

* * * * *

DENNIS ESCHENFELDT,

 Appellant,

v.

Administrator, DIVISION OF
PERSONNEL, &
Secretary, DEPARTMENT OF HEALTH
& SOCIAL SERVICES,

 Respondents.

Case No. 78-257-PC

* * * * *

ORDER

This matter is before the Commission on consideration of the Proposed Decision and Order of the hearing examiner. Having heard the objections and written arguments of the respondents, the Commission adopts as its own the proposed Nature of the Case, Findings of Fact, Conclusions of Law, and Opinion, a copy of which has been attached hereto and incorporated by reference as if fully set forth, with the following addition to the Opinion:

The respondent department objects to the requirement for back pay, citing DER v. Personnel Commission (Doll), 79-CV-3860 (8/18/80), a decision in which one branch of the Dane County Circuit Court held that the Commission lacked the authority to require the payment of back wages in a case involving the denial of a reclassification request. This was based on the theory that a denial of a reclassification request was not one of the enumerated transactions in §230.43(4), Wis. Stats., for which an employe is entitled to back pay, and that this more specific provision controlled over §230.44(4)(c), Stats., which gives the Commission the authority to modify appealed actions and to remand for action in accordance with the decision.

Since this decision, there has been a change in the personnel rules in the Wisconsin Administrative Code, effective March 1, 1981. Section Pers. 29.05 now reads:

"Except for action in accordance with §§230.43(4), 230.44(4)(c), and 230.45, Stats., or to correct an error, no pay increases or decreases shall be retroactive."

Previously, §Pers. 5.037 had only referred to the correction of an error. The revised code section now additionally lists three statutory subsections. If §230.43(4) constituted the sole section authorizing back pay, there would be no need to refer in the rule to §230.44(4)(c), since any action under that subsection which would result in back pay is already set forth in §230.43(4), according to the rationale set forth by the court in the Doll decision.

Furthermore, a recent decision by another judge of the Dane County Circuit Court at least impliedly conflicts with the Doll decision. See DNR v. Personnel Commission (Hess), No. 80-CV-5437 (6/24/81), where the Court held that §230.44(4)(c), gives the Commission the authority to reduce the length of a suspension without pay. While the issue of back pay was not directly before the court, a reduction of a suspension without pay is meaningless unless it includes the payment of back pay. Yet by its terms, the enumeration of transactions in §230.43(4) with respect to which employees are entitled to back pay does not include suspensions.

Section 230.44(4)(c), Wis. Stats., is on its face a broad grant of remedial authority to the Commission. Following a hearing, the Commission can either "affirm, modify or reject" the appealed action, and may issue

an enforceable order to remand the matter "for action in accordance with the decision." With such a broad grant, it cannot be argued that a particular remedial order must be founded on a specific grant of authority. To the contrary, such broad authority encompasses remedies so long as they are within the scope of the matters noticed for hearing and do not offend specific restrictions such as §230.44(4)(d), which prohibits the removal of an incumbent in the absence of a showing of obstruction or falsification. Section 230.43(4) provides that under certain circumstances an employe who is ordered reinstated by the Commission or a court is entitled to back pay, without regard to whether the back pay is ordered or entitlement thereto determined by the Commission or Court. This statute should not be construed as a limitation on the Commission's authority in an appeal of a reclassification denial to require the compensation of an employe who has been found to have been working in a higher classification than that for which he has been paid, for the period following the date his salary would have been changed if his reclassification request had been granted by the respondents.

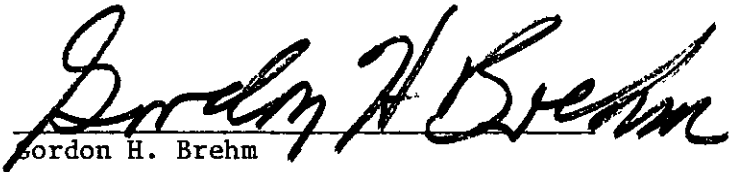
Eschenfeldt v. DP & DHSS
Case No. 78-257-PC
Page 4

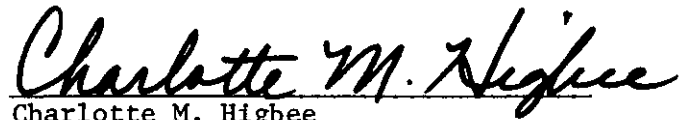
ORDER

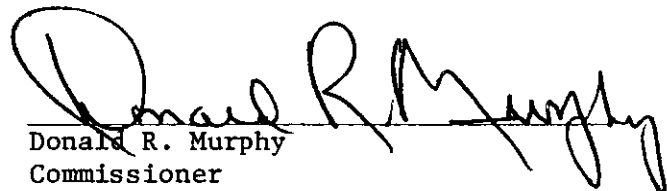
The decision of the respondent Division of Personnel dated October 5, 1978, is modified and this matter is remanded for action in accordance with this decision.

Dated July 22, 1981

STATE PERSONNEL COMMISSION


Gordon H. Brehm
Chairperson


Charlotte M. Higbee
Commissioner


Donald R. Murphy
Commissioner

AJT:mew

Parties:

Mr. Dennis Eschenfeldt
c/o Richard V. Graylow
Lawton & Cates
110 E. Main St.
Madison, WI 53703

Mr. Charles Grapentine
Administrator, DP
149 E. Wilson St.
Madison, WI 53702

Mr. Donald Percy
Secretary, DHSS
1 W. Wilson St.
Madison, WI 53702

* * * * *

DENNIS ESCHENFELDT,
 Appellant,
 v.
 Secretary, DEPT. OF HEALTH AND
 SOCIAL SERVICE and DIVISION OF
 PERSONNEL,
 Respondents.
 Case No. 78-257-PC
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is the appeal of a denial of reclassification of Dennis Eschenfeldt's position from the Officer 4 to the Officer 5 level. Following the July 24, 1979, prehearing conference, the following issues were noticed for hearing.

1. Whether appellant's position should be classified as Officer 4 or Officer 5, with the following sub-issues:
 - a. Whether there was a logical and gradual change in the duties and responsibilities of the appellant,
 - b. Whether the assignment of duties and responsibilities to appellant's position was on a temporary or non-temporary basis,
 - c. Based on the findings and/or conclusions reached with respect to the foregoing sub-issues, whether the reallocation of the appellant's position and regrading of the appellant was or is appropriate.
2. Whether the use of the Officer 5 register was illegal or amounted to an abuse of discretion with respect to the Officer 5 positions at Oakhill and St. John's (Milwaukee).
3. Whether appellant is entitled to back pay for any period of time during which he may have performed Officer 5 duties a majority of the time.

Appellant proposed an additional issue to which respondents objected: whether or not the appellant's job duties or responsibilities were changed because of his participation in the instant litigation.

An Interim Decision (copy attached) was issued on September 4, 1979, wherein the Commission ordered that the following issue be included in the hearing of this matter:

4. "Whether the appellant's job duties and responsibilities were changed in a manner that contravenes the Personnel Board holding in Alderden v. Wettengel, Wis. Personnel Board No. 73-87 (3/22/76)."

Hearing was conducted on October 29-30, 1979, and continued on December 3, 1979, with Charlotte M. Higbee, Commissioner, as hearing examiner. At the conclusion of the second day of hearing, respondent moved to dismiss Issue 2 as untimely. Pursuant to an agreement made at that time and following submission of briefs, the examiner advised the parties orally on November 20, 1979, of her decision to grant the respondent's motion, the discussion of the rationale for her ruling to be incorporated into the proposed decision and order.

FINDING OF FACTS

1. Eschenfeldt was first employed by the Dept. of Health and Social Service (DHSS) in what is now the Division of Corrections in May 1971, as an Officer 1 at the Walworth Correctional Center.
2. Following a series of transfers and promotions, in November 1976 Eschenfeldt became an Officer 4, Shift Supervisor, at the Oakwood State Camp, a large minimum security correctional camp with approximately 148 residents and 83 Officers 1-5.

3. In February 1977, Eschenfeldt took and passed the examination for Officer 5, with a score of 82.75 without veteran's points.
4. On July 1, 1977, Oakwood State Camp became Oakhill Correctional Institution, a medium-sized minimum security correctional institution with a projected population of 300 adult males and a projected staff of 107 Officers 1-5.
5. At the time of the changeover and for over a year thereafter, Officers 4, including Eschenfeldt, were performing Officer 5 duties until gradually, the institution had full Officer 5 coverage through transfers, reinstatement to the Officer 5 classification of officers who had taken voluntary demotions to Officer 4 under the camp system, and promotions based on the promotional exam for Officer 5.
6. At no time was Eschenfeldt interviewed for an Officer 5 position at Oakhill.
7. In November 1977 James Alhert, an Officer 3 at Oregon State Farm, who ranked below Eschenfeldt on the Officer 5 certification list, was promoted to Officer 5.
8. On November 28, 1977, Andrew Binas, Superintendent of Oakhill, requested that Eschenfeldt be reclassified to Officer 5, based on his duties and responsibilities at that time. On May 10, 1978, DHSS denied the reclassification of both Eschenfeldt and Samuel Raymond.
9. Raymond was promoted to Officer 5 in July 1978.
10. The Division of Personnel reviewed the DHSS denial of Eschenfeldt's reclassification, and on October 5, 1978, concurred in the agency's determination that there had not been a logical and gradual change in Eschenfeldt's duties in accordance with the Wisconsin Administrative Code, former Ch. PERS 3.02 (4)(a), but rather was caused by a sudden transition in the organizational structure of the facility. It

concluded that "...the 'new' Officer 5 positions which were created when Oakhill was established had to be filled by some form of competition (e.g., competitive promotional or open examination, voluntary demotion, transfer, reinstatement) rather than by reclassification." (Respondent Exhibit 1.)

11. Eschenfeldt filed a timely appeal from this decision.
12. In May 1978, following the DHSS denial of the request to reclassify Eschenfeldt, James Stratton, Chief of Classifications for the DHSS Bureau of Central Personnel, issued a memorandum to the Oakhill Superintendent directing that Officers 4 be scheduled for Officer 5 duties less than 50% of the time. The memo made it clear that a request should be made for an acting assignment, pursuant to PERS 32.01, if it was desired that Eschenfeldt continue performing Officer 5 duties. At no time was such a request made.
13. Thereafter although Eschenfeldt's advance assignments were for Officer 5 duties less than 50% of the time, he actually continued to perform as an Officer 5 more than 50% of the time because he was assigned to relieve shift supervisors when they were ill or did not work as scheduled for any other reason.
14. In July 1978, Stratton instructed Larry Alberts, Oakhill Security Director, to discontinue the practice of having Eschenfeldt perform Officer 5 duties.
15. On December 18, 1978, at the prehearing conference for Eschenfeldt's appeal, Stratton learned that Eschenfeldt was still performing Officer 5 duties. On December 19, 1978, Alberts received a letter of reprimand from Allyn R. Sielaff, Administrator of the Division of Corrections, because he had not discontinued the proscribed practice.

16. Between July 1977 and January 1979, Eschenfeldt performed Officer 5 duties approximately 60-65% of the time, maintaining a high level of performance. He was never advised that his duties as shift supervisor were temporary or that this was an acting assignment.
17. Beginning January 1979, Eschenfeldt was no longer assigned to shift supervisory (Officer 5) duties.
18. Following the July 1, 1977, changeover from a camp to a correctional institution, there were progressive increases in the resident population, until, in November 1978, it had doubled to about 250. As the population grew and the staff increased, there was a gradual change in organizational structure and reporting relationships. However, both the Officers 4 and 5, including Eschenfeldt, continued to function as they had as Officers 4 under the camp system as related to security of residents and supervisory shift responsibilities.
19. The primary distinction between the Officer 4 and Officer 5 classification is not in the duties or supervisory shift responsibilities but rather in the environment in which those duties are performed.
20. The required knowledge, skills, and abilities for Officers 4 and Officers 5 are virtually identical, as are the training and experience requirements with the exception that the Officer 4 must have four years of experience as an Officer and the Officer 5, five years. (Appellant Exhibit 13)
21. Duties of all positions at the Officer 5 level, irrespective of environment, include touring the buildings and grounds (or wards) of the institution or camp to maintain security and order with primary

responsibility for meeting unusual emergency situations quickly and effectively.

22. Between July 1977 and January 1979, there was a logical and gradual change in the duties and responsibilities of Eschenfeldt's position based upon the gradual changes in the size of resident population at Oakhill, the size and supervisory level of the staff, and in program and support services.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over Issues 1, 3, and 4, pursuant to Sections 230.44(1)(a) and (d) Statutes.
2. The Personnel Commission does not have jurisdiction over Issue 2.
3. The burden of proof is on the appellant to establish that he should have been classified as an Officer 5.
4. The appellant has sustained the burden of proving that he should have been classified as an Officer 5, in that he has established that his duties underwent a logical and gradual change. (Issue #1)
5. The burden of proof is on the appellant to establish that his job duties and responsibilities were changed in a manner that contravenes the personnel board holding in Alderden v. Wettengel, Wis. Personnel Board No. 73-87 (3/22/76). (Issue #4)
6. The appellant has not sustained the burden of proving that his job duties and responsibilities were changed in a manner that contravenes the personnel board holding in Alderden v. Wettengel.
7. The burden of proof is on the appellant to establish that he is entitled to back pay for any period of time during which he may have performed Officer 5 duties a majority of the time. (Issue #3)

8. The appellant has sustained the burden of proving that he was entitled to back pay for any period of time during which he may have performed Officer 5 duties a majority of the time, to the extent that he is entitled to back pay from the time of the denial of his reclassification request.

OPINION

ISSUE # 2

The Personnel Commission does not have jurisdiction over Issue No. 2, and the hearing examiner has granted respondents' motion to dismiss the appeal as to this issue on the basis that it was not timely filed. The appointments from the register about which the appellant complains were made late in 1977, and his non-appointment at that time was not appealed until November 2, 1978. Although respondents did not object to this issue until the second day of hearing, it is well established that jurisdictional matters are never waived (Van Laanen v. Wettengel and Schmidt, 74-17, 1/2/75), and objections to subject matter jurisdiction may be raised at any time (Morgan v. Knoll, 75-204, 5/25/76).

ISSUE # 4

It is undisputed that in May 1978, following denial of the reclassification request by DHSS, Stratton, the department's Chief of Classification, directed the Oakhill superintendent to schedule Officers 4 for Officer 5 duties less than 50% of the time. This policy was not fully implemented until January 1979, when as the result of the prehearing conference, Stratton became aware that Eschenfeldt was still performing Officer 5 duties a majority of the time because he was used to fill in for absent Officers 5 in addition to his scheduled assignments.

The changing of Eschenfeldt's job duties and responsibilities in this manner did not contravene the personnel board holding in Alderden v. Wettengel. In that case, the board found that Alderden's supervisors had changed his duties "because of the events of the hearing" and that "In essence, appellant was penalized for exercising his right to appeal." The board went on to say:

"We wish to emphasize that we are not holding today that management has no prerogative to change the duties and responsibilities of an appellant while an appeal is pending. However, where management changes those duties as it did in the instant reallocation appeal without prior approval of this Board and for no other purpose than because of the appeal itself, then we conclude that the appellant whose position we have determined to have been improperly classified is entitled to back pay." (Emphasis provided)

In the instant case there had been an attempt to limit Eschenfeldt's assignments five months prior to the appeal and for a purpose other than because of the appeal itself.

ISSUE # 1

The fundamental questions to be determined in this case revolve around this issue and its sub-issues, namely whether there was a logical and gradual change in the duties and responsibilities of the appellant so as to qualify him for reclassification to Officer 5, pursuant to PERS 3.02(4)(a). The evidence is undisputed that Eschenfeldt had been performing Officer 5 duties from July 1, 1977, until January, 1979. It is also undisputed that at no time was Eschenfeldt advised that his duties as shift supervisor were temporary; nor was he notified that this was an acting assignment, in accordance with PER 32.01, despite the fact that the Oakhill Superintendent was made aware of this possibility five months before the denial of the reclassification request by the acting deputy administrator of the Division of Personnel. Eschenfeldt

continued to be scheduled as a shift supervisor, and, in fact, performed Officer 5 duties on almost all of his days worked. (Appellant's Exhibit 4) There was no evidence that the assignment of these duties and responsibilities was on a temporary basis.

Respondents contend that the duties were illegally assigned to Eschenfeldt, in that Officer 5 positions must be filled through open competition; but that, if PERS 3.02(4)(a) were to be applied, Eschenfeldt still did not qualify for the higher level because his Officer 5 duties were based on the abrupt change in the character of the institution as of July 1, 1977, and not upon "A logical and gradual change to the duties and responsibilities of the position."

As to respondent's first argument, there is no provision in the Officer 5 class specifications limiting promotion to this level solely on the basis of open competition (Appellant's Exhibit 13B), although there are specific requirements as to knowledges, skills, abilities, training and experience.¹ However, it is undisputed that in February, 1977, Eschenfeldt scored 82.75 without veteran's points in an Officer 5 promotional exam and that he was performing continuously at the 5 level in a very satisfactory manner (Appellant's Exhibits 2 and 3). It was the director of the institution who initially requested the reclassification of both Eschenfeldt and another Officer 4. There is nothing in the record as to why Eschenfeldt was never interviewed for one of the five Officer 5 openings at Oakhill, nor why Raymond (the other Officer 4 whose reclassification was also denied in May, 1978, by DHSS) was subsequently promoted in July, 1978. It is also undisputed that at least one Officer 3 who

¹See Polinske et al v. Schmidt & Wettengel, 74-101 (October 17, 1975) in which the predecessor Personnel Board affirmed on the merits the denial of reclassification from Officer 5 to Officer 6.

ranked below Eschenfeldt on the Officer 5 certification list was promoted in November, 1977.

In light of all these circumstances and the failure of the institution either to request an acting assignment or to remove Eschenfeldt from the job, the Commission concludes that the assignment of Officer 5 duties to Eschenfeldt was not on a temporary basis. The fact remains that he continued to perform the duties of a shift supervisor, Officer 5 level, until after December 19, 1978, at which time his supervisor received the letter of reprimand from the Administrator of the Division of Corrections.

The Commission also concludes that there was a logical and gradual change in the duties and responsibilities of the appellant beginning on July 1, 1977, when Oakwood State Camp became Oakhill Correctional Institution. Despite the fact that there was an overnight change in organizational structure, the record clearly establishes that there was a gradual and logical change in the work environment, namely in the increased number of residents, the allocation and staffing pattern, the resulting change in reporting relationships, and the increased program aspects of the shift supervisor responsibilities. As the institution grew and work environment changed, so did Eschenfeldt's duties and responsibilities. The instant case should be distinguished from Blood et al v. DP, 78-278-PC (December 17, 1979), in which the Commission affirmed the respondent's decision denying appellant's reclassification request. In Blood the Commission concluded that there was not a logical and gradual change in the duties and responsibilities of appellant's positions within the meaning of s. PERS 3.02(4)(a), WAC, and that the respondent's decision to open the positions to competition was appropriate, stating (p. 17):

". . .once the decision was made. . .it took some time for the appellants to acquire the ability to function fully in these areas.

"However, what is of most significance to the Commission is that the decisions in question resulted in significant substantive conceptual changes in the duties and responsibilities of the appellants' positions even though these changes took some time to implement fully."

Eschenfeldt performed fully at an Officer 5 level as soon as the July first change occurred. As the institution grew and its staffing and programs changed, Eschenfeldt continued to perform satisfactorily at the 5 level. Nor can the institutional changes which occurred at Oakhill be categorized as "significant substantive conceptual changes in the duties and responsibilities" of the position.

ISSUE # 3

Having established that his position should be classified as Officer 5, the appellant is entitled to compensation from the effective date of reclassification, which shall be the date on which Eschenfeldt would have been reclassified had his request been granted by the Division of Personnel on October 5, 1978.

Dennis Eschenfeldt v. DHSS & DP
Case No. 78-257-PC
Page 12

ORDER

The decision of the respondent, Division of Personnel, dated October 5, 1978, is rejected and the matter is remanded to the respondents for action in accordance with this decision.

Dated _____, 1981

Charlotte M. Higbee
Chairperson

Donald R. Murphy
Commissioner

Gordon H. Brehm
Commissioner

CMH:mgd

Parties

Mr. Dennis Eschenfeldt
DHSS - WCI - Oakhill
P.O. Box 238
Oregon, WI 53575

Mr. Donald Percy
DHSS, Secy
1 West Wilson St.
Madison, WI 53702

Mr. Charles Grapentine
149 E. Wilson St.
Madison, WI 53702