STATE OF WISCONSIN PERSONNEL COMMISSION

GERALD LINDE,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,[FN]

Respondent.

Case No. 84-0050-PC

DECISION
AND
ORDER

The appellant seeks to appeal the level of salary he receives, arguing that he is entitled to a red-circled salary under the terms of his voluntary demotion in lieu of layoff.

The following facts appear to be undisputed:

The appellant was in a position classified as a Research Assistant 4 (PR8-05) when he was notified in December 1983 that he was to be laid off under the terms of the appropriate labor contract from a represented position in the Division of Employment & Training, Department of Industry, Labor and Human Relations (DILHR). In January 1984, the appellant took a voluntary demotion to a position classified as an Equal Rights Officer 2 (PR12-03) in the Equal Rights Division of DILHR. Appellant demoted in lieu of layoff.

The Research Assistant 4 position was in the Professional Research and Statistics bargaining unit. The appellant's pay rate was $12.785 per hour. The Equal Rights Officer 2 position is in the Professional Social Services bargaining unit. The maximum of pay range 12-03 is $11.406 per hour.

By letter dated February 16, 1984, the appellant wrote the respondent for an explanation of why he received a reduction in base pay upon his voluntary demotion. The respondent sent a reply on March 1, 1984. The appellant filed an appeal with the Personnel Commission on March 21, 1984. A prehearing conference was held on May 16, 1984, in the

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[FN] The parties agreed at the prehearing conference that DILHR is not a party to this proceeding.

Commission's office, Madison, Wisconsin at which time respondent raised a jurisdictional objection to proceeding. The parties completed their briefing schedule on the matter on August 13, 1984.

Parties' Positions:

Respondent basically argues that the Commission does not have jurisdiction to hear this appeal.

In support thereof, respondent contends that there was no action or decision of the respondent involved from which an appeal could be taken.

Respondent next maintains that the salary decision was a decision of the appointing authority; and, therefore, not appealable under §230.44(1)(a) or (b) Stats.

In the alternative, respondent argues "even assuming arguendo that the March 1, 1984 letter from the respondent constituted a decision, it was not an appealable decision."

Finally, respondent maintains that since the Commission lacks jurisdiction it does not have to determine whether the type of situation which gave rise to the appeal was bargained or bargainable.

Appellant first argues that this is an appeal under §230.44(1)(b), Stats. of a decision by the Secretary that he was not entitled to a red-circled salary under the terms of his aforesaid demotion. Appellant claims that the Secretary's letter dated March 1, 1984 is an appealable decision citing some Commission caselaw in support thereof.

Appellant also argues that respondent is estopped from asserting the Commission has no jurisdiction because this is a bargainable issue since respondent "has already taken the position before the arbitrator that the relevant labor agreements do not cover this situation." Despite this argument, appellant claims that he has consistently taken the position that

he was entitled to a red-circled salary either under Pers. 22.08(3)(a)2, Wis. Adm. Code, or the applicable labor agreement. With respect to the agreement, appellant cites the agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO and its affiliated locals -- Professional Social Services and Professional Research, Statistics and Analysis, October 30, 1983 to June 30, 1985), which states, ARTICLE VII, Layoff Procedure, Section 9: Salary -- 8/9/2 -- "An employee who voluntarily demotes to the highest level position available shall retain his/her current rate of pay."

Discussion:

The appellant has argued this appeal can be heard pursuant to §230.44(1)(b), Stats., as an appeal of a personnel decision of the secretary of DER. Laying to one side the question of whether the secretary's letter of March 1, 1984, which was attached to the appeal letter, is a "decision", as opposed to an "explanation" of a decision made by the appointing authority (DILHR), there is a fundamental reason why there is no jurisdiction under §230.44(1)(b), Stats.

That sub-section provides for the "(a)ppeal of a personnel decision under §230.09(2)(a) or (d) or 230.13 made by the secretary . . . ." (emphasis supplied) These statutory provisions deal with position reclassification, reallocation and regrade actions, and decisions as to records accessibility. These categories do not include a decision on salary following a demotion in lieu of layoff.

A further reason why the Commission lacks jurisdiction stems from the operation of §111.93(3), Stats. This section provides that:

> " . . . . 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, homes and conditions of employment whether or not the matters contained in such statute are set forth in such labor agreement." (emphasis supplied)

This statute has the effect of superseding the Commission's jurisdiction as to bargainable subject matter, regardless of whether that subject matter is specifically set forth in the particular labor agreement. The question of salary level upon demotion clearly is bargainable. There can be no question but that the Commission's jurisdiction is superseded by the operation of §111.93(3), Stats. See, e.g., Welch v. DHSS, Wis. Pers. Commn., No. 81-272-PC (10/30/81).

The appellant argues that the respondent is estopped from maintaining that this matter is bargainable because in arbitration it has been argued "that the relevant labor agreements do not cover this situation." It is obvious that the appellant has pursued this matter in two forums. The appellant has not suggested that he was induced to file this appeal by the argument " . . . . that the relevant labor agreements do not cover this situation." Thus there is missing an essential element of an equitable estoppel -- acting or refraining from acting based on reliance on the above representation.[1] See, Schleicher v. DILHR & DP, Wis. Pers. Commn. No. 79-287-PC (8/29/80).

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[1] Even if the appellant had alleged that he had filed this administrative proceeding in reliance on the representation made in the arbitration, it is doubtful whether this would amount to the kind of injury required as an element of an equitable estoppel. See 28 Amn Jur 2d Estoppel and Waiver §§77 & 78.

ORDER

This appeal is dismissed for lack of subject matter jurisdiction.

Dated: August 31, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

DPM/AJT:jab
JEN2

LAURIE R. McCALLUM, Commissioner

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