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JULIA T. DOLPHIN,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 AGRICULTURE, TRADE AND  
 CONSUMER PROTECTION, and  
 Administrator, DIVISION OF  
 PERSONNEL,  
 Respondents.

Case No. 79-64-PC

\* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This case concerns the denial of a request for reclassification of the appellant's position from Regulation and Compliance Investigator 3 (PR5-11) to Regulation and Compliance Investigator 4 (PR5-12). The issues noticed for hearing were:

Is appellant's position properly classified as Regulation Compliance Investigator 3, 4, or 5?

Corollary: Whether or not the Department of Agriculture, Trade and Consumer Protection changed appellant's job duties and responsibilities because of appellant's appeal of the denial of her reclassification request.

Parties filed post-hearing briefs on respondent's objection to the corollary issue on the grounds that the Commission does not have subject matter jurisdiction to hear that issue.

FINDINGS OF FACT

1. The appellant Julia Dolphin is a permanent employe of the Department of Agriculture, Trade and Consumer Protection (DOATCP) classified as Regulation Compliance Investigator 3. (RCI 3) By memorandum to her supervisor, Tom Crist, Assistant Administrator, Division of Consumer Protection, DOATCP, dated November 13, 1978, Dolphin requested reclassification to RCI 4. (App. Exh. 20)
2. By memorandum dated March 2, 1979, E. A. Sholts, DOATCP Personnel

Administrative Officer, denied Dolphin's request. (Resp. Exh. 1)

3. Dolphin filed a timely appeal on March 7, 1979. (Comm. Exh. 1)

4. Dolphin was originally appointed to the positions of Consumer Protection Investigator 1 (CPI 1) in the Division of Food and Standards, Bureau of Special Services, on December 10, 1973. William Hanson, Bureau Director, was her immediate supervisor; N. E. Kirschbaum was Division Administrator. Her position was reclassified to CPI 2 on August 17, 1975, and to CPI 3 on December 19, 1976. From late 1975 until November, 1977, the Products Safety Unit, in which Dolphin worked, was under the direct supervision of Robert Probst, Director of the Bureau of Standards. Because of the illness of the senior investigator, Dolphin worked alone most of 1976.

5. In January, 1977, Michael Moriearty was hired as a CPI 1 and Probst directed Dolphin to take him along on investigations and train him.

6. In 1977, Probst also directed Dolphin to develop a statewide surveillance program to ascertain compliance with Product Safety laws and regulations. (App. Exh. 104). Dolphin completed this assignment.

7. On October 3, 1977, Probst approved a new position description for Dolphin to reflect her duties as the department's expert in product safety. The job summary read:

Under direct supervision of a Bureau Director, serve as lead worker, the consumer protection investigator makes investigations, takes enforcement action, and issues public information regarding consumer product safety throughout the state so as to fulfill the Department's goal to insure the safety of consumer products and in compliance with the Wisconsin Product Safety Law 100.37-43. (App. Exh. 8)

8. Product Safety was a new field for DOATCP. The Wisconsin program originated essentially in 1976, following the passage of Sections 100.37 and 100.41-100.43, Stats. in 1975. Ch. AG72 Wis. Adm. Code (WAC) implementing the Hazardous Substance Act (§100.37 Stats.) became effective February 1, 1978. Dolphin assisted in the development of the legislation and worked with DOATCP legal counsel in the development of the AG72 rules. She was consulted subsequently regarding legislative changes.

9. The duties and responsibilities of the product safety unit are two-fold:

- a. To conduct product safety investigations pursuant to §§100.37-100.42 Stats.
- b. To fulfill requirements of contracts, negotiated between DOATCP and the federal Consumer Product Safety Commission (CPSC).
  - (1) The Information and Education (I and E) contract required DOATCP to conduct public informational activities and file quarterly reports
  - (2) Under the enforcement contracts, DOATCP received monthly lists of assignments which combined investigations and inspections.

10. Dolphin made recommendations to Probst (and later to Tom Crist, when he became her supervisor in October, 1977) regarding the annual enforcement contracts negotiated with CPSC, and she was instrumental in the development of the I and E contract running from October 1977 - October 1978.

11. Up to and including the time of this appeal, Dolphin was responsible for managing the contracts, insuring that the product safety staff fulfilled the requisite number of inspections and performed product recall

checks. She made work assignments and prepared all reports necessary to satisfy the contracts and receive payment. She also maintained DOATCP contacts with the CPSC regional office in St. Paul.

12. In July 1977 the Bureau of Consumer Protection was created in DOATCP; late in October, 1977, the product safety unit was transferred to that division. Tom Crist became Dolphin's supervisor; he also served as acting administrator of the new division until Mary Kay Ryan was appointed administrator in November 1977. Crist became assistant administrator and Director of the Bureau of Consumer Protection. Although Joe Agnes became supervisor of the Madison office of the Bureau, Crist continued to supervise Dolphin and Moriearty. During 1977 and 1978, Crist instructed Dolphin to continue functioning as she had under Probst. In December, 1978, Tom Redman became supervisor of the Madison office, but Crist continued to supervise Dolphin and Moriearty until August 1979.

13. Neither Crist nor Agnes nor Redman had any experience in the area of product safety.

14. Moriearty's position was reclassified to CPI 2 in 1978. Although he and Dolphin discussed assignments from the standpoint of expertise, interest, and geographic location (the latter to avoid duplicative travel), Dolphin determined priorities and assigned and reviewed Moriearty's work. Moriearty was reclassified as RCI 3 in March 1979; he continued to consult with Dolphin until late in 1979.

15. In 1979 Crist directed Dolphin to initiate investigations into products she believed to be hazardous. (Resp. Exh. 24)

16. From November 1977 until after the denial of her reclassification request, Crist continued the reference to Dolphin as "lead investigator" and "lead worker" in her Management by Objective (MBO) reviews and position description as well as to her responsibility for statewide enforcement of product safety laws.

17. Dolphin's position description was updated and signed by Sholts on February 27, 1979, prior to his desk audit of her position. The language is virtually identical with that in her 1977 position description and continues to refer to her as a lead worker, making investigations, taking enforcement action, and issuing public information statewide.

18. During this period (1977-78) product safety was a complex program to administer because of the newness of the legislation and the lack of available legal precedents.

19. Dolphin did all types of investigations, including the most complex, on a statewide basis. Some involved long-term, ongoing investigations of hazardous products in various areas of the state and/or multiple complaints.

20. Under Probst, the regional offices were directed to report product safety problems and complaints to Dolphin, which they continued to do regularly until November 21, 1979, when Crist instructed the regional offices to refer all such matters to Redman. (App. Exh. 50 & 51). Dolphin directed the Division staff in the regional offices regarding inspections she assigned to them and holding orders she asked them to write up, as necessary. She provided training to investigators in La Crosse and Eau Claire on poison prevention and packaging.

21. At the time a personnel management survey of investigator positions was being conducted, during the summer of 1977, Dolphin asked Sholts about possible reclassification to the then CPI 4 level. Sholts advised her that there were no 4's in DOATCP.

22. As the result of the survey, Dolphin's position was reallocated from CPI 3 to RCI 3 in late summer of 1978, based on a new position series adopted in July and issued in August 1978. Dolphin did not appeal.

23. In October 1978 Dolphin discussed the possibility of her reclassification to RCI 4 with Crist. He advised her to submit a written request, which she did on November 13, 1978. Although Dolphin received no written notification, Crist and Ryan in effect denied her request in December 1978.

24. John Jonas and John Kimble, both of whom are also investigators in the Consumer Protection Division in the Madison office but with different areas of specialty than the appellant, were also reallocated for CPI 3 to RCI 3 in August of 1978 following the survey. Jonas was reclassified to RCI 4 in October 1978 and Kimble a month or two later. (There is no evidence in the record concerning the basis of their reclassifications.)

25. On November 15, 1978, Sholts received authorization from the Division of Personnel from the delegated application of the RCI 4 classification within DOATCP, based on the following allocation factors which he had submitted to the Division on November 2, 1978:

1. More than fifty percent (50%) of the work activities assigned to a position in this class are of a statewide nature and are performed under the direction of the Administrator's office. (The position may be located in a regional office but would report to the office supervisor for administrative purposes only).
2. The work is of a lead nature over lower level investigators who may be located in regional offices relative to data and evidence collection in the special program areas of the "4" level investigator.

3. The statewide responsibility for major program activities must be in one of the following areas:
  - (a) auto repair, consumer product safety, or a comparable multi-faceted program area.
  - (b) two or more specific statutory areas where the research and investigations are of a varied nature and involve the testing, modification, revision and development of laws, rules and regulations as well as the investigation of specific cases.  
(App. Exh. 5)

26. Dolphin's request was forwarded to Sholts in January or February 1979. Sholts consulted with Ryan, Jonas, Probst, Crist, Dolphin, and the personnel specialist who handled the survey, to ascertain their opinions regarding the complexity of the program; he also did a desk audit of her position description and those of other investigators at the RCI 3 and 4 levels, including other divisions of DOATCP and the Departments of Justice and Health and Social Services. Based on a comparative analysis of Dolphin's position duties with the RCI classification standards, Sholts denied her request on March 2, 1979. (Resp. Exh. 1)

27. Dolphin's position does not meet the classification standards of the RCI 5 level. She is not "independently responsible for providing and coordinating a comprehensive investigative service... under very general supervision of higher legal or administrative personnel." (Resp. Exh. 3)

28. The position standard for CPI 3 (Comm. Exh. 5), which was Dolphin's position at the time of the 1978 reallocation, is comparable to the RCI 4 standard. (Resp. Exh. 3) The RCI 4 definition and the Model Position for Consumer Protection use much of the same or similar language: "very responsible," "senior staff investigator," "independently review complaints, perform in depth investigations relating to individual and large scale violations, coordinate the activities of other investigators and/or cooperating agencies." Dolphin fulfilled all these requirements as a CPI 3 prior to the 1978 reallocation. (Finding of Fact #22)

29. The RCI 4 classification best fits the duties and responsibilities of the appellant's position. She functioned as both a lead investigator and a senior investigator in the area of product safety. (App. Exh. 3 & 7, Comm. Exh. 5) Dolphin's position also met the allocation factors prescribed by the Division of Personnel (App. Exh. 5).

#### FINDINGS RELATING TO COROLLARY ISSUE

30. Dolphin received many requests to speak to groups throughout the state and, from 1975 until the fall of 1978, her supervisors encouraged her to do so. Those activities became the basis of the 1977-78 I & E contract with CPSC. In December 1978 Dolphin was instructed to keep the supervisor informed of such requests and to obtain advance approval for speaking engagements.

31. Early in her career with DOATCP, Dolphin was encouraged to participate in organizations related to Consumer Protection and DOATCP programs in



order to strengthen the department's liaison with consumer groups.

a. Wis. Nutrition Council (WNC) Originally N. E. Kirschbaum, Administrator of the Division of Food and Standards, assigned Dolphin to attend a quarterly meeting as a representative of the division. Although food is exempt from product safety laws and the Marketing Division had a representative on the WNC, Kirschbaum was concerned about the initial labeling of food products. Both Dolphin's supervisors prior to reorganization told her to continue attending the quarterly meetings. The WNC asked Dolphin to be a consumer member; she joined in 1974 and was elected to the executive committee in 1976. In January 1978, Crist advised Dolphin that her participation on state time was inappropriate; however, Kirschbaum requested that she be permitted to continue until someone from the Food Division was assigned. In December 1978, during her MBO review, Crist told Dolphin to stop attending, and on May 18, 1979, she received a memo to that effect. (App. Exh. 49) Crist's reasons were that there was not enough correlation to product safety; Dolphin was having scheduling problems with her regular work; and, although Kirschbaum had not yet appointed anyone from his division, the department was represented by the Marketing Division.

b. Product Safety Advisory Council (PSAC). This citizen group advises DOATCP on product safety matters. At the direction of her supervisor, Dolphin began attending the monthly meetings in 1974 as an ex officio member, serving as staff resource. As such, she recommended individuals to the department for possible membership on the council, prepared the agenda, and performed the functions of its secretary (minutes,

mailings, etc). On June 1978, Dolphin was directed to work more closely with Ryan in developing the agenda. In March, 1979, all responsibility for work with PSAC was given to Gary Grimm, Consumer Affairs Assistant.

c. Wis. Consumer League (WCL). Dolphin became a member in 1973. When she was elected to the Board of Directors in May, 1976, she received a congratulatory memo from the Deputy Secretary of the Department. On May 18, 1979, Crist instructed Dolphin to participate in the WCL only as a private citizen, because the department must maintain a posture of objectivity in the public's mind as to regulatory and enforcement issues that fall within its jurisdiction.

(App. Exh. 49)

32. In 1976-77, Probst recommended that Dolphin continue and expand these activities. Initially Crist told Dolphin to continue to function in her job as she had before reorganization. He considered Dolphin's participation an achievement and commended her for strengthening liaison with consumer groups, media, and other agencies. (App. Exh. 10)

33. All these activities were listed on Dolphin's itineraries and weekly work summaries. Until she was directed not to participate on state time, her supervisors approved reimbursement for all travel and other expenses related to these activities.

34. Shortly after she became administrator of the new division, Ryan became aware of Dolphin's participation in these organizations on state time, and had questioned their propriety. Ryan made the decision to withdraw Dolphin from these activities in the spring of 1979.

35. The changes in Dolphin's job duties and responsibilities relating to the WNL, PSAC, and WCL were based on sound management principles for the purpose of making the consumer protection program more efficient. These changes did not involve higher level work, nor did they affect the classification level of the position.

36. The changes whereby Dolphin reported to Redman, a regional office supervisor, instead of Crist, and the instruction to the other regional offices to refer all product safety matters to Redman (App. Exh. 51) did not affect the classification level of the position. Although the model Consumer Protection position for RCI 4 provides "Work at this level is normally performed under the general supervision of a program director rather than a field supervisor" (Resp. Exh. 3), the positions of Jonas and Kimble had been reclassified to RCI 4 and they also reported directly to the supervisor of the Madison regional office.

37. The change in Dolphin's supervision was consistent with the organizational structure that had been established in the division. The delay in implementing the supervisory relationship between the two product safety investigators and the Madison regional supervisor was based on the initial lack of knowledgeability in that program area on the part of, first Agnes, and then Redman.

38. Dolphin continued to be the division's senior product safety investigator after these changes.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over the principal issue pursuant to §230.44(1)(b) Stats.
2. The burden of proof is on the appellant to establish to a reasonable certainty by the greater weight of credible evidence that her position was more properly classified as an RCI 4 or as an RCI 5. Reinke v. Personnel Board 53 Wis. 2d 123 (1971)
3. The appellant has met her burden of proof as to the RCI 4 level but not as to the RCI 5 classification. Her position is more properly classified at the RCI 4 level.
4. The Commission lacks jurisdiction over the question of whether the respondent altered appellant's job responsibilities as a means of retaliation for her appeals of the reclassification decision.

OPINION

The primary issue noticed for hearing was whether the appellant's position should be classified at the Regulation Compliance Investigator (RCI) 3, 4, or 5 level. As a corollary question, the appellant has asked the Commission to consider whether the respondent's department altered appellant's job responsibilities due to her decision to appeal the denial of her reclassification request.

It is well established that the Commission must judge the denial of a reclassification based upon the position's duties at the time of the denial. Alisma et al v. Wettengel, Case Nos. 73-107 through 109 (7/3/75). Therefore, any retaliatory changes that the respondent may have made in the appellant's duties after the appeal was filed could have no effect on the Commission's review of the reclassification decision. In addition, as a general matter, the

Commission lacks the authority to review an agency's decisions regarding the assignment or reassignment of duties and responsibilities. Roberts v. DHSS, Case No. 81-44-PC (7/27/81), see also Teggatz v. DHSS, Case No. 79-73-PC (12/13/79) as appealed in Teggatz v. State of Wisconsin (Personnel Commission), No. 80CV1092 (Winnebago County Circuit Court). Only when there is a wholesale reduction in duties for essentially disciplinary purposes, resulting in a downward reallocation and constituting a constructive demotion does the Commission obtain jurisdiction in this area. Juech v. Weaver, Wis. Pers. Bd. 450 (1/13/72). In the instant appeal, the appellant has failed to make any allegations of a constructive demotion. Therefore, based upon the above analysis, the Commission concludes that it lacks subject matter jurisdiction over the corollary issue as identified.\*

With respect to the primary issue, the Commission still must limit itself to the facts as they appeared as of the date of the reclassification denial and analyze the RCI 3, 4, and 5 classifications, accordingly. This opinion will focus on the RCI 3 and 4 levels, based on the finding that the appellant's position does not meet the classification standards for the RCI 5 level. (Finding #27)

The denial of the appellant's request for reclassification was based on a comparative analysis of her duties and the RCI classification standards. E. A. Sholts, the DOATCP Personnel Administrative Officer, also performed a desk audit of other positions at the RCI 3 and 4 levels, including some in the Departments of Justice and Health and Social Services as well as in other

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\*Although the Commission lacks subject matter jurisdiction over the corollary issue as identified, the Decision addresses the parties' factual contentions regarding the issue. See Findings of Fact #30 through 38.

divisions of DOATCP. (Resp. Exh. 1) The only position descriptions placed in evidence in addition to the appellant's (App. Exh. 7 and Resp. Exh. 2) were those of Michael Moriearty (Resp. Exh. 4), and John Jonas, (Resp. Exh. 6), who were also investigators in the Madison regional office of the Consumer Protection Division. Testimony was also heard regarding the reclassification of another investigator in the Madison Office, Paul Kimble.

Moriearty's position description was new and had been developed at about the same time as Dolphin's, following the initial denial of her reclassification request by the Consumer Protection Division. Moriearty was reclassified to RCI 3, effective March 11, 1979; Kimble's reclassification to RCI 4 was effective in March of 1979. Sholts approved Moriearty's position description on March 2, 1979, the same day he denied the appellant's reclassification; he approved Kimble's position description a few weeks later, although both Kimble and Redman (his supervisor) had signed it over a month earlier. Jonas' position description was for CPI 3, signed by Sholts in November, 1977, at the same time as the appellant's earlier position description (App. Exh. 8). There is no revised position description for Jonas, only a notation on the 1977 position description that he was reclassified to RCI 4 on 10/08/78. (App. Exh. 32).

These position descriptions are substantially similar, with the following notable distinctions:

1. Most of the language on the two Dolphin position descriptions is identical. The job summaries of both state that she serves as a lead worker, regarding Product Safety, §100.37-43, Stats.
2. Moriearty's 1979 position description is almost identical to Dolphin's 1977 position description, except that the job summary makes no reference to lead worker and does refer to

other duties under additional sections of the product safety statute, when assigned.

3. The job summary for Jonas states that he is a "senior staff investigator and statewide specialist" in the statutory and WAC areas specified, which are different from Dolphin and Moriearty; the duties listed are very similar, although different language is used.

These position descriptions coupled with the credible testimony adduced at the hearing support the finding that Ms. Dolphin's position was more properly classified at the RCI 4 level.

Personnel classifications is not an exact science. In appeals of reclassification denials, it is usually the case that the employe's duties and responsibilities overlap in some respects both of the class specifications in question. The employe is not entitled to reclassification because some aspects of his work fall within the higher class. Resolution of the question involves a weighing of the specifications and the actual work performed to determine which classification best fits the position. An exact fit is very rarely possible. (Kailin v. Weaver and Wettengel, 73-124-P.B. (11/28/75))

In the instant case, the definition section of the RCI 4 standards "best fits" the appellant's position. She was consistently identified as a lead worker, and lead investigator with statewide responsibilities, by her supervisors. She was the department's "expert" in product safety, and her expertise was utilized for training and advising other investigators in product safety. Only after she appealed the denial of her reclassification request (and a full year after that request) were other regional offices directed to forward product safety complaints to the attention of her supervisor. Even then, the appellant continued to be the "expert" in the cited sections of the law: the Hazardous Substances Act (§100.37, Stats.), Flammable Fabric Law (§100.41, Stats.), Product Safety Law (§100.42, Stats), and Packaging Standards (§100.43, Stats.).

In 1977 the appellant was asked to develop a statewide surveillance program to ascertain compliance with these laws and the product safety regulations. Late in 1978 her new supervisor directed her to initiate investigations into products she believed to be hazardous. She handled the administration of the CPSC contracts and helped to develop the I & E contract which began in October, 1977. She worked independently because, beginning in October, 1977, her first line supervisors in the new Consumer Protection Division were not knowledgeable in the area of product safety. Until August, 1979, she performed under the general supervision of either a Bureau Chief or Deputy Administrator of the division.

The RCI 4 Model Position for Consumer Protection also provides the "best fit" for the appellant's job duties and responsibilities. She was "responsible for conducting an investigation of statewide scope that requires difficult interpretations of relatively vague or untested laws, rules, and regulations." She also coordinated statewide safety investigations whenever she identified a hazardous product that was distributed throughout the state.

Attempts of respondent's witnesses to explain away the lead investigator designation, the statewide nature of appellant's responsibilities, and the complexity of administering new laws and regulations were not persuasive. The preponderance of the credible evidence established the RCI 4 as the appropriate level for the position.

It is undisputed that the appellant did not appeal the reallocation of her position from CPI 3 to RCI 3. It is also undisputed that she had initiated discussions about her possible reclassification in the summer of 1977, while the survey was being conducted; that Sholts advised her at that time that there were no CPI 4 positions allocated to the department; that all the



DOATCP CPI 3 positions, including Jonas and Kimble, were reallocated to RCI 3; that Jonas' position was reclassified to RCI 4 on October 8, 1978; that, late in October the appellant's supervisor, Tom Crist, encouraged her to request reclassification in writing, which she did on November 13, 1978, and that on November 15, 1978, Sholts received authorization, on a delegated basis, for the inclusion of the RCI 4 in the department's allocation pattern. There is nothing in the record as to whether Jonas or Kimble appealed. However, both their positions subsequently were reclassified, not reallocated pursuant to Pers 3.02(2)(e). Under all the circumstances, the Commission considers the appellant's failure to appeal the reallocation irrelevant.

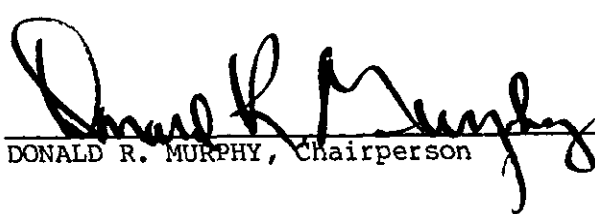
Between December 1976, when her position was reclassified as CPI 3, and the appellant's request for reclassification, there had been a gradual and logical change in her position. In October 1977, her position description was modified to identify her as a lead worker and to reflect her duties as the department's expert in product safety. She was responsible for implementing the new Information and Education contract which she helped develop, as well as administration of the CPSC investigation and inspection contract. She also was given the responsibility of training Moriearty and field staff regarding product safety. When the new division was created, Crist told her to continue functioning as she had previously, and he relied on her expertise in the area of product safety. All of these factors demonstrate a significant change in the level of her duties and responsibilities during the year following her reclassification and continuing the year thereafter.

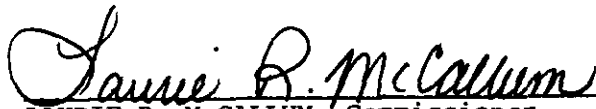
ORDER

Respondent's decision denying the reclassification of the appellant's position is reversed and this matter is remanded to the respondents for action in accordance with this decision.

Dated: July 26, 1982 STATE PERSONNEL COMMISSION

CH/jmf

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

Commissioner Phillips abstained from voting in this decision.

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