STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

RICHARD A. TADDEY,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 86-0156-PC

* * * * * * * * * * * * * * * * *

INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction. A hearing on jurisdiction was held on March 9, 1987, and the parties filed written arguments. The following findings are made for the sole purpose of deciding the issue of the Commission's jurisdiction.

FINDINGS OF FACT

1. On October 7, 1985, a job announcement for a 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. In April of 1986, he interviewed with the respondent for the aforesaid position.

3. Thereafter, sometime in mid-May, Don Schneider called appellant on behalf of the respondent and offered him the position. Schneider

indicated the rate of pay would be $9.231 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.

4. 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 as 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. Mlsna, Personnel Manager, at 526-3244.
>
> I am pleased to have you on the staff.

5. As noted above, appellant was appointed to his position on July 6, 1986. 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 your 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.

6. The collective bargaining agreement in effect between the State of Wisconsin and State of Wisconsin Educational Professionals, AFT, WFT, Local 3271, AFl-CIO from December 5, 1986 to June 30, 1987 and which is applicable to appellant's position, provides, in material part, as follows:

ATTACHMENTS

The following attachments are for informational purposes only and represent reproductions of information issued by the Administrator, Division of Personnel. This information may be altered or changed by the Administrator, Division of Personnel at any time.

These attachments are not a part of the agreement and their inclusion should in now way be construed as having been a subject of negotiations by the parties. No rights expressed or implied are granted to employes by the inclusion of the information in these attachments.

These attachments are as follows:

1. Standardized Class Title
2. 1985-86 and 1986-87 Hourly, Biweekly, Monthly and Annual Pay Schedule #13 Professional:Education.

(For Information Purposes)

Standardized Class Title — Schedule Range

PAY SCHEDULE #13 — PROFESSIONAL EDUCATION (1986 87)

PAY RANGE #	HOURLY BASIS* MINIMUM	PSICM	MAXIMUM	WITHIN RANGE PAY STEP	BIWEEKLY BASIS* MINIMUM	PSICM	MAXIMUM
13-01**	$ 8 326	$ 8 576	$10 812	$ 250	$ 666 08	$ 686 08	$ 864 96
13-02**	8 850	9 116	11 629	266	708 00	729 28	930 32
13-03**	9 485	9 770	12 469	285	758 80	781 60	999 12
13-04**	10 187	10 493	13 457	.308	814 96	839 44	1,076 56
13-05	10 920	11 248	14 451	.328	873 60	899 84	1,156 08
13-06	11 818	12 173	15 641	355	945 44	973 84	1,251 28
13 07	12 776	13 160	17 001	.384	1,022 08	1,052 80	1,360 08
13 08	13.849	14 265	18 461	.416	1,107 92	1,141 20	1,476 88
13-09	14 989	15 439	19 967	.450	1,199 12	1,235 12	1,597 36

PAY RANGE #	MONTHLY BASIS* MINIMUM	PSICM	MAXIMUM	ANNUAL BASIS* MINIMUM	PSICM	MAXIMUM
13-01**	$1,448 73	$1,492 23	$1,881 29	$17,384 69	$17,906 69	$22,575 48
13-02**	1,539 90	1,586.19	2,023 45	18,478 80	19,034 21	24,281 36
13-03**	1,650.39	1,699.98	2,173 09	19,804 68	20,399 76	26,077 04
13-04**	1,772 54	1,825.79	2,341 52	21,270 46	21,909 39	28,098 22
13-05	1,900 08	1,957.16	2,514 48	22,800 96	23,485 83	30,173 69
13-06	2,056.34	2,118 11	2,721 54	24,675 99	25,417 23	32,658 41
13-07	2,223 03	2,289 84	2,958 18	26,676 29	27,478 08	35,498 09
13-08	2,409.73	2,482 11	3,212 22	28,916 72	29,785 32	38,546 57
13-09	2,608.09	2,686 39	3,474.26	31,297 04	32,236 84	41,691 10

*For information purposes only. The Official Hourly Rate is used for payroll purposes

**For teachers only in Pay Ranges 13-01 through 13 04, the pay range minimums and PSICMs, by order of the Department of Employment Relations and effective October 28, 1985, until rescinded or superseded by Compensation Plan adjustments, are as follows Teacher 1 $8 580 and $8.810; Teacher 2 $8.877 and $9 122, Teacher 3 $9 250 and $9 512, Teacher 4 $9 655 and $9 937

7. By letter dated August 7, 1986, appellant filed a timely appeal of this action by respondent with respect to his pay rate.

CONCLUSION OF LAW

The Commission has subject matter jurisdiction over this appeal.

DISCUSSION

Section 230.44(1)(d), Stats., provides for Commission jurisdiction over a:

> ...personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion."

This provision explicitly includes more than the decision as to whom to appoint to a position -- it includes all personnel actions after certfication which are related to the hiring process.

In this case, a personnel action was taken when appellant's starting salary was established. This decision as to how much appellant would be paid occurred after certification, and it was related to the process of hiring appellant to this position. Therefore, there is jurisdiction under §230.44(1)(d), Stats. See Porter v. DOT, Wis. Pers. Commn. No. 78-154-PC (5/14/79), affd., Dane Co. Cir. Ct. No. 79CV3420 (3/24/80).

The next question is whether this subject matter jurisdiction is usurped by the operation of §111.93(3), Stats.:

> ...if a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes... related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes... are set forth in the collective bargaining agreement.

In order to decide this question, the Commission must determine whether the subject matter of this appeal, i.e., the determination of appellant's starting salary should be considered "related to wages, fringe

benefits, hours and conditions of employment...." This inquiry in turn leads to the question of the meaning of the term "wages, hours and conditions of employment" as used in §111.93(3), Stats. This term is not defined in that section. However, §111.91(1), does contain similar wording:

> 111.91 Subjects of bargaining. (1)(a)...[M]atters subject to collective bargaining to the point of impasse are wage rates, as related 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,
>
> (b) The employer shall not be required to bargain on management rights under s.111.90, except that procedures for the adjustment or settlement of grievances or disputes arising out of any type of disciplinary action referred to in s.111.90(3) shall be a subject of bargaining.
>
> (c) The employer shall be prohibited from bargaining on matters contained in sub. (2), except as provided under sub. (3) ....

This statute begins in §111.91(1)(a) with the provision that the mandatory subjects of bargaining are "... wage rates [as defined]; fringe benefits, hours and conditions of employment...," with the exception of certain matters set forth in other subsections, "...except as follows...."

Did the legislature in §111.93(3) intend the term "wages, fringe benefits, hours and conditions of employment" to mean, in effect, "mandatory subjects of bargaining under SELRA," or did the legislature intend the term "wages, hours and conditions of employment" to have a broader meaning?

The former interpretation is favored by the fact that the Wisconsin courts frequently have used the term "wages, hours and conditions of employment" to refer to mandatory subjects of bargaining. However, this

has usually occurred in the context of MERA (Subchapter IV, ch. 111, Stats.), wherein collective bargaining is defined in §111.70(1)(a), as follows:

> 'Collective bargaining' means the performance of the mutual obligation of a municipal employer... and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment, except as provided ... The employer shall not be required to bargain on.... emphasis supplied)

On the other hand, SELRA (Subchapter V, ch. 111, Stats.) defines collective bargaining in §111.81(2) as follows:

> 'Collective bargaining' means the performance of the mutual obligation of the state as an employer... and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in §111.91(1).... (emphasis supplied)

Under these subchapters, the obligation to collectively bargain applies only to mandatory subjects of bargaining. In SELRA, the legislature chose to describe mandatory subjects of bargaining by reference to "the subjects of bargaining provided in §111.91(1)" rather than by utilizing the term "wages, hours and conditions of employment" as it did in MERA at §111.70(1)(a). This is consistent with the conclusion that the term "wages, fringe benefits, hours and conditions of employment" in §111.93(3) is not necessarily synonymous with mandatory subjects of bargaining, but could have a broader meaning.

On the other hand, this argument is weakened somewhat, because while the definition of collective bargaining in SELRA utilizes a reference to §111.91(1) rather than "wages, fringe benefits, hours and conditions of employment," the language of §111.91(1) is quite similar: "wage rates ... fringe benefits, hours and conditions of employment.

Also helpful in interpreting the meaning of this term is an analysis of the operation of §111.93(3), which provides, inter alia:

> ...the provisions of that agreement shall supersede such provisions of civil service and other applicable statutes... related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes are set forth in the collective bargaining agreement. (emphasis supplied)

It is the provisions of the agreement that supersede such provisions of the statutes relating to wages, hours and conditions of employment. In order to determine which statutory provisions are superseded, one must examine the provisions of the agreement.[1] Clearly, §111.93(3) manifests a legislative intent to give effect to the collective bargaining process by having the terms of the agreement supersede the corresponding statutes. Since the legislature in SELRA has authorized bargaining on both mandatory and permissive subjects, both these subjects may be reflected in agreements.

This indicates that when the legislature provided in §111.93(3) that "the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, fringe benefits,

---

[1] Section 111.93(3), Stats., also states that the provisions of the agreement will supersede such statutory provisions related to wages, fringe benefits, hours and conditions of employment "whether or not the matters contained in such statutes are set forth in the collective bargaining agreement." (emphasis added) This means that the provisions of civil service and other applicable statutes related to "wages, fringe benefits, hours and conditions of employment" will be superseded by the corresponding provisions of the labor agreement regardless of whether or not there is an exact overlap between the contractual and the statutory provisions. Hypothetically, for example, the parties might include in an agreement a provision as to compensation in the event of hazardous employment injuries. Such a provisions presumably would supersede the provisions of §230.36, Stats., which covers the same subject, regardless of whether all the matters contained in the statute are set forth in the agreement. Thus, for example, the statute includes in the definition of covered duties certain activities of drivers license examiners. See §230.36(3)(d), Stats. Even if this particular matter were not included in the labor agreement, §230.36(3)(d) presumably would still be deemed to be superseded.

hours and conditions of employment," it intended the latter phrase to include both mandatory and permissive subjects of bargaining. If the term "wages, fringe benefits, hours and conditions of employment" were limited to mandatory subjects of bargaining, then provisions relating to permissive subjects of bargaining would not be superseded in cases where the parties had bargained and reached agreement on permissive subjects of bargaining, circumventing or negating the manifest intent underlying §111.93(3).

Furthermore, this subsection gives no indication that the legislature intended "wages, fringe benefits, hours and conditions of employment" to include more than mandatory and permissive subjects of bargaining. Prohibited subjects of bargaining presumably would never be included in a labor agreement, and therefore there never would be any contractual provisions related to prohibited subjects of bargaining to have any possible superseding effect on the statutes. Obviously, by prohibiting bargaining on these subjects in §111.93(2), the legislature never intended that these statutory provisions would ever by superseded by the collective bargaining process.

The foregoing construction of the term "wages, fringe benefits, hours and conditions of employment" in §111.93(3) is also consistent with the other uses of this term in subchapter V of Chapter 111 (SELRA).

Section 111.93(2) states:

> All civil service and other applicable statutes concerning wages, fringe benefits, hours, and conditions of employment shall apply to employes not included in certified bargaining units. (emphasis added)

If one were to construe the term "wages, fringe benefits, hours and conditions of employment" to mean only mandatory subjects of bargaining, the application of §111.93(2) would lead to an absurd result. Only the

statutes concerning mandatory subjects of bargaining would apply to employes not included in certified bargaining units. Statutes concerning permissive subjects of bargaining presumably would not apply to such employes. Certainly the legislature did not intend this absurd result. As to prohibited subjects of bargaining, these apply at all times to all employes, both in and out of certified bargaining units, so there is no need to reiterate it in this subsection.

Another use of the term "wages, hours and conditions of employment" in SELRA is in the enumeration of unfair labor practices in §111.84(1)(e), Stats:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting state employes.... (emphasis added)

If the term "wages, fringe benefits, hours and conditions of employment" referred only to mandatory subjects of bargaining, this would mean the violation of a collective bargaining agreement provision concerning a permissive subject of bargaining would not be an unfair labor practice, a result at odds with the legislative intent behind SELRA. Again, presumably no labor agreement will contain prohibited subjects of bargaining.

In the past, the Commission has had occasion to interpret the term "wages, hours and conditions of employment" as used in §111.93(3) as encompassing only mandatory subjects of bargaining. See, e.g., Jones v. DNR, 78-PC-ER-12 (11/8/79), where the primary rationale for this approach was stated as follows:

> The phrase 'wages, hours and conditions of employment' has evolved through administrative and judicial interpretation and application, into a term of art referring to mandatory subjects of bargaining... the Wisconsin Supreme Court has stated that areas of mandatory bargaining under MERA are those primarily related to wages, hours and conditions of employment. Unified School District No. 1 of Racine Co. v. WERC, 81 Wis. 2d 89

> (1977); Beloit Ed. Assoc. v. WERC, 73 Wis. 2d 43, 54 (1976)...Although these determinations have been made with reference to MERA, there is no persuasive reason to limit the rationale of these decisions to MERA alone, and there is good reason to maintain a certain uniformity of policy in administering public sector employe bargaining statutes. pp. 8-9 (footnotes omitted)

At this point, the Commission is of the opinion that the precedent established in Jones should be overruled.

In Beloit Education Assoc. v. WERC and Unified S.D. No. 1 of Racine Co. v. WERC, the Court specifically was interpreting and applying MERA, and not SELRA, as discussed above. In MERA, §111.70(1)(d), Stats., provided, inter alia:

> (d) 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages hours and conditions of employment.... (emphasis added)

Therefore, when the Court in those cases referred to the term "wages, hours and conditions of employment" as mandatory subjects of bargaining, it did not do so as the result of an interpretation of that statutory language based on the intrinsic meaning of the words. Rather, it used the term as a means of reference to mandatory subjects of bargaining because the legislature explicitly did so in §111.70(1)(d). In other words, the court did not "construe" the term "wages, hours and conditions of employment" to mean mandatory subjects of bargaining, and such an interpretation in §111.93(3) of SELRA leads to anomalous or absurd results, as discussed above.

In the instant case, the subject matter is the determination of appellant's starting salary. This determination was based on certain pay schedules that were attached to the collective bargaining agreement. While it could be argued that these pay schedules are mandatory subjects of bargaining, it also could be argued that they did not relate to "general

salary scheduled adjustments," as that term is used in §111.91(1)(a), Stats., which defines mandatory subjects of bargaining.

However, it is clear from the language of the agreement that these schedules are there for informational purposes and are not part of the agreement and were not the subject of bargaining:

> The following attachments are for informational purposes only and represent reproductions of information issued by the Administrator, Division of Personnel. This information may be altered or changed by the Administrator, Division of Personnel at any time.
>
> These attachments are not a part of the agreement and their inclusion should in no way be construed as having been a subject of negotiations by the parties. No rights express or implied are granted to employes by the inclusion of the information in these attachments."

Given the nature of the subject matter involved and the surrounding circumstances as reflected in the aforesaid language of the agreement, the Commission is compelled to the conclusion that this subject matter is not a mandatory subject of bargaining, and if it is a permissive subject of bargaining, the parties did not bargain and reach agreement on it. See Wendt v. DHSS, Wis. Pers. Commn. No. 80-110-PC (12/3/81), where the Commission was strongly influenced in its conclusion that a matter involving hazardous employment benefits constituted "wages, hours and conditions of employment" in the context of §111.93(3), Stats., by the fact that the contract in question explicitly dealt with this subject matter:

> It is clear that the parties could not legally have reached agreement on hazardous employment benefits under Art. IV, Sec. 7 of the labor agreement unless this constituted a subject of bargaining under §111.91, Stats. ...by its approval of the contract, see §111.91(1), Stats., the legislature has provided a strong indication of legislative understanding that such an agreement was within the appropriate scope of bargaining it has established under §111.91...." p. 4.

Therefore, the Commission concludes that the provisions of the agreement do not supersede the statutes relating to the subject matter of this

appeal, and the Commission's jurisdiction under §230.44(1)(d), Stats., is not usurped by operation of §111.93(3), Stats.

ORDER

Respondent's motion to dismiss for lack of subject matter jurisdiction is denied.

Dated: June 11, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

DPM/AJT:jmf
ID4/2

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner