STATE OF WISCONSIN PERSONNEL COMMISSION

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KATHY A. WARREN,
Appellant/Complainant,
v.
Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,
Respondent.
Case Nos. 92-0750-PC
92-0234-PC-ER
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INTERIM DECISION AND ORDER

The Commission, after having reviewed the Proposed Decision and Order and the objections thereto, and after having consulted with the hearing examiner, issues the following Interim Decision and Order. In reaching this decision, the Commission did not reverse or modify any of the hearing examiner's credibility determinations.

Nature of the Case

This is an appeal of an involuntary demotion, and a complaint of handicap discrimination. The respondent did not dispute liability. A hearing on the issue of remedy was held on April 11, 1995, before Laurie R. McCallum, Chairperson. The parties were permitted to file briefs and the briefing schedule was concluded on July 10, 1995.

Findings of Fact

1. Effective in November of 1988, appellant/complainant (hereinafter app/comp) was appointed to a Program Assistant-Supervisor 2 (PA Sup 2) position in the Disability Determination Bureau (DDB) of the Division of Vocational Rehabilitation (DVR) of the Department of Health and Social Services (DHSS). In this position, app/comp supervised Support Unit 4 which provided phone receptionist, word and data processing, and other support

services for adjudication staff. App/comp had previously attained permanent status in class only in the Program Assistant 1 (PA 1) classification.

2. In July of 1990, a new Telephone Support Unit (TSU) was established in DDB and app/comp became the supervisor of this new unit. App/comp's PA Sup 2 classification remained the same. The function of the TSU was to provide phone answering and message support, word and data processing support, and receptionist services for the DDB. App/comp's position supervised 3 or 4 PA 1 positions as the supervisor of the TSU.

3. Effective August 10, 1992, app/comp was involuntarily demoted from her PA Sup 2 position in the TSU to a PA 1 position outside TSU but still in the DDB.

4. On or around October 14, 1992, William Shelton, Director of the DDB, requested approval of a requested reorganization of the DDB. This reorganization merged the TSU and the Consultative Exam Unit (CEU), and assigned the responsibility for supervising this new TSU/CEU to the PA Sup 2 position which had been supervising just the CEU prior to the reorganization. At all times material to this matter, this PA Sup 2 position was filled by Joan Smith. At the time of the subject demotion and reorganization, Ms. Smith had greater seniority than app/comp. This reorganization eliminated app/comp's former PA Sup 2 (PR 1-11) position and recreated it as a Financial Specialist Supervisor 3 (PR 1-12) position in another unit. This reorganization was finally approved by the Secretary of DHSS on August 31, 1993.

5. The CEU is responsible for scheduling medical exams and preparing all related correspondence. After the reorganization, the non-supervisory staff of the TSU and CEU consisted of 8 PA 1 positions and these positions were cross-trained to handle the responsibilities of both units.

6. On August 10, 1992, appellant filed an appeal of her demotion; and on December 7, 1992, she filed a complaint of handicap discrimination in regard to her demotion.

7. On or around October 7, 1994, respondent offered app/comp reinstatement to a PA Sup 2 position in the DDB. The PA Sup 2 position which was vacant at that time and remained vacant until at least the date of hearing in this matter functions as the supervisor of Support Unit 3 in the DDB. This offer was made pursuant to settlement negotiations between the parties.

8. In a letter to the Commission dated January 13, 1995, app/comp indicated that settlement negotiations had broken down, and requested that the matter be set for hearing on the issue of remedy.

9. On or before January 13, 1995, respondent admitted liability in both cases under consideration here.

Conclusions of Law

1. These matters are properly before the Commission pursuant to §§230.44(1)(c) and 230.45(1)(b), Stats.

2. App/comp has the burden to show that, as an appropriate remedy in this matter, she is entitled to be restored to the PA Sup 2 position in the TSU from which she was demoted.

3. App/comp has failed to sustain this burden.

4. App/comp has the burden to show that, as an appropriate remedy in this matter, she is entitled to back pay.

5. App/comp has sustained this burden.

6. Respondent has the burden to show that app/comp failed to mitigate damages by rejecting an unconditional offer of restoration.

7. Respondent has failed to sustain this burden.

8. Respondent has the burden to show that the accrual of back pay damages ceased as of the date that app/comp's PA Sup 2 position was eliminated.

9. Respondent has sustained this burden.

Opinion

This matter involves both an appeal of an involuntary demotion pursuant to §230.44(1)(c), Stats., and a complaint of handicap discrimination under the Fair Employment Act (FEA).

The appropriate remedy in a civil service appeal such as the one here is governed by the following statutory sections:

> 230.43(4) RIGHTS OF EMPLOYES If an employe has been removed, demoted or reclassified, from or in any position or employment in contravention or violation of this subchapter, and has been **restored** to such position or employment by order of the commission or any court upon review, the employe shall be entitled to compensation therefor from the date of such unlawful removal, demotion or reclassification at the rate to which he or

> she would have been entitled by law but for such unlawful removal, demotion or classification. Interim earnings or amounts earnable with reasonable diligence by the employe shall operate to reduce back pay otherwise allowable. Amounts received by the employe as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the employe and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment. The employe shall be entitled to an order of mandamus to enforce the payment or other provisions of such order. (emphasis added)
>
> 230.44(4)(c) After conducting a hearing or arbitration on an appeal under this section, the commission or the arbitrator shall either affirm, modify or reject the action which is the subject of the appeal. If the commission or arbitrator rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision. Any action brought against the person who is subject to the order for failure to comply with the order shall be brought and served within 60 days after the date of service of the decision of the commission or the arbitrator.
>
> 230.44(4)(d) The commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in s. 230.43(1).

The statutory scheme presented here provides for the restoration of an improperly demoted employe to her former position, and provides that this *restoration shall not result in the removal of an incumbent absent a showing* of obstruction or falsification.

App/comp does not allege obstruction or falsification here. App/comp does argue, however, that restoring app/comp to the TSU/CEU supervisor position would not actually result in the removal of an incumbent since Ms. Smith would have rights to other positions in state service. This interpretation ignores the clear language of §230.44(4)(d), Stats., i.e., Ms. Smith is the incumbent of the TSU/CEU supervisor position and restoration of app/comp to that position would result in her removal.

App/comp's argument that she is entitled to restoration to the TSU/CEU position because she is entitled to restoration to her former position also ignores the fact that the TSU/CEU supervisor position is not her former position, i.e., app/comp's former TSU supervisor position was eliminated, the authorization for this position was transferred to another unit, the duties of this position were assigned to the TSU/CEU supervisor position, and these TSU

duties comprised only a portion of the duties of this TSU/CEU supervisor position.

Since §230.44(4)(d), Stats., operates to prevent the restoration of app/comp to the TSU/CEU supervisory position here, the question becomes one of determining to what position or type of position app/comp has a right to be restored. The term "restoration" is defined in the Wisconsin Administrative Code as follows:

> ER-MRS 1.02(30) "Restoration means the act of mandatory re-appointment without competition of an employe or former employe . . . to a position:
>
> (a) In the same class in which the person was previously employed;
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> (b) In another classification to which the person would have been eligible to transfer had there been no break in employment; or
>
> (c) In a class having a lower pay rate or pay range maximum for which the person is qualified to perform the work after the customary orientation provided to newly hired workers in the position.

It is undisputed that app/comp was offered appointment to a PA Sup 2 position in Support Unit 3 of the DDB on October 7, 1994. The record here shows that, not only is the position which app/comp was offered in October of 1994 in the same classification as the position from which she was demoted, but also that the nature of the support duties assigned to these positions are equivalent. The Commission concludes as a result that an appropriate remedy in this appeal is the appointment of app/comp to the vacant PA Sup 2 position offered to her by respondent on October 7, 1994.

This matter also involves a complaint of discrimination under the FEA. Although the remedies under the FEA are not as specifically delimited as those in an appeal, the general rule has been that a successful complainant should be made whole to the extent the Commission concludes is consistent with the purposes of the FEA. In cases in which it is concluded that the successful complainant was improperly denied appointment to a position or improperly removed from a position, it has been held that the appropriate remedy is appointment to the same position or a substantially equivalent position and back pay. See, e.g., Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W. 2d 594 (1983);

Paul v. DHSS & DMRS, Case No. 82-PC-ER-69 (1/25/95). In addition, in Paul, the Commission ruled that, given the length of time that had passed since the subject personnel action and the fact that the incumbent of the relevant position had not benefitted from the personnel action rejected by the Commission, removal of the incumbent and appointment of the successful complainant to this "same position" would not be an appropriate remedy. The Commission concludes that the same factors are applicable here in addition to the fact that this "same position" no longer exists other than as a portion of the TSU/CEU supervisor position, and concludes as a result that the removal of Ms. Smith from the TSU/CEU supervisor position would not be an appropriate remedy for the FEA complaint. Since appointment to the "same position" would not be appropriate here, and it has already been concluded above that the vacant PA Sup 2 position in Support Unit 3 which app/comp was offered on October 7, 1994, is a substantially equivalent position, it is concluded here that appointment to this position is also an appropriate remedy in regard to the FEA complaint.

Finally, back pay is an appropriate remedy here for both the appeal and the discrimination complaint and the parties do not dispute this. What is disputed, however, is the duration of such back pay liability on the part of respondent. In Anderson v. LIRC, cited above, the Supreme Court concluded that a mitigation of back pay damages provision in the FEA "would embody an offer of reinstatement as well as the acceptance of other employment." In reaching this conclusion, the Court was interpreting a provision which is identical to certain of the language in §111.39(4)(c), Stats. and which parallels the mitigation of back pay damages language in §230.43(4), Stats. In Anderson, the Court decided that the FEA should be interpreted to allow a valid offer of reinstatement to terminate an employer's back pay obligation as of the date the offer is rejected; and, to constitute a valid offer of reinstatement, the offer must be for the same position or a substantially equivalent position, must be unconditional, must provide the employee a reasonable time to respond, and should come directly from the employer or an agent of the employer authorized to make and effect such offers. The respondent's offer of October 7, 1994, was to appoint app/comp to a substantially equivalent position and is presumed to have given the app/comp a reasonable time to respond since app/comp did respond and no contention to the contrary has been raised, and came directly from one of the respondent's attorneys who is presumed to be a

duly authorized agent for all relevant purposes here. However, the record does not show that the offer was unconditional. The burden of showing that an offer of reinstatement is unconditional rests with the employer; and an offer of reinstatement is not considered unconditional if it requires relinquishment of a discrimination claim, including relinquishment of the right to pursue remedies. Ford Motor Co. v. EEOC, 458 U.S. 219, 73 L. Ed. 2d 721, 102 S. Ct. 3057 (1982); Odima v. Westin Tucson Hotel, 67 FEP Cases 1231 (9th Cir. 1995); Burris v. City of Phoenix, 2 AD Cases 1251 (Az. Ct. of App. 1993); World Mart Inc. v. Ditsch, 2 AD Cases 1091 (Wyo. Sup. Ct. 1993). Although evidence relating to the "parameters and the dimensions of the parties' attempts to settle" these cases was excluded on motion of app/comp and stipulation of respondent, the record shows that the parties were involved in settlement discussions during the relevant time period. It was respondent's burden to show that the offer of the PA Sup 2 position made on October 7 was not a component of these settlement discussions, i.e., that the offer of appointment was not contingent on app/comp's relinquishment of her claim of discrimination. Respondent failed to sustain this burden, conceding at hearing and in post-hearing filings with the Commission that the October 7 offer of the PA Sup 2 position was a component of ongoing settlement negotiations between the parties. (See, e.g., respondent's brief of February 27, 1996) Although respondent admitted liability in these cases on or before January 13, 1995, app/comp was still entitled to pursue her remedies under the FEA, and this admission of liability, as a result, did not render the offer of the PA Sup 2 position unconditional. As a consequence, it is concluded that respondent's back pay liability was not tolled by the admission of liability by respondent or by any other factor of record here, and that respondent has failed to show that app/comp failed to mitigate damages by rejecting respondent's offer of October 7 of appointment to the PA Sup 2 position in the DDB.

In her objections to the Proposed Decision and Order, app/comp raises for the first time a contention that the offer of the PA Sup 2 position on October 7 was not unconditional because there existed then and there remains now a dispute as to the amount of back pay and the level of pay on restoration to which she is entitled. Surprisingly, this argument and the facts which are cited in support of it are based on "the parameters and dimensions of the parties' attempts to settle" these cases which did not become a part of the

evidentiary record here on motion of app/comp, and on extra-record information provided by the parties which the Commission will not consider. In view of the conclusion drawn above that respondent failed to show that an unconditional offer of reinstatement had been made, it is not necessary to address this contention by app/comp. However, it should be noted that the authority cited by app/comp in this regard does not indicate that the failure of an employer to include in an offer of reinstatement specific dollar figures relating to pay places a condition on the offer; and that existing authority (Ford Motor Co. v. EEOC, 458 U.S. 219, 73 L. Ed. 2d 721, 733 at footnote 19 (1982); NLRB v. Midwest Hanger Co. 550 F. 2d 1101, 1103 (CA 8), cert denied 434 U.S. 830, 54 L. Ed. 2d 96, 98 S. Ct. 112 (1977)) indicates that the failure of an employer to include within an offer of reinstatement any provision for back pay does not impose a condition on the offer.

Although respondent has failed to show that the October 7, 1994, offer of reinstatement was unconditional, there is another aspect of the fact situation here that affects the duration of the accrual of back pay. Title VII case law indicates that, consistent with Title VII's purpose of recreating the circumstances that would have existed but for the illegal discrimination, aggrieved persons are not entitled to recover damages for the period beyond which they would have been terminated for a nondiscriminatory reason. See Welch v. Univ. of Texas, 659 F. 2d 531, 535, 26 FEP Cases 1725 (5th Cir. 1981); Gibson v. Mohawk Rubber Co., 695 F. 2d 1093, 30 FEP Cases 859 (8th Cir. 1982). As a consequence, damages would not be recoverable after the date a complainant's position was eliminated for legitimate, non-discriminatory business reasons. Archambault v. United Computing Sys., 786 F. 2d 1507, 40 FEP Cases 1050 (11th Cir. 1986). Respondent sustained its burden here by showing that it undertook and received approval for a reorganization designed to facilitate case processing and maximize the utility of a new computer system, and to continue to build the concept of "unit environment" within the agency. App/comp has failed to show that the reorganization was undertaken for purposes other than those stated by respondent, that the reorganization could not have achieved the stated purposes, or that the goals of the reorganization were not legitimate business goals of the agency. One of the results of the reorganization was that app/comp's position was eliminated and its duties and responsibilities assigned to a surviving PA Sup 2 position (See Finding of Fact 4, above). App/comp has also failed to show that she would have continued in

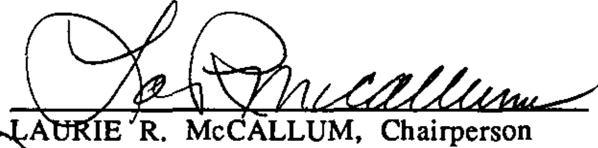
this surviving PA Sup 2 position instead of Ms. Smith, and such a conclusion would be inconsistent with the evidence in the record showing that Ms. Smith had greater seniority than app/comp. The record shows that, although the aspects of the reorganization plan relating to app/comp's PA Sup 2 position were the subject of a pilot implementation beginning in 1992, final approval was not obtained until August 31, 1993. It is concluded as a result that respondent's back pay liability terminated effective August 31, 1993.

Several difficulties with this case should be noted here. First of all, the attorneys who handled the hearing on remedy for the parties here appeared to have an understanding that the sole matter of dispute related to the comparability of app/comp's TSU PA Sup 2 position and the PA Sup 2 position offered app/comp in October of 1994. However, even though this understanding is implicit in view of the scope and content of the hearing record, these attorneys never made this understanding a matter of record. The second difficulty is that the parties have attempted numerous times to supplement the record through the filing of affidavits and through references in their arguments and objections to facts not of record. The Commission, however, is limited to the hearing record in deciding this matter and did not consider this extra-record evidence. In addition, even though the parties stipulated to exclusion from the record of certain evidence relating to settlement discussions, the parties have attempted to utilize such evidence in presenting their objections and arguments. The Commission did not consider here the evidence the parties agreed would be excluded. Finally, the parties had ample opportunity to litigate the issue of remedy in its entirety and the Commission does not intend at this point in these proceedings to hold the additional evidentiary hearing requested by app/comp to resolve factual disputes which could have and should have been addressed in the hearing already held.

Order

These matters are remanded to the respondent for action in accordance with this decision. A prehearing conference will be scheduled to discuss how to proceed in regard to the application for fees and costs filed by app/comp.

Dated: May 14, 1996 STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

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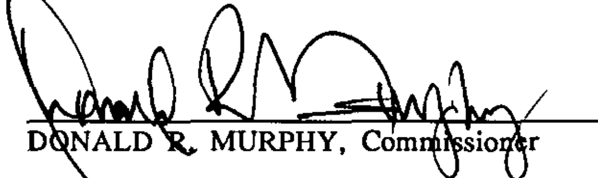
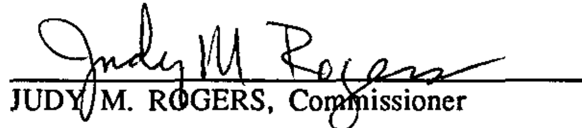


DONALD R. MURPHY, Commissioner



JUDY M. ROGERS, Commissioner

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