

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

C. J., Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS, Respondent.

Case 41
No. 64827
PA(sel)-19

Decision No. 31491

Appearances:

C. J., appearing on his own behalf.

Gloria J. Thomas, Assistant Legal Counsel, Department of Corrections, PO Box 7925, Madison, Wisconsin 53707-7925, appearing on behalf of the Department of Corrections.

ORDER DENYING MOTION TO DISMISS

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss for lack of subject matter jurisdiction.

The record was closed on September 1, 2005 when the final reply brief was received.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT¹

1. Appellant has been employed by Respondent's Division of Adult Institutions in a variety of positions since 1982, including Supervising Officer 2, Corrections Unit Supervisor and, commencing in 2004, Corrections Program Supervisor.

2. Beginning in June 2004, Appellant earned \$28.455 per hour in his Corrections Program Supervisor (CPS) position.

¹The Findings set forth below have been adopted solely for the purpose of ruling on the Respondent's motion.

3. In 2005, Appellant expressed a desire to reinstate into a Supervising Officer 2 (SO2) position.

4. The CPS and SO2 classifications are assigned to the same pay range and neither class is covered by a collective bargaining agreement.

5. In a bulletin dated June 21, 2004, the Office of State Employment Relations informed State agencies of the procedures for making pay adjustments for non-represented employees during the 2004-2005 fiscal year. The bulletin provided, inter alia, that effective April 3, 2005, employees in a position allocated to the CPS classification would be eligible for an "optional market adjustment." Each CPS position in an agency generated \$1.50 per hour that could then be distributed by the agency to CPS position incumbents.

6. Sometime prior to March 10, 2005, Respondent offered to allow Appellant to reinstate into a vacant SO2 position, contingent only on passing a physical examination. Appellant accepted the offer, which was to have a start date of March 20.

7. Appellant subsequently asked that the starting date be delayed until some time after April 3, 2005, so that he would still be in the CPS position on that date, making him eligible for the optional market adjustment. Respondent ultimately agreed with Appellant's request.

8. By letter dated April 6, 2005, Respondent confirmed Appellant's reinstatement to an SO2 position, effective April 10. The letter provided, in part:

In accordance with the State Compensation Plan, when an employee is reinstated the base pay may be set at any rate that is not greater than the last rate received plus intervening adjustments pursuant to s. 230.12, Wis. Stats. Your rate of pay will be \$28.455 per hour. Any further pay adjustments will be in accordance with the provisions set forth in the State Compensation Plan.

9. Appellant passed the SO2 physical exam and remained in the CPS position until April 9, 2005. He was reinstated to an SO2 position at Waupun Correctional Institution on April 10.

10. Prior to the optional market adjustment, Appellant was the highest paid CPS employed by Respondent. Respondent decided not to award Appellant an optional market adjustment even though he was eligible to receive one.

11. There were 21 CPS positions in the Division of Adult Institutions that generated \$1.50 each, creating a pool from which the optional market adjustments could be awarded. Only two incumbents were not awarded adjustments. The rate of pay for the remaining 19 CPS positions was increased by a minimum of \$1.50 per hour and 6 of those positions received additional adjustments of up to \$1.00 per hour.

12. Appellant believed he was going to receive \$29.955 in the SO2 position. He would not have accepted reinstatement to the SO2 position had he not been told that it would not jeopardize receiving the \$1.50 adjustment.

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

CONCLUSIONS OF LAW

1. The Appellant has the burden to establish that the Commission has subject matter jurisdiction over his State civil service appeal.
2. He has sustained his burden.
3. The Commission has subject matter jurisdiction over this matter.

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

ORDER

Respondent's motion to dismiss is denied and the parties will be contacted for the purpose of scheduling a second prehearing conference.

Given under our hands and seal at the City of Madison, Wisconsin, this 24th day of October, 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

Department of Corrections (C. J.)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

This matter is before the Commission on the Respondent's motion to dismiss for lack of subject matter jurisdiction as a State civil service appeal. The Commission's authority to review various civil service personnel actions arises from Sec. 230.44 and .45, Stats. Appellant contends the Commission has the authority to review his claim pursuant to Sec. 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.

The scope of the Commission's authority under 230.44(1)(d) extends to the determination of starting pay upon hire, including starting pay on restoration and reinstatement. *DUSSO v. DER & DRL*, CASE NO. 94-0490-PC (PERS. COMM. 12/22/94) (pay on restoration), citing *SIEBERS v. DHSS*, CASE NO. 87-0028-PC (PERS. COMM. 9/10/87) and *COULTER v. DOC*, CASE NO. 90-0355-PC (PERS. COMM. 1/24/91).²

Appellant asserts that the present case relates to his starting rate of pay in the SO2 position. However, Respondent contends that Appellant is actually attempting to obtain review of Respondent's optional market adjustment decision for Appellant's CPS position effective April 3.³

In his brief, Appellant writes:

The appellant . . . appeals the Respondent's . . . decision on his starting salary after reinstating to a Supervising Officer 2 (Captain) position at Waupun Correctional Institution (WCI). Prior to accepting the Supervising Officer 2 position, [Mr. J] was advised by both Phil Kingston, WCI Warden and Mike Thurmer, WCI Deputy Warden to accept the Supervising Officer 2 position because he was going to be receiving a \$1.50 market adjustment on April 3, 2005 . . . for Correction Program Supervisors. [Mr. J] previous position was a Corrections Program Supervisor. [Mr. J] would not have accepted the Captain position if he hadn't been told that it would not jeopardize him receiving the \$1.50 market adjustment. . . .

² In DOT (GOGGIN) DEC. NO. 31153 (WERC 11/04) the Commission adopted the longstanding interpretation of the term "certification" used in Sec. 230.44(1)(d), Stats., as referring to "a certain segment [of] the appointment process" rather than requiring an actual certification.

³ The parties do not appear to dispute that if Respondent had decided to grant the \$1.50 optional market adjustment to Appellant effective April 3, thereby increasing his hourly rate from \$28.455 to \$29.955 as of that date, the higher rate would have carried over and applied to his SO2 position commencing April 10.

DOC Administrators allowed [Mr. J] to reinstate on April 10, 2005 to a Captain in order for him to receive the market adjustment. They abused their discretion by telling him to take the position, that he would be receiving the market adjustment even though they [knew] that he was going to be the only Correction Program [Supervisor] employed on April 3, 2005 that wasn't going to be issued the adjustment. (Brief, pp. 1 and 19)

Appellant appears *pro se* in this matter. The Commission interprets his brief to set forth a claim of equitable estoppel, i.e. he claims that 1) he was provided certain information relating to the rate of pay he would receive in the SO2 position, 2) he reasonably relied upon that information to his detriment when he decided to go ahead with the reinstatement and 3) Respondent should be equitably estopped from paying him a lesser amount. In Appellant's view, the information Respondent provided him was the equivalent of a letter stating that Respondent agreed to employ him as a SO2 beginning April 10, 2005 at a salary of \$29.955 per hour. The Commission's authority to review a decision establishing an initial rate of pay upon appointment encompasses a contention of equitable estoppel. For example, see *KELLING v. DHSS*, CASE NO. 87-0047-PC (PERS. COMM. 3/12/91); *TE BEEST v. DHSS*, CASE NO. 0086-PC (PERS. COMM. 5/16/90); *MESCHEFSKE v. DHSS & DMRS*, CASE NO. 88-0057-PC (PERS. COMM. 7/14/89).

The Commission agrees with Respondent's contention that the Commission lacks the authority to review the CPS salary decision that was effective April 3.⁴ This conclusion is consistent with the holding in *CESTKOWSKI v. DOC*, CASE NO. 90-0403-PC (PERS. COMM. 2/8/91). On May 5, 1990, Mr. Cestkowski moved from a Building Construction Superintendent 2 (BCS2) position in the Department of Administration to serving as the Superintendent of Buildings and Grounds at DOC's Fox Lake Correctional Institution. He sought review of the decision not to award him a pay increase for the period from April 8th until May 5th while he was working as a BCS2. The Personnel Commission held, in part:

The dispute identified by the appellant relates to his rate of pay during the last month he was employed at the Department of Administration. While it also appears the appellant is alleging that his rate of pay during this period had an effect on his rate of pay while he is employed by the Department of Corrections, it cannot be said that the subject of the appeal is a personnel action which relates to the hiring process within the meaning of Sec. 230.44(1)(d), Stats. The hiring process for the position at Fox Lake was a completely separate personnel event and cannot serve as a basis for review of a preceding salary transaction.

⁴ Elsewhere in his brief, Appellant clearly asks the Commission to review the optional market adjustment decision relating to his CPS position: "DOC Administrators at Waupun Correctional Institution abused their discretion by not distributing the market adjustment in a uniform manner throughout the agency as outlined in the 2003-2005 Compensation Plan." (Brief, p. 19)

While the CESTKOWSKI decision confirms the absence of jurisdiction over the optional market adjustment decision effective on April 3, it does not interfere with the Commission's authority to review the decision establishing Appellant's starting rate of pay in the SO2 position.

Respondent's motion to dismiss is denied.⁵ The sole question properly before the Commission is Appellant's initial rate of pay in the SO2 position and whether, in setting that rate at \$28.455 (rather than at \$29.955), Respondent either acted illegally or abused its discretion. The question includes Appellant's assertion of equitable estoppel.

Dated at Madison, Wisconsin, this 24th day of October, 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

⁵ In its recent ruling in DOC & DHFS (ESLINGER), DEC. NO. 31416 (WERC, 8/2005), the Commission addressed the effect of a bargaining agreement and Sec. 111.93(3), Stats., on its jurisdiction under Sec. 230.44(1)(d), Stats. Because Mr. J.'s position is not part of a collective bargaining unit, the ESLINGER analysis is inapplicable.