STATE OF WISCONSIN PERSONNEL COMMISSION

GREG DAVISON,

Appellant,

v.

State Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION,

Respondent.

Case No. 92-0191-PC

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves an appeal pursuant to §230.44(1)(d), Stats., of a determination by respondent (DPI) that appellant's appointment to a Program Assistant 2 (PA 2) position, effective March 9, 1992, was an original appointment rather than a promotion This matter is being decided on the basis of a motion for summary judgment filed by respondent, the parties having agreed that there apparently were no material facts in dispute, and this having been confirmed by the briefs and supporting documents filed by the parties' counsel in support of, and opposition to, the motion. In the findings which follow, the Commission has recited these facts which are necessary to this decision.

FINDINGS OF FACT

1. Appellant commenced employment in the state classified civil service on July 15, 1979 Following a number of personnel transactions which involved employment in positions with Library Assistant, Typist, Word Processing Operator 1 and 2, and PA 1 classifications, he transferred to a PA 1 position in the classified civil service at DOA (Department of Administration) on March 12, 1989, where he resigned effective September 11, 1991, and left state employment.

2. When he resigned from this position, he had attained permanent status in class, was in pay range 02-08, and was being paid $9.907 per hour.

3. Appellant subsequently took a PA 2 examination, was placed on a register, and was certified for a PA 2 vacancy at respondent DPI (Department of Public Instruction).

4. Respondent appointed appellant to this position effective March 9, 1992, at a pay rate of $9 286 per hour, the minimum for pay range 02-09, and required that he serve a six-month probationary period.

5. Respondent decided that the foregoing appointment constituted, as a matter of law, an original appointment rather than a promotion.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission as an appeal pursuant to §230.44(1)(d), Stats.

2. Appellant has the burden of persuasion.

3. Appellant has not carried his burden of persuasion

4. Appellant's appointment to the PA 2 position at DPI effective March 9, 1992, was, as a matter of law, an original appointment.

5 Respondent's establishment of $9.286 per hour as appellant's starting salary was neither illegal nor an abuse of discretion.

OPINION

This case involves an employe with permanent status in class as a PA 1 who separated from state service in 1991 by resignation, subsequently took a PA 2 exam and was appointed to a PA 2 position in 1992.

In order for this appointment to constitute a promotion, it must meet the definition of promotion set forth in §ER-Pers. 1.02(27), Wis. Adm. Code:

> (27) Except as provided in s. ER-Pers 14.02, "promotion" means any of the following:
>
> (a) The permanent appointment of an employe to a different position in a higher class than the highest position currently held in which the employe has permanent status in class;
>
> (b) The permanent appointment of an employe or former employe in layoff status to a different position in a higher class than the highest position in which permanent status in class was held at the time the employe or former employe became subject to layoff, or
>
> (c) The permanent appointment of an employe on an approved leave of absence, either statutorily mandated or granted by an appointing authority to a different position in a higher class than the highest

> position in which permanent status in class was held at the time the employe began the leave of absence

Neither §ER-Pers 1.02(27)(b) nor §ER-Pers 1 02(27)(c) have any application to this matter, since it is undisputed that at the time of the appointment, appellant was neither on layoff status nor on an approved leave of absence. Turning to §ER-Pers 1.02(27)(a), this transaction does not qualify as a promotion under this definition for three reasons.

First, this subsection requires the appointment of "an employe." (emphasis added) Section ER-Pers. 1.02(6) defines an "employe" as: "any person who receives remuneration for services rendered to the state under an employer-employe relationship." Appellant was not an "employe" when he was appointed to the position in question, because he was not employed by and was not receiving remuneration for services rendered the state, having been resigned from state service for approximately six months. Also, §ER-Pers 1 02(27)(b) refers to "employe or former employes." If §ER-Pers 1.02(27)(a) had been meant to encompass both employes and former employes, it would have been so stated, as was the case in §ER-Pers 1.02(27)(b).

Second, §ER-Pers 1.02(27)(a) provides that the position to which the appointment is made must be "in a higher class than the highest position currently held in which the employe has permanent status in class." (emphasis added) This language apparently imposes a relatively straightforward prerequisite for promotion that the employe in question be currently holding a position (which is consistent with the requirement of being an employe), which appellant was not.

A third basis for the conclusion that appellant was not promoted is provided by §ER-Pers 14.02, "Exclusions," which provides, inter alia:

> (2) The appointment of a former employe who previously had permanent status in class to a position in a higher classification than the employe's former class, after a break in service not covered by leave of absence provisions of ch. ER 18 or a collective bargaining agreement, or the layoff provisions of ch. ER-Pers 22 or a collective bargaining agreement, shall be considered an original appointment.

This language precisely describes appellant's situation. He was appointed to a position in a higher classification (PA 2) than his former classification (PA 1), following a break in service (engendered by his resignation) that did not involve either a leave of absence or a layoff.

However, appellant contends that this case is controlled by §ER-Pers 14.02(5), and that this provision should be interpreted to lead to the conclusion that the appointment in question constitutes a promotion. Section ER-Pers 14.02(5), provides:

> (5) The permissive appointment of an employe to a different position in a higher class than the highest position currently held in which the employe has permanent status in class, when the employe has been certified from a register as eligible for appointment, is a promotion when the position is in a class, class subtitle or progression series in which the employe has not previously attained permanent status in class. Such appointments are reinstatements when the employe is appointed on the basis of qualifying for the position other than as a result of being certified as eligible for appointment from a register.

Appellant argues that the term "currently held" should be interpreted to apply to his situation -- i.e., to "mean that appellant currently held the position of PA 1 at the Department of Administration when he was appointed to the PA 2 position at the DPI." Appellant's brief, p. 11. Appellant bases this contention on the argument that. "the term 'currently held' is an oxymoron in that the word 'currently' refers to the present time whereas the word 'held' is clearly the past tense. Therefore, the phrase is in itself inherently conflicting and open to interpretation. . " id., p. 10.

The Commission cannot agree with this approach. First, §ER Pers 14.02(5), like §ER-Pers 1.02(27)(a), refers to the appointment of an "employe," not a "former employe." Second, the word "held" is associated not only with the past tense, but also with the perfect participle. This usage was discussed in Holman Transfer Co. v. City of Portland, 196 Ore. 551, 249 P. 2d 175, 179-180 (1952); rehearing denied, 196 Ore. 551, 250 P. 2d 929, 930 (1952), as follows:

> "The word 'held' is the perfect participle of the word 'hold.' 'Participles have no reference to time. They simply show the action, being or state of the verbs from which they are derived as finished or unfinished.' ...The meaning of the word 'held' is not to be determined simply from its form, but from its relation to other parts of the contract; and it must be so construed, if possible, as to give force and effect to all parts of the agreement." (citations omitted)

On petition for rehearing, the Court noted.

> [T]he time of happening may be otherwise expressed than by a verb in the clause in which the participle occurs. An example is found in the

> phrase "in a lease heretofore executed," which has no verb. The time of the perfect participle "executed" is fixed by the adverb "heretofore." The phrase is elliptical, the words "which was" being implied before "executed."

Section ER-Pers 14.02(5) uses the language "the highest position currently held in which the employe has permanent status in class." (emphasis added) Since the word "held" is directly modified by the word "currently," this clearly refers to a current status -- i.e., a position held at the time of the appointment, not at some time in the past prior to a break in service.[1]

While in the Commission's opinion it is unnecessary to resort to the rule's promulgation history, the material relied on by appellant in this area is not inconsistent with the foregoing interpretation. Appellant cites DER's summary of §§ER-Pers 14.02(3), (4) and (5) provided in its "Report to Presiding Officer of Each House of the Legislature," Clearinghouse Rule 86-161, April 9, 1987:

> Created. To clarify what the transaction shall be called when an employe is appointed to a different position in a higher class when the employe has reinstatement eligibility or restoration rights. s. 230.31(1), Stats.

Appellant contends that he "falls into this precise category. While appellant does not argue that his permissive appointment to the PA 2 position at the DPI was a reinstatement or restoration, it cannot be questioned that appellant did have statutory reinstatement eligibility." This is a non sequitur There is nothing in the material portions of the rule that are affected by the fact that appellant had reinstatement eligibility.

Appellant argues as follows with respect to the summary of §ER-Pers 14 02(2):

> Amended. To eliminate exclusion of persons in layoff status or on an approved leave of absence from the definitions of promotional appointment. s. 230 19(3), Stats.

> The promulgation history of the administrative rule sections at issue can hardly be clearer. Such history, quoted above, established that

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[1] While appellant has not argued this point, the Commission notes parenthetically that the reference in §ER-Pers 14.02(5) to the "highest position currently held" (emphasis added) undoubtedly is intended to refer to those situations where an employe holds two positions, usually due to part-time appointments.

> §ER-Pers 14.02(2), upon which respondent attempts to rely, was amended only to eliminate "... persons in layoff status or on an approved leave of absence..." as excluded from the definition of 'promotional appointment.' Appellant's brief, p. 9.

Again, since appellant was not in either layoff or leave of absence status, the intent of this amendment to eliminate the exclusion of such persons from the definition of promotion lacks materiality.

The Commission also will consider appellant's policy argument that it is inequitable to require him to serve a probationary period after his many years of prior state service during which he had passed several probationary periods. Even if this kind of consideration could have a bearing on the rule application this case presents, the premise for appellant's position is lacking. Section ER-Pers 14.03(2) requires that an employe promoted between agencies serve a probationary period. Therefore, appellant would have been required to serve a probationary period even if this transaction had been handled as a promotion, because his previous employment had been in a different agency.

Appellant also contends that he should not have to establish illegality or an abuse of discretion consistent with §230.44(1)(d), Stats., and that it appears that respondent's action "may have been taken pursuant to §230.44(1)(a), Stats.," and hence there would be a different (although unspecified) burden involved. The Commission does not need to address this contention beyond noting that, in any event, resolution of this case comes down to a question of law -- i.e., whether under the civil service code this transaction constitutes an original appointment or a promotion [2]

Finally, appellant contends that respondent's handling of this transaction involved a demotion, since his "wage rate has actually been reduced and most of his fringe benefits denied for the first six months of his appointment to his PA 2 position." Appellant's brief, p. 13 While appellant may be disappointed at some of the aspects of his employment following his appointment, these presumably flow from his break in service. However, he has not suffered a demotion, which is defined as "the permanent appointment of an employe with permanent status in class to a position in a lower class than the highest position currently held in which the employe has permanent

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[2] As discussed below, the issue of appellant's starting pay is resolved by the determination of whether the appointment constitutes a promotion or an original appointment.

status in class." §ER-Pers 1.02(5), Wis. Adm. Code. Furthermore, the determination of appellant's starting salary at $9.286, the minimum of PR 02-09, is consistent with §ER 29.03(1)(b), Wis. Adm. Code, once it has been determined that the transaction in question is an original appointment rather than a promotion, and accordingly, on this record it did not constitute an illegal act or an abuse of discretion

ORDER

Respondent's decision to treat appellant's appointment to a PA 2 position effective March 9, 1992, as an original appointment rather than as a promotion, and to establish his salary at $9.286 per hour, are affirmed and this appeal is dismissed.

Dated: January 27, 1993

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT.rcr

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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.