STATE OF WISCONSIN PERSONNEL COMMISSION

LINDA BREHMER, et al.,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 85-0218-PC

DECISION
AND
ORDER

This matter is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction. Respondent contends both that the appeal was untimely filed and that it arises from a decision that is not appealable to the Commission. The parties have filed briefs. The essential facts relating to jurisdiction do not appear to be in dispute and are set forth below.

FINDINGS OF FACT

1. The appellants are all classified employes in the professional patient care bargaining unit of District 1199W/United Professionals for Quality Health Care.

2. Appellants allege that the respondent improperly utilized the procedure of "hiring above the minimum" (HAM) when setting the rate of pay for new employes within the appellants' classifications rather than utilizing the "raised minimum rate" (RHR, for raised hiring rate) procedure.

3. The 1983-85 contract between District 1199W/United Professionals (hereafter referred to as the union) and the State of Wisconsin 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.

4. 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.

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

> INTENT OF THE PAY EQUITY MEMORANDUM OF UNDERSTANDING
>
> 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.
>
> 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.

REMEDY

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.

CONCLUSIONS OF LAW

Due to the effect of §111.93(3), Stats., the Commission lacks jurisdiction over this appeal.

OPINION

The respondent has moved for dismissal of this appeal alleging both that it was not timely filed and that it does not fall within those actions appealable under §230.44(1), Stats.

At the outset, it is helpful to understand the basis for the appellants' contentions. The distinctions between HAM (hiring above the minimum) and RHR (raised minimum rate) are found in §ER-Pers. 29.02, Wis. Adm. 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.
>
> (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:
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> 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.

The appellants point out that they are not challenging the respondent's interpretation of the contract that is embodied in the October 23rd letter. Instead, they are challenging what they allege is an abuse of authority in refusing "to remedy [DER's] unlawful practice of using hirings above the minimum HAM) when the code requires raised hiring rates (RHR). Appellants further assert that the reason why respondent has unlawfully misused HAM is to avoid raising incumbent employes to the higher rate, which would occur with RHR." Brief, p.2.

One of the various arguments raised by the respondent in support of its motion to dismiss is a reference to §111.93(3), Stats., which provides, in part:

> 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.

In the case of Dobbins v. DHSS, 81-91-PC, (6/3/81), the Commission concluded that it lacked jurisdiction over an appeal of a failure to have paid the appellant at higher than the base salary at the time of his appointment. In Dobbins, the appellant's position was within a certified bargaining unit. The Commission cited with approval an unpublished opinion (OAG 65-78) of the Attorney General issued on September 6, 1978, which addressed the question of whether "raised hiring rate" and "hiring above the minimum" practices were prohibited subject of bargaining under §111.91(2)(b)1, Stats. That opinion states:

> Section 111.91, Wis. Stats., provides in part:
>
> > 'Subjects of bargaining. (1) Matters subject to collective bargaining to the point of impasse are wage rates, as related to to general salary scheduled adjustments consistent with sub. (2) and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment, except as follows:
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> > * * *
> >
> > (b) The employer shall be prohibited from bargaining on matters contained in sub. (2), except as provided under sub. (3).
> >
> > * * *
> >
> > (2) Except as provided in sub. (3), the employer is prohibited from bargaining on:
> >
> > * * *
> >
> > (b) Policies, practices, and procedures of the civil service merit system relating to:

> 1. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.
>
> 2. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocations.'

I am of the opinion that the "raised hiring rate" and "hiring above the minimum" practices, as utilized by the administrator in connection with recruitment, are not excluded from the subjects of collective bargaining under §111.91(2)(b)1., Wisconsin Statutes. Whereas such practices are related to "original appointments" and "recruitment", they are primarily concerned with compensation, wage rates, and salary schedule adjustments."

* * *

The terms of a collective bargaining agreement supersede other civil service laws relating to wages. §111.93(3), Wis. Stats. The right to bargain the minimum is not prohibited from collective bargaining under §111.91(2), Wis. Stats. First, only "policies, practices, and procedures" relating to recruitment are excluded from bargaining. Raising the minimum of a particular position is neither a policy, practice, nor procedure, rather it is an economic adjustment. Second, the power over recruitment primarily relates to locating a fit person by examinations, certification, selection methods, and probationary periods. Third, the qualifications as to the bargainability of wage rates in §111.91(1), Wis. Stats., viz., generally salary-scheduled adjustments, must be reconciled with §111.93(3), Wis. Stats., which gives collectible bargaining superseding significance as to "wages" without qualifications. Fourth, raising a minimum is general salary-scheduled adjustment.

In Dobbins, the Commission 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. Therefore, any jurisdiction that the

Commission would otherwise have over such matters was held to have been superseded by the collective bargaining agreement.

The Commission ruling in Dobbins is directly on point.

The Appellants contend that, other than before the Commission, the respondent has consistently rejected the Attorney General's opinion and has maintained that its use of HAM and RHR is a prohibited subject of bargaining because it involved recruitment policies, practices and procedures as those terms are used in §111.91(2)(b), Stats. The only question before the Commission is as to the Commission's jurisdiction. Jurisdiction cannot be conferred by waiver of the parties, and the appellants have not established the elements necessary for application of an estoppel theory. A review of the arbitrator's decisions that were attached to respondent's brief shows that DER was unsuccessful in its arguments, made in the matter of the arbitration between the United Professionals for Quality Health Care and the State of Wisconsin, Department of Health and Social Services, Case No. 1138, that HAM was not arbitrable. The State did not argue in that case that RHR was unarbitrable. Therefore, the arbitrator's award (finding the employer violated the contract by its policy of regularly hiring persons at a rate of pay above the minimum rate) does not act to collaterally estop the respondent from raising a jurisdictional objection in the instant case before the Commission.

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Dated: April 4 ,1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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