

STATE OF WISCONSIN

PERSONNEL COMMISSION

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KAREN R. CAREY, *

Appellant, *

v. *

Administrator, DIVISION OF *

MERIT RECRUITMENT AND *

SELECTION and Secretary, *

DEPARTMENT OF REVENUE, *

Respondents. *

Case No. 85-0179-PC *

* * * * *

DECISION
AND
ORDER

This matter is before the Commission as an appeal of a personnel transaction. The parties agreed to the following issue for hearing:

Was the administrator's decision to certify the appellant to the position of Word Processing Operator 2 in DOR a violation of Subch. II of Chapter 230 and the rules of the administrator promulgated thereunder?

Was the appellant's removal from her position as a Word Processing Operator 2 with DOR illegal or an abuse of discretion?

If the answer to any of the above issues is YES, then what is the appropriate remedy?

FINDINGS OF FACT

1. Prior to August 5, 1985, the appellant had at all relevant times been employed in a variety of LTE and project positions within the Department of Health and Social Services (DHSS). In none of those positions had the appellant attained permanent status in class.

2. Early in 1985, respondent Division of Merit Recruitment and Selection (DMRS) issued a statewide Job Announcement for Word Processing Operator 2 and 3 level positions in the Madison area. The appellant

submitted a timely application and took the examination. Respondent DMRS created a register based on the results of the examination.

3. On June 24, 1985, respondent Department of Revenue (DOR) requested that DMRS prepare a servicewide promotional register in order to fill a WPO 2 vacancy at DOR.

4. Only individuals in positions where permanent status in class can be gained may be placed on a promotional register. Because none of the appellant's positions were permanent positions, she was not eligible for inclusion on a promotional register.

5. During June or early July of 1985, a DMRS employe made a computer encoding error that caused the computerized data to indicate that the appellant had permanent status in class.

6. On June 30, 1985, the appellant's project position (at the Program Assistant 2 level) where she earned \$7.17 per hour ended and she began employment as an LTE (at the Program Assistant 1 level) at \$6.71 per hour. Both positions were within DHSS. In neither position did appellant attain permanent status in class nor was she eligible to attain that status.

7. Due to the encoding error, the appellant's name appeared on the promotional register for the vacancy at DOR.

8. Appellant was interviewed for the DOR position, was offered the position and she accepted. The July 12, 1985, letter reflecting this employment agreement reads as follows:

This is to confirm my offer and your acceptance of a Word Processing 2 position in the Bureau of Budget and Business Operations Word Processing Unit.

As we discussed, this appointment will be effective August 5, 1985. Your work hours will be 8:00 a.m. to 4:45 p.m., Monday through Friday.

You will be required to serve a six-month probation period. Your starting salary will be \$6.454. You will receive an increase upon successful completion of your probation.

Please report to the GEF-3 second floor receptionist on August 5, and I will meet you there. I'm really looking forward to working with you in your new position.

9. Less than two weeks after appellant began employment in the WPO 2 position, it was determined that she had not been eligible for appointment on a competitive promotional basis to the position.

10. DOR advised appellant on Wednesday, August 14, 1985, that her employment had to be terminated by Friday, August 16, 1985.

11. Appellant contacted DHSS and was advised that her old LTE position had not been filled and that she could return to it at a pay rate of \$6.71 per hour. However, DHSS indicated that they might soon fill the LTE position as a permanent position. Therefore, there was no indication that the LTE position to which the appellant could return would exist over a period as long as six months.

12. DOR terminated appellant's employment in the WPO 2 position effective August 16, 1985.

13. Had DOR not terminated appellant's employment, DMRS would have done so because of their determination that the appellant's certification with a WPO 2 position was illegal.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §§230.44(1)(a) and (d) Stats.

2. The decision by DMRS to certify the appellant to the position of WPO 2 in DOR was illegal.

3. Because appellant's employment with DOR was terminated during appellant's probationary period, and by a decision by DOR, the Commission lacks jurisdiction to review whether her removal was illegal or an abuse of discretion.

OPINION

This case is one where a long-term employe of one state agency who had never filled a permanent position had made an extensive effort over a lengthy period to obtain permanent status. Less than two weeks into her probationary period for a permanent WPO 2 position, her probation was terminated, apparently due to no fault of the appellant's. Presumably, the reason for the DOR's decision was the DMRS's admittedly illegal certification. Had the DMRS actually been the agency to remove the appellant, she would have been entitled to notice and to an opportunity to be heard under §230.28(1)(a), Stats., and the removal decision would have been reviewable under §230.44(1)(a), Stats.

Nevertheless, the operable decision was a decision by the DOR to terminate the appellant's probation period. Pursuant to Board of Regents v. Wis. Personnel Commn., 103 Wis 2d 545, 309 N.W. 2d 366 (1981), the Commission lacks the authority to review terminations of probationary employment. Therefore, that portion of the instant appeal must be dismissed for lack of jurisdiction.

The other decision that is at issue in this case is the decision by DMRS to certify the appellant in the first place. During the course of the hearing, the parties agreed that this decision was illegal. The next question is one of proper relief.

The typical relief ordered by the Commission with respect to state agencies is to correct their error. In some cases, that will entail

reaching a different classification decision or withdrawing certain discipline. Here, the appellant was helped by the error of respondent DMRS. Had that error gone undiscovered, she would have enjoyed those benefits attributable to attaining a permanent position in state service. The corrections that would be appropriate in this case have already been accomplished by DOR and by DMRS: appellant's name has been removed from the WPO 2 promotional register and she has been paid for her employment with DOR (\$230.41, Stats.)^{FN}

Appellant argues that she should be awarded back pay from August 16, 1985 until the date of the hearing before the Commission plus restoration of lost benefits that she would have earned during that period had she been employed in a permanent position. She also requests that her name be placed on the appropriate state register so she can be considered for appointment to future vacancies. Appellant's requested relief would give the appellant a windfall to which she is not entitled, by placing her in a far better position than she would have been in absent the error by DMRS.

^{FN} Pursuant to §230.41, Stats:

Invalid appointments. Any person employed or appointed contrary to this subchapter, or to the rules established thereunder, shall be paid by the appointing authority so employing or appointing, or attempting to employ or appoint him, the compensation agreed upon for any service performed under such appointment or employment, or attempted appointment or employment, or in case no compensation is agreed upon, the actual value of such services and any expenses incurred in connection therewith, and shall have a cause of action against such appointing authority, for such sum and for the costs of the action. No appointing authority shall be reimbursed by the state for any sums so paid or recovered in any such action.

Testimony established that the appellant had an opportunity to return to her former position at DHSS after her employment at DOR was terminated, but that she declined. This is not a case where the appellant was induced to climb out on a limb by accepting a job at DOR and then had the limb chopped off without an opportunity to return to her original position at DHSS. Given that appellant declined to return to her old position when she was given that opportunity, the Commission will not consider whether it would have the authority to order that return now.

Because of the actions already taken by DMRS and DOR, no additional remedy is appropriate in this matter.


ORDER

This matter is ordered dismissed.

Dated: March 13, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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