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PHILIP A. LUEDTKE, *

Appellant, *

v. *

ZEL RICE, Secretary, *

Department of Transportation, *

Respondent. *

Case No. 76-42 *

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PHILIP C. BECKER, *

Appellant, *

v. *

ZEL RICE, Secretary, *

Department of Transportation, *

Respondent. *

Case No. 76-47 *

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OFFICIAL

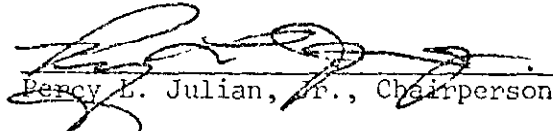
ORDER

Before: JULIAN, Chairperson, STEININGER and DEWITT, Board Members.

Pursuant to a stipulation between the parties we preliminarily affirm the decision of the hearing officer attached hereto. We do intend to prepare a modification of the decision which will be issued as part of our final disposition of this appeal.

Dated May 24, 1976.

STATE PERSONNEL BOARD


Percy L. Julian, Jr., Chairperson

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FINDINGS,
CONCLUSIONS
AND
DECISION

NATURE OF THE CASE

This appeal concerns certain matters connected with the selection process for a position in the Department of Transportation. The appeal was filed pursuant to Sections 16.05(1)(h) and 111.91(3), Wis. Stats., and Article X, sec. 5 of the agreement between the State Engineering Association and the Department of Transportation, and the hearing was before a hearing officer pursuant to those authorities.

FINDINGS OF FACT

This case arose when a Civil Engineer 4 (CE-4) - Transportation position in the Department of Transportation, Division of Aeronautics was vacated by the incumbent. As the first step in filling the position the agency ascer-

tained that no other employes in the CE-4 classification had filed transfer requests.

The agency then reallocated the position from CE-4 to CE-1. This action was taken to facilitate the hiring of a woman or minority in that position in accordance with the Department of Transportation's Affirmative Action Policy (Respondent's Exhibit 4) and Executive Order No. 9, April 23, 1975 (Respondent's Exhibit 2). The reallocation was also consistent with the normal selection and appointment process in this series where the CE-1 and 2 positions are trainee positions for the objective levels of CE-3 and 4.

The personnel officer responsible for filling vacancies within the DOT for the past ten years has never been successful at filling CE positions with women or minorities above the entry, or CE-1, level. It has been his experience that such persons with qualifications above the CE-1 level are employed at wages with which the state cannot compete. At about the time of the decision to reallocate the position from the CE-4 to the 1 level, there were no women or minority persons among the ten engineers employed by the Division of Aeronautics. Within the DOT there were six women and minorities among 718 professional / technical positions (Respondent's Exhibit 3).

The Appellants are and were at the time the vacancy occurred employed by the DOT as CE-3 - Transportation. Both applied for transfer to the vacant CE-4 position and their applications were denied. Both are members of the State Engineering Association. Both are white males.

CONCLUSIONS OF LAW

The issues in this case, as stipulated by the parties, are:

1. Was the reclassification or reallocation of the CE-4 position in the Division of Aeronautics to a CE-1 position arbitrary and capricious? (The parties agreed that the foregoing statement of the issue will not foreclose

the Appellant's argument that said action was motivated by improper anti-union animus.)

2. Who has the burden of proof? The parties agreed at the prehearing conference that the decision of the second issue could be reserved for decision following the hearing, with the Appellant having the burden of proceeding at the hearing.

The parties stipulated and on review of the entire record it is concluded that jurisdiction of this case rests on S. 16.05(1)(h), Wis. Stats.: "Review and act on decisions of impartial hearing officers under S. 111.91(3)." The latter subsection provides in part as follows:

"The employer may bargain and reach agreement with a union representing a certified unit to provide for an impartial hearing officer to hear appeals on differences arising under actions taken by the employer under subsections (2)(b) 1 and 2. . . Nothing in this subsection shall empower the hearing officer to expand the basis of adjudication beyond the test of arbitrary and capricious action. . . ."

The general rule concerning the allocation of the burden of proof is found in 73 C.J.S. Public Administrative Bodies and Procedure S. 124:

"In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof. Also, the burden is on the one making the charges in disciplinary proceedings or where the issue is whether the party charged has committed an illegal or improper act, and this rule applies where the charge is made by the administrative body."

There are a number of circumstances which may lead to a change in the normal rule, as, for example, where one party possesses peculiar means of knowledge, see Kuter and North v. Wettengel, Wis. Pers. Bd. No. 73-152, 159 (July 3, 1975). In this case the appellants have neither presented evidence of nor suggested such circumstances. It is concluded that the appellants have the burden of proof.¹

1. On review of this record, a different allocation of the burden of proof would not result in any changes in the other findings and conclusions.

With respect to the first issue, it is concluded that the reallocation of the CE-4 position in the Division of Aeronautics to a CE-1 position was not arbitrary and capricious. The Wisconsin Supreme Court has defined an arbitrary or capricious decision as "one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful and irrational choice of conduct." Pleasant Prairie v. Johnson, 34 Wis. 2d 8, 12 (1967); Jabs v. State Board of Personnel, 34 Wis. 2d 245, 251 (1967).

Even if there were no affirmative action aspect to the reallocation, a rational basis is provided by the testimony that it is consistent with normal procedure to utilize a CE-1 classification as an entry level for this series. This is consistent with one of the basic provisions for classification action in the classified service, S. 16.07(1)(d), Wis. Stats.: ". . . each class shall . . . where practical, be included in a series to provide probable lines of progression."

The Appellants in their brief point to a perceived discrepancy between the testimony at the hearing concerning the foregoing practice and the position indicated by the Respondent in his letter of March 19, 1976, Appellant's Exhibit 3, which makes reference only to the affirmative action aspect of the decision. The Appellants argue that the Respondent has stipulated² that this is the position of the DOT in this matter.

However, this argument misses the point that the testimony was not that this "progression factor" was the reason for the decision to reallocate

2. The stipulation occurs at p. 4 of the transcript:

Mr. Flesch: ". . . I'd like the Respondent's counsel to stipulate that that letter does indicate the position of the Department and that Mr. Rice, if he was called to testify would testify exactly what appears in this letter.:

Mr. Bernstein: "I'll stipulate to that."

but that the reallocation was not unusual but rather was routine for engineering positions of this nature. The fact that the reallocation was consistent with standard practice that has a rational basis provides support for the conclusion that the reallocation was not arbitrary and capricious, regardless of whether this factor was causative with regard to the actual decision to reallocate. The question presented by this appeal is whether the reallocation was arbitrary and capricious, not the decision to reallocate.

There is further support for a conclusion that there is a rational basis for the reallocation because of the marked scarcity of women and minorities among the professional / technical ranks in the DOT and the agency's past experience of lack of success in recruitment from this segment of the population at above the entry level. In Krajco v. Wettengel, Wis. Pers. Bd. 74-68 (July 30, 1975), the Personnel Board upheld a selection process for a trades position that was limited to women and minorities when the university was able to demonstrate past inability to meet affirmative action goals without such a restriction. In Krajco, the burden was on the employer to demonstrate that the restriction was necessary to the accomplishment of a compelling state interest. Krajco, p. 7. Here, the Appellants have the burden of showing that the action taken was arbitrary and capricious. The findings that the agency had been unable to fill positions above the CE-1 level with women and minorities and that there was a marked imbalance in the agency's professional / technical staff clearly provide a rational basis for the reallocation in the absence of any showing that the reallocation had or would tend to have any deleterious effect on the needs of the service or the functioning of the agency.

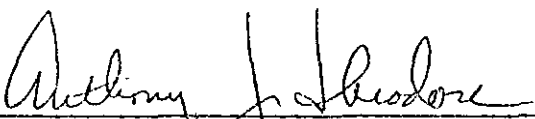
DECISION

It is the decision of this hearing officer that the Respondent's position be affirmed and this appeal be dismissed.

The Respondent's motion to correct transcript was not objected to and is granted and the transcript of the hearing of April 30, 1976, is corrected by the attachment to the transcript of the affidavit of Robert B. Barnes, Jr., subscribed May 12, 1976, and the incorporation by reference of the corrections made in the affidavit to the transcript.

Dated May 18, 1976.

STATE PERSONNEL BOARD



Anthony J. Theodore
Hearing Officer