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WISCONSIN PROFESSIONAL
EMPLOYEES COUNCIL,

Appellant,

v.

Administrator, DIVISION OF MERIT
RECRUITMENT & SELECTION,

Respondent.

Case No. 95-0107-PC

* * * * *

DECISION
AND
ORDER

This is an appeal of the establishment of eight (8) new employing units at the Office of the Commissioner of Banking (OCB). Respondent filed a motion to dismiss for lack of subject matter jurisdiction and the parties were permitted to brief this motion. The briefing schedule was completed on September 21, 1995.

Appellant argues that the Commission has jurisdiction over this matter pursuant to §230.44(1)(a), Stats., which states as follows:

230.44 Appeal procedures. (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).

It is clear from the statutes that "subchapter" within the meaning of the cited provision refers to Subchapter II of Chapter 230 and includes §§230.05 through 230.48, Stats. It is also clear from §230.03(1), Stats., that the term "administrator," for purposes of Chapter 230 means the Administrator of the Division of Merit Recruitment and Selection (DMRS).

The parties agree that respondent Administrator of DMRS approved the establishment of 8 new employing units in OCB, and that employing units are established and revised pursuant to §230.30, Stats., which 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.

Respondent first argues that approval by the DMRS administrator of an appointing authority's request to establish or revise the employing unit structure of the agency is not a "personnel decision" within the meaning of §230.44(1)(a), Stats., i.e., that a "personnel decision" relates to a specific transaction or occurrence in respect to the movement of a person into, out of, or within the classified civil service from one employment to another, and not to broader organizational decisions, such as those relating to employing units, which do not constitute or consist of discrete personnel transactions.

Respondent cites no authority for this argument and the Commission does not find it persuasive. A "decision" is a contemplation of options and a subsequent selection from among these options. A "personnel decision," as used here, would be a decision which affects the employment status of employees or applicants for employment. See Seay v. UW-Madison, 89-0082-PC-ER (3/31/94); aff'd Dane Co. Circ. Ct., 93-CV-1247, 94-CV-1238 (3/3/95). A narrower reading of the operative language of §230.44(1)(a), Stats., is not merited by a review of the statutory language itself or by a review of relevant Commission decisions. A reading of §230.44(1)(a), does not indicate any intent to limit its scope to discrete personnel transactions affecting individual employees or potential employees. Although respondent attempts to draw a parallel to the types of decisions covered by §230.44(1)(b), the language of §230.44(1)(b) narrowly limits its application to discrete classification

transactions through its specific reference to §§230.09(2)(a) and (d), Stats. The parallel language in §230.44(1)(a), broadly references decisions made by the Administrator of DMRS "under this subchapter." Subchapter II of Chapter 230, unlike §§230.09(2)(a) and (d), sets forth a broad scope of decision-making authority for the Administrator of DMRS, some related to individual personnel transactions but most related to broader decisions affecting groups of individuals. The Commission has recognized this and has issued decisions in cases involving the content of civil service examinations (Allen et al. v. DMRS, 89-0124-PC (5/17/90); aff'd Dane Co. Circ. Ct., Allen et al. v. Wis. Pers. Comm., 90-CV-2840 (2/28/91)); the scope of competition for civil service recruitment (Augustin v. DMRS & DOC, 90-0254-PC (10/3/91)); and the use of related candidate registers (Ochalla et al. v. DMRS, 90-0111-PC (5/31/91)).

Respondent also argues that the jurisdiction of the Commission over this matter is superseded by the applicable collective bargaining agreement pursuant to §111.93(3), Stats., which states as follows:

(3) Except as provided in ss. 40.05, 40.80(3), 111.91(1)(cm) and 230.88(2)(b), if a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes, as well as rules and policies of the board of regents of the university of Wisconsin system, related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes, rules and policies are set forth in the collective bargaining agreement.

The controversy here centers on Article VIII, Sec. 8/8/1 of the applicable collective bargaining agreement which states as follows:

8/8/1 The Employer will provide the Union 30 days advance notice of any change in the employing unit structure. The Union shall have the opportunity to discuss these changes with the Administrator of the Division of Merit Recruitment and Selection.

The parties appear to agree that the establishment and revision of employing units is a permissive subject of bargaining and, as a result, subject to the Commission's rationale in Coulter v. DOC, 90-0355-PC (1/24/91), and Taddey v. DHSS, 86-0156-PC (6/1187). The essence of the dispute is whether there is sufficient overlap between the language of §230.30, Stats., and section 8/8/1 of the collective bargaining agreement to support a finding of supercession under §111.93(3).

In Coulter, the Commission, in addressing a dispute relating to add-on pay for college course credit, concluded that the collective bargaining agreement did not contain an express or implied provision governing such add-on pay and that it was "those provisions which are actually bargained and actually stated in a collective bargaining agreement which are given superseding effect under §111.93(3), Stats. Respondent, in support of its position here, points to footnote 1 on page 7 of the Taddey decision which states, in part: . . . the provisions of civil service and other applicable statutes related to "wages, fringe benefits, hours and conditions of employment" will be superseded by the corresponding provisions of the labor agreement regardless of whether or not there is an exact overlap between the contractual and the statutory provisions."

The provision in the applicable collective bargaining agreement relates to notice of and opportunity for input into the determination to establish or revise employment units. The corresponding provision in the statutes relates to the determination itself. Although they both relate to the establishment and revision of employing units, there does not appear to be an overlap between these provisions. As a result, §111.93(3), Stats., would not operate to deprive the Commission of jurisdiction over this matter.

Order

Respondent's motion to dismiss is denied.

Dated: September 29, 1995 STATE PERSONNEL COMMISSION


LAURIE B. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

LRM:irm