STATE OF WISCONSIN PERSONNEL COMMISSION

MICHAEL PEARSON,
Appellant,

v.

President, UNIVERSITY OF WISCONSIN-SYSTEM,
Respondent.

Case No. 84-0219-PC

RULING ON APPELLANT'S PETITION FOR ENFORCEMENT OF COMMISSION'S ORDERS

This matter is before the commission on appellant's petition for enforcement of certain orders of the commission. Both parties have filed briefs and supporting documents.

In an "INTERIM RULING ON PETITIONS FOR DECLARATORY RULING" dated August 5, 1996, the commission summarized the background of this case at that time as follows:

> This case commenced as an appeal pursuant to §230.44(1)(d), Stats., of respondent's failure to have appointed appellant to a vacant Maintenance Supervisor 1-Locksmith position. In its final decision and order entered on September 16, 1985, the commission concluded that respondent's decision not to have promoted appellant constituted an abuse of discretion, and that appellant was entitled as a remedy to appointment to the position in question (or a comparable promotional position) when it next became vacant.
>
> The status quo as to this position remained unchanged for a number of years until the incumbent (William Critchley) retired in 1995. The appellant subsequently sought to invoke the commission's jurisdiction to enter an order restraining respondent from taking any action with respect to the position other than appellant's appointment. The parties then agreed that respondent would take no action with respect to the position in question while their dispute would be submitted to the commission on the parties' respective petitions for declaratory ruling. Id.

In a nutshell, respondent contended that subsequent to Mr. Critchley's retirement, it had refrained from filling the position he had occupied because it was considering possible changes in its locksmith operation that could eliminate the need to fill the position at all. Appellant contended that respondent had been acting in bad faith to find a way to avoid ap-

pointing him to the vacant position and thus deliberately circumvent the commission's original order. The commission resolved this dispute as follows:

> When Mr. Critchley retired, his position became "vacant" as that term is commonly understood. Since the commission's decision and order required that appellant be appointed to this position when it became vacant, it would appear that respondent should have made the appointment at the time of Mr. Critchley's retirement. However, respondent appears to assert that there is no vacancy until it decides the position should be filled, and that the commission has no authority as a remedy for a §230.44(1)(d), stats., appeal like this to require it to fill a vacant position under the circumstances . . . Section ER-MRS 1.02(34), Wis. Adm. Code, provides the following definition: " 'Vacancy' means a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill the position." In *Givens v. DILHR,* 87-0039-PC (3/10/88), affirmed, *Givens v. WPC,* Dane Co. Cir. Ct. 88CV2029 (1/6/89); the commission addressed the meaning of this rule . . . as follows:
>
> > Respondent argues that . . . a "vacancy" does not exist unless there is: (1) a position and (2) a request that the position be filled. In the opinion of the commission, however, respondent tortures the clear language of the code provision to reach this conclusion. In the commission's opinion, such language requires that the appointing authority have the *authority* to initiate an action to fill the position and the *authority* to make a permanent appointment to the position once such an action is initiated in order for the position to be considered vacant. In other words, it is the existence of this authority, not the exercise of it, which triggers the language of the code provision.
>
> This precedent conflicts directly with the respondent's approach in the instant case. Furthermore, respondent's contention that an interpretation of the commission's order which would require it to appoint appellant to the vacant position would somehow interfere with its prerogatives to make management decisions about the position in question, and how to deal with the locksmith program, is misplaced. Respondent is free to decide in good faith to merge, downsize, etc., as it sees fit. If such action were to involve the elimination of the Supervisor 1-Locksmith vacancy, that would not be prohibited by the commission's original decision and order in this case. However, appellant is entitled to an immediate promotion to this vacancy. Id, pp. 3-4 (footnote omitted).

The instant petition is grounded on §230.44(4)(c), Stats., and asks the commission for "enforcement of its orders of September 16, 1985, and August 5, 1996, on grounds that

[r]espondent . . . has failed to comply with the Commission's orders and has acted in bad faith in order to avoid compliance." In the alternative, appellant seeks to appeal (apparently pursuant to §230.44(1)(d), Stats.)[1] respondent's actions. Appellant seeks the following relief:

> Appellant requests that the Commission order the UW-Madison to immediately appoint Mr. Pearson to the Maintenance Supervisor 1-Locksmith position which has been the subject of the parties' litigation since 1985; or, if it has been eliminated, to a comparable position; or if the position has been eliminated and no comparable position is available, to immediately begin the process of restoring the position in question or creating a comparable position, with an acting appointment for Mr. Pearson to this position until [it] is restored and permanent appointment when the process is completed.
>
> Appellant further asks that the Commission order Respondent to provide assurance that its actions constitute a final reorganization plan which may not be changed without good cause shown until Appellant reaches retirement age.
>
> Appellant further asks the Commission to order payment of back wages from June 1, 1995, when Respondent should have appointed Mr. Pearson to the position in question.

In its response to the petition, respondent contends that the commission has no authority under §230.44(4)(c), Stats., to enforce its orders, but that enforcement must be sought in circuit court. However, respondent then states that it "encourages the Commission to conduct a hearing to determine whether or not the Respondent has acted in good faith in the implementation of its orders and whether enforcement action should be sought through the circuit court." Respondent requests an evidentiary hearing because it "disputes many of the statements attributed to its employes by the Appellant and denies the inferences drawn from its actions. . . The decision to seek judicial enforcement of an order is so serious and unprecedented that developing a full record of the actions of the Respondent and its motivations would be the wisest and most efficient course of action."

---

[1] Appellant has not developed this contention, and the Commission is unable to discern how appellant's concerns about respondent's compliance with the Commission's order could be considered an appeal under §230.44(1)(d), Stats. ("[a] personnel action after certification which is related to the hiring process in the classified civil service . . . .")

Respondent's contention that §230.44(4)(c), Stats., does not give the Commission the authority to enforce its own orders is correct. In *Guzniczak v. DHSS,* 83-0210, 0211-PC, 4/6/88, the commission held:

> It is true that [§230.44(4)(c)] states that the Commission may issue an "enforceable" order. However, said section does not state that the Commission does the enforcing. To the contrary, the above section has been interpreted to mean that the Commission cannot enforce its own orders. In *Wisconsin Department of Employment Relations v. Wisconsin Personnel Commission,* Case No. 85CV3022 (Dane Co. Cir. Ct., 12/27/87), the Court held:
>
> > The various provisions of sec. 230.45, Wis. Stats., which enumerate the powers and duties of (the Commission), however, limit (the Commission's) power to only "hear appeals." That section does not empower (the Commission) to enforce anything . . . enforcement actions referred to in sec. 230.44(4)(c) are to be brought only in circuit court.

Notwithstanding the foregoing conclusion, since the parties have briefed all of the issues, and have evinced an interest in having the Commission rule on the questions relating to the implementation of the remedial order, the Commission will proceed to address the major issues raised by the parties on this petition. However, the Commission can not definitively address certain issues which turn on disputes of material fact.

With respect to appellant's claim that he is entitled to back pay from June 1, 1995, when he alleges respondent should have appointed him to the supervisory position, this remedy is not available under the civil service code for this type of transaction, *see,* §230.43(4), Stats.; *Seep v. Personnel Commission,* 140 Wis. 2d 32, 409 N.W. 2d 142 (Ct. App., 1987).

Appellant's main contention is that respondent violated the Commission's order by reconfiguring the Maintenance Supervisor 1-Locksmith position that had been occupied by Mr. Critchley prior to offering it to him.[2] Appellant argues that the new PD (position description) consists of 20% supervisory activities and 80% nonsupervisory, while Mr. Critchley's PD had been 90% supervisory and consulting, and only 10% nonsupervisory.

---

[2] The Commission will not address appellant's allegation that this restructuring was done in bad faith in order to avoid having to promote him, because of the parties' conflicting factual positions on this question.

Appellant further asserts that the new PD is inconsistent with the Maintenance Supervisor 1-Locksmith class specification. In a somewhat related vein, appellant also objects to respondent's expressed intent to eliminate altogether the Maintenance Supervisor 1-Locksmith position (At the time respondent offered appellant the position, he was advised that the position would be eliminated in the near future due to a reorganization and associated change in the way the locksmith shop would be supervised.). Finally, appellant alleges that the elimination of the Maintenance Supervisor 1-Locksmith position would result in his layoff.[3]

As noted above, the parties sharply disagree as to what has occurred and what would have occurred had appellant accepted respondent's offer. However, restricting itself to the undisputed facts, the Commission can make a number of observations about whether respondent has complied with the Commission's August 5, 1996, ruling.

In that decision, the Commission stated that:

> [R]espondent's "contention that an interpretation of the Commission's [September 16, 1985] order which would require it to appoint appellant to the vacant position would somehow interfere with its prerogatives to make management decisions about the position in question, and how to deal with the locksmith program, is misplaced. Respondent is free to decide in good faith to merge, outsource, downsize, etc., as it sees fit. If such action were to involve the elimination of the Supervisor 1-Locksmith vacancy, that would not be prohibited by the Commission's original decision and order in this case. However, appellant is entitled to an immediate promotion to this vacancy. *Id.*, p. 4 (footnote omitted) (emphasis added).

As is expressed clearly by the foregoing, the Commission's original order ran only to the personnel transaction that falls within the Commission's subject matter jurisdiction -- i. e., the promotional process used to fill the position. Just as the good faith[4] total elimination of this position would not have been prohibited by the Commission's order, neither would a good faith revision in the position's PD. In this regard, respondent contends that the PD in question merely was changed to reflect the changes that had occurred in the posi-

---

[3] Respondent diametrically disagrees, contending that appellant will be able to bump into a nonsupervisory locksmith position (vacant or not) at the time the supervisory position is eliminated.

[4] If the position were eliminated merely to deny a promotion to appellant, then the decision would cross over from the realm of program management and become a personnel management decision in violation of the Commission's remedial order.

tion as the former incumbent's (Mr. Critchley's) role had changed over the years so that he was spending less time on supervisory duties per se, and more on what typically would be considered nonsupervisory locksmith activities: "a consideration of the functions he actually performed and a review of the Locksmith-Journey position standard showed that only 20% of the duties qualified as supervisory duties." Respondent's response to enforcement petition, pp.8-9 (footnote omitted). Appellant disagrees that Mr. Critchley's duties have changed to this extent. If it becomes necessary to resolve this dispute, it apparently would require an evidentiary hearing.

It is not clear, however, that resolution of this dispute actually would be necessary, in the context of the elimination of this position.[5] Respondent's Classified Personnel Office (CPO) approved the Maintenance Supervisor 1-Locksmith classification and pay rate with respect to this revised PD. If appellant had accepted the appointment as offered by respondent, the classification level and salary of the position which would be operative for purposes of appellant's layoff rights -- i. e., transfer, demotion, bumping, etc. -- would have been just established by the CPO on the basis of the revised PD. Regardless of what appellant may think about the actual level of the duties and responsibilities reflected in the new PD, it would appear that the recently established class and salary level would be controlling regarding appellant's layoff rights.

The parties also disagree about whether respondent's decision to eliminate the position and to take a different approach to supervision of the locksmith shop was made in good faith, and have submitted many pages of argument and supporting documents related to the management of the locksmith program in the context of the overall physical plant operation. As noted above, the Commission can not resolve this disputed factual issue without holding an evidentiary hearing.

Related to the foregoing issue is the dispute about respondent's assertion, at the time it offered the position to appellant, that he would not lose his employment with the elimination of the position in question. It appears likely to the Commission that respondent correctly outlined what would occur upon elimination of the position.

---

[5] As will be discussed further below, this is also a bone of contention between the parties.

As an incumbent in a supervisory position, appellant's rights with respect to a layoff situation would be governed by the civil service code rather than by a collective bargaining agreement, *see* §111.93(3), Stats. In his new position, appellant would have "permanent status in *a* class," §ER-PERS 22.08, Wis. Adm. Code (emphasis added), and would *not* be "serving an original appointment probationary period," §ER-PERS 22.04(3), Wis. Adm. Code. Therefore, he would be subject to the basic protections of an employe facing layoff. This includes the right to transfer or demote into a vacant position, or to "bump" (displace) an employe in another position, §§ER-MRS 22.08(1),(2), and (3), Wis. Adm. Code[6].

Appellant's concern about losing his employment in the event he were to have taken the promotion and then have faced the elimination of the supervisory position, apparently is posited on the assertion that respondent was revising his locksmith PD as well as the supervisor's PD, and appellant's reconfigured locksmith position "could be reallocated to a higher pay range. In that case it would not be available to Pearson if he had taken the locksmith supervisor position by the University's deadline and that position were then eliminated. Wiggins v. DOD, 82-0246-PC (7/21/83)." Appellant's submission in support of enforcement order, p. 21. The Commission can not perceive how such an eventuality could affect appellant's rights to transfer or demotion in lieu of layoff, although it conceivably could affect appellant's bumping rights under a certain set of circumstances.

With respect to transfer, if appellant's newly reconfigured Locksmith position were at the same or counterpart pay range as appellant's new supervisory position, he presumably could transfer into it in lieu of layoff. With respect to demotion, if it were at a lower level, he presumably could demote into it in lieu of layoff. As to appellant's bumping rights, presumably the only way these could be affected would be if three things occurred -- first, if, contrary to management's representations, respondent were to have filled appellant's old position; second, if the classification of the newly reconfigured position were to have been changed to a classification in a higher pay range than the pay range (or counter-

[6] Pursuant to §§ER 29.03(5)(a), (8)(bm),(c), Wis. Adm. Code, it appears likely that in such an eventuality appellant would retain his supervisory pay rate.

part pay range) of the position's previous classification[7]; and third, if the incumbent in the position were to have been regraded[8] to the higher classification and pay range, rather than having the position be opened to competition[9].

In conclusion, given the unusual posture and history of this case, the Commission makes the following observations. As should be apparent from the foregoing discussion, it appears that much, if not all of the parties' dispute about the nature of the position either has been or would be[10] rendered moot by the elimination of the position. Also, if appellant could establish that respondent's decision to eliminate this position were motivated by a bad faith interest in denying appellant a promotion, it is by no means clear what kind of remedy would be possible or appropriate. Finally, it appears to the Commission that appellant's concerns that he would have ended up unemployed if he had taken this job (which respondent denies would have happened), could have been alleviated by an agreement between the parties which could have had the effect of having guaranteed appellant both a degree of employment security and the benefit of the red-circled supervisory pay rate. Under all these, and other circumstances of record, the Commission urges the parties to explore a plenary settlement of this matter before embarking on further litigation.

In the event that the parties are unable to settle this matter and either or both wish the Commission to conduct further proceedings, it is suggested that a petition for declaratory ruling or other pleading be filed setting forth the jurisdictional basis for the proceeding.

---

[7] Pursuant to §ER-MRS 22.08(3)(a), Wis. Adm. Code, an employe may exercise the right of displacement into "[a] position in the same or counterpart pay range in which the employe had previously attained permanent status in class."

[8] "[T]he language of §230.15, Stats., as well as of §332.040 of the Wisconsin Personnel Manual, reflect strong policy considerations in favor of using the competitive examination process when there has been an assignment of duties which amount to a wholesale change in a position." *Sannes v. DER*, 92-0085-PC, 08/23/93.

[9] If the position were to be opened to competition during the time appellant were to be facing layoff, he presumably would be able to demote into the position while maintaining his pay rate.

[10] I. e., depending on the course of future litigation.

ORDER

Appellant's petition for enforcement is denied. In light of the parties' positions on further proceedings, discussed above, the Commission will retain jurisdiction over this matter for 20 days from the date of service of this order. If no further pleading or motion is filed within this period, this matter will be finally dismissed.

Dated: February 12, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT
840219Adec.doc