STATE OF WISCONSIN PERSONNEL COMMISSION

LORI MCNOWN [WILLIAMS],

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 94-0828-PC

INTERIM DECISION AND ORDER

This case involves an appeal pursuant to §230.44(1)(b), stats., of the denial of reclassification from Unemployment Benefits Specialist 2 (UBS 2) to Unemployment Benefit Specialist 3 (UBS 3). The primary facts are not in dispute, and the following statement of facts is taken for the most part from respondent's posthearing brief. Additional material facts are referred to in the course of the discussion of the issues.

The following findings, as augmented, are from respondents' brief filed on July 21, 1995:

1. The appellant is employed as an adjudicator for the Appleton local office of the respondent's Unemployment Compensation Division. As an adjudicator, she is responsible for the investigation and resolution of all unemployment benefit eligibility issues that arise in the claims that she handles (Respondent's Exhibit 3).

2. The adjudicator positions classified as Unemployment Benefit Specialist 1, 2 and 3 are administered as a progression series. An adjudicator is reclassified from UBS 1 to UBS 2 and from UBS 2 to UBS 3 when a review of his or her work under the Quality Performance Index (QPI) demonstrates that he or she has met the established standards for satisfactory performance (Respondent's Exhibit 5).

3. The QPI has been established by the U.S. Department of Labor for use in its regular evaluations of state unemployment compensation programs. Federal funding of the state's unemployment compensation program is based in part on the state program's ability to meet the QPI standards. For this reason, the respondent uses the QPI in its own evaluations of local office performance and as part of the reclassification process (Respondent's Exhibit 6).

4. For reclassification purposes, the QPI involves the review of 20 of an adjudicator's case files, selected randomly within several categories of cases. To meet the satisfactory [quality] performance criteria for reclassification from UBS 2 to UBS 3, an adjudicator must receive a [passing] score . . . on 16 of the 20 [or 80% of the] cases reviewed. If [only] 15 cases [receive a passing] score . . . the standards provide for the review of another 10 cases, and 24 of the total of 30 [80%] cases must [receive a passing score.] (Respondent's Exhibit 2 & 5).

5. The QPI review conducted in May of 1994 gave the appellant a [quality] score of . . . [70%, Meaning she received a passing score on] 14 of the 20 cases reviewed (Respondent's Exhibit 2 & 7).

6. One of the files that was given a [failing] score . . . involved a claimant who was also a student (Respondent's Exhibit 7 page 3, item #7; Appellant's Exhibits 1 and 9). The reason for the low score was that, due to a word processing error, one of the telephone interview notices that was sent to the claimant contained the date but not the time that the claimant would be called for information. This deprived the claimant of a reasonable opportunity to respond to the issues involving his claim.

7. Because the error in the student case was caused by the local office's computer system and not the appellant, another student case was reviewed as a substitute. This case was . . . [given a failing score[1]] because the appellant received wage information from the employer which was not consistent with information already in the respondent's records and she did not contact the employer to resolve the discrepancy (Respondent's Exhibit 14). The result of the appellant's QPI review remained at 14 passing out of 20, [or 70%.]

8. If an error is made that is attributable to the employe seeking a reclassification based upon QPI results, respondents count that error against that employe irrespective of whether another error, for which the employe was not responsible, also existed in the file.[2]

9. A case involving a dispute over working on Sunday (Respondent's Exhibit 9) was . . . [given a failing score.] The appellant had issued the following determination:

> "The employe quit but not for a reason which would allow the payment of benefits.
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> The employe was requested to work every other Sunday, which he was unwilling to do. The employer offered other alternatives, in an attempt to accommodate the employe's request for Sundays off. The employe felt the alternatives were unreasonable. He was given the option to work every other Sunday or be discharged.

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[1]Appellant does not contest on this appeal the substantive correctness of respondent's scoring of this file.

[2]This finding was added in order to make this aspect of the decision more explicit.

> He refused the work, which resulted in his discharge. His actions were consistent with quitting."

The QPI reviewers . . . [gave a failing score to] this case . . . commenting that the issue was a discharge and not a "constructive quit," and adding: "...all through the rationale[3] it appears the ruling is going to be a discharge until the last couple of sentences." (Respondent's Exhibit 7, page 4).

9. The appellant asked for a further review of the decisions on substituting a different student case and scoring the "Sunday work" case. Both of these issues were considered by Al Jaloviar, the Director of the UC Benefit Operations Bureau. He agreed with the substitution of a new student case for the same reason as given by the QPI reviewers: the case could not be treated as passing because of the lack of adequate notice, but the error was not caused by the appellant. He supported the scoring of the "Sunday work" case because "... the adjudicator did not articulate in either the rationale portion of the determination or in the [determination] itself the reason that this should be considered a quit versus a discharge.[4] Even though the adjudicator states that advice was

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[3]Appellant's "determination rationale" stated as follows: "The clmt was working for this ER about 5-6 years. When he was hired, it was on the condition that he may be required to work an occasional weekend. For most of his employment time, he wasn't required to work Sundays very often. About 2 months ago, the ER told him that he was required to work every other Sunday. When he was scheduled to work Sundays, he called in. The ER offered him several options, so that he could accommodate his church schedule. The clmt thought all the options were unreasonable, so he refused to work Sundays. He was given the option to work his scheduled Sundays or be discharged. He still refused to work Sundays. so was discharged. The ER's request was not unreasonable and it is not "new work" since the clmt was informed of the possibility of working weekends when hired. The clmt admitted to working on Sundays and didn't believe it was a requirement of his religion, to attend church on Sunday. The ER's choice to discharge him was not discrimination. The clmt's actions were consistent with a constructive quit. He worked longer than 10 weeks, so 7E [108.04(7)(e)] doesn't apply. Good cause attributable also doesn't apply, since the ER was trying to offer alternatives to the clmt and the ER's actions were not unreasonable. No other exceptions for quitting apply. " (Respondents' Exhibit 9, p.9)

[4]The claimant appealed appellant's initial determination, which was upheld by the appeal tribunal/administrative law judge in a decision which included the following: "About one month before his last day of work, the employe was informed that he would be required to work every other Sunday. He informed his supervisor that this would present a problem because on Sundays he attends church services with his children and teaches at church. His supervisor indicated that in the next 30 days he would have to agree to work every other Sunday or find another job. During the next 30 days the employer discussed with him alternate arrangements of hours that would possibly accommodate his personal needs and the employer's production needs. He indicated that none of these arrangements would be feasible. On November 4 the employer indicated that the following day would thus be his last day of work.

given by a leadworker that this constitutes a quit, it is the adjudicator's responsibility to articulate the facts for making it an employe initiated separation versus a discharge." (Respondent's Exhibit 8, page 2.)

10. The appellant has not contested the [quality] scoring of the other cases which received a [failing] score. . . .

11. The training and reference information provided to adjudicators establishes categories of issues presented by UC claims. Two of the basic categories are employe-initiated separation (voluntary leaving) and employer-initiated separation (discharge). If the adjudicator believes that the situation is an employe-initiated separation, he or she should determine how the separation occurred, if the claimant initiated the separation, if the separation was voluntary, and what the claimant's intent was. If the situation appears to be a discharge, the adjudicator should determine if the employer initiated the separation, who discharged the claimant, and the reason for the discharge. (Respondent's Exhibit 10.) The adjudicators also have access to a manual which provides detailed information on the subsidiary issues presented by voluntary leaving and discharge cases and the steps that the adjudicator should take to resolve these issues (Respondent's Exhibits 12 and 13). The UC Manual contains a paragraph that describes the elements of a "constructive quit" (Respondent's Exhibit 12 page 19).

"The employe contended that he was discharged. However, the employer had informed him of options that would enable him to preserve the employment relationship. By his choosing not to exercise any of the options, he must be considered to have terminated the employment relationship.

"The issue to be decided is whether the employe's quitting was for any reason that would permit the immediate payment of unemployment benefits.

"The statutes provide that if an employe terminates his employment with an employing unit, his benefit eligibility shall be suspended until four weeks have elapsed since the week of quitting, and the employe has earned wages in covered employment equaling at least four times his weekly benefit rate, unless the termination was with good cause attributable to the employer or was within some other statutory exception.

"It would have been difficult for the employe to work under most of the alternative arrangements of hours that were proposed to him by the employer. However, among the alternatives presented, the employer had indicated that he could come to work early on Sunday, engage in his church activities, and return to work to finish his shift. He had previously worked most of a Sunday shift by reporting to work early. Considering this and the fact that he was being required to work alternate Sundays rather than every Sunday, it must be concluded that this one alternative arrangement was feasible.

"Under the circumstances, the employe's quitting was not with good cause attributable to the employer or for any other reason that would permit the immediate payment of benefits.

"The appeal tribunal therefore finds that in week 45 of 1993, the employe was not discharged by the employer, within the meaning of section 108.04(5) of the statutes.

"The appeal tribunal further finds that in week 45 of 1993, the employe voluntarily terminated his employment, within the meaning of section 108.04(7)(a) of the statutes, and that his quitting was not for any reason constituting an exception." (Appellant's Exhibit 4-5).

> 12. The training and reference information provided to adjudicators for cases involving student employment state that the adjudicator must obtain information from the employer as to the dates of the employe's work, the amount of work and the wages paid (Respondent's Exhibit 15, pages 9-10).

This case involves two rather narrowly-focused issues. Appellant has disputed respondent's evaluation of two files. With respect to the student case referred to in paragraphs 6 and 7 of respondent's recital of facts, appellant contends that since the error in the case was attributable to something over which she had no control, and since she had handled the case satisfactorily as an adjudicator within the sphere of her authority, respondent should have counted this case as satisfactory for the purpose of her QPI reclassification, rather than to have pulled another file which was rated unsatisfactory.

Appellant's objection to respondent's action of first accessing the file in question, and then deciding not to use it because of an error neither attributable to, nor within appellant's control, raises the question of whether this approach was incorrect under the civil service code (Subchapter II, Chapter 230, stats., Chapters ER-MRS and ER, Wis. Adm. Code). Appellant was denied a regrade to UBS 3 because respondent DILHR determined her performance was not satisfactory in the context of what is expected at this class level, see Respondent's Exhibit 2, October 31, 1994, memo from DILHR personnel to appellant:

> Incumbents of adjudication positions may not be regraded: If the incumbent's job performance is not satisfactory...minimum timeliness, productivity and quality standards [must] be achieved for an adjudicator at the Unemployment Benefit Specialist 3 level...Although you have obtained the necessary training and experience and have met the timeliness and productivity standards associated with the objective level [UBS 3] adjudicator, you have not met the minimum quality [QPI] standards.

Section ER 3.015(2)(a), Wis. Adm. Code, provides that incumbent employes may not be regraded if "[t]he appointing authority has determined that the incumbent's job performance is not satisfactory." Accordingly, in an appeal like this, the Commission must decide whether respondent's determination of unsatisfactory performance in the context of the UBS 3 class level was correct. Appellant has the burden of proof and must establish by a preponderance of the evidence that respondent's evaluation of her performance was incorrect. See, e.g., Foust v. DILHR & DER, 84-0218-PC (5/22/85), affirmed, DILHR & DER v.

Wisconsin Personnel Commission, Dane Co. Cir. Ct. No. 85CV3206 (7/29/86). Where, as here, the employe is challenging not the specific substantive QPI scoring of a particular file, but DILHR's procedure or policy with respect to which files to score for purposes of QPI reclassification review purposes, the more specific question is whether that policy or procedure constitutes an inaccurate or otherwise incorrect method of measuring employe performance.

The use of a random sampling approach to evaluate quality of performance is, in and of itself, certainly not inconsistent with an accurate evaluation of quality of performance. As material here, respondent's policy is to exclude from the sample of files selected for QPI evaluation those files which receive a failing score for reasons not attributable to appellant's performance on the file. Respondent's rationale for this policy is summarized in its post-hearing brief at page four as follows:

> The appellant points out that the failure to provide adequate notice for the time of calling was not her fault, and argues that the case documented in Appellant's Exhibit 9 should be retained and scored solely with reference to her own work and solely for the purpose of her own QPI review. The respondent did not agree to this request because the respondent applies the QPI, as does the U.S. Department of Labor, to judge whether the entire case meets acceptable quality standards and to gauge the overall performance of local offices as well as individual employes. The QPI system does not provide for evaluating files in a piecemeal manner because the point of the system is for all members of the UC staff to produce case files that meet the standards.
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> > The only way for the respondent to give the appellant fair treatment under the circumstances was to exclude the "notice error" case from the review and substitute another randomly chosen student case (Respondent's Exhibit 14). The respondent had a reasonable reason for proceeding in this way and the appellant has not provided any basis for judging this decision to be incorrect. (emphasis added)

The Commission is unable to agree with respondent's contention. The exclusion from the otherwise random sample of case files of cases which do not achieve a passing score due to an error or errors not attributable to the employe being evaluated has a tendency to result in a negative impact on that employe's score for reasons unrelated to his or her performance. That is, the policy removes from what otherwise would be a random sample of the employe's work a subset of cases. With respect to this subset, the employe's work is satisfactory but another employe or employes' work is not satisfactory. In place of these excluded cases are substituted cases with respect to which the

evaluated employe's work may or may not be satisfactory.[5] Thus respondent's policy has a bias toward lower QPI reclassification scores as opposed to a true random sampling approach. An employe like appellant is in effect being penalized for errors by other employes. This is inconsistent with the civil service code, § ER 3.015(2)(a), Wis. Adm. Code, which requires that regrades be determined on the basis of the incumbent employe's performance, not the performance of other employes.

DILHR is free to utilize the federal QPI evaluation system in its evaluation of UBS adjudicators for regrade, so long as the results are not inconsistent with the civil service code. However, DILHR has not pointed out anything in the federal system that would be inconsistent with including in an employe's QPI evaluation for regrade purposes those files which are unsatisfactory due to an error or errors not attributable to that employe.[6]

With respect to the second issue concerning the "Sunday work" case, respondent's initial analysis was that:

> The issue is a discharge, not a constructive quit. The claimant had no intention to quit the job. The employer had warned him to work as scheduled or to start looking for another job because he would be fired if after the 30 days he did not find other work or work out a schedule for Sundays. The rationale recognizes this and all through the rationale it appears the ruling is going to be a discharge until the last couple of sentences. (Respondent's Exhibit 7, p.4)

Respondent subsequently changed its rationale for failing this case from a substantive basis (i.e., that the determination of "constructive quit" was incorrect[7]) to that of an inadequate explanation for the result. Respondent's position is summarized in its post-hearing brief as follows:

> The appellant has continued to argue that the result she reached in the case was the correct one. However, as the QPI review specialist testified at the hearing, the problem is not so much the result reached as the way the determination seems to use the terms "quit" and "discharge" interchangeably. The QPI reviews not only the correctness of a case's

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[5] In the instant case, appellant's work on the substituted file was unsatisfactory.

[6] The record also reflects that respondent excludes from scoring files with errors that are nominally attributable to the employe being evaluated for regrade, but where he or she has documented that the error was the result of a lead worker's advice.

[7] As noted above, appellant's constructive quit initial determination was upheld by the appeals tribunal.

> result, but also the "rationale," the explanation as to why the result is required by the facts and the law.
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> In terms of the UC law. there is a significant difference between a "quit" and a discharge. An employe who quits is presumptively not eligible for UC benefits, unless certain special circumstances are present. (§108.04(7), Stats.) For an employe who is discharged, the presumption runs the other direction - he or she generally is entitled to benefits. For the rationale of a decision as to "quit" vs. discharge to make sense, the adjudicator must be able to distinguish between the two and explain which of the two applies to the case at hand.
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> In discussing the "Sunday work" case (Respondent's Exhibit 9) the respondent's witnesses at the hearing agreed that an argument could be made to support the determination that the employe had constructively quit his employment by refusing to agree to work on Sundays and refusing the alternatives offered by the employer. If the appellant had expressed her determination in this way, it would have received a passing score. As written, the determination does not explain itself in a coherent manner and thus cannot be passed. (Respondent's post-hearing brief, p. 5)

With respect to this issue, the evidence presented by the parties does not establish clearly that appellant's rationale for her initial determination was either adequate or inadequate under established agency standards. While in the Commission's opinion, appellant's rationale is not substantially different in its basic approach from the rationale of the appeal tribunal (Appellant's Exhibit 4-5), respondent also criticized her rationale for its inartful use of the terms "discharge" and "quit."[8] On the other hand, appellant's lead worker testified that she did not find appellant's rationale to be either outside the range of allowable individual stylistic approaches or confusing.

In the final analysis, on this record this issue boils down to a difference of opinion concerning the adequacy of a written justification for appellant's conclusion. There is nothing in the record by way of, for example, policies, guidelines, or examples of other adjudicators' rationales on similar issues that have been scored by management, that sheds significant light on this question. Appellant has the burden of proof, and the Commission concludes that she has not established that respondent's scoring of this item was incorrect.

Turning to the question of remedy, the record reflects that if appellant had received a passing score on the first file in controversy (the "student"

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[8]The appeal tribunals decision is probably an illustration of a better approach to the use of these terms

file), her score would have been such that under respondent's procedures, an additional ten files would have been pulled to determine whether she would have obtained an overall passing score. Since on this appeal she prevailed only on the issue involving this first file, this approach will have to be followed on remand.

ORDER

Respondent's action of denying appellant's regrade to UBS 3 is rejected, and this matter is remanded to respondent for action in accordance with this decision.

Dated: November 14, 1995 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

AJT:bjn

JUDY M. ROGERS, Commissioner

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