

STATE OF WISCONSIN

PERSONNEL COMMISSION

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MICHAEL PEARSON,

Appellant,

v.

President, UNIVERSITY OF  
WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 84-0219-PC

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INTERIM  
RULING ON  
PETITIONS FOR  
DECLARATORY  
RULING

This matter is before the Commission on the parties' petitions for declaratory ruling filed on May 1, 1996 (by respondent), and May 28, 1996 (by appellant). Both parties have filed briefs and supporting documentary evidence.

This case commenced as an appeal pursuant to §230.44(1)(d), Stats., of respondent's failure to have promoted 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 comparable promotional position) when it next became vacant.<sup>1</sup>

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.

Respondent's petition states as follows, inter alia:

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<sup>1</sup> The Commission also refused to award back pay and attorney's fees. Appellant appealed this aspect of the decision, and the Commission's decision was affirmed, Dane Co. Circuit Court No. 85CV5312 (6/25/86); Court of Appeals Dist. IV No. 86-1449 (3/5/87) (unpublished).

The Respondent, ... petitions the Commission to issue a declaratory ruling pursuant to sec. 227.41, Stats., declaring that the Respondent would not violate the order the Commission in this case, dated September 16, 1985, if it engaged in any of the following actions:

1. Eliminated the position of Maintenance Supervisor 1-Locksmith and merged the employes of the Locksmith Shop with another shop within Physical Plant;
2. Eliminated the position of Maintenance Supervisor 1-Locksmith and made the Locksmith Shop into a self-managed operation under the Shops and Programs General Manager;
3. Eliminated the position of Maintenance Supervisor 1-Locksmith and made the Locksmith Shop into a self-managed operation under the management of another existing shop manager;
4. Eliminated the position of Maintenance Supervisor 1-Locksmith and divided the Locksmith Shop into single person lock shops on a zone basis throughout the UW-Madison Campus;
5. Eliminated the position of Maintenance Supervisor 1-Locksmith and outsourced its functions.
6. Eliminated the position of Maintenance Supervisor 1-Locksmith and changed the organization of the Locksmith Shop, in any other manner, in order to run the Physical Plant operation competitively and logically.

Appellant petitions the Commission as follows:

Appellant hereby petitions the Personnel Commission for a Declaratory Ruling pursuant to §227.41, Stats., declaring that any action other than prompt appointment of Appellant to the position of Maintenance Supervisor 1-Locksmith will violate the Order issued by the Commission on September 16, 1985.

Respondent asserts that it has not decided whether to fill the vacant Maintenance Supervisor 1 - Locksmith position, and that since the former incumbent retired it has been considering whether to effect fundamental changes in the locksmith operation -- merger, outsourcing, etc., -- that should eliminate the need to fill the position. Respondent states that presently it has refrained from pursuing any particular option pending further proceedings before the Commission. Finally, respondent denies that it has acted, or

declined to act, in good faith, and that it has no motivation to avoid compliance with the Commission's order.

Appellant contends as follows in his brief in support of his petition for declaratory ruling:

Respondent's brief and exhibits, its actions since June, 1995 and its communications to Appellant show, probably inadvertently, that Respondent has made a decision in regards to the open locksmith supervisor position and is searching for a way to avoid appointing Appellant to the head locksmith position and thus to deliberately circumvent the Commission's 1985 Order. Evidence for this is to be found in Respondent's Petition, brief and exhibits. Respondent omitted appointment of a new locksmith supervisor as an alternative that the Commission is to consider and presents the locksmith shop as a leaderless shop.... By doing so Respondent effectively signals, first, its agreement that if the position is filled, Michael Pearson must get the job, as the Commission's 1985 Order directs, and second, that it intends therefore to take some action other than fill appoint Appellant to the position.

The conclusion that Respondent's ongoing intent, from the time Mr. Critchley left the locksmith shop supervisor position, has been to deny Appellant the locksmith supervisor position, is born out by documentation that Appellant obtained through the open records law and by Respondent's communications with Appellant. (pp. 3-4)

The parties thus strongly disagree concerning respondent's intentions regarding the position in question, and, specifically, whether it has acted and intends to act in good faith concerning appellant's interests with respect to the position. While both parties submit that the documentation of record establishes that their respective positions are correct, the facts underlying these positions remain sharply disputed. To the extent that the Commission would have to resolve these disputed issues of fact in order to rule on the declaratory ruling petitions, it would need to convene an evidentiary hearing. However, the ultimate issue presented by these petitions is a legal one which can be answered without the need to resolve these factual issues.

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 of the instant case:

The agency's authority to determine staffing levels and position needs is fundamental to the agency's ability to operate. This authority underlies the agency's ability to create a vacancy. (See Wis. Adm. Code sec. ER-MRS 1.01 [sic](34), sec. 230.09(2)(c) and (g); sec. 230.06(1)(b), Stats.) The Commission's remedial authority, limited as it is to the express provisions of the statutes, cannot be extended to altering the staffing levels and classifications determined by the agency. (emphasis added).

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 that 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 (then §ER-Pers 1.01(15)) 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 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. pp. 4-5.

This precedent conflicts directly with 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, 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.<sup>2</sup> However, appellant is entitled to an immediate promotion to this vacancy.

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<sup>2</sup> Appellant does not dispute respondent's authority to make a good-faith management decision to eliminate this position.

It should be emphasized that respondent took no action with respect to this position prior to Mr. Critchley's retirement. If it had, this could have led to a different conclusion. For example, if respondent had acted in good faith to eliminate the position concurrently with Mr. Critchley's retirement, this would not have transgressed appellant's interests with respect to the position, cf., Kuter v. DILHR, 82-0083-PC (5/23/84).

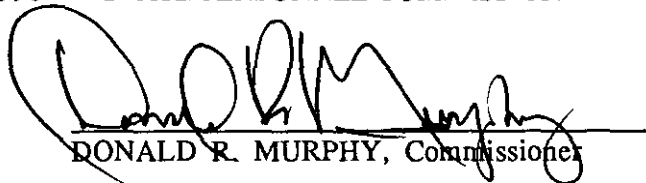
It also should be emphasized that to the extent that either or both of the parties are asking the Commission to rule on the permissibility under its prior decision and order for respondent to pursue the particular alternatives for the locksmith shop and this position which are currently under consideration, the Commission declines to do so. It would make little sense to hold a hearing to try to decide before the fact whether a number of possible scenarios affecting this position would be considered bona fide. It is difficult to determine before it occurs whether a particular management decision would be made in good faith.

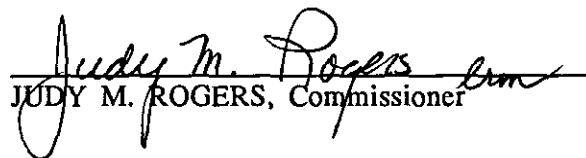
DECLARATION OF RIGHTS

In conclusion, the Commission rules that appellant is entitled to an immediate offer of an immediate promotion to the Maintenance Supervisor 1 - Locksmith position in question. The Commission will continue to exercise jurisdiction over this matter for the limited purpose of entertaining any petition which may be filed under §227.485, Stats.

Dated: August 5, 1996 STATE PERSONNEL COMMISSION

AJT:rcr

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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