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Personnel
Commission

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

WISCONSIN DEPARTMENT OF HEALTH
AND SOCIAL SERVICES AND DIVISION
OF PERSONNEL,

Petitioners,

DECISION and ORDER ON

vs.

REVIEW

WISCONSIN PERSONNEL COMMISSION
(DENNIS ESCHENFELDT),
Respondent.

Case No. 81-CV-5126

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This matter is before the Court for judicial review under ch. 227, Wis. Stats., of a final decision and order of the Wisconsin Personnel Commission (Commission). Petitioners, the Wisconsin Department of Health and Social Services (DHSS) and Division of Personnel assert: (1) that the Commission's order, reclassifying DHSS employe Dennis Eschenfeldt from the position of Officer 4 to Officer 5, is not supported by substantial evidence in the record; (2) that the Commission erroneously interpreted provisions of law; and (3) that the Commission exceeded its statutory authority when it awarded back pay to Eschenfeldt. Thus, two issues are presented for review on the merits: (1) Is the Commission's reclassification order supported by substantial evidence? and (2) Does the Commission possess the statutory authority to award back pay in denial of reclassification situations?

DECISION

The scope of judicial review under ch. 227, Wis. Stats., is confined to the record as sec. 227.20(1), Wis. Stats., provides. Further, the Court must separately consider, as sec. 227.20(3), Wis. Stats., directs, questions of law, fact and procedure. Finally, sec. 227.20(5) and (6), Wis. Stats., define the standards of review to be applied by the court. An agency's factual findings must be supported by "substantial evidence." The Wisconsin supreme court has stated in this regard:

"An agency determination being reviewed under Chapter 227 will not be overturned because it is against the great weight and clear preponderance of the evidence. Rather, the agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."
(Citations omitted.)

Hamilton v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 611, 617-18, 288 N.W. 2d 857 (1980).

Within the confines of review imposed, we will analyze petitioner's contentions.

Reclassification Issue

Eschenfeldt became an Officer 4 (Shift Supervisor) at the Oakwood State Camp, a minimum security correctional camp with a population of approximately 148 residents in November 1976. On July 1, 1977, the Oakhill State Camp became the Oakhill Correctional Institution, a medium-sized minimum security correctional institution with a projected population of 300 residents. At the time of the institutional change-over, the DHSS admits that Eschenfeldt performed Officer 5 duties until January, 1979.

Eschenfeldt's supervisor requested on November 28, 1978, that Eschenfeldt be reclassified to an Officer 5, based on his duties and responsibilities at that time. The DHSS denied the reclassification request on May 10, 1978. The DHSS denial was reviewed by the Division of Personnel and on October 5, 1978, the Division concurred with the DHSS's determination that there had not been a logical and gradual change in Eschenfeldt's duties to support a reclassification within the meaning of PERS 3.02(4)(a), Wis. Adm. Code [now renumbered PERS 3.01(3)(a), Wis. Adm. Code]. The Division further characterized Eschenfeldt's Officer 5 duties as temporary. The Division concluded that Officer 5 vacancies, which were created when the camp changed to a correctional institution, had to be filled, not by reclassification, but by open competition. Eschenfeldt timely appealed the Division of Personnel decision to the Commission.

The Commission reversed the Division's denial of Eschenfeldt's reclassification request. The Commission found that between July,

1977, and January, 1979, there was a logical and gradual change in Eschenfeldt's duties and responsibilities and that during that period of time, Eschenfeldt performed Officer 5 duties approximately 60-65% of the time. Accordingly, the Commission ordered Eschenfeldt's position of employment to be reclassified to Officer 5.

Reclassification is governed by PERS 3.01(3)(a), Wis. Adm. Code, which provides in relevant part:

(3) Reclassification means the assignment of a filled position to a different class by the administrator as provided in s. 230.09(2), Stats., based upon:

(a) A logical and gradual change to the duties and responsibilities of a position.

The DHSS asserts there was no logical and gradual change in Eschenfeldt's duties and responsibilities because, as of July 1, 1977, Eschenfeldt only performed Officer 5 duties due to the change in status of the institution where he worked. While both Officer 4 and 5 are supervisory positions under the state's civil service classification scheme, an Officer 4 is an assistant shift supervisor at a correctional camp while an Officer 5 is a shift supervisor at a correctional institution. The record reveals that while the duties of the two positions can be the same, the responsibilities of the positions differ because of the difference between the institutions. In general, an Officer 5 has greater responsibility because it is a position of employment at a correctional institution.

Acknowledging the change in institutional status, the Commission nonetheless stated in its decision:

Despite the fact that there was an overweight change in organizational structure, the record clearly establishes that there was a gradual and logical change in the work environment, namely in the increased number of residents, the allocation and staffing pattern, the resulting change in reporting relationships, and the increased program aspects of the shift supervisor responsibilities.

Case No. 78-257-PC, p. 10.

We agree with the Commission. The record supports that there was, in fact, a gradual and logical change in Eschenfeldt's duties and responsibilities as the Oakhill facility gradually completed its changeover from a camp to a correctional institution.

Secondly, the DHSS argues that as a matter of law a natural and logical change in job assignments cannot occur within the meaning of

PERS 3.01(3)(a), Wis. Adm. Code, when the change is the result of a management decision. The DHSS would have us believe that because of the institutional status change, one day Eschenfeldt was an Officer 4 and the next day he was an Officer 5 (temporarily, of course). Given this fact, the DHSS consequently argues it was impossible for a gradual and logical change to have occurred within the meaning of the Wisconsin Administrative Code.

The very reason the concept of reclassification exists is to prevent management from increasing the duties and responsibilities of employes without commensurate increases in pay. If the DHSS truly saw itself as temporarily assigning Eschenfeldt to an Acting Officer 5 position, it should have followed its own rules. In this regard, PERS 32.04, Wis. Adm. Code provides:

The appointing authority shall give written notice to both the employe and the administrator of the acting assignment. The letter of notification shall identify the nature of the duties to be assigned, the planned duration and other conditions of the acting assignment including the act that no adjustment in pay shall be made.

The record does not support a conclusion that one day Eschenfeldt was an Officer 4 and the next day he was an Officer 5. The record substantially supports the Commission's conclusion that Eschenfeldt logically and gradually began to perform the duties and responsibilities of an Officer 5 position of employment. Accordingly, we affirm the Commission's order that Eschenfeldt be reclassified to an Officer 5.

Back Pay Issue

Having determined that Eschenfeldt should have been classified as an Officer 5, the Commission then ordered that he was entitled to back pay at Officer 5 level of compensation from his effective date of reclassification, October 5, 1978 (the date he would have been reclassified had his request been granted by the Division of Personnel). The DHSS contends that this back pay award is in excess of the Commission's authority and, should this Court find, as it has, that Eschenfeldt's reclassification request was appropriately granted, we should nonetheless vacate the back pay award on the ground that it is in excess of the Commission's remedial authority. Reliance on this asserted position of the DHSS is premised on a decision rendered by

this Court in Department of Employment Relations, Division of Personnel v. Wisconsin Personnel Commission (Ralph Doll), Amended Decision No. 79-CV-3860 (Sept. 2, 1980). Quoting at length, we stated in Doll:

There remains, however, the question of the Commission's authority to award Doll retroactive relief in the form of back pay. Respondent contends that it has such authority under sec. 230.44, Stats., which confers upon the Commission the power to either affirm, modify or reject the action which is the subject of the appeal. Respondent contends that this authority to "modify" decisions necessarily implies that the Commission has authority to award back pay when it reverses the denial of a request for reclassification. We do not agree.

Rather, we agree with petitioner that an employe's right to monetary relief after a successful appeal to the Personnel Commission, under sec. 230.44, Stats., is governed exclusively by sec. 230.43(4), Stats. That subsection limits retroactive compensation to persons "removed, demoted or reclassified from or in any position . . . in contravention of this subchapter." The plain language of the statute indicates that it is inapplicable in this case. Here, Doll was neither removed nor demoted from his position as Maintenance Mechanic I. The Bureau (now Division) of Personnel denied Doll's request for reclassification at the higher Maintenance Mechanic II level, but this denial cannot be considered an unlawful reclassification within the terms of the statute. Doll was not reclassified at all as a result of that decision; he remained a Maintenance Mechanic. The Commission, the former Board and the circuit courts have consistently viewed sec. 230.43(4), Stats., and its predecessor sec. 16.38, Stats., as precluding the recovery of retroactive compensation to persons who were denied reclassification. Van Laanen v. Personnel Board, Case No. 153-348 (Dane Co. Cir. Ct., 5/31/77, Currie, J.); Ehly v. Personnel Board, Case No. 158-371 (Dane Co. Cir. Ct., 10/17/78, Bardwell, J.)

The Commission can award back pay as a result of sec. 230.43(4), Stats., and, in addition, has express power to award back pay as a remedy under the Wisconsin Fair Employment Act. In the past the Commission has itself denied that it could award back pay as a remedy for a successful appeal under sec. 230.44, Stats., Noltemeyer v. DILHR and Division of Personnel, Case Nos. 78-14-PC and 78-28-I, 12/20/78. In that case the Commission concluded that where the legislature has expressly provided for back pay in two specific situations, that it was inappropriate to find authority to grant similar relief under sec. 230.44, Stats., where such relief was not specified by the legislature.

We conclude that since sec. 230.43(4), Stats., is a specific statute defining when an employe may recover back pay for a successful appeal under chap. 230, Subchap. II, it must control over any general statutory language contained in sec. 230.44(4), Stats.; Schroeder v. City of Clintonville, 90 Wis. 2d 457, 462, 280 N.W. 2d 166 (1979). An employe's right to monetary relief after a successful appeal to the Commission under sec. 230.44 is governed exclusively by sec. 230.43(4), Stats. In this case, since Doll was not reclassified from or in any position, in contravention of sec. 230.43(4), Stats., the Commission had no authority to award him retroactive pay. The Commission's order in that respect must be overturned.

Doll, supra, at pp. 5-7.

The Commission argues that since Doll, PERS 29.05, Wis. Adm. Code, was promulgated which, effective March 1, 1981, provides:

Except for action in accordance with ss. 230.43(4), 230.44(4)(c), and 230.45, Stats., or to correct an error, no pay increases or decreases shall be retroactive.

However, this code provision is identical in substance to PERS 5.037, Wis. Adm. Code, which preceded PERS 29.05 and was in effect at the time we decided Doll.

While this Court admittedly recognizes that the denial of back pay in reclassification requests which should have been granted is unjust because the wronged employe receives no compensation for the wrong endured, the fact remains that the legislature has not rectified this situation since Doll. Accordingly, we have no recourse but to reaffirm our previous holding that the Commission lacks authority to award back pay in denial of reclassification appeals.

The Commission's order is therefore affirmed as to the reclassification of Eschenfeldt as an Officer 5. It is reversed insofar as it awarded him back pay retroactive to October 5, 1978.

Counsel for the Commission is directed to prepare a formal judgment in accordance with the Court's order, a copy of which is to be given to all opposing counsel prior to submission to the Court for signature.

Dated April 27, 1983.

BY THE COURT:

Richard W. Badura
Circuit Judge