

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 JOHN H. GIVENS, III \*  
 \*  
                   Appellant, \*  
 \*  
 v. \*  
 \*  
 Secretary, DEPARTMENT OF \*  
 INDUSTRY, LABOR AND HUMAN \*  
 RELATIONS, and Administrator, \*  
 DIVISION OF PERSONNEL, \*  
 \*  
                   Respondents. \*  
 \*  
 Case No. 83-0046-PC \*  
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 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a layoff. At the prehearing conference, a dispute arose between the parties concerning the proper issue to be heard by the Commission: "Respondent objected to the authority of the Commission to hear the issue as proposed by the appellant (relating to restoration) arguing that denial of restoration is not an action appealable under §230.44(1), Wis. Stats." (Prehearing Conference Report). The parties through counsel have filed briefs with respect to this dispute. The findings of fact which follow are based on various documents submitted by the parties and appear to be undisputed.

FINDINGS OF FACT

. In April, 1982, the appellant was granted a leave without pay pursuant to §230.33(1), Stats., from his position as Director of Job Services Milwaukee Area Director (PR 01-18), a career executive position

within the classified civil service, to serve in the unclassified civil service as Executive Director, Wisconsin Council of Criminal Justice (WCCJ), pursuant to a gubernatorial appointment.

2. Following the appointment of a successor to the appellant as WCCJ Executive Director, the appellant attempted to exercise within DILHR his restoration rights under §230.33(1), Stats.

3. Pursuant to a letter dated February 23, 1983, DILHR notified the appellant as follows:

This letter is in response to your letter to Secretary Bellman, informing him of your plans to return from your leave of absence to the unclassified service.

As you know, your rights of restoration in DILHR are covered by §230.33, Stats. This portion of the law provides that, "The person has restoration rights to the former position or equivalent position in the Department in which last employed without loss of seniority." As you know, we replaced you in your former position when you were granted a leave of absence to serve as Executive Director of the Council on Criminal Justice. We do not have a vacancy in an equivalent position in this agency at this time. Therefore, upon your return, we will have to implement the layoff provisions of the personnel rules.

Accordingly, you are instructed to report to the Administrator of the Job Service Division, Ed Kehl, in Room 201 of GEF 1 at 7:45 a.m. on February 28, 1983, for temporary assignment. Your previous salary will be adjusted by the five percent across-the-board increase that was granted to non-represented employees effective last October. This new salary will be \$20.879 per hour.

4. Pursuant to a letter dated February 28, 1983, DILHR notified the appellant, inter alia, as follows:

Due to your return from a leave of absence, the number of employees in the Career Executive Program must be reduced through layoff in the Career Executive Employing Unit. Since you are the least senior Career Executive, you are subject to layoff from your current classification effective March 18, 1983.

Your current classification which is in Pay Range 01-18, is included in the General Nonrepresented Executive and Management Pay Schedule. Your seniority or continuous service date is

October 15, 1979, and your current rate of pay is \$20.879 per hour. The layoff procedures are in accordance with Chapter Pers. 30.105, Wisconsin Administrative Code. According to these rules, layoff must be accomplished by classification within the employing unit, by seniority, with the least senior employe laid off first. (See attachment for further information.)

If you choose to demote into lower classifications and your current pay rate is higher than the maximum of the pay range for the classification you are displacing or demoting into, then your rate of pay will be reduced to the maximum of that pay range.

5. Thereafter, the appellant chose to and did demote into a non-career executive Job Service Supervisor 5 position (PR 01-14), in the classified civil service, effective March 21, 1983, with a salary of \$15.194 per hour.

#### OPINION

The prehearing conference report reflects the following statements of proposed issues:

Appellant: "Whether or not the appellant's restoration rights were improperly denied with respect to the position of Job Service Milwaukee Area Director."

Respondent: "Was appellant's layoff from DILHR's Career Executive Employing Unit based upon just cause."

Section ER - Pers 30.105, Wis. Adm. Code, defines "layoff" of a career executive as follows:

For purposes of this chapter, 'layoff' means the termination of a career executive with permanent status in the career executive program from the career executive program due to a reduction in the career executive force in the employing unit.

Based on the information before the Commission, it appears that the appellant was the subject of a layoff. The transaction does not appear to have been a career executive reassignment, since it does not meet the definition thereof, see §§ER - Pers 30.10(2), 30.07(1), Wis. Adm. Code. There was no "permanent appointment by the appointing authority of a career

executive within the agency to a different career executive position....," inasmuch as the appellant was not reassigned to another career executive position, as was the case in Basinas v. State, 104 Wis. 2d 539, 312 NW 2d 483 (1981). Career executive layoffs are appealable to the Commission pursuant to §230.44(1)(c), Stats., in accordance with §ER - Pers 30.10(4), Wis. Adm. Code: "Permanent status in the career executive program grants an employe the same redress rights granted employes with permanent status in class under §230.44, Stats...."

In addition to being considered a career executive layoff pursuant to §ER - Pers 30.105, Wis. Adm. Code, the instant transaction also could be characterized as an appealable demotion pursuant to § ER - Pers. 30.10(3):

Removal of an employe with permanent status in the career executive program from the career executive program which results in the placement of the employe in a position allocated to a classification assigned to pay range 17 or below is defined as a demotion, and may be appealed.

In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), the Supreme Court held with respect to a layoff occasioned by the need for a reduction in force, that it was erroneous to utilize a "just cause" standard appropriate to cases involving misconduct discharges. Rather, the court held that the appointing authority:

... 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 46.

As noted above, this transaction is appealable both as a demotion, as defined by §ER - Pers 30.10(3), and as a layoff, as defined by §ER - Pers 30.105. The definition of demotion is broader than that of layoff, and could encompass transactions in addition to layoffs. Since this transaction clearly meets the definition of a layoff, and was handled as

such, the layoff test as set forth in Weaver, above, should be applied, as opposed, for example, to the type of test that might be applied for a demotion for on-the-job misconduct, see Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974). Such an approach also is in keeping with the concept that: "Where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision...." 73 Am Jur 2d Statutes §257.

In the Commission's view, the basic issue for hearing is whether the appellant's layoff from DILHR's Career Executive Employing Unit was based upon just cause. In order to decide that issue, the Commission must decide whether the transaction was handled in accordance with the administrative and statutory guidelines and whether the exercise of that authority was arbitrary and capricious.

The respondent states in its brief as follows:

The appellant may have worded his suggested issue to allow him to make the argument that §230.33, Stats., gives him the absolute right to displace the current Job Service Milwaukee Area Director. The respondent considers that this would be an allowable argument to advance under its phasing of the issue, since the existence of such a right would certainly have a bearing on the presence of just cause for a layoff.

The respondent apparently concedes that if the appellant had a right to have displaced the Job Service Milwaukee Area Director, there might not have been just cause for his layoff. Therefore, the appellant's proposed issue will be considered as a subissue under the general issue of just cause.

ORDER

The following will be the issues for hearing:

ISSUE: Whether the appellant's layoff from DILHR's Career Executive  
Employing Unit was based upon just cause.


SUB-ISSUE: Whether the transaction was handled in accordance with the  
administrative and statutory guidelines and whether the  
exercise of that authority was arbitrary and capricious.

SUB-ISSUE: Whether the appellant's restoration rights were improperly  
denied with respect to the position of Job Service  
Milwaukee Area Director.

Dated: July 12, 1983 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

AJT:jmf

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