STATE OF WISCONSIN STATE PERSONNEL BOARD

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DONALD SEVERSON,

Appellant,

v.

SUPERINTENDENT, DEPARTMENT OF PUBLIC INSTRUCTION, and DEPUTY DIRECTOR, STATE BUREAU OF PERSONNEL,

Respondents.

Case No. 77-78

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**OFFICIAL**

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

## NATURE OF THE CASE

This appeal--filed pursuant to s. 16.05(1)(f), Wis. Stats.--objects to the respondents' refusal to consider the merits of the appellant's reclassification request.

## FINDINGS OF FACT

1. On December 11, 1976, the appellant began employment as an Educational Consultant 1 (EC 1) with the Department of Public Instruction (DPI).

2. The appellant took a leave of absence from July 8, 1975, until June 28, 1976. During this period of time, he still reported to the department for performance of his EC 1 duties on 71.4 days. This work was done at the request of the appellant's supervisor but was on a voluntary, unpaid basis.

3. On June 18, 1976, the appellant applied for reclassification to Educational Consultant 2 (EC 2).

4. In a letter dated October 25, 1976, State Superintendent Thompson informed the appellant that his request for reclassification would not be considered on its merits. The reason stated for the denial was as follows:

It has been called to my attention by the Education Consultant Reclassification Review Board that you do not substantially meet a basic requirement established for reclassification consideration. This requirement is found on page one of Policy and Procedure Manual 53.76 and I will quote in part the particular reference:

[1.4.] "To be considered for reclassification from Education Consultant I classification to an Education Consultant II classification, the following criteria must be substantially met:

A. Three years of full-time service as a permanent employee with the department."[1]

Superintendent Thompson concluded that the appellant had only completed 2.5 years of full time service by the time he applied for reclassification in June of 1976. This total did not include any of the 71.4 days he had worked during his leave time. The alleged failure to meet the three-year standard was the only reason the appellant's request was denied.

5. By June 18, 1976, the appellant had actually worked at DPI as a full-time permanent employe for two years and 10.2 months.[2]

6. The Educational Consultant Review Board has not considered the merits of an application for reclassification to EC 2 where the applicant has not completed three years of full-time service as a permanent employe at the time of application.

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1. The review board referred to is the Educational Consultant Review Board established by the superintendent under the provisions of the DPI Policy and Procedure Manual, Bulletin #53.76. The board is comprised of four department employes who serve two-year terms and one university faculty member who serves an unspecified term. The board reviews requests for reclassification to EC 2 and formulates recommendations for the superintendent regarding these requests.

2. December 11, 1972, to July 8, 1975 = 2 years and 6.9 months of employment.
71.4 work days between July 8, 1975, and June 18, 1976 = 3.3 months of employment.*
2 years 6.9 months + 3.3 months = 2 years and 10.2 months of employment.

*There are 260 work days in a year (5 x 52 = 260).
There are @21.66 work days per month (260 ÷ 12 = 21.66).
The 71.4 work days equals @3.3 months of full-time employment (71.4 ÷ 21.66 = 3.3).

7. The appellant asked for consideration of his request again on November 29, 1976. He was notified that this request would not be processed by the department because of a policy whereby EC 2 reclassification applications are only accepted at one designated time per year.[3]

8. The appellant subsequently applied again in 1977 and was reclassified to EC 2 on June 19, 1977.

9. At the prehearing conference for this appeal, Respondent Knoll moved for dismissal against him because of an alleged lack of action--either delegated or direct--by the Director in this matter.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal pursuant to s. 16.05(1)(f), Wis. Stats.

2. Respondent Knoll's motion for dismissal is denied.

3. The burden of proof is on the appellant to show to a reasonable certainty, by the greater weight of the credible evidence, that the respondents were incorrect in refusing to consider the merits of his reclassification requests. See, Reinke v. Personnel Board, 53 Wis. 2d 123 (1971); Ryczek v. Wettengel, 73-26 (7/3/74); Lyons v. Wettengel, 73-36 (11/20/74).

4. The appellant's 2 years and 10.2 months of employment with DPI constitute the substantial compliance with the three-year employment standard that is established by DPI Policy and Procedure Manual, Bulletin #53.76, I.4.A.

5. The respondents were incorrect in refusing to consider the appellant's June 18, 1976, reclassification request.

6. The respondents were correct in determining that they did not have to consider the appellant's November 29 reclassification request.

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[3] In 1976, the acceptance date was in the month of June.

## OPINION

In his appeal, the appellant asserts that the respondents were incorrect in refusing to consider the merits of his June 18 and November 29 reclassification requests. The respondents defend the propriety of these actions by arguing that they were in compliance with DPI policy. The appellant has successfully shown to a reasonable certainty that the handling of the June 18 request was improper. He has not, however, prevailed on his argument with regard to the November 29 request.

The respondents refused to consider the June 18 request after concluding that the appellant had not met the basic qualification standards set forth in the department's policy and procedure manual. The specific provision at issue states:

> [I.] 4. To be considered for reclassification from an Education Consultant 1 classification to an Education Consultant 2 classification, the following criteria must be substantially met:
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> A. Three years of full-time service as a permanent employee with the Department.[4]

The respondents determined that the appellant had only completed two years and six months of qualifying employment and that this period of time did not constitute substantial compliance with the requirements. However, the record shows that these determinations were incorrect. The appellant had completed 2 years and 6.9 months of employment prior to taking his leave. The addition of the 71.4 days he worked for the department during this leave brings the total of his qualifying working time to 2 years and 10.2 months.[5] In light of the fact that the department only accepts these requests one time per year, that the use of the three-year standard only regulates whether or not

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[4] Policy and Procedure Manual; Department of Public Instruction; Bulletin Number, 53.76; Part, Personnel; Subject, Education Consultant Reclassification

[5] See footnote 2.

the request will be considered on its merits, that several more detailed performance oriented standards are also listed in section I.4. of the manual,[6] and that the provision in question only requires substantial compliance to begin with; the appellant's 2 years and 10.2 months of employment must be considered to have met the three-year standard. In fact the word "substantially" in the context in which it is used here is defined as "being that specified to a large degree or in the main."[7] Since the appellant's work time totals 95 percent of the required three years, it must be said that he has met the requirement to a large degree or in the main and thus that he has substantially complied with it.

In alleging that the appellant's work time is inadequate, the respondents contend that the 71.4 days of work during the leave time should not be counted in the appellant's total time as a permanent employe with the department. The respondents emphasize the fact that this work was performed on a voluntary, unpaid basis.[8] Yet, the fact remains that the appellant did work as an EC 1 level employe for the department on these days and that he did so at management's request. On this basis alone, the days should be counted in the total time.

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6 The other standards deal in a specific and detailed manner with professional expertise, effectiveness in a specific field of endeavor, and professional preparation consistent with continuing educational growth.

7 Webster's Seventh New College Dictionary, p. 876, 1965.

8 In addressing this issue the respondents also cite Wis. Adm. Code §Pers. 18.02(3) as authority for not including the 71.4 days. This provision refers to the effect of time spent on leave in computing "continuous service" credits for determinations as to eligibility for vacation time. As such, this provision does not apply to the facts of this specific case where the appellant actually worked at DPI for some time during his leave and where the matter in question is whether or not he has worked for DPI for a long enough time to be considered for reclassification. Moreover, even if it did apply, it would not work to the respondents' advantage to the extent expected because it would also reqire that all of the leave time taken by the appellant on or after April 9, 1976, be counted in computing his years of service regardless of whether he actually worked at the department on those days or not.

Moreover, equity would also demand including these days since the appellant, in honoring management's request, performed work on an unpaid basis which allowed the department to receive the benefit of over three months of professional level services without having to pay anything for that benefit. Certainly, the respondents cannot now be allowed to successfully claim that those days spent rendering services cannot even be counted in the computation of length of employment under provision I. 4. A. of the policy manual.

In addition to arguing that he substantially met the three-year standard on June 18, the appellant also argues that he met that standard in absolute terms on that date. He argues both that a six-month time leeway should have been used in applying the three-year standard and that his full year of leave time should have been considered as employment time with the department. These arguments are unpersuasive. Although the provisions of Wisconsin Personnel Manual--Classification, section 332.030 allow for use of a six-month time leeway in computation of training and experience for reclassification matters, these provisions are permissive rather than mandatory. Since the respondents have consistently chosen not to use the leeway provisions in requests for reclassification to EC 2, the Board will not require their usage. Similarly, the Board will not require the respondents to include the appellant's full leave of absence time in computing his term of employment. The appellant has not shown any authority for such a requirement nor has he shown any consistant practice to that effect.

Thus, although the appellant has not prevailed in his attempts to have the entire year of leave time counted in his total time of permanent service, he has still successfully shown that he met the standard of substantially complying with the three-year requirement at the time of his June 18 reclassification request. Consequently, the respondents were in error in refusing to

give further consideration to this request because of an alleged failure by the appellant to meet the preliminary requirement.

In contrast to this showing regarding the June 18 request, the appellant has not successfully established that the respondents were incorrect in refusing consideration of his November 29 reclassification request. The respondents have an established policy of convening a review panel to make recommendations on these requests and of accepting requests for review by that panel one time each year. The appellant's November request was five months past the time for requests in 1976 and was refused consideration on this basis. The Board cannot say that the department's policy is incorrect per se where DPI must draw upon outside authorities to staff its review panel and where the preliminary requirements for consideration of requests need only be "substantially" met at the one time each year during which requests are accepted. Therefore, the respondents were not incorrect in adhering to their policy on this matter. The Board does, however, note that the burden of obtaining outside authorities is not overwhelming since only one authority need be acquired for the review of each request and that a strict application of the criteria for consideration (as was used here) could well lead to employes working above their classification for almost an entire year before requests are again accepted. In light of this, the Board suggests that the feasibility of more frequent reclassification considerations be analyzed by the respondents.

Finally, respondent Knoll has moved for dismissal of the appeal as to him because of a lack of any action, either direct or delegated, by the Director in the matter at issue here. This motion is deined. A review of the statutes shows that the provisions of s. 16.07(2), Wis. Stats., specifically give the power of reclassification to the Director. This power is also given to the Director in general terms under s. 16.03, Wis. Stats., and has been

asserted by the Director in Wis. Adm. Code, § Pers. 3.02 and 3.03. Since DPI has no independent authority to reclassify and since the Director has not alleged that the reclassification action by DPI was without authority or illegal, the Board must assume that the Director delegated reclassification authority to DPI and was thus involved in the action by virture of this delegation or that the Director took some direct action on the matter.

ORDER

IT IS HEREBY ORDERED that the respondents' refusal to consider the merits of the appellant's June 18, 1976 reclassification request is rejected and remanded to the Director for action in accordance with this decision, that the respondents' refusal to consider the appellant's November 29, 1976 request is affirmed, and that this appeal is dismissed.

Dated: June 16, 1978. STATE PERSONNEL BOARD

James R. Morgan, Chairperson