STATE OF WISCONSIN PERSONNEL COMMISSION

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MARY SOUTHWICK,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 85-0151-PC

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DECISION AND ORDER ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

This matter is before the Commission on appellant's motion for summary judgment filed June 9, 1986. Both parties have filed briefs, and the Department of Employment Relations (DER) has filed an amicus curiae brief.

The appellant has objected to the Commission's consideration of the amicus brief, arguing that there is no authority for amicus briefs in administrative proceedings. The Commission has fairly broad authority as to the manner of conducting hearings, §§227.07, 227.09, Stats. The legislature has not seen fit to spell out in Chapter 227, Stats., every minute detail of hearing procedure, and the authority to consider amici briefs is well within the Commission's implied powers. Cf. Alabama - Tennessee Natural Gas Co. v. Federal Power Commission, 359 F.2d 318, 343, n. 53 (5th Cir 1966). Therefore, the Commission has considered the amicus brief.

However, the Commission has not considered the affidavit attached to the amicus brief. This is a statement by the then Chief of the Staffing Section of the then Division of Personnel that he assisted in the drafting

of the legislation in question, and setting forth his understanding of the legislature's intent. Such testimony as to legislative intent may not be considered. State v. Consolidated Freightways, 72 Wis. 2d 727, 738, 242 N.W. 2d 192 (1976).

OPINION

SUSCEPTIBILITY FOR SUMMARY JUDGMENT

Neither party nor the amicus has questioned the Commission's authority to decide this motion for summary judgment. The amicus does contend that there are facts in dispute: "...if the instant case turns on a determination of legislative intent there is a dispute of fact as to the history of this program." In the Commission's view, the determination of legislative intent is a matter of law and not fact. Based on the parties' submissions, there are no material issues of fact in dispute. Pursuant to §227.064(1)(d), Stats., a hearing is only required if "there is a dispute of material fact." Since, there is no dispute of material fact, the Commission will decide the appellant's motion for summary judgment.

The following findings are based on the parties' submissions.

FINDINGS OF FACT

1. The appellant, Mary Southwick, is a career executive in the State Civil Service. Prior to the personnel action that is at issue in this appeal, the appellant had been the director of the Bureau of Economic Assistance, Division of Community Services, Department of Health and Social Services. As director of the Bureau of Economic Assistance, she was in pay range (PR) 20.

2. By letter of July 8, 1985, Gerald A. Berge, administrator of the Division of Community Services, involuntarily reassigned the appellant from her position as director of the Bureau of Economic Assistance (PR 20) to

the position of director of the Southern Regional Office of the Division of Community Services, a career executive position in PR 18. The reassignment was effective Monday, July 8, 1985.

3. The appellant did not suffer any loss of salary as a result of the reassignment. However, since the reassignment involved a move to a position in a lower pay range, her potential for future salary increase was adversely affected.

4. Attached to the aforesaid July 8, 1985, letter from Administrator Berge was a confidential memorandum from Berge indicating that the appellant's reassignment was pursuant to §ER-Pers 30.07, Wis. Adm. Code.

5. The respondent did not denominate the aforesaid transaction as disciplinary in nature and the respondent did not have "just cause" for a disciplinary reassignment.

OPINION ON MERITS

This case involves a personnel transaction within the career executive program. The authorization for this program is set forth at §230.24(1), Stats., as follows:

> The secretary may by rule develop a career executive program that emphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employes a broad opportunity for career advancement and to provide for the mobility of such employes among the agencies and units of state government for the most advantageous use of their managerial and administrative skills. To accomplish the purpose of this program, the administrator may provide policies and standards for recruitment, examination, probation, employment register control, certification, transfer, promotion and reemployment, and the secretary may provide policies and standards for classification and salary administration, separate from procedures established for other employment. The secretary shall determine the positions which may be filled from career executive employment registers.

The rules governing the career executive program are contained in Ch. ER-Pers 30, Wis. Adm. Code. The specific provisions most salient to the transaction here in question are as follows:

> ER-Pers 30.07 Career executive reassignment. (1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same or lower classification level for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions. (2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employe in a career executive position within the agency to another career executive position in the same or lower classification level for which the employe is qualified, the appointing authority may make such reassignment provided it is reasonable and proper. All such reassignments shall be made in writing to the affected employe, with the reasons stated therein.
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> §ER-Pers 30.10 Career executive employe redress rights. (1) Career executive program employment grants to each employe thereunder rights and privileges of movement between positions within the program without examination and additional competition. Career executive reassignment and career executive voluntary movement to a position allocated to a classification assigned to a lower or higher pay range shall not be considered a demotion, or a promotion, respectively, and the statutory appeal rights provided thereto shall not apply. (2) Career executive reassignment by the appointing authority as defined under §ER-Pers 30.07(1) and referred to in sub. (1), is authorized without limitation. However, an employe with permanent status in the career executive program may appeal the reassignment to the personnel commission if it is alleged that such reassignment either constitutes an unreasonable and improper exercise of an appointing authority's discretion or is prohibited by §230.18, Stats. (3) Removal of an employe with permanent status in the career executive program which results in the placement of the employe in a position allocated to a classification assigned to pay range 17 or below is defined as a demotion, and may be appealed.

The appellant's argument was summarized in her reply brief as follows:

> Southwick's principal argument in her Motion for Summary Judgment in this matter is that section ER-Pers. 30.07, of the Wisconsin Administrative Code is beyond the scope of its enabling Statute,

> section 230.24(1), Wis. Stats., to the extent that it authorizes reassignment to positions with a lower pay maximum of persons holding positions in the Career Executive Program. Southwick makes two arguments in support of that position:
>
> (1) That, while the Secretary of the Department of Employment Relations is authorized by section 230.24(1), to provide policies and standards for persons holding positions in the Career Executive Program which are different from the policies and standards established for other employment, the personnel actions enumerated in section 230.24(1) for which the Secretary can develop such different policies and standards do not include the personnel action of reassignment to a position with a lower pay maximum;
>
> (2) That the plain language of the first sentence of section 230.24(1), Wis. Stats., does not provide the Secretary with any authority regarding the movement of persons holding positions in the Career Executive Program within the same unit of State government.

With respect to the first contention, the appellant argues that since the legislature has enumerated certain transactions in §230.24(1), Stats., including transfers, but has not included reassignments, the canon of statutory construction "expressio unius est exclusio alterius" (mention of one thing implies exclusion of another) leads to the conclusion that the legislature did not intend that reassignments of the kind involved here be included within the reach of the career executive program.

The appellant argues that the Joint Study Committee on civil service, which proposed the career executive program, and which submitted the forerunner of §230.24 to the legislature, utilized in its deliberations the following definitions:

> Transfer - The movement of an employe to a different position in the same class or another class with the same pay grade.
>
> Reassignment - is the replacement of an existing class to a different schedule or salary range in the compensation plan."

The appellant continues as follows:

> There is a presumption that a statutory word or phrase having a definite meaning was used with such meaning, unless a contrary intention clearly appears in the statute. Nekoosa-Edward

> Paper Company v. Minneapolis St. P & S Railroad, 217 Wis. 426, 259 N.W. 618 (1935). The approved meaning of a word is to be regarded as the one intended and technical words that have acquired a peculiar meaning in the law should be construed in accordance with such meaning. Sharpe v. Hasey, 134 Wis. 618, 114 N.W. 11, 18 (1908); Lukaszewicz v. Concrete Research Inc., 43 Wis. 2d 335, 168 N.W. 2d 581 (1969).
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> In both the draft and final legislation establishing the career executive program, the administrator was empowered to enact separate procedures for transfer of employees but was given no authority to establish separate procedures for reassignment. Again, the express mention of the word transfer in the final career executive legislation implied the exclusion of the word reassignment especially where the legislative history reveals that the particular definitions of each term and the distinctions between each term were considered by the drafters of the legislation. Hillis, supra.

While the appellant's theory has some force, essentially the same argument was presented to, and rejected by, the Court of Appeals in Basinas v. State, 99 Wis. 2d 412, 423-424, 299 N.W. 2d 295 (1980); reversed other grounds, 104 Wis. 2d 539, 312 N.W. 2d 483 (1981):

> (2) Delegated Authority Not Exceeded
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> Petitioner next argues that the division of personnel has exceeded its delegated authority by providing for reassignment of career executive employees. Petitioner points to the grant of power in sec. 230.24(1), Stats., providing in part:
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> "To accomplish the purpose of this program, the administrator may provide policies and standards for recruitment, examination, probation, employment register control, certification, classification, salary administration, transfer, promotion and reemployment separate from procedures for other employment." (Emphasis added.)
>
> Petitioner contends that applying the rule of statutory construction that "the expression of one thing is the exclusion of another" requires us to hold that the areas listed are the only ones in which rules may be promulgated. Since "reassignment" is not on the list, petitioner contends that the rules relating to reassignment exceed the board's authority and are thus unlawful. See Browne, 83 Wis.2d at 333, 265 N.W.2d at 567.
>
> It is not clear whether reassignment is authorized by the statute. The word "transfer" may mean a move from one position to another position having the same pay rate or pay range maximum. This is the definition

> given to the term by the division of personnel with respect to noncareer executive employees. Sec. Pers. 15.01, Wis. Adm. Code. The term may also be understood to mean "move or send to a different location esp. for business ... purposes," without regard to the pay range associated with the positions. Because the statute is capable of being understood by a reasonably well-informed person in two different ways, the statute is ambiguous, and we may rely on extrinsic sources to aid our construction of it. Wirth v. Ehly, 93 Wis.2d 433, 441, 287 N.W.2d 140, 144 (1980).
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> One source to which we may turn for guidance when a statute is ambiguous is the agency's interpretation of the statute. "The general rule is that the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight." Department of Administration v. WERC, 90 Wis.2d 426, 429, 280 N.W.2d 150, 152 (1979).
>
> The board concluded that "reassignment" was encompassed by "transfer." The board determined that part of the legislative intent of sec. 230.24, Stats., was to provide a flexible means of interchange of career executives which is not subject to the rules that apply to regular classified civil service transactions. In this context, the board reviews a section Pers. 30.07 "reassignment" as a form of career executive "transfer."
>
> The board's reasoning is sound. Accordingly, we agree that the term "transfer" found in the statute authorizes the "reassignment" provided in the administrative rules. (footnotes omitted)

In the Commission's view, this holding is dispositive.

Furthermore, continued legislative failure to have amended the career executive program law takes on added significance in light of this decision. While the appellant has argued that the time elapsed since the original promulgation of what is now Chapter ER Pers 32, Wis. Adm. Code, in 1972, is insufficient to render it a "long-standing" administrative construction, Layton School of Art & Design v. WERC, 82 Wis. 2d 324, 340, 262 N.W. 2d 218 (1978), the Court of Appeals decision would be presumed to also have specifically called the matter to the legislature's attention as of 1980, and the law has not been amended since then to alter the court's

construction. This presumption of legislative ratification of judicial construction of a statute is entitled to less weight when the legislature merely fails to act on the statute in question, as opposed to a re-enactment or a refusal to amend, Reiter v. Dyken, 95 Wis. 2d 461, 471, 290 N.W. 2d 510 (1980); Green Bay Packaging, Inc. v. ILHR Dept., 72 Wis. 2d 26, 35, 240 N.W. 2d 422 L(1976). However, there has been some legislative activity with respect to §230.24(1), Stats., since the foregoing decision by the Court of Appeals.

In Laws of 1983, Wis. Act 27, §162 f., the term "administrator" was changed to "secretary," and the following additions and deletions were made in the next to the last sentence:

> To accomplish the purpose of this program, the administrator may provide policies and standards for recruitment, examination, probation, employment register control, certification, ~~classification, salary administration~~, transfer, promotion and reemployment, and the secretary may provide policies and standards for classification, reemployment and salary administration separate from procedures established for other employment...."

Shortly thereafter, the legislature further amended this subsection by replacing "classification, reemployment and salary" with "classification and salary." Laws of 1983, Wisconsin Act 192, §218.

While these changes may be characterized as essentially technical in nature, it still provides "evidence that the legislature agrees with that interpretation, but not as raising a conclusive presumption of tacit adoption and ratification by the legislature...." Green Bay Packaging, Inc. v. ILHR Dept., 72 Wis. 2d at 35. The Court went on: "[t]he weight accorded to this evidence is overcome where this court can unequivocally conclude, as here, that the prior construction is contrary to the clear and express language of the statute." The Commission is in no position to

conclude, unequivocally or otherwise, that the aforesaid construction by the Court of Appeals of §230.24(1), Stats., in Basinas was "contrary to the clear and express language of the statute."

Finally, to the extent that the appellant relies on the definitions of "transfer" and "reassignment" in the working papers of the Joint Study Committee on Civil Service to support the argument that the term "transfer" was intended to be exclusive of "reassignment," it seems to the Commission that the Committee was using "reassignment" in a completely different sense than the personnel transaction here in question. The definition used by the Committee was as follows:

> Reassignment -- is the replacement of an existing class to a different schedule or salary range in the compensation plan.

This refers to the movement of a "class" or classification -- not an employe -- to a different schedule or salary range in the compensation plan. This is the kind of transaction that would occur when it is decided a particular classification needs to be assigned to a different level of compensation in the compensation plan for market or other reasons. See, e.g., §230.12(1)(a), Stats.:

> The compensation plan is the listing of the dollar values of the pay rates and ranges and the within range pay steps of the separate pay schedules to which the classes and grade levels for positions in the classified service established under the classification plan are assigned.

Thus, it seems unlikely that the committee's use of the term "reassignment" had anything to do with the discrete movements of individual employes to positions at higher or lower pay ranges.

The appellant's second attack on this transaction is that "Section 230.24 does not authorize the involuntary movement of a career executive

employee within an agency or unit of state government...." Appellant's brief, p. 13.

Section 230.24(1), Stats., provides, inter alia:

> The secretary may by rule develop a career executive program ... in order to provide for the mobility of such employes among the agencies and units of state government.... (emphasis supplied)

The appellant argues that this language is inconsistent with the movement of career executive employes within, as opposed to among, agencies and units of state government.

The Commission does not need to decide this issue, because it cannot be concluded on the record before it that the appellant was not moved among two units of government, or, put another way, that the appellant was moved within a unit.

The legislature's use of the word "units" in §230.24(1), Stats., presumably can be comprehended in one of two ways. The legislature could have meant "units" in the more or less general sense:

> ... a member of an aggregate that is the least part to have to have clearly definable separate existence and that normally forms a basic element of organization within the aggregate.... Websters Third New International Dictionary, (1981), p. 2500.

The legislature also could have meant "units" as set forth at §15.01(6), Stats.:

> 'Division,' 'bureau,' 'section,' and 'unit' means the subunits of a department, whether specifically created by law or created by the head of the department for the more economic and efficient administration and operation of the programs assigned to the department.

Using either definition, a unit appears to be the smallest recognized entity within the department. All that can be concluded from this record is that the appellant was moved from one position to another within the Division of Community Services. There is no basis on which to conclude

that the positions are in the same "unit" or are not in separate "units." Since the appellant as the moving party has the burden of establishing all elements necessary for recovery, the Commission is unable to make the finding -- that she was moved within a unit -- that is essential to her recovery under her theory that the instant transaction was in violation of §230.24(1), Stats., because it does not authorize career executive movements within units.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats., and §ER-Pers 30.10(2), Wis. Adm. Code.

2. There are no disputed issues of material fact and the Commission may decide the motion for summary judgment on the merits.

3. Those provisions in §§ER-Pers 30.07 and 30.10, Wis. Adm. Code, which permit reassignment of a career executive to a position in the career executive program in a lower salary range, without a just cause requirement, are not in excess of the authority set forth in §230.24(1), Stats.

4. Since on this record there is no basis for a finding that the transaction in question involved a movement of the appellant from a position in one unit to a position within the same unit, the Commission does not reach any conclusion on the appellant's argument that §230.24(1), Stats., does not authorize career executive reassignment within a unit.

5. The appellant having failed to establish that she is entitled to summary judgment as a matter of law, her motion for summary judgment must be denied.

ORDER

The appellant's motion for summary judgment filed June 9, 1986, is denied.

Dated: August 6, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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