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DAVID M. KUTER,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
 Respondent.
 Case No. 82-83-PC
 * * * * *

DECISION
 AND
 ORDER

This is an appeal of a layoff under §230.44(1)(c), Stats. The following findings are based upon a hearing on this appeal.

FINDINGS OF FACT

1. The parties to this proceeding stipulated that the appellant is not complaining about and is not questioning DILHR's (the respondent's) compliance with the statutes and personnel rules regarding his layoff, except that he is challenging:

- (1) the change in employing units;
- (2) economic necessity;
- (3) contractual rights (based on the Polston letter)

2. In 1979, Mr. Tollefson, District Director of Job Service proposed reorganization of his unit. This reorganization included having the Special Applicant Services (SAS) Unit report directly to him instead of the appellant, Mr. Kuter.

3. The proposed reorganization of SAS could have resulted in the appellant being moved to a different position with a different title. Consequently, the appellant objected to changes in his position and title

and appealed these changes to a legislator, his department secretary and division administrator.

4. The proposed changes in appellant's position and title would not have included any monetary consideration, because of the civil service rules in operation at that time.

5. In a letter dated December 12, 1979, Mr. Polston, the division administrator, made the following commitments to the appellant:

1. The organizational structure will remain as it is now. This means that you will remain in the position of a Supervisor 14.
2. The organizational structure will not change as long as you wish to remain in the Fond du Lac office or, you fail to perform your duties as directed and evaluated by the Local District Director.
3. The Local District Director will determine reporting and supervisory responsibilities of the office with the concurrence of the Assistant Administrator for Field Operations.
4. Your personal Management by Objectives plan will be done in accordance with DILHR directives.

These job commitments to the appellant by Mr. Polston allowed the appellant to remain in his position as a supervisor and gave Mr. Tollefson, the district director, the authority to have direct supervisory and reporting responsibilities over the SAS unit.

6. Mr. Tollefson advised the appellant on December 4, 1979, and on January 8, 1980, that he (Mr. Tollefson) would supervise the SAS unit.

7. Prior to the Polston letter, the appellant initiated his bumping rights on a Supervisor 5 position at the Fox Valley Job Service office, but the position was reclassified to a lower level, effectively nullifying the bumping opportunity.¹

¹The Commission has amended this finding to more accurately reflect the record.

8. During this same period, appellant had been interviewed and offered a Supervisor 5 position in respondent's Madison district office. After receiving the Polston letter, the appellant refused the Madison district office position.

9. When Mr. Polston wrote the December 12, 1979, letter, he was not aware of appellant's attempt to bump into another supervisory position. Polston left the Job Service Division in January, 1980, and a new administrator was appointed.

10. In 1981, federal funding for respondent's Work Incentive program (90% federal funding) and Employment Service programs (100% federal funding) were reduced. Respondent planned for layoff by identifying staffing levels in each of the district offices and the administration office and promoting the use of standardized organizational structures in the districts according to their size. The subsequent layoff conducted by respondent extended into 1982. Statewide, three hundred of respondent's twelve hundred Job Service positions were affected by the layoff.

11. In October, 1981, the respondent, under a new executive officer, presented to the Division of Personnel a proposal to redefine its employing units. The proposal covered the entire department -- seven divisions and all district offices. The proposed unit changes were intended to reduce the scope of bumping transactions to geographical and program areas where layoffs were initiated.

12. In December, 1981, the Department of Employment Relations approved respondent's revision of the employing unit structure. The revision of respondent's employing unit structure caused appellant's bumping rights to be geographically changed and reduced from the northeast area to the Oshkosh and Fond du Lac area. Other employes of the respondent's were similarly affected by the revision.

13. A second layoff occurred in the spring of 1982. As in 1981, the layoff was due to a loss of federal funding. The layoff affected Job Service positions over the entire state.

14. Respondent's layoff procedure was:

Each district was given a reduced allocation of positions.

Each district director was charged with planning an organization, within the allotted allocation, to deliver the program services and submitting that plan to respondent's central administrator for review and approval.

Upon approval of each district organization plan, respondent's central personnel office classified the positions in the approved organization plans.

The district office, then, compared the classification of positions in the approved organization plan within the classification of positions in the existing organization.

Layoff decisions were based upon the difference between the positions and classification levels of the approved organization plan and the existing organization.

15. On April 2, 1982, respondent's personnel director notified the appellant that he was subject to layoff from his current classification, effective April 18, 1982. The layoff notification included information about appellant's current classification status, pay range, seniority service date, rate of pay and the layoff process.

16. On April 5, 1982, the appellant exercised his bumping rights option to displace within his classification to Job Service Supervisor 4 at the Fond du Lac district office. Appellant's former Job Service Supervisor 5 position had been abolished through reorganization of the district.

17. On November 11, 1982, based upon recall rights, the appellant was offered a Job Service Supervisor 5 position in the Madison, Central Operations Office. The appellant elected not to accept the position in the Madison office; however, this action did not terminate his recall rights for other vacancies. Employees, besides the appellant, in Job Service Supervisory 5 positions throughout the state were laid off.

18. Subordinates of the appellant in the Fond du Lac office, also were laid off during the spring of 1982.

While the appellant "bumped" to a Job Service Supervisor 4 (JSS 4) level, his rate of pay as a Job Service Supervisor 5 was red circled, which meant that he retained the JSS 5 rate of pay even though it was higher than the maximum of the pay range for the JSS 4.

19. On May 1, 1982, a provision of the budget repair bill became effective which provided that a nonrepresented employee could not receive a cumulative pay adjustment if his or her rate of compensation exceeded the maximum of the pay range to which his or her position was assigned. Section 2015(1)(a), ch. 317, Laws of 1981. This prevented the appellant from receiving the general across-the-board pay increase for nonrepresented employes in July of 1982.²

20. On April 6, 1982, the appellant appealed to this commission respondent's decision to layoff him.

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 appellant was laid off for just cause.

3. Under the agreed stipulation by the parties in controversy, the respondent has conducted the layoff under examination in accordance with the applicable state statutes and administrative code provisions except for the following questions:

- (1) whether the restructuring of DILHR's employing units in late 1981 was a pretext for taking an adverse personnel action against the appellant;

²The Commission has amended this finding to more accurately reflect the record.

- (2) whether the determination that economic necessity required a layoff in April 1982 was a pretext for laying off the appellant; and,
 - (3) whether the Robert Polston letter of December 12, 1979, estops the respondent from undertaking the layoff transaction.
4. The appellant has the burden of proving that the Robert Polston letter of December 12, 1979, estops the respondent from undertaking the layoff transaction.
 5. The appellant has failed to meet his burden of proof.
 6. The respondent has met its burdens of proof.³
 7. The layoff of the appellant in April, 1982, was for just cause.

OPINION

The State Supreme Court in Weaver v. Wisconsin Personnel Board, 71 Wis 2d 46, 49, 237 N.W.2d 183 (1976) set forth the following standard to be applied by the Commission in determining a controversy on layoff.

[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.

³The conclusions of law set forth in the proposed decision and order have been amended to more accurately reflect the burden of proof established in Weaver v. Wisconsin Personnel Board, 71 Wis 2d 46 (1976). That case assigned the burden of proof as indicated in the language set forth in the first paragraph of the Opinion portion of this decision as well as the following paragraph from Weaver:

While the appointing authority indeed bears the burden of proof to show "just cause" for the layoff, it sustains its burden of proof when it shows that it has acted in accordance with the administrative and statutory guidelines and the exercise of that authority has not been arbitrary and capricious. Weaver, 71 Wis 2d 46, 52.

With the exception of the appellant's estoppel theory, the theories advanced by the appellant relate to aspects of the more general question of whether the layoff was the result of arbitrary or capricious action. As to that general question, the respondent has the burden of proof. The Commission has consulted with the hearing examiner and has concluded that the respondent prevails in this matter, even with the revised assignment of the burden of proof.

The appellant argues: Alvin Tollefson, appellant's immediate supervisor and the Fond du Lac Job Service District Director, and DILHR administrative personnel successfully contrived to eliminate appellant's position. They wanted to eliminate appellant's position because in 1973 the appellant had initiated the Kuter-North^{FN} personnel case and in 1979 he wrote letters to various governmental officials objecting to an organizational restructuring of the Fond du Lac Job Service office. Under the pretext of an economic cutback, Tollefson and DILHR personnel restructured respondent's employing units which resulted in the elimination of appellant's position. When the respondent eliminated appellant's position, it violated a 1979 agreement with the appellant which was a promise to continue him in the Job Service Supervisor 5 classification as long as he wished to remain in the Fond du Lac office and perform his duties as directed.

The clear evidence is that in 1981 the federal government reduced the funding for DILHR's work incentive and job service programs. These programs were funded ninety to one hundred percent with federal money. DILHR was forced to reduce its Job Service staff by some ten percent. The resultant layoffs were complicated by bumping rights which crossed divisional lines and extended over wide geographical areas. As a remedial action, DILHR restructured its employing units to reduce the scope of bumping transactions.

Appellant's arguments to the contrary, there is no evidence that DILHR did not suffer a loss of federal funds, necessitating a reduction in its work force or that DILHR changed its employing units, which affected all its employes, for the purpose of eliminating appellant's position. Nor did

^{FN} Kuter, North and WSEU v. DILHR & Bur of Pers, Case Nos. 73-152, 159 (1978).

the appellant present evidence which establishes that Mr. Tollefson, the district director and DILHR administrative personnel manipulated changes in the employing unit to eliminate appellant's position. No link was made between Tollefson and the functions of determining the configuration of employing units or classification of positions with the units,

Appellant's argument that DILHR retaliated against him because he prevailed in the Kuter-North personnel case is not supported with sufficient evidence. While the appellant's position was affirmed in Kuter-North, no remedy was available. No order was issued against DILHR. Under those facts, the Commission finds it difficult to believe DILHR fabricated an economic cut back, restructured its employing units, laid off 200 employes, in order to eliminate appellant's position in payment for some injury he caused them.

Regarding the Robert Polston letter of December 12, 1979: In 1979 Mr. Tollefson, District Director, Fond du Lac Job Service Office, proposed to reorganize his staff by having the Special Applicant Services (SAS) unit report directly to him instead of to the appellant. The appellant opposed this change and wrote letters to several governmental officials. Mr. Polston, the division administrator, was charged with resolving the matter.

Mr. Polston testified that in reviewing the matter with his deputies, Mr. Kehl, Mr. Tollefson and Mr. Kaisler, field operations, it was determined that a removal of appellant's supervising responsibilities would only affect his title because his salary would be red-circled, resulting in no loss in pay. Mr. Polston testified that on December 10, 1979, he met with the appellant and told him that he could retain his title as supervisor but that was it, the SAS would not report to him. Mr. Polston wrote


the letter of December 12, 1979, in confirmation of his December 10, 1979, conversation with the appellant. The letter was not intended to protect the appellant from departmental layoffs or economic cut-backs. Those subjects were not under consideration by DILHR nor were they discussed with the appellant at the December 10, 1979 meeting, which precipitated the letter.

The substantiated facts in this matter do not support the contentions of the appellant. First, the appellant stipulated that his layoff in 1982 was conducted in compliance with all applicable statutes and civil service rules. In accordance with Weaver v. Per Bd (supra) the only question regarding layoff that remained was whether respondent's actions were arbitrary and capricious. Second, the evidence does not support the position that respondent acted arbitrarily or capriciously in laying off the appellant. The clear evidence is that in 1981 the federal government substantially cut its funding of job service programs to DILHR. DILHR's ensuing layoffs were necessary to conform with its reduced budget. The appellant's layoff was in compliance with the applicable state statutes and codes. Finally, the evidence does not support appellant's assertion that the Robert Polston letter of December 12, 1979, immunized him from layoff. The Polston letter was written in response to the specific issue of staff reorganization in the Fond du Lac Job Service Office and simply allowed the appellant to retain his title of supervisor. Appellant's estoppel argument is misplaced.

ORDER

The action of the respondent is affirmed and this appeal is dismissed.

Dated: July 15, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

DRM:jmf
ID3/3


DONALD R. MURPHY, Commissioner

Commissioner Laurie R. McCallum did not participate in the consideration or determination of this matter.

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