STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM PHILLIPS, JR.

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 82-43-PC

DECLARATORY RULING

NATURE OF THE CASE

This matter originally was filed as an appeal of a personnel transaction with respect to the determination of the appellant's salary on reinstatement to employment with the respondent. In initial proceedings before the Commission, the respondent objected to subject matter jurisdiction, but the parties agreed to hold the jurisdictional question in abeyance and to request jointly that the Commission decide the matter by declaratory ruling pursuant to §227.06, Stats.

The parties have agreed to submit this matter on the factual basis provided by a written fact stipulation and certain affidavits. The findings which follow are based on these materials, as well as the State of Wisconsin Compensation Plans for 1979-1983, of which the Commission takes official notice.

Finally, the respondent in his brief has conceded that the department:

> "is estopped from relying on the civil service laws and rules in establishing Phillips' rate of pay upon reinstatement, but only insofar as Benkert represented to Phillips that his 'salary would be the same as it was when [he] left state service, plus the across-the-board raises'." (emphasis in original)

FINDINGS OF FACT

1. The appellant initially began employment with the respondent on July 18, 1977, in an Attorney 12 position in the classified civil service.

2. On October 30, 1978, he was promoted to an Attorney 15 position in the classified civil service in another agency, the Office of the State Public Defender.

3. On May 6, 1979, the appellant was regraded to Regrade Point A for an Attorney 15.

4. On July 1, 1979, the appellant's rate of pay was increased to $10.346 per hour.

5. On July 29, 1979, attorney positions in the Office of the State Public Defender were removed from the classified service and were placed in the unclassified service, in accordance with Ch. 34, Laws of 1979.

6. On May 4, 1980, appellant's rate of pay was increased to $11.458 per hour. This amount was identical to the amount received by employes in the classified service at regrade Point B for an Attorney 15 under the 1979-80 state compensation plan.

7. On June 29, 1980, the appellant's rate of pay was increased to $12.130 per hour. This amount was less than the amount received by employes in the classified service at Regrade Point B for an Attorney 15 under the 1980-1981 state compensation plan. The latter amount was $12.253 per hour.

8. Laying to one side the question of whether such an obligation was imposed by §Pers 29.03(6), Wis. Adm. Code, with respect to the appellant, which the Commission does not reach, the State Public Defender was not generally required to compensate attorneys in unclassified positions in the

same manner as attorneys in classified positions, but could do so in his discretion.

9. The appellant's supervisor, John E. Carter, gave the appellant the foregoing increase, which was slightly smaller than the increase given to attorneys in the classified service, solely because Mr. Carter wished to give slightly larger increases to employes who previously had worked as public defenders for Racine County, and in order to do this it was necessary to recommend a subtraction from the increases given to employes like the appellant, who had done all their work as public defenders as state employes. The smaller increase paid to the appellant was designed to be so slight that it would cause them no more than a de minimis loss of salary.

10. On April 17, 1981, the appellant resigned from the Office of the State Public Defender to enter private practice. His rate of pay upon resignation, and his highest rate of pay in an unclassified attorney position, was $12.130 per hour.

11. In the fall of 1981, the appellant applied for reinstatement with the respondent, and was interviewed for an Attorney 12 position in the classified civil service.

12. Harry Benkert, director of the Legal Services Bureau in the respondent's Worker's Compensation division, told the appellant that "the last attorney the Division had rehired came back at the salary he had when he left state service, plus the across-the-board raises, and the same standard would apply to [appellant]."

13. Robert Collins, supervisor of the respondent's Milwaukee hearing office, offered the appellant the position "on the basis of the interview."

14. The appellant decided to leave private practice and return to state employment on the basis of the representation that his salary would be "the same as it was when he left state service, plus the across-the-board raises."

15. On January 11, 1982, the appellant was reinstated by the respondent in the aforesaid position.

16. At the time of his reinstatement, the 1981-1982 state compensation plan provided the following regrade point minimums for an Attorney 12 in the classified service:

Regrade Point A - $11.616
Regrade Point B - $13.025
Regrade Point C - $14.196

17. Upon reinstatement, the respondent established the appellant's rate of pay at $11.736 per hour by starting with his highest rate of pay in the classified service, or $10.346 per hour, and adding to that rate the across-the-board adjustments given to represented employes in the classified service on July 1, 1980 (seven percent) and on July 1, 1981 (six percent).

18. On October 17, 1982, the appellant completed one year of service at Regrade Point A and was regraded to Regrade Point B, and his rate of pay was increased to $13.197 per hour.[FN]

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §227.06, Stats.

[FN] This finding is based on certain factual allegations in the respondent's brief which were not disputed by the appellant in his reply brief or otherwise.

2. Pursuant to the doctrine of equitable estoppel, the respondent is estopped from failing to pay the appellant, upon reinstatement, less than his highest rate of pay in the unclassified service, plus the adjustment for represented attorneys in the classified service on July 1, 1971, i.e., in toto, $12.858 per hour.

3. The respondent had neither a legal obligation, nor, on this record, a legal basis, to have paid the appellant more than as aforesaid.

4. The respondent acted illegally and abused its discretion in establishing a rate of pay upon the reinstatement of the appellant, but only as, and to the extent, set forth in the foregoing estoppel.

5. The aforesaid estoppel operates against the appellant only until the appellant was regraded to Regrade Point B on October 17, 1982.

OPINION

The appointment of the appellant to the Attorney 12 position in the Worker's Compensation Division in 1982 was a reinstatement pursuant to §230.22, Stats.:

> Employes who have completed an original appointment probationary period in the classified service and are appointed to a position in the unclassified service shall be subject to the following provisions relative to ... restoration rights, reinstatement privileges and pay:
>
> (1) A person appointed ... by any ... appointing authority when both the classified and unclassified positions are within his or her department, shall be granted a leave of absence without pay for the duration of the appointment and for 3 months thereafter, during which time the person has restoration rights to the former position or equivalent position in the department in which last employed without loss of seniority. The person shall also have reinstatement privileges for 3 years following appointment to the unclassified service or for one year after termination of the unclassified appointment whichever is longer.

An employe appointed to the unclassified service only has restoration rights to his or her former position or equivalent position in the department where

last employed in the classified service. This was the office of the State Public Defender (SPD). There is no provision for restoration to any other agency, such as, here, DILHR.

Section 29.03(6)(b), Wis. Adm. Code, provides:

> "When an employe is reinstated, the pay may be at any rate within the pay range for the class to which the employe is reinstated which is not greater than the last rate received plus intervening across-the-board general pay adjustments. The adjustments applied to the employe's last rate received shall be that of the appropriate pay schedule for the class from which reinstatement eligibility is derived."

The term "last rate received: is defined by §29.03(6)(a), Wis. Adm. Code, as follows:

> "... the highest rate received in the classified service position from which reinstatement eligibility is derived or the highest rate received within the last 3 years in a position in which the employe had obtained permanent status in class, whichever is greater."

The Commission need not determine whether, on the facts here present, the "last rate received" for the purpose of determining the appellant's salary on reinstatement should have been based on his pay status in the classified or the unclassified service, since the respondent has conceded that the agency is estopped as follows:

> "... from relying on the civil service laws and rules in establishing Phillips' rate of pay upon reinstatement, but only insofar as Benkert represented to Phillips that his 'salary would be the same as it was when [he] left state service, plus the across-the-board raises." Thus, Phillips' rate of pay upon reinstatement should have been his last rate received in the unclassified service, $12.130 per hour, plus the intervening across-the-board adjustment given to represented attorneys in the classified service on July 1, 1971 (six percent), or a total of $12.858 per hour." (emphasis in original) Respondent's brief, pp 8-9.

Notwithstanding the respondent's concession, there remain other matters in dispute.

position. The Commission can find no basis upon which to reach the interpretation urged by the appellant, and sees no need to recite the extensive legislative history detailed in respondent's brief.

Furthermore, even if the appellant's interpretation of §230.33(3), Stats.,, and his argument that the SPD erred in establishing his rate of pay at $12.130 per hour rather than at 12.253 per hour, were well-founded, there is no provision in the civil service code which would have permitted the respondent to have calculated the appellant's salary on reinstatement on a higher pay rate than $12.130. To the contrary, this would have been in violation of the code.

The respondent was required to have calculated the appellant's salary in accordance with the provisions of §Pers 29.03(6)(a) & (b), Wis. Adm. Code, based on the "last rate received" and "highest rate received." (emphasis supplied). The appellant never received more than $12.130 per hour. Even if the SPD had erred in not having paid him more, there simply is no way under §Pers 29.03(6) that the appellant's pay rate could have been calculated on the basis of any higher rate than he actually was paid, or received, at the SPD.

The remaining issue has to do with the appropriate extent or duration of the equitable estoppel that has been conceded by the respondent.

The respondent concedes that the appellant should have been hired at $12.858 per hour rather than the actually established figure of $11.736. The respondent takes the position that the appellant is entitled to be reimbursed for the difference between $12.858 and $11.736 from the date he was reinstated, until October 17, 1982, when he completed one year at Regrade

As set forth above, the respondent is willing to concede that it should have used the last pay rate received by the appellant in the unclassified service - $12.130 - in computing the appellant's salary on reinstatement to reach a total of $12.858. This ($12.130) is the rate of pay the appellant was receiving when he left the SPD office.

In his briefs the appellant now argues that the SPD erred in establishing his rate of pay at $12.130, and therefore the respondent is obligated to pay him on the basis of the "correct" rate of pay that he should have received from the SPD.

The appellant's contention is based substantially on his interpretation of §230.33(3), Stats., which provides:

> An employe appointed to a position in the unclassified service from the classified service shall be entitled to receive at least the same pay received in the classified position while serving in such unclassified position.

He argues that this statute obligated the SPD to have paid him at the same rate as he would have received had he remained in the classified position:

> "... this language is clear and unambiguous. It does not refer to the pay the employer [sic] received when he was appointed to a position in the unclassified service but to his pay while serving in such unclassified position and that pay would, over the time he was serving in that position, increase as it did in the instant situation." Appellant's reply brief, p.2.

Section 230.33(3), Stats., states that the employe "shall be entitled to receive at least the same pay received in the classified position while serving in the unclassified position." (emphasis supplied). The word "received" is in the past tense. All that this statute does is to provide that an employe who goes to a position in the unclassified service from a position in the classified service can not be paid, while in the unclassified position, less than he was paid, or received, while he was in the classified

Point A and became eligible for, and was regraded to Regrade Point B, at a rate of pay of $13.197. [FN]

The appellant apparently contends that the differential between the rate of pay at which he was hired, and the rate of pay at which the respondent now concedes he should have been hired at, should continue to be added to his base pay indefinitely. The appellant has not suggested how, if he had been hired originally at the "correct" rate of $12.858, his rate of pay on October 17, 1982, would have been any more than the $13.197 rate to which he actually was increased on that date. The Commission cannot conceive how it would be appropriate to put the appellant in a better position than he would have been had the respondent actually complied with its salary representation when the appellant was reinstated. Further, the respondent's position is consistent with the approach taken by the Commission in Porter v. DOT, No. 78-154-PC (5/14/79); affirmed, DOT v. Wis. Personnel Commission, No. 79 CV 3420, Dane County Circuit Court (3/24/80), where the Commission determined that equitable estoppel existed with respect to a representation as to starting salary, and that the employe was entitled to "... the red-circling of her salary at the rate which she reasonable expected to be employed ... until such time as normal progression within the range ... exceeds that rate of pay."

[FN] These facts were not disputed by the appellant in his reply brief and will be assumed by the Commission for the purpose of determining the duration of the estoppel.

Therefore, it is finally declared by the Commission that, due to the operation of the doctrine of equitable estoppel, the respondent is estopped from failing to pay the appellant upon reinstatement, less than his highest rate of pay in the unclassified service, plus the intervening across-the-board pay adjustment for represented attorneys in the classified service, on July 1, 1981, i.e., in toto, $12.858 per hour, but was neither obligated nor permitted to have paid the appellant more than that; and that the estoppel operates against the respondent only until the appellant was regraded to Regrade Point B on October 17, 1982.

Dated: July 7, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

AJT:ers

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