STATE OF WISCONSIN PERSONNEL COMMISSION

GERALD G. HOLTON, JR.,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondents.

Case No. 92-0717-PC

RULING ON RESPONDENT DER'S MOTION TO DISMISS RE: SUBJECT MATTER JURISDICTION AND TIMELINESS

Respondent DER filed a motion to dismiss claiming that neither appellant nor DILHR had a right to appeal DER's allocation (initial classification of a new position). DER argued in the alternative that if either DILHR or appellant had an appeal right, the appeals were filed untimely. The background facts appear undisputed and are recited in the following paragraphs.

In June 1991, DILHR prepared a position description (PD) for a new position and a certification request which were sent to DER for assignment of classification. DER classified the new position as an Engineering Technician 4. In October 1991, the position was filled on a limited term basis with appellant as the incumbent.

Recruitment for a permanent appointment in the new position began in April 1992. By letter dated June 11, 1992, appellant was hired as the permanent appointment, serving a 6-month probationary period beginning on June 15, 1992.

Appellant filed his initial appeal on July 8, 1992, claiming the position should be classified at the higher level of either Environmental Engineer or Environmental Engineering Specialist series. A pre-hearing conference was held at which time DER and DILHR agreed to re-review the position's classification. DILHR concluded from its re-review that the position should be

classified as an Engineering Specialist - Senior. DER concluded from its re-review that the position should be classified as an Engineering Technician 5.

On May 19, 1993, DER issued a notice reallocating appellant's position to Engineering Technician 5, effective retroactively to June 15, 1992. The notice form indicated the reason for reallocation as "ER 3.01(2)(e) Correction of error". Regarding appeal rights, the notice form provided as follows.

> Whenever a position is reallocated by the Secretary, Department of Employment Relations or his/her designated representative, the employe and/or the appointing authority shall have the right of appeal. . . . If you wish to appeal this reallocation you you must submit a written request to the State Personnel Commission. . . .

On May 20, 1993, appellant filed a second appeal with the Commission objecting to DER's conclusion that the position should be at the Engineering Technician 5 classification rather than Engineering Specialist - Senior. A decision was apparently made to treat appellant's second appeal as part of the case already pending.

DISCUSSION

1. DER's Allocation Decision is Appealable to the Commission.

The Personnel Commission has jurisdiction to review decisions made by DER's Secretary relating to the classification of a new position, which is referred to as an "allocation" decision. (See ER 3.01 (2), Wis. Admin. Code.) Similarly, the Commission has jurisdiction to review decisions made by DER's Secretary relating to a classification change of an existing position, which is referred to either as a "reallocation" or a "reclassification" decision, depending on the circumstances or reason for the change. (See ER 3.01 (2) & (3), Wis. Admin. Code.)

> The general jurisdictional grant is found in s. 230.44(1)(b), Stats., which provides, in relevant part, that "**a personnel decision**" made by the Secretary under s. 230.09(2)(a), Stats., is appealable to the Commission. The full text of s. 230.09(2)(a), Stats., is shown below.

> 230.09 Classification.
> * * *
> (2)(a) After consultation with the appointing authorities, the secretary shall **allocate** each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The secretary may **reclassify** or **reallocate** positions on the same basis. (Emphasis added.)

There would be no dispute if this case involved a reallocation decision, rather than an allocation decision. An employe's right to challenge reallocation decisions is beyond dispute. DER, however, argues that allocation decisions should be treated differently to prohibit appeal rights. The statutory language does not support DER's contention.

The Commission's undisputed jurisdiction over reallocations is derived from the very same statutory provisions (cited above) as the Commission's jurisdiction over allocations. There is no language in the statutes to support different treatment for the two transactions.

DER attempts to avoid the plain language of the statute by arguing that an allocation is not a "personnel decision", within the meaning of s. 230.44(1)(b), Stats. Since the statutory language does not support such a statement, DER looks to its administrative rule and concludes that the statutory term "personnel decision" is limited to the types of actions included in ER 1.02(11), Wis. Admin. Code. This code section cited contains the definition of "Employing Unit", which is unrelated to the present inquiry. In fact, DER recognizes the deficiencies of the cited code section as a definition for "personnel decision". Specifically, on p. 2-3 of its initial brief, DER acknowledged that the cited code section fails to list several types of transactions widely recognized as "personnel decisions", such as termination, reclassification, reallocation and regrade.

2. This Case is Not Complicated by the fact that New Positions Have No Incumbent at the Time the Initial Classification Decision is Made.

DER contends no appeal rights should exist for allocations based on the fact that such decisions are necessarily made before anyone is hired for the

new position. The lack of an incumbent, however, is a distinction unsupported by Ch. 230, Stats. Specifically, the language of s. 230.09(2)(a), Stats., speaks of allocating, reallocating and reclassifying a **position**, not an incumbent. Furthermore, "position" is defined in s. 230.03(11), Stats., without reference to an incumbent. DER, therefore, is attempting to create a distinction which does not exist by statute.

DER cites several Commission cases as support for the attempted "no-incumbent" distinction. Commission jurisdiction in those cases was rejected, not because of the alleged "pre-incumbent" action complained of, but because the action complained of did not involve "classification", within the meaning of s. 230.09, Stats., or any other type of action referenced as being within the Commission's jurisdiction, pursuant to s. 230.44(1)(b), Stats.

3. Appellant's Appeal was Timely Filed.

Appellant's second appeal filed on May 20, 1993, was timely as to the reallocation transaction taken on May 19, 1993. The reallocation transaction recognized an error and provided correction back to appellant's first day of work. The remaining dispute is appellant's opinion that the May 19, 1993, corrective action remains deficient. Under these circumstances, the question of whether the initial appeal was timely filed is moot and will not be reached in this decision.

DER argued that the Commission should not hear the second appeal unless the Commission also found the appellant had a right to appeal the initial allocation decision. DER's contention was that if a reallocation action were performed gratuitously by DER, then an appeal should not ensue. The Commission does not resolve this issue here, but notes that a contrary argument could be made. Specifically, DER's responsibilities under Ch. 230, Stats., include the correct classification of positions. Reallocations to correct errors would not be gratuitous if such responsibility were considered to be a continuing obligation. Further, sections 230.44(1)(b) and 230.09, Stats., grant appeal rights for reallocations without any qualification. Therefore, DER would be requesting the Commission to enforce a qualification which appears to lack statutory support.

4. Appellant's Probationary Period Does Not Complicate the Case.

DER contended that even if appellant were determined to have an appeal right, corrective action would be barred under the provisions of ER 3.015(2), Wis. Admin. Code, which does not allow regrading incumbents during their probationary period. The Commission disagrees.

Section ER 3.015(3), Wis. Admin. Code, provides that incumbents of filled positions which will be reallocated or reclassified may not be regraded if:

> (a) The appointing authority has determined that the incumbent's job performance is not satisfactory;
> (b) The incumbent has not satisfactorily attained specified training, education or experience in a position identified in a classification series where the class levels are differentiated on this basis; or
> (c) The secretary determines that the position should be filled by competitive examination under s. 230.15(1), Stats.

The Commission first notes that the cited section is inapplicable to appellant's initial appeal. His initial appeal involved an **allocation** decision, not a **reallocation** or **reclassification** decision. Furthermore, respondent has made no specific argument to support a conclusion that appellant's work has been determined unsatisfactory, or that another of the cited disqualifying circumstances exist. In fact, the contrary inference exists based on DER's reallocation of appellant's position retroactively to his first day of work (rather than his first day off probation).

The Commission's opinion is further supported by ER 3.01(3)(b), Wis. Admin. Code, which clearly creates a bar to regrading of a probationary incumbent but only if a reallocation or reclassification action were involved and if such action was taken pursuant to ER 3.01(2)(f), Wis. Admin. Code, which relates to changes based on a "logical change in the duties and responsibilities of a position". This would not be the reason for reallocating appellant's position if appellant is successful in his appeal. Such change would be taken for "correction of an error", within the meaning of s. ER 3.01(2)(e), Wis. Admin. Code; which is the very reason cited by DER for the May 15, 1993, reallocation.

Furthermore, the code sections cited by DER might prohibit regrade of an incumbent under certain circumstances, but they do not bar an incumbent's appeal of the classification level of the position. In other words, the incumbent could pursue such an appeal even if the incumbent's regrade were not permitted.

5. Even if the Appointment Letter Could be Characterized as an Employment Contract, the Terms of the Contract Would Not Be Interpreted as Changing Appellant's Rights under Ch. 230, Stats.

DER argued that the appointment letter should be considered as a contract of hire and as controlling over any appeal rights which the Commission may find under Ch. 230, Stats. The Commission disagrees. It is the Commission's opinion that the statutory provisions control despite the existence of contrary hiring agreements.

The Commission's opinion is consistent with prior cases. In Kelling v. DHSS [DOC], Case No. 87-0047-PC (3/12/91), the Commission stated (at pp. 9-10) as follows:

> It might be the case that if Mr. Kelling had been dealing with a private sector employer instead of the state, some kind of contractual employment relationship might have resulted under the circumstances that occurred here [the offer of a higher wage than possible by statute]. However, the state civil service system is entirely a statutory creation, and this comprehensive statutory structure can not be overridden by individual contracts of employment created by and between individual state employes and applicants for employment. [Cites omitted] Wisconsin law is consistent with the foregoing authority. In State v. Industrial Commn., 250 Wis. 140, 144, 26 N.W.2d 273 (1947), the Supreme Court held:
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> > By these statutory provisions the state has provided how one may become an employee of the state, which requires, in order for a valid appointment to be made, full compliance with the provisions of the civil-service law. These statutory provisions leave no room for a person to become an employee of the state under an implied contract of hire.

6. DILHR's Appeal Rights, If Any.

DER's arguments filed in support of its motions, also addressed the question of whether DILHR had the right under Ch. 230, Stats., to contest the allocation of a position. DILHR filed no written appeal here, but DER wondered whether DILHR could be deemed to have constructively appealed when the Commission received appellant's appeal.

It is unnecessary for the Commission to reach these additional questions. Therefore, they are not discussed here.

ORDER

Respondent's motion is denied.

Dated November 29, 1993.

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner