STATE OF WISCONSIN PERSONNEL COMMISSION

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HARRY C. McCALLUM, *
Appellant, *
v. *
Secretary, DEPARTMENT OF TRANSPORTATION, *
Respondent. *
Case No. 85-0036-PC *
* * * * * * * * * * * * * * * *

DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss. Respondent argues that the appeal was not timely filed and that it relates to a subject that is not among those appealable to the Commission under §§230.44 and .45, Stats. The following facts appear to be undisputed:

FINDINGS OF FACT

1. Prior to January of 1985, the appellant was employed by respondent as a sergeant in the State Patrol, District 2. The appellant's position was not within a collective bargaining unit.

2. By memorandum dated January 2, 1985, the appellant requested that he be allowed to take a voluntary demotion to a vacant position of State Patrol Trooper 3. All Trooper 3 positions are within a collective bargaining unit.

3. The commanding officer for State Patrol District 2, Captain Roger Hlavacka met with the appellant on January 4, 1985 and followed up with a memorandum forwarding the appellant's request to the director of the Bureau of District Operations. In that memo, Captain Hlavacka stated, in part:

> Sergeant McCallum knows and understands that his present rate of pay ($12.545 per hour) is subject to a reduction to $12.411 per hour -- the maximum for State Patrol Trooper 3.
> We are requesting that Sergeant McCallum's request for downgrade be granted, to be effective at the start of the January 20, 1985 pay period.

4. On January 9, 1985, the director of the Bureau forwarded the request to James Van Sistine, Administrator of the Division of State Patrol and also recommended that appellant be permitted to demote.

5. Mr. Van Sistine conditionally approved the demotion but directed Captain Hlavacka to advise the appellant that the salary for the new position would be set at $11.295 per hour rather than at the maximum of the Trooper 3 pay range. Captain Hlavacka contacted the appellant by telephone and asked the appellant whether the difference in the pay rate would affect the appellant's decision to demote. The appellant stated that he wished to go ahead with the demotion.

6. Mr. Van Sistine then issued a letter dated January 11, 1985 confirming that appellant's request to demote had had been approved effective January 20, 1985 and listing appellant's new salary as $11.295 per hour.

7. On receiving Mr. Van Sistine's letter, appellant asked Captain Hlavacka the name of the person who should be contacted in order to obtain the correct wage. Captain Hlavacka responded by memo dated January 18th and stated that it was standard practice to make similar salary adjustments as had been made in appellant's case.

8. Appellant sent a follow-up memo on January 26th to Captain Hlavacka asking for the name of the person in respondent's personnel office responsible for calculating appellant's wage rate. By memo dated February 8th, Captain Hlavacka provided appellant with the name of Barbara Schultz.

9. On February 10, 1985, appellant sent Ms. Schultz a letter and asked for a step-by-step explanation of the calculations used to arrive at the $11.295 rate.

10. Ms. Schultz responded by memo dated March 4, 1985 that included the calculations.

11, On March 7, 1985, the Personnel Commission received a letter of appeal from the appellant.

CONCLUSION OF LAW

The Commission lacks jurisdiction over this appeal.

OPINION

This matter is an appeal from a decision setting appellant's salary upon a voluntary demotion.

The Commission derives its jurisdiction over certain personnel matters from §§230.44 and .45, Stats. Because this case did not reach the Commission via the non-contract grievance route (§230.45(1)(c), Stats.) or include any allegations of illegal discrimination (§230.45(1)(b), Stats.) or retaliation (§230.45(1)(g),(gm) and (j), Stats.) the Commission focuses on §230.44(1), Stats., which provides:

> 230.44 Appeal procedures. (1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under §230.45(1)(a):
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> (a) Decision made or delegated by administrator. Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under §230.05(2).
>
> (b) Decision made or delegated by secretary. Appeal of a personnel decision under §230.09(2)(a) or (d) or 230.13 made by the secretary or by an appointing authority under authority delegated by the secretary under §230.04(1m).
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> (c) Demotion, layoff, suspension or discharge. If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

> (d) Illegal action or abuse of discretion. A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.
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> (e) Discretionary performance awards. This subsection does not apply to decisions of an appointing authority relating to discretionary performance awards under §230.12(5), including the evaluation methodology and results used to determine the award or the amount awarded.

Appellant states that he is appealing a decision (or decisions) by an appointing authority to establish a level of salary. Appellant argues that such a decision falls within the scope of §230.44(1)(a), Stats.

It is important to note that the term "administrator" as found in ch. 230, Stats., refers to the Administrator of the Division of Merit Recruitment (DMRS), Department of Employment Relations. (See §230.03, Stats.) The authority to fix the compensation of employes is vested in the employe's appointing authority pursuant to §230.06(1), Stats., rather than in the Administrator of DMRS. (Compare §230.05, Stats). Therefore, the decision setting appellant's rate of pay upon a voluntary demotion was neither a decision of the Administrator, DMRS nor a decision delegated by that administrator.

For the same reasons, this appeal does not relate to a decision made or delegated by the Secretary of the Department of Employment Relations under §230.44(1)(b), Stats.

The Commission also has the authority to review certain disciplinary decisions under §230.44(1)(c), Stats. That provision enumerates the specific types of decisions that are appealable and it should be noted that the Commission's jurisdiction over such decisions does not extend to employes in collective bargaining units where a labor agreement exists. See §§111.93(3), Stats.

The wording of §230.44(10(c), Stats., closely tracks the language of §230.34, Stats., which provides, in part:

> 230.34 Demotion, suspension, discharge and layoff. (1)(a) An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.
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> * * *
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> (2) Employes with permanent status in class in permanent, sessional and seasonal positions in the classified service and employes serving a probationary period in such positions after promotion or transfer may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

All of the transactions listed in §§230.34(1) and (2) and 230.44(1)(c), Stats., are actions imposed on an employe involuntarily.[FN] Because §230.44(1)(c), Stats., lists only involuntary personnel actions, the Commission concludes that a decision establishing a salary level upon voluntary demotion is not appealable under this section. The decision in the instant appeal was not a decision to impose an involuntary demotion, nor was it a decision to discipline the appellant by reducing his base pay. The appellant voluntarily demoted and the respondent then exercised its discretion in establishing his new rate of pay.

The only possible jurisdictional basis that remains in this case is §230.44(1)(d), Stats. The provision permits appeals of post-certification actions that are related to the hiring process.

[FN] The standard of "just cause" is applied differently to pure discipline cases (i.e., discharge, suspension, demotion, reduction in base pay) as compared to a reduction in force or layoff. Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46 (1976).

The Commission has previously ruled that the "determination of a promoted employe's salary is not 'related' to the hiring process." Black et al v. DP, 81-266-PC (11/19/81). The Commission has also held that a decision to deny an application for medical benefits was not 'related' to the hiring process. Cleasby v. DOT, 82-227-PC (12/29/82). Support for reading §230.44(1)(d), Stats., to exclude a decision setting salary upon a voluntary demotion as not being a decision to engage in employment may be found in Board of Regents v. Wisconsin Personnel Commission (Dropik), 103 Wis. 2d 545, 558 (Court of Appeals, 1981).

Based upon the above analysis, the Commission concludes that it lacks subject matter jurisdiction over this appeal. The Commission need not address the arguments of the parties relating to the timeliness of the appeal.

Although the Commission does not reach the merits of this case, it would like to call the attention of the parties to the case of Welch v. DHSS, 82-272-PC (10/30/81). There the appellant sought to have reviewed his salary established upon demotion in lieu of layoff. Three findings of fact are helpful in understanding the dicta in that case:

> 3. In March, 1981, the appellant was further informed by the Mendota Mental Health Institute that his salary would be red-circled if he chose to demote, in lieu of layoff, to the position of Stock Clerk 2.
> 4. However, in May, 1981, the appellant was informed that his salary would not be red-circled unless he elected to bump downward into a classification in which permanent status had previously been acquired, which did not include Stock Clerk 2.
> 5. This notification was made prior to the appellant's acceptance of the voluntary demotion to the Stock Clerk 2 position.
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> OPINION
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> Since the Commission lacks jurisdiction over this matter, it will not reach the argument that the department is bound by its initial

indication that the appellant's salary would be red-circled. However, it might be noted that it appears that this case is substantially different from Porter v. DOT, No. 78-154-PC (5/14/79), cited by the appellant. In that case, the Commission held that equitable estoppel prevented the respondent from withdrawing a wage offer that the employe had relied on in leaving another job and accepting the appointment from DOT. Here, the respondent notified the appellant of the mistaken information regarding his starting salary before he accepted the demotion in lieu of layoff. When he did accept the demotion, he was aware that his salary would not be red-circled, so he was not acting in reliance on the respondent's earlier, erroneous representation to that effect.

ORDER

This matter is dismissed due to lack of subject matter jurisdiction.

Dated: June 18, 1985

STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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JGF002/2

Parties

Harry C. McCallum
8380 S. 100 Street
Franklin, WI 53132

Lowell Jackson
Secretary, DOT
P.O. Box 7910
Madison, WI 53707