

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EDWARD J. RYAN, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT**, Respondent.

Case 12
No. 68155
PA(grp)-12

Decision No. 32651-A

Appearances:

Edward Ryan, appearing on his own behalf.

Howard Bernstein, Chief Legal Counsel, Department of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946, appearing on behalf of the Department.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission in the Commission's role as the final step in the grievance procedure for State civil service employees whose positions are not encompassed by a collective bargaining unit. The underlying disagreement relates to the procedure followed by Respondent Department of Workforce Development (DWD) to assign various work to the Appellant. As explained more fully below, there is a related dispute regarding the proper wording of the issue/s before the Commission.

The parties stipulated to various exhibits in lieu of participating in an evidentiary hearing, and later submitted written arguments, the last of which was received by the Commission on December 8, 2008. By Order dated January 20, 2009, Kurt M. Stege, a member of the Commission's staff, was designated as the Hearing Examiner and the matter was ready for the issuance of a proposed decision on February 3.

The examiner issued a "provisional proposed decision and order" on February 6, 2009. In a cover letter of the same date the examiner directed that any request by the prevailing party for fees and costs under Sec. 227.485, Stats., be submitted according to statute. Appellant filed a request on February 16 and Respondent did not respond within the statutory period of 15 working days thereafter. The examiner issued a proposed decision on March 16, 2009. No objections were received by the due date of April 15, 2009.

Dec. No. 32651-A

For the reasons that are explained below, the Commission rejects the Respondent's decision in part and affirms it in part.

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

FINDINGS OF FACT

1. Prior to September 2007, Respondent's official organization structure for the Division of Employment and Training included a central office as well as eleven Workforce Development Areas (WDA). Except for the Milwaukee WDA which constituted a separate "district", the remaining 10 WDAs were divided into five districts, each of which included two WDAs. Every district had its own district director. The Milwaukee director position was assigned to pay range 81-01 and the other five director positions were assigned to the (lower) pay range of 81-02. Every WDA other than Milwaukee also included one Employment and Training Supervisor position assigned to pay range 81-03 that reported to a district director.

2. In September 2007, Respondent notified its employees that it had to eliminate 33 positions within the Division of Employment and Training (DET) for financial reasons.

3. Prior to and during September 2007, Appellant had filled the classified position of Employment and Training Supervisor for the Western WDA and he reported to the Job Service District Director position occupied by Steve Blodgett.

4. Respondent maintains a written policy (Section 464) relating to temporary assignments which are defined in the policy as "duties that are substantively different, are at a different location or have a different reporting relationship than the employee's permanently assigned position" but are contrasted to an "acting" assignment in which the employee "assumes the responsibility for all the duties of a vacant position." The written policy provides that the "duration of the temporary assignment may not exceed six months without the approval of the DWD Human Resources Services Bureau (HR)." The administrator of the DWD division that includes the temporary assignment must "review and approve or deny" a supervisor's request for a temporary assignment. However, DWD's Human Resources Service Bureau must review requests for temporary assignments of more than six months and must either approve or deny the request. Additional language from the policy is set forth in the Memorandum portion of this decision.

5. Effective October 15, 2007, by memo of the same date, and for a period of "up to six months," Appellant was temporarily assigned the duties formerly performed by Mr. Blodgett for the Western WDA. Blodgett was, in turn, temporarily assigned duties for the West Central WDA. Appellant was directed to report to Job Service Bureau Director Brian Solomon during the temporary assignment and was informed that his "classification and salary will not be affected by this temporary assignment."

6. As of October 15, 2007, all WDAs except Milwaukee had one person performing the functions of both director and supervisor.

7. Respondent continued to assign (and Appellant continued to perform) the area director responsibilities throughout the 6-month period referenced in the October 15 memo and beyond.

8. Because he continued to perform the area director responsibilities after April 15, 2008 and because he had not received any notification formally extending the duration of the temporary assignment, Appellant filed a first step non-contractual grievance on April 28, 2008. The grievance stated, in part:

The District Director duties I am currently performing in the Western District are not of a temporary nature, and there is no expectation by anyone within Job Service that this acting assignment will end anytime in the foreseeable future. . . . [N]o reasonable expectation exists that the hiring of a new Job Service management position will be initiated in the Western District or any other state WDA. Continuing to impose the Acting District Director designation indefinitely (renewed every 6 months) is in direct violation of DWD Policy #462 and Wisconsin Administrative Code ER-MRS 32.

In terms of relief, Appellant asked he “immediately be re-classed to the position of Job Service District Director, effective April 15, 2008.”

9. By memo dated May 13, 2008, DET’s Human Services Coordinator and a DET bureau director asked DET Division Administrator Danowski for an extension of the temporary assignments for Appellant and two other employees. The request was for six months beyond the original six-month period. The request was received in the DET Administrator’s office on May 13. The Administrator approved the request. As indicated by notations on the face of the document approved by Administrator Danowski, extension requests for the same three individuals were then advanced to DWD’s Human Resources staff on May 14. The request to Human Resources also took the form of a memo dated May 13.

10. This second May 13th memo was from DET Administrator Danowski and it was directed to Respondent’s Director of Human Resources. It requested an “extension” of various temporary assignments, including Appellant’s, for the period from April 15, 2008 until October 15, 2008. The request cited “supervisory reductions in Job Service and approval of a reorganization structure for the Job Service local offices.” The request was initialed as “approved” by DWD’s Human Resources Director but no date for the approval is noted.

11. Appellant’s first step grievance was denied on June 6, 2008. Appellant filed a second step grievance on June 9 and a third step grievance on June 20. Both were also denied.

12. Appellant first received confirmation of the extension of his temporary assignment as Director of the Western WDA by memo from Bureau Director Solomon dated July 2, 2008. The memo specified that the extension “will last for up to six months” but incorrectly referred to the period as running from March 15 to September 15 rather than the period of April 15 to October 15.

13. Appellant filed the final step of his grievance with the Commission on July 21, 2008.

14. At all relevant times, the DWD Secretary had delegated authority to review and approve all reorganization requests to the Administrator of DWD’s Administrative Services Division.

15. DET Administrator Danowski first submitted a formal request to revise the Bureau of Job Service’s field management structure by memo dated August 25, 2008 that was directed to the Administrator of the Administrative Services Division, Susan Canty. The request was to change the “official” structure for WDA management to reflect the assignments that were actually in effect at that time. At the time of the memo, eight Employment and Training Supervisors (including Appellant) had been serving in a temporary capacity as both supervisor and director for their WDA for periods between six months and four years. The request also proposed that the positions designated as the directors for the 11 WDAs be assigned to a different classification (WD Program Manager) in pay range 81-02. Ms. Canty approved the request to change the organizational structure by memo dated September 11, 2008.

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. 230.45(1)(c), Stats.

2. The Appellant has the burden to establish that the Respondent’s action of continuing to assign him Western WDA director duties on a temporary basis after April 15, 2008 was an abuse of discretion.

3. The Appellant has sustained the burden in light of the failure of Respondent’s Human Resources staff (at the agency level) to review and approve, between April 16 and sometime after May 13 (but before July 2), 2008, the continuation of a temporary assignment of duties to the Appellant.

4. Respondent was no longer abusing its discretion once the agency's Human Resources staff had reviewed and approved the extension of the temporary assignment.

5. Respondent failed to sustain its burden of showing its position in the matter was substantially justified within the meaning of Sec. 227.485, Stats., and Appellant is entitled to reimbursement for the \$50 filing fee.

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

ORDER¹

Respondent's action is rejected in part and affirmed in part. Respondent is directed to cease and desist from violating its written policy regarding temporary assignments by failing to obtain approval of DWD's Human Resources Services Bureau before a temporary assignment exceeds six months. Within 30 days of the date this order is signed, Respondent shall pay Appellant costs in the amount of \$50.00.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.

¹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference.

Department of Workforce Development (Ryan)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The appeal arises because of a change to Appellant's duties that began on October 15, 2007, was to run "for up to six months," but continued past April 15, 2008 despite the absence of any contemporaneous extension approved by DWD's Human Resource Services Bureau. Sometime between May 13 and July 2, the Human Resources Bureau director approved an additional period for up to six months ending October 15, 2008 of the same changed duties. Respondent contends the changed duties were a "temporary reassignment" while Appellant asserts in his final step grievance that the procedure used by the agency to continue the duties past April 15, 2008 was an abuse of discretion because, at least in part, it was contrary to DWD written policy. We propose that his position be reallocated effective April 16, 2008 with "the appropriate" wage increase.²

Source of facts

The case was presented on stipulated exhibits and without an evidentiary hearing, so the Findings of Fact only rely on information that can be derived from the exhibits. The Commission has not relied on any statements of "fact" advanced by the parties that are not premised on the exhibits of record.

Dispute as to issue

The parties participated in a prehearing conference that was conducted on August 20 and continued on September 17, 2008. By correspondence dated September 17, the WERC staff member who presided at the conference identified the following as a possible statement of the issue raised by the appeal:

Whether the Respondent's action of extending (for a limited period) the duration of Appellant's assignment to perform duties of "District" Director rather than making the assignment permanent on April 16, 2008 was an abuse of discretion. If so, what is the proper remedy?

The parties agreed to indicate within 10 days of the conference if they disagreed with the statement of issue(s). Neither party expressed any disagreement within the allotted 10-day period.

² Appellant is not contesting the appropriateness of the initial temporary assignment in October 2007.

The WERC staff member convened another conference with the parties on November 4, at which point the Appellant asked to amend the statement of issue to include the following sub-issue:

Whether the Respondent's action in not promptly extending the duration of the assignment and instead retroactively approving an extension was an abuse of discretion.

Respondent opposes the amendment request, contending it is redundant because it "is simply another way of presenting the argument that the Appellant already is making under the approved issue, which is that the Respondent had no discretion to manage a rational position review and restructuring process and at the end of six months, when the process was not yet complete, the Respondent had no choice but to ignore the rules of the civil service and simply appoint the Appellant into an unapproved position."³

The original statement of issue refers to the Respondent's action of extending, for another six months, what was originally a temporary reassignment that was to last until April 15, 2008. The action occurred sometime between May 13, 2008 (when the extension request was first conveyed to DWD's Human Resources Director) and July 2, 2008 (when the Respondent notified the Appellant by memo that the request had been granted) and was to run until October 15, 2008.⁴

The Appellant's proposed sub-issue is broader. It includes the same extension action (taken on an unknown date between May 13 and July 2, to cover a six-month period from April 15) that is the subject of the original statement of issue, but it also makes it clear that Appellant is asserting Respondent should have acted during the interim period following April 15 to extend the assignment. In other words, the Appellant is asserting that the absence of an extension decision on any day before the May, June or July date of the actual decision, was an abuse of discretion. We do not understand this to be identical to the original statement of the issue so we reject the Respondent's sole objection to the proposed sub-issue, i.e. that it is redundant.

³ We believe that this argument, which was recast in Respondent's response brief, mischaracterizes the Appellant's contention. We understand Appellant to accept the concept of temporary assignments exceeding six months as long as DWD's Human Resources staff approves the assignment before it extends past six months.

⁴ The memo incorrectly stated that the assignment would be "from March 15, 2008 to September 15, 2008" which coincided with the incorrect termination date (March 15, 2008) referenced in the October 15, 2007 original temporary reassignment memo.

Merits

As correctly noted by the Respondent, the Commission has applied the following definition of “abuse of discretion”:

An “abuse of discretion” is “a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” As long as the exercise of discretion is not “clearly against reason and evidence,” the commission may not reverse an appointing authority’s hiring decision merely because it disagrees with that decision in the sense that it would have made a different decision if it had substituted its judgment for that of the appointing authority. (Citations omitted.)

DEPARTMENT OF CORRECTIONS (DOTSON) DEC. NO. 32527-A (WERC, 11/08), citing DEPARTMENT OF CORRECTIONS (ZEILER), DEC. NO. 31107-A (WERC, 12/04).⁵

Appellant contends that Respondent’s effort to extend his assignment past six months was inconsistent with the agency’s own written policy regarding temporary assignments.

DWD’s written policy (Section 464) regarding temporary work assignments includes the following language:

Except for the “related Resources” section, any information referenced within is considered to be a part of this policy.

Policy:

A permanent employee may be temporarily assigned to perform duties that are substantively different, are at a different location or have a different reporting relationship than the employee’s permanently assigned position. However, the authority to effectively hire or discipline may not be assigned to represented employees. The duration of the temporary assignment may not exceed six months without the approval of the DWD Human Resources Services Bureau (HR).

An acting assignment rather than a temporary assignment must be made when an employee assumes the responsibility for all the duties of a vacant position. . . .

⁵ The DOTSON and ZEILER decisions apply an abuse of discretion standard in the context of the review of a non-selection decision pursuant to Sec. 230.44(1)(d), Stats. Even though the present dispute is before the Commission pursuant to Sec. 230.45(1)(c), Stats., the same “abuse of discretion” standard has been established by administrative rule (Sec. ER 46.07(1), Wis. Adm. Code) and we are unaware of any basis for applying some other definition of the phrase.

The request package for a temporary assignment should include the rationale for the request and a draft of the employee's notification of their temporary assignment.

The rationale for a temporary assignment should address:

- . . .
- the anticipated duration of the assignment;

. . .

The employee's notification of the temporary assignment should include:

- . . .
- the beginning and ending dates of the assignment;

Procedures and Responsibilities:

Role of the Supervisor

- Develop a temporary assignment package.
- Send two copies of the package to the Division Administrator for approval(s).
- After receiving approval, provide the employee with a copy of the temporary assignment notification.
- Inform DWD HR when the employee is no longer on a temporary assignment.

Role of the Division Administrator

- Review and approve or deny the temporary assignment package.
- Forward a copy of the approved the [sic] package to DWD HR.
- Once all necessary approvals are obtained, return a copy of the package to the supervisor.
- If denied at any level, return the denial with rational[e] to the supervisor.

Role of DWD Human Resource Services

- Review requests for temporary assignments of more than six months and either approve or deny the request.
- Communicate final approval decision to the Division Administrator.
- If denied, return the denial along with rationale to the Division Administrator.
- File copy of approved request in employee's P-file.

The key policy distinction in terms of the present dispute is that while the Division Administrator is to review and approve or deny temporary assignment packages where the temporary assignment is 6 months or less, a temporary assignment “may not exceed six months without the approval of the DWD Human Resources Services Bureau.”

On September 21, 2007, DET staff requested DET Division Administrator Danowski to approve a temporary assignment of Western WDA director responsibilities to the Appellant “for six months” beginning October 15.⁶ Because, as of September 2007, the assignment was at least not denominated as exceeding six months, DWD’s Human Resources Services did not review or approve the request. After the approved period of six months ended, the area director duties were still assigned to Appellant but no action had been taken to extend or obtain the required approvals. A formal extension request was not advanced to the Human Resources Director until May 13. He granted the request by writing “approved” on it along with his initials. While the date of the approval cannot be confirmed from the limited materials that are of record, it may have been as early as May 13 but was no later than July 2 which is the date of the memo to Appellant from his supervisor notifying him of the extension and of the duration of the extension.

Appellant argues that the implication of DWD’s policy regarding temporary assignments is “the condition that resulted in the temporary assignment could be resolved within 6 months and that an extension would be applicable only in the event of extraordinary circumstances.” Appellant’s argument concedes that some circumstances will justify an extension of a temporary assignment beyond six months, but otherwise it is unpersuasive. There is no “extraordinary circumstances” standard that must be satisfied in order for an assignment to extend beyond six months. The policy does not establish a standard to be applied by Human Resources Services when reviewing longer requests, nor does it establish a standard to be applied by a division administrator for his/her review. The policy does not presume that a temporary assignment will be able to be resolved within six months, it merely establishes different procedures depending on the anticipated duration of the assignment. The sole reasonable assumption is that Human Resources will have a somewhat different perspective and knowledge base to apply when reviewing the longer term assignments.⁷

⁶ As noted in a prior footnote, the temporary assignment request erroneously suggests that six months after October 15 would be March 15 instead of April 15. The September 21 request was from the Bureau Director for Program Management and IT Coordination and from the DET Human Services Coordinator. There is nothing else of record that appears to be part of a temporary assignment request package and that addresses the “anticipated duration of the assignment.”

⁷ For example, HR staff would be more apt to be aware of the administrative rules relating to classification actions which provide that an employee must be performing “permanently assigned duties and responsibilities for a minimum of 6 months” in order to be regraded at the time their position is reallocated or reclassified. Sec. ER 3.015(3)(b), Wis. Adm. Code.

Even though we do not find support for certain aspects of the Appellant's interpretation of DWD's temporary assignment policy, the delay after April 15 before the agency's Human Resources Services Bureau reviewed and approved the request clearly contravened the written policy, which provides: "The duration of the temporary assignment may not exceed six months without the approval of the DWD Human Resources Services Bureau (HR)." Every day from April 16 until after May 13 exceeded the six-month limit for which HR approval was required. Even though the October 15, 2007 memo had become ineffective due to the passage of time, DET management's de facto arrangement was to continue to have Appellant serve as area director for the Western WDA. Appellant's temporary duties had lasted longer than six months and Respondent had not obtained the requisite approval. From April 16 until HR granted approval, Respondent violated its policy.

Sometime between May 13 and July 2, DWD's Human Services Bureau reviewed and approved a request to extend the assignment for six months from April 15, but the action did not erase the earlier period of non-compliance with the policy. The action by Human Services to approve an extension of the assignment only means that from the time the extension was granted until the end of the approved extension period, Respondent's conduct was no longer in conflict with its written policy. By that point, Appellant was performing the temporary assignment for more than six months, but the assignment had been approved as required by DWD policy.

Other arguments

There is very limited information of record underpinning the parties' arguments about Respondent's efforts to formally restructure the supervisory positions in the Job Service Bureau and whether there was a logical endpoint to the assignment in question at the time it was made (or, presumably, until it was extended). As a general matter, there is insufficient evidence of record to draw conclusions that support Appellant's arguments on these topics and show an abuse of discretion in applying written policy. Appellant contends that Respondent abused its discretion by granting an extension of the assignment even though there was no "plan to address the temporary appointment issue" at the time of the approval. The fact that Respondent actually submitted a formal request to revise the Bureau's management structure well within the six-month extension period⁸ is prima facie evidence that the extension decision was not an abuse of discretion. There is nothing in DWD's temporary assignment policy indicating that a request for a temporary assignment of any duration must have a written plan or schedule for making further continuation of the assignment (beyond the proposed end date) unnecessary.

⁸ See Finding of Fact 15.

Remedy

For his remedy, Appellant requests that the position he occupied be reallocated, effective April 16, 2008, to the higher classification of Job Service District Director in order to reflect the duties he was in fact assigned at that time. He also asks for “the appropriate wage increase.” Appellant’s requested relief would be of continuing prospective benefit to him, even though the Commission has already concluded that the Respondent no longer continued to be out of compliance with the temporary assignment policy once staff of the Human Resource Services Bureau had reviewed and approved an extension of the assignment. The scope of the matter before the Commission runs only to the date that HR conducted its review and granted its approval. Nothing after that point is within the scope of the original issue or the Appellant’s sub-issue. We do not believe the relief would be commensurate with the misconduct were we to grant Appellant his request.

There is little guidance in Ch. ER 46, Wis. Adm. Code, Stats., relating to remedial authority in the grievance procedure.⁹ Under the circumstances, we believe that the only appropriate remedy is to order Respondent to cease and desist from failing to obtain review and approval from Human Resources before a temporary assignment exceeds six months.

The Appellant submitted a timely application for costs under Sec. 227.485, Stats. The request was received on February 16, 2009 and Respondent did not respond within the period of 15 working days provided by statute. The sole item in Appellant’s application is for recovering the \$50 filing fee that was imposed by Sec. 230.45(3), Stats., and Sec. PC 3.02, Wis. Adm. Code, and paid to the Commission. According to BROOKE V. UW & DER, CASE NO. 99-0034-PC (PERS. COMM. 5/15/2000) the filing fee is a recoverable cost under Sec. 227.485, Stats.

According to Sec. 227.485(3), Stats.:

The hearing examiner shall award the prevailing party the costs incurred . . . unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

According to Sec. 227.485(2)(f), Stats., “‘substantially justified’ means having a reasonable basis in law and fact.” The agency has the burden to establish it was substantially justified in taking its position. BRACEGIRDLE V. BOARD OF NURSING, 159, WIS.2D 402, 425, 464 N.W.2D (CT. APP. 1990).

⁹ According to Sec. ER 46.11, Wis. Adm. Code, the employer is prohibited from granting relief that is retroactive to “more than 30 calendar days prior to the filing of the grievance at the first step.” This provision has no application here.

Respondent's failure to respond to Appellant's request for costs can be viewed as a stipulation to the appropriateness of the request. We also believe, given the finding that for a period beginning April 16 Respondent abused its discretion in failing to review and approve the continuation of a temporary assignment of duties to Appellant, there was not substantial justification for Respondent to take its position in this matter. Appellant's temporary assignment had exceeded six months without approval from the Human Resources Services Bureau even though the relevant written policy provided that a temporary assignment "may not exceed six months without the approval of the DWD Human Resources Services Bureau.

Dated at Madison, Wisconsin, this 18th day of May, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.