STATE OF WISCONSIN PERSONNEL COMMISSION

GARDIPEE et al.,
(John Mastricola, Doug McFee, Stephen Marshall, Martha Benewicz, Marilyn Gardipee, Janice Letven),

Appellants,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 88-0004-PC

DECISION ON JOINT MOTION TO CLARIFY REMEDY

This matter is now[1] before the Commission on the parties' "joint motion to clarify remedy," which was filed with a "joint stipulation of facts" on September 30, 1991. The parties have filed briefs. For the purpose of deciding this motion, the Commission will adopt as its findings of fact the joint stipulation of facts.

FINDINGS OF FACT

1. In September 1986, the Department of Health and Social Services (DHSS), submitted to the Department of Employment Relations (DER) several certification requests for vacant positions. DHSS recommended that the positions be classified as Area Services Specialist 6's. These certification requests were Nos. 400-6401 through 6404.

2. DER's initial review concluded that the position descriptions (PDs) submitted by DHSS did not support classification at the ASS-6 level. During September, October and November 1986, Eileen Kellor, DER, requested additional information about the positions and told DHSS that no action would be taken on the "cert requests" until the requested information was provided.

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[1] By way of background, the Commission entered an interim decision and order on August 10, 1988, setting forth the issues for hearing. Following a joint request by the parties for postponement of the hearing, the Commission on April 18, 1991, entered a "ruling on motion in limine and motion for protective order."

3. On March 10, 1987, DHSS finally submitted to DER some additional information about the positions.

4. On or around April 30, 1987, DER (by Cornell Johnson), determined that the positions should be classified as Area Services Specialist 5's.

5. In June 1987, DHSS, Division of Community Services, determined that it would be necessary to lay off 6.0 FTE Area Services Specialist 6 positions, effective August 27, 1987. That layoff plan was revised in November 1987, to require the layoff of 5.75 FTE Area Service Specialist 6's, effective January 15, 1988.

6. DHSS formally notified the Union of this layoff action on December 1, 1987.

7. On December 14, 1987, the appellants were sent letters from DHSS Secretary Goodrich, advising them that they would be laid off from their positions as ASS-6's in the Division of Community Services, effective January 15, 1988. In these letters, the appellants were advised of their rights to bump, voluntarily demote, or transfer in lieu of layoff.

8. During December 1987, all the appellants notified the DHSS Personnel Office that they wished to exercise their rights to take a "voluntary demotion in lieu of layoff."

9. All the appellants voluntarily demoted to ASS-5 positions, in lieu of being laid off, effective January 15, 1988.

10. The appellants appealed their voluntary demotions to the Personnel Commission.

11. The issues established for hearing before the Personnel Commission are set forth in the Commission's Order dated April 18, 1991.

12. The three classifications at issue are Area Services Specialist 5 (PR 12-5), Area Services Specialist 6 (PR 12-6), and Administrative Assistant 5 (PR 1-15). Appellants believe the positions they voluntarily demoted into in lieu of layoff, should have been classified as Administrative Assistant-5's (PR 1-15).

13. Appellants had all attained permanent status in class as ASS-6's. ASS-6 positions are assigned to PR 12-6. The counterpart pay range for PR 12-6 is PR 1-14, therefore Appellants could have been considered for transfer in lieu of layoff to any positions assigned to PR 1-14. However, none of the appellants had ever attained permanent status in class in the AA-5 classification or

in any position classified at PR 1-15 or its counterpart. Therefore, appellants could not have transferred in lieu of layoff to an AA-5 (PR 1-15) position.

DISCUSSION

The Commission's order dated April 18, 1991, (referred to in Finding #11) set forth the following issues for hearing:

> (a) Whether appellants' positions should have been classified as Area Services Specialist 5 or 6 or Administrative Assistant 5, for the period from January 17, 1988, until October 8, 1989? What is the appropriate remedy, if any?
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> (b) If these positions should have been classified as Administrative Assistant 5, during the period from January 17, 1988, until October 8, 1989, whether regrade or opening the position to competition is appropriate.

The parties' "joint motion to clarify remedy" includes the following:

> It is the position of the Respondent DER that even if the vacant positions in question had been classified as Administrative Assistant-5's (AA-5) [instead of Area Services Specialist-5's (ASS-5)], none of the Appellants would have been regraded to the AA-5 level, because competition would have been a condition precedent to filling those vacant positions. Also, since none of the Appellants had previously attained permanent status in class in the AA-5 classification, they could not have transferred into AA-5 positions, nor could they have voluntarily demoted in lieu of layoff into an AA-5 position. The Appellants dispute the position of the Respondent.
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> It is stipulated and agreed that the issue of what remedy, if any, is available, may and should be argued and decided upon based on written Briefs. . . .
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> The parties agreed to file briefs, based on the Joint Stipulation of Facts, on the following issue:
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> > Assuming, arguendo, that the vacant positions should have been classified as AA-5's, during the period from January 17, 1988 until October 8, 1989, whether regrade or opening the positions to competition would have been appropriate.

In its brief, respondent contends that if the positions in question had been classified as AA-5 during the relevant period (January 17, 1988 until

October 8, 1989), appellants would have been unable to have moved into these positions in lieu of layoff, since the AA-5 pay range (1-15) is higher than the ASS-6 pay range (1-14) and, therefore, neither transfer, demotion, nor bumping into these positions would have been feasible.

Respondent's position rests explicitly on the assumption that if appellants could establish that their positions should have been classified as AA-5 rather than ASS-5 for the period January 17, 1988 through October 8, 1989, this would impact retroactively the voluntary demotions in lieu of layoff which had an effective date of January 15, 1988 (see stipulated Finding #9). The Commission cannot agree with this assumption for two reasons.

First, assuming arguendo that the positions should have been reclassed to AA-5 and that this reclassification would be given a retroactive effect across the board, since these demotions were effective on January 15, 1988, and the AA-5 classification would only be operative January 17, 1988 through October 8, 1989, it is not apparent how the classification change could affect the earlier transaction. That is even if a retroactive effect is assumed, there can be no retroactive effect earlier than the effective date of the reclassification.

Second, while a changed reclassification or reallocation decision may be effective retroactively for certain purposes, (e.g., salary), it does not follow that a non-classification-related personnel transaction, such as a voluntary demotion, which was valid when made, would be rendered void by the retroactivity of the classification decision for purposes such as salary. Respondent has not cited any authority from the potentially applicable statutes and administrative code rules, or elsewhere, that would require that a subsequent reallocation of these positions be retroactive vis-a`-vis the voluntary demotions which occurred on January 15, 1988, and the Commission is not aware of any. The general rule in this area is that whether an administrative determination has a retroactive effect depends at least in part on the degree of hardship that may be caused by a retroactive application, see 2 Am Jur 2d Administrative Law §477. In this case, the retroactive effect for which respondent argues would work a significant hardship on appellants, who voluntarily demoted into these positions in lieu of layoff. At the time these transactions occurred, they apparently were in compliance with the civil service code based on the official classifications and pay ranges of the positions at that time, and it seems

obvious that appellants must have acted in reliance on the propriety of the transactions. The retroactive application of any reallocations sought by respondent would result in hardship to appellants at this point in time. Furthermore, respondent has identified no compelling reason (or any reason for that matter) why the reclassifications should be given this retroactive effect.

Having concluded that a decision that the positions in questions should have been classified as AA-5 during the period from January 17, 1988 - October 8, 1989, would not retroactively affect appellants' voluntary demotions into these positions effective January 15, 1988, the next question is whether regrade or opening the positions to competition would be appropriate. However, due to the way that this case has been submitted and the first issue has been decided, the Commission is unable to resolve this second issue.

Respondent's brief never really addresses the second issue per se, presumably because of DER's theory that if it were determined that these positions should have been in the AA-5 classification for the period of January 17, 1988 - October 8, 1989, this retroactively would affect appellants' voluntary demotion into these positions effective January 15, 1988.[2] Appellants contend that there has been a logical and gradual change in the duties and responsibilities of these positions over a number of years, as demonstrated by a February 23, 1990, memo from Steven Sanborn, a DHSS personnel specialist. However, this memo is not part of the parties' stipulation of facts. Even if respondent were willing to stipulate to the accuracy of the facts set forth in this memo, and assuming, arguendo, that the facts set forth in the memo support a finding that there was a logical and gradual charge in the duties and responsibilities of the positions during the relevant period covered by the memo — i.e., January 1980 to January 17, 1988[3] — this does not mean a regrade would be appropriate.

The changes which occurred in these positions predate appellants' incumbency. Therefore, even if there were a logical and gradual change in the positions, it does not follow that DER, as a matter of law, would be foreclosed

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[2] As discussed above, the Commission does not agree with this contention.
[3] The memo also describes changes which commenced in 1989, and which apparently led to the April 4, 1990, reclassification to ASS-6, effective October 8, 1989, which was mentioned in the Commission's April 18, 1991, decision.

from deciding that these positions should be filled by competition at the AA-5 level rather than by regrading the incumbents.

Appellants also contend that they "are prepared to prove that during a period of at least six months prior to the date of the instant appeal, perhaps even three (3) years prior to the appeal, they were performing work classified in and reflected by the administrative assistant classification series." Since the appeal was filed on January 14, 1988, which was prior to the effective date of appellants' appointment to the positions in question, appellants presumably were in different positions during the period of time referred to in the quoted contention, and it is not relevant whether they were performing AA work during this period.

As a practical matter, it is probably essentially a moot question whether it would have been appropriate to have regraded the incumbents or to have opened the positions to competition if it is determined the positions should have been at the AA-5 level during the period in question. This is because as set forth in the Commission's April 18, 1991, decision, the positions were reclassified to ASS-6 on April 4, 1990, with an effective date of October 8, 1989. Since this decision was not appealed, the only classification issue for the Commission is limited to the period January 17, 1988 - October 8, 1989. Therefore, any Commission order would be limited to that timeframe. Even if the Commission determined the positions should have been classified at the AA-5 level during this period, this presumably would not affect its ASS-6 classification as of October 9, 1989. Given the Commission's ruling that an AA-5 class for the period January 17, 1988 - October 8, 1989, would not affect retroactively appellants' January 15, 1988 voluntary demotion into the positions, it is difficult to perceive how it would be possible as a practical matter to fill these positions by competition for the period January 17, 1988 - October 8, 1989, at

this point in time. Therefore, while the Commission is unable to say that this conclusion is compelled as a matter of law, it appears that the net effect of appellants prevailing on the AA-5 issue would be back pay for the period January 17, 1988 - October 8, 1989, less the six month period after January 17, 1988, during which appellants would not have been entitled to regrade pursuant to §ER 3.01(3)(b), Wis. Adm. Code.

Dated: January 24, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner