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 *
 LAURIE B. KIMBALL, *
 *
 Appellant, *
 *
 v. *
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 Administrator, DIVISION OF *
 PERSONNEL, & Secretary, *
 DEPARTMENT OF HEALTH *
 AND SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 79-236-PC *
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 * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to s.230.44(1)(b), Wis. Stats., of the effective date of a reclassification.

FINDINGS OF FACT

1. At all relevant times the appellant has been employed in the classified civil service in a position classified as a registered nurse at Mendota Mental Health Institute.
2. In the aforesaid classification series, reclassification from the Registered Nurse 1 to Registered Nurse 2 level is based on the attainment of certain necessary "training and experience and demonstrated performance," see s.Pers 3.02(4)(b), Wis. Adm. Code.
3. By memo dated May 4, 1979, Appellant's Exhibit 1, the appellant's supervisor recommended that she be reclassified to Registered Nurse 2.
4. Due to the fact that both the appellant's supervisor and the director of nursing were new to their positions, they were not aware of the internal procedure at MMHI for requesting that such reclassification actions be initiated, and assumed that the May 4, 1979, memo (Appellant's Exhibit 1) would be sufficient

for this purpose.

5. In fact, the MMHI internal procedure for this type of reclassification required that the employes' supervisor complete a form (see Appellant's Exhibit 8) certifying that in the supervisor's opinion the employe has the necessary training and experience for reclassification.

6. Because the supervisor's recommendation was made by memo, appellant's Exhibit 1, rather than on the standard form, the MMHI personnel office did not recognize it as such a recommendation and simply filed Appellant's Exhibit 1 in the appellant's personnel file following its receipt on May 18, 1979, rather than initiating a reclassification.

7. When it became known that there had been no processing of the reclassification, the appropriate form (Appellant's Exhibit 8) was completed and submitted.

8. By memo to DHSS Bureau of Personnel from the MMHI personnel manager dated June 21, 1979, Appellant's Exhibit 9, an effective date of reclassification of June 17, 1979, was requested "so that the employe will not be penalized for administrative error."

9. Reclassification of appellant's position was finally approved on June 28, 1979, with an effective date of July 15, 1979, see Appellant's Exhibit 2, DHSS having rejected the requested June 17, 1979, effective date.

10. The appellant possessed the necessary training and experience and demonstrated performance for reclassification to Registered Nurse 2 not later than May 4, 1979.

11. The appellant was in all respects qualified for reclassification to Registered Nurse 2 not later than May 4, 1979.

12. If the May 4, 1979, memo, Appellant's Exhibit 1, had been submitted on the proper form and/or processed in the normal manner as a reclassification recommendation by the MMHI personnel office, the effective date of the reclassification

would have been June 17, 1979, in accordance with respondents' standard operating procedure as reflected by Respondent's Exhibit 1.

13. The failure of MMHI management to have processed the appellant's reclassification in a manner that would have lead to an effective date of reclassification to Registered Nurse 2 of June 17, 1979, was due to a ministerial mistake or error, as set forth in s.Pers 5.037, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to s.230.44(1)(b), Stats.

2. The failure or refusal of the respondents to establish an effective date for the reclassification of the appellant's position of June 17, 1979, was an abuse of discretion and in violation of s.Pers 5.037, Wis. Adm. Code.

3. The failure or refusal of the respondents to establish an effective date of June 17, 1979, for the reclassification of appellant's position, was in violation of s.230.09(2)(a), Stats.

4. The appellant is entitled to an effective date of reclassification to Registered Nurse 2 of June 17, 1979.

OPINION

There is no question but that MMHI management mishandled Ms. Kimball's reclassification and thus caused the effective date of that reclassification to have been several weeks later than it would have been had it been handled in accordance with normal procedures. The real question is whether there is any way to remedy that situation on this appeal.

The respondents argue, in essence, that for the Commission to require an earlier effective date would be, in effect, a grant of back pay and that the Commission lacks such authority, citing DER v. Wis. Personnel Commission (Doll),

Case No. 80-1689 (Dane Co. Circuit Court, 8/18/80).

In that case, the Commission determined that the administrator had denied incorrectly Mr. Doll's reclassification request, and that he was entitled to back pay from the date that the administrator had indicated would have been the effective date had the request been granted. The court upheld the Commission's determination that the reclassification denial was incorrect, but held that the Commission lacked the authority to in effect require back pay. This was based on the theory that s.230.43(4), Stats., provides for back pay with respect to certain specific transactions, and since the denial of reclassification was not included, an employe improperly denied reclassification was not entitled to back pay.

The Commission's remedial authority is on its face quite broad. Following a hearing it must either "affirm, modify, or reject the action which is the subject of the appeal," and if the action is modified or rejected, it may issue an enforceable order "to remand the matter to the person taking the action for action in accordance with the decision." S.230.44(4)(c), Stats. It may be the case, as set forth in the Doll Circuit Court decision, that because there are only a limited number of specific transactions set forth in the civil service code with respect to which an employe is entitled to back pay, that those are the only situations in which the Commission can require the payment of back pay as part of its remedial powers under s.230.44(4)(c), Stats.

However, s.230.43(4), Stats., does not include all of the transactions in connection with which an employe may receive back pay. The rules found in the Wisconsin Administrative Code have the force and effect of law. See s.227.01(9), Stats. Section Pers 5.037, Wis. Adm. Code, provides as follows:

"Retroactive salary increase or decrease. Except for action in accordance with section 16.05(1)(e), Wis. Stats., or to correct

an error, no pay increases or decreases shall be retroactive."

Although this section is worded in a negative manner, it clearly recognizes the authority for a retroactive pay increase "to correct an error."

Webster's New World Dictionary, (Second College Edition), defines "error" as "something incorrectly done through inadvertance or carelessness; mistake." In its discussion of synonomous terminology, this source draws the following distinctions:

"error implies deviation from truth, accuracy, correctness, etc., and is the broadest term in this comparison (an error in judgment, in computation, etc.); mistake suggests an error resulting from carelessness, inattention, misunderstanding, etc., and does not in itself carry a strong implication of criticism (a mistake in reading a blueprint)."

In this case, the improper handling of the appellant's reclassification can be characterized as a ministerial error or mistake. Simply put, the appellant's supervisor failed to submit her recommendation for reclassification on the right form, the personnel office failed to recognize it as such a recommendation, and the document was filed away. This is not a situation, such as in the Doll case, where the agency made a judgment about the proper classification level which the Commission, following a de nouveau hearing, determined was incorrect. It was a case of a clerical or administrative error.

In the opinion of the Commission, MMHI did commit an "error" within the meaning of s.Pers 5.037 in the handling of the reclassification of appellant's position, and a retroactive pay increase to correct that error is permissible.

DHSS admits that the reclassification request was mishandled. However, it defends their denial of the June 17, 1979, effective date, on the ground that the policy determining effective dates of reclassifications, Respondent's Exhibit 1, turns on the date that the reclassification request and appropriate attachments are received by the DHSS Bureau of Personnel and Employment Relations. Since this policy makes

no provision for the computation of an effective date except for the date that the reclassification request and attachments are received it is argued that no other date is possible. However, the failure of the policy to mention that exceptions are possible in appropriate cases to correct errors in accordance with s.Pers5.037, Wis. Adm. Code, should not be read as an attempt by the administrator to negate the possible application of s.Pers 5.037. This rule can apply to a number of kinds of transactions. It would be superflous for every statute, rule or policy that might be affected by this rule to have a specific reference to it.

In the opinion of the Commission, to the extent that s.Pers 5.037 is permissive - i.e., that it permits, in the exercise of the agency's discretion, and does not require, the agency to make a pay increase retroactive to correct an error - that discretionary authority was abused in this case by the failure to act to correct an error which was clearly a ministerial mistake.

Furthermore, in the opinion of the Commission, the respondents' handling of this matter constituted a violation of s.230.09(2)(a), Stats. This statute requires that positions be classified and reclassified on the basis of their "duties, authority, responsibilities or other factors recognized in the job evaluation process." These "other factors" include the "attainment of specified training and experience and demonstrated performance by an incumbent in a position identified in a classification series where the class levels are differentiated on this basis," see s.Pers 3.02(4)(b), Wis. Adm. Code, such as the Registered Nurse series. In this case, the appellant/incumbent was in all respects qualified for reclassification not later than May 4, 1979, and in the normal course of the administrative process, but for the mistake that was made, her position would have been reclassified effective June 17, 1979. Consequently, the continued classification of her position as a Registered Nurse 1 after June 17, 1979, was not based on its "duties, authority, and responsibilities or other factors recognized in the job evaluation process."

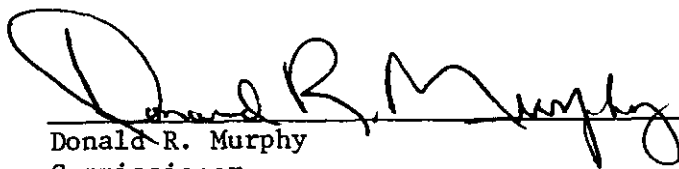
Inasmuch as the establishment of the effective date of appellant's position was affected by error, constituted an abuse of discretion and a violation of the civil service code, and that s.Pers 5.037 provides clear authority for a retro-active pay increase to correct an error, it is the opinion of the Commission that on remand the appellant is entitled to have the effective date of the reclassification adjusted to June 17, 1979, with appropriate intervening salary adjustments.

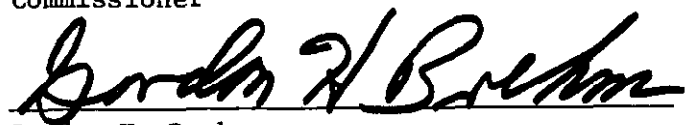
ORDER

The action of the respondents establishing the effective date of the reclassification of appellant's position from Registered Nurse 1 to 2 at July 15, 1979, is modified, and this matter is remanded to the respondent for action in accordance with this decision.

Dated April 23, 1981

STATE PERSONNEL COMMISSION


Donald R. Murphy
Commissioner


Gordon H. Brehm
Commissioner

AJT:mgd

Parties

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