STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN H. GIVENS, III,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 87-0039-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a layoff. A hearing was held on August 11, 1987, before Laurie R. McCallum, Commissioner, and the briefing schedule was completed on December 7, 1987.

FINDINGS OF FACT

1. In early January of 1987, Merry Fran Tryon exercised her mandatory restoration rights and was restored to a Job Service District Director 1 (JSDD 1) position (PR01-16) in the Department of Industry, Labor and Human Relations (DILHR). She was ultimately assigned to the Rock County office.

2. At that time, appellant occupied a Job Service District Director 1 position in DILHR and was assigned to the Milwaukee Central Job Service office. Appellant was the least senior employe in the employing unit in the JSDD 1 classification.

3. At that time, the JSDD 1 position assigned to the Lancaster office was not filled. A certification request was issued for such position on December 30, 1986, and approved on January 2, 1987. The request

was cancelled by DILHR on January 16, 1987. The Secretary of DILHR, as the appointing authority, could have initiated an action to fill such position and could have made a permanent appointment to such position after initiating such a request at any time relevant to this matter prior to the elimination of the Lancaster position on or after March 31, 1987.

4. Some time in January of 1987 prior to January 16, Duane Sallstrom, DILHR's personnel director, asked Ms. Tryon and Shirl Roberts, the JSDD 1 then assigned to the Rock County office, if either of them was willing to accept the assignment to the Lancaster office. Ms. Tryon indicated it would be her last choice and Ms. Roberts said she would not be willing to accept the Lancaster assignment.

5. On January 21, 1987, DILHR submitted a layoff plan for the JSDD1 classification to the Department of Employment Relations (DER) which provided for the layoff of appellant. This layoff plan was approved by DER on January 23, 1987, and appellant was notified of his layoff in a letter from Mr. Sallstrom dated February 3, 1987. Appellant's layoff was effective February 20, 1987.

6. Appellant filed a timely appeal of his layoff with the Commission on March 23, 1987.

CONCLUSIONS OF LAW

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

2. The respondent has the burden of proving that the layoff has been conducted in accordance with the applicable statutes and administrative code provisions and that they layoff is not the result of arbitrary and capricious action.

3. The respondent has failed to sustain that burden of proof.

4. The layoff of appellant from his JSDD 1 position failed to comply with §§230.34(2), Stats., and ER-Pers 22.02(1), Wis. Adm. Code, which require that a "reduction in force" be necessary before a layoff action may be initiated.

DECISION

The Supreme Court decision of Weaver v. Wis. Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), provides the framework for decision of this appeal. In that case, the court held:

> While the appointing authority indeed bears the burden of proof to show "just cause" for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious.
>
> * * *
>
> Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis... and (is) not the result of the "winnowing and sifting" process. 71 Wis. 2d at 52-54.

Applicable statutory and administrative code provisions include the following: §230.34(2), Stats.:

> Employes with permanent status in class in permanent, sessional and seasonal positions in the classified service and employes serving a probationary period in such positions after promotion or transfer may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization, but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

Section ER-Pers 1.01(15), Wis. Adm. Code:

> "Vacancy" means a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill that position.

Section ER-Pers 22.02(1), Wis. Adm. Code:

> Layoff means termination of the services of an employe with permanent status in class, in accordance with the procedure specified in this chapter, from a position in the class, class subtitle, or progression series in which a reduction in force is to be accomplished.

Appellant argues by implication that §§230.34(2), Stats., and ER-Pers 22.02(1), Wis. Adm. Code, require that a "reduction in force" must be necessary before a layoff action may be effected by an appointing authority. The Commission concurs. A question remains, however, as to how to determine when a reduction in force is necessary.

In Mukamal v. WERC, Case No. 79-126-PC, (10/2/81), the Commission stated:

> If an agency has no funds or vacant positions in a situation where an employe has exercised mandatory restoration rights under §230.33(1), Stats., the result is, patently, a "reduction in force due to... lack of... funds" within §230.34(2), justifying the layoff of a permanent (employe in the subject classification).

The only conclusion that can be drawn from this language and from the language of the applicable statutory and code provisions is that, if the agency has a vacant, authorized, funded position in the classification to which an employe has exercised mandatory restoration rights, a reduction in force does not result, i.e., is not necessary.

In the instant case, it has not been alleged by respondent that the Lancaster position was not authorized or was not funded at the time of appellant's layoff. Respondent does allege, however, that it was not "vacant" at that time as that term is defined in ER-Pers 1.02(15), Wis. Adm. Code. Respondent argues that such a "vacancy" does not exist unless there is: (1) a position and (2) a request that the position be filled. In the opinion of the Commission, however, respondent tortures the clear language of the code provision to reach this conclusion. In the Commission's opinion, such language requires that the appointing authority

have the authority to initiate an action to fill the position and the authority to make a permanent appointment to the position once such an action is initiated in order for the position to be considered vacant. In other words, it is the existence of this authority, not the exercise of it, which triggers the language of the code provision. If, for example, a position was authorized but not funded, the appointing authority would not have the authority to fill it and the position could not be considered vacant. If, for example, the governor imposed a hiring freeze, the appointing authority would not have the authority to fill an unfilled position and the position could not be considered vacant.

Respondent's interpretation also leads to an absurd result in the context of the civil service code. §ER-Pers 12.01, Wis. Adm. Code, provides:

> To fill a vacancy, the appointing authority shall submit a request on the prescribed form to the administrator.

If, as contended by respondent, there can be no vacancy until the appointing authority has initiated an action to fill the position, the foregoing provision is rendered meaningless.

From a policy standpoint, the interpretation of §ER-Pers 1.02(15), Wis. Adm. Code, espoused by respondent is conducive to manipulation of positions by the appointing authority to defeat a laid-off employe's rights under Ch. ER-Pers 22. Wis. Adm. Code. For example, an appointing authority could, simply by refraining from taking action to fill a position, defeat an employe's rights to transfer or demote in lieu of layoff. This could effectively demote the employe to a much lower level or even effectively discharge the employe. While the action presumably would be reviewable under an arbitrary and capricious standard, that still leaves substantial

opportunity for manipulation. Cf. Frank v. Personnel Commn. Ct. of Appeals No. 86-045 (9/3/87), which involved an appeal under §230.44(1)(d), Stats.,[1] of the denial of reinstatement. The Commission had upheld the DHSS interpretation of §230.31(1)(a), Stats., and §ER-Pers 16.035 (1), Wis. Adm. Code, to limit reinstatement to a period of three years from separation from state service. The Court held the Commission's interpretation was unreasonable, based in part on the following rationale:

> It [Commission interpretation] would reduce the three-year life of the employee's right by whatever time the agency needed to process a retirement request. As the circuit court noted, it would allow the agency to reduce the value of the right merely by holding a timely request until the three-year period ran out. p.6.

The Court did not even mention the Commission's argument that such an approach by the employing agency would be subject to the constraint of review for "abuse of discretion" under §230.44(1)(d), Stats.

Under the facts of the instant appeal, however, the appointing authority had the authority to fill the Lancaster JSDD 1 position prior to March 31, 1987, as evidenced by the initiation and approval and, later, discretionary withdrawal by the appointing authority of a certification request for this position. The Lancaster JSDD 1 position was, therefore, vacant at the time of appellant's layoff. The existence of this vacant position necessarily leads to the conclusion that a reduction in force was not necessary and appellant's layoff was not for just cause.

---

[1] 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 may be appealed to the Commission.

ORDER

This matter is remanded to respondent DILHR for action in accordance with this decision. The Commission will retain jurisdiction for the purpose of ruling on appellant's "Application for Costs," filed on February 22, 1988.

Dated: March 10 ,1988 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

LRM:jmf
JANE/3