

**JAMES B. TAYLOR,**  
*Appellant,*

v.

**Chairperson, STATE FAIR PARK  
BOARD,**  
*Respondent.*

DECISION  
AND  
ORDER

Case No. 02-0001-PC

This matter is before the Commission as an appeal from a decision to lay off the appellant from his employment with the State Fair Park. The parties agreed to the following statement of issue for hearing.

Whether or not the layoff of the appellant from the position of Events Marketing Supervisor-Food Services was for just cause.

#### FINDINGS OF FACT

1. Prior to October 29, 1999, appellant was employed by the respondent in the classified service. His position was moved into the unclassified service on October 29, 1999, where he remained until he was laid off on February 15, 2002.
2. At all relevant times, the majority of the appellant's time was spent as supervisor within the respondent's food and beverage operation.
3. Respondent operates strictly on program revenues rather than general purpose revenues. In other words, its funding depends entirely on money it earns through its events.
4. Until 2001, patrons at the State Fair Park in West Allis could purchase food and beverages from two categories of vendors. The first category was of "independent vendors/contractors" who purchased their own supplies, sold the products to Park patrons and then paid respondent a percentage of their sales pursuant to a contractual agreement. The second category consisted of food and beverage stands that were

operated directly by the Park, i.e. where Park staff purchased the supplies and hired individuals to sell the products to Park patrons so that all net proceeds of the sales went directly to the respondent. The appellant's position was responsible for overseeing this second ("direct provision") category of food and beverage operation. Those responsibilities included insuring that these stands were adequately stocked and that necessary equipment was in adequate repair.

5. Effective May 14, 2001, respondent made various organizational changes (App. Exh. 121) that resulted in the appellant holding the title of Food Service Director and Space Sales Supervisor with the following responsibilities:

Develop and implement plans and venues for year round Fair Park activities.

Review and make recommendations to State Fair Park Director and Program Services Director to promote greater efficiency and revenue enhancements.

Provide general management and [oversight] in programming of food and beverage concessions.

Monitor State contract food operators with emphasis on customer satisfaction, sales, profitability and warehouse and inventory controls.

Monitor TGT Youth Center foodservice contract operator.

Oversee all food and beverage service during all events at the Park.

Provide general management and [oversight] to Space Sales Director  
Develop contracts and vendors in order to bring the greatest diversity of products, services and ideas to Wisconsin State Fair.

Evaluate all vendors during events as set by prescribed criteria.

Continue to develop relationships with present promoters in order to improve and enhance their events at Wisconsin State Fair Park.

Evaluate all events as to how they fit into future development.

6. During the period leading up to May of 1999, the Governor's Strategic Development Committee reviewed respondent's operations. This committee was charged with examining all aspects of the State Fair Park, including its day-to-day operation, with a goal of making it a year-round destination for entertainment events. The committee included a "Food, Beverage & Entertainment Work Group" and the commit-

tee issued a final report dated May 18, 1999. (Resp. Exh. 104) The report included the following conclusion regarding the Park's business of directly providing food and beverages to patrons:

c. (I)<sup>1</sup> If [State Fair Park] intends on forging true partnerships with [food and beverage] vendors, [the Park] should not be in competition with its partners. Therefore the committee recommends that [the Park] develop a plan to ultimately remove itself from the concession business (two-year window). (Resp. Exh. 105)

7 The Wisconsin State Fair Park Board adopted a resolution on November 12, 2001, that included the following language:

*Resolution directing the Chief Executive Officer to investigate the possibility of increasing net revenues to the Park by issuing a Request For Proposals (RFP) for operating State Food Stands as independent entities and report results to the Board in February, 2002.*

WHEREAS, the Strategic Development Committee Report dated May 18, 1999 calls for a reevaluation of the systems used to provide food and beverage in order to make most efficient use of State Fair resources, eliminate the perception of State Fair Park competition with its independent operators and to maximize the net return to the Fair Park for the provision of its accommodation of this service .

RESOLVED that it is the desire of the State Fair Park Board to privatize the operation of existing State concession stands. And be it

RESOLVED by the Wisconsin State Fair Board that the Chief Executive Officer is hereby directed to prepare and issue a Request for Proposals [RFP] for the operation of existing State Concession Stands. And be it

FURTHER RESOLVED, that such Request for Proposals include operational guidelines which provide for independent supply requirements which minimize the involvement of the Park in the operation of the individual enterprise. And be it

FURTHER RESOLVED that the Chief Executive Officer is to report the results of the Request for Proposal process to the Board at its February, 2002 meeting.

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<sup>1</sup> Elsewhere in the report there is language indicating that an item designated with code "(I)" required "immediate Internal action by staff or Board." (emphasis in original)

8. Sometime prior to January 10, 2002, respondent received a directive regarding the state budget that the Park would lose \$1.2 million from its revenues. As a consequence, respondent was forced to reduce its operating costs.

9. Before it considered layoffs, respondent reduced the operating levels of all of its departments, prohibited overtime absent prior approval, cancelled certain events that had been scheduled for the next season and returned position vacancies to the Department of Administration.

10. Until the layoffs in question, respondent had approximately 42 employees, including three persons employed in food services: 1) complainant, 2) a storekeeper, and 3) a mechanic. Both the storekeeper position and the mechanic position are covered by collective bargaining agreements, while complainant's was not.

11. Respondent prepared a comprehensive layoff plan and submitted it to the Division of Merit Recruitment and Selection (DMRS) for approval. DMRS approved the plan.

12. All three employees in food services received layoff notices.

13. Respondent's layoff plan is consistent with the decision to end the direct provision of food. As a consequence, warehouse space previously used for food and beverage storage will be used for the storage of other park operation equipment, and the building that had been occupied by food and beverage staff has been marked for demolition so that the space may be used as part of an Agriculture Village.

14. Respondent anticipates that by eliminating its prior practice of directly providing food and beverages, its income will increase by more than \$100,000.

15. The elimination of the food service operation will not eliminate the need for respondent's Grounds Department or the Marketing Department.

16. Respondent has engaged in discussions with the union representing the storekeeper and the mechanic positions. The mechanic has found work elsewhere and discussions with the union have generated a plan for the storekeeper to be moved to a new position with respondent outside of food services. Respondent's discussions have been shaped by its understanding that the contractual provisions regarding the store-

keeper and mechanic positions preclude the removal of an employee if the employee's duties are being privatized.

17. The initial letter of layoff sent to appellant was dated December 17, 2001, and was issued under the signature of Joseph M. Chernelich, Chief Executive Officer of Wisconsin State Fair Park. (App. Exh. 103) The letter stated, in part:

Budget reductions and the economic downturn have made it necessary for State Fair Park to closely assess state programs and staffing. As a result of this assessment, we have determined that your unclassified position of Events Marketing Supervisor-Food Services must be vacated effective January 18, 2002.

Additionally, as a result of a layoff plan that will be instituted, it has been determined that you will be laid off. This letter is your official notification of layoff from State Fair Park, with your last working day being January 18, 2002.

18. On January 10, 2002, respondent issued RFPs to select independent contractors to operate concession stands in the Park that had previously been operated by the Park. (Resp. Exh. 103) The due date for the proposals was February 4, 2002.

19. Respondent provided appellant a revised, or amended, layoff letter that was dated January 11, 2002, and was issued under the signature of Moose Speros, Executive Director of State Fair Park. The letter stated, in part:

This letter will amend your previous letter dated December 17, 2001 regarding implementation of the layoff process. Your layoff date is amended from January 18, 2002 to February 15, 2002. This letter serves as your notification of layoff from State Fair Park with your last working day as February 15, 2002.

This action is taken based on budget reductions and the economic downturn. State Fair Park has closely assessed their state programs and staffing operations. We regret we must take this personnel action and are aware and sensitive to the personal hardship this may cause you.

Your current position is in the unclassified service. Prior to October 29, 1999 you were a classified civil service employee. Due to your status in civil service prior to your position becoming unclassified on October 29, 1999, you have the protections afforded employees in the classified service. Layoff procedures must be in accordance with the Wisconsin Administrative Code, Rules of the Department of Employment Relations,

Division of Merit Recruitment and Selection, Chapter ER-MRS 22. State Fair Park is considered one employing unit.

Section ER-MRS 22.08, Wisconsin Administrative Code, identifies alternatives to layoff, in the order listed below, until the effective date of your layoff:

A. Transfer

You have the right to transfer: (1) within the employing unit, to any vacancy in the unclassified service for which you are qualified to perform the work after being given customary orientation provided to newly hired workers in the position. At this time, there are no vacancies available for transfer; therefore, this alternative is not available to you.

B. Demotion as a result of layoff

If no transfer is available and there is a vacancy available for which you are qualified to perform the work after the customary orientation provided to newly hired workers, and which is in a lower level position which could be obtained through displacement, you will be offered a demotion to that vacancy in lieu of layoff. At this time, there are no vacancies into which you could demote which would constitute a reasonable offer of employment according to ss. ER-MRS 22.08(2), Wisconsin Administrative Code. Therefore, this alternative is not available to you.

C. Displacement

You are entitled to exercise a right of displacement in the employing unit only if there is no vacancy to which you could transfer or demote which is at the same or higher level than can be obtained through displacement. This right entitles you to induce the layoff process only to: (1) a position in a lower class in which you had previously attained permanent status in class, or (2) a lower level within an approved progression series in which you had previously attained permanent status in class at a higher level.

You cannot displace into a classification which is represented by a collective bargaining unit. Exercising displacement rights does not guarantee you a position in the classification selected. Displacement only requires that you be included along with other employees in the classification when the layoff process is applied, to determine which employee is laid off as a result of displacement.

There are no positions within the State Fair Park at the same or counterpart pay range to which you are qualified. There are no positions in lower classifications in which you attained permanent status in class. Therefore, displacement as an alternative to layoff is not available to you.

20. Respondent has made arrangements to continue its food service operations on an interim basis from February 15, 2002, the date of appellant's layoff, until March 31<sup>st</sup>, when the operation becomes fully privatized. Those services remaining open until March 31<sup>st</sup> include 4 large stands, 2 smaller stands and the stand in the Wisconsin Products Pavilion.

#### CONCLUSIONS OF LAW

1. This case is properly before the Personnel Commission pursuant to §230.44(1)(c), Stats.
2. Respondent has the burden of proving that the layoff was conducted in accordance with the applicable statutes and administrative code provisions and that the layoff was not the result of arbitrary or capricious action.
3. Respondent met its burden of proof.
4. The decision to lay off the appellant from his position was for just cause.

#### OPINION

The standard to be followed by the Commission when analyzing an appeal of a layoff decision was established in *Weaver v. Wis. Personnel Board*, 71 Wis. 2d 46, 237 N.W.2d 183 (1976):

The circuit judge . . . correctly held that an appointing authority acts with "just cause" in a layoff situation when it demonstrates that it has followed the personnel statutes and administrative standards . . . of the Administrative Code and when the layoff is not the result of arbitrary or capricious action. . . .

We have said that, for administrative action to avoid the label of "capricious or arbitrary," it must have a rational basis. In *Olson v. Rothwell*, 28 Wis. 2d 233, 239, 137 N.W. 2d 86 (1965), this court said:

“Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that said action is unreasonable or does not have a rational basis. . . . and [is] not the result of the ‘winnowing and sifting’ process.”

Appellant filed his letter of appeal with the Commission on January 2, 2002, after he had received the December 17<sup>th</sup> layoff notice signed by respondent’s Chief Executive Officer. Respondent opted to issue a revised layoff notice by letter dated January 11<sup>th</sup>, under the signature of its Executive Director. The revised notice was for a layoff date of February 15<sup>th</sup> rather than January 18<sup>th</sup>. While appellant did not file a separate appeal from the amended letter, the case was presented by the parties at hearing as an appeal from the layoff effective February 15<sup>th</sup>. For that reason, the Commission is reviewing the adequacy of the February 15<sup>th</sup> layoff and not the layoff that was discussed in the December 11<sup>th</sup> letter.

The statutory provisions relating to layoff are found in §230.34(2), Stats.

Employees with permanent status in class in permanent, sessional and seasonal positions in the classified service may be laid off because of a reduction in force due to a stoppage or lack of work or funds or owing to material changes in duties or organization but only after all original appointment probationary and limited term employees in the classes used for layoff, are terminated.

- (a) The order of layoff of such employees may be determined by seniority or performance or a combination thereof or by other factors.
- (b) The administrator shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employee right of restoration or eligibility for reinstatement.

There is no evidence that the respondent failed to comply with either the provisions of §230.34(2), Stats., or of the rules relating to layoff found in ch. ER-MRS 22, Wis. Adm. Code. There is no evidence that respondent retained any limited term employees, project employees, or employees serving an original probationary period contrary to §ER-MRS 22.04. Testimony established that respondent prepared a layoff plan that was approved by the Administrator of the Division of Merit Recruitment and Selection.



Sec. ER-MRS 22.05. Respondent provided appellant with the 15 day notice required by §ER-MRS 22.07, and properly concluded that there were no alternatives to layoff through transfer, demotion or displacement. Sec. ER-MRS 22.08.

The evidence at hearing established that the layoff decision was due to both a lack of funds and a material change in respondent's operation. The 1999 report by the Governor's Strategic Development Committee called for respondent to "remove itself from the concession business." Respondent was also faced with a budget directive that forced respondent to reduce its operating costs. Respondent reasonably concluded that it would generate an additional \$100,000 if it stopped directly providing concessions to patrons and relied entirely on independent vendors/contractors. These facts are comparable to those in *Smalley v. UW*, 86-0128-PC, 4/29/87, where the Commission concluded that the decision to lay appellant off from her Education Services Intern-Supervisor position was the result of a rational process stemming from a decision to computerize a records function and was not arbitrary and capricious.

Complainant points to his Restaurant Manager Certification (App. Exh. 106) and suggests his employment has to be continued in order for the food service to be properly licensed. However, respondent established that it had consulted with the health inspector who confirmed that the license was not required in order to proceed with the wind down of the operation.

At hearing, appellant suggested that the various consultant fees and professional services contracts entered into by respondent would be more appropriate areas for reducing expenditures than eliminating the direct provision of food at the State Fair Park. He also suggested that his employment should be continued because the remaining staff had been unable to promptly answer some questions that were within appellant's area of experience. In *Newberry & Eft v. DHSS*, 82-98, 100-PC, 8/17/83, amended 9/16/83, the Commission addressed a contention that a layoff decision was arbitrary and capricious and held:

[T]he Commission's inquiry in appeals of this nature is relatively limited. If the employer can show that it had a rational basis for its decision, it has satisfied its burden of proof. It is not required to prove that its de-

cision was perforce the best personnel decision that could have been made under the circumstances.

In light of the clear directive to alter its concession business, respondent has clearly sustained its burden as to appellant's arguments.

The facts in the present case are clearly distinguishable from those in *Lyons v. WGC*, 93-0206-PC, 12/5/94. In *Lyons*, the Commission concluded that there were one or more vacant positions into which the appellant should have been demoted in lieu of layoff. There is no evidence of any such vacancies in the present case.

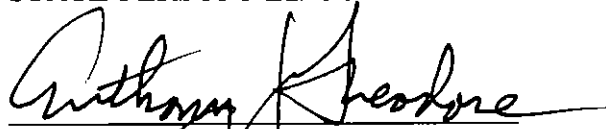
The Commission notes that appellant's position in the unclassified service was outside a collective bargaining unit so no union contract was involved in his layoff. This contrasts to the other two employees in respondent's food services department whose positions were covered by a collective bargaining agreement.

#### ORDER

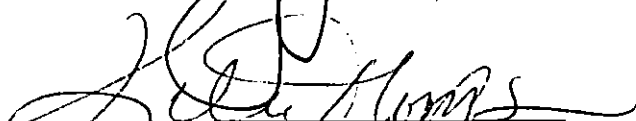
Respondent's decision to lay the appellant off from his position as Events Marketing Supervisor-Food Services is affirmed and this appeal is dismissed.

Dated: April 17, 2002

STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

KMS: 020001Adec1

  
KELLI S. THOMPSON, Commissioner

Parties:

James B. Taylor  
7400 West Tuckaway Creek Drive  
Franklin, WI 53132

Moose Speros, Exec. Dir  
State Fair Park  
PO Box 14990  
West Allis, WI 53214-0990

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95