

STATE OF WISCONSIN

PERSONNEL COMMISSION

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MANTHEI et al, *

(Sandy Manthei, 86-0116-PC *

Denise Kowalski, 86-0117-PC *

Rebecca Finnessy, 86-0119-PC *

Julius Rabideaux, 86-0120-PC *

Dawn Carlson, 86-0121-PC *

Kathy Lambert, 86-0122-PC *

Bruce Marks, 86-0123-PC *

Anita Janowski, 86-0125-PC *

Arlene Conrady, 86-0126-PC *

Appellants, *

v. *

Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, *

Respondent. *

Case Nos. (See above). *

* * * * *

FINAL
ORDER

This matter is before the Commission for consideration of a proposed decision and order, and appellants' motion for fees and costs. The Commission has considered the parties' objections and arguments and consulted with the examiner. The Commission will adopt the proposed decision and order, a copy of which is attached hereto, as its final resolution of this matter, and adds the following:

1) The proposed decision at finding #5 sets forth certain facts concerning a 1985 settlement of discrimination complaints that had been filed by appellants Conrady and Janowski. It should be noted that in an interim decision entered October 29, 1986, the Commission held that it lacked the authority to enforce those settlement agreements with respect to Conrady's and Janowski's reallocations. The Commission also addressed the issue of whether it had the authority "... to consider the settlement

agreement... in determining the correctness of the... reallocations?" The Commission stated as follows:

Obviously, based on the foregoing discussion, the Commission lacks authority to consider the settlement agreement in determining the correctness of the reallocations if this were to involve enforcing the agreement. However, it is difficult to postulate in advance of the hearing for exactly what purpose the settlement agreement might be offered, and in what context. Therefore, beyond reiterating that the Commission cannot 'consider' the agreement for purposes of enforcement, the Commission will not further address [this] issue... in advance of the hearing.

At this point, it should be noted that the settlement agreement played no role in the Commission's decision of this matter.

2) In their objections to the proposed decision, complainants seek an explicit back pay award. They cite §230.43(4), Stats., which provides, inter alia:

if an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been restored to such position or employment by order of the Commission..., the employe shall be entitled to compensation therefore from the date of such unlawful removal, demotion or reclassification at the rate to which he or she would have been entitled by law but for such unlawful removal, demotion or reclassification....

Complainants contend their positions were reallocated in violation of Subchapter II, Chapter 230, and they are entitled to back pay under §230.43(4), Stats. However, this subsection by its terms applies only to employes who have been unlawfully "removed, demoted or reclassified." (emphasis supplied) The appellants' positions were reallocated. A reallocation is separate and distinct from a reclassification, §§ER-Pers 3.01(2),(3), Wis. Adm. Code. Section 230.09, Stats., which deals with the civil service classification system and the secretary's duties and responsibilities with respect thereto, refers repeatedly to "reclassify or

reallocate." Also, pursuant to §ER-Pers 17.02(3), Wis. Adm. Code, a reallocation to a lower classification is not a demotion.

Seep v. Personnel Commission, 140 Wis. 2d 32, 41-42 (1987), contains the following discussion of whether back pay is available with respect to a transaction not enumerated in §230.43(4):

The Commission examined the language of the statute [§230.43(4)] and also relied upon the maxim expressio unius est exclusio alterius in holding that back pay was not a viable remedy for Seep. Since the legislature expressly allowed the Commission to use the remedy of back pay in civil service cases only when dealing with removal, demotion or reclassification, it implicitly chose not to make the remedy available in reinstatement cases.

We conclude that the Commission's interpretation of sec. 230.43(4), Stats., is reasonable and consistent with the plain meaning of the statute. We therefore reverse that portion of the circuit court's decision granting Seep back pay.

In addition to this Court of Appeals decision, see DER v. Wisconsin Personnel Commission (Doll), Dane Co. Cir. Ct. No. 79 CV 3860 (9/2/80); Nunnelee v. State Personnel Board, Dane Co. Cir. Ct. No. 158-464 (9/14/78); DER v. Wis. Pers. Commn. (Cady), Dane Co. Cir. Ct. No. 79 CV 5099 (7/24/81).

Therefore, the Commission must conclude that it lacks the authority to enter the explicit back pay order sought by appellants.

3) Appellants have filed a Motion for Costs pursuant to §227.485, Stats., along with supporting affidavits. Pursuant to this section, the Commission must award appellants their costs unless it finds that respondent was "substantially justified in taking its position." Section 227.485(2)(f), Stats., defines "substantially justified" as "having a reasonable basis in law and fact." In Escalada-Coronel v. DMRS, Wis. Pers. Commn. No. 86-0189-PC (4/12/87), the Commission cited with approval the following language from Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N.D. Ill. 1982):

The standard created by this statute is a new one, not in line with either the common law exceptions to the American rule restricting the award of attorneys' fees, or other statutory standards allowing fee awards in certain cases against the United States. It was intended to serve as a 'middle ground' between an automatic award of fees to a successful party and permitting fees only where the government's position was arbitrary and frivolous....

* * *

...The standard, falls in between the common law 'bad faith' exception and an automatic award of attorney's fees to prevailing parties. (emphasis added)

The instant case involved the reallocation of appellants' positions as a result of a survey of position in the DILHR Job Service/Unemployment Compensation area. The hearing on these appeals of these reallocations resulting from the survey were de novo proceedings, with evidence not limited to a review of what respondent considered at the time the decisions were made during the survey process. Jallings v. Smith, Wis. Pers. Bd. 75-44 (8/23/76).

The record reflects that respondent conducted the survey in its usual manner. Questionnaires were sent to employees and reviewed by those doing the survey. The various types of positions were audited, and appellants' positions were among those audited. After new class specifications were developed, appellants' positions were analyzed and compared to other positions, and a determination was made as to their correct classification.

Now, while the Commission had found on the basis of a de novo hearing that the appellants' positions are more correctly classified as UBS 3's rather than UBS 2's, this is, of course, not equivalent to a conclusion that either respondent's initial decision to reallocate the positions to the UBS 3 level, or subsequent decision to contest these appeals, did not have a reasonable basis in fact or in law. Some of the significant points

in this matter revolved around relative levels of complexity and responsibility, based to some extent on comparing positions. These kinds of determinations call for weighing evidence, opinion, and argument. While the Commission found in favor of appellants on these points, this was not a case where respondent's position lacked any real foundation. This is not a case where, for example, as in Anderson v. DER, 86-0098-PC (11/18/87), the respondent failed to produce evidence at the hearing to support certain distinctions made at the time it denied the reclassification requests, and where the respondent's use of comparable positions was found to be "superficial."

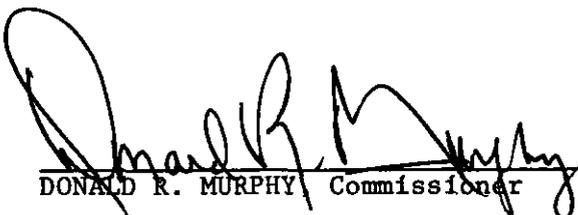
Since the Commission concludes it is inappropriate to award fees under §227.485, Stats., it will not address the issues that have been raised concerning specific items of fees and costs.

ORDER

The Commission adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference, as its final disposition of this matter, subject to the foregoing discussion, and denies appellants' motion for costs.

Dated: January 13, 1988 STATE PERSONNEL COMMISSION

AJT:jmf
JANE/2


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

Parties:

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Dawn Carlson, Kathy Lambert,
Bruce Marks, Anita Janowski,
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STATE OF WISCONSIN

PERSONNEL COMMISSION

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Appellants, *

v. *

Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *

Respondent. *

Case Nos. See above *

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

This matter, captioned above, is before this Commission on an appeal by the appellants of respondent's decision to reallocate the positions held by the appellants to the Unemployment Benefit Supervisor 2 (UBS 2) (PR1-10) classification. A hearing was held on appellants' claims, testimony was given, exhibits were received in evidence and the parties submitted post-hearing briefs. The following proposed findings of fact, conclusions of law, opinion and order are based on the record of the hearing.

FINDINGS OF FACT

1. The appellants are employes of the Unemployment Compensation Division, Department of Industry, Labor and Human Relations.
2. The respondent administers the state agency responsible for personnel policies, employment policies and programs for the state as an employer.

3. On March 30, 1986, appellants, Anita Janowski and Arlene Conrady, both classified at the Job Service Supervisor 3 (PR01-12) level were reallocated by respondent to Unemployment Benefit Supervisor 2 (PR01-11). Also, on this same day, the positions held by appellants, Rebecca Finnessy, Dawn Carlson, Sandra Manthei, Julius Rabideaux, Denise Kowalski, and Kathleen Lambert were reallocated from Job Service Supervisor 2 (PR01-11) to Unemployment Benefit Supervisor 2 (PR01-11). Within thirty days of the reallocation notification, the appellants filed an appeal of the reallocation with this Commission.

4. Reallocation of appellants' positions stemmed from a personnel management survey conducted by respondent. This survey covered positions in the Job Service and Unemployment divisions of the Department of Industry, Labor and Human Relations (DILHR) and included the development of new classification specifications series. The classification specification for the Unemployment Benefit Supervisor Series, which encompasses appellants' positions, was among those specifications newly developed during the survey.

5. Previously, in 1985, as a result of discrimination complaints filed by appellants Conrady and Janowski, DILHR and the respondent executed a settlement agreement which, among other things, provided for the reallocation of their positions from Job Service Supervisor 2 (PR01-11) to Job Service Supervisor 3 (PR01-12) or equivalent classification assigned to pay range 1-12, and to regrade Conrady and Janowski upon implementing the survey or on July 21, 1985, whichever was sooner.

6. On February 4, 1986, after respondent posted proposed reallocations, which recommended a lower reallocation of Conrady and Janowski's positions, the Secretary of DILHR wrote the secretary of DER -- respondent

-- and recommended reallocation of those positions to the Unemployment Benefits Supervisor series at pay range 12.

7. Neither the recommendations of the secretary of DILHR regarding certain positions being surveyed nor the terms of the settlement agreement between Conrady and Janowski and respondent were considered by respondent's survey staff in their deliberations on appropriate allocation for appellants' positions.

8. The state position standard for Unemployment Benefit Supervisor (UBS) positions, which was developed during the survey, under the heading, Class Concepts, provides:

UNEMPLOYMENT BENEFIT SUPERVISOR 2

(PR 01-11)

This is professional supervisory unemployment benefit work in the State Unemployment Compensation Program.

Positions allocated to this class are responsible for supervising staff engaged in the establishment of a benefit claim, benefit record processing and maintenance activities conducted in a local office. Positions at this level are involved in the interpretation and application of established guidelines and procedures which have a direct affect on claimants and employers. Work is performed under general supervision.

Positions are allocated to this class are responsible for supervising staff in a hearings office involved in processing and scheduling appeals of claimant eligibility and/or employer liability decisions filed by claimants and/or employers. Work is performed under general supervision.

UNEMPLOYMENT BENEFIT SUPERVISOR 3

(PR 01-12)

This is professional supervisory unemployment benefit work in the State Unemployment Compensations Program. Positions allocated to this class are responsible for supervising staff engaged in benefit records adjustment and maintenance through the use of the automated system, based on information received subsequent to an initial claim monetary determination; or supervisory positions responsible for coordinating hearings for special programs, such as plumbing license revocation for the Safety and Buildings Division of DILHR, which involves researching and interpreting applicable statutes and federal codes to identify appeal rights, and supervising staff involved in processing and scheduling appeals of claimant eligibility and/or employer liability

decisions filed by claimants and/or employers. Work at this level involves a broader interpretation and application of established guidelines and procedures due to the age and type of claimant records. Work is performed under general supervision.

9. The UBS position standard provides that it is to be used as a framework for classification decisions and, in instances where a position is not specifically defined by one of the class descriptions that position is to be allocated based on general classification factors such as listed in Section E. Section E is as follows:

Individual position allocations are based upon the general classification factors described below:

1. The freedom or authority to make decisions and choices and the extent to which one is responsible to higher authority for actions taken or decisions made;
2. Information or facts such as work practices, rules, regulations, policies, theories and concepts, principles and processes which an employe must know and understand to be able to do the work;
3. The difficulty in deciding what needs to be done and the difficulty in performing the work;
4. The relative breadth, variety and/or range of goals or work products and the impact of the work both internal and external to the work unit;
5. The level and type of staff supervised;
6. Organizational status as it relates to level of responsibility;
7. The nature and level of internal and external coordination and communication required to accomplish objectives.

10. Sandra Manthei, Denise Kowalski, Anita Janowski and Arlene Conrady work in offices located in metropolitan Milwaukee and their job duties and responsibilities are substantially the same. Respondent stipulated that Manthei's position is representative of all positions held by appellants in metropolitan Milwaukee.

11. Manthei's duties and responsibilities are comparable to those described in the position description of Bruce G. Wambold. Wambold is an Unemployment Benefit Supervisor 3, who works in respondent's central office. He supervises the Monetary and Payment Adjustment Control unit, which is composed of a monetary section and a Payment Adjustment Control section.

12. Manthei is the Claims Service supervisor. This unit also is composed of two subunits: Initial Claims and Claims Assistance. Also in the absence of the local office manager, Manthei manages the office and supervises the Claims Service and Adjudication units. The office management responsibility takes approximately ten percent of her time.

13. Prior to the survey, the duties and classification levels of subordinates of Wambold and Manthei were comparable. Afterwards, Wambold's staff was given a higher allocation primarily because they worked in the central office on benefit adjustments.

14. Wambold's unit can be distinguished from Manthei's on the basis that it is in a central office rather than a local office and its claimants may dwell anywhere in the state in contrast to a specific district of the state. There is no evidence that these differences cause duties to be more complex in Wambold's unit than in Manthei's.

15. Respondent's personnel specialist testified that, based upon his discussions with Wambold and others, including personnel specialists, Wambold's unit was also distinguishable from appellants' because it dealt with subsequent changes to benefit records, whereas appellants' units were responsible for establishing benefit records. The record does not support such a finding. Manthei testified, uncontested, that she -- her unit-- handles both initial determinations of benefits and subsequent changes in

those benefits. Further, Wambold's position description, which was placed into the record, does not indicate that his unit deals only with subsequent benefit changes. Wambold was not called as a witness.

16. Respondent stipulated that Rebecca Finnessy's position was representative of positions held by appellants, Dawn Carlson, Julius Rabideaux, Kathy Lambert and Bruce Minx. These appellants work in local offices in various cities around the state other than metropolitan Milwaukee.

17. Rebecca Finnessy's responsibilities and duties are basically the same as Sandra Manthei's. She supervises the Initial Claims and Claims Adjustment units. In some instances initial claim decisions and subsequent adjustments are made en mass. In addition, from her district office in Eau Claire, she evaluates the work done at two branch offices and three itinerant locations. Her evaluation reports go directly to the regional director.

18. Finnessy, as are many of the appellants, responsible for providing the general public, legislative representatives and the media with information about unemployment compensation procedures and policy. This may include radio and T.V. appearances.

19. Based on the record, appellants' positions are comparable to the Wambold position which was determined by respondent to be at the UBS-3 level and representative of that classification.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction under §230.44(1)(b), Wis. Stats.
2. The respondent erred in the reallocation appellants' positions to Unemployment Benefit Supervisor 2 instead of Unemployment Benefit Supervisor 3.

3. The appellants are entitled to reallocation of their positions to Unemployment Benefit Supervisor 3.

OPINION

Appellants claim respondent was in error when it failed to reallocate their positions to the Unemployment Benefit Supervisor 3 classification. They argue that their positions clearly fit into the Position Standard for the UBS 3 classification. Alternatively, appellants argue that if the position standard for UBS 3 positions does not describe their entire job, other positions have been classified to the UBS 3 level when only 5% of their duties were described in the standard.

In support of their position, appellants presented three witnesses, who were stipulated by the parties to be representative of appellants' positions in Metropolitan Milwaukee and positions in other smaller offices around the state. Appellant Manthei testified about her duties in comparison with each item in the position description of Bruce B. Wambold. Wambold's position had been placed at the UBS 3 level by respondent at the recommendation of the same personnel specialist who had audited appellants' positions. Manthei's testimony was corroborated in substance, by appellants' other two witnesses, Rebecca Finnessy and Anita Janowski.

Respondent's only witness was the personnel specialist who audited appellants' positions. In substance, he testified that appellants were given their current reallocation because they establish benefit records rather than change records after they've been established, they are located in a district office rather than the central office and their clients are limited to a given district rather than the entire state.

The evidence demonstrates that appellants handle both the initial establishment and subsequent changes of benefit records. Further, it

demonstrates that appellants supervise employes comparable to those supervised in the representative UBS 3 position. Also, appellants have functions not found in the comparable UBS 3 position, such as office manager, branch office supervisor and itinerant location supervisor, which demonstrates the placement of a high level of responsibility on those positions. The evidence does not demonstrate that central office's work on benefits records is more complex than district office's work on benefit records.

The evidence offered by respondent regarding both Wambold's and appellants' positions, for the most part, was based upon information from employes, supervisors and personnel specialists who did not testify. This factor undercut many of the statements made by respondent's sole witness. For instance, Wambold's position description, which was placed into evidence, did not reflect the distinctions articulated by respondent's witness.

Based on the record, appellants' positions fit within the UBS 3 position standard and are comparable to a representative UBS 3 position. They should be treated accordingly.

DECISION

Respondent's action is rejected. This matter is remanded for action in accordance with this decision.

Dated: _____, 1987 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DRM:jmf
JMFO6/3

DONALD R. MURPHY, Commissioner

Parties:

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