

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANITA KRASNO, Appellant,

vs.

STATE OF WISCONSIN, LABOR AND INDUSTRY
REVIEW COMMISSION, Respondent.

Case ID: 464.0000

Case Type: PA

DECISION NO. 36127-A

Appearances:

Steven C. Zach, Boardman & Clark LLP, 1 S. Pinckney Street, Suite 410, P.O. Box 927, Madison, Wisconsin, appearing on behalf of Appellant Anita Krasno.

Amesia N. Xiong, Department of Administration, Office of the Secretary, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of Respondent State of Wisconsin Labor and Industry Review Commission.

Appellant Anita Krasno has appealed the decision to lay her off from her full-time position as an attorney at the Respondent Labor and Industry Review Commission (LIRC). Funding cuts required the reduction of two full-time attorney positions. LIRC made the decision to select Krasno and one other person for layoff. LIRC exercised its right to bypass seniority in the case of two individuals with less seniority than Krasno. The result was that Krasno was scheduled to lose her full-time position effective August 12, 2015. In the interim, between the notice of layoff and the actual termination, a part-time employee resigned. Krasno was given the opportunity to fill that position on a one-half time basis. She accepted that position and is currently employed. LIRC moves to dismiss based upon an asserted lack of subject-matter jurisdiction. The parties have each submitted written argument in support of their respective positions.

DECISION AND ORDER DENYING MOTION TO DISMISS

Anita Krasno is challenging the decision of the Labor and Industry Review Commission to select her for layoff from her attorney position. Pursuant to § 230.44(1)(c), Stats., the state

employer is required to prove just cause for the layoff decision. The state, however, moves to dismiss arguing that we lack subject-matter jurisdiction over the appeal of the layoff decision. The state argues that Krasno was not laid off because she accepted a transfer opportunity to a half-time attorney position. The argument is based, in principal part, upon the definition of the term “layoff” as set forth in Wis. Admin. Code Ch. ER-MRS 1.02(11). A layoff is there defined as:

[T]he termination of the services of an employee with permanent status in class from a position in a layoff group approved under s. ER-MRS 22.05, in which a reduction in force is to be accomplished.

The state asserts that because Krasno accepted a part-time position before the effective date of the termination of her full-time attorney position, she was not laid off. One problem with the argument is that it requires one to assume that a 50 percent FTE attorney position is the same job as a full-time attorney position. On July 15, 2015, the layoff plan was approved and in the vernacular of the Bureau of Merit Recruitment and Selection, Krasno was required to “vacate” her position effective August 1, 2015. That decision was modified in a letter to Krasno, dated July 27, 2015, which advised her that even if she accepted the part-time position “your last day of work in your current position will be August 11, 2015.” The updated layoff plan (Attachment J to the Affidavit of Laurie McCallum), dated July 27, 2015, indicated that Krasno was being laid off effective August 12, 2015. Ultimately, Krasno accepted the part-time position offer and started on August 12, 2015 in that position earning one-half the amount of money she previously earned. Contrary to the state’s argument a layoff did in fact occur. Krasno lost her full-time position which she was required to “vacate.” We note that in *Sortedahl v. St. Croix County*, Dec. No. 34688-A (WERC, 11/2014), the Commission concluded *in dicta* that there was no difference between a layoff and a significant reduction in scheduled hours of work.

The state also argues that the move from full time to half time was a voluntary transfer precluding our exercise of jurisdiction. It relies on *Thiel v. DOT*, Dec. No. 31725-A, 31726-A, p.14 (WERC, 12/2009). As Krasno notes, *Thiel* was a § 230.44(1)(a), Stats., appeal not a layoff. As the various documents referenced above indicate, Krasno was required to vacate her position. Krasno’s decision to accept another part-time position does not alter her status. Krasno was certainly required, from a mitigation of damages perspective, to accept the part-time position. Had she refused the part-time position she would not have lost her rights to restoration or future reinstatement as the new position did not meet the standards under Wis. Admin Code. Ch. ER-MRS 22.09(2)(c) because of the significant reduction in hours. The state at least as reflected in § 22.09 does not consider a part-time position to be a “reasonable offer of appointment” to one who has been laid off from a full-time position.

The state argues that our decision in *Peterson v. DNR*, Dec. No. 32605 (WERC, 11/2008), supports its theory that Krasno’s decision to take the part-time position was a

“voluntary transfer.” In *Peterson*, the employee was notified of his discharge and following negotiations between the agency and his attorney was later permitted to resign. The effect of the resignation was a significant increase in post-separation benefits. Under those circumstances, the resignation could plausibly be considered voluntary. Here, Krasno lost her job through layoff and accepted a part-time position as an alternative to unemployment. Assuming Krasno is not independently wealthy, it is a stretch to conclude that her decision was voluntary.

While we are denying the motion to dismiss, it is important to note that the state has a relatively light burden to establish just cause for an economic reduction in force decision. As we observed in *Sortedahl supra*, “the appointing authority need only prove that it acted in accordance with statutory requirements and that the decision was not arbitrary and capricious.” In that matter, the Commission credited the subjective evaluation of a small attorney staff by an experienced district attorney. We recognized that layoff decisions often require close calls particularly when choosing amongst professional staff.

ORDER

The motion to dismiss is denied.

Signed at the City of Madison, Wisconsin, this 1st day of December 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman