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HOWARD BEHM,

Appellant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM,

Respondent.

Case No. 93-0212-PC

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DECISION
AND
ORDER

Nature of the Case

This is an appeal of a layoff. A hearing was held on January 24, 1994, before Laurie R. McCallum, Chairperson.

Findings of Fact

1. Prior to the subject layoff, appellant held the position of Electronics Supervisor 4 in the Clinical Engineering unit of the Plant Engineering Department of the University of Wisconsin Hospital and Clinics (UWHC). The Clinical Engineering unit consisted of a Clinical Engineer position (Dreifuerst) which headed the unit; appellant's position which was directly supervised by the Dreifuerst position; and eight positions classified in the Engineering Technician series which were directly supervised by appellant's position.

2. In a memo dated April 9, 1992, Gordon Derzon, Superintendent of UWHC, advised department heads that, due to projected reductions in revenue growth, the growth in expenditures would also have to be reduced and, as a result, each department, in developing its budget for the 1992-93 fiscal year, should target "a 5% increase or less in total expenditures."

3. In a memo to all administrators and department heads dated January 29, 1993, Peter Christman, Associate Superintendent for Finance for the UWHC, stated that the UWHC was faced with serious fiscal problems as it approached the 1993-94 fiscal year which made it clear that it was necessary to "begin an extensive hospital-wide effort to reduce costs." Mr. Christman also stated in

this memo that a major emphasis in this effort must be on staff levels since "[t]otal staffing levels at the Hospital per equivalent patient day are considerably higher than other hospitals in the area" and "do not compare favorably with other academic medical centers." At this time, UWHC also had a larger supervisor/worker ratio than many other comparable hospitals. Ms. Christman directed in the memo that 1993-94 budget requests be developed without including any staff increases.

4. In a meeting with department managers held on February 5, 1993, Mr. Christman advised that UWHC revenue exceeded expenditures by 9.9% in 1991 and by 3.2% so far in 1993 and that he expected this trend, attributable to reduction in the growth of revenue, to continue; that the maximum expenditure increase possible in the 1993-94 budget would be 3.5 to 5%; and that 200 positions would need to be cut to achieve this.

5. In a memo to administrators and department managers dated February 16, 1993, Jim Seifriz, one of Mr. Christman's subordinates, provided worksheets setting forth tentative budget calculations for each department for the 1993-94 budget based on the expenditure targets set by Mr. Christman. The worksheet for the Plant Engineering Department provided a 1993-94 payroll budget figure of \$1,939,599.

6. In a memo dated February 24, 1993, to Lewis Cole, the Director of the Plant Engineering Department, Faisal Kaud, an Associate Superintendent of UWHC and Mr. Cole's supervisor, provided a revised payroll budget worksheet for the 1993-94 budget which added to the \$1,939,599 figure the amount attributable to a one-half step pay increase given to classified personnel in December of 1992 for a total of \$1,960,051.35. On or around March 11, 1994, Mr. Cole was advised by Mr. Kaud that the Plant Engineering Department's 1993-94 budget should be prepared using the lower figure, i.e., \$1,939,599.

7. On or around March 9, 1993, Mr. Siefriz provided further worksheets to department heads calculating payroll costs for the 1993-94 fiscal year based on then-current staffing levels. This payroll total for the Plant Engineering Department was \$2,045,044, or \$105,445 over the budget target amount of \$1,939,599. Based on this calculation, Mr. Cole prepared, on or around March 12, 1993, a preliminary worksheet identifying those positions he would recommend be cut. These positions included an Instrument Maker-Journey position (Thatcher-\$43,017), a Motor Vehicle Operator 1 position (Retalick-\$29,467), \$11,000 from the student employee budget, and \$22,000 from the LTE

budget. After preparing this worksheet, one of the Motor Vehicle Operator 1 positions (not the Retalick position) became vacant and was not filled.

8. On or around March 31, 1993, revised payroll cost calculations for the 1993-94 fiscal year were provided to Mr. Cole which indicated a payroll total for the Plant Engineering Department of \$1,070,599, or \$131,000 over the budget target amount of \$1,939,599. Based on this calculation, Mr. Cole prepared a preliminary worksheet identifying those positions he would recommend be cut. Under his first scenario (Option 1), these positions included a CADD Specialist-Entry position (Tate-\$34,731), an Electronic Technician 2 position (Stage-\$17,594), an Instrument Maker Journey position (Thatcher-\$43,017), a Maintenance Mechanic 3 position (Riley-\$38,277), a Motor Vehicle Operator 1 position (Retalick-\$29,467), \$11,000 from the student employee budget, and \$15,110 from the LTE budget. Under Mr. Cole's second scenario, (Option 2), these positions included the Stage position, the Thatcher position, a Mechanical Engineering Supervisor 2 position (Thoreson-\$59,086), the Retalick position, \$11,200 from the student employee budget, and \$28,850 from the LTE budget. At this time, Mr. Cole was aware that Mr. Riley intended to retire some time in 1993; and that Mr. Stage was transferring to a position outside the Plant Engineering Department.

9. On or around April 6, 1993, Mr. Cole learned that the Plant Engineering Department would have to make \$78,000 in additional cuts to their 1993-94 budget.

10. Mr. Cole prepared a memo dated April 8, 1993, stating as follows:

Due to budget restrictions caused by hospital cash flow reductions, I am recommending the following positions be deleted from the Plant Engineering Department.

Cost Center	Title	Current Incumbent	Comments
4102	Electronics Sup 4	Howard Behm	
4102	Electronics Tech 2	Joseph Stage	Has accepted transfer out eff 4/12/93 (0.5 FTE)
4106	Instr Maker-Journ	Wayne Thatcher	
4103	Main Mech 3 (lead)	John Riley	Retire 6/93

4103 Mech Eng Sup 2 Erik Thoresen

4105 Motor Veh Op 1 Ron Retalick May not be
least senior?

None of the above have been notified yet. Behm and Thoresen are classified non-represented. Behm has had previous classified represented service as an electronic technician 5.

11. In a worksheet he prepared on April 13, 1993, Mr. Cole identified the following positions for elimination under Option 2: the positions held by Behm, Stage, Thatcher, Riley, Thoresen, Retalick as well as \$11,200 from the student employee budget and \$28,500 from the LTE budget. Under Option 1, Mr. Cole identified the following positions for elimination: the Tate position (CADD Specialist-Entry) and the positions held by Behm, Stage, Thatcher, Riley, and Retalick, as well as \$11,000 from the student employee budget and \$16,110 from the LTE budget.

12. In a memo dated July 19, 1993, and directed to all UWHC employees and medical staff, Mr. Derzon stated that "the Hospital will end the 1992-93 fiscal year with fewer patient days and admissions than originally projected. These trends, coupled with declining reimbursement from both governmental and private payors, are the primary reasons we must undertake a major cost-reduction initiative."

13. In a letter dated September 23, 1993, Mr. Derzon requested approval from James Stratton, Director of UW-Madison's Classified Personnel Office, of UWHC's layoff plan for non-represented positions. This letter stated as follows, in pertinent part:

. . . the Hospital's decreasing patient census and declining revenues have resulted in the imposition of significant budget constraints during this fiscal year. Unfortunately, this pattern of declining numbers of patients has continued beyond the first three months of this fiscal year and shows no signs of abatement.

To address these constraints, we have taken a number of steps. We have directed a major cost reduction effort spanning all Hospital departments and programs. Each department head was required to carefully examine their budgets and determine where costs could be reduced in non-salary categories as well as personnel, and to meet defined budget targets when submitting their annual budget proposal. . . .

Recognizing that personnel expenditures are the single largest expense category in the Hospital's budget, amounting to 57% of the total, our initial focus has been to reduce the total number of positions, including the total FTE complement of

permanent classified and unclassified employees, as well as students and limited term employees. In order to reach the budget targets for fiscal year 1993-94, it will be necessary to reduce salary costs by approximately \$2.5 million on an annual basis. This requires a decrease of 80 FTEs. Because Hospital employee turnover averages 15% annually, we have been able to realize significant cost reductions by not refilling a number of classified and academic positions as they were vacated during the past ten months. We have also not renewed several academic staff in an effort to decrease layers of management, and further review is ongoing. In addition, we have reduced the number of LTE and student employees.

Even after realizing the above reductions, it is necessary to eliminate several occupied non-represented positions in order to meet our budget targets. After careful review of work assignments and operational needs it was determined that elimination of these positions would best accomplish the budget reductions while minimizing the impact on departmental operations or patient care. . . .

. . . Reductions will also be necessary in bargaining unit positions. . . .

14. This layoff plan for non-represented positions submitted by Mr. Derzon to Mr. Stratton identified for layoff the positions held by Mr. Behm and Mr. Thoreson as well as 4 nursing supervisor positions.

15. This layoff plan for non-represented positions was approved by the Classified Personnel Office and forwarded to the Division of Merit Recruitment and Selection (DMRS) of the Department of Employment Relations for final approval in a memo from Mr. Stratton dated September 27, 1993. DMRS approved this layoff plan.

16. In a letter dated October 6, 1993, appellant was notified of his layoff effective October 29, 1993, and was advised of options available to employees who have been notified of pending layoff. An employer is required to give an employee at least 15 days' notice of layoff.

17. In an August meeting and an October 6 meeting with Renae Bugge, Director, Employment Relations and Training, UWHC; in a letter from Ms. Bugge to appellant dated October 11, 1993; and in a letter to appellant from DMRS dated September 23, 1993, appellant was advised that "positions that are covered by a labor agreement are not available for displacement to a non-represented employee." Appellant understood this advice to mean that he could not bump an employee in a represented position.

18. On or after he first learned of his impending layoff, appellant was offered a vacant Maintenance Mechanic 3 position (which was assigned to a pay range several levels below that to which his Electronics Supervisor 4 positions was assigned) at the rate of pay he was receiving in his Electronics Supervisor 4 position; and was advised that, by accepting this position, he would not be giving up any of the rights to which he was entitled as the result of his layoff. Appellant declined this Maintenance Mechanic 3 position. This Maintenance Mechanic 3 position was the Riley position which Ms. Bugge had directed be held open so that it could be offered to appellant and, if he declined, to Mr. Thoresen. Mr. Thoresen accepted the position which is slated for elimination once it becomes vacant again. Also at this time, appellant was advised of an Electronics Technician position for which he could compete but he decided not to do so.

19. The effective date of appellant's layoff was delayed until November 5, 1993, to give him an opportunity to use accrued vacation leave.

20. In the 1993-94 UWHC budget, a new telecommunications system was added to the Information Systems unit. Telecommunications services had previously been provided to UWHC by the UW-Madison on a fee-for-services basis. UWHC management determined that long-range cost savings could be achieved by the addition of this system.

21. Mr. Cole selected appellant's position for layoff because he was of the opinion that the Clinical Engineering unit was not large enough to require two supervisory positions, i.e., appellant's position and the Dreifuerst position, in order to supervise eight Electronics Technicians; that the Dreifuerst position could assume the supervisory duties of appellant's position; and that the non-supervisory duties of appellant's position could be more easily assumed by other positions than the non-supervisory duties of the Dreifurst Clinical Engineer position. As a guideline, Mr. Cole felt that one supervisory position should be assigned to supervise at least 15 full-time-equivalent subordinate positions.

22. Mr. Cole selected Mr. Thoresen's position for layoff due to a planned reduction in the number of construction projects.

23. At the time of appellant's layoff, none of the represented employees targeted for layoff had been notified of their impending layoff because UWHC management and DMRS did not want to affect the course of the collective bargaining process.

24. After April 20, 1993, two Maintenance Mechanic 3 positions in the Plant Engineering Department became vacant and were filled due to Mr. Cole's decision that no further cuts should be made in the Maintenance area.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.
2. The respondent has the burden to show just cause for the subject lay-off.
3. Respondent has sustained this burden.
4. The layoff of appellant was for just cause.

Opinion

Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183 (1976), provides a framework for decision of this type of appeal. In that case the Supreme Court held:

While the appointing authority indeed bears the burden of proof to show "just cause" for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious.

* * * * *

Arbitrary and capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis . . . and [is] not the result of the "sifting and winnowing" process.

Appellant does not appear to allege, nor does the Commission find, that respondent failed to follow applicable administrative and statutory requirements for effecting the layoff. The record shows that appellant was provided the proper notice within the proper time period, that this notice contained the required information, and that the appropriate authorities reviewed and approved the layoff.

Was the process followed by respondent in effecting expenditure reductions the result of "sifting and winnowing" and did it have a "rational

basis" within the meaning of the Weaver decision? The Commission is of the opinion that this question should be answered in the affirmative.

In Newberry & Eft v. DHSS, Case Nos. 82-98,100-PC ((8/17/83), the Commission found that:

. . . the Commission's inquiry in appeals of this nature is relatively limited. If the employer can show that it had a rational basis for its decision, it has satisfied its burden of proof. It is not required to prove that its decision was performed the best personnel decision that could have been made under the circumstances.

This principle was also articulated by the Commission in Oakley v. Ofc. of Comm. of Securities, Case No. 78-66-PC (4/19/79) as follows:

Both a decision regarding office reorganization and the assignment of duties and responsibilities, and a decision regarding appropriate staffing levels in light of economic conditions are management decisions which are not properly reviewable by the Commission in appeals of this nature.

Appellant first appears to be arguing that the required bases for a reduction in force were not present here. Section 230.34(2), Stats., provides as follows, in pertinent part:

Employees with permanent status in class in permanent . . . positions in the classified service . . . may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization.

However, the record clearly shows that the financial condition of the UWHC had changed and that these changes would continue and would require substantial reductions in the rate of growth of expenditures. This situation satisfies the "lack of funds" language of §230.34(2), Stats.

The record also shows that Mr. Cole went through a careful "sifting and winnowing" process in developing a plan for the elimination of certain positions which would, in his opinion, interfere least with the achievement of the higher-priority goals of the Plant Engineering Department. In regard to appellant's position, Mr. Cole determined that it was not necessary or efficient to have two supervisory positions supervising eight Engineering Technicians, that the supervisory duties of appellant's position could be assumed by the Dreifuerst position, and that the non-supervisory duties of appellant's position could be more easily assumed by other positions than the non-supervisory duties of the Dreifuerst Clinical Engineer position. This provides a "rational

basis" for Mr. Cole's decision to target appellant's position for layoff. In addition, appellant has failed to show that this determination did not actually reflect Mr. Cole's opinion at the relevant time; or that this determination misrepresented, or failed to take into account, or was in conflict with the factual information available to Mr. Cole or other management employees participating in the layoff decision at the time such decision was made.

Appellant's basic argument here focuses on the program management decisions made by respondent in reaction to the changing financial condition of the UWHC. However, as stated above, it is not the Commission's role to determine what the "best" decisions would have been but to determine whether the decisions respondent did make had a rational basis and were the result of a "sifting and winnowing" process. (See also Attoe v. UW, 90-0388-PC (8/16/91); aff'd Attoe v. Wis. Pers. Comm., 91-CV-3587 (Dane Co. Cir. Ct., 5/12/92). When confronted with reduced revenue growth, an employer has not just the prerogative, but the obligation, to make choices among competing priorities and to make changes based upon these choices. Appellant argues that, at the time of his layoff, there were vacant positions within UWHC which could have been eliminated rather than laying him off; and that there were new programs created and staffed, such as the new telecommunications system, which could have been postponed or not undertaken rather than laying him off. However, in any organization which exists over a period of time, changes will be necessary due to advances in technology, evolving client and program needs, and fluctuations in financial and other resources. The organization would be crippled if such changes were deemed subordinate to maintaining the status quo or could be held hostage to the unpredictable comings and goings of individual employees. In this case, management made a decision that the program goals of the UWHC could better be met by eliminating appellant's position than by eliminating certain other vacant positions; and by eliminating appellant's position than by delaying or not undertaking the addition of the new telecommunications system. These are the types of tough program decisions reserved to management. Respondent has shown that there was a rational basis for these decisions which was the result of a "sifting and winnowing" process, and appellant has failed to successfully rebut this showing.

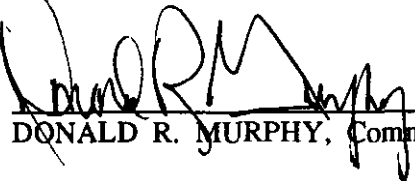
Order

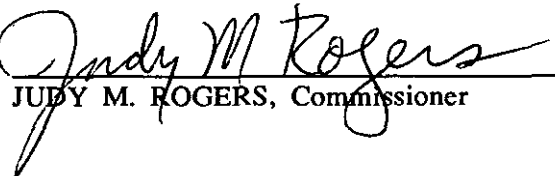
The action of respondent is affirmed and this appeal dismissed.

Dated: March 31, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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 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.)