STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KAREN ESLINGER, Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS, and
Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES, Respondents.

Case 32
No. 64029
PA(adv)-52

Decision No. 31416

Appearances:

Karen Eslinger, 1242 North Main Street, Cadott, Wisconsin 54727, appearing on her own behalf.

Gloria J. Thomas, Assistant Legal Counsel, DOC, P. O. Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

Paul Harris, Assistant Legal Counsel, DHFS, P.O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Department of Health and Family Services.

ORDER DISMISSING APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION

This matter, which relates to the rate of pay for Karen Eslinger (the Appellant), is before the Commission on a question of subject matter jurisdiction. The Department of Corrections (DOC) filed a motion to dismiss for lack of jurisdiction and the final brief from the parties was filed on January 27, 2005.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Karen Eslinger was originally hired as an employee of the State of Wisconsin in 1987 by the precursor of what is now the Department of Health and Family Services (DHFS). She worked continuously with that agency until she resigned her position as a Resident Care Technician 2 in 1996. She subsequently worked as a full-time Dental Hygienist in the private sector.

2. In February 2002, Ms. Eslinger applied for a vacant half-time position as a Dental Hygienist position at DOC's Stanley Correctional Institution (SCI).

3. On January 3, 2003, she was offered the position at $20.919 per hour and she accepted this offer. Her appointment was confirmed by letter dated January 8, 2003, which stated, in part:

> This confirms your appointment to the position of Dental Hygienist, pay range 6-16 . . . . This appointment is effective January 27, 2003.
>
> In accordance with Appendix 3 of the agreement between the State of Wisconsin and Wisconsin State Employee Union, your starting salary will be $20.919 per hour. . . . Any further pay adjustments will be in accordance with provisions set forth in Appendix 3 of the WSEU agreement.
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> Your position is included in the Technical certified bargaining unit.

4. DOC viewed the hire as a reinstatement (resulting in adjusted seniority of approximately 9 years) rather than as an original appointment. If calculated as an original appointment, the starting wage at SCI would have been $17.553.

5. DOC increased Ms. Eslinger's rate of pay to $22.840 in approximately June 2003.

6. By letter dated July 28, 2004, Ms. Eslinger notified DOC that she had accepted a transfer opportunity to a full-time Dental Hygienist position at the Northern Wisconsin Center operated by Respondent DHFS. DOC accepted her resignation.

7. DHFS staff responsible for determining the rate of pay in the new position concluded that Ms. Eslinger's hire by DOC in 2003 had been an original appointment rather than a reinstatement because it took place after her reinstatement eligibility had expired. DHFS notified DOC of the conclusion.

8. DOC contacted Ms. Eslinger on August 17, 2004, informed her that she had been overpaid during her employment and told her that money would be deducted from her final paycheck dated September 2, 2004.

9. By letter to Ms. Eslinger dated August 18, DHFS confirmed that her rate of pay in her new position would be $19.767/hour.

10. Ms. Eslinger resigned from her position at SCI effective August 21, 2004 and transferred to the full-time Dental Hygienist position at Northern Wisconsin Center on August 22, 2004. DHFS has paid Ms. Eslinger at the rate of $19.767 per hour.

11. In a letter dated September 7, 2004, DOC notified Ms. Eslinger that:

> During an audit of our payroll, it was discovered that your pay rate for Dental Hygienist was calculated incorrectly. In reviewing our records, we found that when you started employment at Stanley Correctional Institution, your wage was set based upon an adjusted seniority date. Because more than 3 years of separation existed between when you left state service (7/31/96) and when you returned (1/27/03), your seniority should have been the day you started at Stanley Correctional Institution.
>
> Your September 2, 2004 paycheck will [sic] reflect the reduction in your supplemental pay rate to $19.767/hour. However you have been overpaid from January 27, 2003 through August 21, 2004 for a total overpayment of $5,062.68. (Minus first payment of $138.72 deducted from PP 1804 pay check). I have attached a spreadsheet that outlines these calculations.
>
> You have been overpaid for 40 pay periods; therefore, we can recoup this money over the same timeframe. This will mean a deduction of $126.26 for 38 pay periods and $126.08 for the final pay period. If you would like to pay this money back on a faster schedule, please contact. . . .

12. DOC deducted $138.72 from Ms. Eslinger's paycheck dated September 2, 2004 and reduced her salary level from $22.840 to $19.767 per hour, an amount of $122.92 per pay period. The paycheck reflected the hours she worked during the pay period commencing Sunday, August 8, 2004 and ending Saturday, August 21, 2004.

13. At all times relevant to this appeal, Ms. Eslinger's position has been within a collective bargaining unit with a collective bargaining agreement in effect.

14. Ms. Eslinger filed a contractual grievance regarding the matter on September 15, 2004. She filed the present appeal with the Commission on September 21, 2004.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that the Commission has the authority to review the action taken by the Department of Corrections in September 2004 to reduce her rate of pay.

2. The Appellant has failed to sustain that burden.

3. The Commission lacks subject matter jurisdiction over this appeal.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

This matter is dismissed for lack of subject matter jurisdiction.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Judith Neumann, Chair

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Paul Gordon, Commissioner

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Susan J. M. Bauman, Commissioner

Parties:

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Matthew Frank
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MEMORANDUM ACCOMPANYING ORDER DISMISSING APPEAL

The question posed by DOC's motion to dismiss is whether the Commission has the authority under Sec. 230.44 or .45 to review this State civil service personnel action. The employing agency, DOC, acted to reduce Ms. Eslinger's rate of compensation and to recoup amounts previously paid to her in order to correct what DOC has determined was an error when it initially set her rate of pay approximately 18 months earlier.[1] DOC contends that by statute, the terms of the applicable collective bargaining agreement supersede the authority the Commission would otherwise have over this dispute.

Of the various provisions in Sec. 230.44 and .45, the only two even arguable bases for exercising jurisdiction over this matter are Sec. 230.44(1)(c) and (d), Stats., which provide:

> (c) *Demotion, layoff, suspension or discharge.* If an employee has permanent status in class . . . the employee 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.

The focus of DOC's motion to dismiss this appeal is on the effect of Sec. 111.93(3), Stats., which provides:

> [I]f 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 . . . 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 relationship between Sec. 111.93(3), Stats., and Sec. 230.44(1)(d), Stats., was the subject of the decision in TADDEY V. DHSS, CASE NO. 86-0156-PC (PERS. COMM. 5/5/85). In that case, Richard Taddey began to work in a Teacher-Auto Detailing position on July 6, 1986, after receiving an appointment letter citing a pay rate of $9.321 per hour. The

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[1] Appellant's September 2, 2004 paycheck reflected a decision by DOC to reduce her rate of pay commencing her first day on the job in January of 2003. The decision reflected the conclusion that she was a "new hire" when she began work with DOC and did not qualify for reinstatement. While this appeal has been pending, Ms. Eslinger's current employer, DHFS, has continued to pay Ms. Eslinger based on an initial rate of $19.767 per hour but has not made any deductions to offset what was described by DOC in its September 7th letter as the overpayment of approximately $5,000.

position was

included in a bargaining unit. On July 15, respondent informed him he would be paid at $8.877 per hour: "Upon review of the Wisconsin Federation of Teachers, AFT Local 3271, Contract, the correct rate of pay is $8.877 per hour, according to the pay schedule for a Teacher 2." The Personnel Commission[2] (PC) noted that Sec. 230.44(1)(d), Stats., provided jurisdiction over how much Mr. Taddey would be initially paid and the only question was whether subject matter jurisdiction was usurped by the operation of Sec. 111.93(3), Stats. The PC held that matters usurped included mandatory subjects of bargaining plus matters that were in fact bargained as indicated by language in the collective bargaining agreement. Salary schedules were merely attachments to the bargaining agreement which described them as follows:

> The following attachments are for informational purposes only and represent reproductions of information issued by the Administrator, Division of Personnel. This information may be altered or changed by the Administrator, Division of Personnel at any time.
>
> These attachments are not a part of the agreement and their inclusion should in no way be construed as having been a subject of negotiations by the parties. No rights express or implied are granted to employees by the inclusion of the information in these attachments.

Based on this very specific language limiting the effect of the pay schedules that were attached to the bargaining agreement, the PC held that its jurisdiction was not superseded by 111.93(3).[3]

In HEATH & MORK V. DOC & DER, CASE NO. 94-0550-PC (PERS. COMM. 12/22/94), the employing agency, DOC, had notified appellants that their pay had been incorrectly calculated when they moved from the Probation and Parole Agent 1 classification to the Agent 2 level approximately 7 months earlier. DOC claimed appellants had been overpaid during the 7 month period, and reduced their hourly wages accordingly. DOC moved to dismiss the subsequent appeal for lack of subject matter jurisdiction. The PC granted the motion after specifically addressing the interaction of Sec 230.44(1)(c) and 111.93(3):

> Appellants' positions were covered by a "bargaining agreement" within the meaning of s. 111.93(3), Stats. Further, the "determination of an incumbent's pay status resulting from position reallocation or reclassification" is a

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[2] Prior to July 2003 when 2003 Wis. Act 33 went into effect, jurisdiction to hear matters appealed under Sec 230.44 and .45, Stats., rested with the PC.

[3] In dicta in BROOKS V. DOC, CASE NO. 00-0142-PC (PERS. COMM. 10/4/2000), the PC noted that it lacked jurisdiction over whether the appellant was entitled to back pay under a bargaining agreement that covered a Purchasing Agent-Objective position where the appellant had promoted into the position before the bargaining agreement had been reached: "Even if the topic in the present case could be said to fall within the scope of 230.44(1)(d), Stats., the Commission's jurisdiction would be superseded pursuant to 111.93(3), Stats."

bargainable issue, pursuant to s. 111.91, Stats. Any potential jurisdiction which

> the Commission might have had under Ch. 230, Stats., over the pay issue raised in this case would be superseded by the bargaining agreement."

There is no dispute that Ms. Eslinger's employment, and more specifically her rate of pay, has been subject to the terms of a collective bargaining agreement between her bargaining unit and the State of Wisconsin. Wage rates are listed as a mandatory subject of bargaining in Sec. 111.91(1)(a), Stats., and there is no indication (such as was present in TADDEY) that the wage rates are merely attached to the contract for information purposes. Given the precedent established in TADDEY and in HEATH & MORK, the Commission concludes that any jurisdiction that it might possess over this matter pursuant to Sec. 230.44(1)(c) or (d), Stats., is superseded by the language of Sec. 111.93(3), Stats.

In her responsive brief and in her original appeal, Ms. Eslinger has presented extensive information suggesting that she would not have accepted the half-time Dental Hygienist position with DOC in January 2003 had she been offered an initial wage of $17.553. Appellant's arguments relate to a theory of equitable estoppel, i.e. ". . . the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct." PORTER V. DOT, CASE NO. 78-154-PC (PERS. COMM. 5/14/79), AFF'D, DANE CO. CIR. CT. 79-CV-3420, 3/24/80. The Appellant is seeking to apply the theory of equitable estoppel to the merits of the dispute she has with DOC. Before the merits of the appeal can be considered, the Commission must have the statutory authority to review the dispute. In effect, Sec. 111.93(3), Stats., relegates wage issues, such as this one, to the collective bargaining arena, rather than the Commission's jurisdiction.[4]

Dated at Madison, Wisconsin, this 10th day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann, Chair

Paul Gordon, Commissioner

Susan J. M. Bauman, Commissioner

[4] We note that, as reflected in Finding of Fact 15, above, Ms. Eslinger has also filed a grievance pursuant to the collective bargaining agreement's grievance procedure, challenging DOC's action.

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