



partial transcript, with its own transcription of the sections that contained material the appellant found inaudible set forth in brackets:

Q: Did, a Mr. Wallock report back to you as to the outcome of the audit?

A: Yes, he did.

Q: Did he tell you that the positions at Green Bay had been in existence for more than 18 months.

A: He told me the starting date of the positions, yes.

Q: And what was the starting date?

A: I believe it was \_\_\_\_\_ of '81.

[A: I believe it was like something in '82 or was it '81. I can't recall right now.]

Q: Would the letter of appointment tell you the date in which the employees began in the positions?

A: Yes, it would.

Q: Do you have appellant's exhibits 2 and 3? I ask that you revert to appellant's exhibit 2c. \_\_\_\_\_ from that document the date that Ms. Schoenbeck was appointed to that position?

[Q: Do you have appellant's exhibits 2 and 3? I ask that you refer to appellant's exhibit 2c. Do you see from that document the date that Ms. Schoenbeck was appointed to that position?]

A: April 4, 1982.

Q: Four years from that date would be when, mam?

A: April 4, 1986.

Q: And I'm asking you to refer to appellant's exhibit 3d. Can you identify that document?

A: This is an appointment document \_\_\_\_\_.

[A: This is an appointment letter for Ruth Trowbridge.]

Q: And when was Ms. Trowbridge to begin her appointment in that position?

A: February 21, 1982.

Q: Did Mr. Wallock indicate to you what assurances he had been given that the projects would end on the date certain that he was given?

A: They have to end in 1986 according to \_\_\_\_\_.

[A: They have to end in 1986 according to the letter.]

The petition for rehearing contains the following argument:

Counsel for the appellant has reviewed the transcript tape recording and is unable to provide the balance of the last cited answer, as it is inaudible. He encourages the Commission to review its tape recording in an effort to clarify this answer. In context, the only conceivable meaning that may be provided to the Administrator's answer is that Wallock had been given the assurance that the projects would end in 1986. Since this is after late summer, 1985, appellant submits that the testimony of the administrator herself establishes that there was a likelihood that the positions would continue beyond that time.

To the contrary, the above-transcribed testimony supports the Commission's conclusion set forth above that the only evidence to support a projected ending date after late summer of 1985 was found in the appointment letters, appellant's exhibits 3d and 2c.

The second ground for the petition is that the Commission committed an error of law in its construction of §248.03 A.2. of the personnel manual.

The Commission's discussion of this section was as follows:

However, even after a determination that the project positions had a probable ending date of 18 months or more, a permanent appointment still is not dictated under §248.03 A. 2. "when there is no likelihood of the project or position continuing." Since there is no explicit reference point given for "continuing," the policy must be interpreted to determine its meaning.

The respondent testified that she drafted the policy and that by "continuing" she meant "continuing beyond four years" -- i.e., the four year period referred to in §230.27(1), Stats.

The only other interpretation that seems possible is to read this as "continuing beyond the "probable ending date" referred to. The policy would be read as follows:

2. Permanent appointments are required for project positions which have a probable ending date of 18 months or more except when there is no likelihood of the project or position continuing beyond the probable ending date.

The great advantage of this construction is that the missing part is supplied by reference to an immediately preceding part of the subparagraph, and the policy itself. The respondent's construction relies on borrowing an outside concept, the four year restriction, that is not suggested by anything within the subparagraph.

However, it is unnecessary for the Commission to decide on one or the other construction, since the appellant cannot prevail under either.

It seems clear that for the Commission to decide that the respondent violated §248.01 A. 2. of the Wisconsin Personnel Manual - Staffing, in refusing to order the positions filled on a permanent appointment basis, it would have to determine that at some relevant point in the process the situation did not fit within the exception set forth in the foregoing provision: "except when there is no likelihood of the project or position continuing." Using the respondent's construction, the Commission would have to determine whether there was no likelihood (or any likelihood) of the project or position continuing beyond 4 years. Using the alternative construction, the Commission would have to determine whether there was no likelihood (or any likelihood) of the project or position continuing beyond the probable ending date.

On this record, the only time it has been established that there was a probable ending date of more than 18 months was, as set forth in Appellant's Exhibit r, when the projected ending date, as of January 11, 1983, was anticipated to be "late summer of 1985." However, there is nothing in this record that would indicate that as of January 11, 1983, or any other relevant time, it could be said there was any likelihood of the projects or positions continuing either beyond late summer of 1985, the probable ending date, or beyond 4 years. There may have been a possibility of continuation, but this is not the same as a likelihood. If there was no likelihood of continuation, then the exception came into play.

Appellant in its petition argues, inter alia, as follows:

Appellant also respectfully submits that the interpretation it accords the provision of Section 248.03 A.2. makes no sense and as a consequence is a construction contrary to the legal requirements of statutory or regulatory interpretation. The Commission adopts an interpretation of this section which was argued by neither party to this dispute. It inserts the clause "beyond the probable ending date" at the end of the section? "2. Permanent appointments are required for project positions which have a probable ending date of 18 months or more except when there is no likelihood of the project or position continuing beyond the probable ending date." It notes that the definition of "likelihood" is "the fact of being likely to happen or something that is likely to happen, probability." Citing Webster's New World Dictionary, Second College Edition, page 819. The same source defines at page 1131 "probability" as "1. the quality or state of being probable; likelihood. s2. Something probable." In turn,

the word "probable" is defined as "likely to occur or be; that can reasonably but not certainly be expected." In short, if a position or appointment has a "probable" ending date, it cannot at the same time be likely or probable that it will continue beyond that probable ending date. In this regard, the same dictionary notes that when the term "likely" is used as an adverb, it means "probability". Id. at 819. The consequence of the definition provided by the Commission to this section is to create a logical tautology. If a position has a probable ending date, by definition, it is one not likely to continue.

One of the consequences of this interpretation is to reduce the issue in cases such as this to whether or not the probable ending date offered by the agency is in fact erroneous in the sense that there is some other probable ending date. If there is, then the most that can be established is that there is a probable ending date beyond which the position is not likely to continue thus sweeping the issue within the exception. If this occurs, then clearly the exception has swallowed the rule. This is particularly true where all project appointments and positions by definition must end within four years, thus there will always be a probable ending date for a project position beyond which there can be no likelihood of the project or the position continuing. Thus, any project appointment falls within the exception as defined by the Commission.

The Commission would point out that it did not, contrary to appellant's assertion, construe the policy to mean "continuing beyond the probable ending date." Rather the Commission said: "... it is unnecessary for the Commission to decide on one or the other construction, since the appellant cannot prevail under either."

Another point concerning the appellant's arguments is that it fails to consider a certain lack of parallelism in §248.03 A.2. The first clause refers to "project positions which have a probable ending date of 18 months or more," (emphasis added), while the clause containing the exception refers to "the project or position continuing..." (emphasis added). Therefore, a situation could occur where a position could have a probable ending date of 18 months or more, yet there could still be a likelihood (or probability) of the project or position continuing beyond the probable ending date of the position.

This effectively renders the term "or position" superfluous, since if a position has a particular probable ending date, there presumably cannot be a likelihood of the position continuing beyond that date, but the policy is not rendered a nullity as appellant contends.

While the appellant finds error in the Commission's approach to §248.03 A. 2., it has not come forward with any specific alternative. However, it seems to suggest that the Commission should have interpreted the term "no likelihood" to mean "no possibility."

This approach would result in radical surgery to the policy by substitution of an entirely different word and concept. While the use of a commonly accepted dictionary definition of "likelihood" results in rendering two words ("or position") superfluous, this seems preferable to actually rewriting the policy. Furthermore, the Commission's approach seems to be in keeping with the underlying intent of the policy, which, according to Ms. Christopher, was as follows:

...that was written to encourage and was presented to the personnel manager's council and the personnel managers who weren't there, presented to them as an encouragement for them to consider the positions that they were filling on a project basis -- we wanted to encourage them to promote the idea that individuals who were hired in project positions that were going to last for a long time might be good employes to hang on to, so by making their appointments permanent, they would have that option to do that. We also wanted to ensure that if an agency thought that the four year project would continue, they would definitely use a permanent appointment....

The emphasis is on the use of permanent appointments where projects are likely to continue. This is not consistent with a construction that would require a permanent appointment whenever a project position has a probable ending date of 18 months or more except when there is no possibility of the project or position continuing, because in some cases there

might be no likelihood of a project continuing, but at least a bare possibility that it could.

With respect to construction of the word "continuing," the only apparent potential interpretation not already specifically discussed by the Commission in its decision is to read the policy as "continuing beyond 18 months or more." Then the entire policy would read as follows:

Permanent appointments are required for project positions which have a probable ending date of 18 months or more except when there is no likelihood of the project or position continuing beyond 18 months or more.

However, this would result in a complete nullification of the exception, since if a position had a probable ending date of 18 months or more, there never would be a case when there would be no likelihood of the position continuing beyond 18 months or more. Also, if the probable ending date of the position were 18 months or more, how could the probable ending date of the underlying project ever be any less? Thus, there also would always be a likelihood of the project continuing beyond 18 months or more.

Also, with the exception being effectively nullified, the intent of the policy would be undermined, since permanent appointments might be required in situations where there would not even be a possibility of the project or position continuing and ultimately being staffed on a permanent basis.

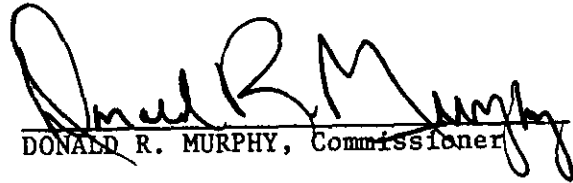
As discussed in the Commission's August 1, 1985, decision, the appellant could not prevail under either of the two most likely interpretations of the word "continuing" in §248.03 A. 2., and therefore the Commission need not determine which to adopt.

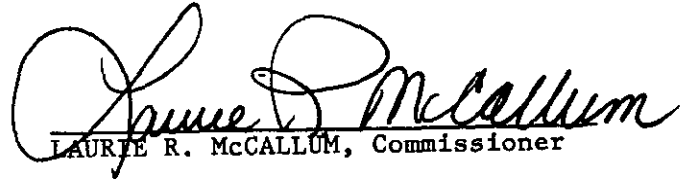
ORDER

Appellant's petition for rehearing filed August 12, 1985, is denied.

Dated: August 30, 1985 STATE PERSONNEL COMMISSION

AJT:jmf  
ID8/1

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

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