STATE OF WISCONSIN PERSONNEL COMMISSION

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RODOLFO J. MIRANDILLA,

Appellant,

v.

Secretary, DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Case No. 82-189-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., with respect to the removal of the appellant's supplemental pay for supervisory/administrative responsibility. At the prehearing conference, the parties agreed to the following statement of issues:

1. Whether the Commission has subject matter jurisdiction. Sub-issue: Whether the transaction in question is legally a demotion or reduction in pay that would be cognizable under §230.44(1)(c), Stats.

2. If so, whether there was just cause for the action taken.

The conference report reflected that "The parties agreed to defer a decision on the jurisdictional issue until after the hearing." At the hearing, the respondent raised an additional jurisdictional objection based on untimely filing of the appeal.

The respondent submitted, with a post hearing brief on April 21, 1983, a copy of Section D of the State of Wisconsin Compensation Plan for 1979-1981, of which the Commission takes official notice.

FINDINGS OF FACT

1. In 1980 the appellant was employed as a physician in Red Lake Falls, Minnesota, where he was guaranteed a minimum annual income of $60,000.00 by the St. John's Hospital Corporation and Red Lake County Health Planning Council.

2. In 1980, the Wisconsin Veterans Home, King, Wisconsin (hereinafter referred to as the home), a unit of the Department of Veterans Affairs, advertised an opening for a staff physician, with a starting annual salary advertised to $63,000.

3. The appellant submitted an application for this vacancy on or shortly after April 15, 1980.

4. By letter of May 5, 1980, Mr. Peters, personnel manager at the home, indicated to the appellant as follows:

> Based on the preliminary information received from you, we could offer you a starting salary of $56,300. This would increase to $60,250 on July 1, and to $61,350 upon completion of a six month probationary period. Additional salary is also available if you are board certified or have residency training in a specialty related to the care of our residents.

5. Thereafter, the appellant indicated that he would not accept the job at less than his Minnesota minimum income--i.e., $60,000 per year.

6. In order to raise the salary to a level acceptable to the appellant, the institution management decided to create the title of assistant medical director for the position in question and to add to the aforesaid salary of $56,300 per annum a supplemental supervisory pay addition.

7. The function of the assistant medical directorship, as conceived and ultimately implemented by management, was to fill in for the medical director in his or her absence.

8. The aforesaid function of filling in for the medical director had been divided among the staff physicians prior to the designation of the appellant as assistant medical director.

9. Mr. Peters then told the appellant that if he would provide proof of his Minnesota income, that the respondent would be able to pay him $60,000.

10. By letter of July 1, 1980, the appellant sent to Mr. Peters a copy of his contract with the foregoing Minnesota entities. Mr. Barden, the institution superintendent, sent the appellant a letter dated July 15, 1980, which included the following:

> This is to confirm your appointment as Staff Physician at the Wisconsin Veterans Home, beginning August 4, 1980.
>
> As agreed previously, your starting salary will be $29.40 per hour or $61,152 on an annual basis. You will be required to serve a six month probationary period, and will receive an increase of 60¢ per hour upon the successful completion of probation.

11. The aforesaid salary included the sum of $1.75 per hour as supplemental supervisory pay (the institution originally had requested of the Division of Personnel a figure of $2.02 per hour. For reasons that do not appear of record, that was reduced by the latter agency to $1.75.)

12. In reliance on the respondent's statement, as set forth in the foregoing letter of July 15, 1980, as to his salary, the appellant left his practice in Minnesota and commenced employment at the home on August 4, 1980, with a starting salary of $29.40 per hour.

13. The appellant had not been informed, and was not aware, when he commenced his employment on August 4, 1980, that his salary of $29.40 per hour included the $1.75 supplemental supervisory pay.

14. The appellant was not officially appointed as assistant medical director until September 30, 1980, when the commandant, Mr. Barden, promulgated the following memo:

> ... Effective this date I have appointed Dr. Rodolfo Mirandilla, Deputy Medical Director of the Wisconsin Veterans Home. In this capacity, Dr. Mirandilla is authorized to act on behalf of Dr. Oscar P. Ansaldo [medical director] whenever he is absent. At such times, Dr. Mirandilla will be the Acting Medical Director.

15. Notwithstanding that the appellant, as aforesaid, was not officially appointed as assistant medical director until September 30, 1980, he received the $1.75 supplemental supervisory pay at all times from August 4 through September 30, 1980.

16. In 1982, Dr. Ansaldo resigned as medical director and replaced the appellant as assistant medical director, resulting ultimately in the appellant's loss of his supplemental supervisory pay.

17. The appellant originally received a letter dated July 1, 1982, from LaVerne L. Hanke, Administrative Officer I, stating that "...effective July 11, 1982, you will be relieved of the duties of Assistant Medical Director... The deletion of administrative duties from your present position will result in a reduction of $1.75 in your hourly salary." Subsequently, a letter dated July 6, 1982, from Mr. Hanke, stated as follows:

> This is to advise you that my letter of July 1, 1982, advising you in a decrease in your salary was in error. Although the salary stated in your original letter of employment did include an adjustment for performing the duties of Assistant Medical Director, this adjustment was not stipulated.
>
> Therefore, effective July 11, 1982, your duties as Assistant Medical Director will be changed to those of a Staff Physician with no reduction in salary.

18. Sometime thereafter, the appellant received a letter dated August 18, 1982, from Mr. Barden (Respondent's Exhibit 18), which stated in part as follows:

> As you are aware, recently your duties at the Wisconsin Veterans Home have been changed. Upon appointment of the new Medical Director, Kay Jewell, it was determined that you would be relieved of the Assistant Medical Director duties that you performed as part of your employment. This action is not a demotion or an adverse reflection on your performance but rather is the result of carefully considered staff assignment changes. These changes are within the state civil service personnel policies and reflect the managerial authority and responsibility to assign and revise the duties of employes as it is determined to be necessary and appropriate.
>
> Your pay will be reduced by $1.75 per hour, as required by the State Compensation Plan, to reflect the change in assignments. The $1.75 is a supplemental pay which you have received since you were hired. At that time, the Assistant Medical Director responsibilities were assigned to you. For this reason, no additional compensation is due to you. The appropriate documents have been processed and the change should be reflected on the check you receive September 2, 1982.

19. The effective date of the deletion of the appellant's supplemental supervisory pay was September 2, 1982. He was notified of this deletion on or after August 26, 1982. The appellant had had permanent status in the classified service since he had successfully completed probation.

20. Management replaced the appellant with Dr. Ansaldo as assistant medical director not because of any management dissatisfaction with the appellant's performance. The sole reason assigned by the respondent for this action was that it believed Dr. Ansaldo to have been better qualified to have been assistant medical director, primarily because of his experience as medical director.

21. Sometime in late 1982 or early 1983, Dr. Ansaldo resigned his employment at the home. The respondent did not reappoint a new assistant medical director thereafter, but rather utilized the two staff physicians to fill in for the medical director in her absence, without additional compensation, as had been the case before the appellant assumed the title in 1980.

22. The appellant filed his appeal with this Commission on September 22, 1982.

CONCLUSIONS OF LAW

1. This appeal was timely filed pursuant to §230.44(3), Stats.

2. The Commission has jurisdiction over the subject matter of this appeal as a constructive reduction in base pay cognizable pursuant to §230.44(1)(c), Stats.

3. The action taken was arbitrary and capricious and accordingly there was not just cause therefore.

OPINION

Section 230.44(3), Stats., provides in part as follows:

> TIME LIMITS. 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....

The respondent argues that this appeal, filed September 22, 1982, was untimely in that the appellant was notified by letter of July 1, 1982, that he would be relieved of his assistant medical director duties effective July 11, 1982.

However, the appeal on its face is of a "demotion and reduction in pay," (emphasis supplied), and the reduction set forth in the July 1st letter was rescinded not in the July 6th letter and not reinstated until

the August 26th letter, effective September 2nd. Furthermore, it is quite clear from this record, as will be discussed below, that the essence of the subject matter of this appeal is the supplemental salary, not the title of assistant medical director, which was never more than a means to obtain the extra compensation.

The respondent also objects to jurisdiction on the ground that the transaction is not cognizable under §230.44(1)(c), Stats., as it is not a "reduction in base pay." (emphasis supplied), the word "base" having been inserted by Chapter 140, sec. 11, Laws of 1981, effective March 31, 1982.

The appellant argues that the change in the law, if applied to him would constitute "an unconstitutional infringement on the rights of parties to contract and to have contractual obligations performed." Brief filed April 6, 1983. The Commission need not approach this constitutional question inasmuch as in its opinion the transaction in question is cognizable notwithstanding the change in the statute as a constructive reduction in base pay.

The concept of personnel transactions which are considered "constructive" in nature is a familiar one in Wisconsin. The main area where this has been recognized is in the area of discharges. Even though statutes may only give administrative agencies jurisdiction over "discharges," this does not prevent the examination of a transaction facially denominated something other than a discharge to determine whether, in legal effect, it amounts to and should be considered a discharge.

For example, in Watkins v. Milwaukee County Civil Service Comm., 88 Wis. 2d 411, 276 N.W. 2d 775 (1979), the Supreme Court dealt with the question of whether a resignation from civil service employment which was

alleged to have been coerced was cognizable by the Milwaukee County Civil Service Commission under a statute providing for hearings on discharges, § 63.10(1), Stats. Despite the fact that the statute makes no explicit reference to coerced resignations, the Court had no difficulty in concluding that they were covered by the statute:

> Resignation obtained by coercion poses serious possibilities of abuse. "[A] separation by reason of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency." (Emphasis in original.) Dabney v. Freeman, 358 F.2d 533, 535 (D.C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. The strength of this policy is underscored by the language of sec. 63.04, Stats., which provides that "no person shall be ... removed from the classified service in any such county [which has adopted the civil service system], except in accordance with the provisions of said sections [secs. 63.01 to 63.16 inclusive]." 88 Wis. 2d at 420.

This type of approach was followed by this Commission in Evard v. DNR, 79-251-PC (2/19/80), and Petrus v. DHSS, 81-86-PC (12/3/81). The Commission's predecessor agency, the Personnel Board, in Juech v. Weaver, (1/13/72), determined that a transaction which had been denominated a reclassification was in legal effect a demotion, where the employer first removed all of the appellant's supervisory duties and subsequently reclassified his position from Maintenance Mechanic 2 to Maintenance Mechanic 1.

In the instant case, the supplemental supervisory pay was, in a literal sense, not part of the base pay, just as, in a literal sense, a resignation is not a discharge. However, the whole concept of an assistant medical director and the attendant supplemental pay was, as the home's personnel manager candidly testified, merely a device to obtain a

sufficient starting salary to satisfy the amount requested by the appellant. The work associated with the title was work that had been performed by the staff physicians before the designation of an assistant medical director and continued to be after Dr. Ansaldo resigned and there no longer was an assistant medical director. The transparency of the assistant medical director title is underscored by the facts that the appellant was not officially so designated until September 30, 1980, almost two months after he commenced employment at the home, but he was paid the additional salary anyway, and that the institution did not see fit to maintain the title after Dr. Ansaldo left.

The intended purpose underlying supplemental supervisory pay is not set forth in the Compensation Plan. It seems manifest, however, based on the very structure of the pay plan, that the intended purpose is to compensate physicians for the performance of supervisory functions that may be assigned to a physician's position in addition to its essential or basic functions--presumably primarily the provision of medical care and treatment. Base pay, on the other hand, does not depend on whether certain specific duties and responsibilities above and beyond patient care are assigned to the physician.

A physician could expect that his or her base pay would continue to be paid unless his or her pay were reduced for disciplinary reasons, in which case an appeal clearly would lie under §230.44(1)(c), Stats., some other disciplinary action were taken, or he or she were laid off.

On the other hand, a physician receiving normal supplemental supervisory pay could expect to be paid such pay only while performing supervisory duties. Once those duties were removed, he or she could expect

not to receive that pay, and, since the change in §230.44(1)(c), Stats., in 1982, there would be no right to appeal.

In this case, the duties and responsibilities of the assistant medical director were not recognized as an entity for pay purposes before the appellant began his employment or after Dr. Ansaldo ended his, even though it was and is necessary for someone on the staff to fill in in the absence of the medical director. The concept of the title of assistant medical director was conceived and implemented solely as a means of meeting the appellant's salary requirements and inducing him to leave his practice in Minnesota and to accept the position in question. The appellant was paid supplemental supervisory pay for approximately two months before he officially was designated assistant medical director. Under these circumstances, the pay associated with the assistant medical director title is far closer in concept to base pay than to supplemental supervisory pay.

In the Watkins case, the court looked to the possibility of abuse in determining that an alleged coerced resignation should be treated in legal effect as a discharge so that it would be subject to administrative review by the Milwaukee County Civil Service Commission:

> Resignation obtained by coercion poses serious possibilities of abuse. [A] separation by reasons of a coerced resignation is, in substance, a discharge effected by adverse action of the employing agency. (Emphasis in original.) Dabney v. Freeman, 358 F. 2d 533, 535 (D.C. Cir. 1966). Treating coerced resignations as discharges for purposes of hearings under sec. 63.10, Stats., fits well with the policies of security of tenure and impartial evaluation which underlie the civil service system. 88 Wis. 2d at 420.

In the instant case, there is an apparent difference between a more traditional reduction in supplemental pay, where an agency determines to reassign or eliminate real, meaningful duties and responsibilities, and a

case such as this where a title is created and then reassigned basically only for the purpose of augmenting employes' salaries. The potential for abuse in the latter type of transaction is apparent, as an employe can reassign a title for the sole purpose of increasing or decreasing salaries, solely at the employer's whim, and without any available review.

For these reasons, the Commission concludes that the transaction here in question amounted to a reduction in base pay and should be treated as a constructive reduction in base pay which is appealable pursuant to §230.44(1)(c), Stats.

Having determined that jurisdiction is present pursuant to §230.44(1)(c), Stats., the Commission must consider the second issue for hearing, "... whether there was just cause for the action taken."

In appeals under §230.44(1)(c), Stats., involving disciplinary actions taken for workplace misconduct or inefficiency, the just cause standard involves the question of whether the employe's conduct has sufficiently undermined the efficient performance of the duties of employment, with the employer having the burden of proof. See Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974); Reinke v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1964). In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), an appeal of a non-disciplinary layoff for economic reasons, the court held that in such a case, although the respondent continued to have the burden of proof, the standard was less rigorous than that prevailing in disciplinary proceedings:

> 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. 71 Wis. 2d at 52.

In this case, there are few explicit legal requirements with respect to the administration of supplemental supervisory pay. The only real question is whether the respondent's action was arbitrary and capricious, which has been defined as action which is "unreasonable" or which "does not have a rational basis." Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W. 2d 86, (19654); Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 54, 237 N.W. 2d 183 (1976).

The only rationale advanced by respondent for their decision to remove the appellant as assistant medical director and to give the title to Dr. Ansaldo was that Dr. Ansaldo was better qualified. The immediate difficulty with this rationale is that the record clearly shows that the assistant medical director title was never more than a device for salary augmentation. What the respondent did was to take a function--filling in for the medical director in his or her absence--that was performed by the staff physician both before and after Drs. Mirandilla and Ansaldo were denominated assistant medical director, and to use it as the basis for a title and the appurtenant payment of supplemental supervisory pay.

To take a title that is transparently and admittedly a salary augmentation device, and to reassign it on the grounds of superior qualifications, when there have never been any concerns expressed about the performance of the appellant, strikes the Commission as at least questionable.

One also must consider that the respondent developed the whole concept of the assistant medical director title for the sole purpose of being able to raise the starting salary offer for the position in question above the $56,300 figure otherwise allowable under the pay plan, in order to induce the appellant to abandon his practice in Minnesota and to accept the

appointment, and the appellant, in reliance on that offer, did exactly that. To then remove this title and the accompanying salary that had been promised the appellant, solely because Dr. Ansaldo was considered better qualified, when there were no questions about the appellant's performance, is even more questionable. The Commission must conclude that the decision was unreasonable, arbitrary, and capricious.

The action of the respondent must be rejected, and the appellant is entitled to have his supplemental supervisory pay restored, with appropriate back pay for the period he has not received such pay.

ORDER

The action of the respondent is rejected and this matter is remanded for action in accordance with this decision.

Dated: July 21, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jmf

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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