

* * * * *

GORDON THOMAS, *

Appellant, *

v. *

Chancellor, UNIVERSITY OF *

WISCONSIN-MADISON, *

Respondent. *

Case No. 81-332-PC *

* * * * *

DECISION
AND
ORDER

This matter is before the Commission for consideration of a proposed decision and order issued by the hearing examiner following a hearing. The Commission will adopt the proposed findings, conclusions, and opinion, but, for the reasons set forth below, will reject the proposed order and enter an order which will change the effective layoff date from July 24, 1981, to July 25, 1981.

Under the civil service code as it existed prior to the sweeping changes enacted by Chapter 196, Laws of 1977, appeals of layoffs were to the Personnel Board, this Commission's predecessor agency, pursuant to s.16.05(1)(e), stats., (1975). After hearing, that subsection required that the Board "shall either sustain the action of the appointing authority or shall reinstate the employe fully." Upon reinstatement, the employe was entitled to full back pay from the date of the unlawful layoff pursuant to s.16.38(4), stats., (1975).

Under current law, the Commission is not restricted on an appeal of a layoff to either sustaining the action or reinstating the employe fully. Section 230.44(4)(c), stats., provides that the Commission can "either affirm, modify or reject the action which is the subject of the appeal." (Emphasis supplied) The manifest intent and effect of this change in the law was and is to provide the Commission with considerably more flexibility in dealing with layoff and other appeals.

The proposed decision and order results in a remedy which the Commission, upon its review, finds inconsistent with what is necessary to redress a perceived procedural error which resulted in no demonstrable harm to the appellant. Had the respondent not - in every substantive way - a proper legal basis for its layoff action, a decision to reject in its entirety the action of the respondent would have been the singular choice available to the Commission. However, empowered as it is to modify this action so as to protect the rights of the employee and to recognize those legitimate necessities of an agency to undertake layoff actions, the Commission arrives at a remedy more appropriate for and compatible with the reality of the facts and circumstances of this case.

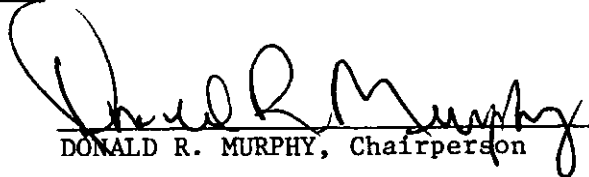
ORDER

The Commission adopts as if fully set forth the findings, conclusions and opinion contained in the proposed decision, a copy of which is attached hereto and incorporated by reference. The Commission rejects the proposed order and in its place and stead hereby orders that the action of the respondent laying off the appellant is modified by changing the effective date thereof from July 24, 1981, to July 25, 1981, and this matter is remanded for action in accordance with this decision.

Dated: March 25, 1982 STATE PERSONNEL COMMISSION

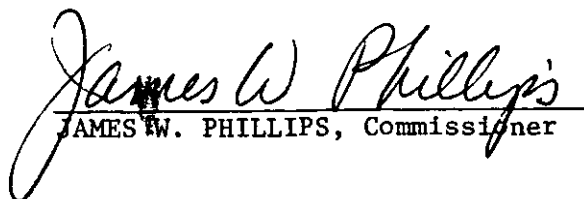
Parties

Gordon Thomas
Rt. 1, Box 104A
Ridgeway, WI 53582


DONALD R. MURPHY, Chairperson

Irving Shain
159 Bascom Hall
500 Lincoln Dr.
Madison, WI 53706


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

5. The only classification identified in the Layoff Authorization Request and the Layoff Plan was MIS-3.

6. The appellant occupied the only position (permanent, limited term, project or probationary) at the MIS-3 level in the Center for Health Sciences employing unit.

7. In a letter dated July 10, 1981, from Robert Pound of the University of Wisconsin-Madison Personnel Office, the appellant was first provided with written notice that he was being laid off, effective July 24, 1981. A copy of the letter is attached hereto and incorporated by reference as if fully set forth as part of this finding.

8. The respondent failed to notify the appellant of the impending layoff at least 15 calendar days prior to the effective date of the layoff.

9. On two separate occasions, the appellant and Mr. Pound discussed the availability of unemployment compensation subsequent to layoff. At some time prior to July 10, 1981, Mr. Pound advised the appellant that if he were laid off, the appellant would be in a position to collect unemployment compensation, but this situation would change if he was offered a position into which he could transfer, bump or be demoted. Mr. Pound also indicated at that time that the availability of unemployment compensation might be negotiable with the University's legal staff.

10. Subsequent to this conversation, but prior to July 22, Mr. Pound learned that the appellant would be offered a demotion in lieu of layoff to a Data Processing Operations Technician 1 (DPOT-1) vacancy.

11. On July 22, 1981, the appellant and Mr. Pound discussed the consequences if appellant refused to accept the DPOT-1 position. During this discussion, the conversation also touched upon the availability of unemploy-

ment compensation benefits. Mr. Pound made no specific statements indicating that appellant could collect unemployment even if he refused to accept the demotion in lieu of layoff. However, the appellant incorrectly assumed that he could refuse the DPOT-1 position and collect his unemployment benefits. Appellant's assumption was unwarranted, given the content and context of the July 22nd conversation.

12. On July 22, 1981, the appellant refused to accept the DPOT-1 position and was informed that by doing so he forfeited any further rights to appointment under § Pers. 22.08, Wis. Adm. Code, as well as any recall rights.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Wis. Stats.

2. The respondent has the burden of proving that the layoff has been conducted in accordance with the applicable personnel statutes and administrative code provisions and that the layoff is not the result of arbitrary and capricious action.

3. The respondent has failed to sustain that burden of proof.

4. The layoff of the appellant from his MIS-3 position failed to comply with § Pers. 22.07, Wis. Adm. Code, which requires the employe to "be given written notice of such [layoff] action, not less than 15 calendar days prior to the effective date thereof."

OPINION

The standard to be followed by the Commission in reviewing a layoff was announced by the Wisconsin Supreme Court in Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 237 N.W. 2d 183, (1976):

"[A]n appointing authority acts with 'just cause' in a layoff situation when it demonstrates that it has followed the personnel statutes and administrative standards set forth in [the applicable provisions] of the Administrative Code and when the layoff is not the result of arbitrary or capricious action." 71 Wis. 2d 46,49.

Among the various Administrative Code provisions currently establishing layoff requirements is § Pers. 22.07, Wis. Adm. Code, which provides in part:

Any employe affected by such layoffs shall be given written notice of such action, not less than 15 calendar days prior to the effective date thereof.

The evidence presented by the respondent at the hearing in this matter shows that the first written notice to the appellant of the July 24, 1981 layoff was dated July 10, 1981. Other documents of record indicate that the letter notifying the appellant was actually presented to the appellant on July 10, 1981. Therefore, the Commission must conclude that the respondent failed to comply with the requirements of § Pers. 22.07, Wis. Adm. Code, thereby failing to act with just cause as required by statute.

Although the result in this matter is dictated by respondent's failure to comply with the Administrative Code, the focus of appellant's argument was that he had been misinformed as to the availability of unemployment compensation, causing respondent's layoff decision to be arbitrary and capricious. As noted in the Findings of Fact, the appellant's assumption that unemployment compensation would be available even if he refused to accept demotion to the DPOT-1 position, was unwarranted. The appellant had previously been told that he could not collect unemployment under those circumstances and he was not justified in assuming that the situation had changed.

ORDER

The respondent's layoff decision is rejected and the appellant shall be reinstated to his former position. This matter is remanded for action in accordance with this decision, as provided in §§ 230.43(4) and 230.44(4)(c), Wis. Stats.

Dated: _____, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

Parties:

Mr. Gordon Thomas
Route 1, Box 104A
Ridgeway, WI 53582

Chancellor Irving Shain
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706