

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 CHARLES McDOWELL, *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *
 *
 Respondent. *
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 Case No. 87-0006-PC *
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission in order to establish issues for hearing. During a prehearing conference held on February 13, 1987, a schedule was established for the parties to file proposed issues and arguments in support of the proposals. The facts set out below are based on the materials filed by the parties and are made only for the purpose of this interim decision.

FINDINGS OF FACT

1. In approximately August of 1984, appellant was promoted to the position of Executive Personnel Officer 2 (PR1-17), with a working job title of Team Supervisor, within the Division of Classification and Compensation in the Department of Employment Relations. Appellant was one of two team supervisors. The other, Robert Belongia, transferred to the Department of Natural Resources in approximately August of 1986. Both Team Supervisor positions reported directly to the Administrator of the Division of Classification and Compensation (DCC).

2. Appellant attained permanent status in class at the EPO 2 level.

3. In the Fall of 1986, the DCC was reorganized and a Bureau of Classification and Compensation was created. Instead of the two EPO 2 (PR1-17) positions, there was one EPO 3 (PR1-18) position which had two EPO 1 (PR1-16) positions reporting to it.

4. On September 25, 1986, Howard Fuller, Secretary of DER, signed a reallocation notice reallocating the appellant's position, pursuant to s. ER-Pers 3.01(2)(g), Wis. Adm. Code, from EPO 2 to EPO 3 effective September 28, 1986. The notice indicated that appellant's base pay was changed from \$17.110 to 17.799 per hour and stated: "This action does not require you to serve a new probationary period, nor does it require an examination." The notice also specified that the position was not currently a Career Executive position nor was the incumbent a Career Executive employee.

5. Also on September 25, 1986, Mr. Fuller notified the appellant: "Your position has been placed in the Career Executive Program on September 28, 1986." The letter notified the appellant that he had one year to decide whether he wished to enter the Career Executive Program:

As this notice is being sent after the effective date of your reallocation, you may choose to enter the program as of the effective date of the reallocation if your option form is returned to me by October 9, 1986. If your option form is returned after that date, entrance into the Program can be no sooner than the date I receive the form. Once we have received your form, our office will notify your agency of your decision.

6. The appellant signed a document on September 25, 1986, in which he elected to enter the Career Executive Program on September 28, 1986.

7. In a memo dated October 13, 1986, Barbara Horton, Administrator of the DCC wrote to Jon Reneau, DER Personnel Manager:

I am hereby withdrawing the request to reallocate the Executive Personnel Officer 2 (currently occupied by Charles McDowell) position to the Executive Personnel Officer 3 level. I would like to have all documentation related to this request returned directly to me.

8. On December 17, 1986, Ms. Horton wrote Mr. Reneau a second memo in which she stated:

Per our discussion, the purpose of this memo is to clarify the intent of my October 13, 1986 memo to you in which I informed you that I wished to withdraw the request to reallocate the Executive Personnel Officer 2 position (currently occupied by Charles McDowell) to the Executive Personnel Officer 3 level.

The intent of my October 13 memo was not to retract the request to reallocate the above referenced position; rather, it was solely for the purpose of retrieving the paperwork to correct the effective date of the regrade of Mr. McDowell. I had intended to resubmit the paperwork after correcting the effective date.

At this juncture, instead of retrieving the documentation related to the reallocation request, I hereby request that the effective date of Mr. McDowell's regrade, as specified in my October 6 memo to you, be changed from September 28, 1986 to March 29, 1987 to allow the incumbent to perform the permanently assigned duties and responsibilities for a period of 6 months from the date of the reallocation of the position to the EPO 3 level (9/25/86), as required pursuant to ER-Pers 3.015(3).

9. On or before December 30, 1986, David Hinrichs exercised his restoration rights under s. 230.33(1), Stats., to a classified position in DER. DER management concluded that, for programmatic reasons, it was best for DER to restore Mr. Hinrichs to an Administrative Officer 3 position (AO-3) (PR1-18) in DER's Division of Administrative Services. The AO-3 position had been filled by Joe Pellitteri.

10. On December 30, 1986, Peggy Howard Moore, Acting Secretary of DER, issued a memo to Susan Christopher of DER's Division of Merit Recruitment and Selection which stated:

In response to the recent career executive reassignment of Joe Pellitteri from an Administrative Officer 3 position to an Executive Personnel Officer 3 position it has become necessary to initiate a layoff action pursuant to ss. 230.34(2), and (3), Stats. Mr. Pellitteri's reassignment is effective January 17, 1987.

* * *

The position currently occupied by Mr. McDowell in an acting capacity is classified as an Executive Personnel Officer 3. His

position was reallocated from the Executive Personnel Officer 2 class to the Executive Personnel Officer 3 class effective September 25, 1986. Because of the reallocation the Executive Personnel Officer 2 position no longer exists. Although Mr. McDowell's position was reallocated on the stated date, he was not at that time, and is not now, eligible for regrade under ER-Pers. 3.015(3), Wis. Admin. Code. The Executive Personnel Officer 3 position is not included in the Career Executive program, but Mr. McDowell does not have permanent career executive status. He continues to be classified as an Executive Personnel Officer 2.

The Executive Personnel Officer 3 position is the only career executive position in the Department whose incumbent does not have career executive status. Therefore, I have decided to reassign Mr. Pellitteri to the Executive Personnel Officer 3 position in order to be able to restore Mr. Hinrichs to the Administrative Officer 3 position. The reassignment of Mr. Pellitteri will cause a layoff in Mr. McDowell's present classification, namely, Executive Personnel Officer 2.

* * *

The employe in the layoff group with the least seniority is Chuck McDowell.

11. By letter dated December 30, 1986, from Acting Secretary Moore, appellant received an "official notification of layoff," effective January 17, 1987:

As a result of Mr. David Hinrichs returning to the classified service, Mr. Joe Pellitteri is being reassigned under the Career Executive program. He is being appointed on a permanent basis to the Executive Personnel Officer 3 position in the Division of Classification and Compensation. You are currently serving in this position in an acting assignment basis under WPM Section 332.040(F)(3). Since a permanent assignment is being made effective 1/17/87, your acting assignment is being terminated effective immediately.

As a result of the same two personnel actions (Hinrich's return to the classified service and Pellitteri's reassignment) the Department is also initiating a layoff in the Executive Personnel Officer 2 classification since we have two people classified as Executive Personnel Officer 2s and only 1 authorized position.

As a result of a layoff instituted in the Executive Personnel Officer 2 classification, it has been determined that you are the least senior member and thus identified for layoff. This letter, then, is your official notification of layoff from the Department of Employment Relations, effective at the end of the working day January 17, 1987.

Section Pers. 22.08(1)(2) and (3), Wisconsin Administrative Code, Rules of the Administrator, Division of Merit Recruitment and Selection, identify alternatives in lieu of layoff in the order listed below:

* * *

B. Demotion

You shall be offered a demotion to any available vacancy within the Department for which you are qualified to perform the work after being given the customary orientation provided newly hired workers in such positions.

The Department currently has a vacancy at the Executive Personnel Officer 1 level in the Division of Classification and Compensation. You are hereby offered this Executive Personnel Officer 1 position. Since this offer appears to meet the definition of a reasonable offer in accordance with Pers. 22.09(2) a refusal to accept it will result in a termination of your restoration rights unless you can justify why it does not constitute a reasonable offer.

Please respond within 5 days of the date of this offer to indicate your acceptance or refusal of appointment to this position.

12. The appellant filed a letter of appeal with the Commission on January 16, 1987.

DISCUSSION

The appellant has proposed the following issues for hearing:

ISSUE 1:

Whether or not the decision by the Respondent to deny that the Appellant had obtained permanent status as an Executive Personnel Officer 3 was in compliance with the relevant statutes, administrative rules and policy?

ISSUE 2:

Whether the Respondent committed an abuse of discretion by:

a. classifying the Appellant as an EPO 2 for the purpose of identifying and establishing the layoff group relevant to this appeal; and

b. by failing to acknowledge that the Appellant was a Career executive, and affording him the redress rights and layoff procedures mandated by the Wisconsin Administrative Code?

ISSUE 3:

Whether there existed "just cause" to demote the Appellant?

ISSUE 4:

Whether the Respondent was substantially justified in the legal interpretations and applications of relevant statutes and rules regarding the transaction being appealed herein?

The respondent proposed the following issues:

1. Was the Layoff of the Appellant from the Executive Personnel Office[r] 2 position for just cause?
2. Was the purported reallocation of the Appellant's position from the Executive Personnel Officer 2 classification to the Executive Personnel Officer 3 classification contrary to ER-Pers. Ch. 3, Wis. Admin. Code?

The appellant contends that he had obtained permanent status in class at the EPO 3 level in the Career Executive Program and that, as a consequence, the respondent had to follow the procedure in s. ER-Pers 30.105, Wis. Adm. Code, for the layoff of career executive employes rather than the more general layoff provisions found in ch. ER-Pers 22, Wis. Adm. Code.

On the other hand, the respondent argues that the appellant did not acquire permanent status in class in a career executive position:

[I]t is the DER's position that reallocation was contrary to ER-Pers. 3.02, Wis. Admin. Code, that in fact a new position was created, and that it should have been filed through competition or other appropriate personnel transaction. The rights the Appellant now claims to have could only have been secured as the result of a personnel transaction that was contrary to the rules. It is the DER's position that the civil service system does not and cannot permit the recognition of rights based on erroneous transactions.

* * *

Based on a number of factors,... I believe that Secretary Tries will in the near future formally rescind the reallocation of the EPO 2 position and take what other steps are necessary to correct the paper work relating to the personnel transactions occurring as a result of the reorganization of the Division of Classification and Compensation.

The appropriate focus in this case is not on what allegedly should have happened, but on what did happen to the appellant. The appellant

correctly points out that the respondent, in the context of appellant's appeal of the demotion/layoff decision, cannot ask the Commission to revise a reallocation decision that respondent made three months earlier.¹ Cf. Engbregsten v. DHSS & DER, 85-0156-PC (3/13/86). No timely appeal of the reallocation decision was filed with the Commission as required by s. 230.44(3), Stats. Furthermore, the respondent lacks standing to ask the Commission to overturn respondent's own reallocation decision. Nichols v. DER, 83-0097-PC (9/16/83).

The ultimate issue in this case is whether the appellant was in legal effect demoted rather than laid off. This issue turns on whether appellant had permanent status in the EPO 3 position in the Career Executive Program. Therefore, the Commission concludes that a preferable statement of the issues in this matter is as follows:

1. Whether the appellant ever attained permanent status in class in an Executive Personnel Officer 3 position in the Career Executive Program.

Subissues:

- a. Whether the position was reallocated to the EPO 3 level.
 - b. Whether appellant was regraded to the EPO 3 classification.
2. If the answer to question 1 is "yes", was there just cause for appellant's demotion from the EPO 3 position.
 3. If the answer to question 1 is "no", was there just cause for the layoff of the appellant from the position of EPO 2.

¹ On this appeal, the Commission has no occasion to address and does not address the question of the extent of any authority the respondent himself has to take such retroactive action. This interim decision addressed only the question of whether the Commission can consider the aforesaid issue on an appeal of a separate transaction under s. 230.44(1)(c), Stats.

The fourth issue proposed by the appellant is premature. If the appellant is the prevailing party in this case, he will be provided an opportunity to seek costs under s. 227.485, Stats. Until the merits of the appeal are determined, it would be inappropriate to have the parties offer testimony or argument on this issue. Appellant correctly notes in his brief that if he prevails he may, at that time, submit a motion for costs incurred as provided by law.

Based on the above, the Commission issues the following

ORDER

The issues and subissues for hearing will be as follows:

1. Whether the appellant ever attained permanent status in class in an Executive Personnel Officer 3 position in the Career Executive Program.

Subissues:

- a. Whether the position was reallocated to the EPO 3 level.
 - b. Whether appellant was regraded to the EPO 3 classification.
2. If the answer to question 1 is "yes", was there just cause for appellant's demotion from the EPO 3 position.
 3. If the answer to question 1 is "no", was there just cause for the layoff of the appellant from the position of EPO 2.

The Commission will contact the parties for the purpose of scheduling a second prehearing conference.

Dated: April 15, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner