STATE OF WISCONSIN PERSONNEL COMMISSION

GARY LOCKE, et al.,
(Patricia Bitter, Mary Fargen, Janice R. Haupt, Loretta Hooker, Linda Larry, William P. McNelly, Jamie Payne, Lonnie Steinhauer, Kathryn Bruhn-Collum, Sharon Franklin, Adele Hoium, Judy Lakin, Marianne Meyer, Beverly Reynolds, Mary Wickus),

Appellants,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 90-0384-PC

INTERIM DECISION AND ORDER

Nature of the Case

This is a joint appeal pursuant to §230.44(1)(b), stats., of the effective date of the reallocation of appellants' positions from Institution Aid 2 (IA 2) (PR 06-07) to Therapy Assistant 2 (TA 2) (PR 06-09). The stipulated issue for hearing is:

> Whether respondent's decision to reallocate appellants' positions from IA 2 to TA 2 with an effective date of January 15, 1989, rather than July 3, 1988, was correct. Conference report dated December 14, 1990.

This decision also will address a motion to add Carol Peck as a party-appellant, filed February 20, 1991.

Findings of Fact

1. Appellants at all relevant times have been employed by respondent DHSS in the classified civil service at Central Wisconsin Center (CWC).

2. By memos dated September 5, 1990 (Respondent's Exhibit 7), appellants were informed by Stephen P. Sanborn, a Personnel Specialist in the Bureau of Personnel and Employment Relations (BPER) in DHSS, that their positions had been reallocated from IA 2 to TA 2 with an effective date of January 15, 1989. This document includes the following:

> On June 15, 1989, this office received a Reclassification Request for your position (along with 17 other Program Aid positions) then classified as Institution Aid 2 (PR06-07) to be Therapy Assistant 2 (PR06-09). Your request was received by the Central Wisconsin Center Personnel Office on January 4, 1989, with a proposed effective date of January 15, 1989.
>
> My review finds that Therapy Assistant 2 is the most appropriate classification for your position; however, reallocation is used pursuant to s.ER 3.01(2)(e) Wis. Adm. Code to correct an error. Reclassification is not appropriate because the changes in duties and responsibilities that fit the Therapy Assistant 2 classification were acquired by incumbents through job reassignments or transfers from Unit/Ward Aid positions to Program Aid positions for the majority of positions. Several incumbents came from other types of positions such as Licenced Practice Nurse or Teacher Assistant. Changes in duties and responsibilities that have occurred since each incumbent acquired the duties of Program Aid have not influenced this classification decision.

3. Appellants' positions had been performing duties and responsibilities more appropriately classified as TA 2 than as IA 2 for several years prior to both the January 15, 1989, effective date, and the July 3, 1988, requested effective date, of the reallocation of their positions.

4. Mike Linak has at all relevant times been appellants' immediate supervisor. He has been of the opinion that these positions were incorrectly classified as IA 2's since 1985. Appellants have had ongoing discussions with Mr. Linak over the years concerning the classifications of their positions. Appellants have expressed concerns that their positions have been underclassified. During these discussions, Mr. Linak repeatedly told appellants in effect that he agreed that their positions should be reclassified and that management would be taking care of it.

5. In 1988, appellants became aware that another group of employes with similar duties and responsibilities in a different unit ("Sherman

Academy") had applied for reclassification to the TA series. In further discussions with Mr. Linak, he explained, in response to their requests for information, how they could formally request reclassification but urged them to await the outcome of the Sherman Academy group reclass request, and he implied that appellants would be treated the same as the Sherman group.

6. Throughout the aforesaid period, Mr. Linak had been in discussions with Dr. Scheerenberger, CWC Director, regarding appellants' classification situation. While Mr. Linak expressed the view that the positions were improperly classified, Dr. Scheerenberger directed him that they be retained as IA 2's and that he was not to submit a reclassification request for them, because of Dr. Scheerenberger's stated interest in protecting the institution's access to federal funds under Title XIX, which he understood were dependent to a certain extent on the number of this type of position. At some point, Dr. Scheerenberger told Mr. Linak that when the matter of the Sherman Academy positions classification was resolved, this would effectively resolve the appellants' reclassification issue by appellants' being "grandfathered" into the TA 2 classification.

7. Several months after the Sherman group had been reclassified and Mr. Linak was aware that no action was being taken with respect to appellants' classifications, he met with them in December 1989, and provided them the forms and instructions for them to formally request reclassification, which they did and filed the documents with the CWC personnel office in early January, 1989.

8. Appellants did not file requests for reclassification before then because they were relying on Mr. Linak's representations, set forth above, that management would take care of the matter.

9. Appellants had copies of employe handbooks which included the following information regarding reclassification requests:

> Supervisors may request, through their appointing authority, that their employing unit personnel office review an employe's position to see if a reclassification is warranted. In some situations an employe may wish to initiate a request for review. This request must be made in writing to the employe's supervisor and should clearly indicate that the employe wishes to have their position reviewed for proper classification. If the supervisor does not give the employe a written response within 30 days, the employe may submit a copy of the original request to the employing unit personnel office along with a statement requesting

> assistance in having the request reviewed. Employes should bear in mind that the effective date of the reclassification action is determined by the date it is received in the employing unit personnel office. If the supervisor or personnel office concludes that a reclassification is not appropriate, the employe will be informed, in writing, of the reasons why the request is denied and the employe's appeal rights. Respondent's Exhibit 5.

10. DER's policy, as set forth in its classification and compensation manual, Respondent's Exhibit 4, is that reclassifications and reallocations are effective the beginning of the first pay period following effective receipt of the written reclassification request in the employing unit personnel office.

CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to §230.44(1)(b), stats.

2. Ms. Peck was not part of the original appeal and did not file a timely appeal of her own, and therefore she is not an appropriate party-appellant.

3. Appellants have the burden of proof to establish that respondents' decision to reallocate their positions from IA 2 to TA 2 with an effective date of January 15, 1989, rather than July 3, 1988, was incorrect.

4. Appellants have satisfied their burden of proof by establishing that respondent DHSS acted inequitably and fraudulently, and in so doing manifestly abused its discretion, by inducing appellants to take no action on their own behalf by representing that management was taking care of their reclassification concerns, that appellants' failure to act on their own behalf before January, 1989, was in reasonable reliance on respondent's representations, and thus appellants have established that management is equitably estopped from utilizing the January 15, 1989, effective date based on when appellants submitted their formal written reclassification requests.

DISCUSSION

The determination of January 15, 1989, as the effective date of the reallocation of appellants' positions was in keeping with DER policy as set forth in its classification and compensation manual, and was based on the date the written reclassification request was received at the CWC personnel office. The Commission has upheld as a general proposition the appropriateness of this approach to effective date. Grinnell v. DP, 81-101-PC (4/29/82). However, the

Commission also has recognized in cases where management misleads an employe into not filing a written reclassification request because of representations that something is being done about the employe's classification, the employer can be equitably estopped from relying on the formal policy.

The basic elements of equitable estoppel are: "(1) Action or inaction which induces (2) reliance by another (3) to his detriment." Gabriel v. Gabriel, 57 Wis. 2d 424, 429, 204 N.W. 2d 494 (1973). In order for equitable estoppel to be applied against the state, "the acts of the state agency must be established by clear and distinct evidence and must amount to a fraud or manifest abuse of discretion." Surety Savings & Loan Assoc. v. State, 54 Wis. 2d 438, 445, 195 N.W. 2d 464 (1972). However, "the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable." State v. City of Green Bay, 96 Wis. 2d 195, 203, 291 N.W. 2d 508 (1980). The Supreme Court also has held that: "where a party seeks to estop the Department of Revenue and the elements of estoppel are clearly present, the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position." DOR v. Moebius Printing Co., 89 Wis. 2d 610, 641, 279 N.W. 2d 213 (1979).

Warnda v. UW-M & DER, 87-0071-PC (6/2/88), involved the application of equitable estoppel to a situation similar to the one here involved:

> This is a clear-cut case of equitable estoppel because appellant repeatedly voiced her concerns about the classification of her position, initially verbally and then in a letter to her department head in July 1985. Throughout this process, management gave her every indication that her concerns would be addressed by management, and never suggested there was any need for her to submit a written request to the personnel office, as it now asserts. This procedure was not even mentioned in the section on reclassification in the UW-M employes' handbook. Clearly, appellant reasonably relied on respondent's representations and course of conduct in pursuing her attempt at reclassification, and respondent's posture amounted to a manifest abuse of discretion, which is underscored when its conduct is juxtaposed to its current insistence that she should have filed a written reclassification request with the UW-M personnel office. Therefore, respondent is estopped from now arguing that an earlier effective date for appellant's reclassification/regrade is precluded by the fact that she did not submit a written reclassification request to the UW-M personnel office before March 9, 1987.

The only possible distinguishing feature between that set of facts and those in the instant case is that here the employe handbook does cover employe-initiated classification transactions and states that employes "should bear in mind that the effective date of the reclassification action is determined by the date it is received in the employing unit personnel office." However, this does not make appellants' reliance on management's representations unreasonable. Appellants were continually reassured by their supervisor that management was taking care of their classification concerns. It was not unreasonable to have assumed that what was required to have been done was being done. The employes' handbook states:

> Supervisors may request, through their appointing authority, that their employing unit personnel office review an employe's position to see if a reclassification is warranted. In some situations, an employe may wish to initiate a request for review. This request must be in writing to the employe's supervisor. (emphasis added)

If an employe has been led to believe by his or her supervisor that management supports a reclassification and is working on getting it done, why should the employe assume that this is a case where he or she should initiate a reclass request on his or her own behalf? There is no basis in this record for a conclusion that appellants acted unreasonably in relying on Mr. Linak's representations that management was taking care of the reclassification.

Respondents also argue that management's actions did not amount to fraud or a manifest abuse of discretion as required for equitable estoppel. The Commission cannot agree, and also is of the opinion it would be unconscionable not to apply estoppel. Not only did management represent that they would take care of the reclassification matter when in fact nothing was being done, but also management was actively engaged in trying to stall appellants in their efforts to obtain a classification level to which they concededly were entitled, in order to attempt to protect CWC's Title XIX finding.

The Commission bases its findings concerning how CWC management dealt with appellants' reclassification request on Mr. Linak's testimony. Respondents objected to his testimony as to Dr. Scheerenberger's statements on hearsay grounds.[1] This objection was properly overruled. The prohibition

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[1] Dr. Scheerenberger did not testify.

against hearsay is not per se applicable to Commission proceedings, §PC 5.03(5), WAC. Furthermore, Mr. Linak's testimony as to what Dr. Scheerenberger said does not constitute hearsay because it was not being offered "to prove the truth of the matter asserted," §908.01(3), stats. That is, these statements were not offered to try to show, for example, that CWC in fact was receiving federal Title XIX funds that were tied to the number of institution aides employed, but rather to show the role that Dr. Scheerenberger played in management's handling of appellant's reclassification matters and management's motivation for its actions. Finally, even if the statements were deemed within the general definition of hearsay, coming from the CWC appointing authority these statements fall within the exclusion set forth at §908.01(4)(b)4., stats.: "[a] statement by [the party opponent's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

Respondents clearly are estopped from relying on the January 15, 1989, effective date. Therefore, given the wording of the issue, respondents must utilize the July 3, 1988, effective date on remand.[2]

In a posthearing brief, appellants contended that respondents' use of the January 15, 1989, effective date had the effect of violating the collective bargaining agreement. As respondents point out, the Commission has no authority to address this contention. This subject matter is outside the Commission's statutory grant of authority and is explicitly precluded by operation of §111.93(3), Stats.

Finally, the motion to add Ms. Peck as a party-appellant must be denied. She apparently was inadvertently omitted from the original group appeal. The 30 day time limit provided by §230.44(3), stats., for appeals of this nature is considered mandatory and jurisdictional in nature, Richter v. DP, 78-261-PC (1/30/79), and the Commission has no authority to consider an untimely appeal that may have been inadvertently not filed within the 30 day time period.

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[2] Respondents concede this in their posthearing brief: "[I]t is apparent that two conflicting dates are relevant in this instance — only one must prevail: (a) The date proposed by the Respondent: January 15, 1989 and (b) The date proposed by the appellant: July 3, 1988."

ORDER

1. The motion to add Ms. Peck as a party-appellant is denied.

2. Respondents' action establishing the effective date of appellants' reallocations as January 15, 1989, rather than July 3, 1988, is rejected and this matter is remanded to respondents for action in accordance with this decision.

Dated: July 11, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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