STATE OF WISCONSIN PERSONNEL COMMISSION

RAJ KUMRAH,

Appellant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 87-0058-PC

DECISION ON APPELLANT'S §227.485 MOTION FOR COSTS AND FINAL DISPOSITION FOLLOWING REMAND

This matter is before the Commission on appellant's motion for attorney's fees and costs pursuant to §227.485, stats., filed December 15, 1989. The parties have filed briefs. The Commission also must comply with the order of the Circuit Court entered March 31, 1989, the Commission having received the record from said court on March 16, 1990.

This case involves an appeal pursuant to §230.44(1)(c), stats., of a layoff transaction, an involuntary demotion in lieu of layoff to a Veterinarian 3 position. Of the issues involved in the appeal, the following was material with respect to the ultimate disposition of the litigation:

> Was §ER Pers 22 violated by DATCP's refusal to give appellant the Agricultural Supervisor 5 position when he was laid off from his Veterinarian Supervisor 1 position?

The material portions of Chapter ER-Pers 22, Wis. Adm. Code, are as follows:

> §22.08(2) DEMOTION AS A RESULT OF LAYOFF (a) Within an agency. If no transfer under sub. (1) is available and if there is a vacancy available, for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions, in a higher level position than could be obtained through displacement under sub. (3), an appointing authority shall offer the employe a demotion to that vacancy. This offer shall be subject to the criteria for a reasonable offer of appointment under s. ER-Pers 22.09.

* * *

22.09(2) An offer of appointment shall be considered reasonable if it meets the following 5 conditions as of the date of the offer:

(a) The position is one which the employe would be qualified to perform after customary orientation provided to new workers in the position;

(b) The position is the highest level position available within the agency to which the employ could either transfer or demote;

(c) The number of work hours required does not vary substantially from the number of work hours previously worked; and

(d) The position is located at a work site that is within reasonable proximity of the original work site.

(e) The pay range of the position offered is no more than 2 pay ranges or counterpart pay ranges lower than the pay range of the position from which the employe was laid off, unless the employe's rate of pay at the time of layoff is maintained in the position offered.

Following a hearing, the hearing examiner issued a proposed decision which would have had the effect of rejecting respondent's decision to not appoint appellant to the Agricultural Supervisor 5 position. This position was in the same salary range as the Veterinarian 3 position. However, the examiner reasoned that §ER-Pers 22.09(2)(b) ("The position is the highest level position available within the agency.") must refer to something other than salary range since salary range is specifically covered by §ER-Pers 22.09(2)(e) ("The pay range of the position offered is no more than 2 pay ranges. . . lower than the pay range of the position from which the employe was laid off.") Since the Agricultural Supervisor 5 position had been found to be at a higher level in terms of salary potential, organizational level, working conditions, etc., the examiner concluded it should have been offered to appellant.

In its final decision dated April 20, 1989, the Commission rejected the examiner's analysis. First, the Commission determined that the record did not support the examiner's factual finding in the discussion portion of the proposed decision at p. 10 that, based on the stipulated

facts regarding the differences between the positions in question, that the Agricultural Supervisor 5 positions were at a "higher level" in terms of non-salary factors. Second, the Commission rejected the examiner's conclusion that the term in §ER-Pers 22.09(2)(b) "highest level position" referred to something other than salary range.[1] The Commission expressed the view that the reference to pay range in §ER-Pers 22.09(2)(a) was meant to convey the notion of a "floor" for an offer of appointment -- i.e., the agency had to offer the highest level available position to the employe, but it had to be within two pay ranges of the employe's previous position. It was pointed out that if the term "highest level position" were not interpreted as a reference to pay range, there would be great uncertainty about how to determine the relative level of positions, and that the kind of criteria relied on by the examiner in determining relative level -- reporting relationship, working conditions, etc. -- had already been evaluated by the Department of Employment Relations as part of the classification process for these positions pursuant to §§230.09(2)(a) and (b), stats., which had resulted in the positions having been placed in classifications in the same pay range.

The Commission decision affirming the layoff transaction was the subject of judicial review pursuant to Chapter 227, stats. The Brown County Circuit Court Branch II reversed the Commission in a decision dated March 14, 1989. The Circuit Court decision subsequently was affirmed by the Court of Appeals District III in an opinion dated November 21, 1989. The Court's analysis was as follows:

> We are not bound by the Commission's conclusions of law. However, if its conclusion is reasonable, we will sustain it even though an alternative conclusion may be equally reasonable. *United Way of Greater Milwaukee, Inc. v. DILHR*, 105 Wis. 2d 447, 453, 313 N.W.2d 858, 861 (Ct. App. 1981).

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[1] The first aspect of the Commission's decision was never really addressed in the judicial review proceedings. However, since the final judicial resolution of this matter ordered the Commission to adopt the proposed decision and order (as modified by the dissenting Commissioner) the Commission's finding that the stipulated facts did not support a finding that the Agricultural Supervisor 5 positions were at a higher level in terms on non-salary factors must be deemed to have been implicitly reversed.

United Way of Greater Milwaukee, Inc. v. DILHR, 105 Wis. 2d 447, 453, 313 N.W.2d 858, 861 (Ct. App. 1981).

The Commissions' conclusion that "highest level position" refers only to salary level is not a reasonable construction of the rule. The phrase "highest level position" does not, on its face, restrict consideration to salary; and, considering the rule in its entirety, it is clear that no such restriction was intended. Section 22.09(2) lists five criteria for determining whether an offer of appointment is reasonable. The second of those criteria requires that it be the "highest level position." The fifth criterion requires that "the pay range of the position offered is no more than 2 pay ranges. . . lower than the pay range of the position from which the employe was laid off. . . ." Because the rule separates the "highest level position" from the restrictions on pay range, "highest level position" must mean something other than pay range.

The Commission contends that the two subsections could be read together to mean that the employer must offer the highest salary level available, but no more than two pay ranges lower than the previous position. If that was the drafter's intent, it could have been much more clearly stated. It is illogical to separate the rules relating to salary level into two parts with a discussion of work hours and location sandwiched between them. The Commission's construction of the rule is unnatural and contorted, and cannot be sustained regardless of the deference this court accords its decision.

In Escalada-Coronel v. DMRS, 86-0189-PC (4/27/87), the Commission discussion of the application of §227.485(3), stats., included the following:

The Commission must evaluate the agency position to determine whether it was "substantially justified," §227.485(2)(f), stats. The agency has the burden of proof. See, e.g., Iowa Exp. Distribution, Inc. v. NLRB, 739 F. 2d 1305, 1308 (8th Cir. 1984).

The legislative definition of "substantially justified" is the same as has been developed by the federal courts. See, e.g., Hoang Ha v. Schweiker, supra, 707 F. 2d at 1106:

> "The government need not win the case to show that its position is substantially justified; it must show its case had a reasonable basis both in law and in fact. Tyler Business Services, 695 F. 2d at 75, H.R. Rep. No. 1481, 96th Cong., 2d Sess. at 10, 14. . ." (emphasis added).

The Commission agrees with those federal court decisions that have characterized this standard in the following manner:

> "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) Berman v. Schweiker, 531 F. Supp. 1149, 1153-1154 (N.D.Ill. 1982).

The Commission went on to say with respect to cases decided against an agency under a standard of abuse of discretion or arbitrary and capricious action, that such a result:

> "[W]ill usually result in an award of costs under the EAJA, and may perhaps create a presumption that costs should be awarded, [but] such an award should not be automatic."

The Commission stated that one set of circumstances where EAJA costs might not be awarded in such a case is where the agency acted in reliance on a previously decided Commission case or in keeping with its own long-standing interpretation of the rule in question.

In the instant case, the Commission upheld respondent's construction of the rule in question and the resultant transaction. Obviously the Commission was of the opinion that respondent's action had a "reasonable basis in law and fact." However, the ensuing judicial analysis called into question the reasonableness of the Commission's interpretation of the rule, and, by necessary implication, respondent's underlying interpretation and application of the rule. The Court of Appeals held as follows, inter alia:

> "We are not bound by the Commission's conclusions of law. However, if its conclusion is reasonable, we will sustain it even though an alternative conclusion may be equally reasonable.
>
> The Commission's conclusion that 'highest level position' refers only to salary level is not a reasonable construction of the rule. . . .
>
> . . .It is illogical to separate the rules relating to salary level into two parts with a discussion of work hours and location

> sandwiched between them. The Commission's construction of the rule is unnatural and contorted, and cannot be sustained regardless of the deference this court accords its decision. (citation omitted)

Given this characterization of the Commission's decision, which upheld respondent's construction and application of the rule in question, it is difficult to perceive how respondent's action could be said to have been "substantially justified" as having a "reasonable basis in law." While in Escalada-Coronel the Commission referred to certain kinds of circumstances that might avoid an award of costs in this kind of case -- i.e., where the agency decision in question is overtly characterized on review as unreasonable or in some similar manner -- it does not appear that such circumstances are present in this case.

In its submission in opposition to attorney's fees, respondent points out that the layoff plan for the transaction in question was approved in advance by DMRS, which has the authority pursuant to §§230.05 and 230.34(2)(b), stats., to adopt rules governing layoffs and has done so by promulgating Chapter ER-Pers 22, Wis. Adm. Code. However, while it appears that DMRS approved the general reorganization and layoff plan, it further appears based on the pertinent portions of respondent's letter to DMRS, quoted in appellant's reply brief, that there was no mention whatsoever of the Agricultural Supervisor V position that is in issue in this case. The Commission has no basis on which to conclude that DMRS actually approved the specific rule interpretation that led respondent to deny appellant the Agricultural Supervisor V position. Therefore, there is no basis for a conclusion not to award attorney's fees under §227.485, stats., on the grounds that respondent's position was "substantially justified" as having a "reasonable basis in law and fact."

Respondent also contends §227.485 does not authorize the award of attorney's fees in connection with the judicial review proceedings which resulted in the reversal of the Commission's decision. However, Sheely v. DHSS, 150 Wis. 2d 320, 339-340, 442 N.W. 2d 1 (1989), and the cases cited therein lend strong support for the conclusion that §227.485 implicitly authorizes an award of costs in connection with such judicial proceedings. In Sheely the Supreme Court awarded costs on appeal

under §814.245(3), stats., which, like §227.485, does not expressly authorize costs on appeal, holding that such a construction was necessary to fulfill the legislative intent of that subsection.

Furthermore, §227.485(1), stats., provides:

> The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act, 5 USC 504.

Federal court decisions interpreting 5 USC 504 support the allowance of attorney's fees for judicial review proceedings. See, Glick v. Civil Service Commn., 567 F. Supp. 1483, 1485-1486 (N.D. Ill. 1983), affd. 799 F. 2d 753 (7th Cir. 1986).

Respondent has raised no objections to any of the specific, itemized costs and fees submitted with this motion, and the entire amount, in the sum of $8,481.08, will be awarded.

ORDER

1. Appellant's motion for attorney's fees and costs filed December 15, 1989, is granted and appellant is awarded said fees and costs in the amount of $8,481.08.

2. The Commission having received on March 16, 1990, the return of record from the Brown County Circuit Court Branch II, and said court having ordered that the Commission adopt the proposed decision and order with the changes thereto as set forth in the dissent to the Commission's April 20, 1988, decision and order, said proposed decision and order, as amended, is adopted as the Commission's final disposition of this case and this matter is remanded to respondent for action in accordance therewith.

3. Respondent is directed to comply with this order within 30 days of its date of entry.

Dated: April 17, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:gdt

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

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DR. RAJ K. KUMRAH,
JOHN J. FLETCHER,

Appellants,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent

Case Nos. 87-0058, 0059-PC

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FINAL DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments and consulted with the examiner. A copy of the proposed decision and order is attached. The Commission concludes that some of respondent's objections to the proposed decision are well-founded and that the proposed decision must be rejected in a number of particulars, and it also concludes the ultimate result reached in the proposed decision is incorrect and the actions of the respondent should be sustained.

These cases involve appeals pursuant to §230.44(1)(c), Stats., of layoff situations wherein appellants were demoted in lieu of layoff into Veterinarian 3 positions. They claim that respondent should have offered them the opportunity to demote into Agricultural Supervisor 5 positions, which were in the same salary range as the Veterinarian 3 classification, but which appellants deemed preferable for a number of reasons.

The proposed decision rests in large part on construction of the following provisions from Chapter ER-Pers 22 of the Wisconsin Administrative Code, which covers layoff policy procedures in the classified civil service:

> ER-Pers 22.025 Vacancies, how filled. For purposes of this chapter, the appointing authority shall fill vacancies in the following order, after considering transfers, demotions and reassignments limited to persons currently employed in the employing unit who are not affected by the layoff:
>
> (1) Through alternatives in lieu of termination as a result of layoff.
>
> (2) Through restoration following layoff.
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> * * *
>
> ER-Pers 22.08 Alternatives to termination from the service as a result of layoff. If an employe with permanent status in a class has received a notice of layoff under s. ER-Pers 22.07 these alternatives shall be available in the order listed below until the effective date of the layoff. Employes in the same layoff group who are laid off on the same date shall have the right to exercise the following alternatives to termination from the service as a result of layoff in direct order of their seniority, most senior first:
>
> (1) TRANSFER. (a) All employes who have received a notice of layoff have the right to transfer:
>
> 1. Within the employing unit: to any vacancy in the same or counterpart pay range for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in the position; or
>
> 2. Within the agency: to any vacancy in the same class, class subtitle or progression series from which the employe is being laid off for which the employe is qualified to perform the work after being given the customary orientation provided to new workers in the position.
>
> (2) DEMOTION AS A RESULT OF LAYOFF. (a) Within an agency. If no transfer under sub. (1) is available and if there is a vacancy available, for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions, in a higher level position than could be obtained through displacement under sub. (3), an appointing authority shall offer the employe a demotion to that vacancy. This offer shall be subject to the criteria for a reasonable offer of appointment under s. ER-Pers 22.09.

2. An employe who is demoted by the appointing authority, as a result of a layoff to the highest level vacancy available for which the employe is qualified, shall have his or her pay determined under s. ER-Pers 29.03(8)(c).

(3) DISPLACEMENT. (a) If there is no vacancy obtainable under subs. (1) and (2) at the same or higher level than any position obtainable under this subsection, an employe may exercise a right of displacement within the employing unit.

* * *

5. If there is more than one position in the same or counterpart pay range to which the employe is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employe shall first exercise the right of displacement.

ER-Pers 22.09 Failure to accept reasonable offer of appointment. (1) an employe who has been notified of layoff and fails to accept a reasonable offer of permanent appointment within the agency within 5 work days of the offer or who, upon acceptance, fails to be available for work within 5 work days after acceptance forfeits any further rights to an appointment under ss. ER-Pers 22.08 and 22.10.

(2) An offer of appointment shall be considered reasonable if it meets the following 5 conditions as of the date of the offer:

(a) The position is one which the employe would be qualified to perform after customary orientation provided to new workers in the position;

(b) The position is the highest level position available within the agency to which the employe could either transfer or demote;

(c) The number of work hours required does not vary substantially from the number of work hours previously worked; and

(d) The position is located at a work site that is within reasonable proximity of the original work site.

(e) The pay range of the position offered is no more than 2 pay ranges or counterpart pay ranges lower than the pay range of the position from which the employe was laid off, unless the employe's rate of pay at the time of layoff is maintained in the position offered.

The proposed decision contains, inter alia, the following analysis:

Section ER-Pers 22.08(2)(a) provides that an offer of a demotion to a vacancy under this section "shall be subject to the criteria for a reasonable offer of appointment under s. ER-Pers 22.09." Section ER-Pers 22.09(2) lists five criteria for a reasonable offer of appointment. Subsection ER-Pers 22.09(2)(b) addresses the situation where there are multiple positions available by providing: "The position is

> the highest level position available within the agency to which the employe could either transfer or demote." This seems pretty clearly to refer to something other than solely salary range since salary range is specifically covered by subsection (e). The record supports a finding that the Agricultural Supervisor 5 positions were at a higher level (in terms of salary potential, organizational level, working conditions, promotional opportunities, etc.) than the Veterinarian 3 positions. The record is undisputed that appellants were qualified to perform the work of the Agricultural Supervisor 5 position after being given the customary orientation provided to newly hired workers in such a position. Therefore, respondent should have offered appellants the Agricultural Supervisor 5 positions.
>
> This conclusion is supported by the language of s. ER-Pers 22.08(3)(a) which deals with displacement. Section ER-Pers 22.08(3)(a) 5 deals with a situation somewhat parallel to that presented in the instant case:
>
> > 5. If there is more than one position in the same or counterpart pay range to which the employe is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employe shall first exercise the right of displacement. (emphasis added)
>
> Application of the doctrine "express mention/implied exclusion" suggests that the failure to include a similar provision (vesting authority for designating the position in the appointing authority) in the section on demotions in lieu of layoff means that the appointing authority lacks this prerogative with respect to demotions in lieu of layoff.[1]

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[1] Unlike displacements, demotions in lieu of layoff do not have a direct effect on the status of other employes.

The Commission disagrees with this analysis in two respects.

First, the Commission does not agree that "The record supports a finding that the Agricultural Supervisor 5 positions were at a higher level (in terms of salary potential, organizational level, working conditions, promotional opportunities, etc.) than the Veterinarian 3 positions." These cases were submitted on the basis of a factual stipulation and various exhibits. The most significant language from the stipulation as it relates to the aforesaid part of the proposed decision is as follows:

16. Veterinary [sic] 3 positions are within the Wisconsin Science Professional Bargaining Unit. The Agriculture [sic] Supervisor 5 position is nonrepresented and is supervisory in nature. There is a significant difference in duties and responsibilities between the two positions.

17. Hours, wages and working conditions for the Veterinary [sic] 3 position are covered by a Collective Bargaining Agreement. Wages, hours and working conditions for the Agriculture [sic] Supervisor 5 position are covered by a Unilateral Pay Plan, and the rules of Wisconsin Administrative Codes [sic], Civil Service Rules.

18. While there was no loss in current income for Dr. Kumrah, his new position is contained in a bargaining unit, which will affect the compensation provisions governing his pay raises, his promotional and transfer opportunities, his inclusion in management decisions, and issues regarding wages, hours and working conditions, for better or worse.

In addition, to this stipulation (which applies to both appellants), the parties stipulated to the submission of an organizational chart and a document entitled "Pay Adjustment Comparison 1980 to Present." The organizational chart shows that the Agricultural Supervisor 5 positions report directly to the Food Division Administrator, while the Veterinarian 3 positions report directly to a Veterinarian Supervisor 1 position which in turn reports to the Food Division Administrator. The pay adjustment comparison document lists the annual pay adjustments for appellants, who were non-represented, as opposed to the pay adjustments for comparable represented employes.

In the opinion of the Commission, the only part of the examiner's proposed finding, as set forth in the proposed decision at p. 10, that the Agricultural Supervisor 5 positions were at a higher level than the Veterinarian 3 positions, that is supportable on this record is the fact that the Agricultural Supervisor 5 positions have a higher level reporting relationship than the Veterinarian 3 positions, since the former positions report directly to the division administrator. As to salary, the Commission believes it is speculative to infer from the fact that appellants

received higher salary increases than their represented counterparts over a period of years that the unrepresented Agricultural Supervisor 5 positions were at a higher level in terms of salary potential than the represented Veterinarian 3 positions. There obviously are many factors which affect employes' salary increases. Contracts are negotiated, and unrepresented pay plans are revised, biannually. To the extent that unrepresented employes typically have a discretionary, performance-related component in their salary structure, the amount obviously will vary depending on how well they perform and how their supervisors perceive that performance. Appellants' salary history as Veterinarian Supervisor 1's cannot support a finding that the Agricultural Supervisor 5 positions are at a higher level than the Veterinarian 3 positions in terms of salary potential.

As to the other aspects of the finding, while the record shows that there are differences between the two positions, it would be speculative to say that the Agricultural Supervisor 5 positions are at a higher level in terms of promotional opportunities, transfer opportunities, benefits, hours and working conditions.[1]

If all that can be found with respect to the comparison between the Agricultural Supervisor 5 and the Veterinarian 3 positions is that the Agricultural Supervisor 5 positions have a higher level reporting relationship, does this support a finding, in the language used in §ER-Pers 22.09(2)(b), Wis. Adm. Code, that the Agricultural Supervisor 5 positions are: "...the highest level position[s] available within the agency to which the employe[s] could either transfer or demote"?

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[1] The fact that the Agricultural Supervisor 5 vacancies were filled by promotion has no significance that the Commission can perceive.

If the term "highest level position" is given the most generalized meaning, as the proposed decision apparently did, the Commission believes it would be tenuous to conclude that a position should be considered at a higher level than another position solely because, of the many potential bases for comparing as to "level," that the former reports to a one level higher supervisor.

Furthermore, the Commission agrees with respondent that it is erroneous to conclude that the reference to 22.09(2)(b), Wis. Adm. Code, to "highest level position" refers to anything other than salary range.

The language of Chapter ER-Pers 22 gives rise to some difficulty in construction. Section ER-Pers 22.09(2) lists five criteria for a reasonable offer of appointment. Section ER-Pers 22.09(2)(e) utilizes pay range to convey, as respondent points out, the notion of a "floor" for an offer of appointment:

> "The pay range of the position offered is no more than 2 pay ranges or counterpart pay ranges lower than the pay range of the position from which the employe was laid off...."

Section 22.09(2)(b) requires that the offer be to "the highest level position available within the agency to which the employe could either transfer or demote." As the examiner noted, it is reasonable to assume that if the intent behind this rule was to refer to the "highest level position" in terms of pay range, the rule would have used that term explicitly, just as it did in §ER-Pers 22.09(2)(e). However, there are a number of difficulties associated with a construction of "highest level" in §ER-Pers 22.09(2)(b) to mean some general concept other than pay range.

The main problem with such a construction is the resultant uncertainty. If one is not using any explicit criteria to determine

"level," what criteria should be considered? For example, presume there are two jobs in the same pay range. One is a staff job that reports directly to the division administrator. The other is a line job that reports to a bureau director, but that has a higher level of programmatic impact than the staff job. Which would be considered the higher level job?

Furthermore, as respondent points out in his objections to the proposed decision, the Civil Service Code (Subch. II, Ch. 230, Stats., Chs. ER-Pers, Wis. Adm. Code) distinguishes positions for purposes of demotions, transfers, promotions, etc., solely on the basis of pay range and classification.[2]

Section 230.09(2), Stats., provides, inter alia, as follows:

> (a) ... the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities and other factors recognized in the job evaluation process....
>
> * * *
>
> (b) ... the secretary shall, upon initial establishment of a classification, assign that class to appropriate pay rate or range, and may, upon subsequent review, reassign classes to different pay rates or ranges. The secretary shall assign each class to a pay range according to the skill, effort, responsibility and working conditions required for the class...."

Thus, the assignment of a position to a classification and a classification to a pay range reflects DER's assessment of the level of the associated "skill, effort, responsibility and working conditions," §230.09(2)(b), Stats. Implicit in the assignment of the Agricultural Supervisor 5 and Veterinarian 3 classifications to the same pay range is the judgment that they are at the same level with respect to these

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[2] Positions in different classification series are distinguished on the basis of pay range.

factors. It would be arbitrary for the Commission to find that these Agricultural Supervisor 5 positions are at a higher level than the Veterinarian 3 positions solely because the former report to a higher level position when the positions have been classified in classifications having the same pay range based on an analysis of all the criteria set forth above in §230.09(2). For example, the record reflects that a prerequisite for employment as a Veterinarian 3 is a Doctor of Veterinary Medicine degree and possession of, or eligibility for, a valid license to practice Veterinary medicine in Wisconsin and eligibility for State-Federal accreditation. There is no such prerequisite for employment as an Agricultural Supervisor 5. This is the kind of factor that presumably would be taken into account in assigning a classification to a pay range. It would be anomalous to seize on one or more factors (such as reporting level) to the exclusion of the entire analysis of the positions that presumably went into the classification and pay range analysis in the first instance, to decide that in some generalized sense the Agricultural Supervisor 5 positions were at a higher level than the Veterinarian 3 positions.

Since the Commission concludes that the Veterinarian 3 and the Agricultural Supervisor 5 positions are at the same level, as that term is used in §ER-Pers 22.09(2)(b), Wis. Adm. Code, and since it is undisputed that the offers of appointment met the other criteria for a reasonable offer of appointment as set forth in §ER-Pers 22.09(2), it follows that the offers were proper under Ch. ER-Pers 22, unless it also is concluded, as appellants contend, that §ER-Pers 22.08(2)(a) provides the affected employe his or her choice among equivalent positions when there are multiple vacancies available for possible demotion in lieu of layoff.

The applicable language from §ER-Pers 22.08(2)(a) is as follows:

> "... If no transfer under sub. (1) is available and if there is a vacancy available ... in a higher level position than could be obtained through displacement under sub. (3), an appointing authority shall offer the employe a demotion to that vacancy...." (emphasis added)

The parties' positions as to this rule may be characterized as follows. Each appellant points to an Agricultural Supervisor 5 vacancy and in effect says:

> "there is a vacancy available ... [the] appointing authority shall offer the employe a demotion to that vacancy."

Respondent, on the other hand, points to the Veterinarian 3 vacancies and says in effect:

> "there is a vacancy available ... [the] appointing authority shall offer the employe a demotion to that vacancy."

In the Commission's view, if it were construing §ER-Pers 22.08(2)(a) based solely on the language of this subsection without consideration of the remainder of the section, it would be constrained to sustain respondent's approach. Literally, respondent's action does not transgress any of the language of §ER-Pers 22.08(2)(a). As to each appellant, there was a vacancy available which satisfied the criteria contained in the rule, and respondent offered each appellant a demotion to that vacancy, and each offer satisfied the criteria set forth in §ER-Pers 22.09(2). In order for appellant's view to prevail, there would have to be some language in §ER-Pers 22.08(2)(a) which suggests that the employe has the prerogative of choosing among multiple qualifying vacancies. They have been unable to point to any such language. Therefore, there is no basis for a conclusion that respondent's action violated the subsection.

Another approach to construction of §ER-Pers 22.08(2)(a), which is urged by appellant, is to construe the word "a" as in the phrase "if there

is a vacancy available" to have the plural sense or to mean "any." This would be consistent with the holding in State ex rel Cities S.O. Co. v. Bd. of Appeals, 21 Wis. 2d 516, 529 (1963): "... it is a rule of statutory construction that the article 'a' is generally not used in a statute in a singular sense unless such an intention is clear from the language of the statute." Also, see Black's Law Dictionary (Revised 4th Ed.), p. 3:

> "The article 'a' is not necessarily a singular term; it is often used in the sense of 'any' and is then applied to more than one individual object...."

Using such an approach to construction the subsection then could be read as follows:

> "...if there are any vacancies available...an appointing authority shall offer the employe a demotion to that [any?] vacancy...."

However, in the opinion of the Commission, such a construction does not aid appellants' case, because there is still nothing in the statute so construed to connote that the employe has the prerogative to choose among multiple vacancies, or that an employer offer of a demotion to a vacancy chosen by the employer would not be in compliance with the rule, so long as the offer met the criteria for a reasonable offer of appointment under §ER-Pers 22.09(2).

In attempting to construe §ER-Pers 22.08(2)(a), the proposed decision relies heavily on the fact that §ER-Pers 22.08(3)(a)5., which deals with displacement, makes it clear that in the event of multiple vacancies, the appointing authority has the right to designate into which position displacement will occur:

> "5. If there is more than one position in the same or counterpart pay range to which the employe is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employe shall first exercise the right of displacement."

The proposed decision concluded that an absence of a similar provision in the section of the rule dealing with demotions, §ER-Pers 22.08(2), meant that the appointing authority was not intended to have this prerogative in the case of demotions.

However, §ER-Pers 22.08 deals with three alternatives in lieu of layoff -- transfer (§ER-Pers 22.08(1)), demotion (§ER-Pers 22.08(2)), and displacement (§ER-Pers 22.08(3)). Section ER-Pers 22.08(3)(a) 5. makes it explicit that with respect to displacement, when there are multiple qualifying vacancies, the appointing authority can decide into which vacancy displacement will occur. However, §ER-Pers 22.08(1) also makes it clear with respect to transfer that if there are multiple qualifying vacancies, the employe has the prerogative:

> (a) All employes who have received a notice of layoff have the right to transfer:
>
> 1. Within the employing unit: to any vacancy in the same or counterpart pay range....
>
> 2. Within the agency: to any vacancy in the same class, class subtitle or progression series, from which the employe is being laid off...." (emphasis added)

The proposed decision juxtaposes only the demotion and displacement provisions in applying the "express mention, implied exception" rule. Obviously, if the transfer and demotion provisions are juxtaposed, the same rule of construction can be applied to a different end, since the transfer provision is no less explicit in giving the employe the option in the case of multiple vacancies, and it could be argued that the absence of similar language in §ER-Pers 22.08(2) is indicative of an intent that the employe not have such an option with respect to demotions. Therefore, it appears that the "express mention, implied exception" rule is of little use in construing §ER-Pers 22.08(2), and, as discussed above, it cannot be

concluded that respondent violated the rule based solely on the language of that subsection.

The proposed decision also concludes respondent violated §ER-Pers 22.025. Wis. Adm. Code, which provides, inter alia, as follows:

> "... For purposes of this chapter, the appointing authority shall fill vacancies in the following order, after considering transfers, demotions and reassignments limited to persons currently employed in the employing unit who are not affected by the layoff:
>
> (1) Through alternatives in lieu of termination as a result of layoff.
>
> (2) Through restoration following layoff."

The proposed decision includes the following language:

> "Section ER-Pers 22.025 does not mention promotions. Since all permissible personnel transactions for filling vacancies are prioritized and set out, it must be concluded that promotions are not to be considered prior to filling the vacancy as an alternative in lieu of layoff. Therefore, respondent's promotion of Dennison and Cress into the Agricultural Supervisor 5 position is a violation of the procedure set forth in §ER-Pers 22.025 as to how vacancies during a layoff should be filled...." proposed decision, pp. 11-12.

Section ER-Pers 22.205 provides that "the appointing authority shall fill vacancies in the following order...." (emphasis added) Then, after referring to certain kinds of transactions involving employes in the employing unit who are not affected by the layoff, the rule lists:

> "(1) Through alternatives in lieu of termination as a result of layoff.
>
> (2) Through restoration following layoff."

Thus, laying to one side the transactions involving employing unit employes, the only order for filling vacancies the rule establishes is that as between employes who are in a position to exercise alternatives in lieu of termination as a result of layoff, and laid-off employes with restoration rights, the appointing authority must give priority to the former. By its terms, the rule itself establishes no priority as between the exercise

of an alternative in lieu of layoff and some other kind of transaction not mentioned in the rule, such as a promotion. The question of which of these transactions has priority can only be determined by adverting to another rule, i.e., §ER-Pers 22.08(2)(a). Therefore, §ER-Pers 22.025 has no application to the resolution of these appeals.

In the Commission's opinion, the result it reached is consistent with sound policy considerations. Under this construction of the personnel rules concerning layoff, an employe who is faced with layoff, but who has no transfer opportunities available, has the protection of being entitled to an offer of demotion if there is a higher level position available than could be obtained through displacement that meets the criteria set forth in the rules. In the event there are multiple vacancies, the employe continues to be entitled to an offer of appointment. While the employer can decide on the vacancy, the employe is protected by the fact that the offer must meet all of the criteria set forth in §ER-Pers 22.09(2).[3] That is, that the position selected by the employer is the highest level position available, that the hours and location are similar to the employe's prior position, and that the pay range not be more than 2 pay ranges or counterpart pay ranges lower than the employe's prior position, unless the employe's rate of pay is maintained. At the same time, the employer retains the authority to manage the agency and utilize its personnel as efficaciously as possible, within the boundaries of these protections afforded the employe.

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[3] The employe who is facing layoff under these circumstances has additional protection from the fact that on a layoff appeal, the employer's action can be reviewed not only for violation of the personnel rules, but also for abuse of discretion, Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 52, 237 N.W. 2d 183 (1976).

ORDER

A. The Commission adopts the following parts of the Proposed Decision:

1) Nature of the Case

2) Findings of Fact

3) Conclusions of Law #2, #7 and #8

4) That part of the "DECISION" section headed "Section ER-Pers 22.08(1)(a), Wis. Adm. Code"

B. The Commission rejects the following parts of the Proposed Decision:

1) Conclusions of Law #1, #3, #4, #5 and #6

2) All of the "Decision" section except that part headed "Section ER-Pers 22.08(1)(a), Wis. Adm. Code"

3) "ORDER"

C. The Commission enters the following substitute Conclusions of Law:

1. These matters are properly before the Commission pursuant to §230.44(1)(c), Stats.

3. Respondent has satisfied its burden of proof.

4. Respondent's decision to demote appellants in lieu of layoff to the Veterinarian 3 positions did not violate §ER-Pers 22.08(2)(a), Wis. Adm. Code.

5. Respondent's refusal to give appellants the Agricultural Supervisor 5 positions in question when they were laid off from their Veterinarian Supervisor 1 positions did not violate §ER-Pers 22.08(2)(a), Wis. Adm. Code.

6. Respondent's actions as aforesaid did not violate §§ER-Pers 22.01, 22.025 or 22.07, Wis. Adm. Code.[4]

D. The Commission enters the following substitute "ORDER":

"Respondent's actions are sustained and these appeals are dismissed. Appellants' motions for costs are denied."

Dated: April 20, 1988 STATE PERSONNEL COMMISSION

DPM/AJT:rcr
JMF02/3

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

[4] Although the stipulated issues did not include any question as to the violation of these sections per se, since the parties did not object to the inclusion in the proposed decision and order of Conclusion No. 6 which addressed the question of violations of §§ER-Pers 22.01 and 22.07, and the proposed decision discussed without objection the question of whether ER-Pers 22.025 had been violated, this Conclusion is amended as set forth for the sake of consistency.

DISSENT

I respectfully dissent from the majority decision and would, instead, adopt the proposed decision and order with the following changes.

1. Revise the fifth sentence in the first full paragraph on page 10 of the proposed decision to read:

> The record supports a finding that the Agricultural Supervisor 5 positions were at a higher level in terms of salary potential and organizational level than the Veterinarian 3 positions.

2. Add the following finding of fact:

> 20.5. The Agricultural Supervisor 5 positions were at a higher level in terms of salary potential and organizational level than the Veterinarian 3 positions, and appellant's employment situation would be adversely effected in these areas by respondent's failure to give them the opportunity to fill the Agricultural Supervisor 5 positions.

Dennis P McGilligan
DENNIS P. McGILLIGAN, Chairperson

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STATE OF WISCONSIN PERSONNEL COMMISSION

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

DR. RAJ K. KUMRAH,
JOHN J. FLETCHER,

Appellants,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent

Case Nos. 87-0058, 0059-PC

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

PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

These are appeals from respondent's decision to lay off appellants and their subsequent demotions to Veterinarian 3 positions. At prehearing conferences held on June 10, 1987, the parties agreed to the following issues for hearing:

1. Did the decision of respondent to demote the appellant in lieu of layoff to the Veterinarian 3 position violate s. ER Pers 22.08(2)?

2. Was s. ER Pers 22 violated by DATCP's refusal to give appellant the Agricultural Supervisor 5 position when he was laid off from his Veterinarian Supervisor 1 position?

Hearing in the matter was scheduled on July 24, 1987, before Dennis P. McGilligan, Chairperson. On July 24, 1987, the parties agreed to consolidate the two cases for hearing and disposition. The parties also agreed to stipulate to certain facts in lieu of a hearing. The parties completed their briefing schedule on November 13, 1987.

FINDINGS OF FACT

1. At all times material herein, the appellants have been employed in the classified civil service by the Department of Agriculture, Trade and Consumer Protection (DATCP).

2. Prior to the actions giving rise to the instant appeals, appellant Kumrah was employed as a Veterinarian Supervisor 1 (PR1-17) in the Green Bay region.

3. Prior to the actions giving rise to the instant appeals, appellant Fletcher was employed as a Veterinarian Supervisor 1 (PR1-17) in the Eau Claire region.

4. On February 19, 1987, Helene Nelson, DATCP Deputy Secretary, sent a letter to Susan Christopher, Administrator, Division of Merit Recruitment and Selection (DMRS) requesting her approval of the layoff of certain DATCP employes resulting from the reorganization of the Food and Meat Divisions.

5. Basically, the DATCP reorganization involved the merger of the Food and Meat Divisions, which specifically included consolidation of the supervision of meat inspection and food inspection staffs.

6. By letter dated February 24, 1987, Susan Christopher approved the layoff plan.

7. As a result of this layoff plan, appellant Kumrah's position of Veterinarian Supervisor 1 was eliminated. Appellant Fletcher's position was also eliminated. Four new positions were created. Two were Agricultural Supervisor 5's (PR1-16); the other two positions were Veterinarian 3 positions (PR15-8). There was an Agriculture Supervisor 5 - Food and a Veterinarian 3 position located in Green Bay. The other two positions were located in Eau Claire. The Veterinarian 3 classification is assigned to pay range 16.

8. The layoff plan letter noted in Finding of Fact 4 also made reference to the creation of a new position, Administrative Officer 2 (AO 2) (PR1-17). An Agricultural Supervisor 6 Management (PR1-17) position was abolished in order to create said AO 2 position. The incumbent of the Agricultural Supervisor 6 Management position, Donald Konsoer, transferred in lieu of layoff into the Administrative Officer 2 position, effective April 12, 1987. He was offered said position April 6, 1987. He had more seniority than appellants.

9. By letter dated March 24, 1987, appellants received a notice of layoff. The letter indicated that appellants' effective date of layoff would be April 11, 1987. The letter noted three alternative personnel transactions: transfer, displacement, and demotion in lieu of layoff. The letter states that there were no transfer or displacement options available to appellants. The only specific option given appellants was demotion into the newly created Veterinarian 3 positions noted above.

10. On March 5, 1987, a promotional opportunity announcing those two aforesaid Agricultural Supervisor 5 - Food vacancies was posted. The filing date for application was March 13, 1987.

11. Appellant Kumrah applied for and indicated an interest in the Agricultural Supervisor 5 - Food position in Green Bay. He was qualified to perform the work of said position after being given the customary orientation provided to newly hired workers in such a position. There was no higher level position that could be attained by appellant Kumrah through displacement as provided in s. ER Pers 22.08(3).

12. Appellant Kumrah interviewed for the Agricultural Supervisor 5 - Food position in Green Bay on March 26, 1978. He was not offered the position.

13. Bryon Dennison was promoted to the Agricultural Supervisor 5 - Food position in Green Bay. He was informed of this by letter on March 30, 1987 and assumed those duties on April 13, 1987.

14. Appellant Fletcher was given no notice that he could demote into an Agricultural Supervisor 5 - Food position. When he inquired he was advised orally that he could compete, if he chose, for the position.

15. Appellant Fletcher was qualified for the Agricultural Supervisor 5 - Food position. He had been certified and was a finalist for a similar position in the Madison area in 1986.

16. The Agricultural Supervisor 5 - Food position in appellant Fletcher's area was filled by promotion of Raymond Cress.

17. On March 30,1987, appointment letters were sent to appellants confirming their filling the Veterinarian 3 positions noted above in Green Bay and Eau Claire. Appellants assumed the duties of these positions effective April 12, 1987. Thereafter, they filed timely appeals with the Commission.

18. Veterinarian 3 positions are within the Wisconsin Science Professional Bargaining Unit. The Agricultural Supervisor 5 - Food position is nonrepresented and is supervisory in nature. There is a significant difference in duties and responsibilities between the two positions.

19. Hours, wages and working conditions for the Veterinarian 3 position are covered by a collective bargaining agreement. Wages, hours and working conditions for the Agricultural Supervisor 5 position are

covered by the Unilateral Pay Plan, and the rules of Wisconsin Administrative Codes, Civil Service Rules.

20. While there was no loss in current income for appellants in their demotion into the Veterinarian 3 positions, wages, promotional opportunities,

transfer opportunities, benefits, hours and working conditions all would be affected in the future as a result of the aforesaid actions.

21. Chapter ER-Pers 22 entitled "Layoff Procedure" provides, in relevant part, as follows:

> ER-Pers 22.01 Purpose. This layoff procedure is adopted under s. 230.34(2), Stats., and is intended to be fair to and understandable by all employes; retain for the state service its most effective and efficient personnel; and insure that all layoff actions are appropriately and systematically administered.
>
> ER-Pers 22.025 Vacancies, how filled. For purposes of this chapter, the appointing authority shall fill vacancies in the following order, after considering transfers, demotions and reassignments limited to persons currently employed in the employing unit who are not affected by the layoff:
>
> (1) Through alternatives in lieu of termination as a result of layoff.
>
> (2) Through restoration following layoff.
>
> ER-Pers 22.07 Notice prior to layoff; appeal notice. Any employe affected by layoff shall be given written notice of the action, not less than 15 calendar days prior to its effective date. The written notice of layoff shall, to the extent practicable, include the specific alternatives within the agency available at that time to the employe in lieu of termination. The appointing authority shall continue to keep the employe aware of new alternatives available up to the effective date of the layoff.
>
> ER-Pers 22.08 Alternatives to termination from the service as a result of layoff. If an employe with permanent status in a class has received a notice of layoff under s. ER-Pers 22.07 these alternatives shall be available in the order listed below until the effective date of the layoff. Employes in the same

layoff group who are laid off on the same date shall have the right to exercise the following alternatives to termination from the service as a result of layoff in direct order of their seniority, most senior first:

(1) TRANSFER. (a) All employes who have received a notice of layoff have the right to transfer:

1. Within the employing unit: to any vacancy in the same or counter-part pay range for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in the position; or

2. Within the agency: to any vacancy in the same class, class subtitle or progression series from which the employe is being laid off for which the employe is qualified to perform the work after being given the customary orientation provided to new workers in the position.

(2) DEMOTION AS A RESULT OF LAYOFF. (a) Within an agency. If no transfer under sub. (1) is available and if there is a vacancy available, for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions, in a higher level position than could be obtained through displacement under sub. (3), an appointing authority shall offer the employe a demotion to that vacancy. This offer shall be subject to the criteria for a reasonable offer of appointment under s. ER-Pers 22.09.

2. An employe who is demoted by the appointing authority, as a result of a layoff to the highest level vacancy available for which the employe is qualified, shall have his or her pay determined under s. ER-Pers 29.03(8)(c).

(3) DISPLACEMENT. (a) If there is no vacancy obtainable under subs. (1) and (2) at the same or higher level than any position obtainable under this subsection, an employe may exercise a right of displacement within the employing unit.

5. If there is more than one position in the same or counterpart pay range to which the employe is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employe shall first exercise the right of displacement.

ER-Pers 22.09 Failure to accept reasonable offer of appointment. (1) an employe who has been notified of layoff and fails to accept a reasonable offer of

permanent appointment within the agency within 5 work days of the offer or who, upon acceptance, fails to be available for work within 5 work days after acceptance forfeits any further rights to an appointment under ss. ER-Pers 22.08 and 22.10.

(2) An offer of appointment shall be considered reasonable if it meets the following 5 conditions as of the date of the offer:

(a) The position is one which the employe would be qualified to perform after customary orientation provided to new workers in the position;

(b) The position is the highest level position available within the agency to which the employe could either transfer or demote;

(c) The number of work hours required does not vary substantially from the number of work hours previously worked; and

(d) The position is located at a work site that is within reasonable proximity of the original work site.

(e) The pay range of the position offered is no more than 2 pay ranges or counterpart pay ranges lower than the pay range of the position from which the employe was laid off, unless the employe's rate of pay at the time of layoff is maintained in the position offered.

22. Section ER-Pers 1.02(15), Wis. Adm. Code, provides as follows:

(15) "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.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.44(1)(a),(c), Stats.

2. The respondent has the burden of proving that it acted in accordance with s. ER-Pers 22, Wis. Adm. Code, in demoting appellants in lieu of layoff to the Veterinarian 3 position instead of offering them the Agricultural Supervisor 5 position; in failing to notify appellant Fletcher of his

right to seek transfer to the Administrative Officer 2 position; and in failing to allow him to transfer into said position as an alternative to layoff. Weaver v. Wis. Personnel Bd., 71 Wis 2d 46, 52, 237 N.W. 2d 183 (1976).

3. The respondent has not satisfied its burden of persuasion as to the Agricultural Supervisor 5 position, but has satisfied its burden with respect to the Administrative Officer 2 position.

4. The decision of respondent to demote the appellants in lieu of layoff to the Veterinarian 3 positions violated s. ER-Pers 22.08(2)(a), Wis. Adm. Code.

5. Respondent's refusal to give appellants the Agricultural Supervisor 5 position when they were laid off from their Veterinarian Supervisor 1 position violated s. ER Pers 22.08(2)(a), Wis. Adm. Code.

6. Respondent's actions as aforesaid violate ss. ER-Pers 22.01 and 22.07, Wis. Adm. Code.

7. Respondent's failure to notify appellant Fletcher of his right to seek transfer into the Administrative Officer 2 position did not violate s. ER-Pers 22.07, Wis. Adm. Code.

8. Respondent did not violate s. ER-Pers 22.08, Wis. Adm. Code, by failing to allow appellant Fletcher to transfer into the Administrative Officer 2 position.

DECISION

The parties stipulated to the issues as stated in the "Nature of the Case," above. Appellants assert a right to be appointed to the Agricultural Supervisor 5 positions. In addition, appellant Fletcher asserts a right to be appointed to the Administrative Officer 2 position. Respondent

asserts that appellants have failed to establish that it violated or denied any of their rights.

Section ER-Pers 22.08(2)(a), Wis. Adm. Code

Appellants basically argue that s. ER-Pers 22.08(2)(a) gives them the right to demote into the Agricultural Supervisor 5 positions. Section ER-Pers 22.08(2)(a) sets forth an employe's rights to demote as a result of layoff. Appellants rely on the language of that section which provides that "if there is a vacancy available... an appointing authority shall offer the employe a demotion to that vacancy." (emphasis supplied) Appellants argue that when a vacancy exists, the employe has rights to that vacancy if he is otherwise qualified for the job. Appellants contend that vacancies existed in the aforesaid Agricultural Supervisor 5 positions at the time of their layoff, and they were qualified to fill them.

Respondent rejects appellants' contention that they have a "right to select among the pay range 16 positions available when they were notified of their layoff." Respondent argues that s. ER-Pers 22.08(2)(a) is worded as if there were only one vacancy. "There is no suggestion whatsoever that there is a matter of choice." Respondent concludes that it complied with the section to the letter: "each appellant was offered a vacancy -- Veterinarian 3 position -- and that vacancy was at the highest level (in terms of pay range) that was available." Respondent adds that said section places no limitation on its decision as to which vacancy an employe will be demoted to except that the offer must be to a position that satisfies the criteria set forth in s. ER-Pers 22.08.

Respondent concedes that at the time appellants were notified of their layoff, two Agricultural Supervisor 5 positions were vacant. The only

question is whether appellants had the right to demote into these vacancies. For the reasons listed below, the Commission concludes that they have such a right.

Section ER-Pers 22.08(2)(a) provides that an offer of a demotion to a vacancy under this section "shall be subject to the criteria for a reasonable offer of appointment under s. ER-Pers 22.09." Section ER-Pers 22.09(2) lists five criteria for a reasonable offer of appointment. Subsection ER-Pers 22.09(2)(b) addresses the situation where there are multiple positions available by providing: "The position is the highest level position available within the agency to which the employe could either transfer or demote." This seems pretty clearly to refer to something other than solely salary range since salary range is specifically covered by subsection (e). The record supports a finding that the Agricultural Supervisor 5 positions were at a higher level (in terms of salary potential, organizational level, working conditions, promotional opportunities, etc.) than the Veterinarian 3 positions. The record is undisputed that appellants were qualified to perform the work of the Agricultural Supervisor 5 position after being given the customary orientation provided to newly hired workers in such a position. Therefore, respondent should have offered appellants the Agricultural Supervisor 5 positions.

This conclusion is supported by the language of s. ER-Pers 22.08(3)(a) which deals with displacement. Section ER-Pers 22.08(3)(a) 5 deals with a situation somewhat parallel to that presented in the instant case:

> 5. If there is more than one position in the same or counterpart pay range to which the employe is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employe shall first exercise the right of displacement. (emphasis added)

Application of the doctrine "express mention/implied exclusion" suggests that the failure to include a similar provision (vesting authority for designating the position in the appointing authority) in the section on demotions in lieu of layoff means that the appointing authority lacks this prerogative with respect to demotions in lieu of layoff.[1]

Finally, the phrase in s. ER-Pers 22.08(2)(a), "if there is a vacancy available," cannot mean that the agency can make the position unavailable by deciding to fill it by promotion. This would defeat the operation of the subsection.

Section ER-Pers 22.025, Wis. Adm. Code

Initial inquiry into the meaning of this provision is to its plain meaning. In s. ER-Pers 22.025 the procedure for filling vacancies at time of layoff is set forth. The appointing authority is given the right to consider transfers, demotions and reassignments of persons currently employed in the employing unit. It is then required that the appointing authority first fill the vacancy as an alternative in lieu of termination as a result of layoff and then through restoration following layoff. Section ER-Pers 22.025 does not mention promotions. Since all permissible personnel transactions for filling vacancies are prioritized and set out, it must be concluded that promotions are not to be considered prior to filling the vacancy as an alternative in lieu of termination as a result of layoff. Therefore, respondent's promotion of Dennison and Cress into the Agricultural Supervisor 5 position is a violation of the procedure set

---

[1] Unlike displacements, demotions in lieu of layoff do not have a direct effect on the status of other employes.

forth in s. ER-Pers 22.025 as to how vacancies during a layoff should be filled. Such a conclusion is consistent with the requirements of s. ER-Pers 22.08(2)(a) noted above and the Commission's decision respondent violated the aforesaid section by failing to offer appellants the opportunity to demote in lieu of layoff to the Agricultural Supervisor 5 position.

Sections ER-Pers 22.01 and 22.07, Wis. Adm. Code

Section ER-Pers 22.01 states that the layoff procedure is intended "to be fair to and understandable by all employes." Having concluded that respondent violated s. ER-Pers 22.08(2)(a) and 22.025 by its refusal to allow appellants to demote into the Agricultural Supervisor 5 positions, it can hardly be concluded that the layoff procedure was "fair" and understandable to all concerned. Therefore, the Commission agrees with appellants' contention that respondent violated s. ER-Pers 22.01 by its actions herein.

Likewise, s. ER-Pers 22.07 requires that any employe affected by layoff be given written notice which to the extent "practicable" shall include specific alternatives within the agency "available at that time to the employe in lieu of termination." Since respondent was required by s. ER-Pers 22 to offer appellants the Agricultural Supervisor 5 position, it follows that their written notice should have contained an offer to this effect. Respondent's failure to include such an offer in the aforesaid written notice is also a violation of Chapter 22.

Section ER-Pers 22.08(1)(a), Wis. Adm. Code

Appellant Fletcher argues separately that respondent violated his rights under s. ER-Pers 22.08(1)(a). Under this section appellant Fletcher argues that he had transfer rights into a newly created Administrative Officer 2 position. However, appellant Fletcher maintains that he was given no notice of the availability of said position; that he was not advised of his right to transfer into the position and that the position was one he was qualified for and able to move into.

Respondent argues that Donald Konsoer also had "rights" under this section to be appointed by transfer to the Administrative Officer 2 position. According to respondent, nothing in the rules gives appellants or Konsoer more "right" to the position than any other. Respondent concludes, therefore, that "since there were three affected employes, and only one vacancy, management exercised its right to transfer Konsoer, the most senior employe, into the Administrative Officer 2 position."

On receiving his notice of layoff, Konsoer, like appellants, acquired rights under s. ER-Pers 22.08(1). On April 6, 1987, Konsoer and appellants had "rights" under this provision to be appointed by transfer to the Administrative Officer 2 position. Section ER-Pers 22.08 provides that employes in the same layoff group shall have the right to transfer as an alternative to termination from the service as a result of layoff on direct order of their seniority, most senior first. Since Konsoer had more seniority than appellant Fletcher, respondent properly exercised its right to permit Konsoer, the most senior employe, to transfer into the Administrative Officer 2 position. Konsoer, by virtue of his seniority, had the right to transfer into the disputed position. Since appellant Fletcher had no right to the position which superseded Konsoer's, respondent's failure to notify him of this vacancy does not constitute a violation of the rule.

Remedy

The Personnel Commission's jurisdiction is granted by s. 230.45, Stats. Section 230.45(1)(a), Stats. provides that the Commission shall conduct hearings on appeals under 230.44, Stats. Section 230.44(4)(d), Stats. reads as follows:

> The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1).

It is clear from the above that the Commission may not remove an incumbent as a remedy to successful appeal under s. 230.44(4)(d), Stats., unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1), Stats. Section 230.43(1), Stats. speaks in terms of acting "willfully, or corruptly"; and, therefore, appellants must show that respondent acted willfully and/or corruptly in the appointment process when it denied appellants demotion to the Agricultural Supervisor 5 position. Although respondent violated Chapter 22 by demoting appellants in lieu of layoff to the Veterinarian 3 position instead of the Agricultural Supervisor 5 position, appellants have not sustained their burden that respondent acted willfully or corruptly to deny them their rights herein. To the contrary, the record indicates that respondent acted under the mistaken belief it was proceeding properly with respect to the layoff and subsequent job fillings. Therefore, the Commission rejects this claim by appellants.

Appellants argue, however, that under s. 230.28(1)(a), Stats. that the administrator has the authority to remove an employe during an employe's probationary period if the administrator finds... "that such an employe was appointed as a result of fraud or error." Although the Commission has found that respondent erred within the meaning of s. ER-Pers 22 in

appellants' layoff, it is questionable whether this is the kind of "error" referred to in s. 230.28(1)(a). Such a reading would essentially eviscerate §230.44(4)(d) in cases where the incumbent of a position is still on probation. In any event, s. 230.28(1)(a) provides for "notice and an opportunity to be heard" (obviously referring to the incumbent) prior to removal, and this has not occurred. Furthermore, there has been no showing that the incumbents in the Agricultural Supervisor 5 positions are still on probation. Therefore, the Commission rejects this argument of appellants.

The Commission can, however, order respondent to appoint appellants to the disputed position (Agricultural Supervisor 5) or an equivalent position upon its next vacancy. Therefore, respondent is ordered to offer appellants the next available equivalent Agricultural Supervisor 5 position and to give them all rights, benefits and privileges to the extent possible to which they would have been entitled from April 13, 1987, the first date on which they could have begun this employment with respondent, until the time they are offered an equivalent position by respondent or until they indicate they are no longer interested in a position, or until the time they become unavailable to accept a position, whichever occurs first.

The Commission will also award back pay pursuant to s. 230.43(4), Stats., effective from April 13, 1987 until such time as appellants' receive a job offer as noted in the above paragraph.

ORDER

The decision of the respondent in not appointing the appellants to the Agricultural Supervisor 5 position is rejected and this matter is remanded for action in accordance with this decision.

Dated: _____,1988 STATE PERSONNEL COMMISSION

_____
DENNIS P. McGILLIGAN, Chairperson

DPM/AJT:jmf
JMF02/3

_____
DONALD R. MURPHY, Commissioner

_____
LAURIE R. McCALLUM, Commissioner

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