STATE OF WISCONSIN PERSONNEL COMMISSION

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GAIL LARSON,

Appellant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison)

Respondent.

Case No. 84-0017-PC

DECISION AND ORDER

This matter is before the Commission on respondent's objection to subject matter jurisdiction, both parties having filed written arguments. The underlying facts relating to subject matter jurisdiction do not appear to be in dispute and are set forth hereafter.

FINDINGS OF FACT

1. The appellant was employed by the respondent as a Clerical Assistant 2 (CA2) from September 3, 1980, until she resigned effective September 8, 1983.

2. In December 1983, she accepted reinstatement effective January 8, 1984, to another CA 2 position with the respondent.

3. The aforesaid positions are within a certified or recognized bargaining unit, with respect to which at all relevant times a labor agreement has existed between by the Wisconsin State Employes Union (WSEU), American Federation of State County and Municipal Employes (AFSCME), Council 24 and the State of Wisconsin.

4. At the time she resigned her employment in September, 1983, the appellant's rate of pay was $7.247 per hour.

5. Upon her reinstatement, appellant was paid $6.657 per hour.

6. The appellant alleges and the respondent denies that when she accepted the offer of reinstatement it was agreed with the respondent that her salary would be the same as when she resigned - $7.247 per hour.

OPINION

The matter in controversy on this appeal is the determination by respondent of the appellant's starting salary upon reinstatement.

The respondent argues that the Commission's jurisdiction over this subject matter is superseded by the effect of §111.93(3), Stats., which provides:

> If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours, and conditions of employment, whether or not the matters contained in such statutes are set forth in such labor agreement.

In other words, once a collective bargaining agreement has been reached, it has a superseding effect as to all bargaining subjects, and regardless of whether or not a particular issue is covered specifically and explicitly by the agreement.

If the matter of the determination of an employe's starting salary following reinstatement is considered to be related to "wages, hours, and conditions of employment and a bargainable subject, then §111.93(3), Stats., applies to supersede any jurisdiction the Commission might otherwise have under §230.44(1), Stats.

In determining whether this should be considered a bargainable matter, the Commission is guided by an attorney general's opinion on whether some comparable subjects - raised hiring rate and hiring above the minimum - were bargainable subjects.

A raised hiring rate, §Pers 5.02(1)(b), Wis. Adm. Code,[1] and hiring above the minimum, §Pers 5.02(1)(c), Wis. Adm. Code, are the only means by which an appointing authority can pay a starting salary on initial appointment to a position that is above the lowest or minimum rate in the pay range for the position in question.

In an opinion issued on September 6, 1978, (OAG 65-78, unpublished), the Attorney General addressed the question of whether the "raised hiring rate" and "hiring above the minimum" practices were prohibited subjects of bargaining, pursuant to §111.91(2)(b)1., Wisconsin Statutes. This opinion included the following discussion:

> Section 111.91, Wis. Stats., provides in part:
>
> > Subjects of bargaining. (1) Matters subject to collective bargaining to the point of impasse are wage rates, as related to general salary scheduled adjustments consistent with sub. (2) and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment, except as follows:
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> > ***
> >
> > (b) The employer shall be prohibited from bargaining on matters contained in sub. (2), except as provided under sub. (3).
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> > ***
> >
> > (2) Except as provided in sub. (3), the employer is prohibited from bargaining on:
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> > ***
> >
> > (b) Policies, practices, and procedures of the civil service merit system relating to:
> >
> > 1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.

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[1] These code references are to the code as it existed at the time the attorney general's opinion was promulgated on September 6, 1978.

2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocations.

I am of the opinion that the "raised hiring rate" and "hiring above the minimum" practices, as utilized by the administrator in connection with recruitment, are not excluded from the subjects of collective bargaining under §111.91(2)(b)1., Wisconsin Statutes. Whereas such practices are related to "original appointments" and recruitment", they are primarily concerned with compensation, wage rates, and salary schedule adjustments."

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The terms of a collective bargaining agreement supersede other civil service laws relating to wages. §111.93(3), Wis. Stats. The right to bargain the minimum is not prohibited from collective bargaining under §111.91(2), Wis. Stats. First, only "policies, practices, and procedures" relating to recruitment are excluded from bargaining. Raising the minimum of a particular position is neither a policy, practice, nor procedure, rather it is an economic adjustment. Second, the power over recruitment primarily relates to locating a fit person by examinations, certification, selection methods, and probationary periods. Third, the qualifications as to the bargainability of wage rates in §111.91(1), Wis. Stats., viz., general salary-scheduled adjustments, must be reconciled with §111.93(3), Wis. Stats., which gives collective bargaining superseding significance as to "wages" without qualifications. Fourth, raising a minimum is general salary-scheduled adjustment."

In the opinion of the Commission, much the same could be said of the bargainability of determining pay rate on reinstatement. If anything, this subject is less in the nature of a non-bargainable subject than raised hiring rate and hiring above the minimum. These matters not only are related to staffing and the appointment process, but also are directly tied to recruitment.

A raised hiring rate can only be established:

> When competitive labor market conditions have been evaluated and the initial rate as established is determined to be below the market rate for a class, or when the class, or the recruitment option for the class has unique requirements or geographic location and it is unlikely that quality applicants would be available under such conditions. . . " §Pers 5.02(1)(b), Wis. Adm. Code.

Hiring above the minimum can only occur after a determination that it is "...necessary for effective recruitment ...", §Pers 5.02(1)(c), Wis. Adm. Code, and only "...provided that the increased pay potential was included in the recruitment information. (Emphasis added.)

The subject of determining initial salary on reinstatement is not so directly related to recruitment as are raised hiring rate and hiring above the minimum.

The foregoing discussion is buttressed by the fact (even though this is not a prerequisite to the operation of §111.93(3), Stats.) that the subject of the salary rate to be paid separated employes has been bargained for and is included in the current contract, of which the Commission takes official notice. See "Agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employes Union, AFL-CIO (Clerical and Related)," § 8/9/4, p. 61:

> 2. A separated employe who is reinstated within the department shall receive his/her last rate of pay plus any intervening across-the-board general pay adjustments.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: July 19, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jab

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

Gail Larson
4401 American Ash Dr.
Madison, WI 53704

Robert O'Neill, President
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706