

* * * * *

RICHARD ASHMORE, *

Appellant, *

v. *

DENNIS CONTA, Secretary, *
Department of Revenue, *

Respondent. *

Case No. 76-157 *

* * * * *

JOHN HIGGINS, *

Appellant, *

v. *

DENNIS CONTA, Secretary, *
Department of Revenue, *

Respondent. *

Case No. 76-168 *

* * * * *

Before: DeWitt, Morgan, Warren and Hessert, Board Members.

Nature of the Case

These consolidated cases are appeals pursuant to Section 16.05(7), stats., at the fourth step of grievances relating to appellants' discretionary performance award (DPA) determinations. The consolidated hearing of these cases began originally with eight similar cases. However, the six additional appeals were resolved by a stipulated settlement reached in the course of these proceedings. See appeals of Steel, Bongard, Jung, Schweitzer, Miller and Cohen. Nos, 76-178, 180, 182, 183, 193 and 194.

OFFICIAL

OPINION
AND
ORDER

The following findings and conclusions refer to only the two remaining appellants except where reference is made to respondent's handling of this matter in a group or collective fashion.

Findings of Fact

The appellants at all relevant times have been employed by the Bureau of Municipal Audit, Division of State-Local Finance, Department of Revenue. Mr. Ashmore's position has been that of deputy director of the bureau and chief of the audit section. He reports directly to Mr. Alff, the bureau director, who reported to Mr. Fairholm, the division administrator during the period in question. Mr. Ashmore has been the immediate supervisor of Mr. Higgins, who has assisted Mr. Ashmore and supervised the field staff. Mr. Ashmore's position's civil service classification has been Audit Supervisor 5; Mr. Higgins' has been Audit Supervisor 3.

The department's policy and procedure on DPA's and other merit pay increases for non-represented employes is set forth in an administrative directive #307-2, dated December 10, 1975. (Appellants' Exhibit 6) Additional policy and procedures were set forth in a document entitled "Instructions for Supervisors, 1976 Merit Award Program, Wisconsin Department of Revenue" (Respondent's Exhibit 5) This document included, in part, the following statement:

"A general explanation of the rating levels for the various merit awards (Sustained Performance Awards and Discretionary Performance Awards) is contained in AD 307-2, Sections I.B. and I.C. [Appellants' Exhibit 6] More specific information on the criteria to be used in determining the level of employe performance is contained on the back of the rating sheets [Respondent's Exhibit 6].

While no explanation or justification for a rating of 'in the manner required' is necessary, a written justification is required for all other rating used to identify the level of employe performance. The content of these justifications was the subject of a memorandum from Barbara Coleman, dated July 28, 1975 [Respondent's Exhibit 38], in which guidelines and criteria were indicated. Reference should be made to this memo before writing justifications.

All copies of employe merit evaluations are to be submitted through channels to the Division Administrator. Please note that only one signature other than that of the supervisor need appear on the rating to indicate that the evaluation has been reviewed. (An exception to this requirement is that for ratings of 'in the manner required' only the supervisors signature is necessary on the evaluation form.) While other persons at higher levels in the organization may review the evaluations, no signature is required."

Respondent's Exhibit 28 contained in part the following statement:

"May I suggest that some explanation of the employe's history (length of service, for instance), specific examples of the duties performed, and how the employe has distinguished herself/himself from others in the unit in the performance of the particular duties involved would add considerably to our appreciation of the employe's efforts. (I should add that long service in the agency does not, in and of itself, justify an exceptional rating.) Examples of the kind of explanation referred to would be"

The instructions on the rating sheet (Respondent's Exhibit 6b) contained this statement: "Your rating on this form should not be inconsistent with evaluations of the employe's performance that you have made under the department's semi-annual Employe Performance Evaluation system (see AD 380-1)."

Mr. Ashmore was responsible for preparing DPA reports for a number of professional employes under his supervision, including Mr. Higgins. These reports, including Mr. Higgins' (Appellants' Exhibit 11), were prepared by Mr. Ashmore and forwarded to Mr. Alff by memo of June 8, 1976 (Appellants' Exhibit 48). This document contained in part the following:

"It should be recognized that the evaluations are of professional personnel who perform a multitude of varied duties with different levels of responsibility and expertise requirements which can differ considerably depending on work classification, location and circumstances. Evaluations are based on an employe's overall performance versus the average performance we have received and/or expected from employes similarly classified. Because of the numerous and varied duties and responsibilities of staff members, little specific reference to such is included in the ratings. Anyone interested in general duties and responsibilities can read the PDQs (AD-PERS-10) on file with P and ER. The suggested write-up format indicated in Ms. Coleman's memo of July 28, 1975 does not lend itself well to professional staff evaluations. Considering the number of employes to be evaluated, it is apparent that many days of writing and typing would be required if the example format were strictly followed, and the

evaluations certainly wouldn't fit on the forms provided. Such effort is not considered justifiable because it would only prove to be repetitious, expensive and nonproductive. With two seminars coming up in the next two weeks followed by vacation time, it was difficult to get these out as they are this week. In addition, funds available for distribution are so minimal, particularly using a fixed rigid percentage allocation concept, that most employes will very likely get only token increases."

Mr. Alff reviewed the reports, concurred in them, and forwarded them, along with the report he prepared for Mr. Ashmore (Appellants' Exhibit 1), on June 22, 1976, to Mr. Fairholm for his review.

Mr. Fairholm faced a deadline of July 6, 1976, imposed by a memo dated May 17, 1976, from the department's director of personnel and employment relations (Appellants' Exhibit 10), by which to forward the reports to the personnel office. However, this deadline subsequently was advanced to June 30, 1977, and appellant had reference to this date when the reports in question were before him.

Following his review of the appellants' reports, Mr. Fairholm determined to change Mr. Ashmore's rating from "Above Manner Required" to "In the Manner Required" and Mr. Higgins' from "Exceptional" to "Above Manner Required." In making this determination Mr. Fairholm utilized certain criteria he developed, as set forth in part in a memo to the departmental personnel manager dated June 30, 1976 (Respondent's Exhibit 7):

"I have used the following criteria in reviewing bureau level recommendations and have changed some ratings when I felt the written justification did not conform to these criteria.

"CRITERIA FOR EVALUATING EMPLOYES - MERIT AWARDS"

1. A past history of consistently high level performance rating will be largely discounted due to the vagaries of rating among the various managers in the Department and state government and to the fact that other factors than truly exceptional performance are included in rating schemes currently operating in the state.
2. Uncommon expertise displayed by an employe will have value in terms of the rank of the employe: That is, an employe who displays uncommon expertise at a journeyman level may truly be 'exceptional' or be per-

forming 'above the manner required' while the same level of activity for an operating supervisor will represent work 'in the manner required..'"

Mr. Fairholm's rationale for reducing Mr. Higgins' rating, stated summarily, was that the items in the report were either required or not unusual for an employe in his position, and that there was not the kind of specific, detailed analysis such as was called for by deputy secretary Coleman's memo (Respondent's Exhibit 28). Mr. Fairholm's rationale for reducing Mr. Ashmore's evaluation involved this factor and other elements. He felt that a first line supervisor of Mr. Ashmore's experience should be expected as a matter of course to be performing the functions and at the levels described by Mr. Alff. He also considered an incident involving a letter dated December 24, 1975, from Mr. Ashmore to the Rock County finance committee chairman (Respondents' Exhibit 18).

The appellant wrote this letter in response to a decision by Rock County to award the county audit to a private accounting firm, of whom Mr. Ashmore disapproved for a number of reasons, rather than the BMA.

Mr. Ashmore's letter contained the following:

"To the best of our knowledge, this firm has had no experience whatsoever in auditing financial records of Wisconsin Counties. We understand that one of your principal reasons in changing auditors was to obtain possible benefits resulting from employing auditors using a different approach and having a different outlook. The audit of the county's 1975 records will undoubtedly prove to be a memorable experience for both the auditors and the county officials and employes."

This letter elicited a response from the county administrator (letter of January 5, 1976, to the deputy secretary Coleman, Respondent's Exhibit 19), which included the following statement:

". . . under county policy, we were required to contract with the lowest bidder able to meet our specifications.

Because of its somewhat sarcastic tone, it has caused rather hard feelings among those supervisors who have seen it. I hope you would agree that the comments, however accurate, might have been better left unwritten."

Mr. Ashmore received both verbal and what amounted to a written reprimand (letter of January 12, 1976, from Secretary Adamany to Chairman Zick, Respondent's Exhibit 21), Mr. Ashmore stated that he felt that this reaction to the January 12th letter was too strong and because it was written and sent without any prior discussion with the appellant relative to the background, which he went on to provide. However, the appellant also stated in that letter (Respondent's Exhibit 22): "It is apparent that my December 24, 1975, letter to Mr. Zick was in poor taste, was poorly written and was ill-advised since it produced the immediate reaction it did."

In any event, Mr. Alff met with Mr. Fairholm late in the afternoon of June 23, 1976, when the reports were discussed by the two men. Mr. Fairholm told Mr. Alff he had made changes in many of the evaluations and wanted to know if he concurred in those changes, and Mr. Alff said he did not. The evidence conflicts as to what else was said during this conversation, particularly whether Mr. Fairholm specifically directed or asked Mr. Alff to provide additional formal justification for the evaluations. The preponderance of evidence supports a finding that Mr. Fairholm made a more general statement to the effect that the matter of the evaluations would be discussed further at a later date.

Mr. Alff had previous commitments to other matters which would occupy his time on June 24th and June 25th. In any event, following this meeting and later that afternoon Mr. Alff prepared a short memorandum setting forth his disagreement with Mr. Fairholm's position on the evaluations (Respondent's Exhibit 10) and gave it to Mr. Fairholm's secretary. This document contained in part the following comments:

"A summation of your proposed rating changes is given below with my reaction thereto. Brief notes (necessary under time constraints) on each rating follow that summation with the understanding that we will discuss them further."

At the time he prepared this memo, Mr. Alff believed that he could prepare sufficient additional justifications to sustain his original ratings if he had sufficient time. He did not intend for this memo to be his sole response to Mr. Fairholm on the subject.

Mr. Fairholm reviewed Respondent's Exhibit 10 and determined that the additional information or argument it supplied was insufficient and that his changes in the DPA reports would stand. On June 25, 1977, he gave the report forms to his secretary with instructions to make the corrections he had marked in pencil. These consisted of changes in which boxes (exceptional, above the manner required, etc.) were checked. He did not instruct her to indicate on the forms that changes in Mr. Alff's rating had been made by him. Because she was busy she gave the forms to another secretary, who in turn was instructed by Mr. Ashmore not to complete the forms because he felt it would be improper. The forms were then returned to her and she made the indicated alterations.

When Mr. Alff returned to his office on June 28th he found that the forms had been changed as set forth above. He went to Mr. Fairholm's office and told him, among other things, that he didn't concur in the changes and that he was concerned about the effect on the staff morale if they received the reports as changed with no indication who made them. Mr. Fairholm responded that something should be added to the forms to indicate that the changes had been made by him. These additions were made and Mr. Fairholm signed off on the forms on June 29th.

Mr. Fairholm based his changes in the evaluations on a review of the forms prepared by Messrs. Alff and Ashmore, and not on his personal knowledge of appellants' performance, except for some knowledge of Mr. Ashmore, and more particularly the Rock County matter set forth above.

If the DPA reports had not been submitted by the deadline, it would still have been possible to make the awards retroactively or on a delayed payment basis.

Mr. Higgins filed a departmental grievance concerning his DPA, charging that the change by Mr. Fairholm was erroneous because he lacked the opportunity to evaluate his performance and did not consult with his immediate supervisor, Mr. Ashmore, about the rating change. He also alleged that the change ignored departmental policy set forth on the DPA rating form (Respondent's Exhibit 6): "Your rating on this form should not be inconsistent with evaluations of the employe's performance that you have made under the department's semi-annual Employe Performance Evaluation System (see AD 380-1)," as well as on the applicable departmental administrative directive (Appellants' Exhibit 6), paragraph I.B.4.: "Determination of the rating level shall include consideration of the employe's previous anniversary performance evaluation" The appellant attached to his grievance a number of employe performance summaries since the inception of the program by DOR. On all of these he was rated excellent in all five rating categories.

Mr. Ashmore also filed a grievance concerning his DPA contending that:

". . . Mr. Fairholm's evaluation is inequitable, incorrect, inconsistent with ratings given by his supervisor on 6/21/76 and 3/5/76, not reconcilable with his historical performance evaluation records (copies attached) and was given with insufficient opportunity to observe or properly evaluate his performance" (Appellants' Exhibit 9a)

In his denial of these grievances at the second step Mr. Fairholm stated that the two evaluation procedures were not entirely comparable, see Appellants' Exhibit 13b (Higgins), and noted the lack of specific justification on the DPA report for Mr. Higgins as well as the repetitive nature of his performance evaluations. In Mr. Ashmore's case, Mr. Fairholm pointed out that the performance evaluations, while high overall, noted areas of needed improvement, and noted the DPA report's "absence of any demonstrable innovations or extraordinary levels of productivity." (Appellants' Exhibit 9ii). He also mentioned the Rock County incident described above.

Respondent's denial of Mr. Higgins' grievance at the third step contained in part the following language:

"Should the justification be found to be insufficient to support the recommended rating by either level of review, the form is to be returned through channels to provide the supervisor with an opportunity to supply additional justification to support the higher rating initially recommended. While there appears to be a concern that there was an insufficient opportunity to provide additional justification, the fact remains that either level of the agency review process has the responsibility and authority to require a change in the supervisor's original merit rating if the supervisor's recommendation does not meet the department's standard for the rating.

Therefore, based upon my review of the facts of this grievance, I concur with the decision by Mr. Gilbert Fairholm, Division Administrator, that the written justification provided by your supervisor is commensurate with the agency standards for a rating of 'Above the Manner Required'. Therefore, I am denying your request for reinstatement of the initially recommended rating of 'exceptional'." (Appellants' Exhibit 14c,d) (emphasis supplied)

Respondent's denial of Mr. Ashmore's grievance at the third step contained in part the following language:

"Should the supervisor not be able to substantiate the recommended rating level to the satisfaction of either the bureau director/division administrator or the Secretary's Office, the employe's rating would be changed to a level which is consistent with the appropriate standard and justification provided. After final approval is given by both the bureau director/division administrator and the Secretary's Office, the merit award rating forms are then distributed to the employes.

In your particular situation, the recommended rating by your supervisor, Mr. Alff, was reviewed by Mr. Fairholm and it was determined that the written justification initially provided did not warrant a rating of 'Above the Manner Required'. During a conference with Mr. Alff regarding recommended merit ratings for employes in your bureau, Mr. Alff was informed that the justification provided did not support your recommended rating level. Mr. Fairholm directed Mr. Alff to provide additional justification which would warrant approval of the rating as recommended. The additional justification provided Mr. Fairholm by Mr. Alff was also adjudged to be insufficient to sustain Mr. Alff's recommendation to rate you at "Above the Manner Required". Mr. Fairholm therefore reduced your rating to 'In the Manner Required' which he determined to be appropriate based upon his interpretation of the agency standards and justification provided."

Conclusions of Law

The issue to which the parties stipulated at the prehearing conference is as follows:

"Whether or not Gilbert Fairholm's changes of appellants' June 1976 DPAR evaluations constituted an abuse of discretion, an abuse of authority or a violation of the civil service law or rules promulgated thereunder."

Section 16.086(5), stats., provides in part:

". . . the compensation program shall contain either individual or combinations of pay advancement techniques, and the pay schedules therein may contain provisions for a variety of methods of within pay range pay progressions including, but not limited to discretionary performance awards, equity adjustments, 'time in grade' adjustments, and other appropriate within range adjustments as may be provided in the compensation schedule."

Section 16.32(1), stats., provides:

"In cooperation with appointing authorities the director shall establish a uniform employe work planning and progress evaluation program, incorporating the principles of management by objectives, to provide a continuing record of employe development and, when applicable, to serve as a basis for decision making on employe pay increases and decreases, potential for promotion, order of layoff and for other pertinent personnel actions."

Section Pers. 20.08 (renumbered from 20.04), W.A.C., provides:

"In accordance with standards and procedures established by the director as provided under section 16.32(1), Wis. Stats., each appointing authority subject to the approval of the director shall establish an employe performance evaluation and development program directed at motivating and assisting state employes to furnish state services to the public as fairly, efficiently and effectively as possible. The program shall provide for a written performance evaluation to be developed and discussed by the appointing authority for and with each classified employe in a permanent position at least once each year."

The director has issued Statewide Guidelines for Performance and Equity Awards, No. P-842.¹ As was set forth in the findings the respondent has issued a number of documents (Respondent's Exhibits 5, 6, 28, Appellants' Exhibit 4) setting forth the criteria, policy and procedure relative to discretionary performance awards. Inasmuch as the various departmental administrative directives and instructions are part of a statutory and administrative code plan specifically calling for the development of such guidelines, and these documents were introduced in evidence at the hearing without objection, it is concluded that consideration of these documents is within the scope of the stipulated issue.

¹This document was not received in evidence at the hearing. However, respondent quoted from it without objection in his post-hearing brief and it will be officially noticed.

The "Instructions for Supervisors - 1976 Merit Award Program" (Respondent's Exhibit 5) issued by the department's personnel office clearly stated that the preparations of the required written justifications for the higher ratings should be guided by the deputy secretary's memo of July 28, 1975 (Respondent's Exhibit 38). In Mr. Ashmore's memo of June 8, 1976 (Appellants' Exhibit 48), forwarding the DPA reports to Mr. Alff stated that the reports were not in this form:

"The suggested write-up format indicated in Ms. Coleman's memo of July 28, 1975, does not lend itself well to professional staff evaluations. Considering the number of employes to be evaluated, it is apparent that many days of writing and typing would be required if the example format were strictly followed, and the evaluations certainly wouldn't fit on the forms provided. Such effort is not considered justifiable because it would only prove to be repetitious, expensive and nonproductive."

Mr. Fairholm's rejection of a large number of these recommendations rested in substantial part on their failure to comply with this directive to provide specific objective justification for the ratings. Yet despite this the wholesale character of his disagreement with Mr. Alff's recommendations, and the fact that Mr. Alff stated in his memo of June 23, 1976 (Respondent's Exhibit 10): "Brief notes (necessary under time constraints) on each rating follow that summation with the understanding that we will discuss them further," Mr. Fairholm proceeded to review the memo, determine that the additional information was insufficient, and change Mr. Alff's recommended ratings. While it is within the realm of the possible that some further changes might have occurred as a result of his conversation with Mr. Alff on June 28, 1976, it must be concluded on this record that Mr. Fairholm did not allow Mr. Alff a sufficient opportunity to review the individual transactions and to provide additional justification of the nature and in the format set forth in the deputy secretary's memo. This approach denied the affected employes an opportunity to have their DPA's evaluated in accordance with departmental criteria. This was not corrected when the appellants filed their grievances. The statement

that one level of management has the authority and responsibility to require a change in rating if the justification provided by another level of management is insufficient is not responsive to the problem created for an employe when one level of management does not provide sufficient opportunity to the other level of management to prepare the justifications. It also is not responsive to the problem created for an employe when one level of management fails to follow appropriate guidelines in the preparation of the justifications. The employe should not be penalized because of the failure of management at any level or levels to handle something in an appropriate manner.

Another area in which the change of the appellants' DPA reports was in conflict with departmental policy had to do with the weight or lack of weight placed on the employe's performance evaluation. Mr. Fairholm contended in his second step response to appellants' grievance that the DPA rating system was not comparable to the Employe Performance Evaluation system, and that his ratings did not run afoul of the instruction contained on the back of the DPA report (Respondent's Exhibit 6b):

"Your rating on this form should not be inconsistent with evaluations of the employe's performance that you have made under the department's semi-annual Employe Performance Evaluation system (see AD 380-1)."

However, the DPA evaluation system consisted of more than just this instruction. The departmental administrative directive 307-2 (Appellants' Exhibit 6) contains the following, I.B.4.:

"Determination of the rating level shall include consideration of the employe's previous anniversary performance evaluation, the performance standards of the work unit, and the general department-wide criteria established for each rating level. (emphasis supplied)

Mr. Fairholm discounted completely Mr. Higgins' prior employe performance summary. He noted the similarity among the summaries over the last five years and the lack of objective specifics thereon. See response to Higgins' grievance at

step 2 (Appellants' Exhibit 13b). His criticism of these performance summaries from a personnel management standpoint may well have been justified but it deprived the employe of the benefit of another departmental criterion in his DPA evaluation and, again, served to penalize the employe for something done by the employe's supervisor.

In the case of Mr. Ashmore, Mr. Fairholm also discounted the weight of the "excellent" ratings awarded on his performance summaries. See step two response (Appellants' Exhibit 9gg):

"While a rating on an employe performance summary relates directly to his day-to-day activities within the job classification assigned him, the discretionary performance ratings are intended to rate unusual or outstanding performance over and above that normally required of the position, so that while an employe may be performing excellently within the manner required that excellent performance need not be unusual or beyond the normal requirements of the job and therefore is not relevant to the so-called merit requirements."

This approach is inconsistent with the above-cited directives (Respondent's Exhibit 6b and Appellants' Exhibit 6).

Mr. Fairholm, however, did take into consideration the areas for improvement noted on the performance summaries and the specific Rock County incident. Mr. Ashmore has argued that the department's handling of this incident and the weight it apparently attached to it as partial support for his DPA rating reduction constituted an over-reaction and was unwarranted. It is concluded that it was not inappropriate for respondent to have considered this incident and that the nature and extent of reliance on it did not constitute an abuse of discretion, an abuse of authority, or a violation of the civil service law or rules or any administrative directives promulgated pursuant thereto. However, this conclusion does not negate the other conclusions concerning failure to allow sufficient opportunity for Mr. Alff to prepare additional justification and failure to give appropriate consideration to his overall performance evaluation. These factors should have been considered as well

as the Rock County incident and the other factors that were taken into consideration.

There were other issues raised by appellants. They argued that Mr. Fairholm did not have the authority to change or alter the DPA ratings, citing paragraph I.C.2 of AD 307-2 (Appellants' Exhibit 6): "The merit award amount shall be based on the evaluation of the employe's performance by the immediate supervisor" However, paragraph II.B. provides: "All ratings and recommendations for merit or bonus awards are to be submitted by the immediate supervisor through the appropriate channels for review and approval by the division administrator." As this clearly contemplates ultimate authority for the DPA reports in the division administrator, he had the authority to change them. There was also considerable debate about the manner in which Mr. Fairholm initially directed that the DPA forms be changed with no indication that they had been changed, and at his direction. However, the forms were in fact amended at Mr. Alff's request prior to their dissemination to the affected employes and it is unnecessary to reach any conclusion as to this facet of the case.

The appellants also allege that respondent failed to follow appropriate procedures in the processing of their grievances. Since this is outside the scope of the stipulated issue, it will not be the subject of any conclusions of law.

Order

This grievance is resolved partially in favor of the appellants and partially in favor of the respondent as set forth above. This matter is remanded to the respondent for reprocessing of appellants' DPA's, which were effective July 4, 1976, in a manner consistent with this opinion.

Dated September 15, 1977 STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson