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WILLIAM R. NEWBERRY, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

HEALTH AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 82-100-PC \*

DECISION  
AND  
ORDER

\* \* \* \* \*

MARTIN J. EFT, \*

v. \*

Secretary, DEPARTMENT OF \*

HEALTH AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 82-98-PC \*

\* \* \* \* \*

NATURE OF THE CASE

These are appeals pursuant to §230.44(1)(c), stats., of layoffs, which were consolidated for the purpose of hearing.

FINDINGS OF FACT

1. Both appellants, at all times material, have been employed by the respondent in the Division of Vocational Rehabilitation (DVR), with permanent status in the classified service.

2. Prior to their layoffs, the appellants were employed as Regional Administrators classified as Human Services Administrator 1, under the direct supervision of John Biddick, who initially was the Director of the Bureau of Client Services and subsequently the Assistant Director of that bureau.

3. As a result of certain involuntary budget reductions, the respondent determined to delete a number of positions in DVR, including four regional administrator (or supervisor) positions, which were classified as Human Services Administrator 1.

4. The following regional administrators were in the layoff group of Human Services Administrator 1, and are listed in order of most to least seniority:

William Newberry  
William Eft  
Rodney Van Devanter  
Donald Snyder  
Raymond Truesdell

5. The DVR administrator, Patricia G. Kallsen, elected to exempt Mr. Van Devanter and Mr. Truesdell from layoff pursuant to §Pers 22.06(2), Wis. Adm. Code, on the basis of "special or superior skills."

6. In making the determination on these exemptions, Ms. Kallsen consulted only with Mr. McClarnon, DVR Deputy Administrator, and relied very heavily on his recommendation, which was to exempt Truesdell and Van Devanter.

7. Mr. Biddick, the direct supervisor of the appellants and the other employes in the layoff group, reported to Mr. McClarnon.

8. Mr. McClarnon evaluated the performance record of the employes in the layoff group for the purpose of recommending exemptions primarily on the basis of certain written performance evaluations of these employes which had been prepared by Mr. Biddick, see Respondent's Exhibits 5-8. These were the most recent available written performance evaluations of these employes available at the time of the exemption decision. The evaluations of the exempted employes were more favorable than those of the appellants.

9. Mr. Biddick's recommendation for an exemption on the basis of "special or superior skills" would have been Mr. Newberry.

10. At the time of the decision in question, Mr. Biddick and Mr. McClarnon each had been with DVR about 25 years. Ms. Kallsen had been with DVR since 1971.

11. Following the determination to exempt Truesdell and Van Devanter, the appellants were notified of their layoffs.

12. Mr. Newberry originally was notified by letter of March 18, 1982, Respondent's Exhibit 4B, that he would be laid off effective April 2, 1982. By letter dated March 25, 1982, Respondent's Exhibit 4A, he was notified that: "In order that sufficient time be provided to prepare for your demotion in lieu of layoff into a vacant VR Supervisor 3 position ... we are changing the effective date of the layoff from your Human Service Administrator 1 position ... to April 16, 1982. All rights and benefits outlined in the March 18, 1982, letter will pertain during this additional two week period."

13. Mr. Newberry received the March 18, 1982 letter on or after March 19, 1982. Prior to March 25, 1982, he elected to demote into a vacant VR Supervisor 3 position, and subsequently did so, effective April 19, 1982. His salary was red-circled, see §Pers 29.025, Wis. Adm. Code.

14. Mr. Eft originally was notified by letter March 18, 1982, that he would be laid off effective April 2, 1982. By letter dated March 25, 1982, he was notified that: "In order that sufficient time be provided to vacate the VR Supervisor 1 position for which you have exercised your displacement rights, we are changing the effective date of the layoff from your Human Service Administrator 1 position ... to April 16, 1982. All rights and benefits outlined in the March 18, 1982, letter will pertain during this

additional two-week period." Both of these letters were included as part of Respondent's Exhibit 3.

15. Mr. Eft received the March 18, 1982, letter on or after March 19, 1982. Prior to March 25, 1982, he elected to exercise his displacement rights with respect to a VR Supervisor 1 position, and subsequently did so, effective April 19, 1982. His salary was red-circled, see §Pers 29.025, Wis. Adm. Code.

16. Following the personnel movements by the appellants as set forth above, certain of their duties and responsibilities were assumed by other employees. In particular, some of Mr. Eft's duties and responsibilities were handled by Mr. Brekke, a less senior but higher ranking employe in the career executive program.

17. Sometime after the personnel movements by the appellants as set forth above, an assistant bureau chief position in the Bureau of Operations and Planning was filled by Mr. Mommaerts. The failure to have used this position for restoration purposes was not appealed nor was it noticed as an issue for hearing with respect to the instant appeals.

18. The layoffs in question were effected pursuant to a comprehensive written layoff plan that had been approved by the administrator, see §Pers 22.06, Wis. Adm. Code.

#### CONCLUSIONS OF LAW

1. These appeals are properly before the Commission pursuant to §230.44(1)(c), stats.

2. The respondent has the burden of proving that there was just cause for the layoffs, 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 in all respects.

4. The assignment of certain of Mr. Eft's duties to Mr. Brekke's position was neither illegal nor improper under the civil service code.

5. Any question as to whether Mr. Eft should have been recalled to the assistant bureau chief job referred to in finding #19 is not properly before the commission since it was neither appealed nor noticed for hearing.

#### OPINION

Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), provides a framework for decision of this type of appeal. In that case, the Supreme 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 statutory guidelines and the exercise of that authority has not been arbitrary and capricious.

\* \* \*

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.

The appellants have argued that the respondent failed to provide 15 days notice of layoff as required by §Pers 22.07, Wis. Adm. Code. The respondent contends that any defect with respect to the initial notice of layoff which had denominated April 2, 1982, as the effective date of layoff, was cured by the subsequent letter of March 25, 1982, which changed the effective date to April 16, 1982.

The second letters, dated March 25, 1982, had the effect of superseding the first letters with respect to effective date. It is noteworthy that the second letters stated that "All rights and benefits outlined in the

March 18, 1982, letter, will pertain during this additional two week period." Because of these second letters and the change in the effective date of the layoffs from April 2d to April 16th, the appellants had more than the requisite 15 day notice, including the opportunity to exercise their rights and benefits under the civil service code with respect to layoff, and to consider whether or not to appeal, during this period.

As to the matter of arbitrary or capricious action, the appellants argue that this describes the respondent's decision on exemptions from layoff.

The decision on exemptions was made by Ms. Kallsen, the division administrator. She relied for her advice on this question on Mr. McClarnon, the deputy administrator, and did not consult directly with Mr. Biddick, the direct supervisor of the employes in the layoff group, which included the appellants.

Mr. McClarnon recommended the exemption, on the basis of "special or superior skills" of two employes other than the appellants. Mr. Biddick testified that if the decision had been his, his first choice for exemption would have been Mr. Newberry, based on performance factors.

Arbitrary or capricious administrative action 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. The respondent's decision in this instant case was premised on the assessment of Mr. McClarnon, who had about as many years of service with the agency as Mr. Biddick. While Mr. Biddick was the direct supervisor of the employes in question, Mr. McClarnon's recommendation was supported by Mr. Biddick's written performance evaluations of the affected employes that were in existence at the time the exemption decision was made, see Respondent's Exhibits 5 - 8. In the view of the Commission, the

exempted employes' evaluations are more favorable than the appellants' evaluations.

The Supreme Court in Weaver made it clear that in an appeal of this nature, the employer is not required to prove that the employes selected for exemption from layoff were the best qualified. Rather, the employer is only required to show that it had a rational basis for its evaluation and decision. See also, Reit v. WERC, Wis. Pers. Commn. 81-128-PC (6/25/82); affirmed by Milwaukee Co. Circuit Court, No. 589-670 (12/15/82). Therefore, the Commission's inquiry in appeals of this nature is relatively limited. If the employer can show that it had a rational basis for its decision, it has satisfied its burden of proof. It is not required to prove that its decision was perforce the best personnel decision that could have been made under the circumstances. Under the facts and circumstances set forth on this record, the Commission can only conclude that the respondent had at least a rational basis for its actions.

It is further noted that at the time of the layoff there was no requirement for a formal "ranking," as contended by the appellants. §Pers 22.03(4), Wis. Adm. Code, referred to in the Weaver decision, was superseded by §Pers 22.06, Wis. Adm. Code (1975).

Mr. Eft also raised the issue of whether the respondent's reassignment of certain of his former duties to an employe (Mr. Brekke) with less seniority was improper or illegal. The record revealed that Mr. Brekke was a less senior but higher-ranked career executive, see chapter Pers 30, Wis. Adm. Code. As a career executive, Mr. Brekke could not have been part of Mr. Eft's layoff group. See §Pers 30.105 (2), Wis. Adm. Code. The Commission can perceive no illegality or impropriety in assigning certain of Mr. Eft's duties to Mr. Brekke following Mr. Eft's layoff.

Mr. Eft attempted to contest the filling of an assistant bureau chief vacancy which occurred sometime after his layoff. He argued that someone in the layoff group should have been restored to this position.

This transaction was not part of the layoff. It was neither appealed nor part of the issue for hearing. As such it is outside the scope of this appeal. See, § 227.07(1), (2), stats., Wis. Telephone Co. v. DILHR, 68 Wis. 2d 345, 228 N.W. 2d 649 (1975).

ORDER

The appellants' various motions for the administrative equivalent of directed verdict are denied. The respondent's actions are affirmed and these appeals are dismissed.

Dated: August 17, 1983 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

AJT: lmr

  
DENNIS P. MCGILLIGAN, Commissioner

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