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CLAYTON HARLEY, *

Appellant, *

v. *

Secretary, DEPARTMENT OF TRANSPOR- *
 TATION & Administrator, DIVISION *
 OF PERSONNEL, *

Respondent. *

Case No. 80-77-PC *

* * * * *

OFFICIAL

ORDER

This matter having come before the Commission as a Proposed Decision and Order, and the Commission, having considered the parties' objections to the Proposed Decision and arguments of the parties and having consulted with the examiner, adopts and incorporates by reference, as if fully set forth, as its decision in this matter the attached Proposed Decision, including the "nature of the case," "findings of fact," and "conclusions of law," with the addition of the following conclusion of law which is necessary to reflect the Commission's determination with respect to the decision of the administrator appealed pursuant to §230.44(1)(a), Wis. Stats.:

6. The appellant failed to sustain his burden of proving that the administrator's approval of the transfer violated a civil service statute or rule and it is concluded that it did not.

Therefore, the Commission enters the following order:

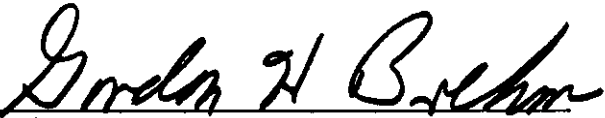
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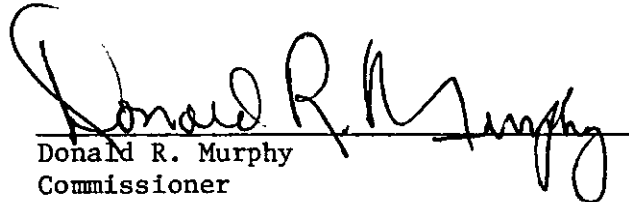
ORDER

The actions of the respondents are affirmed and this appeal is dismissed.

Dated Nov. 7, 1980

STATE PERSONNEL COMMISSION


Gordon H. Brehm
Commissioner


Donald R. Murphy
Commissioner

Dissent: 
Charlotte M. Higbee
Chairperson

AJT:mek

Parties:

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Menomonee Falls, WI 53051

Mr. Lowell Jackson
Secretary, DOT
4802 Sheboygan Ave.
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Mr. Charles Grapentine
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Madison, WI 53702

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 TRANSPORTATION, & Administrator, *
 DIVISION OF PERSONNEL, *
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PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This case, filed pursuant to §230.45(1)(c), Wis. Stats., involves an appeal from the denial of the respondent at the third step of the appellant's non-contractual grievance concerning his transfer at the same classification and pay level from the Milwaukee Department of Transportation (DOT) office to the Madison DOT Office. The appellant also appealed, pursuant to Section 230.44(1)(a) and (b), Wis. Stats. The matter was heard by Commissioner Gordon H. Brehm on May 27, 1980.

FINDINGS OF FACT

1. The appellant in this case has been employed by the respondent in its Milwaukee Transportation District 2 Office from 1949 until his transfer to Madison, effective July 28, 1980. At all relevant times the appellant occupied a position classified as Civil Engineer 7-Transportation-Supervisor.

2. On December 28, 1978 former DOT Secretary Dale Cattnach announced the pending consolidation of DOT Transportation Districts 2 (Milwaukee) and 9 (Waukesha) into a new merged District 2-Southeastern Wisconsin (Comm.

Ex. #2). Harvey Shebesta, District Director of the Milwaukee DOT Metropolitan District, stated in a memorandum dated January 10, 1979 to all district employes (Comm. Ex. #3), that:

"Changes required to complete the merger of staff will be made gradually, in an orderly manner, consistent with applicable civil service and collective bargaining rules and agreements and program requirements."

Shebesta also added:

"Efficiencies achievable through consolidation will permit a reduction in staff of some 37 positions. Currently, 17 of those positions are vacant. The balance of reduction is anticipated to be accomplished through attrition over the period of time the merge [sic] is expected to take place. We do not anticipate the merger will result in the need to terminate anyone's employment with the Department of Transportation."

3. Prior to the merger of Transportation Districts 2 and 9, there existed 11 Civil Engineer 7, Transportation Supervisor (CE-7) positions in the two Districts. The merger resulted in a reduction of some 37 positions, six of which were CE-7 positions. Of the 11 persons who, prior to the merger of the two Districts, held positions of CE-7's, Appellant Harley ranked second in seniority.

4. At a meeting held August 6, 1979, the new section heads for the merged District were announced by District Director Shebesta. Appellant Harley was informed that he had not been selected as one of the section chiefs, that he was to request a voluntary transfer or he would be involuntarily transferred by the DOT.

5. When Appellant Harley failed to request a transfer, he was notified by letter dated January 9, 1980 (Comm. Ex. #12) that:

"Effective January 28, 1980, you will be expected to assume the duties and responsibilities of Development Engineer-Supervisor, Methods Development Unit, Central Office Design Section at your present classification of Civil Engineer 7-Transportation Supervisor."

This new assignment was in the Madison DOT Office. The letter went on to state:

"As discussed, this reassignment will have a delayed effective date, anticipated to be July 28, 1980. At that time, you will be placed on temporary living expenses of up to ninety days. This two-step approach will provide you with approximately nine months to arrange your living accommodations. Your travel expenses will be covered by the Department throughout this transition period as would be the case with any official business arrangement."

6. The merger of the two highway districts did not become effective until January 28, 1980 -- the same date appellant was transferred -- because it was late October of 1979 before it finally became clear that the State Legislature was not going to override the Governor's veto of an earlier decision by the Joint Committee on Finance ordering that the merger not be effected.

7. The involuntary transfer of appellant from Milwaukee to Madison because of the merger of the two highway districts was a proper management decision within the discretion of the hiring authority.

8. The respondent administrator approved the transfer prior to its effective date.

9. The appellant filed this appeal on March 10, 1980.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to Section 230.45(1)(c), and §230.44(1)(a), Wis. Stats.
2. The appellant has the burden of proving that the respondent's denial of his grievance challenging his transfer was not correct.
3. The appellant failed to sustain that burden.
4. The respondent's denial of appellant's grievance was correct.
5. Respondent's actions with respect to appellant's transfer did not violate any civil service statute or rule.

OPINION

The issue in this case was established by the Commission in its order dated May 15, 1980 denying respondent's motion to dismiss the appeal. The Commission ordered that the hearing be held on the legal standard of review used in Kennel, Brauer and Murphy v. DOT, Wis. Pers. Comm. No. 78-263, 265, 266-PC, (2-15-79), of whether the respondent had violated the civil service code or rules through their incorrect interpretation or "unfair application."

Since the hearing was held in this case on May 27, 1980, the Dane County Circuit Court has reversed the decision of the Commission in the Kennel, Brauer and Murphy case, Department of Transportation v. State Personnel Commission, Case No. 79-CV-1312 (July 21, 1980).

In the above case, three employes of the then Waukesha highway district grieved their involuntary transfers to other highway districts in the state. When the DOT refused to alter its decision to transfer them, the three appealed to the Commission. The Commission rejected the action of the DOT,

finding that the transfers were "unfair applications of the Statutes and Administrative Rules." On review of this decision, the Dane County Circuit Court has sustained the action of the DOT and found that the Commission exceeded its authority and applied an erroneous standard of review in the Kennel, Brauer and Murphy case.

The court stated:

"Here DOT's determination that it could better accomplish its program needs by the transfer of Kennel, Brauer and Murphy rather than three other employes was a program management decision which violated no civil service statute or administrative rule."

The court went on to conclude:

"For the reasons stated above the Court determines that the Commission lacked subject matter jurisdiction to hear and determine the grievance filed by Kennel, Brauer and Murphy."

In view of this decision, the only issue to determine by the Commission in this case was whether there was compliance with the statutes and administrative rules in the transfer of appellant Harley.

Section 230.29, Wis. Stats., states:

"A transfer may be made from one position to another only if specifically authorized by the administrator."

Section 230.14(3), Wis. Stats. states:

"An appointing authority shall:

(a) Conform to, comply with, and aid in all proper ways in carrying into effect this subchapter and the rules prescribed thereunder.

(b) Appoint persons to or remove persons from the classified service, discipline employes, designate their titles, assign their duties and fix their compensation, all subject to this subchapter and the rules prescribed thereunder.

(c) Provide the administrator with current information relative to the assignment of duties to permanent classified positions in his or her agency.

(d) Report promptly to the administrator such information as the administrator requires in connection with any delegated personnel function and with each appointment, promotion, demotion, suspension or separation from the service or other change in employe status.

(e) When requested by the secretary or the administrator, provide reports on employe work performance and any other records or information the secretary or administrator requires to carry out this subchapter.

(f) Provide the administrator with the civil service information required under §16.004(7)."

Appellant argues that because respondent did not introduce any testimony or evidence showing that the Department of Transportation obtained the approval of the Administrator of the Division of Personnel, the inference should be drawn that he did not approve appellant's transfer. This argument attempts to improperly shift the burden of proof from the appellant to the respondent in this matter. In this type of appeal, the burden of proof is on the appellant to prove that the transfer was illegal.

Commission's Exhibit #13, a copy of a memorandum from DOT Personnel Director John Roslak to the administrator dated January 14, 1980, informed the administrator about appellant's transfer and requested his approval. The only inference that can properly be drawn, since appellant did not challenge this document, is that the administrator did approve the transfer. This is in keeping with the general presumption of administrative regularity. Additionally, Exhibit #13 contained a note that the transfer had been approved verbally by the administrator.

It is important to point out that the governor had already approved the merger of the two highway districts (Commission's Exhibit #1) and subsequently respondent received approval of the administrator to revise

the DOT employing unit structure to provide that appellant's employing unit was expanded to the statewide Division of Highways and Transportation Facilities (Commission's Exhibit #16).

Appellant argues that respondent should have been required to initiate and use a formal layoff plan as described in Pers. Ch. 22, Wis. Admin. Code in implementing the consolidation of the two highway districts. Section 230.34(2), Wis. Stats. states:

"Employes with permanent status in class in permanent, sessional and seasonal positions in the classified service and employes serving a probationary period in such positions after promotion or transfer may be laid off because of a reduction in force due to material changes in duties or organization but only after all original appointment probationary and limited term employes in the classes used for layoff, are terminated.

(a) The order of layoff of such employes may be determined by seniority or performance or a combination thereof or by other factors.

(b) The administrator shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotions and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employe right of reinstatement."

This statute provides that an agency may layoff employes for various reasons. It does not require an appointing authority to invoke a layoff whenever there is to be a reduction in force. Subsection (b) provides that alternative procedures must be established to give the hiring authority other options in addition to layoffs.

This is precisely what occurred in this instance. The DOT adopted procedures -- which were approved by the Administrator -- in lieu of laying off any employes. Therefore, since a layoff was not invoked, there was no requirement that the hiring authority follow the procedures spelled out in

Pers. 22. All of the necessary personnel reductions necessitated by the merger of the two highway districts were accomplished by retirements, voluntary demotions, and transfers and no employe had to be laid-off.

The Personnel Board, the predecessor agency to the Commission, ruled in several previous cases that it is within the discretion of an appointing authority to choose a method to deal with reductions in staff levels short of invoking layoffs. In Neitzel v. Carballo, Case No. 73-32, (August 23, 1976), the Board held that:

"There is no requirement that a layoff be utilized for a reduction in force if another means such as employes reaching the statutory retirement age, will effectuate the same results."

In Sheda v. Carballo, Case No. 76-114, (June 13, 1977), affirmed, Dane County Circuit Court, Sheda v. State, 158-117 (11/16/78), the Personnel Board again stated:

"Nowhere in these provisions [Sec. 16-28, Stats. (now §230.34), and Chapter Pers. 22] is there any requirement that any agency faced with the situation confronting the Respondent here, i.e., loss of federal funds and consequently required reduction in work force, pursue layoff procedures before resorting to the alternative actually utilized. We conclude that the Respondent did not err in failing to follow layoff procedures." (Emphasis supplied)

Respondent argued that to the extent that this is an appeal of a decision of the administrator approving the transfer, it is untimely. Since the appeal actually was filed prior to the effective date of the transfer, although more than 30 days after initial notice of the transfer, it is timely.

ORDER

The decision of respondent in denying appellant's grievance in this matter is affirmed and this appeal is dismissed.

Dated _____, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Chairperson

Donald R. Murphy
Commissioner

Gordon H. Brehm
Commissioner

GHB:mew

Parties:

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