

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIAM DUSSO,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS and
Secretary, DEPARTMENT OF
REGULATION & LICENSING,

Respondents.

Case No. 94-0490-PC

* * * * *

RULING ON
DER'S MOTION TO DISMISS

The parties were notified of a prehearing conference scheduled for 11/4/94, by Commission letter dated 10/14/94. The Department of Employment Relations (DER) appeared as did Mr. Dusso. The Department of Regulation and Licensing (DRL) did not participate.

DER raised a question of the Commission's subject matter jurisdiction at the prehearing conference. Accordingly, a briefing schedule was established with DER and Mr. Dusso agreeing to the due dates. The issue and briefing schedule were confirmed by Commission letter dated 11/4/94, with a copy mailed to DRL. DRL has not requested an opportunity to file a brief. The final brief was received by the Commission on 12/2/94.¹

The section below represents what appears to be undisputed facts. The findings are made solely for the purpose of resolving DER's pending motion.

FINDINGS OF FACT

1. Mr. Dusso was employed by DRL as a classified attorney starting in 1977 and including a period as DRL's legal counsel from 8/77 to 3/80, at an Attorney 13 classification. His pay in 3/80, as a classified Attorney 13 at regrade point C was \$12.427 per hour.

¹ Mr. Dusso filed an additional brief on 12/9/94, which was not considered by the Commission having been received a week after close of the briefing schedule.

2. In 3/80, Ms. Haney, then-Secretary of DRL, appointed Mr. Dusso as Administrator of the Division of Administrative Services, an unclassified position which he held until 8/21/94. His duties in the unclassified position were similar to the duties of his classified position as legal counsel, except he became the supervisor of DRL's classified attorneys and he no longer was routinely expected to draft administrative rules or to conduct hearings.
3. If Mr. Dusso had remained in his classified position rather than accept the unclassified position, he would have achieved Attorney 13 regrade point D on 9/25/80.
4. At a date unspecified by the parties, DER reallocated classified legal counsel positions from the Attorney 13 to the Attorney 14 level. If Mr. Dusso had stayed in the classified position, it would have been reallocated to the Attorney 14 level.
5. Mr. Dusso, having been appointed from a classified to an unclassified position within the same department, was entitled to certain restoration rights pursuant to s. 230.33(1), Stats., as shown below in pertinent part.²

230.33 Leave of absence and pay while serving in unclassified position. Employees 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:

(1) A person appointed . . . 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. . . .

² Mr. Dusso also had reinstatement rights under s. 230.33(1), Stats., which are not at issue in this case. The dividing line between restoration and reinstatement rights in s. 230.33(1), Stats., is the timing of the request to return to classified service. Restoration rights exist for the duration of the appointment and for an additional 3 months, after which time reinstatement rights apply.

6. The union contract for classified attorneys settled in or about 6/93. Mr. Dusso realized he might receive a higher wage under the new union contract in a classified attorney position than if he remained in the unclassified position. He first explored the possibility of obtaining a higher wage in his unclassified position, but was unhappy with the results. (See the following letters attached to Mr. Dusso's appeal letter: a) Dusso letter to Secretary Litscher dated 11/5/93, and b) Litscher's reply dated 11/24/93.)
7. On 1/25/94, Mr. Dusso requested restoration to an attorney 14 classified position at DRL. (See 1/25/94 Dusso letter to Secretary Cummings, attached to Mr. Dusso's appeal letter.)
8. On 5/3/94, DER Secretary Litscher, informed Mr. Dusso that the maximum starting pay in a classified attorney position pursuant to Mr. Dusso's restoration rights would be \$28.33 per hour as of June 27, 1993. (See 5/3/94 letter attached to Mr. Dusso's appeal letter.)
9. On 6/2/94, Mr. Dusso sent Secretary Litscher a letter which explained why he felt a starting salary of \$34.462 per hour would be more appropriate. (See 6/2/94, 15-page memo attached to the appeal letter).
10. On 8/16/94, Secretary Litscher responded to Mr. Dusso's letter of June 2nd, providing details of why he continued to disagree with Mr. Dusso's calculations. (See 8/16/94 letter attached to Mr. Dusso's appeal letter.)
11. Copies of Mr. Dusso's and DER's calculations for Mr. Dusso's wage entitlement upon restoration are included with his appeal letter. One major difference between the calculations is Mr. Dusso gave himself the regrade to point D as if he had remained in the Attorney 13 classified position, whereas DER did not. A second major difference is Mr. Dusso gave himself annual merit increases from 1981 through 6/27/93, whereas DER calculated merit increases only from 3/10/91 through 6/27/93.
12. On 8/22/94, Mr. Dusso returned to a classified position in DRL as an Attorney 14; earning an hourly total wage of \$32.466 (\$30.416 as a base salary, plus \$2.05 as an add-on allowed by s. A4.11 of the union contract).

DISCUSSION

The question at this time is whether the Commission has jurisdiction to hear Mr. Dusso's claim that he was underpaid upon his return to classified service when he exercised his restoration rights under s. 230.33(1), Stats. The detailed pay calculations could be reached by the Commission only if Mr. Dusso prevails on this jurisdictional issue.

The Commission's jurisdiction for civil service appeals is set forth in s. 230.45(1)(a), Stats., which references "appeals under s. 230.44", Stats., the relevant portion of which is shown below.

(1) APPEALABLE ACTIONS AND STEPS. Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

(a) *Decision made or delegated by administrator.* Appeal of a personnel decision under this subchapter made by the administrator or by an appointing authority under authority delegated by the administrator under s. 230.05(2) [the general provision regarding the Administrator's authority to delegate].

(b) *Decision made or delegated by secretary.* Appeal of a personnel decision under s. 230.09(2)(a) [pertaining to allocation, reallocation and reclassification decisions] or (d) [pertaining to an incumbent's fate when a filled position is reallocated or reclassified, meaning regrade] or 230.13(1) [pertaining to certain closed records] made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m) [the general provision regarding the Secretary's authority to delegate].

(c) *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.

(d) *Illegal action or abuse of discretion.* 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 may be appealed to the commission.

(Emphasis appears in the original text. Information in brackets was added here for clarity.)

Section 230.44(1)(a), Stats., does not apply
to Mr. Dusso's appeal.

DER contends that the Administrator of DER's Division of Merit, Recruitment and Selection (DMRS) (hereafter, Administrator) is responsible for all restoration issues except the pay established upon restoration which DER views as the responsibility of DER's Secretary (hereafter, Secretary). The Commission disagrees.

As noted by DER, section 230.04(1), Stats., grants to the Secretary all powers and duties not exclusively vested by statute in the Administrator³, appointing authorities or the Commission. Chapter 230, Stats., grants the Administrator authority over limited types of reinstatements (s. 230.31(2), Stats.) and over restoration after military leave (s. 230.32(5), Stats.). With the noted exception in the following paragraph, the statute does not exclusively vest responsibility for restorations other than those occurring after military leave.⁴ Accordingly, non-military-return restoration issues as well as returns from unclassified service under s. 230.33(1), Stats. (at issue here), vest with the Secretary leaving Commission jurisdiction potential under s. 230.44(1)(b), Stats. rather than under s. 230.44(1)(a), Stats.

The noted exception to the foregoing also explains why the Commission added DRL as a party even though DRL was not mentioned as a party in Mr. Dusso's appeal letter. Specifically, DRL has the responsibility as the appointing authority to appoint persons to positions within its department and to set the compensation for those positions in accordance with pertinent

³ DER's brief contains citations to "ER-MRS" sections of the administrative code. Prior to 10/94, the cited code sections were referred to as "ER-Pers". DER argues that the delegation of restoration generally to the Administrator is evidenced by DMRS administrative rules (Chapter ER-MRS., Wis. Admin. Code). Similarly, DER argues that the delegation to the Secretary of pay upon restoration is evidenced by the Secretary's administrative rules (Chapter ER, Wis. Admin. Code). Section 230.04(1), Stats., however, makes it clear that such responsibilities must be shown by statute, not by rule authority.

⁴ The statutes also do not exclusively vest responsibility for reinstatements other than those found in s. 230.31(2), Stats., leaving all others as the Secretary's responsibilities.

administrative rules, pursuant to s. 230.06(1)(b), Stats., the text of which is shown below in relevant part.

Powers and duties of appointing authorities. (1) An appointing authority shall:

* * *

(b) Appoint persons to or remove persons from the classified service, . . . and fix their compensation, all subject to this subchapter and the rules prescribed thereunder.

The pertinent administrative rule for setting the pay upon Mr. Dusso's restoration is found in ER 29.03(6), Wis. Admin. Code; a rule of the Secretary most likely made under the Secretary's ultimate compensation setting authority under s. 230.12(1)(a)3., Stats. In Mr. Dusso's case, DRL had the responsibility to set Mr. Dusso's pay upon restoration in accord with the Secretary's rules. Furthermore, in Mr. Dusso's case, DER apparently agreed to perform the calculations on behalf of DRL which had the initial responsibility by statute to set Mr. Dusso's pay upon restoration.

Section 230.44(1)(b), Stats., does not confer PC jurisdiction in Mr. Dusso's case.

Appeals against the Secretary under s. 230.44(1)(b), Stats., are limited to the enumerated personnel decisions which include reallocation, reclassification, regrade or closed records. Mr. Dusso's appeal does not involve any of the enumerated decisions. Accordingly, s. 230.44(1)(b), Stats., does not give the Commission authority to hear Mr. Dusso's appeal.

Mr. Dusso does not claim that jurisdiction exists under s. 230.44(1)(c), Stats.

Section 230.44(1)(c), Stats., pertains to appeals involving demotion, layoff, suspension, discharge or reduction in base pay. Mr. Dusso does not claim that this section applies to his appeal.

The Commission has jurisdiction of Mr. Dusso's
appeal pursuant to s. 230.44(1)(d), Stats.

Section 230.44(1)(d), Stats., pertains to appeals of personnel actions after certification which relate to the hiring process and which are alleged to be either illegal or an abuse of discretion. The term "personnel action" is not defined in the statute or related administrative rules. The common meaning of the term is sufficiently broad to include restoration and pay assigned upon restoration.

The prior decisions of the Commission support a conclusion that the starting pay for appointments is a personnel action related to the hiring process, within the meaning of s. 230.44(1)(d), Stats. See, Siebers v. DHSS, 87-0028-PC (9/10/87) where the Commission took jurisdiction under s. 230.44(1)(d), Stats., of the pay offered in relation to the appointment of a specific individual to a specific position. The Commission (on p. 2 of the decision) indicated that the issue in Mr. Siebers' case was unlike the Secretary's assignment of a classification to a particular pay range (pursuant to current s. 230.09(2)(b), Stats.), which would not be appealable to the Commission. In accord, Coulter v. DOC, 90-0355-PC, p. 3 (1/24/91).⁵ Also see, Lundeen v. DOA, 79-208-PC, p. 4 (6/3/81), where the Commission held that reinstatement was a transaction relating to the hiring process.

DER argues that s. 230.44(1)(d), Stats., is inapplicable to Mr. Dusso's case on the grounds that his restoration did not occur after certification because no certification list was generated at any point for the position filled by Mr. Dusso's exercise of his restoration rights. Again, the Commission's prior decisions do not support DER's argument.

DER's argument equates the term "certification" to a certification list generated by DMRS when a vacancy occurs and the appointing authority chooses to interview candidates eligible for interview by virtue of their score on a competitive exam (hereafter, Exam Applicants). The certification process, however, may be either supplemented or supplanted when an appointing authority chooses to include applicants who are not required to compete

⁵ It is unclear from the Commission's decision in Siebers, Id. and Coulter, Id. whether the appellants' hires were from within or outside of state service.

(hereafter, Non-Exam Applicants) due to, for example, transfer, reinstatement or restoration rights. In other words, the appointing authority may fill a position by solely using Exam Applicants, by solely using Non-Exam Applicants, or by using a combination of the foregoing alternatives. Non-Exam Applicants are not included on certification lists. (See ER-MRS 12 (formerly entitled "ER-Pers 12").)

At least two permissive reinstatement cases set the stage for resolution of the issue noted in the preceding paragraph. In Lundeen v. DOA, Id., Mr. Lundeen was eligible to interview without competition and, therefore, was not included on the certification list. The Commission stated (on p. 2-3 of its decision) that Mr. Lundeen's inclusion on the certification list was not a precondition for Commission jurisdiction under s. 230.44(1)(d), Stats.

In Wing v. DER, 84-0084-PC (4/3/85), no certification existed because the appointing authority decided to recruit from a pool of applicants seeking transfer, reinstatement or demotion; Non-Exam Applicants. The Commission found jurisdiction under s. 230.44(1)(d), Stats., stating:

The apparent intent of s. 230.44(1)(d), Stats., is to permit, inter alia, appeals of appointment decisions. Those decisions are made in all instances by the appointing authority. There are no apparent policy reasons for interpreting s. 230.44(1)(d), Stats., to permit appeals of appointment decisions only when an actual certification by the administrator preceded the selection decision. An interpretation of the phrase "personnel action after certification" to exclude appointment decisions that were not preceded by a particular certification would result in an illogical distinction within one category of personnel selection decisions. An employe seeking reinstatement, voluntary demotion, or transfer into a position could appeal an alleged abuse of discretion in the appointment decision if the appointing authority's consideration of eligibles included those certified as a result of competition, but could not appeal if there was no such certification because the appointing authority had requested only the names of those interested in transfer, reinstatement or voluntary demotion, pursuant to ER-Pers. 12.03(3), Wis Adm. Code:

The administrator may submit the names of persons interested in transfer, reinstatement or voluntary demotion along with a certification or, at the request of the appointing authority, in lieu of a certification.

The Commission is convinced that no such distinction was intended and that the legislature utilized the phrase "after certification" to refer to a certain segment of the appointment process. . . .

(Underlining appears in the original document. Bold type was added for emphasis.)

Cases cited by DER do not lead to contrary result.

DER argued in its final brief (dated 12/1/94, p. 3), as follows:

However, the controlling cases make it clear that the Commission is without jurisdiction after a person is hired. Board of Regents v. Wis. Pers. Comm., 103 Wis 2d 545, 558-60 (Ct. App. 1981), held that the hiring process, for purposes of sec. 230.44(1)(d), Wis. Stats., has been completed once the employe has been hired and thereby attains probationary status. The Commission has also held that it has no jurisdiction over one's salary upon completion of probation because that is not related to the hiring process. Meschefske v. DHSS, 88-0057-PC (7/13/88). Both of those cases were reaffirmed in Cross-Madsen, et. al. v. UW & DER, Case No. 92-0828-PC (7/30/93).

The error made in DER's argument, is the failure to recognize that the person selected for a position as well as the *starting* pay is considered part of the hiring process. This is clear in the Meschefske case cited by DER. Meschefske appealed her pay at two points in time; her pay upon hire and her later pay upon successful completion of her probationary period. The Commission stated in its decision (p. 4), as shown below:

The Personnel Commission concludes then, in the instant case, that it has jurisdiction, pursuant to s. 230.44(1)(d), Stats., over respondent's decision establishing appellant's rate of pay upon appointment to the subject position. Since, however, the establishment of appellant's rate of pay by respondent upon completion of her probationary period could not be considered part of the hiring process, it is not reviewable by the Personnel Commission.

Conclusion: The Commission has jurisdiction over Mr. Dusso's appeal. The parties will be contacted in the near future to schedule another prehearing

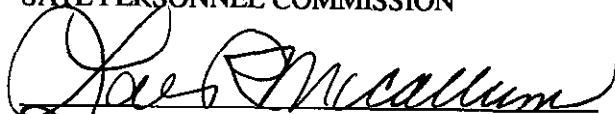
conference at which time the parties should be prepared to schedule a hearing date, to define the hearing issue and to determine if at least some of the pertinent facts could be submitted by stipulation between the parties.


ORDER

DER's motion to dismiss is denied.

Dated December 22, 1994.

SATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

cc: W. Dusso
D. Vergeront
M. Cummings