STATE OF WISCONSIN PERSONNEL COMMISSION

WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT & SELECTION,

Respondent.

Case No. 95-0107-PC

ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner, and the consideration of written objections and oral argument with respect thereto. While the Commission will adopt the proposed decision and order (which is attached hereto and incorporated by reference as if fully set forth herein) as its final disposition of this matter, it adds the following discussion.

Appellant contends for the first time in oral argument following the promulgation of the proposed decision and order that respondent, not the appellant, has the burden of proof.[1] Laying to one side the question of whether this contention come so late as to be waived,[2] the Commission cannot agree substantively with appellant's contention.

Appellant cites State v. Hanson, 98 Wis. 2d 80, 89, 295 N.W. 2d 209 (Ct. App. 1980); affirmed, 100 Wis. 2d 549, 556-58, 302 N.W. 2d 452 (1981), in support of its position. Appellant argues that this case falls fully within the ambit of the "proof of exceptions" principle, which supports placing the burden of proof on the party who relies on an exception to a general rule or statute. However,

[1] The general rule in administrative proceedings of this nature is that the appellant, as the party asserting a claim or seeking relief, has the burden of proof on all issues. See, e.g., Lawry v. DP, 79-0026-PC (7/30/79); 2 Am Jur 2d Administrative Law §360.

[2] Appellant admits that if the Commission rules in its favor on this issue, there would have to be an opportunity for a new hearing.

comparison of the statutory framework in State v. Hanson with that present here leads to the conclusion that the "proof of exceptions" principle does not apply to the instant case.

State v. Hanson involved the operation of the Wisconsin Sex Crimes Act. Under that law, a sex offender committed because of a need for specialized treatment was to remain committed "so long as in its [DHSS's] judgment, such control is necessary for the protection of the public," §975.11, Stats. (1975), subject to the proviso that the offender was entitled to release at the expiration of the maximum term for the underlying offense unless DHSS acted under §975.13 to continue its control over the offender. Under §975.13, if DHSS made the determination that discharge at the normally prescribed time would be dangerous to the public, it could petition the court for an order continuing the commitment. The question before the court arose because of the operation of §975.09, which required DHSS to examine the offender at least annually. If it failed to do so, the offender could "petition the court for an order of discharge, and the court shall discharge him unless it appears in accordance with §975.13 that there is necessity for further control." Id.

The Supreme Court held that the statutory scheme had the effect of placing an annual obligation on DHSS to justify continued departmental control of the offender. Since this statutory framework placed the burden of proof for continuation of confinement on DHSS, the department's failure to conduct an annual exam and the offender's ensuing petition under §975.09 could not shift the burden to the offender.

The Supreme Court did not specifically elucidate how this result was related to the "proof of exceptions" principle. However, this was set forth in the Court of Appeals decision as follows:

> In reviewing sec. 975.09, Stats., we note that failure to conduct a periodic examination entitles an offender to petition for discharge, which discharge shall be granted "unless it appears in accordance with s. 975.13, Stats., that there is a necessity for further control." The "unless" clause is an exception to the statutory command that the offender be discharged upon failure to hold a periodic examination. The exception is part of the enacting clause of the statute. Because of the policy reasons which we have already discussed favoring placing the burden of proof upon the state, we deem this language to be expressive of the legislature's intent to afford the state an opportunity to prove an exception to the statutory command. We note that the definition of the word "unless" is

> "except." Webster's New Collegiate Dictionary 1280 (1977). We conclude that this factor is supportive of a holding that the state should bear the burden of proof. 98 Wis. 2d at 89 (emphasis added).

Determining whether a provision in a statute is an exception to the command of a statute, or a constituent element of the statutory command is not always straightforward. State v. Hanson relied heavily on State v. McFarren, 62 Wis. 2d 492, 502, 215 N.W. 2d 459 (1974), where the Court cited the CJS discussion of this issue with respect to criminal statutes:

> "Where, however, an exception is part of the enacting clause, or where, whether appearing as an exception or a proviso, its terms are in fact part of the description of the offense, the burden is on the state to prove that the accused is not within such exception or proviso . . . It has been stated, however, that the preceding rule cannot be mechanically applied and the real question is whether the exception is so incorporated within the clause defining the offense that it becomes in fact a part of the description, and such question cannot be determined by the mere position of the exception in the text." (citation omitted; emphasis added)

The Court applied this principle to §30.12(1), Stats., which provided:

> Unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:
>
> "(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or
>
> "(b) To deposit any material or to place any structure upon the bed of ;any navigable water beyond a lawfully established bulkhead line. (emphasis added)

The Court held that "the part of sec. 30.12, Stats., dealing with bulkhead lines is not phrased as an exception but rather as part of the description of the violation," 62 Wis.. 2d at 502, and relied on this and other factors in concluding that the state's burden of proof included the establishment of the nonexistence of a bulkhead line, i.e., that the language dealing with bulkhead lines did not operate to shift the burden of proof.

Turning to the instant case, §230.30, Stats., provides, inter alia:

> Each agency shall constitute an employing unit for purposes of personnel transactions, except where appropriate functional, organization or geographic breakdowns exist within the agency. (emphasis added).

In the context of the foregoing authorities, the statutory language cited above describes the factors that are to be taken into consideration in the establishment of employing units, rather than providing an exception to the constituent parts of a statutory command.

Dated: April 4, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

LRM:lrm

JUDY M. ROGERS, Commissioner

Parties

Wisconsin Professional Employees Council
c/o Michael Plaisted
1334 Applegate Road
Madison, WI 53713-3184

Robert Lavigna
Administrator, DMRS
PO Box 7855
Madison, WI 53707-7855

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

STATE OF WISCONSIN PERSONNEL COMMISSION

WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL,

Appellant,

v.

Administrator, DIVISION OF MERIT RECRUITMENT & SELECTION,

Respondent.

Case No. 95-0107-PC

PROPOSED DECISION AND ORDER

Nature of the Case

This is an appeal of respondent's approval of the creation of eight new employing units for the Office of the Commissioner of Banking. A hearing was held on October 19 and 20, 1995, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on January 5, 1996.

Findings of Fact

1. From the date of its creation until May 15 or July 31, 1995, the Office of the Commissioner of Banking (OCB) constituted a single employing unit.

2. One of OCB's primary responsibilities is to conduct financial examinations of state-chartered banks. At all times relevant to this matter, it has been required that each state-chartered bank be examined annually and these examinations have been conducted for OCB by staff examiners assigned to one of the OCB's district offices. Beginning in 1972 or 1973, a position which functioned as a supervisor of examiners was assigned to each district office.

3. Prior to September 26, 1994, bank examiners were assigned to conduct particular examinations by the supervisor of the district to which they were assigned; and 95% of these examinations were of banks located within the geographical boundaries of the examiner's assigned district. It was somewhat more likely that a bank examiner who was a trust specialist would be assigned to examine a bank outside his or her district than it was for an examiner without this specialty.

4. At all times relevant to this matter, the financial and management practices and characteristics of state-chartered banks in each OCB district have differed in significant ways from those of the banks in other districts; and, due to these differences, the experience and expertise gained by an examiner in a particular district is not substantially identical to that gained by examiners in other districts.

5. In February of 1994, the Legislative Audit Bureau (LAB) completed an audit of OCB. This audit concluded, among other things, that the bank financial examination function was overstaffed by at least 7 full-time equivalent (FTE) positions, and that the non-depository institution (NDI) examination function was unreasonably backlogged and otherwise inadequate.

6. Rather than simply transferring positions from the bank examination function to the NDI examination function as recommended in the LAB audit, OCB undertook a study of the NDI examination function. Pending the completion of this study, the bank examination schedule which had been followed in previous years was revised and bank examiners were assigned to particular examinations by OCB's central office rather than by their district offices and certain bank examiners were temporarily assigned to other functions. These measures were temporary and were taken to assure that all bank examiner positions were being fully utilized.

7. The conclusion reached by the NDI study was that NDI examinations should be conducted primarily as desk audits in OCB's Madison and Milwaukee offices rather than as field exams in each of OCB's district offices, and that it was not necessary to add staff to the NDI function. This conclusion was adopted and implemented by OCB management.

8. In 1984, there were 480 state-chartered banks in Wisconsin. As of the date of hearing, there were 320 state-chartered banks in Wisconsin. At all times relevant to this matter, the forecast has been that this trend will continue. The OCB district most affected by this trend has been the Appleton district. In 1987, there were 84 chartered banks in the Appleton district; as of the date of hearing, there were 50.

9. Effective January 1, 1994, OCB and the Federal Deposit Insurance Corporation (FDIC) entered into an agreement whereby they would share responsibility for the annual examination of state-chartered banks. This has resulted in a substantial reduction in the number of bank financial examinations for which OCB is responsible.

10. Some time in 1995, the number of OCB district offices was reduced from 6 to 4 and the geographical boundaries were redrawn at least in part to more closely resemble the four FDIC districts in Wisconsin.

11. In late 1994 or early 1995, OCB management decided that layoffs of examiners were necessary to address the overstaffing in the bank financial examination program area.

12. On January 6, 1995, representatives of OCB management met with Jesus Garza, a policy advisor to respondent Administrator of DMRS. OCB had requested the meeting to obtain respondent's assistance in reorganizing OCB. OCB representatives described the agency's program functions and district operations. Mr. Garza indicated that it appeared as though OCB was functioning with separate employing units although not formally structured that way, and recommended that OCB consider separating into multiple employing units. Mr. Garza explained that this would permit promotional competition within a district office, and would permit requiring an employee reinstated or transferred to a district office other than the one to which he or she had been previously assigned to serve a probationary period.

13. In February and March of 1995, OCB developed a plan to separate the agency into eight (8) employing units and this plan was finally approved by respondent on or around July 31, 1995. This plan called for each of OCB's district offices to be considered a separate employing unit.

14. One of the reasons for OCB's request that the agency be separated into eight employing units was to enable OCB to develop a layoff plan which would base the number of bank examiner positions in a particular district on workload projections for that district and would retain bank examiners in the districts to which they had been assigned prior to layoff. If OCB had remained a single employing unit, a layoff would have been required to have been accomplished on an agency-wide, not district-wide, basis.

15. Subsequent to the approval of OCB's separation into eight employing units, OCB developed and implemented a layoff plan for bank financial examiner positions. This plan resulted in the layoff of two (2) examiners in the Eau Claire district, five (5) examiners in the Appleton district, two (2) examiners in the Madison district, and no (0) examiners in the Milwaukee district. Due to their seniority with OCB, some of the examiners laid off would not have been subject to layoff if OCB had remained a single employing unit.

16. Certain other state agencies with offices or institutions

geographically removed from the central office have a multiple-employing-unit structure, with one or more of these remote offices or institutions constituting a separate employing unit, e.g., Department of Corrections; Department of Industry, Labor and Human Relations; Department of Transportation; Department of Health and Social Services; Department of Natural Resources; Department of Veterans Affairs; and Department of Military Affairs.

Conclusions of Law

1. Appellant has the burden to show that respondent violated §230.30, Stats., when it approved the creation of eight new employing units at the Office of the Commissioner of Banking during 1995.

2. Appellant has failed to sustain this burden.

Opinion

The issue to which the parties agreed is:

> Whether the establishment of eight new employing units at the Office of the Commissioner of Banking violated §230.30 of the Wisconsin Statutes.

Section 230.30, stats., states as follows:

> **230.30 Employing units; establishment and revision.** Each agency shall constitute an employing unit for purposes of personnel transactions, except where appropriate functional, organizational or geographic breakdowns exist within the agency. These breakdowns may constitute a separate employing unit for one or more types of personnel transactions under an overall employing unit plan if requested by the appointing authority of that agency and approved by the administrator. If the administrator determines, after conferring with the appointing authority of the employing agency, that an employing unit is or has become inappropriate to carry out sound personnel management practices due to factors including, but not limited to, the size or isolated location of portions of the employing unit, the administrator may revise the employing unit structure of the agency to effect the remedy required.

Appellant has the burden to show that respondent, in establishing eight new employing units for OCB, did not satisfy the requirements of §230.30. Although §230.30 has numerous requirements relating both to procedure and to substance, appellant's sole contention here appears to be that respondent

erred in concluding that OCB's single-employing-unit structure had become inappropriate to carry out sound personnel management practices.

Appellant argues that the record fails to show that the personnel management practices carried out by OCB under the single-employing-unit structure were no longer sound. The changes in personnel practices which OCB sought to achieve by converting from a single-employing-unit structure to a multiple-employing-unit-structure were as follows:

a. to permit layoffs and promotions to be carried out on a district-wide, rather than statewide basis--this would result in examiners remaining in the districts in which they had gained their experience.

b. to permit OCB to require an examiner transferring from one district to another or reinstating to a district other than the one in which he was formerly employed to serve a probationary period--under a single-employing-unit structure, such a permissive probationary period could not be required--this change would permit OCB to assess an examiner's performance examining different banks before granting the examiner permanent status upon transfer or reinstatement.

Did respondent err in concluding, prior to the creation of the eight new employing units, that the existing personnel practices in the areas described in paragraphs a. and b., above, were no longer sound? Implicit in OCB's and respondent's offer of these areas as the basis for the change in OCB's employing-unit structure is the contention that the experience and expertise gained in an examiner position in one district is sufficiently distinct from that gained in an examiner position in a different district to justify not treating the situations as substantially identical for purposes of layoff, promotion, transfer, or reinstatement. (See Finding of Fact 4, above). The record shows that all banks differ as to their method of operating, management practices, banking philosophy, and reasons for making changes and it takes time for an examiner to learn these things about a particular bank; and that each district has a different mix of banks and a specific mix of needs. It is possible to maintain this experience and expertise in a particular district in the mutiple-employing-unit structure requested by OCB and approved by respondent but not in a single-employing-unit structure. The Commission concludes on this basis that appellant has failed to show that respondent erred in this regard, i.e., appellant has failed to show that respondent erred in concluding that the existing personnel practices under the single-employing-unit structure were

no longer sound. This reliance on the existence of geographically separate offices as a basis for establishing multiple employing units appears to be contemplated by §230.30, Stats., which indicates that one of the factors to consider in determining the continuing appropriateness of a single-employing-unit structure is the isolated location of portions of the employing unit. In addition, creation of separate employing units for district offices is consistent with the practice followed in certain other state agencies (See Finding of Fact 16, above).

Appellant contends in this regard that the fact that OCB assigned examiners to conduct examinations outside their districts demonstrates that OCB regarded the experience and expertise acquired in one district as freely transferrable to a different district. However, the record shows that this occurred, prior to the LAB audit, in regard to approximately 5% of non-trust examinations and in regard to a somewhat higher percentage of examinations of bank trust departments. In addition, the record shows that the higher rate of out-of-district assignments which occurred in 1994 and 1995 was a temporary situation designed to permit OCB to complete its study of the NDI examination function and to make full use of its examiner staff resources until a reorganization plan could be completed. As a result, the evidence in the record does not support appellant's contention in this regard.

Appellant further contends that respondent can not now argue that the desire to maintain district-specific experience and expertise in a particular district in a layoff situation was one of the goals of the creation of multiple employing units at OCB since "[a]t the hearing in this matter, Jesse Garza and all the OCB management that testified denied steadfastly that the perceived need to lay off examiners on a regional basis had anything to do with the decision of the Administrator or the request of the agency for separate employing units. ... Deputy Commissioner Jim Huff and administrator Michael Mach denied that it was a concern at the time the request was made." However, Deputy Commissioner Huff testified that each district has different bank examination needs and attributes; that, once a decision was made to effect the bank examiner layoffs, OCB conducted a review of the bank examination workload in each district and determined from that review what the bank examiner staffing should be in each district; that OCB management felt that it would be inefficient and costly to maintain more bank examiners in a district than the district workload could justify; that OCB management considered the

reassignment of examiners to other districts (that could have resulted from layoff of examiners on an agency-wide basis under a single-employing-unit structure) as problematical from a cost and efficiency standpoint; and that the inability to lay off employees on a district-wide, rather than agency-wide, basis was a problem before the change to a multiple-employing unit structure which is not a problem since that change has been effected. This testimony does not confirm appellant's characterization of the record as it relates to OCB management. Although Mr. Garza's testimony is not entirely clear in regard to this point, it would be inconsistent to conclude, based on the testimony of OCB management and the timing of the layoffs, that respondent did not discuss with OCB, and consider the impact of, the proposed change in the employing unit structure of OCB on the examiner layoffs in recommending and approving the change. The Commission concludes that both OCB and respondent based the decision to change OCB's employing unit structure in part on the impact this change would have on the layoff of bank examiners in the district offices. However, even if respondent DMRS did not base its approval of OCB's new employing unit structure on the impact it would have on layoffs, the remaining bases, i.e., those related to promotion, transfer, and reinstatement, are sufficient to sustain respondent's action here.

Appellant implies in its argument that basing the change in the employing unit structure of OCB in whole or in part on a desire to lay examiners off on a district-wide as opposed to agency-wide basis is improper per se. Not only does appellant fail to cite any persuasive authority for this contention, but a layoff is a personnel management practice and, as such, may properly be considered in taking action under §230.30, Stats. Appellant also asserts that the subject action constitutes a thinly disguised effort to circumvent the terms of the applicable collective bargaining agreement. However, any allegation such as the one here relating to the violation of collective bargaining requirements is outside the scope of the Commission's jurisdiction.

Order

The action of respondent is affirmed and this appeal is dismissed.

Dated:_____, 1996 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

_____
DONALD R. MURPHY, Commissioner

LRM:lrm

_____
JUDY M. ROGERS, Commissioner