

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DENNIS SEARS, Appellant,

vs.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 3
No. 62759
PA(adv)-4

(formerly 03-0015-PC)

Decision No. 30794

Appearances:

Dennis Sears, 64005 East Ruth Lake Road, Iron River, Wisconsin 54847, appearing on his own behalf.

Edward S. Alschuler, Deputy General Counsel, University of Wisconsin System, 1852 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin 53706, appearing on behalf of the University of Wisconsin System.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

This matter is before the Commission on Respondent's motion to dismiss the matter for lack of subject matter jurisdiction. The parties have filed written arguments and the following findings are undisputed.

FINDINGS OF FACT

1. Commencing August 4, 1986, Appellant was employed by the University of Wisconsin-Superior (UW-S) in a classified position as an Administrative Assistant 4 - Supervisor in the Purchasing Office. He gained permanent status in class in that position.
2. By letter dated July 13, 1988, from the UW-S Chancellor, Appellant was appointed to the position of Administrative Program Manager which was a limited appointment, academic staff position. The appointment letter stated, in part:

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I am pleased to confirm your appointment as an Administrative Program Manager, Salary Grade 4, limited appointment, as defined in UWS Chapter 15.

. . .

You will not lose existing rights to a classified appointment by accepting this unclassified appointment.

Appellant served in this unclassified position at the pleasure of the appointing authority.

3. Appellant's unclassified position was re-titled to "Director, Unspecified (6)" in 1992 and the working title was changed in 1999 to Director of General Services.

4. Sometime between 1988 and July of 2003, the State abolished the classification of Administrative Assistant 4 - Supervisor.

5. Respondent terminated Appellant's employment and eliminated the Director of General Services position on July 31, 2003. At the same time, Respondent restored Appellant to a Purchasing Supervisor position at UW-S in the classified service.

6. Respondent eliminated the Purchasing Supervisor classified position at the end of the working day on August 1, 2003, and Appellant was laid off at that time. Appellant received notice of this layoff by letter dated May 13, 2003.

7. No later than May of 2003, Respondent began the recruitment process for a new limited appointment "Director, Unspecified (6)" position titled Director of Recreation Facilities. This position was also in the unclassified civil service and the appointee would serve at the pleasure of the appointing authority.

8. By letter dated June 3, 2003, Respondent informed Appellant:

The Director of Recreation Facilities position that you have inquired about is a limited [appointment] position in the unclassified civil service that serves at the pleasure of the appointing authority. Because the position is in the unclassified civil service, no restoration or other rights to this position exist. You of course are eligible to apply on the same basis as any other applicant for any limited unclassified position for which you believe you are qualified.

9. Appellant was not hired by Respondent for the Director of Recreation Facilities position.

CONCLUSIONS OF LAW

The Commission's jurisdiction over this matter is limited to the Appellant's claim that the decision to lay him off from the Purchasing Supervisor position was without just cause.

OPINION

Appellant filed his letter of appeal on April 21, 2003. 1/ During a prehearing conference conducted on November 4, 2003, the Appellant agreed that his appeal related to his layoff from the position of Purchasing Supervisor, rather than from the elimination of the limited appointment academic staff position of Director of General Services. During the same conference, Appellant also stated that his only allegation in the present case related to the Respondent's decision to create the position titled Director of Recreational Facilities as an academic staff position in the unclassified service rather than as a position in the classified service. However, in his subsequent written arguments regarding the motion to dismiss, Appellant made statements indicating his appeal also related to other personnel actions:

My case is unique in that it is the first known case involving a classified staff that moved to Academic Staff with a mandatory back-up appointment to be laid off. The nature in which the elimination decision was made, the reason given for my position elimination, and the way the mandatory back-up position was created is the basis for my appeal.

I believe that the very fact that my academic staff position had a connecting mandatory classified back-up position gives jurisdiction over the entire decision for position elimination. Both Positions were effectively eliminated by the decision.

How can a [Purchasing Supervisor] position that does not exist suddenly exist on that day and then be eliminated the same day? It was stated the state can do so just to meet the criteria of the law. I believe this was done just to eliminate me as an employee of the state without having fully analyzed other possible positions that were better suited to be cut under the current budget cut directives. The directive from Chancellor Erlenbach was to give careful consideration to all and any positions that would be suitable for cuts.

1/ *The appeal was filed with the Wisconsin Personnel Commission. The Personnel Commission was abolished by 2003 Wis. Act 33, effective July 26, 2003, and the authority over this matter was transferred to the WERC.*

Based upon both his statements at the November 4th telephone conference and in his subsequent brief, the Commission understands the Appellant to now be contesting: 1) the process used to eliminate the Director of General Services position; 2) the reason Respondent

eliminated that position; 3) the way in which the Purchasing Supervisor position was created; 4) the elimination of the Purchasing Supervisor position rather than some other position; and 5) Respondent's decision to create the Director of Recreational Facilities position outside of the classified service.

Analysis of Respondent's motion requires an understanding of the distinction between positions in the classified and unclassified service. The primary statutory section that designates positions in the civil service to be in either the classified or unclassified service is §230.08, Stats., 2/ which provides, in relevant part:

- (1) Classes. The civil service is divided into the unclassified service and the classified service.
- (2) Unclassified service. The unclassified service comprises positions held by . . .
(cm) All positions of the University of Wisconsin System identified in s. 20.923(4g) and (5). . . .
- (3) Classified service. (a) The classified service comprises all positions not included in the unclassified service.

2/ This ruling recites those statutes and administrative rules that were in effect at the time of the personnel actions that are the subject of this appeal.

The UW-S positions of Director of General Services and Director of Recreation Facilities fall within the scope of §20.923(5), Stats., which reads:

- (5) Other University of Wisconsin System administrative positions. The board of regents of the University of Wisconsin System shall assign the positions of . . . administrative directors and associate directors of physical plant, general operations and services and auxiliary enterprises activities or their equivalent, of each University of Wisconsin institution . . . to salary ranges established under s. 36.09(1)(k)2.b.

Appellant moved into the unclassified service in 1988 from his classified position of Administrative Assistant 4 – Supervisor. This transaction meant that the Appellant retained certain rights arising from his classified position. Pursuant to §230.33, Stats:

Employees who have completed an original appointment probationary period in the classified service and are appointed to a position in the unclassified service shall be subject to the following provisions relative to leave of absence, restoration rights, reinstatement privileges and pay

(1m) A person appointed to an unclassified position by an appointing authority other than an appointing authority described under sub. (1), [i.e., the Governor, elected officer, judicial body or legislative body or committee] when both the classified and unclassified positions are within the appointing authority's department, shall be granted a leave of absence without pay for the duration of the appointment and for 3 months thereafter, during which time the person has restoration rights to the former position or equivalent position in the department in which last employed in a classified position without loss of seniority. The person shall also have reinstatement privileges for 5 years following appointment to the unclassified service or for one year after termination of the unclassified appointment whichever is longer. Restoration rights and reinstatement privileges shall be forfeited if the reason for termination of the unclassified appointment would also be reason for discharge from the former position in the classified service.

(2) A person appointed to an unclassified position by an appointing authority other than an appointing authority described under sub. (1) to a department other than the one in which the person was a classified employee may be granted a leave of absence without pay at the option of the person's former appointing authority in accordance with the leave of absence provisions in the rules of the secretary. An employee granted a leave of absence shall have the same restoration rights and reinstatement privileges as under sub. (1m). If not granted a leave of absence, the employee shall be entitled only to the reinstatement privileges under sub. (1m). . . .

(4) This section shall supersede any provision of law in conflict therewith but shall not diminish the rights and privileges of employees appointed to the unclassified service from the classified service prior to April 30, 1972.

It was this language in §230.33, Stats., that required Respondent to return the Appellant to the classified service after UW-S terminated his employment in the unclassified Director of General Services position. There is no dispute that the Administrative Assistant 4 – Supervisor classification had been abolished by the time Appellant's limited appointment to the Director of General Services was terminated. It is also undisputed that the Purchasing Supervisor position was an "equivalent position" to the Administrative Assistant 4 – Supervisor position. After just one day in the Purchasing Supervisor classified position, Appellant's layoff from the classified service became effective.

The relevant basis for the Commission to exercise jurisdiction over layoff decisions for employees of the State of Wisconsin is in §230.44(1)(c), Stats., which provides:

If an employee has permanent status in class . . . the employee 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.

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

(2) 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 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.

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.

The language in §230.44(1)(c), Stats., serves as the jurisdictional basis for the Commission to review the decision to eliminate the Purchasing Supervisor position rather than some other position. However, it does not provide for the review of a layoff of an employee from the unclassified service. Separate administrative rules apply to appointments to the unclassified service, including faculty appointments (ch. UWS 2 through 9, Wis. Adm. Code), academic staff appointments (ch. UWS 10 through 13) and limited appointments (ch. UWS 15). These rules establish specific procedures for any layoffs of faculty (ch. UWS 5) and academic staff (ch. UWS 12).

Limited appointments are described in §36.17, Stats.:

- (1) An appointment to a position listed in sub. (2) shall be a limited appointment and the appointment *shall be at the pleasure of the board* [of regents]. . . .
- (2) Limited appointments apply to the following positions: . . . such other administrative positions as the board determines at the time of appointment. [Emphasis added.]

A civil service employee who is serving “at the pleasure of” the appointing authority is subject to removal without cause. *HILL V. CITY OF LONG BEACH*, 33 CAL. APP. 4TH, 1995 CA. APP. LEXIS 353 (1995). None of the other provisions in §230.44 or .45, Stats., provide this agency with the authority to hear an appeal based solely on either the process used to eliminate the Director of General Services position or the reason Respondent eliminated that position.

Therefore, Appellant has the right to appeal his layoff from the Purchasing Supervisor position in the classified service, but the Commission lacks the authority to hear a direct appeal from the elimination of the Director of General Services position or the termination of his limited appointment to that position in the unclassified service.

Appellant also is contesting the way in which the Purchasing Supervisor position in the classified service was created. The jurisdictional issue here is whether a classified employee can pursue an appeal under §§230.44 or .45, Stats., of the decision to create a new position. The Commission is unaware of any provision in either the statutes or the administrative rules indicating the Administrator of the Division of Merit Recruitment and Selection would have had any involvement or responsibility in terms of the manner in which the Purchasing Supervisor position was created.

It is noteworthy that it is the Secretary of the Department of Employment Relations (DER) who is “charged with the effective administration” of Ch. 230, Stats, and who retains “[a]ll powers and duties, necessary to that end, which are not exclusively vested by statute in the commission, the administrator or appointing authorities.” §230.04(1), Stats. Only certain actions taken by or delegated by the Secretary of DER (now the Director of OSER) are directly reviewable by the WERC. Those actions are specified in §230.44(1)(b), and include allocation, reallocation and reclassification decisions as well as decisions relating to certain personnel records rather than any decisions to create a new position.

Certain disciplinary actions can be appealed to the Commission under §230.44(1)(c), Stats., but, as noted above, this is limited to personnel actions with respect to classified positions rather than unclassified positions. Paragraph 230.44(1)(d), Stats., permits the review of post-certification actions relating to positions in the classified service but Appellant is seeking direct review of the decision to create the position rather than to fill it with a particular

candidate. None of the other provisions in either §230.44(1) or .45(1) are even remotely related to the decision to create a position in the classified service.

Appellant's final contention relates to Respondent's decision to create the Director of Recreational Facilities position outside of the classified service. Appellant argues that given his status as an at-risk employee, "this position could have been made a classified position and [been] granted to me as a back-up position." However, in a previous decision, the Commission was found to lack the authority to review a decision by the Department of Employment Relations to deny an appellant's request to convert her position from the classified service to an academic staff position in the unclassified service:

None of the statutory references [in §230.44(1)(b)] relate to decisions by DER designating positions as academic staff versus classified civil service under §36.09, Stats., thereby indicating a legislative intent that the Commission not have the authority to review such transactions. *BUCKLEY V. DER*, 91-0018-PC, 5/1/91 (footnote omitted)

All of the above analysis has been in the context of whether the Appellant could directly appeal the decisions to eliminate the Director of General Services position (and the process used to generate that result), to create the Purchasing Supervisor position and to create the Director of Recreational Facilities position outside of the classified service.

While a significant portion of the claims that the Appellant seeks to review are beyond the Commission's authority to review as *direct* appeals under the language of §230.44(1), Stats., that does not mean evidence relating to these actions could not be relevant to his claim relating to his layoff from the classified service. The standard in *WEAVER V. WIS. PERSONNEL BOARD*, 71 Wis. 2d 46, 237 N.W.2d 183 (1976), includes establishing that the layoff was the "result of the 'winnowing and sifting' process," had a "rational basis" and was "not the result of arbitrary or capricious action." In *NEWBERRY & EFT V. DHSS*, 82-98, 100-PC (8/17/83), the Personnel Commission 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 decision was performed the best personnel decision that could have been made under the circumstances.

This principle was discussed in a more recent case as follows:

The elimination of a position and the layoff of the position incumbent as the result of a reorganization falls squarely within the scope of those actions

authorized by §230.34(2), Stats. What appellant actually appears to be challenging here are the management decisions which form the basis for the subject reorganization and which are more appropriately addressed . . . in the context of whether the layoff was “arbitrary and capricious” within the meaning of the WEAVER decision. (Citation omitted.)

ATTOE V. UW, 90-0388-PC, 8/16/91, AFFIRMED, ATTOE V. WIS. PERSONNEL COMM., 91 CV 3587, DANE COUNTY CIRCUIT COURT, 5/12/92. In ATTOE, the Commission reviewed the employing agency’s conduct that led up to the layoff in terms of the “rational basis” standard.

The record shows that the reorganization and redeployment of staff resources within LSS [the College of Letters and Science], as the focus of the department changed, resulted from the ongoing examination by several management employees of a substantial volume of information regarding a variety of alternatives over a considerable length of time. . . . Appellant argues that respondent should have consulted with the technicians within LSS before deciding how to reallocate LSS staff resources. . . . Appellant has failed to cite any authority which would require the technicians to have been consulted in order for the “sifting and winnowing” requirement to have been met.

The next inquiry is whether the decision reorganizing and redeploying staffing resources within LSS, which led to the subject layoff, had a rational basis. Appellant argues that it did not and was a pretext for terminating appellant.

Appellant argues in this regard that the clerical needs of LSS, other than those being met by the Department Secretary, “could have been met” by student hourly employees as they had been for a considerable length of time. . . . These representations provide a rational basis for respondent’s decision that LSS’s clerical needs, other than those being met by the Department Secretary, could best be satisfied by a full-time permanent clerical position. . . .

Appellant argues further in this regard that respondent did not have a rational basis for assigning video and microcomputer repair/maintenance duties to technician positions other than appellant’s and for selecting appellant’s position for elimination. . . .

The Commission concludes that there was a rational basis for respondent’s decision to use the vacant LSS position to hire a technician, rather than a clerical employee. . . . ATTOE, IBID.

In another case, the Commission addressed similar claims:

The appellant argues . . . [that under] the pretext of an economic cutback, Tollefson [appellant's immediate supervisor] and DILHF personnel restructured respondent's employing units which resulted in the elimination of appellant's position. . . .

Nor did the appellant present evidence which establishes that Mr. Tollefson, the district director and DILHF administrative personnel manipulated changes in the employing unit to eliminate appellant's position.

KUTER V. DILHR, 82-83-PC, 7/15/85; AFFIRMED, KUTER V. STATE PERSONNEL COMM., 86-1950, COURT OF APPEALS (1987).

The Commission's ability to consider the underpinnings of a layoff decision is analogous to its review of certain other personnel actions. As a general matter, the Commission lacks the authority to review job assignments. KIENBAUM V. UW, 79-246-PC, 4/25/80 However, job assignments can be reviewed in the context of both classification appeals, ROBERTS V. DHSS & DP, 81-44-PC, 7/27/81, and appeals that allege a constructive demotion. DAVIS V. ECB, 91-0214-PC, 6/12/92.

In the present case, the Appellant is alleging that the Respondent took various personnel actions around the time of his layoff as a pretext for eliminating the Appellant's position in the *classified* service and laying him off. One of the actions specifically referenced by the Appellant is the decision to create the Director of Recreational Facilities position in the unclassified service rather than the classified service. He contends that because of his status as an "at risk" employee, the new position "could have been made a classified position and granted to me as a back-up position." The Commission lacks the authority to hear a direct appeal of that decision, but the Commission may consider it in the context of Appellant's layoff case as an element in the "rational basis" test established in WEAVER. The key in terms of the Commission's review is whether there was a rational basis for his layoff from the Purchasing Supervisor position in the classified service in terms of the management actions that led up to the layoff. Those management actions include the decision to place the Director of Recreational Facilities position in the unclassified service. To the extent Appellant contends there was no rational basis for the elimination of the Director of General Services position and that action was merely a pretext for laying off Appellant from the Purchasing Supervisor position, the Commission can also examine the elimination of the Director of General Services position.

ORDER

Respondent's motion to dismiss for lack of subject matter jurisdiction is granted in part and denied in part as outlined above. The Commission will contact the parties for the purpose of scheduling further proceedings on the following issue:

Whether there was just cause for Appellant's layoff [from the position of Purchasing Supervisor].

Sub-issue (1): Whether Respondent acted in accordance with the relevant administrative and statutory guidelines regarding layoffs.

Sub-issue (2): Whether the exercise of that authority was arbitrary and capricious.

Based upon his submissions to date, the Commission understands Appellant is contesting sub-issue (2) but not sub-issue (1).

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of March, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner