

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
 PATRICIA POPP,  
                   Appellant,  
 v.  
 Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
                   Respondent.  
 Case No. 88-0002-PC  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Stats., of the effective date of the reallocation of appellant's position from Program Assistant 2 (PA 2) to PA 3. Respondent has moved to dismiss on jurisdictional grounds, and the parties have submitted briefs. The underlying facts relating to jurisdiction do not appear to be in dispute, and are set forth below. These findings are made solely for the purpose of resolving respondent's motion to dismiss.

FINDINGS OF FACT

1. At all relevant times the appellant has been employed in the classified civil service by the Department of Regulation and Licensing (DLR), in a position included in a collective bargaining unit with respect to which a collective bargaining agreement has existed.
2. In 1985, appellant sought a reclassification of her position from Fiscal Clerk 2 to PA 3. DRL advised DER that it supported reclassification

to PA 2. DER approved reclassification to PA 2 effective August 18, 1985. This decision was not appealed.<sup>1</sup>

3. In 1987, DRL requested that DER conduct a personnel survey of Program Assistants and Administrative Assistants in DRL. DER conducted the survey and reallocated appellant's position from PA 2 to PA 3, in order to correct an error perceived by DER in the previous classification of the position, pursuant to §ER-Pers 3.01(2)(c), Wis Adm. Code. The effective date of the reallocation was May 10, 1987.

4. DER notified appellant of the aforesaid reallocation by letter dated December 9, 1987. Appellant filed this appeal on January 7, 1988. The appeal requests an effective date of August 18, 1985.

#### CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction over this appeal pursuant to §230.44(1)(b), Stats.

2. Commission jurisdiction is not superseded by operation of §111.93(3), Stats.

3. While the Commission lacks authority to award back pay per se, it does have the authority to reject an incorrect effective date for a reallocation decision.

#### DISCUSSION

In its brief, respondent argues this appeal is untimely pursuant to §230.44(3), Stats:

If the Appellant believed that she should be classified as a Program Assistant 3 on or about October 16, 1985, she should have appealed the

---

<sup>1</sup> Complainant alleges in her brief that there was no notice of appeal rights included with the notice of reclassification, and if there had been, she would have appealed that transaction in 1985.

decision reclassifying her position to Program Assistant 2 thirty days . . . [after] she received notice of her reclassification to Program Assistant 2 on October 16, 1985. . . .

In the Commission's opinion, there is no jurisdictional defect under §230.44(3), Stats., with respect to this appeal. Respondent rendered a decision reallocating appellant's position from PA 2 to PA 3 with an effective date of May 10, 1987. Appellant received notice of this transaction on or shortly after December 9, 1987, and filed an appeal on January 7, 1988. Therefore, the appeal was filed in a timely manner under §230.44(3), Stats. The fact that three years earlier appellant, for whatever reason,<sup>2</sup> did not appeal a different decision (i.e. the decision to reclassify her position to PA 2 with an effective date of August 18, 1985) does not alter this conclusion. The point is that respondent in 1987 made a new decision with regard to the classification of this position, and this latter decision was appealed in a timely fashion.<sup>3</sup> It should be noted that in denying respondent's timeliness motion, the Commission addresses neither respondent's arguments concerning the proper interpretation to be given Mr. Marx's statements in his December 9, 1987 letter, nor respondent's arguments concerning its effective date policy, which more properly run to the merits of the appeal.

Respondent also argues that, to the extent appellant is seeking back pay, her appeal is barred by §111.93(3), Stats. This sub-section provides,

---

<sup>2</sup> Whether appellant was aware of her appeal rights at that time is not material to this resolution of respondent's motion.

<sup>3</sup> To the extent that respondent's contentions on this point could be construed as an affirmative defense based on some kind of theory of res judicata or collateral estoppel, this also would not be persuasive. It is doubtful whether these doctrines could be applied to non-record, non-adjudicative proceedings such as these classification transactions, and the subject matter of each transaction is different.

in summary, that as to employees in represented positions, the provisions of a collective bargaining agreement supersede civil service statutes related to wages, fringe benefits, hours and conditions of employment. However, not everything involving the broad subject of wages is subject to bargaining. Section 111.91(1)(a), Stats., requires bargaining on:

". . . wage rates, as related to general salary scheduled adjustments consistent with sub (2), and salary adjustments upon temporary assignments of employes to duties for a higher classification or downward reallocations of an employe's position . . ."

A back pay award based on an erroneous classification decision does not fit within a "general salary scheduled adjustment " or a salary adjustment "upon temporary assignment of employes to duties of a higher classification or downward reallocation . . . ." It cannot be inferred that by the use of the term "wages" in §111.93(3), Stats., the legislature intended that as to nonbargainable matters covered by the civil service code, the civil service provisions should be superseded as to represented employes. See Taddey v. DHSS, Wis. Pers. Commn. No. 86-0156-PC (6/11/87). Therefore, §111.93(3), Stats., has no application to this case.


The Commission agrees with respondent that it cannot explicitly award back pay in a case such as this. See Seep v. Personnel Commission, 140 Wis.2d 32, 40-42 (Ct. Appeals, 1987). However, this conclusion does not affect the Commission's jurisdiction over respondent's decision establishing the effective date for this reallocation, and if the Commission were to reject respondent's decision as to effective date it can remand the matter to respondent for action pursuant to §230.44(4)(c), Stats. As was noted in Ghilardi & Ludwig v. DER, Wis. Pers. Commn. Nos. 87-0026, 0027-PC (4/88), note 3: ". . . salary transactions normally are effectuated by the employing agency following finalization of a Commission decision rejecting a reclassification denial."

ORDER


Respondent's motion to dismiss filed February 23, 1988, is denied.

Dated: May 12, 1988 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

AJT:akw  
VIC01/1

  
LAURIE R. McCALLUM, Commissioner

Parties:

Patricia Popp  
5004 Camden Drive  
Madison, WI 53716

John Tries  
Secretary, DER  
P. O. Box 7855  
Madison, WI 53707