

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 SALLY GAUGER JENSEN, . *
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 Appellant, *
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 v. *
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 President, UNIVERSITY OF *
 WISCONSIN SYSTEM (Milwaukee), *
 *
 Respondent. *
 *
 Case No. 88-0077-PC *
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DECISION
 AND
 ORDER

This matter is before the Commission upon a jurisdictional objection. The parties filed briefs. The following facts appear to be undisputed.

FINDINGS OF FACT

1. Prior to January 17, 1988, appellant was employed by respondent as an Offset Press Operator 2. Appellant had obtained permanent status in that classification. Her position was in the Blue Collar bargaining unit.

2. Effective January 17, 1988, appellant began employment by respondent as a Program Assistant 1. The appellant was required to satisfactorily complete a six month probationary period. The letter of appointment stated that the appellant was being promoted to the Program Assistant 1 position. Program Assistant 1 positions are in the Clerical and Related Bargaining Unit.

3. On May 23, 1988, appellant was notified that her employment as a Program Assistant 1 would be terminated on June 10, 1988 due to unsatisfactory performance.

4. By letter dated May 24, 1988, the president of union Local 82 for the University of Wisconsin-Milwaukee was notified that former Offset Press

Operator 2 positions had been eliminated due to an "impending reduction in the work force." The letter stated, in part:

The previous incumbent [i.e., the appellant] transferred to a counterpart position in a different employing unit and will not pass her probationary period. Consequently, the elimination of the position in which she attained "permanent status" mandates that we now utilize the layoff provisions to ascertain her placement or layoff.

5. By letter dated June 10, 1988, the director of respondent's

Department of Personnel Services wrote the appellant:

You have been notified by your supervisor that you will not attain permanent status in class as a Program Assistant 1 in the Department of Financial Aid as you will be terminated from permissive probation effective June 24, 1988. Because your former position as Offset Press Operator 2 in the Department of Printing Services has been eliminated through reorganization, your employment status will be determined through exercise of the layoff provision of Article VIII of the WSEU Labor Agreement. Effective June 24, 1988, you will be in layoff status under the terms of the Agreement.

You have attained permanent status in class as an Offset Press Operator 2 in Administrative Affairs. Article VIII of the WSEU Labor Contract contains the layoff procedure and your layoff rights as outlined below. The contract references in parentheses refer to the specific article, section and subsection.

Bumping - An employee affected by layoff may "elect to bump downward to a lower class in the same series or bump to a class within the employing unit in which they had previously obtained permanent status in the classified service and which is in the same or a lower pay range as the position occupied at the time of notification of layoff" (8/5/3). There are no vacant Offset Press Operator 1 or 2 vacancies, nor incumbents in the Offset Press Operator series with less seniority than you.

Voluntary Demotion - You may voluntarily demote to any vacancy for which you are qualified, with the approval of the employer (8/5/3(2)), on or before June 24, 1988.

Voluntary Transfer - You may voluntarily transfer to any Program Assistant 1 or counterpart vacancy on or before June 24, 1988.

If you have not voluntarily transferred or demoted on or before June 24, 1988, you will be separated from state service. Your recall rights are as follows....

6. Appellant attempted to voluntarily transfer or demote to vacancies for which she was qualified but she was unable to do so prior to June 24, 1988.

7. Appellant was laid off effective June 25, 1988.

OPINION

The respondent argues that the Commission lacks jurisdiction over appeals from probationary terminations and over appeals arising from the layoff and transfer rights of represented employees. The appellant contends that, as a consequence of her probationary termination, she was entitled either to those transfer rights afforded by §ER-Pers 15.055, Wis. Adm. Code, or to certain promotion rights under §ER-Pers 14.03, Wis. Adm. Code, depending on whether her movement to the Program Assistant 1 position was properly categorized as a promotion (see language in appointment letter, finding 2), or as a transfer (see language in reduction in force letter, finding 4). By implication, the appellant also contends that she was denied those rights.

The administrative rules in these areas read as follows:

ER-Pers 14.03 Kinds of promotion; status and rights.
(1) PROMOTION WITHIN THE SAME AGENCY. In accordance with s.230.28(1), Stats., the promoted employe shall be required to serve a probationary period. At any time during this period the appointing authority may remove the employe from the position to which the employe was promoted without the right of appeal and shall restore the employe to the employe's former position or a similar position and former rate of pay, as determined under s.ER 29.03(7)(a). Any other removal, suspension without pay, or discharge during the probationary period shall be subject to s.230.44(1)(c), Stats. If the position to which the employe has restoration rights has been abolished, the employe shall be given consideration for any other vacant position in the same or counterpart pay range for which the employe is determined to be qualified by the appointing authority to perform the work after being given the customary orientation provided for newly hired workers. If no such vacant position exists, the employe shall be

treated as if he or she had been restored to the position held prior to promotion and the provisions for making layoffs under ch. ER-Pers 22 shall apply.

ER-Pers 15.055 Employee removal; status and rights. If a probationary period resulting from a transfer under s.ER-Pers 15.04 or 15.05 is required, the appointing authority, at any time during this period, may remove the employe from the position to which the employe transferred, without the right of appeal. An employe so removed shall be restored to the employe's previous position or transferred to a position for which the employe is qualified in the same pay range or pay rate or a counterpart pay range or pay rate without a break in employment. Any other removal, suspension without pay, or discharge during a probationary period resulting from transfer shall be subject to s.230.34, Stats.

Of the various sources of the Commission's jurisdiction, two relate to the instant appeal.

Pursuant to s. 230.44(1)(c), Stats.:

If an employe has permanent status in class, the employe may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause.

In Board of Regents v. Wis. Pers. Comm., 103 Wis. 2d 545 (Ct of App., 1981), the court of appeals held that the Commission lacked jurisdiction over appeals of probationary termination decisions. However, according to s. ER-Pers 14.03(1), Wis. Adm. Code, set out above, an employe who is removed from his/her position during a promotional probation period and who is not restored to their "former position or a similar position ... shall be subject to s. 230.44(1)(c), Stats." When this language is read with subsequent subsection (1), it becomes apparent that this appeal right does not extend to those situations where the former position of the employe has been abolished and no appropriate vacant position exists for transfer. Therefore, the reference to s. 230.44(1)(c), Stats., appeal rights appear to apply to those circumstances where a promotional probationary employe

engages in conduct of such a nature that the appointing authority decides to separate the employe from state service. This is clearly not the situation in the instant appeal because the respondent did effectively treat the appellant as if she had been restored to her former Offset Press Operator 2 position before it engaged in the layoff procedure.

Pursuant to s. ER-Pers 15.055, Wis. Adm. Code, the rights granted to transferred employes who are removed while on probation are phrased somewhat differently. According to the rule, if a transferred employe is removed and not restored to his/her previous position or transferred to a comparable position, the decision is subject to s. 230.34, Stats., which provides, in part:

(1)(a) An employe with permanent status in class may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

* * *

(ar) Paragraphs (a) and (am) apply to all employes with permanent status in class in the classified service, except that for employes in a certified bargaining unit covered by a collective bargaining agreement, the determination of just cause and all aspects of the appeal procedure shall be governed by the provisions of the collective bargaining agreement.

Because the appellant in the instant appeal had attained permanent status in the Offset Press Operator 2 classification, her appeal procedure under s. ER-Pers 15.055, Wis. Adm. Code and s. 230.34(1), Stats., would be established by the collective bargaining agreement rather than in s. 230.44(1)(c), Stats.

The second jurisdictional provision which is related to the instant appeal is §230.44(1)(d), Stats., which provides:

A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission.

In recent decisions, the Commission has interpreted this provision as not requiring an actual certification. In Wing v. DER, 84-0084-PC, 4/3/85, the Commission held that the phrase "after certification" as used in §230.44(1)(d), Stats., referred to a certain segment in the appointment process. The Commission concluded that the intent was to permit appeals of all appointment decisions rather than just those where an actual certification had preceded the selection decision. In Wing, the Commission held that it had the authority to review the appointing authority's decision not to select the appellant from among a list of persons seeking transfer, reinstatement and demotion to a vacant position.

In the present case, the actions of granting an employe a certain status which would make them eligible for consideration in filling a position are actions which are simultaneous to, or which precede, the certification stage of any appointment process. These actions are not "post-certification" actions even when that term is defined as in Wing. This result is consistent with that in Seep v. DHSS, 83-0032-PC & 83-0017-PC-ER, 10/10/84; affirmed in part, reversed in part by Racine County Circuit Court, Seep v. State Pers. Comm., 84-CV-1705, 84-CV-1920, 6/20/85; affirmed in part, reversed in part by Court of Appeals District II, 140 Wis. 2d 31, 5/6/87. In its decision in Seep, the Commission held:

This statutory language [in §230.44(1)(d), Stats.] refers not to a specific event, but rather to a point in the selection process "after certification."

This particular line of demarcation has substantial significance, as can be seen from the roles of the administrator "of the Division of Merit Recruitment and Selection] and the appointing authorities in the selection process.

The administrator is responsible for recruitment, §230.14, Stats., examination, §230.16, Stats., and the certification of eligibles to the appointing authorities, §230.25, Stats.

The appointing authorities have the authority to appoint persons to vacancies, see §230.06(1)(b), 230.25(2), Stats.

The point of certification marks the extent of the administrator's legal authority in the selection process. The

appointing authority is generally responsible for actions in the selection process which occur after the point of certification. Actions which occur at or prior to certification, and which typically concern the examination process, are appealable pursuant to §230.44(1)(a) or (b) as actions of the administrator. Actions which occur after the point of certification (and which meet the other criteria set forth in §230.44(1)(d) are appealable pursuant to §230.44(1)(d), Stats. [footnote omitted]


In the present case, the appellant seeks review of certain actions¹ by the appointing authority rather than of the actions of the administrator of the Division of Merit Recruitment and Selection. Here, prior to its layoff analysis, the appointing authority tacitly decided that the appellant was not eligible to even be considered for appointment to another position. This tacit decision is not a "point in the selection process," much less a point in that process that could be considered to be "after certification." The appellant has failed to identify any vacancies for which the respondent failed to consider her. The language in the respondent's June 10th letter indicates that there were no such vacancies. Without any indication that there was a vacancy for which the appellant contends she should have been considered, the Commission cannot find that there was a post-certification action by the respondent relative to the appellant.

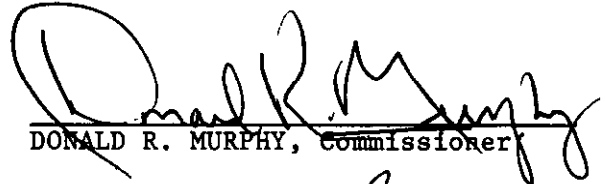
¹ These actions would include deciding the promotional employe had no restoration rights or would not be considered for a vacancy in the same or counterpart pay range and would also include decisions that the transfer employe had no restoration rights or transfer rights.

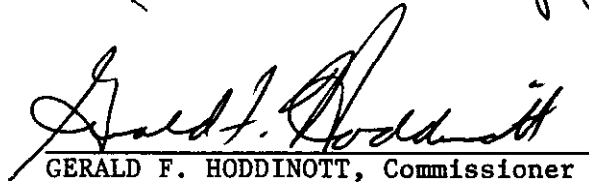
ORDER

Respondent's motion to dismiss is granted and this matter is dismissed
due to lack of subject matter jurisdiction.

Dated: December 14, 1988 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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