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 HOWARD LUSTIG v. Secretary, DEPARTMENT OF *
 INDUSTRY, LABOR & HUMAN RELATIONS, *
 Case No. 78-277-PC *
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 KEVIN CARR v. Secretary, DEPARTMENT OF *
 INDUSTRY, LABOR & HUMAN RELATIONS, *
 Case No. 79-8-PC *
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 RONALD PACK AND KEVIN CARR v. Secretary, *
 DEPARTMENT OF INDUSTRY, LABOR AND HUMAN *
 RELATIONS AND Administrator, DIVISION *
 OF PERSONNEL, *
 Case No. 79-88-PC *
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 JOYCE BORKENHAGEN v. Secretary, DEPARTMENT *
 OF INDUSTRY, LABOR, AND HUMAN RELATIONS *
 AND Administrator, DIVISION OF PERSONNEL, *
 Case No. 79-74-PC *
 *
 CHARLES HAMMER v. Secretary, DEPARTMENT *
 OF NATURAL RESOURCES, *
 Case No. 79-159-PC *
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DECISION
 AND
 ORDER

NATURE OF THE CASES

These appeals involve certain transactions pursuant to the attorney's pay schedule. A number of jurisdictional issues have been raised and briefs have been filed. The following findings are based on material in these files which appears to be undisputed.

FINDINGS OF FACT

1. The appellants at all relevant times have been employed in the classified civil service in positions classified as attorneys and included in a bargaining unit represented by the Wisconsin State Attorney's Association.

2. The appellants stated in their appeals, in part, as follows:

A. Lustig

"I feel I should be regraded to point B as of November 24, 1978, my three-year anniversary with the State as an attorney.

Alternatively, I feel I should be regraded to point B as of January 1, 1979, since I had one-and-one-half years of state service as of July 1, 1977."

B. Carr

"My seniority date is November 24, 1975. As of November 24, 1978, I had three years of continuous State service as an Attorney 12. November 12 was in the middle of a pay period which ended December 1, 1978. As of December 14, 1978, I should have received a paycheck reflecting a regrade to Regrade Point B... No such regrade increase was given...."

* * * *

"This problem arose as a result of a decision by the state to begin the regrade system...at the salary level in which the attorney was on January 1, 1978, regardless of seniority...."

C. Pack and Carr

"5. That the appeal is as to the decision by Mr. Knoll not to direct payment of wage increases to the petitioner in a fair and equitable manner causing harm to the petitioner."

D. Borkenhagen

"Persons hired after the Pay Plan was enacted achieve a pay range at Regrade C after four years of employment with the State. Further, they receive their 'regrades' on their anniversary dates. Because of the interpretation of the plan, after four years of employment with the State, I am still in Regrade A. I will not be placed in Regrade B until July 1, 1979, and I will not achieve Regrade C until July 1, 1980. Consequently, my pay does not adequately reflect my experience or my years of state service.

Furthermore, because of another interpretation of the Pay Plan, persons placed in Regrade A after July 1, 1978, are receiving more money than me even though I have almost two years more seniority than some of them."

E. Hammer

"3. I received on May 8, 1979, a written notice from the Department of Natural Resources that the effective date of regrade from Point A to B would be June 17, 1979. On or about May 30, 1979, I received a copy of a letter to Mr. James A. Kurty, my supervisor, from Mr. Verne Knoll which suggested that the regrade date would be July 1, 1979. I received no written notice from the Department of Natural Resources that the May 8, 1979, memorandum was no longer considered accurate, but was informed by the Department of Natural Resources Bureau of Personnel on June 26, 1979, that the Bureau considered the May 8, 1979, determination to be supplanted by the letter to Mr. Kurty from Mr. Knoll.

4. This appeal is from the decision by Mr. Knoll in his letter to Mr. Kurty not to direct pay adjustments or a retro-active regrade...."

3. As far as appears from the appeals, and the Commission finds, the appeals of Hammer, Borkenhagen and Lustig are direct appeals, and those of Pack and Carr are appeals of decisions of non-contractual grievances at the third step.

OPINION

Respondent DILHR has objected to subject matter jurisdiction of the Commission over these matters as appeals of noncontractual grievances on the theory that no rules have been promulgated by the Secretary of DER pursuant to §230.45(1)(c), Wis. Stats. The Commission has held that in the absence of such rules a jurisdictional basis is provided by the prior rules, Chapter PERS 25, Wis. Adm. Code, and the transitional provisions of Chapter 196, Laws of 1977, see particularly §129(4q). See Germane v. DILHR, No. 79-50-PC (8/30/79). This objection is overruled.

The Commission raised a question on the possible effect on its jurisdiction of §111.93(3), Wis. Stats., which provides:

"If a labor agreement exists between the state and a union, representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes relating to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."

The appellants argue in a brief filed on October 23, 1980, that the subject matter of these appeals constitute a prohibited subject of bargaining and hence do not relate to wages, hours and conditions of employment, citing the collective bargaining agreement as follows:

"Section 1. Movement Through Pay Ranges

It is recognized by the parties that the establishment of pay schedules, the assignment and reassignment of classifications to pay ranges within the pay schedules, and the determination of the incumbent's status resulting from position reallocations, or promotions, are not negotiable."

The subject matter of these appeals falls within the heading of "the establishment of pay schedules" and "the assignment and reassignment of classifications to pay ranges within the pay schedules." This is a prohibited subject of bargaining, see §111.93(2) b. 2, Stats. The employer is only required to bargain on "wage rates, as related to general salary scheduled adjustments, see §111.91(1), Stats. Since the subject matter of these appeals constitutes a prohibited subject of bargaining, it does not fall within the heading of "wages, hours and conditions of employment" as set forth in §111.93(3), Wis. Stats., and the provisions of that subsection do not operate to supersede the Commission's jurisdiction.

The respondent Division of Personnel also objected to the Commission's jurisdiction on the ground that the basis for these transactions can be found in the attorneys' pay plan, which is in the final analysis a function of the legislative Joint Committee on Employment Relations, and that it is not a personnel decision of the administrator over which the Commission has jurisdiction.

Section 230.12(1)(a), Wis. Stats., provides as follows:

"(1) COMPENSATION PLAN. (a) General Provision. The compensation plan is the listing of the dollar values of the pay rates and ranges and the within range pay steps of the separate pay schedules to which the classes and grade levels for positions in the classified service established under the classification plan are assigned. In addition, the compensation plan may, when applicable, include provisions for supplemental pay and pay adjustments, and other provisions required to implement the plan or amendments thereto. Provisions for administration of the compensation plan and salary transactions shall be provided in either the rules of the administrator or the compensation plan."

(b) Separate Schedules. The several separate pay schedules may incorporate different pay structures and wage and salary administration features. Each schedule shall provide for pay ranges or pay rates and applicable methods and frequency of within range pay adjustments based on such considerations as competitive practice, appropriate principles and techniques of wage and salary administration and determination and the needs of the service. Not limited by enumeration, such considerations for establishment of pay rates and ranges and applicable within range pay adjustments may include provisions prevalent in schedules used in other public and private employment, professional or advanced training, recognized expertise, or any other criteria which assures state employe compensation is set on an equitable basis."

The appellants' brief, filed October 23, 1980, contains in part the following under "Statement of Facts":

"In 1977 the State of Wisconsin revised its job classification system regarding attorneys employed by the State. This was done through a document entitled "Explanation and Application of Pay Schedule #9." Pursuant to this revision a number of attorneys were assigned to regrade points within a job classification."

The "Explanation and Application of Pay Schedule #9, Legal" is part of the State Compensation Plan. See Germane v. DILHR, Wis. Pers. Comm., No. 79-50-PC (8/30/79). The compensation plan (frequently referred to as the "pay plan") is developed by the Secretary of the Department of Employment Relations and submitted for approval to the Legislative Joint Committee on Employment Relations (JOCER). See §230.12(3)(a), Wis. Stats. Subsection 230.12(3)(b), Stats., provides in part:

"The proposal, as may be modified by the Joint Committee on Employment Relations together with the unchanged provisions of the current compensation plan shall, for the ensuing fiscal year or until a new or modified plan is adopted under this subsection, constitute the State's compensation plan for positions in the classified service. Any modification of the secretary's proposed changes in the compensation plan by the Joint Committee on Employment Relations may be disapproved by the governor within 10 calendar days. A vote of 6 members of the Joint Committee on Employment Relations is required to set aside any such disapproval of the governor."

In Holmblad v. Hart, No. 76-229 (2/23/77), the Personnel Board, the predecessor agency to this Commission discussed a jurisdictional issue raised by an appeal of the following grievance:

"The salary schedule for Management Information Specialist 1 through 6 provides smaller increments and has a lower maximum than the salary schedule for Management Information Specialist 1 through 6-Confidential, despite the fact that the training, experience and job assignments for both classes are the same."

Under the then existing statute, §16.086, Wis. Stats. (1975), the compensation plan was developed by the director, Bureau of Personnel, submitted to the Personnel Board for "advice and counsel," and then to JOCER for approval, followed by possible disapproval by the governor and override by JOCER.

The Board held that it lacked jurisdiction as an appeal of an action of the director pursuant to §16.05(1)(f), Wis. Stats. (1975), concluding that:

"It would be totally incongruous and at odds with the evident legislature intent if the Personnel Board had a plenary review power over the entire pay plan once it had been approved through the operation of the Section 16.086 procedure. This is a situation calling forth the rule that the more specific statute controls over the more general one."

In the revision of §16.086, see Chapter 196, Laws of 1977, effective February 16, 1978, certain changes were made in the law. The responsibility for changes in the compensation plan was vested in the secretary, Department of Employment Relations. The Personnel Board's "advice and counsel" role was removed.

To the extent that the transactions here in question were effected or affected by changes in the compensation plan that were made by the director prior to the effective date of §230.12, and potentially attributable to the administrator, the director's successor, the rationale of the Holmblad decision leads to the conclusion that the Commission lacks jurisdiction under §230.44(1)(a) or (b), Wis. Stats. The fact that the Personnel Board has been removed from the statutory scheme is of limited significance. The legislative removal of an advice and counsel role by the Commission's predecessor agency does not evidence an intent that the Commission have a plenary review power over the plan itself. The key points of the plan implementation process have not been changed -- JOCER must approve the plan before it becomes effective. JOCER action is subject to disapproval by the governor subject to what amounts to an override by JOCER. The Commission cannot ascribe to the legislature the intent that, following the completion of this rather involved process,

the Commission has plenary authority to review the compensation plan and potentially determine that parts of it are incorrect or illegal.

The Commission also reaches the conclusion that it lacks jurisdiction pursuant to §230.45(1)(c), Wis. Stats., as possible appeals of decisions of noncontractual grievances. This statute by its terms limits the grievance procedure to "conditions of employment." This term normally is used to refer to bargainable subjects, and it already has been determined that the subject matter of these appeals is non-bargainable. In any event, the more specific provisions of §230.12, relating to the development and effectuation of the compensation plan control and preclude review of the plan by the Commission.

ORDER

These appeals are dismissed for lack of subject matter jurisdiction.

Dated January 12, 1981

STATE PERSONNEL COMMISSION

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Charlotte M. Higbee
Chairperson

Donald R. Murphy
Donald R. Murphy
Commissioner

Gordon H. Brehm
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