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 MICHAEL MCGEE ET AL,
 Appellants,
 v.
 DEPARTMENT OF REVENUE,
 Respondent.
 Case No. 78-33-PC
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ORDER

In his objections to the Proposed Decision of the examiner the respondent argues that:

"The subject matter of this grievance is §230.215, Stats. (part-time employment and flexible-time schedules). The issue is whether the respondent has violated that statute by unfair application or incorrect interpretation ... Instead the hearing examiner substituted his judgment for that of the respondent in applying §230.215. This is not within the province of the Commission. See Borrmann v. DLAD, 76-235 decided February 20, 1978. In Shew v. UW, 76-213 decided April 11, 1978, it was held that an agency has discretionary authority to change the working hours of the employee. The Commission may only act if the agency has abused its discretion in making its decisions."

The Commission does not agree that the examiner in the Proposed Decision has substituted his judgment for that of the agency's. It also does not agree that the cited cases apply here.

Section 230.215, Stats. (1977), states in part:

"Each agency shall develop a plan for the establishment of employe flexible-time schedule experiments. The plan shall attempt to maximize efficiency of agency operations, the level of services to the public, energy conservation and employe productivity and shall consider traffic congestion, transit facilities and other relevant factors."

This statute is new, with an effective date of February 16, 1978.

See Chapter 196, Laws of 1977. The cases cited by respondent did not

involve this statute. In Shew v. UW, Wis. Pers. Bd. 76-213 (4/11/78), the appellant was changed from first to second shift. The Board held that this kind of change in the appellant's job was a matter of discretion with the agency. In Borrmann v. DLAD, Wis. Pers. Bd. 76-235 (2/20/78), the appellant's duties were reassigned so that he no longer was working on certain functions. Again, the Board held there was no abuse of discretion. In neither case did the Commission cite a particular statute. Both situations undoubtedly were subject to §16.04(1)(b), Stats. (1975):

"Each appointing authority shall: Appoint persons to the classified service ... assign their duties"

This general statute does not contain the specific criteria contained in §230.15(2), Stats. (1977), which provide the basis for review of this appeal. The conclusion of law recommended by the respondent:

"The respondent has discretionary authority to change the work schedules of employes and to provide for a flexible time experimental plan,"

ignores these statutory criteria. The respondent's objection to the Proposed Decision that the examiner substituted his judgment for the agency is overruled.

Following consultation with the hearing examiner it was agreed by the examiner and the other Commissioners that certain findings needed to be amended to conform to the evidence in the record. Accordingly, the following amended Findings are substituted for the original Findings contained in the Proposed Decision:

1. On November 14, 1973, the Department of Revenue under the authority of §16.30, Wis. States., issued a work schedule plan on a six week trial basis for employees in Revenue Audit Bureau. This plan called for employees selecting a schedule which could start as early as 6:30 a.m.,

and quitting as late as 5:00 p.m., depending on when a person started and how long the lunch hour was. Details of each persons individual plan were to be worked out with the supervisors and deviations from the schedule needed the supervisor's approval.

* * *

3. There are 104 auditors in the Department of Revenue Central Audit.

4. When grievant was recruited for the Tax Audit Bureau, one of the amenities mentioned was the flexible work schedule. It was one of the reasons grievant decided to take a job with the State of Wisconsin.

* * *

6. As of December 1977, approximately 85% of the employees were finished with their work by 4:30 p.m., under the flexible schedule put into effect in 1973. The majority finished their eight hour tour by 3:30 p.m., --70% by 4:00 p.m.

7. A minimum of five (5) people are needed to answer telephone and walk-in contacts between 4:30 p.m., and 5:00 p.m., and there were always at least that many at work during that period.

* * *

14. Employees leaving work under the new schedule were doing so at a time when traffic flow was considerably greater than under former schedule.

In all other respects, the Proposed Opinion and Order, which is attached hereto, is adopted as the Final Decision of the Commission.

Dated: Dec 20, 1978.

STATE PERSONNEL COMMISSION

Joseph W. Wiley
Joseph W. Wiley, Chairperson

Edward D. Durkin
Edward D. Durkin, Commissioner

Charlotte M. Higbee
Charlotte M. Higbee, Commissioner

STATE OF WISCONSIN

PERSONNEL COMMISSION

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MICHAEL MCGEE ET. AL.,

Appellant,

v.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-33-PC

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PROPOSED OPINION
AND ORDER

NATURE OF THE CASE

This is an appeal of the denial of a grievance concerning the changing of the Flexible Hours Schedule for employees of the Department of Revenue.

ISSUE

Respondent: whether respondent abused its discretion in requiring that a certain number of employees be on duty at certain times during the day?

Appellants: Does the Department follow the letter and intent of the law as specified in §230.215(1) and (2), Wis. Stats.?

JURISDICTION

The jurisdiction on this matter is found in §230.45(1)(c). Neither party objected to the Commission having jurisdiction on the issue.

PERTINENT STATUTES

§230.215(1)(a) Declaration of policy. The legislature finds and declares: that employment practices which provide flexibility in scheduling hours of work often result in increase worker productivity, reduced absenteeism, improved employee morale and a more economical and efficient use of energy, highway and other transit systems.

§230.215(1)(d) That it is the intent of the legislature that all agencies of state government participate in developing and creating flexible-time work schedules, ... in order to maximize, in a manner consistent with the needs of state service, the employment options available to existing and potential state employees.

§230.215(2) In this subsection "flexible-time schedule" means a work schedule which includes required days or hours during which an employee subject to the work schedule must be present for work and designated hours during which the employee, with the approval of his or her supervisor, may elect a time of arrival to and departure from work. Every agency shall develop a plan for the establishment of employee flexible-time schedule experiments. The plan shall attempt to maximize efficiency of agency operations, the level of service to the public, energy conservation and employee productivity and shall consider traffic congestion, transit facilities and other relevant factors.

FINDINGS OF FACT

1. On November 14, 1973, the Department of Revenue under the authority of §16.30, WI Stats., issued a work schedule plan on a six week trial basis for employees revenue in Audit Bureau. This plan called for employees selecting a schedule which could start as early as 6:30 a.m., and quitting as late as 5:00 p.m., depending on when a person started and how long the lunch hour was. Details of each persons individual plan were to be worked out with the supervisors and deviations from the schedule needed the supervisor's approval.

2. The November 14, 1973 memo implementing the program stated that if the program was successful, it would be adopted on a permanent basis. Employees were warned that if production faltered or problems occurred, they

would not be permitted to continue the program.

3. There are 104 auditors in the Department of Revenue, Central Audit.

4. When grievant was recruited for the Tax Audit Bureau, one of the amenities mentioned was the flexible work schedule. It was one of the reasons grievant decided to take a job with the State of Wisconsin.

5. The new flexible schedule was thought to be permanent by employees in the Tax Audit Division.

6. As of December 1977, approximately 85% of the employees were finished with their work by 4:30 p.m., under the flexible schedule put into effect in 1973. The majority finished their eight hour tour by 3:30 p.m., --70% by 4:00 p.m.

7. A minimum of five (5) people are needed to answer telephone and walk in "contacts" between 4:30 p.m., and 5:00 p.m., and there was always at least that many at work during that period.

8. The great majority of walk in "contacts" and "phone contacts" are received from the public between the hours of 9:00 a.m., and 1:00 p.m. Very few "contacts" come in after 3:30 p.m., or before 8:00 a.m.

9. The State cut the security budget beginning in 1975 which resulted in no security guard being on duty between 6:00 a.m. and 6:30 a.m., a period of time when the doors were unlocked, but no one had to be at work. This caused a 30 minute security gap. There are some very vital documents in the files in Audit Bureau.

10. There was at least one written complaint each year during 1976, 1977, and 1978 concerning the flexible schedule in effect at the time. The complaints varied from employees contacting taxpayers too early, to everyone leaving by 3:00 p.m.

11. On March 13, 1978, a directive changing the flexible work

schedule that had been in effect since 1973 was issued. The new change took effect March 27, 1978.

12. Car pools were disrupted with more being broken up than new ones created when the flexible work schedule was changed on March 27, 1978.

13. The earliest an employee can start under the new plan is 7:15 a.m., and the earliest an employee can leave is 3:45 p.m. Latest quitting time of 5:00 p.m., is the same as in the previous schedule.

14. Employees leaving work under the new schedule were doing so at a time when traffic flow was considerably greater than under former schedule.

15. Another major change from the previous plan was that selection of schedule had to be made on yearly basis with change of schedule allowed each November.

16. Doors to the office are unlocked at 6:50 a.m., with the earliest work schedule being 7:15 a.m., leaving a security gap of 25 minutes. There are some very vital documents in the files in Audit Bureau.

CONCLUSIONS OF LAW

1. This appeal is properly before the Commission pursuant to §230.45(1)(c), Stats.

2. The respondent's changes in flextime in March 1978 in the Audit Bureau failed to comply with statutory requirements as follows: (a) It impairs employee morale. (b) It makes poorer use of energy, highways and transit systems than did the former flextime plan. (c) It does not maximize the employment options available to existing and potential state employees. (d) It deprives supervisors from having real control over employees' schedules. (e) It does not better meet the level of service to the public, maximize energy conservation, and employee productivity, and provide benefits in the area of traffic congestion and transit facilities, as compared to the previous plan.

3. The respondent erred in its decision of the grievance at the third step.

OPINION

Since the parties refused to agree what the issue is for this Commission to arbitrate, we must first decide what issue is before us. Typically, the grievant in a case such as this would have framed the issue to be - Was the respondent agency unreasonable in their change of the flexible schedule in effect since 1973? However, since the respondent had issued a policy change that at least 50% of the employees would be on duty at certain times of the day, they should have used 50% instead of "certain number" of employees when they framed the issue.

Therefore, since appellant allows the choice of framing the issue in

such a way that it compares the facts in the case against the letter and intent of the law, we choose the appellant's version of the issue.

No matter how the issue was framed, one glaring omission in the record is the answer to: "How much of an Audit Bureau employee's average tour of duty is spent in contact with the public by phone or in person?" Obviously, if an employee is only in direct contact with the public 10% of the time it's a much different situation than if their job places them in contact with the public 90% of the time. Even an up to date job description would have aided the Commission in this case. The grievant in this case brought a number of witnesses whose testimony verified service to the public was not affected by the former flexible schedule in effect between 1973 and 1978. Most of the contacts by the public occurred between 9:00 a.m., and 1:00 p.m., those before 8:30 a.m., and after 4:00 p.m., were few in comparison to the rest of the day.

The respondent did not put witnesses on the stand who had received verbal complaints relative to flex hours. They did put in three letters of complaints. One was in 1976 for an employee calling a taxpayer at 7:00 a.m., in which the employee said it was 7:30 a.m. The 1977 letter was not even put into the record, only an answer from Secretary Conta explaining flexible hours to a taxpayer concerning the Sales Tax personnel. The third letter refers to a constituent whose primary complaint concerned another matter, but who also asked why all employees of DOR are gone at 3:00 p.m.

The 1976 complaint was due to an indiscretion of a single employee and the employee should have been held responsible for it. The second can not even be called a complaint because there is no evidence it was, nor did it concern the Audit Department. In the third letter, the primary

complaint was not concerning flexible time and the part referring to flexible time was clearly incorrect, therefore little weight is given it.

Inasmuch as there are specific statutes governing this area, these provide the necessary guidance for evaluation of the agency action.

230.215(1)(a)

1. There is no answer in the record as to whether worker productivity was increased or not by the change made by the Department.

2. There is no answer in the record on how the change effected absenteeism.

3. The record indicates employee morale was damaged by the change.

4. While slight, the record indicated that the former schedule did make better use of energy, highways, and transit systems.

230.215(1)(d)

1. The agency, DOR, did develop and create flexible-time schedules.

2. Both schedules meet the needs of state service.

3. The March 27, 1978 schedule did not maximize the employment options available to existing and potential state employees.

230.215(2)

1. Both schedules required a certain "core" time which employees were subject to.

2. The new schedule deprives supervisors from having real control over the employees schedules.

3. Based on the record, the 1978 schedule does not better meet the level of service to the public, energy conservation and employee productivity, traffic and other relevant factors, than the 1973 schedule.

The record indicates that the pertinent statutes governing flexible

schedules would be more nearly met by the one in effect between 1973 and 1978. However, there were some potential problems with security. Also staffing between 4:00 and 4:30 was at a minimum level. It is reasonable to expect the security problem can be cured with cooperation of the Security Department, but since the record did not include the key factor as to the percentage of time an auditor works with the public directly compared to his other duties this Commission is not inclined to order the complete 1973 system put back in force.

ORDER

The Commission hereby remands to the Department of Revenue the question of flexible schedule. Unless the agency can clearly demonstrate that Security will not cooperate with a 6:20 unlocking of the doors, the flexible schedule shall include an option of starting at 6:30 a.m. Further the record also indicates that no more than 25% of the employees should be mandated to work after 4:00 p.m. Finally, the law clearly states that the supervisors shall control the individual schedules within their jurisdiction and responsibility should be placed on such supervisors.

Dated: _____, 1978.

Edward D. Durkin
Commissioner

Dated: _____, 1978.

Charlotte M. Higbee
Commissioner

Dated: _____, 1978.

Joseph W. Wiley
Chairperson