STATE OF WISCONSIN PERSONNEL COMMISSION

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KIRBIE MACK,
RENAE BUGGE,

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS

Respondent.

Case Nos. 87-0182, 0183-PC

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DECISION
AND
ORDER

NATURE OF THE CASE

These cases are appeals pursuant to §230.45(1)(c), Stats., of the respondent's denial at the third step of certain non-contractual grievances. Respondent has moved to dismiss for lack of subject matter jurisdiction and the parties have filed briefs. At this time, one of the three Commissioner positions is vacant. Commissioner Murphy has recused himself from participation in the consideration or determination of these matters. Commissioner McCallum is of the opinion the Commission lacks subject matter jurisdiction over these matters, for the reasons set forth below. Therefore, these appeals must be dismissed for lack of subject matter jurisdiction.

DISCUSSION

These cases involve virtually identical non-contractual grievances. The third step grievance forms reflect that the employes submitted them on August 7, 1987, and contain the following statement of grievance directed to respondent:

> ELIGIBILITY FOR DISCRETIONARY AWARD
>
> I have decided to appeal your decision to deny my eligibility to earn a discretionary base pay adjustment because I am classified as an Employment Relations Specialist 2. This is not a grievance of the amount of

the award, nor am I dissatisfied with the methodology used to evaluate my performance or the evaluation results. I have decided to initiate this appeal with you as Department Secretary in the hope that we can settle this matter at the department level. I am requesting that you reconsider your decision to deny me eligibility for a base pay increase and direct that I be awarded a merit pay increase based on the performance evaluation criteria established in your June 25, 1987, memorandum.

I believe the eligibility denial should be reversed for the following reasons:

The Compensation Plan approved by JCOER on June 17, 1987, established eligibility criteria for receipt of discretionary base pay adjustments and gives the agency head the discretion to distribute the available funds to eligible employes. The department secretary's authority to distribute funds does not include the authority to deviate from the eligibility criteria established by JCOER. To deviate from those criteria amounts to an abuse of the discretionary authority provided by the legislative approval of the Compensation Plan. Wisconsin statutes expressly provide JCOER with the authority to establish the Compensation Plan, including the criteria for each employe's eligibility to earn a base pay adjustment. The Plan approved by JCOER provided that all classified, non-represented employes are eligible for a pay adjustment except those identified in the Plan. The JCOER-approved Compensation Plan does not give the department secretary the authority to establish additional eligibility criteria.

The DER Bulletin CC-116 dated June 24, 1987, directing implementation of the Compensation Plan, excludes employes below progressive series objective levels from eligibility for base pay adjustments. This exclusion amounts to an additional eligibility criterion not approved by JCOER. Just as importantly, this criterion was not included in the Compensation Plan as initially proposed and was not submitted to public hearing before JCOER approval. Employes affected by this criterion had no notice or opportunity to comment on the criterion in accordance with statutory procedures.

This arbitrary exclusion of employes below the objective level in progressive series is inconsistent with express provisions in the Compensation Plan which provide for both reclassification/regrade adjustments and for discretionary base pay adjustments. Eligibility for merit increases is distinct form eligibility for reclassification/regrade increases. The argument that employes eligible for reclassification/regrade adjustments should not also be eligible for base pay adjustments is without merit. Employes in progressive series are not assured that their position will be reclassified during any specific time frame. Position reclassification is governed by Administrative Code provisions separate and independent of employes' performance or merit. Even if a position is reclassified, the incumbent is not assured that she will be correspondingly regraded.

In spite of the preceding discussions, I am eligible to receive a base pay increase according to both the Compensation Plan and the DER Implementation Bulletin. DER's Employment Relations Specialist-Management

classification has not been characterized as a progressive series by the Division of Classification and Compensation in the past. Even if DER's Employment Relations Specialist-Management series is characterized as a progressive series, the decision to treat the ERS 4 as the objective level for DER and the ERS 2 as the objective level for all other departments is without merit. The DER Bulletin identifies the ERS 2 as the objective level. ERS 2s and 3s in other agencies are eligible to receive pay adjustments while their counterparts in DER are denied the same right.

The decision to deny my eligibility to earn a base pay adjustment based on my classification as an ERS 2 should be reconsidered. This is an arbitrary and capricious basis for denial, and it exceeds the discretionary authority delegated to you by JCOER. Please redetermine my eligibility for a base pay increase based on the criteria established in the Compensation Plan and my performance evaluation.

Thank you for your consideration of this appeal.

Respondent denied each of these grievances at the third step on September 3, 1987, as follows:

Grievance denied. Secretary's decision to award zero percent increases to employes who are in progression series, but not at the objective level of those series, is not inconsistent with JCOER approved Compensation Plan provisions.

Grievant's classification, Employment Relations Specialist 2, is below the objective level for the Employment Relations Specialist progression series in the Department of Employment Relations. Objective level for the Department's progression series is Employment Relations Specialist 4.

Subsequently, appellants filed these appeals.

Section 230.45(1)(c), Stats., provides that the Commission shall:

"(C) Serve as final step arbiter in a state employer grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure."

Section 230.45(2), Stats., provides:

"Subsection (1)(c) does not apply to an employe who, using the agency grievance procedure, grieves his or her dissatisfaction with the evaluation methodology and results to determine any discretionary performance award or the amount of such an award. Any such employe grievance shall be settled on the basis of the appointing authority's decision."

Section ER 46.07, Wis. Adm. Code, provides in part as follows:

> (1) If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step... the decision may be grieved to the Commission... except that decisions involving the following personnel transactions may not be grieved.
>
> (c) The evaluation methodology used by an employe to determine a discretionary pay award, or the amount of the award."

Finally, §230.12(5)(e), Stats., provides:

> "Appeal of discretionary performance award. An employe who is dissatisfied with the evaluation methodology and results used by an agency to determine any discretionary performance award, or the amount of such an award, may grieve the decision to the appointing authority under the agency's grievance procedure. The decision of the appointing authority is final and may not be appealed to the Commission under §230.44 or 230.45(1)(c)."

It is abundantly clear from the aforesaid statutes and rule that the Commission has no jurisdiction over appeals of non-contractual grievances with the subject matter of the "evaluation methodology and results used by an agency to determine the amount of [a discretionary performance] award, or the amount of such an award...." Appellants in their briefs contend that these cases fall outside of this restriction:

> "This appeal does not involve the methodology used to evaluate either employe. In fact, both employes were evaluated as 'exceeds expectations'. Nor does this appeal involve the amount of award earned by either employe. The subject of this appeal is the Employee's arbitrary decision to deny pay adjustments solely on the basis of the Appellants classification as Employment Relations Specialist - Management 2."

The Commission resolved very similar issues in Nikolai v. DOR, No. 80-0319-PC (12/17/80). In that case the appeal of a noncontractual grievance involved the following subject matter, as stated in the body of the appeal:

> "... the denial of a Discretionary Performance Award (DPA) based on a Department of Revenue policy that denied DPA's to employes, effective June 29, 1980, who 'received or ar expected to receive salary increases for other reason (reclassification or probationary increases) in May, June, or July of this year' irregardless or their performance rating for the previous year ...."

The Commission concluded that the above-cited statutory restrictions precluded any jurisdiction over the subject matter of the appeal, and in so doing dealt with the same contentions advanced here by appellants:

> The final net product of the appointing authority's decisional process with respect to discretionary performance awards is the amount of the award. The amount can be fixed at from $0 to the maximum permissible amount. An employe who is dissatisfied with the denial of a DPA may be said to be dissatisfied with the amount having been fixed at $0. Similarly an employe who feels that the DPA was inadequate essentially is dissatisfied with the amount having been fixed at a lesser level than he or she felt would have been appropriate. In either case the grievance runs to "the amount of such an award" and the statute prohibits appeal to the Commission.
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> It might be argued that the language "the amount of such an award" contemplates that there be some money actually awarded, and that the employe disputes the precise amount -- e.g., $.34 vs. $.36 per hour. A corollary of this interpretation might be that the statute does not address and therefore does not prohibit an appeal of the complete denial of any DPA on the basis of some factor unrelated to performance, as apparently was the case here.
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> This interpretation flies in the face of plain language of the statute. An "amount" literally can be anything from zero on up. Se Webster's Third New International Dictionary, Unabridged, 1961: "The total number or quantity." The Commission can discern no reason to depart form the literal language of the statutes.
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> The statute also prohibits appeals to the Commission by employes who may or may not be dissatisfied with the amount of the award but disagree with the evaluation used to determine the award. For example, an employe might be dissatisfied with a performance rating of "in the manner required." However, because, for example, of the allocation of funds for the agency, that employe's DPA amount might not be increased by a higher rating. Perhaps, even if the rating affected the SPA amount, an employe might be more concerned with the rating than the pay and would want to pursue an appeal of that rating even if he or she could not appeal the amount of the award. However, the statutory language, "dissatisfied with the evaluation methodology and results used by an agency to determine any discretionary performance award," also prohibits an appeal of that matter of the Commission.
>
> The appellant argues that he is not appealing his evaluation but rather an allegedly arbitrary decision by the agency to deny DPA's to employes who received or were expected to receive salary increases from reclassifications or completion of probationary periods. He also argues: "The wording 'amount of such an award' in the statutes, I believe, refers to the amount the department determines for each evaluation level and I have no argument with that." Letter from appellant dated October 13, 1980.
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> In the opinion of the Commission, §§230.12(5)(e), and 230.45(2), Stats., prohibit appeals to the Commission of all decisions on the amounts of SPA's. There is nothing in the statutory language that limits the restriction on appealability to instances in which the decision is based on performance evaluations. Rather, as indicated

above, the language "dissatisfied with the evaluation methodology and results" provides a legislative restriction on appeals of an employe evaluation where the actual award may not be in question.

The second argument, that the language "amount of such an award" refers to the "amount the department determines for each evaluation level," finds no support in the plain language of the statute and is not persuasive.

The Commission can discern no reason to depart from the foregoing holding, and therefore it concludes it lacks jurisdiction over the subject matter of these appeals.

ORDER

These appeals are dismissed for lack of subject matter jurisdiction.

Dated: June 2, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Commissioner

AJT:rcr
VIC01/2

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