STATE OF WISCONSIN PERSONNEL COMMISSION

LINDA BREHMER, et al.,

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 85-0218-PC

DECISION AND ORDER ON PETITION FOR REHEARING

This matter is before the Commission on appellants' petition for rehearing filed April 25, 1986, pursuant to §227.49(3), Stats. [1] The petition relates to the Commission's decision and order dated April 4, 1986, and mailed on April 7, 1986, which dismissed the appellants' appeal for lack of subject matter jurisdiction.

In order for a petition for rehearing to be granted under §227.49(3), Stats., there must be a finding of:

(a) Some material error of law.
(b) Some material error of fact.
(c) The discovery of new evidence sufficiently strong to reverse or modify the order and which could not have been previously discovered by due diligence.

DECISION

Appellants filed an amended letter of appeal on November 27, 1985 which stated, in part:

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[1] Pursuant to 1985 Wis. Act 182, §227.12, Stats., was renumbered as §227.49, Stats., effective April 22, 1986.

> The above-mentioned Appellants ... hereby appeal, pursuant to §230.44, Wis. Stats., a decision by Howard Fuller, Secretary of the Department of Employment Relations dated October 23, 1985.

As noted in the Commission's April 4th decision and order, Secretary Fuller's October 23rd decision was made as a consequence of a request by the union (in which the appellants are members) to remedy pay inequities experienced by its members arising from decisions setting the rate of pay for new employes within the appellants' classifications. Those underlying (hereafter referred to as "individual") decisions were made when new employes were hired to fill vacancies in the RN 2, Therapist 2 and 3 and PHE 3 classifications. The appellants contend that the new employes were hired under §ER-Pers 29.02(3), Wis. Adm. Code, "Hiring above the minimum" (or HAM), even though their positions required no qualifications not normally required for positions in that classification and no qualifications not readily available in the labor market.

The appellants ultimately seek to have their rate of pay increased to match that of the new employes. Appellants contend that instead of using the HAM procedure, the respondent should have used the "Raised minimum rate" (or RHR, for raised hiring rate) as provided in §ER-Pers 29.02(2), Wis. Adm. Code. The distinctions between HAM and RHR are set out in the administrative code:

> ER-Pers 29.02 Beginning Pay. (1) MINIMUM RATE. The minimum rate in the pay range shall be the rate payable to any person on first appointment to a position in the class except as otherwise provided in this section.
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> (2) RAISED MINIMUM RATE. (a) When competitive labor market conditions have been evaluated and the minimum rate is determined to be below the market rate for a class or subtitle for a class, or when a class or subtitle for a class has unique requirements and it is unlikely that quality applicants would be available under such conditions, the administrator, at the request of the appointing authority, may establish a raised minimum rate above the pay range minimum

for recruiting, hiring and retaining employes. Such rates may be established on a statewide or smaller geographic basis.

(b) The raised minimum rate shall be the lowest rate payable to any employe whose position is assigned to the class or class and subtitle in the geographic area where the raised hiring minimum is in effect.

(c) Subject to the pay range maximum, if a raised minimum rate is established, the PSICM rate shall also be raised by a like dollar amount and any provisions in this chapter relating to PSICM shall apply to the raised PSICM so established.

(3) HIRING ABOVE THE MINIMUM. (a) the administrator may authorize hiring above the minimum (HAM) when:

1. The duties and responsibilities of a position require the employment of a person with qualifications that differ significantly from those normally required for other positions in the same class, and the persons who possess such qualifications are not readily available in the labor market at the minimum rate in the pay range; or

2. A recruitment effort has failed to produce or would likely not produce a full certification of qualified candidates.

(b) Hiring above the minimum must be authorized prior to formal recruitment and the increased pay potential must be included in all recruitment information where pay is stated.

(c) Only those candidates who possess qualifications which significantly exceed the requirements for the class or subtitle or who possess qualifications which differ significantly from those normally required for other positions in the same class may be hired above the minimum of the pay range.

As noted above, the appeal letter in this matter was directed at an October 23, 1985 decision issued by the Secretary of the Department of Employment Relations. That decision arose out of language in the 1983-85 contract between District 1199 W/United Professionals (hereafter referred to as the union) and the State of Wisconsin. The contract included the following language on pay equity:

> If pay inequities exist or develop as a result of personnel transactions (e.g., hiring above the minimum, promotional incentive increase, etc.) the Secretary of the Department of Employment Relations (DER), at his/her sole discretion, can seek to remedy those inequities. Such inequities and remedies will be discussed in full with the Union 1199W/UP. If the Secretary of DER determines that an inequity has occurred, he/she will submit

> a plan of action to the Joint Committee on Employment Relations (JCOER). If JCOER does not schedule a meeting within 15 days of the transmittal letter, the Secretary can proceed to implement this plan of action.

Early in 1985, the union requested that the secretary take measures to remedy pay inequities. On July 16, 1985, the Administrator of the Division of Collective Bargaining within DER made a preliminary recommendation to the respondent secretary regarding pay inequities. The union was provided an opportunity to submit arguments in response.

The respondent issued a final decision on October 23, 1985. That letter, directed to the union, stated in part:

> INTENT OF THE PAY EQUITY MEMORANDUM OF UNDERSTANDING
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> Your September 12 letter asserts that the "intent of the language is to redress existing and developing pay inequities resulting from the use of H.A.M. (or other personnel transactions) and its impact on incumbent employes." Neither the recollection of the state's spokesman nor the notes of bargaining team members support this interpretation. Furthermore, such a broad interpretation of the memorandum would lead to the result that the State and the Union would have agreed to the same concept contained in the 1979 contract language on hiring rates which the State has consistently opposed both in litigation and subsequent negotiations.
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> In reviewing the bargaining history, it appears the agreement to include the memorandum in the United Professional contract followed the State's agreement to include identical language in the WSEU contract. No broader reading of the language is permissible in interpreting the United Professionals' contract than in interpreting the WSEU contract where the State specifically rejected union demands for a pure seniority-based compensation system which would have raised the pay of all more senior employes to the highest rate paid to a less senior employe. The interpretation contained in the recommendation limits the applicability of H.A.M. remedies to resolving disparities between similarly qualified persons hired in an employing unit at approximately the same time. That interpretation is consistent with the intent of the labor agreement.
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> REMEDY
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> Consistent with the above interpretation, I will seek to remedy only inequities between persons hired during the term of the contract in the same employing unit where those persons had the same qualifications and were hired into positions with similar

> duties and responsibilities. No comparisons will be made to employes hired prior to the term of the current contract containing the memorandum of understanding.

The respondent moved to dismiss the appeal for lack of subject matter jurisdiction, contending both that the appeal was untimely filed and that it arose from a decision that was not appealable to the Commission. In its April 4th decision and order, the Commission relied on Dobbins v. DHSS, 81-91-PC (6/3/81) which held that both hiring above the minimum and establishing raised hiring rates were not prohibited subjects of bargaining and were included in "wages, hours and conditions of employment" as that term is used in §111.93(3), Stats. That statutory provision reads:

> Except as provided in §§40.05, 40.80(3) and 230.88(2)(b), if a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

The Commission concluded that any jurisdiction it would otherwise have over HAM and RHR would be superseded by the collective bargaining agreement.

In their petition for rehearing, the appellants included an affidavit by Tracy Suprise, president of the union. The affidavit states, in part, as follows:

> 1. I am and have been the President of District 1199W/United Professionals for Quality Health Care, the certified bargaining representative of the petitioners in this matter. From my own personal knowledge or review of the Union's records I am familiar with negotiations between the State and the Union which resulted in the 1979-1981, 1981-1983, 1983-1985 and 2985-1987 Collective Bargaining Agreements.
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> 2. In those negotiations the State has consistently taken the position that the decision to use HAM or RHR is not a mandatory subject of bargaining. The reasons for this position have been that 1) only adjustments to the salary schedule are bargainable under Section 111.91(1) of the State Employment Labor Relations Act, and not minimum or initial rates under that salary schedule and 2) HAM and RHR are recruitment and original-appointment practices specifically covered by Chapter 230 and the Civil Service Rules in the Wisconsin

> Administrative Code, and thus are prohibited subjects of bargaining under Section 111.91(2), Stats.
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> 3. Since 1979 the Union has not bargained into its Collective Bargaining Agreements any provisions regarding the State's decision to use HAM or RHR. The provision in the 1979-1981 agreement which resulted in the arbitration award referred to in the Decision and Order was the result of an impact provision which dealt with the impact on bargaining-unit members as a result of the State's unilateral decision to use HAM or RHR. Specifically, the provision provided that, if the State used HAM or RHR, it would raise the wage rates of pertinent bargaining-unit members up to the HAM or RHR level. Similarly, the pay-equity memorandum in the 1983-1985 agreement was strictly an impact provision. It did not interfere with or relate to the States decision to use HAM or RHR, but provided only that the Union could seek to have the secretary remedy the impact of any such personnel transactions on bargaining-unit members.

The appellants' petition then goes on to argue that the Commission's decision errs when it ignores precedents establishing the distinction "between public-policy decisions of a governmental agency (which are non-bargainable) and decisions which primarily relate to or have an impact on wages, hours and working conditions (which are mandatorily bargainable)":

> The same personnel transaction may have both bargainable and non-bargainable aspects. One must distinguish these aspects before concluding that the entire subject is preempted. For purposes of illustration, it may be that in our case the decision to use HAM or RHR is not mandatorily bargainable and therefore reviewable by the personnel commission, while the impact of such a decision on the wages of bargaining-unit personnel is mandatorily bargainable and thus preempted. If this were so, the Commission would have jurisdiction over the appeal, which complains of the State's repeated decisions to use HAM instead of RHR. Petition, page 3.

Appellants also request a limited evidentiary hearing.

In their petition, the appellants appear to have altered the focus of their appeal. Whereas in the original appeal, the appellants sought review of the respondent's October 23rd decision, (which, pursuant to the terms of the provision in the contract, is an impact decision because it relates to pay inequities that exist or develop as a result of personnel transactions), now the appellants appear to seek review of the initial

individual decisions to use HAM rather than RHR. Those individual decisions were made more than 30 days prior to the date this appeal was filed as indicated by the fact that the appellants, through the union, requested the respondent to investigate the pay situation early in 1985. At that time, the appellants "suspected," although they allege they did not definitely know, that some newly hired co-workers were being paid more than they. Appellants' brief in opposition to motion to dismiss, p. 2. As noted by respondent, the use of RHR and HAM requires approval from the respondent prior to the commencement of recruitment and is noticed by job announcements that are posted publicly. Respondent's reply brief on motion to dismiss, p.1. Where, as here, a general notice was provided and the appellants suspected the existence of a pay differential, additional and more individualized notice is not required pursuant to §230.44(3), Stats:

> Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later...

So even if there is some merit to the appellants' contention regarding the applicability of §111.93(3), Stats., to the individual decisions as to whether or not to utilize HAM rather than RHR, their appeals of those decisions are untimely filed.[2]

To the extent the appellants seek to appeal the impact of those decisions (as embodied in the respondent's October 23rd decision) the subject matter is included within the scope of the terms of the collective

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[2] Even if the appeals of the individual decisions were timely filed, they do not appear to fall within any of the categories of decisions appealable to the Commission under §230.44(1), Stats. These decisions by the Secretary of the Department of Employment Relations are not among those decisions of the Secretary enumerated in §230.44(1)(b), Stats., and the decisions are made prior to certification rather than after certification as required in §230.44(1)(d), Stats.

bargaining agreement, and, as provided by §111.93(3), any jurisdiction that the Commission might have is superseded by the contract.

The Commission must deny the appellants' petition for rehearing because the appellants have failed to meet the requirements of §227.49(2), Stats.

ORDER

Appellants' petition for rehearing is denied.

Dated: May 23, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

KMS:jmf
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