STATE OF WISCONSIN PERSONNEL COMMISSION

GLENN E. KELLEY,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 93-0208-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(d), Stats. In a ruling on respondent's motion to dismiss entered on February 23, 1994, the Commission denied respondent's motion to dismiss for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. Gregory Frigo began serving in 1981 as the Director of the Bureau of Legal Affairs (BOLA) in the Unemployment Compensation (UC) Division in the Department of Industry, Labor and Human Relations (DILHR), following a competitive process. This position has been at all relevant times in the classified civil service with a classification of Attorney 14 - Management.

2. Effective January 29, 1990, Mr. Frigo accepted an appointment as Administrator of the Workers Compensation (WC) Division within DILHR. This position at all relevant times has been in the unclassified civil service.

3. Following a competitive process, appellant (Glenn E. Kelley) accepted an appointment as BOLA director, effective May 13, 1990. Prior to this appointment, appellant had been in a court attorney position, classified as Attorney 14, in the Labor and Industry Review Commission (LIRC).

4. Respondent never advised appellant during the selection process for the BOLA director position that Mr. Frigo had restoration rights pursuant to §230.33(1), Stats., with respect to the BOLA director position. However, appellant knew that Mr. Frigo had been the BOLA director before he (Frigo) accepted the WC administrator appointment.

5. During his tenure as BOLA director, respondent considered appellant's performance to have been excellent.

6. Part of the basis of Mr. Frigo taking the unclassified WC administrator job in January of 1990 was his understanding, based on his conversation with DILHR management, that he would have the right to an Attorney 14 position within DILHR if and when he left the WC administrator position.

7. In June 1993, Mr. Frigo became aware that as a consequence of the recently negotiated state attorneys' contract, and related changes in the nonrepresented attorneys' pay plan, his salary in his unclassified position was falling substantially below what he would have been earning if he had remained in his classified position, and that if he restored to an Attorney 14 position in the classified service, his annual salary would increase by about $10,000.

8. Mr. Frigo decided that because of the impending matriculation in college of two children he would prefer to restore to the classified service, and in a letter to respondent's secretary (Carol Skornicka) and her executive assistant (Richard Wegner) dated June 14, 1993, (Respondent's Exhibit 1) he stated he was "requesting reassignment to an attorney position within DILHR."

9. Following this request, DILHR management engaged over a period of several weeks in a dialogue with the Department of Employment Relations (DER), concerning the effectuation of this request.

10. Respondent wanted to restore appellant to the BOLA director position, and then on a temporary basis dual fill that position while assigning Mr. Frigo on a temporary interchange basis, pursuant to Ch. ER 47, Wis. Adm. Code, to his WC administrator position. This interchange, which required DER approval, §ER 47.02, would have allowed him in effect to have continued as WC administrator while drawing the higher salary available to an Attorney 14 - Management in the classified service.

11. As set forth in an August 12, 1993, memo from DER to DILHR (Respondent's Exhibit 5), DER advised of its final decision that it would not approve such an interchange agreement because, in its opinion, the temporary interchange provisions were not applicable to intraagency (vs. interagency) interchanges.

12. Following this communication from DER, DILHR proceeded to reorganize BOLA by using a vacant represented Attorney 14 position to create

a Deputy Director position,[1] restoring Mr. Frigo to this position, and then immediately temporarily assigning him pursuant to Ch. ER-Pers 32, Wis. Adm. Code ("ACTING ASSIGNMENTS") as acting WC administrator. These transactions were reflected primarily in two letters dated August 20, 1993. In a letter to Secretary Skornicka from Mr. Frigo (Respondent's Exhibit 8), he advised he was "resigning as the Administrator of the Workers Compensation Division and exercising my right to return to an Attorney 14, Management position." In a letter from Secretary Skornicka to Mr. Frigo (Respondent's Exhibit 9), she advised that he would be restored effective August 22, 1993, and further as follows:

> The position I intend to initially restore you to is that of the Deputy Director of the UC Bureau of Legal Affairs. This position has just been submitted to the Department of Employment Relations for appropriate approvals. While I await their approvals, I need to confer with Bruce Hagen [UC Division Administrator] and determine which management attorneys should end up in which positions. Additionally, I need to address the issue of how to fill your vacant division administrator position. During this interim period, I am assigning you to serve as the acting Administrator of the Worker's Compensation Division. You would serve with all of the authority you have had in the past. This assignment is effective August 23, 1993, and will last until October 26, 1993, unless rescinded earlier.

13. Respondent's intent was to assign Mr. Frigo as acting WC administrator for a minimum of 45 days, which would not require DMRS approval, §ER-Pers 32.02, Wis. Adm. Code, while pursuing DMRS approval for a six months acting assignment, which could be extended, also subject to DMRS approval.

14. On September 10, 1993, respondent both requested DMRS approval of Mr. Frigo's six months acting assignment as WC administrator and advised Mr. Frigo that his acting assignment would continue until February 22, 1994.

15. On September 21, 1993, DMRS refused to approve the acting assignment, based on its interpretation of Chapter ER-Pers 32 that acting assignments could not be made to unclassified positions.

16. At this point, respondent proceeded to address the issue of Mr. Frigo's return from his acting assignment as WC administrator to the classified

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[1] Appellant had recommended this reorganization for program reasons prior to Mr. Frigo's request to return to the classified service, but it had not been implemented previously.

service, in light of the necessity of abandoning its original plan due to DMRS's decision. A series of discussions were held among a number of management officials, including, at various points, the secretary, the secretary's executive assistant, the agency personnel manager, the UC division administrator, and the UC deputy division administrator. The focus of discussions was the question of whether Mr. Frigo would be returned to the BOLA director's position or remain in the deputy position to which he nominally had been restored. Mr. Frigo was consulted during this process, but not appellant.

17. When management consulted with Mr. Frigo concerning the need to actually return him to a classified position from his acting assignment as WC administrator, Mr. Frigo said he would be a "good soldier" and do a good job in any position to which he might be assigned, but that his preference was for the BOLA director position.

18. Respondent ultimately decided to transfer Mr. Frigo to the director's position and appellant to the deputy position, and this was effectuated effective October 17, 1993.

19. Respondent's decision was based on a number of factors. Respondent's interpretation of Mr. Frigo's restoration rights under §230.33(1), Stats., in the context of this decisional process, was that those rights would be satisfied by restoration to either the director or the deputy position. Both Mr. Frigo and the appellant were considered to be exceptional employes, so performance was <u>not</u> a factor. Respondent felt there was no precedent for the situation with which they were dealing, and that under these circumstances it was appropriate to advert to the factor of seniority that controls or figures prominently in somewhat analogous personnel transactions such as layoffs and contractual transfers. Since Mr. Frigo had greater seniority both in terms of overall state employment and as BOLA director, this factor favored him. Respondent also considered Mr. Frigo's preference for the director's position. Respondent also stated it did not want to "penalize" Mr. Frigo for having accepted the unclassified appointment.

20. Respondent developed position descriptions (PD's) for the BOLA director and deputy director positions (Respondent's Exhibits 17 and 18) with the intention that there would be a degree of shared governance of BOLA, and also with the intention that the positions would be at the same level (Attorney 14 - Management) from a classification standpoint. Without addressing whether these goals were achieved theoretically, the director's position is

classified at the same level as the deputy position, but the director's position is at a somewhat higher level of authority, responsibility, and prestige in terms of its reporting relationship -- it reports directly to the UC division administrator, while directly supervising the deputy -- and in terms of having (and in some cases exercising) final authority on BOLA decisions.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of persuasion to establish that the personnel action by which he was moved from the BOLA director position constituted an illegal act or an abuse of discretion.

3. Appellant has failed to sustain his burden except to the extent the record establishes that respondent based its decision in part on an erroneous interpretation of §230.33(1), Stats. However, since a correct interpretation would have reinforced the decision respondent actually reached, this incorrect interpretation amounted to harmless error, and the action appealed did not constitute an illegal action or an abuse of discretion and must be affirmed.

OPINION

The parties through counsel stipulated to the following statement of issue for hearing: "Was the personnel action by which appellant was moved from the position of director to deputy director an illegal act or an abuse of discretion." Conference Report dated April 18, 1994. In his posthearing briefs, appellant attempts to interject two new issues -- whether he was constructively demoted without just cause, and whether he was removed from the BOLA director position without just cause. These issues are outside the scope of the issue noticed for hearing and cannot be considered by the Commission. See, e.g., Chicago, M., St.P. & P.R.R. Co. v. ILHR Dept., 62 Wis. 2d 392, 399-400, 215 N.W. 2d 443 (1974). This is particularly the case given the Commission's February 23, 1994, ruling on respondent's motion to dismiss, which, while concluding there was jurisdiction under §230.44(1)(d), Stats.,[2]

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[2] "Illegal action or abuse of discretion. A personnel action after certification which is related to the hiring process in the classified service

explicitly rejected appellant's assertion of jurisdiction under §230.44(1)(c),[3] as a demotion, actual or constructive. The Commission noted that under prevailing precedent, there could not be a constructive demotion "unless the appellant's duties have changed to the extent that his position should be reclassified to a class lower than Attorney 14 - Management, and unless the personnel transaction in question was taken with the intent to discipline the appellant," but that "appellant does not make either assertion." Ruling, p. 3. Subsequent to this ruling, appellant never requested reconsideration or made such an assertion, and, as noted above, stipulated to an issue that does not include an allegation of actual or constructive demotion.

Even if these issues were properly before the Commission, appellant could not prevail on either. What occurred here was not a demotion, as the Commission concluded in its earlier ruling, because appellant was moved between two positions in the same classification, at identical pay ranges and with the same salary, and §ER-Pers 1.02(5), Wis. Adm. Code, defines "demotion" as a move to a position in a lower classification. Appellant now contends that this was a "removal" under §230.34(1)(a),[4] Stats., for which there was no just cause. Neither Chapter 230, not the rules promulgated thereunder define "removed." However, since what happened to appellant in this case clearly was a transfer,[5] pursuant to §230.29, Stats.,[6] the more specific denomination of this transaction would control. Furthermore, the Commission has no jurisdiction pursuant to §230.44(1)(c), Stats.,[7] over an appeal of a "removal" unless the transaction were equivalent to a discharge or demotion.

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and which is alleged to be illegal or an abuse of discretion may be appealed to the commission."

[3] "*Demotion, layoff, suspension or discharge.* 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."

[4] "An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause."

[5] Section ER-Pers 1.02(3), Wis. Adm. Code, defines "transfer" as: "the permanent appointment of an employe to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employe's current positions is assigned."

[6] "A transfer may be made from one position to another only if specifically authorized by the [DMRS] administrator."

[7] "*Demotion, layoff, suspension or discharge.* If an employe has permanent status in class ... the employe may appeal a demotion, layoff,

With respect to the issue of constructive demotion, appellant has not attempted to show either an intent to discipline, or circumstances which would give rise to a constructive demotion in lieu of layoff, so the elements of a constructive demotion are missing. See Davis v. ECB, 91-0214-PC (6/21/94).

Turning to the stipulated issue in this appeal ("Was the personnel action by which appellant was moved from the position of director to deputy director an illegal act or an abuse of discretion." Conference Report dated April 18, 1994), aside from the extraneous issues discussed above, appellant has not alleged any illegality per se with respect to this transaction, so the case comes down to whether there was an abuse of discretion.

Before proceeding further with this question, it is important to delineate the reach of the Commission's inquiry pursuant to §230.44(1)(d), Stats. Under this provision, the subject matter of the appeal is limited to a "personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion." (emphasis added). As respondent contends, the Commission may not address the management decisions that preceded this personnel transaction, specifically the decision to create a BOLA deputy director position, at least in part to address the situation created by Mr. Frigo's request for restoration. Therefore, this decision does not address the merits of that action.

With respect to the substantive law applicable to the issue before the Commission, an abuse of discretion is: "'a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.' Murray v. Buell (1889), 74 Wis. 14, 19, 41 N.W. 1010." Bernfeld v. Bernfeld, 41 Wis. 2d 358, 365, 164 N.W. 2d 259 (1969). See also Lundeen v. DOA, 79-0208-PC (6/3/81). An agency acts outside the scope of a proper exercise of, or abuses its discretion, when it bases a discretionary decision on an erroneous view of the law relating to the transaction in question. Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W. 2d 16 (1981) ("A discretionary determination, to be sustained, must demonstrably be made and based ... in reliance on the appropriate and applicable law."); Galang v. Medical Examining Board, 168 Wis. 2d 695, 700, 484 N.W. 2d 375 (Ct. App. 1992) ("And where the record shows that the agency looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable tribunal could reach, and (b) consistent

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suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause."

with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree. Hartung v. Hartung [id.]."). A related principle is that if an agency considers a factor it should not have considered, or fails to consider at all a factor it should have considered, this can amount to an abuse of discretion. See Motor Veh. Mfrs. Assn. v. State Fam. Mut., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 458, 103 S. Ct. 2856 (1983).

The actual personnel transaction that moved appellant from the BOLA director position to the BOLA deputy director position was a transfer. While the appointing authority has the authority to transfer employes, the civil service code provides no real specific guidance as to the parameters of the proper exercise of this authority.[8] Therefore, based on the authority cited above, the decision must be examined to determine:

(1) Whether the decision had a rational basis.

(2) Whether respondent failed to consider any factors which it can be concluded it should have considered, or considered any improper factor.

(3) Whether respondent based its decision on any erroneous views of the law.

Included in respondent's decisional process was the at least implicit opinion that although Mr. Frigo had already technically exercised his §230.33(1), Stats., restoration rights by his appointment to the deputy position prior to the actual transaction which was appealed and is the subject matter of this proceeding (Frigo's transfer to the director position simultaneous with appellant's transfer to the deputy position), the transfer decision properly should have taken into consideration Mr. Frigo's status of requesting restoration to the classified service. That is, after Mr. Frigo had requested restoration, respondent created the deputy position through a reorganization and restored him to this position. However, respondent initially conceived of this as strictly a temporary move while it pursued its primary goal of allowing Mr. Frigo to remain in the WC administrator position while being paid commensurate with a classified Attorney 14 - Management status.[9] Thus, Mr.

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[8] Chapter ER-Pers 15 and §ER Pers 1.02(33), Wis. Adm. Code, provide technical requirements for transfers, such as that the position to which the transfer is made has to be in a classification having the same or counterpart pay rate or pay range as the position from which the transfer is made. There is no dispute in this case about compliance with these technical requirements.

[9] See Finding #12, where Secretary Skornicka in her August 20, 1993, letter to Mr. Frigo states that: "I intend to initially restore you to ... Deputy

Frigo was placed in the deputy position only "on paper" while he continued to perform the WC Administrator job on a temporary basis pursuant to §ER-Pers 32.02, Wis. Adm. Code.[10] After about a month under this arrangement, respondent found out that DMRS would not approve Mr. Frigo's acting assignment as WC administrator. Therefore, respondent then addressed the question of which position Mr. Frigo would occupy on a permanent basis. In making this decision, the most significant factor respondent relied on was seniority. Respondent's reliance on seniority in turn was based primarily on analogizing the situation involving Mr. Frigo and appellant to a layoff situation, which in turn relied on viewing the matter from the perspective of a §230.33(1), Stats., restoration from the unclassified to the classified service.[11] The initial question presented by these circumstances is whether respondent's consideration of Mr. Frigo's restoration rights under §230.33(1), Stats., was reasonable, given that presumably he already had exercised those rights when he had been restored to the deputy position.[12] While the advisability of respondent's approach is certainly open to debate, in the Commission's opinion this approach did at least have a reasonable basis.

To begin with, as discussed above, there are no substantive criteria under the civil service code that govern the appointing authority's exercise of

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Director ... While I await their [DER] approvals, I need to confer ... and determine which management attorneys should end up in which positions."

[10] Pursuant to this provision, the appointing authority has discretionary authority to make an acting assignment for up to 45 days. Acting assignments over 45 days require DMRS approval.

[11] See, e.g., Christenson deposition, 51-52:

> Q So in using the layoff analogy, you weren't aware of really any authority for using that analogy other than it seemed appropriate...?
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> A. Well, the authority is clear to me under 230 that he has a restoration right, that he has a right to a Range 14 pay position, and the issue becomes one -- if you have multiple attorneys -- multiple positions at the same level, on what basis do you make the decision who goes where ... if it's not going to be based on performance or it's not going to be based upon special skills ... seniority is what the system uses basically ... that's what we do in layoff type situations.

[12] As will be discussed below in the Commission's opinion, Mr. Frigo's §230.33(1) restoration right actually ran to the director position, and arguably he still had that right at the time of his transfer to that position.

discretion with respect to transfers, so there is no specific barrier to this approach. Second, this approach recognized that Mr. Frigo's initial restoration had always been intended as a nominal and temporary transaction while respondent attempted to work out a permanent solution that would be acceptable to DER and which would address the interests of all the involved principals -- the result respondent sought would have kept appellant in the BOLA director position and Mr. Frigo in the WC administrator position, which would have been the best outcome from a management perspective. Given the temporary and contingent nature of the initial restoration, it does not appear unreasonable for respondent to have considered, as part of its exercise of discretion with respect to the transfer, where things stood before the restoration, rather than ignoring all of this background that led up to that point.

Having concluded that it was not unreasonable for respondent to have considered Mr. Frigo's restoration rights in making its decision regarding transfer, the Commission will proceed to consider the other facets of the transaction from the standpoint of whether there was an abuse of discretion. The Commission will address the factors respondent actually considered, as well as factors that arguably should have been considered.

The primary factor respondent considered was seniority. As was discussed above, seniority was brought into the picture by analogizing to a layoff situation, which analogy in turn depended on consideration of Mr. Frigo's restoration rights. In other words, respondent analogized to layoff situations involving multiple employes and multiple positions, with respect to which an employe's rights to positions are controlled under certain circumstances by seniority.[13] While there are various arguments, pro and con, that can be made concerning the appropriateness of respondent's reliance on the seniority factor in this context, in the Commission's opinion respondent's approach here was based on an incorrect interpretation of Mr. Frigo's restoration rights (as will be discussed below), and a correct

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[13] For example, ER-Pers 22.08 (intro), Wis. Adm. Code, provides: "Employes in the same layoff group who are laid off on the same date shall have the right to exercise the following alternatives to termination from the service as a result of layoff in direct order of their seniority, most senior first." (emphasis added).

interpretation would have led directly to the same result respondent actually reached through a more circuitous route.

Respondent's view of the law in this area was that Mr. Frigo's restoration rights under §230.33(1), Stats., extended only to another position in the same classification as the position he previously had held in the classified service, and not to the BOLA director job itself. This conclusion was a basis for respondent analogizing to a layoff situation involving multiple employes, none of whom have paramount rights to a particular position, at which point seniority becomes the deciding criterion. However, once respondent approached the instant transaction from the standpoint of a restoration, which, as discussed above, was itself reasonable, respondent should have recognized under a correct interpretation of §230.33(1) that Mr. Frigo under the circumstances had mandatory restoration rights to the BOLA director position without respect to seniority. The Commission bases its conclusion as to the meaning of §230.33(1), Stats., on both the statutory language and recent caselaw interpreting similar language, which the Commission considers highly persuasive.

Section 230.33(1), Stats., provides for "restoration rights to the former position or equivalent position." (emphasis added). The word "equivalent" means: "[e]qual in value, force, measure, volume, power, and effect or having equal or corresponding impact, meaning or significance; alike, identical." BLACK'S LAW DICTIONARY 486 (5th ed. 1979). This word thus connotes a greater degree of sameness than is necessarily satisfied by another position which is merely in the same classification. This is illustrated by the juxtaposition of the language in §230.33(1), with somewhat analogous provisions such as found in §230.337 ("**Rights of employes: corrections or parole.**") which provides for restoration rights "to a position having a comparable or lower pay rate or range," (emphasis added); and §230.3335 ("**Rights of unclassified division administrators**"), which provides on termination from the unclassified position for "appointment rights ... to a comparable or lower level position." (emphasis added).

The foregoing discussion is also consistent with judicial interpretation of similar language. Andersen v. LIRC, 111 Wis. 2d 245, 256, 330 N.W. 2d 594 (1983), includes the following discussion of the term "same position or a substantially equivalent position":

> First the offer of reinstatement should be for the same position or a substantially equivalent position. Comparability in salary should not be the sole test of a reasonable offer of alternative employment; it is only one factor to be considered. Comparability in status is often more important, especially as it relates to opportunities for advancement or for other employment. (emphasis added) (citation omitted)

The Supreme Court followed this case in Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 246-50, 493 N.W. 2d 68 (1992), which interpreted a provision in the Family and Medical Leave Act (FMLA) which requires that on return from FMLA leave, an employe must be placed in his or her former position, or if not vacant, a position with "equivalent compensation, benefits, working shift, hours of employment and other terms and conditions of employment." §103.10(8)(a)2, Stats. The Court held that notwithstanding that the position to which the employe had been returned "was equivalent in terms of compensation benefits, working shift, and hours ... her new position was not an equivalent employment position because her authority and responsibility were greatly reduced in the new position." 172 Wis. 2d at 247. The Court continued as follows:

> There is a deterrent factor in taking leave if all that is protected is an employe's salary, hours, and benefits. It is punitive in nature for an employee to have job responsibility and authority stripped while on leave. This forces an employee to choose between their family or health and job which is exactly what the legislature intended to prevent by adopting the FMLA.
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> In defining what a substantially equivalent position was for reinstatement under the Wisconsin Fair Employment Act, this court stated that comparability in salary was only one factor to be considered in determining whether a new position was substantially equivalent to the employee's previous position. *Andersen v. LIRC*, 111 Wis. 2d 245, 256, 330 N.W. 2d 594 (1983). This court stated that "[c]omparability in status is often more important, especially as it relates to opportunities for advancement or for other employment." *Id.* 172 Wis. 2d at 250.

In the instant case, while the deputy and the director position were in the same classification and salary range, there is no question on this record but that the director position, which has ultimate authority over BOLA operations and directly supervises the deputy, is at a higher level than the deputy position in terms of authority and responsibility, and the positions were not equivalent. Since there was no equivalent position available, Mr. Frigo's restoration rights ran to his previous position of BOLA director, and respondent should have resolved this factor on this basis, without having to

have gone through the layoff/seniority analogy process. However, since respondent reached the same result, its erroneous interpretation of §230.33(1) constituted harmless error.

Based on the foregoing conclusion regarding Mr. Frigo's §230.33(1) restoration rights, it is arguable that since his initial appointment to the BOLA deputy director position was not to his "former position or equivalent position," it did not exhaust his restoration rights (notwithstanding respondent's denomination of it as a restoration). That is, §230.33(1) provides both for restoration rights and reinstatement privileges (the latter "for 3 years following appointment to the unclassified service or for one year after termination of the unclassified appointment whichever is longer.") Arguably Mr. Frigo's appointment to the deputy position was in legal effect a reinstatement and he retained his restoration rights for three months after his departure from the unclassified service effective August 22, 1993, and still had a mandatory restoration right to the director's position as of the October 17, 1993, date of his appointment to that position via what was denominated a transfer. However, even looking at this transaction (as did respondent) as a discretionary transfer, respondent's decision had a rational basis and must be sustained.

The other factors respondent relied on (besides seniority stemming from its opinion concerning the effect of §230.33(1), Stats.) were Mr. Frigo's preference for the director position over the deputy position, and the desire not to "penalize" Mr. Frigo for having taken an unclassified position. In and of themselves, these are not unreasonable considerations, although obviously it can be argued that respondent should have given more weight to other factors.[14]

There are a number of factors that respondent either did not consider, or, if considered implicitly, were not given sufficient weight from appellant's standpoint. Before discussing these points, the Commission will address appellant's "politicization" contention, set forth in his post-hearing brief as follows:

> This case is about politics and the civil service system. A political appointee who found the appointment not to his liking is being given

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[14] These factors also are implicit in Mr. Frigo's restoration rights, discussed above.

> more than his statutory restoration rights, at the expense of a dedicated civil service employee who responded to an advertisement of a permanent position, who competed for this position under the merit recruitment rules, who left a secure and worthy job, who moved his residence and family to be closer to his new position, and who performed the job for three and one half years, consistently receiving excellent evaluations. Thus, a bureau level position has been politicized, contrary to the established practice that political appointments do not extend below the division administrator level.

However, there is no evidence in this record either that Mr. Frigo was politically oriented or any other evidence that respondent's decision was colored by either "political" considerations or Mr. Frigo's status as an administration appointee, as appellant apparently contends.

Appellant also contends that respondent failed to consider the fact that respondent never informed him during the selection process for the BOLA director job either that Mr. Frigo had restoration rights to this position under certain circumstances, or that it would be possible that his (appellant's) tenure as BOLA director would be anything but permanent.[15] While the Commission agrees with appellant that it is indeed unfortunate that the candidates for the BOLA director's position were not advised regarding Mr. Frigo's §230.33(1), Stats., restoration rights, respondent's failure to have considered this factor does not constitute the basis for a conclusion of abuse of discretion with respect to appellant's subsequent transfer.

Appellant testified that he was aware from his state service prior to his appointment to the BOLA director position that Mr. Frigo had occupied that position for a number of years prior to his (Frigo's) acceptance of the WC administrator's position. Mr. Frigo's restoration rights, and their potential impact on the BOLA director incumbent were a matter of statutory law at the time appellant interviewed for the position. An appointing authority has no general obligation to inform an employe of his or her status under the civil service code. See Jabs v. State Board of Personnel, 34 Wis. 2d 245, 148 N.W. 2d 853 (1967), where the Court specifically rejected the contention that the circumstances surrounding a discharge, which included the appointing authority's failure to have advised the employe concerning the leave rules applicable to her situation, constituted arbitrary or capricious action.

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[15] Appellant testified that had he known about these factors, he probably would not have pursued this promotional opportunity.

Appellant also relies on §230.01, Stats., "[s]tatement of policy" (intro.), which provides at §230.01(2) that:

> It is the policy of the state to ensure its employes opportunities for satisfying careers and fair treatment based on the value of each employe's services.

This general language adds little to the abuse of discretion analysis. The degree of fairness or unfairness involved in a discretionary decision presumably could enter into the evaluation of the reasonableness of that decision. However, the general policy language contained in §230.01(2) cannot supplant the abuse of discretion standard reflected in §230.44(1)(d), Stats., with some generalized notion of fairness.

In any event, turning to appellant's more specific related arguments, he characterizes what occurred here as losing by transfer a position he "won" under the competitive civil service process. However, Mr. Frigo also testified that he had obtained the BOLA director appointment through a competitive process. The interchange by transfer of Mr. Frigo and appellant was not rendered unfair because of the fact appellant had competed for the director's position.

Appellant also stresses the fact that respondent never consulted with him during the decision-making process, while it did consult with Mr. Frigo. Respondent had an obvious reason to have consulted with Mr. Frigo inasmuch as he was the one who had requested restoration. Upon the demise of respondent's plan to restore him to a classified position on a technical basis only, while keeping him in the WC administrator position, it was logical for respondent to have discussed the situation with him, at least in part to determine which of the classified positions he preferred. While in the Commission's opinion, it also would have been preferable from the standpoints of personnel management and fairness also to have given appellant an opportunity for input, the question is whether the failure to have done so provides a basis for a conclusion of abuse of discretion.

There are some civil service transactions which must be preceded by notice and an opportunity to be heard -- e.g., discharges, see e.g., Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Appellant has not identified any civil service or case law requirements for a

hearing prior to the type of transaction which occurred here, and the Commission is aware of none.[16]

Although prior consultation with appellant was not legally required per se, this conclusion does not resolve the abuse of discretion question. At the time it was making its decision, respondent was of the opinion that both appellant and Mr. Frigo had performed excellently in the BOLA director job. It was implicit that appellant would prefer not to transfer from the director position to the deputy director position, albeit the two positions were nominally at the same level. The Commission also notes that appellant has not identified any particular information which respondent did not have available as a result of its failure to have consulted with him.[17] Obviously, appellant was denied the opportunity to have "pled his case" by respondent's failure to have consulted with him. This opportunity is a fundamental aspect of a due process procedure, see, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543, 84 L. Ed. 2d 494, 504-05, 105 S. Ct. 1487 (1985) ("Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect." (citation omitted)). In the absence of a due process requirement for such a consultation in this case, and in the absence of the identification of any specific type of information that respondent missed access to as a result of not having sought prior discussions with appellant, the Commission cannot conclude that respondent's failure to have afforded appellant such consultation provides a basis for a conclusion of an abuse of discretion. As discussed above, the Commission believes there was a rational basis for the decision respondent reached, and the omission of one potentially advisable step (consultation with appellant) in the decisional process does not lead to a conclusion of an abuse of discretion.

In conclusion, the record reflects not only that respondent recognized it was faced with a difficult decision at the time the decisional process occurred, but also that there are legitimate arguments that can be made both

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[16] Appellant has not advanced a claim of a due process entitlement in this regard.

[17] Even in this de novo administrative proceeding before the Commission, which has been accompanied by extensive discovery, and in which appellant has been represented by counsel, appellant has been unable to produce sufficient evidence to establish that respondent's decision lacked a rational basis.

for and against the decision respondent reached. Respondent's decision to interchange appellant and Mr. Frigo certainly had a negative impact on appellant's employment situation, and was particularly frustrating given the fact that when he had competed for the position he had been unaware of the potential for Mr. Frigo to return to the position. However, the positions were in the same classification and pay range, and had been configured to provide some degree of comparability. Furthermore, the civil service code recognizes, through the provision in §230.33(1), Stats., for restoration following an unclassified appointment "to the former position or equivalent position," a significant degree of protection for classified civil service employes who, like Mr. Frigo, accept unclassified appointments within the same department. Under all the circumstances, and with proper deference to the abuse of discretion standard, the Commission cannot conclude that respondent's decision constituted an abuse of discretion, except to the extent that it failed to recognize that Mr. Frigo had the right under §230.33(1), Stats., to restoration to the BOLA director position. Since a correct interpretation of this statute would only have reinforced respondent's decision, this erroneous aspect of respondent's decisional process amounted to harmless error.

ORDER

Respondent's action transferring appellant to the BOLA deputy director position is affirmed and this appeal is dismissed.

Dated: March 16, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

AJT:rcr

Parties:

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95