

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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PATRICK DEAN,

Appellant,

v.

SECRETARY, DEPARTMENT OF REVENUE,

Respondent.

Case No. 77-150

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OFFICIAL

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal of a grievance (nonrepresented) at the fourth step pursuant to s. 16.05(7), Stats. The subject matter involves the effective date for payment of a raised hiring rate for New York based auditors.

FINDINGS OF FACT

1. The appellant at all relevant times has been an auditor employed in the classified service by respondent in a classification not included in a certified bargaining unit.

2. The appellant pursued a unilateral grievance, which was denied at all three steps, concerning the failure to make a raised hiring rate (or "geographic pay differential") for New York based auditors retroactive to the commencement of his assignment in New York. This grievance contained the following statement of "relief sought":

Payment of the geographic differential retroactively from September 12, 1976, to February 12, 1977. This payment encompasses \$1,000 of back wages to reflect the higher costs of living and working in the New York area.

3. In approximately January 1976, the appellant and the director of revenue audit bureau discussed the impending opening of an office in New

York by the Department of Revenue primarily to assist in the audit of multi-state corporations.

4. In that discussion the director stated that work was being done on the establishment of a mechanism for the augmentation of salaries of employes in the New York office to compensate for the higher cost of living in that area.

5. The positions of Auditor 2-CP-Revenue, for the New York Area, were announced on a departmental competitive promotional basis on June 21, 1976.

6. The announcement (Respondent's Exhibit 2) contained no reference to a geographical salary augmentation or similar mechanism for salary augmentation of these positions.

7. The appellant applied for an auditor 2 position and was notified by memo dated July 22, 1976 (Respondent's Exhibit 3) of his promotion to Auditor 2 effective October 10, 1976. There was further notice that his headquarters could be at 330 Madison Avenue, New York City. The basic salary information was also included but contained no reference to a geographical pay differential or similar device.

8. The appellant commenced his assignment in the New York office on September 13, 1976.

9. The department of revenue personnel unit became aware that a raised hiring rate, geographical pay differential, or similar device to augment the pay of New York based auditors, was desired, sometime prior to September, 1976, and began doing research and preparation to make a formal request for this to the director of the bureau of personnel.

10. This project was one of a number of others the personnel unit had during this period, some of which were assigned a higher priority.

11. The personnel unit submitted on February 1, 1977, a request to the director, state bureau of personnel, for approval, pursuant to §Pers. 5.02 (1)(b), W.A.C., of a raised hiring rate for auditors assigned to the New York office (Appellant's Exhibit 12A).

12. This request was approved by the director on February 7, 1977 (Appellant's Exhibit 16).

13. This pay increase was implemented by the department of revenue with an effective date of February 13, 1977.

14. Following a complaint by the appellant that the pay increase was not retroactive to September 13, 1976, the department asked the bureau if retroactive pay would be permitted and was advised it would not.

CONCLUSIONS OF LAW

1. The personnel board has jurisdiction over so much of this appeal as relates to the claim for relief for retroactive payment of the geographical differential or raised hiring rate from September 12, 1976, to February 13, 1977.

2. The personnel board lacks jurisdiction over so much of this appeal as relates to the claim for temporary living expenses from October 10, 1976, until November 9, 1976.

3. The respondent's refusal to pay appellant a geographical differential or raised living rate of \$200 per month from September 12, 1976, to February 13, 1977, did not violate the civil service statutes or the rules of the director and did not constitute an abuse of discretion.

OPINION

At the prehearing conference the parties agreed to the following issues:

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1. Whether or not the respondent's refusal to pay appellant a geographical differential of \$200.00 per month from September 12, 1976, through February 13, 1977, when it received approval from the Bureau of Personnel for such payments, was in violation of the civil service statutes or the rules of the director of the bureau of personnel.
2. Whether or not the respondent abused its discretion in not granting the geographical differential from September 12, 1976, instead of from February 12, 1977.

The following issue was proposed but objected to:

Whether or not the appellant is entitled to temporary living expenses from October 10, 1976, when his assignment to the New York office became permanent, until November 9, 1976.

The latter issue was never raised in the appellant's departmental grievance and therefore cannot be raised at the fourth step before the board.

The respondent has objected to the board's jurisdiction over the first two issues because, it is argued, the subject matter does not fall within the matters which the grievance procedure provides is appealable to the board at the fourth step:

The statewide grievance procedure designates the personnel board as a final step from third step agency decisions only in grievances alleging that the agency has violated through incorrect interpretation or unfair application:

- (1) A rule of the personnel board or civil service statute, or
- (2) A function which the Director of the Bureau of Personnel has affirmatively delegated his authority to the appointing officer.

Respondent's Brief, p. 6.

The board has held that a grievance need not specify the statutes or rules allegedly violated, Neitzel v. Carballo, 73-32 (8/23/76). It is sufficient that a grievance involves subject matter which falls within the appropriate categories. Graham v. Weaver, 75-124 (3/11/76). The instant grievance concerns an issue relating to SPers. 5.03(9), W.A.C., and the board has jurisdiction pursuant to s. 16.05(7), Stats.

With respect to the first stipulated issue, the board can discern no statutory or administrative code violation in the respondent's handling of appellant's salary. Pursuant to §Pers. 5.03(9), retroactive pay is only appropriate following board action under s. 16.05(1)(e), Stats. (reinstating fully a disciplined employe) or to correct an error. Neither situation is present here.

With respect to the second stipulated issue, the only possibly arguable abuse of discretion might be in the amount of time the respondent took to present the request for approval of a raised hiring rate to the director. However, the burden of proof on all issues is on the appellant and there is certainly not a preponderance of evidence on this record that would support such a conclusion.

The appellant has argued that he relied on certain representations made to him regarding the department's efforts to obtain a raised hiring rate, the possible location of the office outside of New York City proper, and the potential rate of advancement in the New York office. In the opinion of the board, the last two points are immaterial to the only issue that was grieved, that of the retroactive pay adjustment, and no findings were made with respect to them. As to the first point, the respondent agency never told the appellant more than that it was working on a geographical pay increase. To the extent that principles of contract or promissory estoppel might be available in this case, these representations fall far short of any agreement, commitment or promise by the agency to raise the appellant's salary. The board also rejects the theory that the failure to pay the raised hiring rate at an earlier date constituted a reduction in salary. There can be no reduction when the salary has not yet been received. It is not a demotion. See §Pers. 17.01, W.A.C.

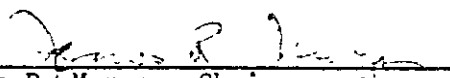
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The appellant in his post-hearing brief asked that the board make a ruling on the adequacy of the New York pay differential. This question was not grieved, was not part of the hearing notice, and will not be considered by the board now.

ORDER

The respondent's position on this grievance is sustained and this appeal is dismissed.

Dated: June 16, 1978. STATE PERSONNEL BOARD



James R. Morgan, Chairperson