

Jeffrey J. Jansen et al. v. DOT & DP
Case Nos. 78-170,156,162,163,168,171-175,
194,196,201,204,206-209,212,228,
229,231-PC

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by law. To say that it is 'legal' implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner. In this sense 'illegal' approaches the meaning of 'invalid'...Further, the word 'lawful' more clearly implies an ethical content than does 'legal.' The latter goes no further than to denote compliance with positive, technical, or formal rules; while the former usually imparts a moral substance or ethical permissibility."

In the context of this case, a reclassification criterion may be said to be "unlawful" if it offends the substantive legal standard applied by the Commission in reviewing appeals of classification transactions. This standard is one of "correctness." See §Pers. 3.05,

Wis. Adm. Code:

"If the employe believes the classification action of the director or his designated representative to be incorrect, or if the appointing authority believes the classification action of the director to be incorrect on the basis of the class specifications, the employe/appointing authority shall, upon written request, be entitled to appeal such action as provided in Wis. Adm. Code Chapter Pers 26." (emphasis supplied)

See also Ryczek v. Wettengel, No. 73-26 (7/3/74), wherein the Personnel Board, predecessor agency to this Commission, adopted this standard and rejected the argument that it should utilize a standard of "arbitrary and capricious" action:

"The statutory language [§16.05(1)(f), Wis. Stats. (1971)] does not command that the Board reject the action of the director, only if it is arbitrary. It does not say that if the Board determines that the director's actions are incorrect that it must, nevertheless, affirm such action merely because it might also determine that the director had not been totally unreasonable. No express limitation is found in the statute and, therefore, we conclude that none was intended by the Legislature.

The director's rules indicate that the standard that the Board should apply is whether the director's action was correct. Pers 3.05, Wis. Adm. Code...provides...This provision quite clearly specifies that in reallocation appeals the matter to be determined by the Board is whether the classification is correct, not whether the director acted unreasonably."

If, in an appeal of a particular classification transaction, the action of the administrator is to be rejected if it is determined to have been "incorrect," reliance on a reclassification criterion may be said to be "unlawful" if it is determined that its use leads to incorrect results. It is not necessary to have determined that the criterion was arbitrary and capricious in order to reach this conclusion.

The approach taken here does not involve, as is suggested by the respondents in their objections to the Proposed Decision, a substitution of the examiner's judgment for that of the DOT on an issue of program management. Certainly it is the prerogative of the DOT to decide how its troopers are to patrol the state's highways. However, the Commission has the responsibility by law to review classification decisions when they are appealed. The Commission must determine whether these decisions are correct. In classification series differentiated on the basis of performance, the Commission must determine whether "demonstrated performance" has been evaluated correctly. It has made this determination and has concluded that respondent's sole reliance on the MSA criterion fails to take into consideration all relevant factors and is therefore likely to result in incorrect determinations of demonstrated performance. In turn,

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such incorrect determinations are likely to lead to incorrect applications of the standards of the class specifications.

The respondents cite in their objections the Commission's comment in York v. Division of Personnel, No. 78-42-PC (7/18/80), an appeal of the DOT sergeant's exam, as follows: "While the Commission might well disagree as a matter of the Commission's own ideas of program management with some aspects of the bench marks [answer guidelines], such disagreement cannot constitute the basis for a conclusion of invalidity." In that case, the basis of the appellant's objections to the bench mark answers essentially was that on their face they were ridiculous or offended common sense. The respondent had presented "job experts," persons familiar with the sergeant jobs, who defended the content of the bench marks. The Commission concluded that the bench marks were not "clearly ridiculous," and commented that a mere difference of opinion as to the policy represented by the bench marks would not provide a basis for a conclusion of invalidity. Nevertheless, the Commission did evaluate the accuracy of the exam as a measuring device.

In the present case, there was conflicting testimony as to the accuracy of the measurable standard of activity (MSA) as a measurement of performance. In the opinion of both the examiner and the Commission, based on the evidence presented in this case, the MSA was not a sufficiently accurate measurement of performance to lead to correct classification decisions when used as an absolute criterion. In making this

determination, the Commission is not invading DOT program management prerogatives as to the assignment, management, and utilization of state patrol personnel. Rather, it is reviewing the accuracy of the MSA as a measuring device for reclassification purposes.

The appellants have requested that the Commission enter an order that the respondents cease and desist from "applying or attempting to apply the MSA criterion to reclassification(s) involving Trooper 3's." Inasmuch as the Commission has concluded only that the use of an absolute MSA requirement for reclassification to Trooper 3 is unlawful, the entry of such a cease and desist order would be unwarranted.

The Commission does, however, reject the action of respondents in denying appellants' reclassification from Trooper 2 to Trooper 3, since the decisions were based on unlawful application of the MSA criterion. The appropriate resolution of these cases is for the respondent to re-evaluate the prior reclassification decisions in light of the Findings of Fact, Conclusions of Law and Opinion of the Commission, and to take action in accordance therewith.

ORDER

The attached Proposed Decision and Order is adopted by the Commission as its final decision of this matter, with the addition of the foregoing opinion, and with the following changes:

1. On page 12, the reference to §111.07(2m), Wis. Stats., is changed to §110.07(2m), Stats. The reference to Chs. 240 to 250 is

changed to 340 to 350. These changes are to correct typographical errors.

2. Findings of Fact #3, 4 and 5 are amended to better conform to the evidence, to read as follows:

"3. Reclassification to Trooper 3 requires the successful completion of 60 hours of in-service training beyond the Trooper 2 level, a passing average on two examinations, and the recommendation of the trooper's supervisor. That recommendation is to be based on an evaluation of five rating factors: Initiative and Performance of Duties, Problem-Solving Capability, Knowledge of Responsibilities, Practical Judgement, and Report Writing. (Resp. Exh. #1). One "unsatisfactory" or two "conditional" ratings on these five factors results in a denial of the supervisory recommendation.

4. 'Initiative and Performance of Duties' is expanded on the evaluation form as:

'Wise use of time, punctual, willingness to carry out assignments as directed and on own initiative, performs well under limited supervision, demonstrates leadership capabilities, diversification of enforcement activities, ability to assume responsibility.'

If the Trooper 2 functions more than 54% 'below' (actually above) the established average MSA of 4.1, the Trooper 2 receives an unsatisfactory rating on this element and is not recommended for reclassification to Trooper 3, irrespective of any other considerations; an MSA of 5.3-6.3 (28% to 54% deviation) results in a conditional rating.

5. Each appellant has been employed as a Trooper 2 by the Wisconsin State Patrol, Division of Enforcement and Inspection, DOT, and has met the training and examination prerequisites for reclassification to Trooper 3. Each was denied reclassification based wholly or in part on not meeting the MSA; each received either a conditional or unsatisfactory rating on 'Initiative and Performance of Duties' and failed to obtain the positive recommendation of his supervisor."

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3. In order to respond directly to the issues noticed for hearing, the following conclusion of law is added:

"8. Denial of the various reclassification requests on the basis of failure to comply with a pre-determined measurable standard of activity (MSA) as an absolute criterion was unlawful."

Dated January 8, 1981

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Chairperson

Donald R. Murphy
Donald R. Murphy
Commissioner

Gordon H. Brehm
Gordon H. Brehm
Commissioner

AJT:mek

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 JEFFREY J. JANSEN ET AL., *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 TRANSPORTATION & Administrator, *
 DIVISION OF PERSONNEL, *
 *
 Respondent. *
 *
 Case No. 78-170-PC *
 *
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is the consolidated appeal of a group of Trooper 2 employes of the Wisconsin State Patrol, following the denial of their request for reclassification to Trooper 3 by the Department of Transportation (DOT). Two issues were noticed for hearing:

1. Whether the DOT based its denial of the various reclassification requests on unlawful criteria, namely:
 - a. Failure of the Trooper 2 to secure the affirmative recommendation of the trooper's supervisor.
 - b. Failure of the Trooper 2 to comply with a pre-determined measurable standard of activity (MSA).
 - c. Failure of the Trooper 2 to comply with a pre-determined number of "hazardous moving violations" (HMOV).

2. Whether or not the appeal of William P. Liedke v. DOT and Division of Personnel, Case No. 79-70-PC, was untimely.

Hearing was held on June 26-27, 1979, before Charlotte M. Higbee, Commissioner.

FINDINGS OF FACT

1. It is undisputed that the undated letter of appeal of William P. Liedtke, received by the Personnel Commission on September 25, 1978, and assigned case number 78-171-PC, was timely filed. (App. Exh. 6, 7; TR-5) His second appeal was filed on March 15, 1979, following denial of his second request for reclassification on February 1, 1979 (Case No. 79-70-PC).

2. In June, 1978, the State Personnel Board revised the classification of State Patrol Trooper 1 and 2 (PR 5-09 and PR 5-10) and created the classification of State Patrol Trooper 3 (PR 5-11). The purpose of the additional classification was to achieve position comparability; troopers frequently left the State Patrol for higher paying law enforcement jobs, resulting in a serious morale problem and high turnover rate. The class levels of Trooper 1, 2 and 3 are intended to be differentiated on the basis of demonstrated performance, training, and experience, as described in Sec. Pers. 3.02(4)(b), WAC, not on the basis of job duties, although the Class Specifications do, in fact, distinguish between the three levels in both the definition and the examples of work performed. The Division of Personnel delegated to DOT the determination of the level of performance for each trooper classification, and the procedure for evaluation of Troopers 2 for possible reclassification was developed by DOT's Division of Enforcement and Inspection (Resp. Exh. #1).

3. Reclassification to Trooper 3 requires the successful completion of 60 hours of in-service training beyond the Trooper 2 level, a passing average on two examinations, and the recommendation of the trooper's super-

visor. That recommendation is to be based on an evaluation of five rating factors: Initiative and Performance of Duties, Problem-Solving Capability, Knowledge of Responsibilities, Practical Judgement, and Report Writing.

(Resp. Exh. #1)

4. "Initiative and Performance of Duties" is expanded on the evaluation form as:

"Wise use of time, punctual, willingness to carry out assignments as directed and on own initiative, performs well under limited supervision, demonstrates leadership capabilities, diversification of enforcement activities, ability to assume responsibility."

If the Trooper 2 functions more than 54% "below" (actually above) the established average MSA of 4.1, the Trooper 2 receives an unsatisfactory rating on this element and is not recommended for reclassification to Trooper 3, irrespective of any other considerations.

5. Each appellant has been employed as a Trooper 2 by the Wisconsin State Patrol, Division of Enforcement and Inspection, DOT, and has successfully met the prerequisites for reclassification to Trooper 3 except the MSA. Each was denied reclassification based on not meeting that standard; each received an unsatisfactory rating on "Initiative and Performance of Duties" and failed to obtain the positive recommendation of his supervisor.

6. The MSA is computed by dividing the number of enforcement patrol hours (EPH) by the number of citations given for Hazardous Moving Violations (HMV) plus the quotient of the EPH and total "contacts" made by the trooper, including HMV. In the first evaluation the MSA was based on the twelve-month period prior to the evaluation.

- a. HMV may not, in fact, involve moving violations but are so-denominated because of the seriousness of the violation of the motor vehicle code. Conversely, some moving violations are not hazardous.*
- b. EPH includes only those hours actually used in patrolling the highways, up to the completion of the arrest or warning. It excludes taking a driver for a drunk-driving test, report-writing, court appearances, servicing equipment, traffic control, etc.
- c. A contact is any formal interaction with a member of the traveling public. There is no contact credit for such actions as assisting at a fire or other non-motor vehicle incidents, administering first-aid to a non-motorist, recovering lost or stolen property, or providing information during a break or other non-EPH periods.
- d. Issuance of a correction notice (e.g., equipment violations) constitutes one contact. If a citation is also issued, there is an additional contact; two, if the violation is an HMV.

7. The 4.1 MSA standard of performance was developed as an average of all state troopers for the three-period, fiscal 1976-78. As such, it was intended to level out the differences between districts. Each Trooper 2 is evaluated against this average, irrespective of the district in which the trooper functions. An MSA of 5.2 or lower (27% deviation) qualifies the Trooper 2's performance as satisfactory for reclassification. Between 5.3

* (They are identified with an asterisk in the Uniform Enforcement Policy Manual, App. Exh. #27.)

and 6.3 (54% deviation) qualifies the trooper conditionally, dependent on overall evaluation of performance. An MSA of 6.4 and above is unsatisfactory. (App. Exh. #23)

8. The MSA has been used to evaluate the performance of all troopers, since 1973.

9. Neither the Personnel Board nor the Division of Personnel approved the specific criteria for determining whether a Trooper 2 should be reclassified. There is no reference to MSA in the Trooper classification specifications.

10. There are substantial differences in the sizes of the seven state patrol districts (Comm. Exh. #2), the concentration of the traffic accident experience, the nature of the highways patrolled, weather conditions, the number of troopers in each district, the number of miles patrolled by each trooper, and the EPH of individual troopers.

11. Areas of opportunity are not proportionate from district to district. The larger the EPH, the higher the MSA for the same number of HMV and other contacts. There are greater opportunities for HMV contacts in the districts with heavier concentrations of traffic.

12. Over 50% of the state patrol are assigned to Districts 1 and 2, in the populous southern third of the state, having greater concentration of traffic and higher accident experience. Since the MSA was computed as a statewide average, it is disproportionately influenced by the experience of these two districts, whereas District 8, with only 5.8% of the troopers, had little impact on the average. This skew effect is compounded when the average is applied to troopers assigned to the lesser areas of opportunity.

13. Troopers who have non-patrol assignments, such as the Governor's detail and troopers with full-time court duties, are exempt from the MSA concept in the evaluation of their performance for reclassification.

14. Appellant Jansen: In September, 1978, based on the one-year period from June 19, 1977, to June 17, 1978, Jansen was denied reclassification to Trooper 3 because of unsatisfactory initiative and performance of duties (emphasis provided) based on his MSA of 7.3 (App. Exh. #12).

- a. On March 11, 1978, Jansen, who had been a Trooper 2 for 7-8 years, received a favorable Evaluation and Improvement Report (App. Exh. #11). He had met the goals set at his previous evaluation for an improved accident arrest record (emphasis provided). The goals to be accomplished during his next evaluation period were identified as "...diversify enforcement activity including emphasis on assisting the public with registration, motoring and related activity," none of which involve HMV and would do little if anything to improve his MSA. His supervising sergeant had not detected any area with a noticeable need for improvement, and the general evaluation was that Jansen had done very well in both quality and quantity of work performed and contributed effectively to the accomplishment of unit goals.
- b. On March 31, 1978, Jansen received a commendation for his initiative and performance of duties (emphasis provided) in completing the apprehension of individuals involved in a high speed chase (App. Exh. #14).

- c. During the six months following the initial denial of reclassification, Jansen made a considerable decrease in the amount of his EPH while increasing the number of HMV's. This resulted in a satisfactory MSA, and Jansen was reclassified as Trooper 3 in January, 1979.

15. Appellant Du Playee, a Trooper 2 for 10-11 years, was denied reclassification to Trooper 3 on September 8, 1978, because of an unsatisfactory MSA, based on his work performance during fiscal 1978.

- a. Du Playee achieved "above standard" in 3 of 5 rating factors used to evaluate Troopers 2 for possible reclassification to Trooper 3, and "meets standard" in a fourth.
- b. Du Playee had a high EPH, 80.4% of his total duty hours, and a weekly average of 32.2 hours on patrol as contrasted with the statewide average of 26.4 hours or 66%. Some troopers spend as little as 40-50% of their duty hours as EPH.
- c. Du Playee was assigned to District 4, one of the two northern districts where the state patrol assigns 1-1/3 troopers per county, based on accident experience, rather than two troopers per county. This is a district in which there are lesser opportunities for HMV contacts.

16. A Trooper 2 can function satisfactorily at the level set forth in the definition of Trooper 3 and perform satisfactorily for a six-month period all duties and responsibilities listed in the class specifications and be denied reclassification based on the MSA.

17. None of the 19 examples of work performed by Troopers 3, in addition to all functions identified at the Trooper 1 and 2 levels, involve HMV contacts, and few if any involve EPH, two factors intrinsic to the determination of the MSA.

18. The exercise of discretion is an important part of the state trooper's law enforcement responsibility, including the use of good judgment in evaluating the seriousness of the violation in relation to the circumstances and conditions existing at the time of the violation. Even in the case of mandatory citations,

"...hard fast adherence to a set policy is not to be substituted for common sense or human understanding."

(Uniform Enforcement Policy, App. Exh. #27, p. 4, 7.)

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over these appeals pursuant to §230.44(1)(b), Wis. Stats.

2. The burden of proof is on the appellants to establish to a reasonable certainty by the greater weight of credible evidence that the criteria on which the respondent based the denial of appellants' reclassification requests were illegal. Alderden v. Wettengel 73-87 (1975) Reinke v. Personnel Board 53 Wis. 2d 123 (1971).

3. The appellants have not sustained their burden of proving that the recommendation of the supervising sergeant is an unlawful criterion for reclassification to Trooper 3.

4. The appellants have not sustained their burden of proving that MSA/HMV is contrary to statutory law, namely §§110.07 (2m) and 345.55(1), Wis. Stats.

5. The appellants have sustained their burden of proving that denial of their reclassifications based solely on their failure to comply with the MSA criterion was a violation of Pers. 3.02(4)(b), WAC.

6. The burden of proof is on the appellant William P. Liedke to establish that he filed his second appeal, Case No. 79-70-PC, in a timely manner. Van Laanen v. Wettengel and Schmidt, 74-17 (1975).

7. Appellant Liedke did not sustain his burden; his second appeal was not timely filed.

OPINION

The Personnel Commission takes official notice of all relevant provisions of the 1977 Wisconsin Statutes, the Wisconsin Administrative Code (WAC), and the 1977-78 Classification and Compensation Plan as well as the following cases decided by its predecessor agency, the Personnel Board. Alderden v. Wettengel, 73-87 (1975); Kailin v. Wheeler, 73-124 (1975); Janzcaketel v. Hart and Knoll, 73-164 (1976); Luebke v. Wettengel, 74-26 (1975).

Dealing first with the issue of appellant Liedke's second appeal, the Commission concludes that Liedke failed to comply with the 30-day time limit for filing prescribed by §230.44(3), Wis. Stats., thereby depriving the Commission of subject matter jurisdiction. Liedke was notified of the action on February 1, 1979; and, although his appeal letter was dated

February 27, 1979, it was not received by the Commission until March 15, 1979, the forty-first day following his notification. This appeal clearly was untimely; the term "filed" requires physical receipt by the Commission. Richter v. Division of Personnel, Case No. 78-261-PC (1979).

The fundamental issue in this case is whether or not DOT's denial of reclassification of Troopers 2 to Trooper 3, based on their failure to comply with its established MSA, was based on unlawful criteria, in that

- (1) Reclassification law does not require the affirmative recommendation of the supervising sergeant,
- (2) MSA/HMV is contrary to statutory law, namely §§110.07 (2m) and 345.55(1), Stats., and
- (3) MSA is not based on the Trooper 3 class specifications.

It is undisputed that the Trooper 3 classification was created for the purpose of retaining experienced troopers who were at the full performance level of enforcement of the state motor vehicle code, which, along with assisting local agencies in the enforcement of the code, is their primary duty (§110.07, Wis. Stats.). The procedure for evaluating Troopers 2 for possible reclassification to Trooper 3, developed by DOT's Division of Enforcement and Inspection (Resp. Exh. #1), on its face appears to be an appropriate tool for implementing the classification standards, both as to the Definition and the Examples of Work Performed (App. Exh. #1). Troopers 2 are required to demonstrate their attainment of specified training and experience, pursuant to Pers §3.02(4)(b), WAC, by meeting an additional 60-hour training requirement and achieving a passing average on two examinations.

The candidate for Trooper 3 must demonstrate the performance requirement of Pers. 3.02(4)(b) Stats., in relation to five rating factors (Resp. Exh. #1). The critical factor is the first, "Initiative and Performance of Duties," the definition of which is set forth in Finding #4, and which includes "diversification of enforcement activities." It is undisputed that Troopers 2 whose primary assignment was highway patrol and who did not meet the MSA (including allowable deviation) were rated unsatisfactory on this factor and were not recommended by their sergeants for reclassification to Trooper 3.

1. Although neither classification law nor the Trooper standards require either the recommendation or approval of the supervising sergeant, the Commission concludes that the practice of requiring supervisory recommendation for reclassification to Trooper 3 is not unlawful. The Definition of the Trooper 3 classification provides that

"Work at this level is differentiated from that performed at lower state trooper levels by the scope, variety, and complexity (as exemplified by the additional functions listed below as examples of work performed) of law enforcement decisions which must be made independently on a day-to-day basis under only general supervision of a State Patrol Sergeant."

The standards specify that the determination as to qualifications of a Trooper 3

"...will be made based on an analysis of the objectives and tasks performed and by an identification of the education, training, work or other life experience which would provide reasonable assurance that the skills required to perform the tasks and the knowledge required upon appointment have been acquired."

The supervising sergeant is in the best position to determine whether or not the Trooper 2 requesting reclassification meets the Trooper 3 standards. The minutes of the State Personnel Board meeting of June 23, 1978, at which the new Trooper standards were recommended by the Deputy Administrator of the Division of Personnel, include these statements:

"The Board was informed that the criteria to be used to determine whether Trooper 2s were eligible to become Trooper 3s are 60 more hours of training and passing two exams as well as an evaluation by a supervisor. The duties are not much different but there should be increased proficiency,"

and

"no regrade (reclassification) actions will occur until the incumbents have demonstrated their performance in a manner acceptable to agency management." (App. Exh. #28)

The problem encountered by the appellants is not the failure to obtain affirmative recommendations by their supervising sergeant per se, but rather that such recommendation was withheld based upon the MSA.

2. The MSA/HMV concept is not contrary to statutory law. Section 111.07 (2m) Stats., provides in part that

"The primary duty of a state traffic officer shall be the enforcement of Chs. 240 to 250 or of any other law relating to the use or operation of vehicles upon the highway."

The various factors considered in the determination of the HMV and MSA are clearly related to traffic enforcement. (See App. Exh. #19) It is true that DOT emphasizes arrest by, in effect, providing double "credit" for HMV's in computing the MSA, as contrasted with patrol hours attributable to issuing warnings, providing driver assistance, patrolling the highways, etc. However, the MSA does not exclude consideration of other enforcement activities and cannot be said to be violative of §110.07 (2m), Wis. Stats.

Section 345.55(1), Wis. Stats., provides:

"No traffic officer shall demand, solicit, receive or be paid any remuneration upon the basis of number of arrests made, convictions obtained, or amount of fines collected."

Perusal of the legislative history of this statute, beginning with the development of the Motor Vehicle Code as Ch. 454, Laws of 1929, supports respondent's argument that this section was intended to prohibit law enforcement officers to solicit or accept compensation based on a "bounty" system. The Deputy Attorney General came to a similar conclusion as set forth in his letter of January 11, 1979, to Appellant Jansen, where he stated:

"It seems to me that this section [§345.55(2), Wis. Stats], which imposes a forfeiture, would be narrowly construed by the courts to apply to situations where persons enforcing the traffic laws are paid on a Commission basis....In my view no state patrol officer would be prosecutable under this section for meeting the established requirement (i.e., MSA) in the normal course of his/her duties."

3. Denial of reclassification based solely on failure to comply with the MSA criterion is a violation of Pers. 3.02(4)(b), WAC.

The respondent's application of the MSA is not consistent with the class specifications for Trooper 3. Neither the definition of the classification and the basis for differentiation from the lower trooper classifications set forth in the definition, nor the examples of work performed justify the automatic rejection of Troopers 2 who do not meet the MSA. It is incongruous to deny reclassification based on a standard which measures only enforcement activities performed during patrol hours, with emphasis on HMV, whereas none of the 19 additional functions performed by a Trooper 3,

as listed in the class specifications, involve HMV contacts, and few are performed while on patrol duty. Furthermore, the MSA concept is not used in reclassifying Governor's drivers, court officers, and other troopers who are not assigned to patrol functions. All of these troopers are able to demonstrate their performance at the 3 level without reference to MSA.

There are other factors which appropriately may outweigh an MSA that does not come within the acceptable range and which may demonstrate the trooper's performance at the 3 level. Appellant Jansen is a case in point. On March 31, 1978, Jansen received a commendation for his initiative and performance of duties (App. Exh. #14). His annual evaluation and achievement report dated March 20, 1978, commented very favorably on his performance and noted that he had met goals set at his previous evaluation regarding improved accident arrest record, and established new goals emphasizing non-HMV activities. As of June 30, 1978, Jansen's supervisor rated him unsatisfactory in Initiative and Performance of Duties, because he failed to meet the MSA. In January, 1979, after deliberately increasing his HMV and decreasing his EPH, Jansen was reclassified as a Trooper 3 (Tr. 256).

Similarly, Appellant DuPlayee achieved a superior rating in three of the five Trooper 3 factors, and his supervisor noted that he uses good judgment and common sense and makes good use of discretion (App. Exh. #19). Yet his high percentage of EPH (80.4%) and relatively low HMV (127) combined to render his MSA and hence his performance unsatisfactory.

The Commission cannot accept as the sole criterion for reclassification under Pers. 3.02(4)(b) a performance standard (MSA) which begets such anomalous results. The Commission concludes that the MSA may be considered as

one measure of demonstrated performance; however, it should not be applied so as to deny reclassification to Troopers 2 who otherwise demonstrate the increased proficiency required by the class specifications.

The Qualifications section of the Trooper 3 standards reads:

"The qualifications required for this classification level will be determined on a position-by-position basis at the time of recruitment. Such determinations will be made based on an analysis of the objectives and tasks performed and by an identification of the education, training, work or other life experience which would provide reasonable assurance that the skills required to perform the tasks and the knowledge required upon appointment have been acquired."

The Department's arbitrary application of the MSA is a violation of Pers. 3.02(4)(b) in that it is not applied uniformly to all Troopers 2 and it fails to take into consideration other facets of demonstrated performance which would provide reasonable assurance that the skills required to perform the tasks of a Trooper 3 have been acquired.

Appellants placed considerable emphasis on the effect MSA has on the Bureau's clearly-enunciated policy that the trooper's exercise of discretion is an important part of law enforcement. Patently, the impact of MSA will be to tip the discretionary balance in favor of citations rather than warnings. Appellant Jansen is a case in point. By deliberately changing his prior pattern of operation and reducing his use of discretionary warnings, Jansen succeeded in being reclassified four months after his initial denial. Based on the class standards and the Uniform Enforcement Policy (Manual), there is no evidence that Trooper Jansen in fact improved his performance other than to bring his MSA within the acceptable range. However, there is no basis for concluding that the MSA is unlawful solely because it discourages the Troopers' exercise of discretion.

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ORDER

It is hereby ordered:

1. That the second appeal of William P. Liedke, Case No. 79-170-PC, is dismissed for lack of jurisdiction.

2. That the action of respondent in denying reclassification of the appellants to Trooper 3 solely on the basis of the MSA is rejected, and the matter is remanded to the respondent DOT for action in accordance with this decision.

Dated _____, 1980

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Chairperson

Donald R. Murphy
Commissioner

Gordon H. Brehm
Commissioner

CMH:mew

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