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 *
 JAMES R. HUMPHREY, *
 *
 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 TRANSPORTATION, *
 *
 Respondent. *
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 Case No. 77-203 *
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DECISION

NATURE OF THE CASE

This is an appeal of the third step of the grievance procedure under §230.45(1)(c), Wis. Stats.

ISSUE

1. Did the management abuse its discretion in denying the appellant a merit increase effective on or about July 1, 1977?
2. Was the management obligated to give written reasons for the denial of the merit increase at the time of the denial?

FACTS

1. The appellant has worked for the Department of Transportation since 1959.
2. In 1961 he became a review appraiser and still holds that position with the State of Wisconsin.
3. In recent years he has competed for promotional exams and, while certified for promotion, has not been appointed. Presently he is working under the supervision of a person he ranked higher than on the certified list.

4. The last time the appellant was evaluated, June 11, 1975, his overall grade was in the category where an employe exceeds normal requirements and standards of the position (A-#6).

5. The appellant was neither evaluated or disciplined during the period of 1976 through 1977.

6. The appellant had verbal confrontations with his supervisors and fellow employes of the state during the previous years including those where he was marked above average by his supervisor.

7. Appellant refused to attempt to solve appraisal review problems with staff and fee appraiser because his advice was not always accepted.

8. During the state employes' strike starting July 28, 1977, the appellant did not report to work during the first week but did report to work the second week of the strike.

9. The appellant was not eligible for a merit increase until July of 1977. He was not granted a merit increase for the period of July 1977 through 1978.

10. At no time prior to his notification of the denial was the appellant ever warned that unless his work improved he would not receive the merit increase.

OPINION

ISSUE 1. Did the management abuse its discretion in denying the appellant a merit increase effective on or about July 1, 1977?

Section 16.086 of the Statutes provided the authority for granting of merit increases to State employes at the time pertinent to this case. Looking to that statute, we find 16.086(5)(a) as the specific authority to grant "discretionary performance awards." Sections b, c, and d contain limiting provisions for such performance awards.

These performance awards are referred to in this grievance as merit increases by both parties and therefore mean the same thing in all respects in this instant case.

Since 16.085 of the Statutes does not convey the criteria for determining this dispute, the next area the Commission has to look to is the Department of Administration non-contractual grievance procedure that put this case before the Commission. Section D, 1, b, 10 provides for grievances to be filed concerning " ... incorrect interpretation or unfair application ... of a Civil Service Statute ... (§16.01 - 16.38)." Therefore, this grievance is subject to the broad terms of an unfair application of Statutes 16.086(5)(a).

The appellant contends that he was not disciplined, that his last evaluation was above average, and that he was not warned in any way that he might not be granted his merit increase.

The respondent gives 3 reasons for denying the merit increase.

1. The grievant is openly critical of his supervisor's and management decisions, and
2. he has refused to attempt to solve appraisal review problems with staff and fee appraisers, and
3. his attitude undermines

working relationships with district personnel affecting both quantity and quality of work.

Being critical of management's or a supervisor's decisions is not necessarily wrong. Recently, the U.S. Supreme Court reversed a decision to fire a public school teacher who had openly criticized her principal. (Givhan v. Western Line Consolidated School District, case no. 77-1051 - L.W.)

At the same time free speech rights of public employes are not absolute, the Supreme Court held that in determining whether a government employe's speech is constitutionally protected "the interest of the employe as a citizen, in commenting upon matters of public concern" must be balanced against the "interest of the State as an employer, in promoting the efficiency of the public services it performs throughout its employes." (Pickering v. Board of Education, supra, 391 U.W. at 568.)

Evidence in the record makes it difficult, if not impossible, for the Commission to determine if appellant's statements to his supervisors would fall under the protected rights or not. It is further complicated because the rights of the employes to his job are far greater than his rights to a merit award where the employer has discretion in granting such award. Further, since the record does provide ample evidence for the Commission to make a decision without addressing the constitutional issue, we decline to do so in this case.

The second reason given for the denial of discretionary performance award was that the appellant refused to attempt to solve appraisal review problems with staff and fee appraisers. The appellant did not deny this charge but took the position that such action was justified because his

opinions and expertise were not always accepted in previous problem solving instances. Refusing to cooperate with his fellow workers and his supervisors certainly puts the appellant in an unfavorable position to be granted a discretionary performance award.

The respondent's third reason for denial is really the effect of the first two reasons and not a substantial charge in itself.

The appellant rests his case on a number of reasons. First, he was not disciplined the previous year. While this is true, the respondent raises a good argument when they contend the two are not necessarily connected. In fact, to accept the appellant's position would be to set the stage that all state employees who are disciplined would become ineligible for a merit increase the following year. The Commission takes the position that each case should stand on its own merits and not foreclose the rights of any party.

The second argument that the appellant had not received an evaluation during the previous year is also true. However, he had the opportunity to file a grievance if he wanted one. His failure to receive one hardly proves that he was automatically qualified for a discretionary performance award.

Another point raised by the appellant compares his evaluations of his current supervisor and his former one. Again, his proper action was to grieve his evaluation if he was unsatisfied with it. The Commission fails to see how a former supervisor's evaluation qualifies an employee for a discretionary performance award during a period other than the one the award covers.

The appellant raises a good point that employees should be forwarded

before something (bad) is going to happen to them. The respondent, in its brief, challenges the Commission's authority to decide the constitutional question of due process. However, the respondent ignored the grievance procedure which governs in this case, the Department of Administration's non-contractual employe grievance procedure. The Commission certainly doesn't have to look to the Constitution to determine if failure to give prior notice in this case was "unfair application" of State Statute 16.086.

The appellant is not inexperienced in disputes in the past with his supervisors. The appellant was aware that he had unfavorable encounters with his supervisors during the year preceding the denial of the discretionary performance award. Looking to the meaning of the word discretionary, we find Webster saying: "... power of free decision or latitude of choice." The grievance procedure gives the Commission a broad range with the words "unfair application," but the Statute gives to the appellant's supervisor broad powers also in granting the performance awards. In this case, based on finding of fact #7, we do not find that the appellant proved the respondent guilty of unfair application of their right to make a free decision.

ISSUE 2. Was the management obligated to give written reasons for the denial of the merit increase at the time of the denial?

The respondent makes a good point that nothing in either the Statutes of the Wisconsin Administrative Code, Rules of the Director, requires an employe to be furnished a written explanation when discretionary awards are denied. Assuming that the appellant is correct that performance awards monies are generated based on a formula that each position

generates a certain sum and even assuming the statute was enacted with the aid of the employes, the Commission still does not find language obligating management to give written reasons at the time of the denial.

The non-contractual employe grievance procedure does, however, provide for written answers by the management. Written answers without reasons or failure to give written answers certainly would provide the appellant with a valid claim of "unfairness." While respondent did not give a written answer at step 1 and 2 and was in violation of the grievance procedure, they did so at step 3. Therefore, the Commission has nothing in this record, nor do we find any in our own research, that indicates that the management was obligated to give written reasons for the denial of the merit increase to the appellant at the time of the denial.

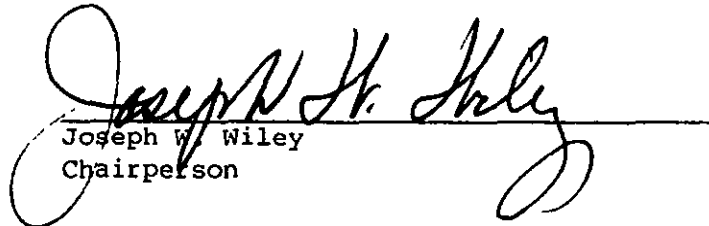
CONCLUSIONS OF LAW

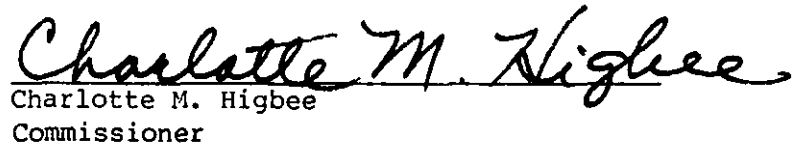
1. This case is properly before the Commission under §230.45(1)(c).
2. The burden of proof is on the appellant on both issues before the Commission.
3. The appellant has failed to prove that management abused their discretion in denying him his merit increase effective on or about July 1, 1977, nor did the appellant prove that management was obligated to give written notice for such denial at the time of the denial.

ORDER

The grievance submitted by appellant is denied and this case is dismissed.

Dated: July 5, _____, 1979. STATE PERSONNEL COMMISSION


Joseph W. Wiley
Chairperson


Charlotte M. Higbee
Commissioner

EDD:jmg

4/24/79