STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT C. JUNCEAU,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 92-0768-PC

INTERIM DECISION AND ORDER

This matter is before the Commission on a dispute as to the appellant's proper rate of pay. On June 22, 1993, Kurt M. Stege was designated hearing examiner, with his decision to serve as the final decision of the Commission pursuant to §227.46(3)(a), Stats. The parties filed a stipulation of facts. That stipulation is set forth below in substantially the same form as submitted by the parties, with the exception that all references to attached documents have been deleted.

FINDINGS OF FACT

1. The appellant is an attorney currently employed as an administrative law judge for the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations (hereafter respondent).

2. From 1978 until October 1985, the appellant was employed as a staff tax counsel and litigator for the Department of Revenue. On October 13, 1985, the appellant was classified as an Attorney 14 with a pay rate of $21.12 per hour.

3. Effective October 14, 1985, the appellant served in an unclassified appointive position as a commissioner on the Wisconsin Tax Appeals Commission. Because his duties as a commissioner required him to rule on cases involving the Department of Revenue, he did not request a leave of absence from the position he held at the DOR.

4. The appellant received a letter from the Department of Employment Relations in February 1992 which stated that he had reinstate-

ment eligibility under §230.33(2), Stats., for one year after the termination of his unclassified appointment. The letter also stated that the appellant did not have restoration rights to this former position or its equivalent.

5. The appellant's appointment to the Tax Appeals Commission came to an end on July 1, 1992. On July 17, 1992, the appellant was hired by the respondent as an administrative law judge (Attorney 13). The respondent calculated the appellant's salary to be $21.262 per hour, treating the transaction as an original appointment (per §ER 29.03(6)(a), Wis. Adm. Code) to which HAM (hiring above the minimum) guidelines could be applied. The salary of $21.262 per hour was one step below the midpoint of the Attorney 13 pay range. The appellant's employment with the respondent began on July 27, 1992.

6. In September of 1992, the respondent adjusted the appellant's salary to $21.883 per hour (retroactive to start date). The respondent did this because it concluded that the HAM guidelines allowed a maximum salary at the midpoint of the Attorney 13 pay range.

7. Shortly before September 1, 1992, the appellant was notified verbally by Teel Haas, Chief Counsel for DER, that DER had determined that he was, in fact, eligible for restoration under §230.33(1), Stats. On September 1, 1992, the appellant requested restoration to the Department of Revenue by letter of that date.

8. Because the appellant preferred to remain in his current administrative law judge position at DILHR, rather than accept a Collections - Attorney 14 position at the Department of Revenue, an agreement was reached under which he would resign from DILHR, accept a one day restoration to the Department of Revenue (on October 31, 1992, a non-work day) at a rate of pay of $28.082 per hour, and then accept a voluntary demotion back to DILHR at that same rate of pay, effective November 2, 1992.

9. On October 29, 1992, the Department of Revenue restored the appellant to an Attorney 14 position under §230.33(1), Stats., effective October 31, 1992. The appellant's salary upon restoration was $28.082 per hour. Effective November 2, 1992, the appellant was voluntarily demoted to the Attorney 13 - Administrative Law Judge position in the Division of Unemployment Compensation at the salary of $28.082 per hour.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden to establish that respondent's action in setting his starting pay at $21.883 per hour was illegal or an abuse of discretion.

3. Appellant has sustained his burden of persuasion.

OPINION

The matter before the Commission relates to the appellant's rate of pay for the period from July 17 through October 30, 1992. In its brief, the respondent raised a jurisdictional objection to consideration of the appeal under §230.44(1)(a) or (b), but referenced Meschefske v. DHSS, 88-0057-PC, 7/13/88 as supporting jurisdiction under §230.44(1)(d). The Commission agrees that jurisdiction in this matter is premised on §230.44(1)(d), and, based on the language of that paragraph, the Commission must determine whether the respondent's action was illegal or an abuse of discretion.

The respondent based its decision to pay the appellant at the rate of $21.883 on its interpretation of §ER 29.03(6)(a), Wis. Adm Code, treating the transaction as the equivalent of an original appointment for purposes of calculating starting pay. Pursuant to §ER 29.03(6)(a):

> (6) PAY ON REINSTATEMENT. (a) When an employe who has *not held permanent status in class within the last 3 years* is reinstated, pay on reinstatement shall be determined in accordance with the provisions regarding pay on original appointment. (emphasis added)

Respondent argues that because the appellant was not actually employed in a permanent classified position within the 3 years prior to reinstatement, he did not hold permanent status in class and respondent had to use §ER 29.03(6)(a) in calculating his starting pay. Complainant contends that this provision is inapplicable because he "held permanent status in class" throughout the period of his unclassified service because he was on a leave of absence without pay

from his DOR Attorney 14 position during that period pursuant to the provisions of §230.33(1):[1]

> **230.33 Leave of absence and pay while serving in unclassified position.** Employes who have completed an original appointment probationary period in the classified service and are appointed to a position in the unclassified service shall be subject to the following provisions relative to leave of absence, restoration rights, reinstatement privileges and pay:
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> (1) *A person appointed by the governor*, elected officer, judicial body or by a legislative body or committee, or by any other appointing authority when both the classified and unclassified positions are within his or her department, *shall be granted a leave of absence without pay for the duration of the appointment and for 3 months thereafter*, during which time the person has restoration rights to the former position or equivalent position in the department in which last employed without loss of seniority. *The person shall also have reinstatement privileges for 3 years following appointment to the unclassified service* or for one year after termination of the unclassified appointment whichever is longer. Restoration rights and reinstatement privileges shall be forfeited if the reason for termination of the unclassified appointment would also be reason for discharge from the former position in the classified service.
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> (2) A person appointed to an unclassified position by an appointing authority other than an elected officer, judicial body, legislative body or committee, to a department other than the one in which the person was a classified employe may be granted a leave of absence without pay at the option of the person's former appointing authority in accordance with the leave of absence provisions in the rules of the secretary. An employe granted a leave of absence shall have the same restoration rights and reinstatement privileges as under sub. (1). If not granted a leave of absence, the employe shall be entitled only to the reinstatement privileges under sub. (1).
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> (3) An employe appointed to a position in the unclassified service from the classified service shall be entitled to receive at least the same pay received in the classified position while serving in such unclassified position.
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> (4) This section shall supersede any provision of law in conflict therewith....(emphasis added)

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[1] Complainant contends that because of his status, respondent should have applied the language of §ER 29.03(6)(c), which states in part:

> (c)1. [W]hen an employe is reinstated, the base pay may be at any rate which is not greater than the last rate received plus intervening compensation plan adjustments... or contractual adjustments....

Initially, DER took the view that the appellant did not meet the requirements of §230.33(1) because he had not requested a leave of absence from DOR when he took the unclassified position at the Tax Appeals Commission. DER felt that because the appellant had not requested the leave, he did not actually receive the "leave of absence without pay for the duration of the appointment and for 3 months thereafter" referenced in sub. (1). It is undisputed that the appellant was "appointed by the governor,"[2] thereby meeting the other requirement of sub. (1).[3] As explained in Finding of Fact 7, DER changed its view after appellant had already reinstated to the DILHR position. DER determined that appellant had the rights provided under sub. (1) because he "had a mandatory right to a leave of absence upon his appointment to a Tax Appeals Commissioner position." DER explained its new conclusion as follows:

> Thus, we do not believe that denying Mr. Junceau's request for restoration on the basis of his failure to request a leave of absence would sustain a challenge; it appears that the obligation to provide such a leave was mandatory and, therefore, he should not have had to request a leave in order for it to be granted. Stipulation, Exhibit 4, page 2.

The issue raised by this appeal is whether, as a consequence of being on the leave of absence without pay, the appellant "held permanent status in class" as that phrase is used in §ER 29.03(6)(a). If so, the respondent was required to apply §ER 29.03(6)(c) when calculating his rate of pay on reinstatement. If not, the respondent was required to apply §ER 29.03(6)(a).

The rule relied on by respondent, §ER 29.03(6)(a), relates to the reinstatement of "an employe who has not held permanent status in class within the last 3 years." "Reinstatement" is defined in §ER 1.02(41) as "the act of permissive reappointment without competition of an employe or former employe under... 230.33." "Permanent status in class" is defined in §ER 1.02(29):

> "Permanent status in class" means the rights and privileges attained upon successful completion of a probationary period re-

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[2]Pursuant to §15.06(1)(a), "members of commissions shall be nominated by the governor, and with the advice and consent of the senate appointed...."

[3]Because he was appointed by the Governor rather than by another appointing authority, other language in §230.33(1) referring to situations where "both the classified and unclassified positions are within his or her department" is inapplicable to the appellant.

> quired upon an appointment to a permanent, seasonal or sessional position.

The definition simply refers to having attained rights and privileges. Nothing in the definition suggests that permanent status in class can only be maintained by continuing to actually work in the permanent, seasonal or sessional position which was the source of the rights and privileges.

One of the rights and privileges associated with permanent status in class is the right to appeal certain disciplinary actions to the Personnel Commission under §230.44(1)(c):[4]

> If an employe has permanent status in class... the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

An employe who is discharged for misconduct after having successfully completed a probationary period in a position and while on an approved leave of absence from that position, would clearly have a right to appeal the discharge under §230.44(1)(c), as an employe "with permanent status in class.". An employe does not temporarily give up their "rights and privileges" by taking a week-long leave of absence to extend a vacation. "Leave of absence" is defined in §ER 1.02(16) as "an absence from employment" rather than specifying a loss of rights.

The leave of absence scenario can be distinguished from an employe who has permanent status in class and then takes a promotion or transfer, serves a probationary period, and is terminated while in that probationary period. Such an employe may be terminated while on probation in their new position without a right to appeal that decision to the Commission under §230.44(1)(c), Stats.[5] This latter situation was addressed in DHSS v. State

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[4]For employes who have permanent status in class and are in a collective bargaining unit with a collective bargaining agreement in effect, "the determination of just cause and all aspects of the appeal procedure shall be governed" by the agreement. §230.34(1)(ar)

[5]Harshman v. UW, 91-0019-PC, 4/18/91. However, where the promotion is within the same agency, a termination from the promotional position which results from conduct of such a nature that the appointing authority decides to separate the employe from state service would be an appealable action. Jensen v. UW, 88-0077-PC, 12/14/88

Personnel Board, 84 Wis. 2d 675, 267 N.W. 2d 644 (1978), which interpreted the authority of the Commission's predecessor, the Personnel Board, under §16.05(1)(e), 1975 Stats., to:

> Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to... discharges,... but only when it is alleged that such decision was not based on just cause....

The employe in that case, Mr. Ferguson, sought review of a decision by the Department of Health and Social Services terminating his employment while serving a probationary period as a Management Information Specialist 3 (MIS 3). Mr. Ferguson had attained permanent status in class as a MIS 2 at the University of Wisconsin before taking a promotion to the MIS 3 position at DHSS. The court noted that another statutory provision specified that promotions "*within* a department shall not affect the permanent status in class and rights, previously acquired by an employe within such department," and that the administrative rules at that time defined permanent status in class as "... the status of an employe *in a position* who has served a qualifying period to attain a permanent position *for that class*."[6] The court concluded that this definition required "that status in class relate to a class in which the employe is then serving, not a position in which he has served in the past." 84 Wis. 2d 675, 682 Because Mr. Ferguson did not have permanent status in class as a MIS 3 at the time of his termination, the board lacked jurisdiction over his appeal of the termination decision.

If the definition of "permanent status in class" that was in effect in 1975 remained in effect in 1992, an argument could be made that the appellant's rights would arise solely from his position in the unclassified service rather than out of a classified position from which he was on leave. However, the current definition of "permanent status in class," set forth above, does not require the employe to be actually serving in a position in order to have the rights and privileges associated with holding permanent status in class.

This interpretation of the current definition of "permanent status in class" found in §ER 1.02(29), is supported by the language of §230.28(1)(d):

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[6]As discussed below, this definition has been changed since the transaction under review in DHSS v. State Personnel Board, and this significantly affects the outcome in the instant appeal.

> A promotion or other change in job status within an agency shall not affect the permanent status in class and rights, previously acquired by an employe within such agency. An employe demoted under s. 230.34(1) shall not retain the permanent status in class previously acquired in the classification from which demoted.

This language explicitly establishes that permanent status in class can continue, even though the employe has left the position from which that status was initially generated.

Other provisions in §ER 29.03 also refer to employes who hold permanent status in class:

> (4) PAY ON PROMOTION. (a) Definitions. In this subsection:
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> 1. "Present rate of pay" means any of the following:
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> a. For the promotion of an employe serving a probationary period who also attained permanent status in class within the past 3 years, the base pay rate calculated as if the employe were restored to a position in the class in which the employe had permanent status in class. If the employe *held permanent status in more than one position within the past 3 years*, the base pay rate on restoration must be calculated for each position in which the employe held permanent status and the "present rate of pay" would be the greater of these base pay rates.
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> * * *
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> e. For the promotion of an employe on approved leave of absence, the base pay rate calculated as if the employe were restored to a position in *the highest class in which permanent status in class was held* at the time the employe began the leave of absence.
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> * * *
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> (6) PAY ON REINSTATEMENT. (a) When an employe who has not held permanent status in class within the last 3 years is reinstated, pay on reinstatement shall be determined in accordance with the provisions regarding pay on original appointment.
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> (b) For the purposes of par. (c), "last rate received" means the highest base pay rate received in any position in which the employe *held permanent status in class*, within the last 3 years.

These provisions indicate that is possible to hold permanent status in class in more than one position at the same time, for purposes of computing pay.

Nothing in the statutes or rules suggests that an employe commencing an approved leave of absence from a permanent position from which the employe has obtained permanent status in class loses any "rights and privileges attained upon successful completion of a probationary period required upon appointment" so as to fall outside of the definition of "permanent status in class" in §ER 1.02(29).

In the present case, the appellant served in the unclassified service from 1985 to 1992 but he simultaneously retained permanent status in class at the Attorney 14 level as a consequence of being on an unpaid leave of absence from his previous classified position. Because he held permanent status in class during this period, the respondent erred in applying §ER 29.03(6)(a) when calculating his starting pay upon reinstatement.

ORDER

Respondent's action of invoking §ER 29.03(6)(a) is rejected and this matter is remanded for action in accordance with this decision.

Dated: September 30, 1993 STATE PERSONNEL COMMISSION

KURT M. STEGE, Hearing Examiner

KMS:kms
K:D:Merits-pay (Junceau)