in Juech v. Weaver, 1/13/72. In that case, the appellant occupied a position classified as a Maintenance Operations Foreman (Salary Range 3-09). The employer/agency relieved the appellant of all supervisory duties, ostensibly as a result of a reorganization. Shortly thereafter, his position was reclassified downward to Maintenance Mechanic 1 (Salary Range 3-07), and the appellant appealed. Following a hearing, the Board held as follows:

> "While all of the discussion between the parties was of 'reclassification,' what the respondent really had in mind and did was to 'demote' the appellant in both pay and position.
>
> This appeal is in fact an appeal from a demotion and not an appeal from a reclassification."

The Board went on to order the transaction overturned and the appellant reinstated as a Maintenance Operations Foreman.[1]

In the instant case, the appellant seeks to raise questions concerning the agency reorganization preceding the layoff and the economic necessity rationale advanced for the layoff. It would be incorrect to rule that any evidence relating to these points would be irrelevant. To the extent that such evidence is relevant to an attempted showing that the reorganization and the determination of economic necessity were pretexts designed to mask the department's intention to subject Mr. Kuter to an adverse personnel action, it should be admitted.

The Commission wishes to emphasize that while the motion in limine will be denied, this ruling should not be interpreted as opening the door to a substantive review of agency program decisions merely because the appellant disagrees with them from the standpoint of program policy. Rather, the Commission only will consider whether the factors which the respondent contend caused the ultimate personnel transaction, which have been alleged to have been pretextual, were indeed pretexts designed to

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[1]Perhaps parenthetically, the Commission does not believe that this holding interferes with management's legitimate right to assign and reassign duties to employes. First, there was evidence that the employer's underlying intention was to effect what would amount to an involuntary demotion of the appellant. Second, it is questionable whether this type of reassignment of duties met the definition of a reclassification. Compare, §ER-Pers. 3.01(3), Wis. Adm. Code: "Reclassification means the assignment of a filled position to a different class ... based upon a logical and gradual change to the duties and responsibilities of a position..." (emphasis supplied) Just as the appointing authority need not utilize a competitive examination to staff a position if there is an upward reclassification and a regrade of the incumbent, see §ER-Pers. 3.01(4), Wis. Adm. Code, based on a logical and gradual increase in the level of its duties and responsibilities, so normally an appointing authority need not have just cause for a downward reclassification based on a logical and gradual decrease in the level of a position's duties and responsibilities, §ER-Pers. 17.02(3), Wis. Adm. Code.

mask an underlying intention to "get rid of" the appellant. Furthermore, the Commission wishes to emphasize that the hearing examiner has broad discretion to limit the testimony in these areas along the lines set forth in §904.03, Stats.:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues ... or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

At oral argument, the respondent suggested that if it were to be determined that there was a "mixed motive" -- i.e., the respondent acted partially for legitimate and partially for illegitimate reasons - then the respondent would prevail. Compare, Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). We need not reach that contention at this juncture, since it runs to the merits.

The third point in controversy involves what has been characterized as the commitment made to Mr. Kuter by then Job Service Administrator Polston concerning Mr. Kuter's job security. The Commission agrees with the examiner that evidence regarding this matter is properly before the Commission.

Unlike the first two points concerning reorganization and the respondent's economic decision, the department here does not even have the argument that this matter is concerned solely with the agency's program prerogatives. Clearly, the letter in question concerned a personnel matter and dealt directly with the appellant's tenure in the classification he then held.

Furthermore, if the Commission is to consider whether the respondent's action was "arbitrary, capricious, or in bad faith," it seems clear that the Commission must consider the impact of this letter from Mr. Polston.

This is particularly so when one considers that, at the time of this layoff, under the personnel rules then prevailing, the respondent had available a substantial degree of discretion in determining which employes would be subject to layoff. The layoff rules included the following provision at § Pers. 22.06(2), Wis. Adm. Code:

> "The appointing authority may exempt from the layoff group up to 2 employes or 20%, whichever is greater, of the number of employes in the layoff group... Exemptions may be used to retain employes having special or superior skills; for affirmative action purposes; or for other such purposes as may be determined by the appointing authority." (emphasis supplied)

At least theoretically, the respondent could have considered exempting Mr. Kuter under this provision had it felt that it had created an obligation to him by Mr. Polston's 1979 letter.

Among the other arguments advanced by the respondent are that Mr. Polston lacked authority to have made the commitment that Mr. Kuter argues he did, and that the Commission lacks the authority to enforce a contract.

As to the first argument, this runs to the merits and is not presented by the respondent's motion. With respect to the second argument, the Commission does not see its role as enforcing a contract. Rather, it simply is determining whether the respondent acted arbitrarily, capriciously, or in bad faith, as set forth in Weaver.

The Commission enters the following order in disposition of the respondent's motion in limine:

ORDER

The respondent's motion in limine is denied. The appellant will be allowed to present evidence on the matters discussed above -- i.e., reorganization, economic necessity, and the Polston commitment -- within the parameters of the foregoing opinion.

Dated: May 23, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jat

Laurie R. McCallum did not participate in the consideration or decision of this matter.

DENNIS P. McGILLIGAN, Commissioner

Parties:

David Kuter
2333 Sunset Dr., Rt. 4
Fond du Lac, WI 54933

Howard Bellman
Secretary, DILHR
P.O. Box 7946
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

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DAVID M. KUTER,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS,

Respondents.

Case No. 82-83-PC

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PROPOSED DECISION AND ORDER

This is an appeal pursuant to §230.44(1)(c), Stats., of a layoff. This matter is before the commission following a hearing that had been scheduled on the merits, and which also considered the respondent's "motion in limine," or to exclude certain evidence from consideration.

The aforesaid motion originally was filed in writing. It requested exclusion of "any evidence regarding the respondent's decision in 1981 to redefine the employing units in the Department of Industry, Labor and Human Relations, and to exclude any evidence regarding the respondent's determination of appropriate staffing patterns in light of the economic conditions."

At the hearing, the respondent's attorney's argument in support of this motion included the following:

> The respondents have filed their motion in limine basically arguing that the Commission doesn't have jurisdiction to hear certain issues and therefore shouldn't allow the introduction of certain evidence, or any evidence, on those issues. The petitioner seems to be challenging three different items, three different complaints.

First of all, he seems to be challenging the change in DILHR's employing units which was done at the end of 1981. Secondly, he is questioning and challenging the economic necessity of the layoff, which took place in April of 1982, and thirdly, he seems to be claiming that he has a contractual right to continue as Job Service Supervisor 5 in the Fond du Lac office, a contractual right which he bases on his exibit 1, which is a letter from Robert Polston to the petitioner.
The respondent believes and is claiming that the Personnel Commission doesn't have jurisdiction to review any of those issues and basically our argument, our motion, is based on the Weaver v. Personnel Board case. a Supreme Court case, and a Personnel Commission case entitled Oakley v. Commissioner, no. 78-66-PC (4/1/79). I think that those two cases taken together make it clear that in a layoff situation the issue is whether there was just cause for the layoff, and just cause is established by the employer showing that it has complied with the civil service statutes and the personnel rules that govern the layoff procedure. Those cases also establish very clearly that it's inappropriate to look into or question the issue of economic necessity for a layoff. A state employer has-it's a management prerogative to decide whether or not budget cutbacks or other economic situations may make it necessary to have a layoff and that's a question that's really beyond the reach of the Commission, and that's plainly clear from the Weaver case.

The same argument-an analogous argument with respect to the change in the employing unit. The employee has a prerogative, a management prerogative, to change its employing units, and that decision cannot be reached by a challenge to a layoff.

The third issue, whether or not there was a contractual right to continue in his Job Service Supervisor 5 position, again is an issue that the Commission does not have jurisdiction to reach. That issue really presents a breach of contract issue or some type of wrongful-not a wrongful discharge but perhaps a wrongful layoff based on contract, which really is, perhaps a case that should go to circuit court. . . . "

Thus, in the oral argument, the respondent expanded its "motion in limine" from two points to three.

The hearing examiner's ruling on the motion included the following:

"I would have to agree that based upon the Weaver, and also the Oakley case, that it appears to me that this Commission does not have the authority to review the question of economic necessity on the part of the respondent department, that once the evidence is presented in the terms of a statement or information indicating economic necessity that we can not go behind and determine whether or not in fact the decision on the part of the respondent was a wise one. That is the belief I have in terms of the Commission's authority.

> With respect to the second point with regard to the letter from Mr. Polston to Mr. Kuter in 1979, again I must say that I don't believe it's the Commission's authority to consider what might be considered quasi-contractual or in fact contractual matters between parties. We have authority to consider layoffs. We have authority to consider other matters-other personnel matters-but I'm not aware of any authority that we might have to consider what might be considered contractual matter between parties, so I would have to agree again with the respondent that, with regards to that letter, and its contents, and relevancy in terms of this hearing on the basis of layoff, I have some questions on whether or not it would have much relevance.
>
> To the last point of reorganization, again, relying on Weaver... it would appear that the Commission has no authority to decide, whether or not reorganization was correct, it appears that that is a question for management, and certainly in a layoff situation, based upon Weaver, we have no authority to look behind and whether reorganization was, or the form or method of reorganization was proper once that decision has been made and approved by the division of Personnel.
>
> I would have to agree with and approve the motion in limine, to evidence that pertains to the layoff and the layoff procedure under the administrative code and under the statutory requirements regarding layoff of classified personnel. So the motion in limine is in fact granted. . .

Thereafter, the examiner gave the appellant the opportunity to present an offer of proof as to those matters that he would have presented had the motion not been granted, and the appellant did so.

Thereafter, the parties reached a stipulation as to matters remaining in issue in light of the ruling on the motion. This was summarized in the following statement by the respondent's attorney:

> I think that it is important to Mr. Kuter that he preserve all of his rights in terms of the issues or the complaints that he has. And it seems to me that his complaints again are the three items-the change in the employing unit, economic necessity, and any contractual rights, and he may feel on the merits that some of those decisions were arbitrary and capricious, but he doesn't seem to have any complaints beyond those. And those are significant and broad enough in and of themselves.
>
> I guess in order to accommodate his needs in order to preserve his rights there, I would propose a stipulation to this effect: The parties stipulate that the petitioner [appellant] is not complaining about and is not questioning DILHR's compliance with the Statutes and Personnel rules regarding his layoff, except

> that he is challenging one, two, and three the change in the employing unit, economic necessity, and any contractual rights.

The appellant then stated his agreement to this stipulation, and the hearing was adjourned after the establishment of a post-hearing briefing schedule.

The Commission is of the opinion that the foregoing motion was correctly decided with respect to the matters relating to economic necessity and reorganization, based on the authority provided by the Weaver and Oakley cases. However, the exclusion of all evidence relating to what might be characterized as Mr. Polston's commitment, as reflected in his letter to the appellant dated December 12, 1979, swept too broadly.

While it seems clear, as an abstract proposition, that the Commission lacks authority to enforce a contract, the question of the materiality of the Polston commitment cannot be considered in so narrow a context. The issues for hearing that the parties agreed to include the following:

> Whether there was just cause for the layoff and voluntary demotion of the appellant effective April 19, 1982.
>
> > Sub-issue: Whether any previous agreement with or commitment by DILHR, as set forth in the December 12, 1979, letter from Mr. Polston to the appellant, as a matter of law should stop the respondent from the aforesaid transaction or otherwise render it illegal.
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> Prehearing conference report dated May 20, 1982.

Pursuant to the Weaver case, in a layoff appeal the respondent employing agency has the burden of proof, which was stated as follows:

> 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 it has acted in accordance with the administrative and Statutory guidelines and 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).

The difficulty with the ruling on the motion, in its exclusion of all evidence regarding the Polston commitment, is that this fails to take into account that such evidence cannot be said to be irrelevant to the question

of whether the respondent acted in an arbitrary and capricious manner. This is so whether one looks merely at the commitment itself or at the question of, whether all the elements of an equitable estoppel against a state agency are present.

Since the ruling on the motion excluded all evidence of the Polston commitment, it must be ordered that the hearing be reopened. It is unclear whether additional evidence will need to be taken, in light of the presence of the offer of proof. The parties should be consulted in this regard prior to convening another hearing.

ORDER

So much of the ruling on the motion in limine which excluded all evidence relating to the "Polston commitment" is rescinded, and this matter is remanded to the examiner for further proceedings in accordance with this decision

Dated:_____,1983 STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Chairperson

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LAURIE R. McCALLUM, Commissioner

AJT:jab

_____
DENNIS P. McGILLIGAN, Commissioner

Parties:

David M. Kuter
2333 Sunset Drive, Rt. 4,
Fond du Lac, WI 54933

Howard Bellman
Secretary, DILHR
P.O. Box 7946
Madison, WI 53707