STATE OF WISCONSIN PERSONNEL COMMISSION

DEAN SPAITH,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondent.

Case No. 89-0089-PC

DECISION AND ORDER

This matter is before the Commission as an appeal of a decision relating to the examination process. By letter dated October 5, 1989, the parties were informed that the following would serve as the issue for hearing:

> Whether respondent's action of permitting Dennis Jacobson, Rick Stokes and Richard Swenson to participate in the Shop Supervisor examination on June 17, 1989, was contrary to the civil service code (Subchapter II, Chapter 230, stats., and administrative rules issued thereunder).

A hearing was held on December 18, 1989, and the parties filed post-hearing briefs.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the appellant has been classified as a Crafts Worker Supervisor in the University of Wisconsin-Madison Physical Plant, where he has served as the foreman in the carpentry shop.

2. On May 1, 1989, a promotional opportunity was posted for UW-Madison Physical Plant employes for the position of Shop Supervisor. The announcement stated in part:

> Deadline for receipt of applications is May 24, 1989. Apply with the Application for State Employment form (DER-MRS-38) to Merit Recruitment and Selection; P. O. Box 7855; Madison, WI 53707-7855. Applications received after 4:30 p.m. of the deadline date will not be accepted. [Emphasis in original]

3. The duties of the Shop Supervisor include providing overall supervision to one of the Physical Plant shops and providing direction to Crafts Worker Supervisors and Crafts Workers.

4. The appellant completed an application for the Shop Supervisor position and hand-delivered it to the respondent on May 4, 1989.

5. Rich Stokes has been employed in the Carpentry Shop as a Journeyman Carpenter since approximately 1981.

6. Mr. Stokes completed a Shop Supervisor application on May 23rd, placed it in a stamped envelope and gave it to a co-worker for mailing to DMRS. Mr. Stokes knew that the application was due by 4:30 p.m. on May 24th and that applications received after that time would not be considered. His application was not received at DMRS until 11:00 a.m. on May 25, 1989.

7. In January of 1988, Daniel Wallock was appointed as the Administrator of DMRS. He adopted a more flexible policy than had previously existed in terms of allowing applicants to participate in the examination process despite having filed applications which were, in some manner, technically deficient. The policy permitted applicants who had filed technically deficient applications to take an exam as long as it would not significantly inconvenience DMRS, i.e., where business necessity did not prevent examinees from being added. For example, respondent feels it has more flexibility to add someone at the last minute to the Madison examination center but the additional time necessary to mail an additional copy of the examination to the Wausau exam center may prevent a last minute addition there. Also, if there are a large number of examinees scheduled for a particular exam at one center, one or more of the applicants are likely to be absent and the last minute addition may be permitted to fill in after showing some identification to the exam proctor. In contrast, an absence is much less likely if only a few examinees are scheduled. The basis for the more flexible policy was the goal of permitting as many persons as possible to take DMRS exams, so that the best possible candidates would be available for selection. Mr. Wallock delegated his authority to apply the "business necessity" standard to the Director of the respondent's Bureau of Exam Development and Register Establishment, Cheryl Anderson. The policy was never placed into writing. Only Mr. Wallock and Ms. Anderson had the authority to make exceptions and to accept what were otherwise technically deficient applications.

8. The policy was not developed pursuant to the rule-making procedure of ch. 227, Stats., and it was not filed as a rule pursuant to §227.20, Stats.

9. The Shop Supervisor exam was scheduled for June 17, 1989.

10. On approximately June 12 or 13, 1989, an applicant with the name of Acker contacted the respondent and stated that he had submitted his Shop Supervisor application without filling in the box for his social security number. Cheryl Anderson decided to grant Mr. Acker an opportunity to take the examination. Ms. Anderson based her decision on the fact that Mr. Acker's application was on a form which had been changed because the form design had caused a number of applicants who had used it for various examination opportunities to leave off their social security number.

11. Ms. Anderson instructed a subordinate employe at DMRS, Gerald Pippin, to permit Mr. Acker to take the exam. Mr. Pippin then advised Ms. Anderson that there were five or six others whose Shop Supervisor applications had been rejected, either because they had failed to provide their social security number or because their application had been received one day after the deadline.

12. Ms. Anderson decided to accept the other technically deficient applications in order to maintain consistency with the exception previously granted to Mr. Acker and because there was enough time to print additional exams and to get them to the exam site.

13. On June 15th, the personnel manager at the UW Physical Plant issued a memo to Rick Stokes and four other Physical Plant employes who had filed incomplete or late applications informing them they would be permitted to take the June 17th examination.

14. Mr. Stokes and the appellant were among the applicants who took the Shop Supervisor examination on June 17th.

15. The applications of all examinees, including Mr. Stokes and the appellant, were ranked after being scored. Mr. Stokes' overall ranking was #9 and the appellant's was #16. The overall ranking was divided further based upon the different crafts. Mr. Stokes was ranked #3 while the appellant was ranked #6 in terms of a carpentry shop vacancy. As of the date of hearing in this matter, there had not been any certification from the register for a Shop Supervisor - Carpentry vacancy.

16. In deciding to allow Mr. Acker, Mr. Stokes and the other persons who had submitted incomplete or late applications to take the examination, Ms. Anderson was not motivated by a concern that there were not enough qualified applicants.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(a), Stats.

2. The appellant has the burden of establishing that respondent violated the provisions of the civil service code by granting exceptions to persons who filed technically deficient applications so they could compete in a promotional exam for the Shop Supervisor classification.

3. The appellant has not satisfied his burden of proof.

4. The action of the respondent in granting exceptions to persons who filed technically deficient applications was not contrary to the civil service code.

OPINION

This appeal arises from the decision of the respondent to permit someone who failed to comply with a very specific application deadline to, nevertheless, take the Shop Supervisor examination. Mr. Stokes ended up being ranked ahead of the appellant, who because he was ranked sixth, could affect whether or not he is certified for a Shop Supervisor - Carpentry vacancy.[1] The issue presented is whether the respondent had the authority to ignore the application deadline it had itself established or, whether it must invariably apply the announced deadline.

The language in the promotional announcement setting the time limit for submitting applications was clearly written:

> Deadline for receipt of applications is May 24, 1989. Apply with the Application for State Employment form (DER-MRS-38) to

[1]Pursuant to §230.25(1), Stats., the top 5 names are certified by the Administrator of DMRS for a vacancy when the register of eligibles is less than 50.

> Merit Recruitment and Selection; P. O. Box 7855; Madison, WI 53707-7855. Applications received after 4:30 p.m. of the deadline date will not be accepted. [Emphasis in original]

A second statement in the announcement also read: "Applications received at the announced location after 4:30 p.m. of the deadline date will not be processed."

The only statutory provision relating to application deadlines is found in §230.16(1)(a), Stats:

> The administrator shall require persons applying for admission to any examination under this subchapter or under the rules of the administrator to file an application with the division a reasonable time prior to the proposed examination.

As a general matter, an administrative agency "must conform to the requirements of the statute delegating a power or it is without authority to act." 2 Am. Jur. 2d *Administrative Law* §188 (footnotes omitted). Here, the language of §230.16(1)(a), Stats., does not specifically address the question of whether a deadline, once established, may be modified or treated "flexibly" by the respondent. The statute simply requires the respondent to set a "reasonable time *limit prior to the proposed examination" for submitting applications.* The absence of a statutory pronouncement simply extends discretion to the respondent to make its own determination on the topic:

> The very essence of a discretionary power is that the person or persons exercising it may choose which of several permissive courses will be followed, and discretion is defined, when applied to public functionaries other than courts, to be a power or right, conferred upon them by law, of acting officially in certain circumstances according to the dictates fo their own judgment and conscience as to what is just and proper under the circumstances, *uncontrolled by the judgment or conscience of others. When the* only right of an individual or the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right.

2 Am. Jur. 2d *Administrative Law* §191 (footnotes omitted).

In promulgating §ER-Pers 6.03, Wis. Adm. Code, the respondent established one set of circumstances as sufficient to modify an application deadline:

> **Insufficient number of applicants.** In the event that a sufficient number of qualified applicants fail to apply for an examination or to qualify after the examination, the administrator may reannounce the vacancy or extend the date for filing of applications, or, if necessary, cancel the examination.

The appellant contends that by promulgating a rule which established one exception to an application deadline, the respondent has precluded itself from applying the "business necessity" policy allowing other exceptions to the deadline. This argument fails to recognize that the focus of the quoted rule is to list the various options available to the respondent when it is confronted with an insufficient number of qualified applicants. The rule makes no attempt to address the topic of applications which are received a day after the deadline or which otherwise suffer from some technical deficiency. The appellant's argument is similar to the "exclusio" rule of statutory construction; i.e. a statute (or rule) which expresses one thing is exclusive of another. Gottlieb v. Milwaukee, 90 Wis.2d 86, 95, 279 N.W.2d 479 (Ct. App., 1979). Rules of construction are designed as an aid to determining the intent of the drafters. Here, the maxim can only be used to support a construction of the administrative rule which would limit respondent to one of the three listed courses of action when confronted with an insufficient number of applicants. The Commission does not accept the appellant's inference that by adopting §ER-Pers 6.03, Wis. Adm. Code, the respondent intended to limit extensions of application deadlines to only those examinations where there is an insufficient number of applicants.

The appellant's second argument is that the "business necessity standard" should be in the administrative code if it is to be followed. The Commission interprets this argument to be a contention that the policy described in finding of fact 7 fits the definition of an administrative rule and that because it was not promulgated as a rule it is void.

Section 227.01(13), Stats., defines a rules as:

> a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" does not include . . . any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:

(a) Concerns the internal management of an agency and does not affect private rights or interests.

In Kraus v. DHSS, 78-268-PC, 79-63-PC, 12/4/79, the Commission rejected the action of the Department of Health and Social Services not to consider two candidates for vacancies where the candidates were the brothers of the individual who would serve as the supervisor for the vacant positions and where the action was based on a code of ethics which was not promulgated as an administrative rule. The Commission held that because the code of ethics which was relied upon as a reason for disqualifying the two brothers constituted an "announced agency policy of general application," it met the definition of a rule and had to be promulgated as such to be effective, citing Frankelthal v. Wis. Real Estate Brokers Board, 3 Wis.2d 249, 89 N.W.2d 825 (1958). In Frankelthal, the court held:

> We have no hesitancy in holding that the issuance by the board in 1956 of the mimeographed instructions for renewal of real-estate broker's licenses which contained the requirement that all members of a partnership must be licensed as a condition to licensing the partnership, constituted the making of a rule . . .
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> When a party files an application for a license with an administrative agency and the latter points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule . . . .

More recently, the Court of Appeals rejected a decision setting "good time" credit for two mandatory release parole violators which was based on a memorandum issued by an executive assistant in DHSS which set forth general policies and specific criteria under which all decisions on good time for mandatory release parole violators were to be made. In State ex rel. Clifton v. Young, 133 Wis.2d 193, 197, 394 N.W.2d 769 (Ct. App., 1986), the memo in question was directed to department hearing examiners and read, in part:

> In deciding whether to allow an individual to earn good time credit on the forfeited time, the hearing examiner shall take into consideration the factors described in HSS 328.24(2), other mitigating or aggravating circumstances, and overall goals and objectives of supervision under HSS Chapter 328.

The court concluded:

> In this case, the hearing examiners decided Clifton's and Watson's cases after the department had prepared and disseminated a memorandum stating that it was "adopting procedures" for determining good time forfeitures and directing the examiners to consider specific criteria in making those determinations.
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> The Stanchfield memorandum does not speak to a specific case, nor is it limited to an individual inmate. It announces the general policies and the specific criteria under which all decisions on good time for mandatory release parole violations are to be made, now and in the future. The trial court correctly determined that the memorandum was a "rule" within the meaning of sec. 227.01(13), Stats., and that it was invalid for lack of proper adoption and promulgation. We are also satisfied that, by making this "rule" applicable to all such cases, and by deciding Clifton's and Watson's cases under improperly-adopted standards, the department abused its discretion. [Emphasis added]

In the present case, the policy which Mr. Wallock implemented when he was appointed in January of 1988 was intended to apply to a request made by an applicant whose application suffered from a technical defect and who contacted either Ms. Anderson or Mr. Wallock. The facts in this case indicate that the line staff who reviewed applications as they were received did not grant exceptions and did not automatically notify Ms. Anderson or Mr. Wallock when an application came in that might qualify under the policy. It took a telephone call by Mr. Acker to Ms. Anderson in order for the respondent to invoke the policy. Line staff did not schedule for examination those applicants who filed a technically deficient application. Only Ms. Anderson or Mr. Wallock could decide to make an exception under the policy and they only did so when an applicant contacted them.

The fact that the exception policy was not directed at line staff as well as its informal and discretionary nature removes it from the definition of a rule. Respondent's policy does not fit within the limits of a "statement of policy . . . of general application which is issued . . . to implement . . . legislation . . . administered by the agency." The term "general application" is typically understood in the context of its opposite: a contested case decision applicable solely to the parties in that particular proceeding or an order directed at one or more

specifically named persons. §227.01(13)(b) and (c), Stats. Here, the policy in question was directed at the members of a described class, i.e. persons who had filed technically deficient applications where an applicant had contacted either the Administrator of DMRS or the Director of the Bureau of Exam Development and Register Establishment. By definition, the policy was not applied consistently by the agency when that agency is viewed as a whole. It was only applied by two individuals within respondent agency, it was not applied by the other persons within the agency and it did not include absolute standards but was instead an effort to permit additional examinees where reasonably possible and consistent with the respondent's exam procedures. The policy in question here was essentially a determination to treat individual applications with technical deficiencies on a case-by-case basis rather than to apply rigidly the previously announced technical application requirements. "General application" has to mean something more than merely something that is applicable to a describable class. Otherwise an unwritten policy adopted by one DMRS staff member to treat as timely any examination received exactly 4 days after the filing deadline would also be a "rule." Here, because respondent's policy only affected applications which were specifically brought to the attention of either of two persons in the agency who then were to exercise

considerable judgment on a case by case basis, the policy cannot be held to meet the definition of a rule.[2]

Because the Commission has already determined that the respondent's policy does not meet the definition of "rule," the Commission need not address the separate issue of whether the definition of "rule" found in §227.01(13), Stats., also excludes policies which have never been reduced to writing.

This determination that the respondent was not required to follow rule-making procedures leaves the question of whether the respondent complied with the statutory reference which requires "persons applying for admission to any examination . . . to file an application . . . a reasonable time prior to the proposed examination." §230.16(1)(a), Stats. The respondent initially set May 24th as the deadline for submitting applications. That date was initially found by the respondent to be reasonable in terms of allowing the respondent to process the applications and to prepare for the examination. However, the respondent's subsequent action effectively changed the deadline so that applications received after the initial deadline were still considered. This change occurred on or about June 14th. In justifying the change, the respondent showed that it was able to provide notice to the additional applicants and to prepare the exam site for the additional examinees. The fact that the respon-

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[2]The Commission has been unable to find any case law specifically on point and the parties' briefs did not reach this issue. The Commission notes that there are certain competing considerations which tend to support the inclusion of the subject policy in the definition of "rule:"

> The term "rule" should be construed so as to effectuate the purposes of the 1981 [Model State Administrative Procedure Act]. One of those purposes is to facilitate participation by members of the public in the formulation of agency policy that will affect them. Consequently, in determining whether, in a close case, a particular agency statement is a "rule," consideration should be given to the fact that if that statement is classified as a "rule," its formulation and adoption will have to proceed in accordance with the rule-making procedures of Article III. Those procedures require agencies to allow and to facilitate broad public input into the process of considering the adoption of the statement. A refusal to characterize the statement as a "rule," however, means that the requirements of Article III will not apply to its adoption, and that the agency will not be required to allow and to facilitate broad public input into that process.

A. Bonfield, State Administrative Rulemaking, §3.3.2(d), at 86 (1986).

dent could make the necessary arrangements in time to conduct the examination fairly for those who took it generates the conclusion that the revised date of approximately June 14th was also a "reasonable time prior to the proposed examination" so as to comply with the requirement of §230.16, Stats.

Because the appellant has failed to show that the respondent did not comply with civil service code, the Commission issues the following

ORDER

The action of the respondent is affirmed and this appeal is dismissed.

Dated: April 19, 1990 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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