

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAMELA J. FULLERTON, Appellant

vs.

Secretary, **DEPARTMENT OF CORRECTIONS**, Respondent.

Case 613
No. 62921
PA(adv)-17

Decision No. 31308

Appearances:

Tara K. Kleinhans, Kleinhans Law Office, LLC, Attorney at Law, 1518 11th Street, Suite 1-7, Monroe, Wisconsin 53566, appearing on behalf of Pamela Fullerton.

Dolores A. Kester, Assistant Legal Counsel, P.O. Box 7925, Madison, Wisconsin 53707, appearing on behalf of the Department of Corrections.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission on review of a layoff decision made in September 2003 by the Department of Corrections (hereafter referred to as DOC or Respondent). More specifically, Appellant contends that she had a right to displace, in lieu of layoff, another employee filling a position classified as Institution Human Resources Director – Advanced. Appellant contends that her displacement right arose from her previous employment as a Personnel Manager 4-Management. A hearing was held in this matter on January 25, 2005 before Commissioner Paul Gordon, who was serving as the designated hearing examiner. The parties had agreed to defer any question of remedy and to proceed to hearing on the following issue: “Did the Employer have just cause to layoff the Appellant.” During the course of the proceeding, the parties stipulated to an expedited post-hearing schedule, with written briefs filed by January 28, 2005, and an expedited proposed decision from the hearing examiner by February 4, 2005. The record was closed on January 28, 2005. Pursuant to the stipulation, the examiner communicated his proposed order to the parties on February 4, 2005, with the understanding that a written proposed decision would follow. The hearing examiner issued a proposed decision on April 18, 2005. No objections were filed by the requisite due date of May 18, 2005. For the reasons set forth below, the decision of the Respondent is affirmed.

Dec. No. 31308

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Pamela Fullerton, the Appellant in this matter, began working at DOC's Lincoln Hills School (LHS) in 1988. By 1990, she had attained permanent status in class in the position of LHS Human Resources Director which was then classified as a Personnel Manager 3.

2. In 1990 and until 1997, the 13 classifications comprising the Personnel Manager (PM) series were assigned to 5 different pay ranges:

Personnel Manager 1 & Supv	01-10
Personnel Manager 2 & Supv	01-12
Personnel Manager 3 & Mgt & Supv	01-13
Personnel Manager 4 & Mgt & Supv	01-14
Personnel Manager 5 & Mgt & Supv	01-15

3. In May of 1990, Ms. Fullerton submitted a request to have her position reclassified from PM 3 to PM 4-Mgt. The request was subsequently granted and Fullerton consequently attained permanent status in class in the PM 4-Mgt classification assigned to pay range 01-14. However she transferred from the Human Resources Director position into a Teacher position at LHS in July.

4. Sometime after her 1990 transfer but prior to 2003, Ms. Fullerton was promoted within LHS to a position as Teacher-Supervisor, a classification ultimately assigned to pay range 81-03.

5. Between 1997 and 2001, the State conducted classification surveys and modified the classification series and the assigned pay ranges that related to the LHS Human Resources Director position. These changes revised the pay range assignments for certain entry level classifications that were below the class level of PM 4-Mgt. The changes were not designed or intended to result in promotions or pay increases to the LHS position incumbent. All of the changes were made by the Department of Employment Relations (DER) pursuant to written bulletins. Neither Ms. Fullerton nor the then position incumbent sought administrative review of any of the transactions.

6. In October 1997, DER implemented the Human Resources Management Personnel Management classification survey that abolished the Personnel Manager series and created the classifications of Institution Human Resources Director 1 through 4 which were assigned to the following pay ranges:

IHRDirector 1	01-13
IHRDirector 2	01-14
IHRDirector 3	01-15
IHRDirector 4	01-16

DER issued Bulletin CC/SC-77 to implement the survey.

7. The State subsequently modified the IHRDirector series or the assigned pay ranges on at least 3 occasions. In March of 2000, and as described in Bulletin CLR/SC-109, DER abolished the IHRDirector 3 and 4 classifications and replaced them with the IHRDirector-Advanced classification assigned to pay range 81-78. This change was part of the State's efforts to place more positions into wider pay ranges, also known as "broadbanding." The State reassigned the IHRDirector-Advanced classification from pay range 81-78 to pay range 81-03 as provided in DER Bulletin CLR/SC-115, effective July 2, 2000. Then in May of 2001, in another effort at broadbanding, DER abolished the IHRDirector 1 and 2 classifications and created the new classification of IHRDirector, assigned to pay range 81-04. Pay range 81-03 is a higher pay range than 81-04.

8. Violet Herman occupied the LHS Human Resources Director position commencing no later than August 5, 1991. She remained in the position for most of the decade. Before she left, the position was classified at the PM 5-Supervisor level and then the IHRDirector 3 level. After Ms. Herman's departure, Michael Nichols was hired in January of 1998 to fill the position at the IHRDirector 1 level. It was reclassified to IHRDirector 2 effective December 20, 1999 and then to IHRDirector 3 effective February 27, 2000, before it was reallocated to the IHRD-Advanced level when that classification was created thereafter.¹

9. Mr. Nichols occupied the Human Resources Director position at Lincoln Hills School in 2003.

¹ The Commission has deleted what was identified as Finding 9 in the proposed decision because it was redundant.

11. Ms. Fullerton had an earlier seniority date than Mr. Nichols.
12. In August of 2003, Ms. Fullerton's Teacher-Supervisor position and Mr. Nichols' position were both in pay range 81-03, which is a higher pay range than 81-04.
13. Once Ms. Fullerton indicated that she wished to exercise any displacement right she might have, DOC obtained complete information about her employment history. Two people within DOC conducted separate analyses of the employment history in light of the applicable portions of the administrative code and the Wisconsin Human Resources Handbook as well as the relevant classification bulletins. DOC subsequently submitted the displacement question to Leean White at DER, as well. Ms. White took into account her personal knowledge relating to the relevant bulletins. All three individuals independently concluded that Fullerton's displacement rights arising from her PM 4-Mgt position did not extend to the LHS Human Relations Director position occupied at the time of the layoff by Mr. Nichols at the IHRD-Advanced class level assigned to pay range 81-03.
14. By letter of August 28, 2003 Appellant was notified by DOC that her Teacher-Supervisor position at Lincoln Hills School, Division of Juvenile Corrections, was being eliminated and that she would be laid off effective September 20, 2003.
15. None of the classification series involved in this matter is a progression series, i.e. a series where the levels are differentiated on the basis of having attained specified training, education or experience.
16. All the positions in question are in the same employing unit.
17. As an alternative to layoff, Appellant did not have a right to displace incumbent Nichols in the position classified as IHRD-Advanced.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to Sec. 230.44(1)(c), Stats.
2. The Respondent has the burden to establish 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 has met its burden of proof.
4. Appellant was not eligible to displace Mr. Nichols in the IHR Director-Advanced position.
5. The decision to lay off the appellant from her position was for just cause.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's decision to lay the Appellant off from her position as Teacher-Supervisor is affirmed and the appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of July, 2005.

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

Parties:

Pamela J. Fullerton
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Mathew J. Frank, Secretary
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DOC (Fullerton)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This matter arises from DOC's decision to effectuate a layoff of Ms. Fullerton from her position as Teacher-Supervisor at Lincoln Hills School, effective September 20, 2003. 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, 53-54, 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, 238, 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 sole allegation in the present matter is that Respondent failed to provide Ms. Fullerton with one of the requisite "alternatives to termination from the service as a result of layoff" described in Sec. ER-MRS 22.08, Wis. Adm. Code:

(3) DISPLACEMENT. (a) If there is no position obtainable under subs. (1) and (2) [relating to transfer in lieu of layoff and demotion in lieu of layoff] at the same or higher level than any position obtainable under this subsection, an employee may exercise a right of displacement within the employing unit.

1. The employee may exercise the right of displacement in the order which will achieve the highest level position to which the employee has rights. If qualified to perform the work after customary orientation provided for newly hired workers in such positions, an employee may exercise the right of displacement only to one of the following:

a. A position in the same or counterpart pay range in which the employee had previously attained permanent status in class.

. . .

2. If the employee has previously attained permanent status in class in a position whose classification had been affected by an action of the [director],² the employee shall immediately attain rights to the classification which replaced the original classification of the position previously held by the employee.

Appellant contends her tenure as Human Resources Director at Lincoln Hills School until 1990 makes her eligible to avoid termination from service in 2003 by displacing Michael Nichols, who was filling the Human Resources Director position at the time of Appellant's layoff. Respondent asserts that because the position was classified in 2003 at the IHR Director-Advanced level in pay range 81-03, it was not in the "same or counterpart pay range" to the position classified at the PM 4-Mgt level, at pay range 01-14 in 1990, i.e. a classification in which Appellant had previously attained permanent status.

The administrative rules governing layoffs and various personnel actions in lieu of layoff have been promulgated by the Administrator of the Division of Merit Recruitment and Selection pursuant to the authority granted in Sec. 230.34(1)(b), Stats. The three alternatives to layoff (transfer, demotion and displacement) are described in Sec. ER-MRS 22.08, Wis. Admin. Code. Additional guidance in interpreting and applying the layoff provisions is found in Chapter 232 of the Wisconsin Human Relations Handbook. The Handbook addresses the displacement option but it is silent in terms of applying Sec. ER-MRS.08(3)(a)2. relating to the effect of changes to a classification to which the employee facing layoff has attained permanent status in class. The Handbook reads, in relevant part:

3. Displacement in lieu of layoff: If there is no vacant position to which an employee may either transfer in lieu of layoff or demote in lieu of layoff, the employee may opt to displace an employee within the employing unit.

a. A position in a classification in which the employee had previously attained permanent status in class **and** is assigned to the same or counterpart pay range as their current level.

² Although the rule refers to the "action of the administrator" of the Division of Merit Recruitment and Selection, the context and relevant legislative history indicates the intent is to refer to the "director" of the Office of State Employment Relations. When subd. (3)(a)2. was added in 1983 to the administrative rule relating to displacement, the "administrator" was the Administrator of the Division of Personnel. The language of (3)(a)2. is unchanged since that time. However, the executive branch has undergone a variety of reorganizations so that the functions of the former Administrator of the Division of Personnel are now split between the Director of the Office of State Employment Relations and the Administrator of the Division of Merit Recruitment and Selection. While the Administrator of DMRS has the authority to promulgate administrative rules relating to the layoff process, it is the Director of OSER who has the responsibility under Sec. 230.09, Stats., to establish and modify the civil service classification structure. The Commission's analysis of the current version of Sec. ER-MRS 22.08, Wis. Adm. Code, is premised on the understanding that the subd. (3)(a)2. must be read to reference the Director rather than the Administrator.

- b. A position in a classification within the employee's present classification series (either progression or non-progression) **and** is assigned to a lower pay range than their current level.
- c. A position in a different classification (from their current classification) in which the employee had previously attained permanent status in class in that classification **and** is assigned to a lower pay range than their current level.
- d. A position in a different classification series within an approved progression series in which the employee had previously attained permanent status in class at a higher level **and** is assigned to a lower pay range than their current level. (emphasis in original)

In 1990, Ms. Fullerton transferred within LHS from her position as the school's Human Resources Director, then classified at the Personnel Manager 4-Management (PM 4-Mgt) level³ assigned to pay range 01-14, to a position classified as a Teacher. Several years later she was promoted to a position, classified as Teacher-Supervisor, that she held without interruption until Respondent's layoff action in 2003. LHS continued to employ a Human Resources Director and at the time of Fullerton's layoff, the position was occupied by Michael Nichols and was classified at the IHRDirector-Advanced level assigned to pay range 81-03. During the years between 1990 and 2003, the Director of OSER (or the Director's organizational equivalent at the time, i.e. the Secretary of the Department of Employment Relations) implemented numerous personnel decisions that had an effect on the classification and corresponding pay range of the LHS Human Resources Director position.

The parties agree the question of whether Ms. Fullerton was eligible to displace Mr. Nichols in the LHS Human Resources Director position in 2003 is answered by analyzing

³ In her post-hearing brief, Ms. Fullerton describes the PM 4-Mgt level as the "highest objective level" of the PM series, presumably for positions outside of DOC's central office in Madison. While the class specifications are not of record, Fullerton's description is contrary to evidence showing that Violet Herman, a subsequent incumbent, occupied the LHS Human Resources Director position at the PM 5-Supv level. The Commission agrees with Fullerton that the analysis of this matter might have been easier if all of the relevant class specifications had been of record. She unsuccessfully attempted to obtain the PM specifications in a request for the production of documents that she submitted to the Department of Corrections prior to hearing. DOC responded by stating that it no longer had a copy of the obsolete specifications and suggested that the document "may be on file at OSER in a historical record." Resp. Exh. 148. It was not until her post-hearing brief that Fullerton complained about the sufficiency of DOC's response to the discovery request. To the extent Fullerton considered the discovery response to be inadequate, she had a responsibility to pursue the issue in a manner consistent with Sec. PC 4.03, Wis. Adm. Code, and Sec. 804.09 and .12, Stats., rather than to wait until after the hearing and raise her concerns in written argument on the merits of the appeal.

the classification and pay range transactions that were implemented after Fullerton filled the same position at the PM 4-Mgt class level in 1990. Appellant describes the different postures of the parties as follows:

[T]he appellant argues that she had the right to displace the current Institution Human Resources Director – Advanced at Lincoln Hills School, as she had previously attained permanent status in class in the equivalent position, previously named “Personnel Manager 4 – Management,” which position, due to administrative action, evolved into the current position of Institution Human Resources Director – Advanced. The respondent argues that “Personnel Manager 4 – Management” evolved, through administrative action, to only “Institution Human Resources Director,” a lower classification within the current Institution Human Resources Director series. (Brief, p. 2)

A review of the changes to the classification of Appellant’s former PM 4-Mgt position shows that it became a classification now called IHRDirector rather than IHRDirector-Advanced. In 1990 the Personnel Manager Classification Series had thirteen classifications with five (5) corresponding pay ranges. Appellant’s position was PM3 when she initiated a reclass request and while it was still pending, transferred to the teaching position. Her former PM position was reclassified to PM4-Mgt pay range 01-14 effective before her transfer. Thus, the highest classification Appellant attained was that of PM 4-Mgt, assigned to PR 01-14. Thereafter, that classification became IHRDirector 2, then IHRDirector. The latter classification is in pay range 81-04, which is a lower pay range⁴ than is assigned to IHRDirector-Advanced. When the various classification changes were made, they were tied to pay ranges. Appellant contends that bulletin CC/SC 77⁵ can be read to allow for salary increases of PM positions besides entry level. However, the changes were designed to broadband and collapse several series of classifications, not to effectuate promotions or pay raises. This was the directive given to witness Leann White, who was employed within the Department of Employment Relations, from the secretary of that

⁴ The following terms are defined in Sec. ER-MRS 1.02, Wis. Adm. Code: 1) counterpart pay ranges; 2) higher class; 3) higher pay range; 4) lower class; 5) lower pay range; and 6) pay range.

⁵ This “Classification & Compensation Bulletin” issued by the Department of Employment Relations on October 17, 1997 informed State agencies that various changes had been made to the classification plan. The bulletin read, in part:

Phase I of the Human Resources Personnel Management Survey abolishes the . . . Personnel Manager 1-5 (including Supervisor & Management) . . . classifications and creates the . . . Institution Human Resources Director 1-4 classifications, effective October 12, 1997. This survey is intended to update the language of the 1975 classification specifications and does not change current allocation patterns except as they relate to agency human resources director positions and redefining the entry level at PR 13 consistent with other professional occupations.

department. The evidence at the hearing was that the only exceptions referenced in the bulletins were for entry level positions, which is what was accomplished by placing the new entry level IHRD 1 classification at pay range 01-13. PM4-Mgt was abolished and IHRDirector 2 was created at the same 01-14 pay range. The best evidence in this record relating to the various classification and pay range changes, particularly the classification survey implemented by Bulletin CC/SC-77 in 1997, is the testimony of Ms. White, who was directly involved in the survey implementation. Her testimony established, quite clearly, that the PM 4-Mgt classification correlated to the IHRDirector 2 classification, rather than the IHRDirector 3 level.

The position in which Appellant had attained permanent status in class in 1990 did not become, and was not in 2003, at the classification of the position she wished to displace. Accordingly, the displacement rights under Sec. ER-MRS 22.08(3)(a)1.a., Wis. Adm. Code, do not allow her to displace Mr. Nichols, whose position is in a higher level classification. This principle, i.e. that right of displacement extends only to comparable and lower classifications rather than higher classifications, has been recognized in prior Personnel Commission decisions. *LAROSE V. UNIVERSITY OF WISCONSIN SYSTEM (MILWAUKEE)*, CASE NO. 82-153-PC (PERS. COMM. 1/2/85); *WIGGINS V. DEPARTMENT OF DEVELOPMENT*, CASE NO. 82-246-PC (PERS. COMM. 7/21/83).⁶

DOC's analysis of Appellant's displacement request was performed pursuant to Chapter 232 of the Wisconsin Human Resources Handbook and ch. ER-MRS 22, Wis. Admin. Code. Chapter 232 of the Handbook is in compliance with ch. ER-MRS 22 and with Sec. 230.34 and .44, Stats. DOC's analysis tracked changes in classifications made pursuant to directives of the secretary that tied changes in classifications to pay ranges. The allocation of classifications in a series based on pay ranges is a rational process, and advances legitimate goals of administrative and fiscal economy. There is no evidence of any illegal, arbitrary or capricious action on the part of DOC in its review of Appellants' displacement request nor in the way it views and applies the changes to the classification plan between 1997 and 2001. Both DOC and OSER have analyzed Appellant's request the same way. The DOC has met its burden under the *WEAVER* and *OLSON* standards.

Appellant contends that a comparison of the IHRDirector and IHRD-Advanced classification specifications to her final position description as LHS Personnel Director supports a finding that the position would be better described at the higher classification. Appellant is essentially arguing that a classification analysis should be conducted for her former position. Respondent disagrees, contending that the current Institution Human Resources Director classification series is not relevant to the displacement issue.

⁶ Those decisions arise from a version of the applicable administrative rule that did not include language comparable to what is now ER-MRS 22.08(3)(a)2.

Appellant's argument concerns comparing duties of a position to a classification specification to reach a result. However, the administrative rules applicable to displacement call for a comparison of classifications, not positions to classifications. There is no statute, rule or decision that prevents DER, now OSER, from revising classification specifications and making broadbanding decisions in the manner in which they did. The record does not show that an incumbent in Appellant's former position appealed those decisions. Any attempt to do so now would be time barred. Moreover, Appellant seeks to compare a 1990 position description to a classification that did not exist in 1990.

Reclassification decisions are to be based upon the duties assigned to the position as of the effective date of the request. BLOOM V. DER, CASE NO. 92-0088-PC (PERS. COMM. 8/25/93); GUTIERREZ V. DOT & DER, CASE NO. 96-0096-PC (PERS. COMM. 4/11/97). Displacement decisions and reclassification (or reallocation) decisions are entirely different analyses and sets of issues. It is a very different process to seek reclassification of a position as opposed to seeking to displace an incumbent from a position based upon classification. The DOC was not acting in an arbitrary or capricious manner by making its decision based on the evolution of the classifications as opposed to using a reclassification analysis.

The DOC denial of the displacement request was made in conformance with applicable statutes, administrative rules, policies and procedures, and was not arbitrary or capricious. Respondent has sustained its burden of proof. The denial of the displacement request was made with just cause.

Dated at Madison, Wisconsin, this 1st day of July, 2005.

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