
RAJ K. KUMRAH, D.V.M.,

Petitioner,

vs.

Case No. 88-CV-1543

WISCONSIN PERSONNEL COMMISSION
and SECRETARY, DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER
PROTECTION,

DECISION

RECEIVED

Respondents.

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NATURE OF CASE

~~Personnel~~
Commission

This proceeding is to review a final decision and order of the respondent, Wisconsin Personnel Commission (Commission) dated April 20, 1988. The commission sustained the respondent, Department of Agriculture, Trade and Consumer Protection (DATCP) in offering to the petitioner, Raj K. Kumrah, D.V.M. (Kumrah) the position of Veterinarian 3 and not the position of Agricultural Supervisor 5 as a demotion in lieu of layoff as a Veterinarian 1. The commission dismissed Kumrah's appeal and on June 2, 1988 denied a petition for rehearing. The court set a briefing schedule and both parties have filed briefs.

FACTS

The case was submitted on a stipulation of facts and briefs and the hearing examiner issued a proposed decision and order on January 22, 1988. The Commission adopted the hearing examiner's findings of fact but in a split decision disagreed with his conclusions of law in favor of the petitioner.

The findings of fact of the Commission that apply to Kumrah are as follows:

1. At all times material herein the appellant has been employed in the classified civil service by the Department of Agriculture, Trade and Consumer Protection.

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. 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 employees resulting from the reorganization of the Food and Meat Divisions.

4. 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.

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

6. As a result of this layoff plan, appellant Kumrah's position of Veterinarian Supervisor 1 was 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.

7. The layoff plan letter noted in Finding of Fact 3 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 appellant.

8. By letter dated March 24, 1987, appellant received a notice of layoff. The letter indicated that appellant's 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 appellant. The only specific option given appellant was demotion into the newly created Veterinarian 3 positions noted above.

9. 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.

10. 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).

11. Appellant Kumrah interviewed for the Agricultural Supervisor 5 - Food position in Green Bay on March 26, 1987. He was not offered the position.

12. Byron 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.

13. On March 30, 1987, an appointment letter was sent to the appellant confirming his filling the Veterinarian 3 position noted above in Green Bay. The appellant assumed the duties of this position effective April 12, 1987. Thereafter, he filed timely an appeal with the Commission.

14. 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.

15. 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.

16. While there was no loss in current income for the appellant in his demotion into the Veterinarian 3 position, wages, promotional opportunities, transfer opportunities, benefits, hours and working conditions all would be affected in the future as a result of the aforesaid actions.

17. 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 and understandable by all employees; 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 employee 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 employee in lieu of termination. The appointing authority shall continue to keep the employee 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 employee 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. Employees 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 employees 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 employee 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 employee is being laid off for which the

employee 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 employee 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 employee 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 employee who is demoted by the appointing authority, as a result of a layoff to the highest level vacancy available for which the employee 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 employee 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 employee is eligible to exercise the right of displacement, the appointing authority may designate the position to which the employee shall first exercise the right of displacement.

ER-Pers 22.09 Failure to accept reasonable offer of appointment. (1) an employee who has been notified of layoff and fails to accept a reasonable offer of permanent appointment within the agency within five work days of the offer or who, upon acceptance, fails to be available for work within five 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 employee 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 employee 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 employee was laid off, unless the employee's rate of pay at the time of layoff is maintained in the position offered.

18. 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.

The Commission disagreed with the Hearing Examiner's conclusion in his/her decision that based on the stipulated facts the Agricultural Supervisor 5 was a higher level position than Veterinarian 3. The Commission ruled that pay classification was the only criteria to be used in applying the Administrative Rules and since both positions had the same pay level they were the same level position. The petitioner, hearing examiner and dissenting commissioner held that the Agricultural Supervisor position was at a higher level in terms of salary potential, and organizational level. Both the petitioner and hearing examiner found it was also higher in working conditions and promotional opportunities. The petitioner from 1981 to 1987 had, except for two years, received higher pay adjustments as a nonrepresented

employee than the represented pay employees had received in the same class.

ISSUES

(1) Do the words "highest level position" in 22.09(2)(b) Wis. Admin. Code refer to any criteria other than salary range?

(2) If both Veterinarian 3 and Agricultural Supervisor 5 are equal positions, under 22.09(2)(b) does 22.08(2)(a) require both vacancies be offered to the employee?

DECISION

I am reversing the decision of the Commission and adopting the decision of the hearing examiner. This question raises a question of law, and the court is not bound by the agency's conclusion of law, West Allis School District v. DIHLR, 110 Wis. 2d 302, 304 (CT. App. 1982), affirmed 116 Wis. 2d 410 (1984). It is often recommended that the courts defer to the experience, technical competence and specialized knowledge of the agency involved. In this case, however, the Commission itself was split, and the hearing examiner came to a different conclusion. It is also a simple interpretation of language that does not require any technical competence or specialized knowledge to decide. The rule distinguishes between pay range and highest level position available. ER-Pers 22.09(2)(b) uses the words "highest level position" and 2(3) uses "the pay range of the position." Clearly if they were meant to be the same, the drafters would have used the same words.

The facts support the conclusion of the dissenting chairman of the commission and the hearing examiner that Agricultural Supervisor 5 was the highest level position. It has a higher

level reporting relationship reporting directly to the Food Division Administrator while Veterinarian 3 report directly to Veterinarian Supervisor 1 which in turn to the Food Division. Further, it is a supervisory, non-union position much closer in nature to the Veterinarian 1 position, and finally the pay scale is not controlled by union but the merit of the employee increasing salary potential. The Commission's decision does not deny these facts but holds that salary level is the only criteria. Their construction of the statute while possible ignores the standard rules of statutory construction and is not accepted by this court.

I agree with the dissenting chairperson of the Commission that the hearing examiner's proposed decision should be modified as suggested in his dissent to make a clearer record, but the body of the decision includes those thoughts.

Because I have concluded that "highest level position" has been incorrectly interpreted by the Commission and that Agricultural Supervisor 5 was the highest level position, it is not necessary that I reach the second issue. The Respondent's decision to demote the petitioner in lieu of layoff to the Veterinarian 3 position instead of Agricultural Supervisor 5 position violated ER-Pers 22.08(2)(a), Wis. Adm. Code.

The decision of the Commission is reversed and the court adopts the decision and order of the hearing examiner with the changes recommended by the dissenting chairperson, Dennis P. McGilligan.

Counsel for the petitioner shall prepare an order in

accordance with this decision and present it to the court for approval and signature.

Dated this 14th day of March, 1989.

BY THE COURT:

Vivi L. Dewey
Circuit Court Judge

VLD/sew