

STATE OF WISCONSIN

PERSONNEL COMMISSION

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KENNETH V. BALLWEG, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 92-0378-PC *

* * * * *

FINAL
DECISION
AND
ORDER

This matter is before the Commission on respondent's motion to dismiss for lack of subject matter jurisdiction filed August 13, 1992. Both parties have filed briefs. The facts material to subject matter jurisdiction do not appear to be in dispute.

This appeal concerns the rate of pay in connection with a voluntary demotion. On April 14, 1992, appellant accepted a voluntary demotion from a position classified as Resident Care Technician 2 (RCT 2), pay range 06-08, to a position classified as Custodian 2, pay range 03-04, effective April 19, 1992, with the understanding that his rate of pay would remain at \$9.106 per hour. Both positions were represented. By letter dated April 29, 1992 respondent advised appellant that an error had been made in determining his rate of pay, that \$9.106 was above the maximum of the Custodian 2 pay range, and that therefore his pay would be \$8.554 per hour.

In support of its motion to dismiss, respondent asserts that pursuant to §111.93(3), Stats., the Commission lacks subject matter jurisdiction over this appeal. Section 111.93(3), Stats., provides that:

[I]f a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes ... related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes, rules and policies are set forth in the collective bargaining agreement.

In Taddey v. DHSS, 86-0156-PC (6/11/87), the Commission held that §111.93(3), Stats., has a preclusive effect with respect both to mandatory subjects of bargaining and permissive subjects of bargaining, where, as to the latter, the parties have bargained and reached agreement on the subject or subjects in question.

In the instant case, appellant argues that the rate of pay on demotion is a non-negotiable subject. However, respondent points out that the contract provides at Article VII, Section 9, Para. 2:

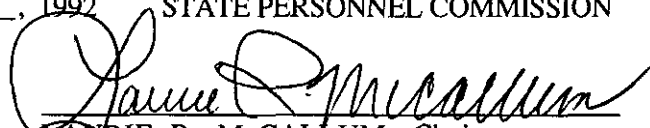
An employe who voluntarily demotes in lieu of layoff to the highest level position available shall retain his/her current rate of pay. The rate of pay of an employe who voluntarily demotes under any other circumstances shall be no greater than the pay range maximum of the new position.

The enumeration of prohibited subjects of bargaining in §111.91(2)(b), Stats., does not include the matter of salary determinations upon voluntary demotion, and the presence of this subject in this agreement, which had to have been approved by the legislative branch pursuant to §111.92, Stats., is a strong indication it is a bargainable subject, see Taddey v. DHSS; Wendt v. DHSS, 80-0110-PC (12/3/81). Therefore, the Commission concludes that any jurisdiction it has over this matter is precluded by the operation of §111.93(3), Stats., and it must be dismissed.


ORDER


This appeal is dismissed pursuant to §111.93(3), Stats.

Dated: November 13, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation