

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 WISCONSIN FEDERATION OF
 TEACHERS,
 Appellant,
 v.
 Administrator, DIVISION OF
 MERIT RECRUITMENT & SELECTION,
 Respondent.
 Case No. 84-0154-PC
 * * * * *

DECISION
 AND
 ORDER

This matter is before the Commission following the issuance of a proposed decision and order, a copy of which is attached hereto. The Commission has considered the parties' arguments and objections, and consulted with the examiner.

This case involves, in summary, the project appointments of two teachers to project positions, see §230.27, Stats., chapter ER-Pers 34, Wis. Adm. Code, at the Green Bay Correctional Institution (GBCI), in early 1982. These positions were based on overpopulation at GBCI. The appointments and positions continued at least through the date of hearing, November 27, 1984. In June 1984, the Wisconsin Federation of Teachers (WFT) asked the respondent, inter alia, as follows:

In accordance with Wisconsin Personnel Manual-Staffing, ch. 248, (July, 1983) project positions which have a probable ending date of 18 months or more should be filled as project permanent rather than project-project.

We are requesting that you audit the actions of the Department of Health and Social Services in filling these positions and, if appropriate, order the Department to fill them on a project-permanent basis.... Respondent's Exhibit 3, letter of June 27, 1984.

After looking into the matter, a subordinate of the respondent advised the appellant that the agency "will not be issuing an order to the Department of Health and Social Services regarding the hiring practices for project positions...." Respondent's Exhibit 2, letter of July 26, 1984. This appeal ensued.

The issue for hearing in this matter is:

Was the decision, if any, of the Administrator of the Division of Merit Recruitment and Selection refusing to audit the action of the Department of Health and Social Services in continuing project appointments to two half-time project teacher positions at Wisconsin Correctional Institution, Green Bay, and refusing to order the Department of Health and Social Services to fill those positions on a permanent appointment basis, a violation of Chapter 230 (Section 230.05 and 230.07, Stats.) and the rules and policies promulgated thereunder?

With respect to the first part of the issue, concerning the respondent's refusal, if any, to audit the DHSS action in continuing project appointments, the proposed decision implies in conclusions of law #3 and #4¹ that the respondent refused to conduct an audit. The examiner went on to discuss this as follows:

§248.04 Procedures d. states:

Documentation of the reason(s) for project appointments to project positions which have a duration of more than 18 months shall be maintained with the certification request and may be audited by the Division of Merit Recruitment and Selection (emphasis added)

This language makes it clear that respondent has the discretion to conduct or not to conduct an audit under the circumstances therein.

¹ 3. The appellant has not sustained its burden with respect to respondent's refusal to audit the action of the aforesaid Department in continuing project appointments to two half-time project teacher positions as noted above.

4. The respondent's decision to deny the appellant's request to audit the action of the Department of Health and Social Services in continuing project appointments to two half-time project teacher positions at Wisconsin Correctional Institution, Green Bay did not violate Chapter 230 and/or the rules and policies promulgated thereunder.

The respondent has insisted in post-hearing arguments that she in fact conducted an audit. The tape of the hearing reflects the following testimony by respondent:

Q. Now looking at Respondent's Exhibit 3, which I believe is a letter from Margaret Liebig, do you know what action, if any, was taken in response to this letter?

A. When I received this I referred it to a staff member, Dan Wallock, and had him contact DHSS and find out what happened.

* * *

Q. Do you, when as a result of the investigation, for lack of a better term, that Mr. Wallock conducted for you, with respect to these positions, do you know when these positions... were anticipated to be -- their ending date was supposed to be?

A. Best of my recollection, '85, that's also indicated in Ms. Liebig's letter, and that's fairly accurate.

The foregoing testimony was not controverted in any way, and it would be an elevation of form over substance to conclude from this record that there was no "audit" conducted. The appellant obviously disagrees with the approach used in the audit and the conclusions reached, but that is a different matter. Obviously, if an audit was conducted, there was no violation of statute, rule or policy occasioned by a failure to audit.

With respect to the second part of the issue, whether the respondent's refusal to order DHSS to fill the positions in question on a permanent appointment basis a violation of statutes or the rules and policies promulgated thereunder, the Commission will first address the status of §248.03 A.2. of the Wisconsin Personnel Manual-Staffing. 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.

The Commission agrees with the proposed decision's conclusion that this policy is in legal effect a rule, and as such is enforceable against the respondent, who promulgated it, notwithstanding that it was never formally adopted under Chapter 227, Stats. In post-hearing arguments, the respondent stresses that she never intended that the policy be more than a "guideline." This professed intention has little materiality under the circumstances here present. Pursuant to §ER-Pers 34.03(1), Wis. Adm. Code, "A project position may be filled on a project appointment basis only after approval by the administrator...." (emphasis supplied) When the administrator promulgates to the appointing authorities a "policy" which states, inter alia:

248.01 This Chapter outlines the policies and procedures for staffing project positions....

* * *

248.03 A. 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. Respondent's Exhibit 4,

one has to assume the appointing authorities reasonably would expect that the respondent's decision whether to approve project appointments would be in accordance with this policy. That the respondent may have not intended that this be the case is virtually meaningless in the absence of any communication of this intent to the appointing authorities.

While the parties have debated whether the policy in question is mandatory or directory, this distinction is of limited significance. Because a statute or rule is directory does not mean that an agency is free to ignore it, see 73 Am Jur 2d Statutes §16:

A directory provision has been defined as one the observance of which is not necessary to the validity of the proceeding. However, directory provisions are not intended by the legislature to be disregarded.

While the status of a provision as mandatory or directory may affect the remedy appropriate upon a conclusion of a violation of such a provision, it does not affect the question of whether there has been a violation thereof.

Finally, the respondent asserts in connection with its objections to the proposed decision that §248.03 A.2. was not effective until July 20, 1983, when the current language of the manual was disseminated. See Respondent's Exhibit 4. However, the record is quite clear that the version disseminated July 20, 1983, did not change materially the substance of the subject matter of this section. This was set forth in the memo disseminating the revised Chapter 248, Respondent's Exhibit 4:

Because the majority of the agencies felt that the existing project appointment policies reflected in Chapter 314 of the Wisconsin Personnel Manual -- Administration, Classification Compensation were adequate and the proposed changes would be more restrictive, the policies for staffing project positions remain similar to the original policies of Chapter 314.

See also the respondent's testimony:

- Q. Now did Respondent's Exhibit 4, the 2 documents together, represent a change in policy of what had previously been established?
- A. Not really, the policy that's in here was pulled, and some other parts, were pulled from Chapter 314, which used to be in the classification and compensation part of the same manual. What we did at that point was put recruitment and selection -- those parts of that chapter -- in the right part of the staffing -- in the right part of the manual. So we pulled some things out of there. I would guess that the new stuff that is in there, it might be the use of HAM for project positions for example, probably was not in Chapter 314. But that did appear here.

Based on this record, there is adequate support for a finding that either §248.03 A. 2. or its substantial equivalent was in effect at all times material to the issues in this case.

Section 248 of the Wisconsin Personnel Manual - Staffing provides, inter alia:

248.03 A. 1. After the classification has been determined, project appointments may be made without review to project positions which have a probable ending date of less than 18 months.

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. (emphasis in original)

* * *

248.04 d. Documentation of the reason(s) for project appointments to project positions which have a duration of more than 18 months shall be maintained with the certification request and may be audited by the Division of Merit Recruitment and Selection.

In the case before the Commission, the appointments had effective dates of February 21, 1982, (Trowbridge), and April 4, 1982 (Schoenbeck), and were confirmed by letters from the appointing authority dated April 14, 1982. See Appellant's Exhibits 2C and 3D. Certain personnel forms more or less contemporaneous with these appointments showed a "Term. Date," apparently for the positions (as opposed to the appointments), of 063082. See Appellant's Exhibit 3a and 2b. Subsequently, these positions and appointments apparently were extended, but the record is not clear exactly how and when this occurred. The record includes a letter dated June 23, 1983, from the Division of Corrections to the president of one of appellant's locals which states inter alia as follows:

Ruth Trowbridge and Harriet Schoenbeck -- both positions are half-time project project teacher 2 positions with the project ending June 30, 1983. Both positions will probably continue for another year. Appellant's Exhibit 5.

This implies that if in fact the positions were to have terminated June 30, 1982, as suggested by Appellant's Exhibits 3a and 2b, they were extended for another year. Again assuming that to be the case, one or more further

extensions must have occurred, as the positions were in existence at least as of the date of hearing.

At the time respondent "audited" these project appointments in June/July 1984, the positions had been in existence and filled for in excess of two years. With respect to their expected further duration, the respondent testified she agreed with the estimate set forth in the appellant's letter of June 27, 1984 (Respondent's Exhibit 3): late summer of 1985.

As a result of the inquiry or "audit" conducted by the respondent, she declined to issue any order to DHSS requiring that the positions be filled on a permanent basis. It can fairly be implied from her testimony that her course of action was based at least in part on her belief that the policy on filling project positions was only a "guideline."

In response to a question as to whether she would have issued an order requiring that the positions be opened to competition and filled on a permanent basis, had she believed that the policy in the staffing manual were more than a "guideline," she replied:

In this case, this is 1984, the positions are going to not continue to 85, through 85, they have to end, and its actually statutorily mandated they have to end because they've been going on for a couple of years even before the policy was out -- at that point, even if the policy of 18 months was mandatory, they would fall within the 18 months. There's no likelihood, and if one reads that exception, written in the policy, which is 18 months except when it's not going to continue beyond the four years, its obvious it's not going to continue beyond 4 years because statutorily it cannot.

The Commission must determine whether the respondent's failure or refusal to order DHSS to fill the positions in question on a permanent basis violated applicable statutes, rules, or policies. As discussed above, in the commission's opinion, the respondent erred in treating the policy in question as an unenforceable guideline in the context of the

circumstances of this case. However, if the application of the policy would not have lead to a conclusion that such an order should issue, then it follows that the respondent did not violate the policy in refusing to issue the order. Therefore, it is appropriate to look at the respondent's "hypothetical" substantive analysis of the situation, as set forth above, after she was asked whether she would have issued an order had she believed the policy were more than a guideline.

The difficulty with the respondent's substantive response is that it never addresses whether there was a probable duration of the positions of 18 months or more at the time of appointment. Rather, the respondent focuses on the anticipated duration of the positions measured from the date of the "audit."

Looking at §§248.03 and 248.04 as a whole, they contemplate that prior to making the appointment to a project position the appointing authority is to evaluate the anticipated duration of the position, and to make a permanent appointment where the anticipated duration is 18 months or more, except where there is no likelihood of the project or position continuing.

Section 248;03 A. 1. states that "After the classification has been determined, project appointment may be made without review to project positions which have a probable ending date of less than 18 months." (emphasis added). Logic dictates that no appointment can be made until after the classification of a position has been determined. This presumably would occur at the very beginning of the staffing process. Then the "probable ending date" of the position is evaluated. If it is 18 months or more, a permanent appointment is dictated unless there is no likelihood of the project or position continuing.

This view of the process is reinforced by §248.04 d:

Documentation of the reason(s) for project appointments to project positions which have a duration of more than 18 months shall be maintained with the certification request and may be audited by the Division of Merit Recruitment and Selection.

This provision clearly envisions that the appointing authority will provide documentation of the reasons for these project appointments at the beginning of the process, and if an audit occurs, it includes that previously submitted documentation.

By looking solely at the length of time remaining in the positions at the time of the "audit," the 18 month parameter set out in the policy is essentially obviated. Evaluation of the propriety of an appointment and a determination of whether the duration of the position exceeds 18 months would turn on when the respondent looked at the situation, which is an arbitrary point in time.

If the respondent had considered the information that DHSS had available at an earlier date, it is reasonable to infer from this record that she would have found that in fact DHSS knew at least as early as January 11, 1983, that the duration of the positions was until late summer of 1985, which was more than 18 months beyond both that point and the June 1983 extension. This conclusion is based primarily on Appellant's Exhibit 4. The first document in that exhibit is a letter dated January 11, 1983, from the personnel manager at GBCI to the union local. Therein he states in part:

Both of these teachers were hired on a 'project' basis due to the overpopulation we have experienced for the past few years. They understand that their positions will be abolished when we reach a suitable population figure for our facility. Both teachers began here in September of 1981 and we anticipate their project positions will end by late summer of 1985. (emphasis supplied).

Now, it can be argued that this underscored language is not a projection of the duration of the positions based on an estimate of the duration of the conditions that lead to their creation, but rather it is an indication of the maximum duration of the positions due to the four year restriction set forth in the civil service code. The Commission disagrees with this approach, for three reasons.

First, the context of the entire letter is inconsistent with this argument. The writer says that the teachers were hired "due to the overpopulation we have experienced for the past few years." He says the teachers "understand that their positions will be abolished when we reach a suitable population figure for our facility. He then goes on to say that they began there in September 1981² and that "we anticipate their project positions will end by late summer of 1985." This language is consistent with an estimate of how long the circumstances that gave rise to the positions would continue. Not only would an interpretation of the last sentence as a reference to the four year restriction be inconsistent with the context provided by the entire paragraph, the language of the statement itself is inconsistent with an implied statutory reference. The statute in effect at the time of the letter, §230.27(1) (1981-1982), provided that "The duration of a project appointment under this section may not extend for a period of more than 4 years, commencing with appointment to the position." (emphasis supplied) The letter refers not to the duration of the appointments, but rather to the duration of the "project positions." Furthermore, if he had been referring to the statutory provision, it is not likely he would have said "we anticipate" to refer to the definitive statutory proscription.

² This clearly is incorrect.

Finally, the respondent, in the statement of facts in its post-hearing brief with the examiner, relied on the letter in the same manner the Commission believes is justified:

The two project positions described in paragraph 4 & 5 (above) were created because of a problem of inmate overpopulation at the institution. The problem was anticipated to be a temporary one and the positions and appointments are not expected to last beyond the summer, 1985. (Appellant's Exhibit No. 4a)

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 a 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 can not 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 4, 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.

The proposed decision in Finding #9 states:

The two aforesaid positions as of the date of the hearing were not scheduled to terminate until approximately February of 1986.

It also states in the opinion at p. 13: "They were not scheduled to terminate until February of April of 1986."

However, the Commission is convinced that the only evidence supporting these findings consists of the following statements in the appointment letters:

However, the duration of your appointment shall be a period not to exceed four years from the date of appointment to such position. Appellant's Exhibits 3d and 2c; Findings 4 and 5.

In the Commission's view, this statement cannot reasonably be interpreted as an estimation of the probable duration of the positions. Rather, it is simply a reflection of the statutory prohibition of project appointments in excess of 4 years. See §230.27(1), Stats. (1981-1982)

There simply is nothing in this limited record that would support a finding that there was ever any likelihood that the projects or positions would continue beyond late summer of 1985. The fact that the positions were based on prison overcrowding and had received certain extensions does not create a reasonable inference that there was any likelihood the overcrowding would continue, and other factors would be present, that would support continuation of the projects or positions. As discussed above, it must be kept in mind that the policy exception uses the language, "except when there is no likelihood (emphasis added) of the project or position continuing," not "except when there is no possibility (emphasis added) of the project or position continuing." The word "likelihood" is defined as "the fact of being likely to happen or something that is likely to happen, probability." Webster's New World Dictionary, Second College Edition, p. 819. That there may be a possibility of something happening removes the situation from the status of there being no possibility of it happening; it does not remove it from the status of there being no likelihood of it happening.

Since the record does not support a conclusion that the refusal of the respondent to order DHSS to fill these positions on a permanent basis was a violation of Chapter 230 (Section 230.05 and 230.27, Stats.) and the rules and policies promulgated thereunder, the respondent's decision must be affirmed and this appeal dismissed.

ORDER

1. The Commission adopts and incorporates by reference as its findings the following findings contained in the proposed decision and order: 1, 3, 8, 10, 12 and 14, and, as modified as hereinafter indicated, proposed findings 2, 9, 11, 13 and 15:

2. By letter dated July 26, 1984, after having had a subordinate look into the matters raised by appellant in the foregoing letter, the respondent advised the appellant that she would "not be issuing an order to the Department of Health and Social Services regarding the hiring practices for project positions."

* * *

9. The two aforesaid positions as of the date of the hearing were not scheduled to terminate until ~~approximately/February/of~~ 1986. the end of summer 1985.

* * *

11. At the time the two positions were created they did ~~not~~ have a probable ending date of less than 18 months.

* * *

13. The record ~~does/not~~ supports a finding that there was no likelihood of the project or position continuing.

* * *

15. Essentially the following policies and procedures for staffing project positions were in effect at all times material herein....

2. The Commission adopts and incorporates by reference as its conclusions of law the following conclusions contained in the proposed decision and order: 1 and 2. The Commission rejects proposed conclusions 3, 4, 5, and substitutes the following:

3. The appellant has not sustained its burden with respect to either matter set forth in the preceding conclusion.

4. The respondent did not refuse to audit the action of DHSS in continuing project appointments to two half-time project teacher positions as noted above, and therefore did not violate Chapter 230 (Section 230.05 and 230.27, Stats.) and the rules and policies promulgated thereunder by refusing to conduct such an audit.

5. The respondent's decision to deny the appellant's request to order the Department of Health and Social Services to fill the aforesaid two half-time project teacher positions on a permanent appointment basis did not violate Chapter 230 (Sections 230.05 and 230.27) and the rules and policies promulgated thereunder.

3. The Commission incorporates by reference the proposed opinion except that it deletes the last three lines on page 12 and the first twenty lines on page 13, the last five lines on page 15, and all of page 16.

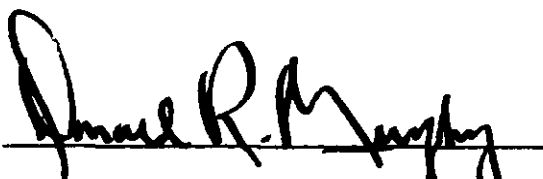
4. The Commission rejects the proposed order and as and for its final order in this matter enters the following:

ORDER

The respondent's decision denying the appellant's request that she order DHSS to fill the two disputed positions on a permanent appointment basis is affirmed and this appeal is dismissed.

Dated: August 1, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

AJT:jmf
ID9/1
Attachment

Parties:

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PROPOSED
 DECISION
 AND
 ORDER

This is an appeal from respondent's actions regarding certain hiring steps taken by the Department of Health and Social Services. According to the terms of an Interim Decision and Order by the Commission dated November 14, 1984, the issue for hearing in this matter was established as follows:

Was the decision, if any, of the Administrator of the Division of Merit Recruitment and Selection refusing to audit the action of the Department of Health and Social Services in continuing project appointments to two half-time project teacher positions at Wisconsin Correctional Institution, Green Bay, and refusing to order the Department of Health and Social Services to fill those positions on a permanent appointment basis, a violation of Chapter 230 (Section 230.05 and 230.27, Stats.) and the rules and policies promulgated thereunder?

Hearing on the dispute was held November 27, 1984, before Dennis P. McGilligan, Commissioner. The parties completed their briefing schedule on March 12, 1985.

FINDINGS OF FACT

1. By letter dated June 27, 1984, a representative of the Wisconsin Federation of Teachers (hereinafter appellant) wrote to the respondent, asking her to audit certain hiring actions taken by the Department of

Health and Social Services; and, if appropriate, order the department to fill the disputed positions on a project-permanent basis:

In September, 1981, two teachers were hired by Green Bay Correctional Institution, Department of Health and Social Services, as half-time project employees. The project positions were, apparently, created prior to that date. According to the information we have received, these positions will continue until at least late summer, 1985. Currently these teachers are working more than half-time.

In accordance with Wisconsin Personnel Manual - Staffing, Ch. 248, (July, 1983) project positions which have a probable ending date of 18 months or more should be filled as project-permanent rather than project-project.

We are requesting that you audit the actions of the Department of Health and Social Services in filling these positions and, if appropriate, order the Department to fill them on a project-permanent basis. We would appreciate a decision by July 16, 1984. Thank You.

2. By letter dated July 26, 1984, the respondent advised the appellant that she would "not be issuing an order to the Department of Health and Social Services regarding the hiring practices for project positions."

3. On July 30, 1984, the appellant filed a timely appeal of respondent's actions with the Commission.

4. Ruth Trowbridge received a project appointment to a half-time teacher project position (position No. 308760) at Green Bay Correctional Institution effective February 21, 1982. The initial expected termination date for the project appointment was June 30, 1982. However, Trowbridge's appointment letter dated April 14, 1982, noted "the duration of your appointment shall be a period not to exceed four years from the date of appointment to such position."

5. Harriet Schoenebeck received a project appointment to a half-time teacher project position (position No. 308759) at Green Bay Correctional Institution effective April 4, 1982. The initial expected termination date for the project appointment was June 30, 1982. However, Schoenebeck's

appointment letter dated April 14, 1982, also noted that "the duration of your appointment shall be a period not to exceed four years from the date of appointment to such position."

6. The two aforesaid project positions were created because of a problem with inmate overpopulation at the institution. Both of these positions were later extended until June 30, 1983.

7. By letter dated January 11, 1983, Tom A. Lukas, a personnel manager for DHSS, informed a representative of the appellant that both Trowbridge and Schoenebeck "understand that their positions will be abolished when we reach a suitable population figure for our facility. Both teachers began here in September of 1981 and we anticipate their project positions will end by late summer of 1985."

8. By letter dated June 23, 1983, Robert Hable (a representative of the Department of Health and Social Services) notified a representative of appellant that "both positions will probably continue for another year."

9. The two aforesaid positions as of the date of the hearing were not scheduled to terminate until approximately February of 1986.

10. At the time of the appellant's request for an audit of the project positions and an enforceable order, the two project appointments described in Findings of Fact 4 & 5 above had lasted for approximately two years and two months and two years and four months, respectively. Neither appointment has exceeded four years.

11. At the time the two positions were created they did not have a probable ending date of less than 18 months.

12. The positions at the time appellant requested an audit did not have a probable ending date of less than 18 months from the date of the requested audit and order.

13. The record does not support a finding that there was no likelihood of the project or position continuing.

14. The administrator of the Division of Merit Recruitment and Selection refused to direct that the positions be filled on a permanent basis.

15. The following policies and procedures for staffing project positions were in effect at all times material herein and were the subject of a memo dated July 20, 1983, from the acting administrator of the Division of Merit Recruitment and Selection to staffing manual holders as follows:

Please add the attached Chapter 248 to your Wisconsin Personnel Manual- Staffing

This Chapter outlines the policies and procedures for staffing project positions. These policies reflect the input of the agencies through the Personnel Management Council as well as through written and verbal comments received from agencies on a draft policy circulated to agencies in March of this year.

Because the majority of the agencies felt that the existing project appointment policies reflected in Chapter 314 of the Wisconsin Personnel Manual - Administration, Classification, Compensation were adequate and the proposed changes would be more restrictive, the policies for staffing project positions remain similar to the original policies of Chapter 314.

Chapter 248, however, does emphasize the following:

1. Project appointments for project positions which have a probable ending date of 18 months or more should be supported with documentation of the reasons, and this documentation may be audited by the Division of Merit Recruitment and Selection.

Chapter 248 - Project Appointments

248.01 Introduction

This Chapter outlines the policy and procedures for staffing project positions. The procedures outlined in the sections below should be followed in conjunction with procedures specified in Chapters 312, 314 and 316 of the Wisconsin Personnel Manual - Administration, Classification and Compensation.

248.02 Definition

Project employment as defined in §230.27, Stats., is employment of at least 600 hours per year in a planned undertaking

which is not a regular or continuing function and which has a probable duration of not more than four years. Individuals appointed to project positions may be permanent or project employes.

248.03 Policy

A. Project Position Appointments

1. After the classification has been determined, project appointments may be made without review to project positions which have a probable ending date of less than 18 months.
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.

* * *

- d. Documentation of the reason(s) for project appointments to project positions which have a duration of more than 18 months shall be maintained with the certification request and may be audited by the Division of Merit Recruitment and Selection.
- e. Questions regarding recruitment and selection procedures for project positions should be directed to the Employee Selection Specialist assigned that classification.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(a), Stats.
2. The appellant has the burden of proving that the respondent violated Chapter 230 (Section 230.05 and 230.27, Stats.) and the rules and policies promulgated thereunder by refusing to audit the action of the Department of Health and Social Services in continuing project appointments to two half-time project teacher positions at Wisconsin Correctional Institution, Green Bay, and by refusing to order the Department of Health and Social Services to fill those positions on a permanent appointment basis.

3. The appellant has not sustained its burden with respect to respondent's refusal to audit the action of the aforesaid Department in continuing project appointments to two half-time project teacher positions as noted above.

4. The respondent's decision to deny the appellant's request to audit the action of the Department of Health and Social Services in continuing project appointments to two half-time project teacher positions at Wisconsin Correctional Institution, Green Bay did not violate Chapter 230 and/or the rules and policies promulgated thereunder.

5. The appellant has sustained its burden with respect to respondent's refusal to order the Department of Health and Social Services to fill these positions on a permanent appointment basis.

6. The respondent's decision to deny the appellant's request to order the Department of Health and Social Services to fill the aforesaid two half-time project teacher positions on a permanent appointment basis did violate Chapter 230 and the rules and policies promulgated thereunder.

OPINION

There are basically two issues before the Commission. One is whether the decision, if any, of the Administrator of the Division of Merit Recruitment and Selection refusing to audit the action of the Department of Health and Social Services in continuing project appointments to two half-time project teacher positions at Wisconsin Correctional Institution, Green Bay violated Chapter 230 and the rules and policies promulgated thereunder. The second issue is whether the decision, if any, of the Administrator in refusing to order the Department of Health and Social Services to fill these positions on a permanent appointment basis violated Chapter 230 as noted above. The parties differ sharply on these issues.

Parties' Positions:

Initially, appellant argues that the Wisconsin Personnel Manual-Staffing, Chapter 248 entitled "Project Appointments" constitutes a "rule" within the meaning of Chapter 227, Stats. In support thereof, appellant argues that an administrative rule is one defined by Section 227.01(9) as follows:

'Rule' means a regulation, standard, statement of policy or general order (including the amendment or repeal of any of the foregoing), of general application and having the effective law, issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency.

Appellant goes on to state that Chapter 248 constitutes a statement of policy issued by respondent to implement and make specific Section 230.27(2) which provides that the administrator may provide by rule for the selection and appointment of a person to a project position. Appellant concedes that the properly promulgated rules of the Department and the administrator establish only that a project appointment requires approval by the administrator. In making this decision, appellant argues that respondent must enforce the standard found in its own staffing manual "wherein it is provided that permanent appointments are required (emphasis supplied) 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."

Appellant maintains that the Supreme Court in an analogous factual situation has applied the statutory definition of a rule in a fashion which supports such a finding here. Appellant cites Wisconsin Telephone Co. v. IHLR Dept., 68 Wis 2d 345, 228 N.W. 2d 649 (1975) wherein "the court held that the Equal Rights Division's 'Sex Discrimination Guidelines constituted

a 'rule' since they were a statement of general policy or an interpretation of statute intended to govern the agency's enforcement of legislation."

The appellant adds that ERD's guidelines constituted an attempt to delineate that agency's interpretation of the Fair Employment Practices Act much like Chapter 248 establishes guidelines by which the administrator "will require the appointment on a permanent basis of employees to project positions."

Appellant also argues that even if the Commission should hold that Chapter 248 is not a "rule" it should be enforced as an "officially stated agency policy." In this regard the appellant points out the obligation of an agency to abide by its own rules, procedures and practices as set forth by Section 227.20, Stats., which provides as follows:

The Court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion... is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency... but the court shall not substitute its judgment for that of the agency on an issue of discretion.

The appellant notes that while there appears to be no reported cases involving the failure of an agency to follow its own rules or officially stated policies, there have been several regarding the failure of an agency to comply with its own prior practice citing Public Service Corp. v. Public Service Commission, 109 Wis. 2d 256, 325 N.W. 2d 867 (1982) and Arrowhead United Teachers in support thereof.

Finally, appellant maintains that the only plausible interpretation of Section 248.03, is that which requires permanent appointments to project positions which have a probable ending date of 18 months or more. In this regard, appellant argues that based on the clear language of the section

"no review is required of a project appointment to a project position which has a probable ending date of less than 18 months, whereas permanent appointments are required for those which have a probable ending date of 18 months or more." The appellant contends that the disputed positions did not have probable ending dates of less than 18 months at any time material herein. The appellant notes that at hearing the administrator suggested that the phrase "except when there is no likelihood of the project continuing" would apply to the facts herein as neither position can continue under state law for more than four years. Appellant maintains that if this argument is accepted permanent appointments would never be required for project positions which have a probable ending date of 18 months or more since in all cases under Section 230.27, project positions must terminate at the end of four years. Appellant concludes that "since this interpretation would effectively render Section 248.03, A, 2. meaningless, it is absolutely invalid as a matter of interpretation."

In summary, appellant requests:

that the Commission conclude as a matter of law that Chapter 248 of the Wisconsin Personnel Manual - Staffing constitutes a rule within the meaning of Section 227.01(9); that the administrator of the Division of Merit Recruitment and Selection is compelled to abide by her own rules or officially stated agency policies; that the administrator has in this case failed to do so; and that the administrator has failed to establish any rational basis for her actions in direct contradiction to her own rules.

For relief, appellant asks for a cease and desist order as well as a direction that said positions be filled on a permanent appointment basis.

The respondent, on the other hand, argues that the policy embodied by Chapter 248 is directory, not mandatory. In this regard, respondent claims that her intention when this policy was issued and her practice in applying it are to permit agencies to fill project positions with project appointees even if the appointments last longer than 18 months. Respondent claims

that the purpose of the policy was and continues to be to encourage agencies to make permanent appointments to long-term project positions. Respondent does not feel that it can require agencies to make permanent appointments under such circumstances.

Respondent next argues that there is no evidence in the record to support a finding that the disputed positions were ever anticipated to be more than 18 months, thus invoking the aforesaid policy requiring consideration of permanent instead of project appointments to said positions.

Respondent also argues that assuming the chapter and all applicable provisions fit the definition of a rule and that said sections mandate permanent appointments to project positions lasting longer than 18 months it has not been promulgated in accordance with the procedures for rule-making under the administrative procedures and review act. Therefore, respondent maintains the provisions are invalid and ineffective.

Finally, respondent argues that the burden of proof is on the appellant and that appellant has failed to meet said burden.

In conclusion, respondent claims she lacks the authority under the current statutory and rule scheme to prohibit a project appointment to a project position simply because that appointment may last beyond 18 months. Therefore, respondent urges the Commission to affirm her decision and dismiss the appeal.

Merits of the Case:

Chapter 248, Wisconsin Personnel Manual-Staffing, deals with project appointments. There are two sections of the chapter which most apply to the instant case and issue. They are:

s. 248.03 Policy

A. Project Position Appointments

1. After the classification has been determined, project appointments may be made without review to project positions which have a probable ending date of less than 18 months.
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.

s. 248.04 Procedures

* * *

- d. Documentation of the reason(s) for project appointments to project positions which have a duration of more than 18 months shall be maintained with the certification request and may be audited by the Division of Merit Recruitment and Selection.

Respondent first argues that the aforesaid Chapter is directory, not mandatory. Therefore, the respondent adds, she can encourage agencies as a matter of practice and policy to make permanent appointments to long-term project positions but cannot require it.

Section 227.20, Stats., noted above, provides that a Court shall reverse or remand a case to an agency if it finds that the agency's exercise of discretion is inconsistent with an officially stated agency policy and the deviation is not explained to the satisfaction of the court. By analogy, in an administrative review proceeding such as this, the Commission should be able to reverse an agency action inconsistent with its official policy where no rational explanation is offered for the deviation, and where the policy constitutes a substantive application and interpretation of the respondent's statutory authority in this area, and the substantive correctness of the policy has not been challenged by either party.

In the instant case, Chapter 248 is the official policy or standard utilized by respondent for determining what action should be taken with respect to approving a request regarding the selection and appointment of a

person to a project position under Section 230.27(2) Stats. and ER Pers 34.03. By analogy to Section 227.20 Stats., respondent must follow this policy or explain any deviation satisfactorily to the Commission. The respondent offered no persuasive evidence as to why she failed to enforce Chapter 248's policy. It can't be because said policy was unreasonable as neither party at hearing attacked the 18 months standard contained in 248.03 A.2. as being arbitrary or unworkable. Respondent did state that it was her intention when this policy was issued and her practice in applying it was to permit agencies to fill project positions with project appointees even if the appointments lasted longer than 18 months. However, this intention and practice flies in the face of at least some of the language of Chapter 248 itself. In this regard, the Commission notes that the provisions therein state:

248.03 A. 2. Permanent appointments are required (emphasis added) 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."

This language could not make it more clear that permanent appointments are required for positions which have a probable ending date of 18 months or more. On the otherhand, s. 248.04 Procedures d. states:

Documentation of the reason(s) for project appointments to project positions which have a duration of more than 18 months shall be maintained with the certification request and may be audited by the Division of Merit Recruitment and Selection (emphasis added)

This language makes it clear that respondent has the discretion to conduct or not to conduct an audit under the circumstances therein.

Respondent next argues that there is no evidence in the record to support a finding that these positions were ever anticipated to be more than 18 months, thus fitting within the exception noted in s. 248.03 A.2.

above eliminating the requirement of a permanent appointment within the meaning of that exception. The record, however, does not support a finding regarding same. To the contrary, the record supports a finding that there was a likelihood of the project/position continuing 18 months or more.

In this regard, the Commission notes that at the time the appellant sought her review of these positions, they were not then scheduled to terminate until a date more than 18 months later. Beyond this, the positions had already been in existence for more than 24 months. The positions at issue were created in early 1982. They were not scheduled to terminate until February or April of 1986. They were created because of a problem with inmate overpopulation at the institution. They were periodically extended over the aforesaid period of time to deal with the problem of prison overcrowding. Findings of Fact 4 through 12 support a conclusion that at the very least there was a likelihood of said positions continuing 18 months or more, budget uncertainties notwithstanding. See in particular, Findings of Fact 4, 5, 7 and 9. As noted above, the disputed language reads "Permanent appointments are required (emphasis added) ... except when there is no likelihood of the project or position continuing." Clearly, the record supports a finding that the exception contained in s. 248.03 A. 2. has not been satisfied.

Respondent further argues that assuming appellant is correct in its argument that Chapter 248 constitutes a "rule" within the meaning of Chapter 227, Stats., nevertheless the administrator's own rules cannot be applied to require her compliance since they had not been promulgated in accordance with Chapter 248. However, the record is clear that Chapter 248 is an officially stated policy of respondent to be utilized in carrying out her responsibilities under the aforesaid pertinent statutes and rules.

Even though the policy here in question was not promulgated as a rule, and perhaps might not be enforceable against a third party, this does not mean it has no materiality to this appeal. On occasion, courts have required agencies to comply with their own unpublished regulations. See, Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224-225 (D.C. Cir. 1959):

Agency action that substantially and prejudicially violates the agency's rules cannot stand. At the time of this proceeding the Commission had no general regulations governing all rule-making, but when it proposed an allocation of TV channels to particular communities it was its usual practice, followed in this instance, to prescribe a cutoff date [for comments]...⁸ By plain implication, this rule forbade submitting material to the Commission's members after the time for filing it with the Commission had gone by. The rule cannot be interpreted to permit parties to make off the record contentions that it forbids them to make on the record.

⁸ This rule has since been codified in the Commission's Procedural Practices and Rules adopted December 11, 1957, 47 C.F. R. 31. 213 (1958).

⁹ The Commission's present regulations make explicit what was formerly implicit.

See also, Burke v. Children's Services Division, 607 P.2d 141, 144, 288 Ore. 533 (Ore., 1980):

... the original 'directive' or 'statement' adopting CSO's day care payment program, whatever informality attended its promulgation, constituted an implementation of agency policy within the meaning of the definition and was therefore a rule.

* * *

An agency may not rely on its own procedural failures to avoid the necessity of compliance with its rules. (emphasis added)

See also, Fulgham v. Saif Corporation, 666 P. 2d 850, 852, 63 Or. App. 731 (Ore., 1983).

Finally, respondent argues that the burden of proof is on the appellant citing Jackson v. State Personnel Board, Dane County Cir. Ct. 164-086 (2/26/79) in support thereof. The Commission agrees. However, contrary to respondent's assertion that this is an abuse of discretion case, the standard by which the Commission should judge the respondent's actions is whether the personnel action being appealed violated the relevant civil service statutes, rules, or policies promulgated thereunder.¹ WFT v. DMRS, 84-0154-PC, pages 3-4, (11/14/84). Section 230.27(2) Stats. provides that the administrator may provide by rule for the selection and appointment of a person to a project position. ER Pers 34.03(1) - Use of Project Appointments states:

A project position may be filled on a project appointment basis only after approval by the administrator. Project appointments shall be made so as to contribute to a competent and balanced work force.

As noted previously, Chapter 248 is an officially stated policy utilized by respondent in applying ER Pers 34.03 and can be considered by the Commission in deciding this appeal.

Based on same, and all of the above, the Commission finds that the answer to the first part of the issue as framed by the Commission is NO, the decision, if any, of the Administrator of the Division of Merit Recruitment and Selection refusing to audit the action of the Department of Health and Social Services in continuing project appointments to two

¹ Even if the standard were abuse of discretion, the respondent's failure to follow its officially stated policy as set forth in this record would, in the opinion of the Commission, give rise to an abuse of discretion. Action in violation of its own rules, amounts to an abuse of agency discretion. 2 Am Jur 2d Administrative Law §651 page 509 n.20, citing Brown v. Humble Oil & Ref. Co. 126 Tex 296, 83 SW2d 935 (1935), affirmed other grounds, 87 SW2d 1069.

half-time project teacher positions at Wisconsin Correctional Institution, Green Bay, was not a violation of Chapter 230 (Sections 230.05 and 230.27 Stats.) and the rules and policies promulgated thereunder. However, based on all of the foregoing, the answer to the second part of the issue as framed by the Commission is YES, the refusal of respondent to order the Department of Health and Social Services to fill the disputed positions on a permanent appointment basis as requested in appellant's letter dated June 27, 1984, is a violation of Chapter 230 (Sections 230.05 and 230.27, Stats.) and the rules and policies promulgated thereunder.

ORDER

The respondent's decision denying the appellant's request that she order the Department of Health and Social Services to fill the two disputed positions on a permanent appointment basis is rejected and this matter is remanded for action in accordance with this decision.

Dated: _____, 1985 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DPM:jmf
ID3/2

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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