STATE OF WISCONSIN PERSONNEL COMMISSION

RICHARD A. TADDEY,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 86-0156-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal from respondent, Department of Health and Social Services' (DHSS) decision to change appellant's starting pay rate. At a prehearing conference held on August 20, 1987, before Dennis P. McGilligan, Chairperson, the parties agreed to the following issues for hearing:

1. Was respondent's changing of appellant's initial wage rate an illegal act or an abuse of discretion?

2. If so, what was appellant's correct wage rate from July 6, 1986 to January 4, 1987?

Hearing in the matter was held on September 23, 1987, before Dennis P. McGilligan. The parties completed their briefing schedule on December 29, 1987.

FINDINGS OF FACT

1. On October 7, 1985, a job announcement for Teacher-Auto Detailing appeared in the Current Employment Opportunities Bulletin (COB). The job announcement provided, in relevant part, as follows:

> Dept. of Health and Social Services (DHSS); Kettle Moraine Correctional Institution; Plymouth. Start between $1332 and $1892 per month, depending on applicant's educational background and experience.

2. Appellant applied for the Teacher-Auto Detailing position in a timely manner in October of 1985; took an exam for the position in November of the same year and thereafter was certified for the position. On or about April 30, 1986, he interviewed with the respondent for the aforesaid position. During the interview Ray Gielow, who was the Assistant Director of Education at Kettle Moraine Correctional Institution (KMCI), discussed the advantages of working for the state including employe benefits.

3. After the interview and before the position was offered to him, the appellant called at least three times to inquire as to the status of the selection process.

4. Thereafter, sometime in late May, Don Schneider called appellant on behalf of the respondent and offered him the position. Schneider indicated the rate of pay would be $9.321 per hour. Appellant stated he would consider the offer. Appellant calculated how much money he would be making at the above-mentioned rate; decided it would pay his bills; and called Schneider up and informed him that he would accept the job. Appellant was aware that he was eligible for a pay increase at the completion of a six month probation.

5. On June 12, 1986, respondent sent appellant an appointment letter as follows:

> This is to confirm your appointment as a Teacher 2 effective July 6, 1986.
>
> Your starting pay will be $9.321 per hour. You will be required to serve a probationary period of six months after which you will receive an increase of one within range pay step.
>
> This position is included in the Wisconsin Federation of Teachers bargaining unit which has a fair share agreement. A payroll deduction of $16.17 per biweekly A & B pay periods is required as your fair share payment. You will be entitled to all benefits provided under the contract.

> Your beginning classification as a Teacher 2 was based upon your having two years of teaching experience. You will need twelve credits necessary for the Teacher 3 classification. Future promotions will be based upon completion of additional pre-approved relevant credits after your starting date with us.
>
> Please report to the personnel office at 7:45 a.m. on Monday, July 7, 1986, for payroll processing and orientation. If you have any questions in the meantime, please call Mrs. Misna, Personnel Manager, at 526-3244.
>
> I am pleased to have you on the staff.

6. The appellant began work as a Teacher 2 at KMCI on July 6, 1986. This was an original appointment for appellant.

7. By letter dated July 15, 1986 respondent informed appellant that he would be paid at a lower rate as follows:

> Your original letter of hire mistakenly stated that you starting pay will be $9.321 per hour. Upon review of the Wisconsin Federation of Teachers, AFT Local 3271, Contract, the correct rate of pay is $8.877 per hour, according to the pay schedule for a Teacher 2.
>
> We're sorry for any inconvenience this may have caused you.

8. The appellant had been employed for approximately 7 months at Russ Darrow Chrysler-Plymouth in West Bend as a service manager in the garage before accepting the Teacher position at KMCI.

9. As Service Manager he received $1,000.00 per month plus a commission (7 percent) on the labor charges over $10,000.00 per month. His gross wages, including the commission, ranged from $1,200.00/month to $1,800.00 per month. The average gross wage was about $1,400.00 to $1,500.00.

10. In addition to the salary described above, the only benefits available to the appellant as service manager for Russ Darrow was health insurance and vacation (two weeks/year).

11. At the time the appellant was appointed, the minimum of the pay range 13-02 was $8.850. The raised minimum rate for Teacher 2 which is assigned to pay range 13-02 was $8.877.

12. The appellant was required to serve a six month probationary period. At the successful completion of the probationary period, the appellant received a 26.6 cent/hour increase, effective January 4, 1987.

13. Effective January 4, 1987, a Personnel Management Survey of Teacher positions was implemented resulting in the abolition of the old Teacher 1-6 series and the creation of a new Teacher 1 and 2 classifications which were assigned to pay ranges 13-05 and 13-06, respectively. The appellant's position was reallocated to Teacher 1 (PR 13-05), and his rate of pay was adjusted to the PSICM of the pay range.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden of proving that the initial wage rate decision made by respondent was an illegal act or an abuse of discretion.

3. The appellant has failed to sustain his burden of proof.

4. Respondent's decision to change appellant's initial wage rate was neither illegal nor an abuse of discretion.

DECISION

The first issue is whether the respondent's changing of appellant's initial wage rate was illegal or an abuse of discretion.

Appellant argues that respondent violated §230.41, Stats., which provides in relevant part as follows:

> 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...the compensation agreed upon for any service performed under such appointment or employment...

Respondent argues that the above section does not apply to the instant dispute since neither party is arguing that the appellant was illegally

appointed or employed. The Commission agrees. The above language clearly refers to someone employed or appointed contrary to the subchapter or rules promulgated thereunder. It does not mention rate of pay which is an action distinct from the appointment or hiring process although tangentially related. In the instant case, the appellant passed the examination and was legally certified, interviewed, selected and appointed to the position. The question before the Commission involves the fixing of the appellant's salary not the legality of the appointment. Appellant has proven no illegality and none can be reasonably inferred from the record in this proceeding. An issue remains as to whether respondent properly exercised its discretion.

The term "abuse of discretion" has been defined as "...a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 81-74-PC (1982).

Appellant argues that respondent has an obligation to fulfill its salary offer as made, accepted and confirmed. Appellant expands upon this argument in its brief as follows:

> The abuse of discretion lies in the appointing authority's negligence in making a timely determination as to what the correct hiring salary should be; making an offer to Taddey with an incorrect hiring rate; said offer being accepted, confirming that hiring rate in writing a full four weeks later, while still having neglected to verify its correctness; and then reducing that rate after the

appellant had already quit his previous job and begun working for Kettle-Moraine.

Relying primarily on §230.41, Stats., appellant concludes that despite the fact certain other statutes and rules require that his salary be set at a certain rate the Commission should enforce respondent's promised wage rate and find in his favor.

The Commission finds, for the reasons listed below, that contrary to appellant's position there was a reasonable basis for respondent's action. First, as noted above, appellant's reliance on §230.41, Stats., in support of its position is misplaced. Secondly, appellant does not challenge (aside from his reliance on §230.41, Stats.) respondent's establishment of the initial wage rate according to the applicable civil service statutes and rules. Rather, appellant's argument appears to be that the appointing authority is bound by the letter of appointment irrespective of the other requirements imposed on it. However, appellant was unable to cite any persuasive authority in support of this position. Thirdly, respondent admits that it erred in identifying the appellant's salary at $9.321/hour. However, the error was discovered shortly after appointment before appellant received his first pay check. Respondent acted immediately to fix the salary at the proper rate required by the statutes and rules. Finally, it should be noted that as unfortunate as respondent's error was in telling appellant one wage rate during the hiring process and later changing it to the correct rate respondent had no choice in the matter once it discovered the error.

Appellant also argues that respondent should be equitably estopped from reducing his salary for the period of time (six months) he anticipated receiving that salary.

The Commission discussed the elements of equitable estoppel in Goeltzer v. DVA, 82-11-PC (5/12/82):

> The only circumstances under which [dismissal for filing outside the 30 day limit] can be avoided are those which give [rise] to an equitable estoppel. Equitable estoppel has been defined as "the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct." Porter v. DOT, 78-154-PC (5/14/79). In order to establish estoppel against a state agency, "the acts of the state agency must be proved by clear and distinct evidence and must amount to a fraud or a manifest abuse of discretion." Surety Savings & Loan Assn. v. State of Wisconsin (Division of Highways), 54 Wis. 2d 438, 195 N.W. 2d 464 (1972).

In Porter v. DOT, Supra at p. 12, the Commission noted three factors essential for equitable estoppel to lie: (1) action or inaction which induces (2) reliance by another (3) to his detriment.

The only dispute herein is whether appellant's reliance on the wage rate contained in respondent's job offer was to his detriment. For the reasons listed below the Commission finds that such reliance was not to his detriment.

First, the record is clear that the appellant was very anxious to obtain state employment and salary was only one factor making state employment desirable. He applied for the position which was announced with a starting salary as low as $1,332.00 per month. Furthermore, after the interview during which the advantages of state employment including employe benefits, but not salary, were discussed, the appellant called several times to find out if a decision was made, and to make it clear that he was interested in the position. The Commission finds it reasonable to conclude that appellant acted because of an opportunity to gain state employment with all its advantages, including salary, benefits and job security.

Even if the Commission concluded that the appellant accepted employment solely because of the identified salary, estoppel does not lie. Respondent identified the reasons why in its brief as follows:

> The final requirement is one of detriment. The appellant did not act to his detriment. The appellant testified that his average salary at his former job was between $1,400.00 and $1,500.00 per month. The salary rate which was quoted to him was $9.321/hour. Based upon the calculations he made at the time of his acceptance, his monthly salary worked out to be $1,491.36 (40 hours/week x 4 weeks x $9.321/hour). Based on the same formula, the $8.877/hour figures to $1,420.32/month.*1. Both figures equal his then current average monthly pay. In addition, state employment granted him a great deal more benefits than his private sector job which only provided health insurance and vacation. Unlike in Porter where the employe would have suffered a substantial pay cut to take employment in the classified service at the minimum pay rate, there is no adverse pay effect at either pay rate as compared with his salary at the previous job. (emphasis added)

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*1. This formula is in error. The state calculates monthly wages on a 174 hour month. Therefore, the monthly rate at $9.321/hour is $1,621.854, and at $8.877/hour is $1,544.598.

Finally, there is no persuasive evidence or even an allegation that the action of the respondent amounted to fraud or a manifest abuse of discretion. The respondent offered the appellant a position at a salary rate which was in error. It is unclear how the wrong rate was determined. However, once the error was found, it was corrected on a timely basis. Appellant received his probationary increase and a substantial increase in January 1987 as the result of the implementation of the Personnel Management Survey of Teacher positions which resulted in his reallocation as noted in Finding of Fact 13. While $453.10 is not insignificant (the amount appellant contends is the difference between the amount the parties agreed to, and the amount he was actually paid for the time in question) respondent's failure to pay this sum does not amount to fraud or a manifest abuse of discretion under the aforementioned circumstances.

In view of all of the above, the Commission finds that respondent's decision to change appellant's initial wage rate was reasonable and justified by the facts and was neither illegal nor an abuse of discretion.

ORDER

The action of respondent DHSS in changing appellant's initial wage rate from $9.321 per hour to $8.877 per hour is affirmed and this appeal is dismissed.

Dated: May 5, 1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

DPM:rcr
RCR01/2

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