STATE OF WISCONSIN PERSONNEL COMMISSION

JEANNE DuPUIS,

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0219-PC

DECISION AND ORDER

NATURE OF THE CASE

This case involves an appeal pursuant to §230.44(1)(d), Stats., of respondent's denial of appellant's request for restoration in 1990 pursuant to §ER-Pers. 15.055, Wis. Adm. Code, following the termination of her permissive probation in connection with an interdepartmental transfer. On September 3, 1992, the Commission finalized a proposed decision and order issued by the hearing examiner on February 18, 1992,[1] and entered the following order: "Respondent's action refusing to restore appellant pursuant to §ER-Pers 15.055, Wis. Adm. Code, is rejected and this matter is remanded for action in accordance with this decision." Subsequently the parties engaged in a partially successful effort to reach agreement as to the parameters of appellant's remedy. A prehearing conference was held on August 6, 1993, at which time the parties agreed to a hearing "to determine any unresolved issues as to the remedy to be awarded appellant." Conference report dated August 6, 1993. At the outset of the hearing, the parties' counsel advised that they had reached agreement as to all outstanding issues concerning remedy except one, and that the only issue to be heard was whether respondent had made a valid offer of restoration to appellant in 1992.

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1 The parties had attempted to settle the matter in the interim.

FINDINGS OF FACT

1. For the purpose of providing the context of this matter, the Commission reiterates the findings set forth in its September 3, 1992, decision, as follows:

> 1. Appellant transferred from a Nursing Clinician 2 (NC2) position at the Wisconsin Resource Center (WRC) to a NC2 position at the Fox Lake Correctional Institution (FLCI), effective September 25, 1989. Both positions were in the classified civil service.
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> 2. At the time of the transfer, both institutions were within DHSS (Department of Health and Social Services). WRC was in the Division of Care and Treatment Facilities, and KMCI [sic] was in the Division of Corrections.
>
> 3. Immediately prior to her transfer, appellant had permanent status in class. She was placed on permissive probation at FLCI.
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> 4. Pursuant to 1989 Wis. Act 31, the Division of Corrections became the Department of Corrections (DOC) effective January 1, 1990.
>
> 5. As a result of this reorganization, KMCI, appellant's position, and appellant became part of the new DOC effective January 1, 1990. Appellant's time served on probation at KMCI [sic] prior to January 1, 1990, was carried over; i.e., she was not required to commence a new probationary period beginning January 1, 1990.
>
> 6. Appellant's probationary employment was terminated effective February 9, 1990. Notice of this action was contained in a letter dated January 29, 1990 (Appellant's Exhibit 4), which provided as follows:
>
> > This is to inform you that your permissive probation is being terminated at Fox Lake Correctional Institution and your employment there will not be continued. Your supervisor believes that your job performance is poor and that repeated attempts to guide and counsel you have not produced the expected results. Due to these reasons, you will not be passing your probation at Fox Lake Correctional Institution. Your last work day will be February 9, 1990.

> If you have specific questions regarding this action you may contact your supervisor.

7. Appellant then sought to be rehired as a NC2 at WRC. She was not so rehired or otherwise restored or reinstated. Respondent's position on this matter was set forth in a letter dated May 3, 1990 (Appellant's Exhibit 7).

2. Respondent sent a letter to appellant signed by the WMHI director, and dated July 2, 1992, (Respondent's Exhibit 1), which stated as follows:

> This letter is to confirm your reinstatement to the Nurse Clinician 2 position in the Division of Care and Treatment Facilities, Department of Health and Social Services, Winnebago Mental Health Institute effective August 3, 1992.
>
> Your salary will be determined. Your permissive probationary period will be six months.
>
> Your employment is contingent upon passing a physical examination which includes screening for rubella. . .
>
> * * *
>
> Your position is included in the UPQHC certified bargaining unit.
>
> Please report to Nursing Inservice on August 3, 1992 at 7:00 A.M. for assignment of your new duties and responsibilities.

3. After appellant's attorney complained that the foregoing letter provided insufficient information about the new position, respondent's attorney by letter dated July 29, 1992, (Respondent's Exhibit 3), advised, among other things,[2] that appellant's salary would be "approximately $16.566 per hour," and that she would have "the normal rotating 'federal' shift" in units 7 and 8 in Sherman Hall.

4. After another request for clarification from appellant's attorney, respondent's counsel, in a letter dated August 17, 1992, provided, among other

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[2] The letter also advised that appellant, "will be on immediate permanent status, without probation."

things, the information that: "[t]he normal rotating 'federal' shift alternates work weeks of the a.m. and p.m. shifts."

5. The position in question at WMHI was in the same pay range or pay rate as appellant's prior position and was a position for which appellant was qualified.

CONCLUSIONS OF LAW

1. The issue for decision by the Commission at this time -- whether respondent has made a valid offer of restoration to the appellant -- must be resolved under the civil service code applicable to the transaction in question -- i.e., most specifically, §ER-Pers 15.055, Wis. Adm. Code.

2. Regardless of which party is considered to have the burden of proof, the Commission concludes that respondent made a valid offer of restoration as of August 17, 1992.

OPINION

As noted above, the parties agreed to a hearing "to determine any unresolved issues as to the remedy to be awarded." The parties reached agreement prior to the hearing as to all aspects of the remedy save one, and agreed that the sole question before the Commission at that point was whether respondent had made a valid offer of restoration. Initially, the Commission must determine what criteria apply to the decision of this issue.

In its September 3, 1992, substantive decision of this matter, the Commission determined that appellant's status at the time of her termination of her permissive probation at FLCI was controlled by §ER-Pers 15.055, Wis. Adm. Code, which provides:

> **Employe removal; status and rights.** If a probationary *period resulting from a transfer under s. ER-Pers 15.04 or 15.05 is* required, the appointing authority, at any time during this period, may remove the employe from the position to which the employe transferred, without the right of appeal. An employe so removed shall be restored to the employe's previous position or transferred to a position for which the employe is qualified in the same pay range or pay rate or a counterpart pay range or pay rate without a break in employment. Any other removal,

> suspension without pay, or discharge during a probationary period resulting from transfer shall be subject to s. 230.34, Stats.

The Commission went on to conclude at page 3 as follows:

> [Since] appellant was serving at the time of her probationary termination "a probationary period resulting from a transfer under §ER-Pers 15.04" (transfer between different employing units of the same agency), §ER-Pers 15.055 provides only two options with respect to the termination of employment. A termination has to be either "subject to §230.34, Stats." (i.e., discharge for cause of an employe with permanent status in class) or the employe has to be restored to the previous (or like) position. It is undisputed that a just cause discharge procedure was not followed. Therefore, under this rule appellant was entitled to have been restored to her previous position at WRC (or transferred to a like position). (footnote omitted)

The Commission's order rejected "[r]espondent's action refusing to restore appellant pursuant to §ER-Pers 15.055, Wis. Adm. Code," p.9, and remanded the matter for action in accordance with its decision.

Inasmuch as respondent ran afoul of the civil service code by failing to follow the requirements of §ER-Pers 15.055, the Commission must utilize this provision in determining whether respondent provided an appropriate remedy with its offer of restoration at WMHI. In their post-hearing briefs, both parties have cited Anderson v. Labor and Industry Rev. Comm., 111 Wis. 2d 245, 330 N.W. 2d 594 (1983), as providing the material criteria. However, the Commission respectfully disagrees that this case is controlling.[3] In Anderson, the Supreme Court's statement of the issues it was addressing includes the following:

> (1) Should the Wisconsin Fair Employment Act be interpreted to allow a valid offer of reinstatement to terminate the accrual of back pay as of the date the offer is rejected; (2) if a valid offer of reinstatement does terminate the accrual of back pay, did Diel's offer to Anderson constitute such an offer. 111 Wis. 2d at 247-48.

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[3] The Commission is not bound by the agreement of both parties on a point of law, c.f. 73 AM JUR 2d Stipulation §5 (court not bound by stipulation on question of law.)

In addressing the first issue, the Court noted that the FEA provides for mitigation of back pay awards, and stated:

> It seems logical that the principle of mitigation of wages lost should embody an offer of reinstatement as well as acceptance of other employment. . . under federal law, a valid offer of reinstatement terminates the accrual of the employer's back pay obligation. We feel that such a rule is sound and is consistent with the language of sec. 111.36(3)(b), Stats. 1973. We therefore adopt the rule that a valid offer of reinstatement ends the accrual of back pay. 111 Wis. 2d at 253-54. (citations omitted)

The Court then went on to discuss the second issue and to delineate guidelines for a valid offer of reinstatement.

There are a number of factors that distinguish the instant case from Anderson. The latter case was brought under the FEA, while this case involves the civil service code.[4] Anderson involved the question of what kind of offer of reinstatement is sufficient to terminate the employer's back pay liability in the context of the concept of mitigation, and in the absence of any specific language in the FEA that addresses this issue. The issue now before this Commission involves the question of whether respondent complied with a Commission order which was issued because respondent failed to comply with §ER-Pers 15.055, Wis. Adm. Code, after it terminated appellant's permissive probation at FLCI, and which order was intended as a "make whole" remedy -- i.e., to put appellant as nearly as possible in the position she would have been had the respondent complied with the rule in the first instance. Under these circumstances, the criteria by which to evaluate respondent's offer of re-employment are the criteria contained in the rule.[5]

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[4] The jurisdictional basis for this appeal is §230.44(1)(d), Stats.

[5] The issue as framed by the parties does not appear to involve the question of mitigation as an issue distinct from the question of whether respondent has complied with the Commission's order. However, to the extent the issue should be construed as involving the question of whether respondent made an offer that terminated its back pay liability in the context of mitigation, the Commission would conclude that the criteria to be applied would be those set forth in §ER-Pers 15.055. This rule is controlling regarding the extent of appellant's remedy on this appeal, and it would be inconsistent with this and the basic principles of mitigation for her to be able to decline an offer of re-employment that gave her the same employment to which she

For the purposes of the present case, the primary distinction between the provisions of §ER-Pers 15.055 and the criteria for an offer of reinstatement under the FEA that will curtail damages in the mitigation context, involves the similarity between the position previously held and the position in which the employe is to be re-employed. Under §ER-Pers 15.055, the employe either can "be restored to employe's previous position or transferred to a position for which the employe is qualified in the same pay range or pay rate or counterpart pay range or pay rate." A qualifying offer of reinstatement under Anderson "must be for the same position or a substantially equivalent position." 111 Wis. 2d at 256. In determining whether another position is equivalent, "salary should not be the sole test. . . it is only one factor to be considered. Comparability in status is often more important, especially as it relates to opportunities for advancement or for other employment." id. (citation omitted).

The great majority of the parties' efforts during the hearing involved the question of whether the positions in question were "substantially equivalent" under Anderson. Since, as discussed above, this reliance on Anderson was misplaced, most of this evidence is of little or no relevance.[6] It is undisputed that the position at WMHI into which appellant was reinstated is in the same classification (NC2) as the appellant's previous position, and involved the same pay range and pay rate, and is a position for which appellant was qualified. Therefore, respondent's action was valid under §ER-Pers 15.055.[7]

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would be entitled to as a final remedy, and to continue to be entitled to the accrual of back pay.

[6] In a post-hearing brief, appellant requested reconsideration of a ruling during the hearing excluding certain evidence because of failure to comply with §PC 4.02, Wis. Ad. Code. This request is denied, in part because of the foregoing discussion concerning relevance.

[7] Under Anderson, the employer has the burden of proof with respect to the affirmative defense of failure to mitigate damages, see 111 Wis. 2d at 255. The parties have proceeded under that premise. While the Commission does not believe that the employer in this case has the burden of proof on the instant issue, the relevant evidence in this case clearly supports the Commission's conclusion regardless of which party is considered to have the burden of proof.

For the same reason, the question of the appropriateness of appointing appellant to the institution where Mr. Branchfield and his wife were employed,[8] which arguably could have had an effect on appellant's working conditions, is also outside the scope of this case.

However, the parties' debate about whether, under Anderson, appellant was given sufficient notice of the transaction also implicates civil service code requirements for appointments generally which apply to §ER-Pers 15.055 transactions. Section ER-Pers 12.08, Wis. Adm. Code, provides as follows:

> Confirmation of appointment shall be in writing by the appointing authority and shall be sent to the employe no later than the first day of employment. Such letter of appointment shall include conditions of employment such as starting date, rate of pay, and probationary period to be served.

Since the first letter of appointment dated July 24, 1992 (Respondent's Exhibit 1) did not contain appellant's starting salary, it was defective under §ER-Pers 12.08 with respect to this condition of employment. However, this deficiency subsequently was cured by a follow-up letter of July 29, 1992, to appellant's attorney (Respondent's Exhibit 3).

With respect to a position such as the one in question, which normally involves shift work, another "condition of employment" which §ER-Pers 12.08 requires to be in the appointment is assigned shift. The record establishes that this information was not provided until respondent's second follow-up letter dated August 17, 1992 (Respondent's Exhibit 5). This is because the prior notice was not sufficiently free of ambiguity under an objective standard to constitute effective notice of appellant's assigned shift, since appellant's peer group was not familiar with the term "federal shift" used in respondent's July 29, 1992, letter (Respondent's Exhibit 3).

In conclusion, respondent made a valid offer of restoration under §ER-Pers 15.055 as of August 17, 1992.

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[8] Appellant contends that Mr. Branchfield effectuated an illegal termination of her probationary employment at FLCI, and that she had pending legal actions against him during the period in question.

ORDER

Respondent having made a valid offer of restoration under §ER-Pers 15.055, Wis. Adm. Code, as of August 17, 1992, and the parties having reached a stipulation as to all other elements of the remedy phase, this matter is hereby dismissed.

Dated: October 4, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:dkd

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all

parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.