
 *
 BRICKLAYERS AND ALLIED *
 CRAFTSMEN UNION NO. 8, and *
 RANDALL J. RADISH, *
 *
 Appellants, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF *
 HEALTH & SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 81-367-PC *
 *

ORDER

The attached proposed decision and order is adopted and incorporated by reference by the Commission as its final decision and order in this matter with the following amendment to the opinion. On page eight, third line from the bottom, the words "its administrative proceedings" are deleted and replaced by the words "this instance."

Dated: May 28, 1982 STATE PERSONNEL COMMISSION


 DONALD R. MURPHY, Chairperson


 LAURIE R. McCALLUM, Commissioner


 JAMES W. PHILLIPS, Commissioner

AJT:ers

Parties

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STATE OF WISCONSIN

PERSONNEL COMMISSION

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PROPOSED
 DECISION
 AND
 ORDER

This matter is before the Commission as an appeal of respondent's classification of a position at the Ethan Allen School. A hearing on the merits was held on February 15, 1982. At the commencement of the hearing, appellant union moved that the incumbent of the position at issue be permitted to be added as a co-appellant. The motion was opposed by the respondents who at that point renewed a prior objection to the union's standing. The examiner withheld ruling on the motion, and testimony was received on the merits of the appeal. The parties declined to submit briefs but did make oral arguments.

FINDINGS OF FACT

1. At the prehearing conference in this matter, the respondent raised an objection to appellant's standing. A decision on the issue of standing was reserved.

2. At all times relevant to this proceeding, Randall Radish has been a journeyman bricklayer and mason and a member of the appellant union, Bricklayers and Allied Craftsmen Union No. 8.

3. Sometime prior to August 19, 1981, Mr. Radish saw an advertisement for a limited term position at the Ethan Allen School. The advertisement specified that the position was to be classified at the Facilities Repair Worker 3 (FRW 3) level, was to "assist in our maintenance department... for 3 months" and would receive a salary of \$6.648 per hour. The advertisement also noted that the "[a]pplicant must possess background and experience in masonry work and cement finishing."

4. After a successful interview, Mr. Radish was hired and began work on August 19, 1981. On that date he signed a Limited Term Employment Request/Report for the Facilities Repair Worker 3 position. His duties were described as follows:

Under general supervision, perform repairs to buildings and grounds. Duties include stucco patching, tuck-pointing, veneer work, interior plastering, fire-proofing of duct work and masonry and concrete repairs.

5. Mr. Radish worked in the position in question for a period of approximately 3 months.

6. The vast majority of Mr. Radish's work during the period falls within at least one of the following categories: brick and block construction, furniture and appliance moving, cleaning a garage/work area, pouring concrete slabs, storing fixtures; patching concrete steps, caulking, sidewalk replacement, asphalt (road) patching, repairing and replacing quarry and ceramic tile, hauling sand and repairing/replacing asphalt tile.

7. Mr. Radish spent no more than one-third of his time during the 3 month period in brick and block construction.

8. The position standards for the FRM 3 and Bricklayer and Mason (B&M) classifications include the following definitions and work examples:

FACILITIES REPAIR WORKER 3

Class Description

Definition:

This is responsible buildings and grounds maintenance and repair work. Employees in this class perform a variety of inspections, adjustments and repairs to buildings and grounds and make minor repairs to mechanical equipment. Positions at this level also function as a member of a concrete crew. Work is performed under the general supervision of higher level maintenance personnel.

Examples of Work Performed:

Prepares surfaces for painting and paints walls and segments of other interior and exterior surfaces.
Prepares rough woodwork as required in the alteration, repair and maintenance of buildings and equipment.
Builds forms and pours and finishes concrete floors, foundations, steps, retaining sidewalks and curbs.
Operates welding and cutting equipment.
Inspects, maintains and repairs parking lots.
Maintains and repairs roofs, cabinets, shelves, and internal and external trim.
Maintains and replaces screens and glass windows.
Repairs tile walls and floors.
Other assigned work may include tasks not specifically enumerated above which are of a similar kind and level.

BRICKLAYER AND MASON

Class Description

Definition:

This is journeyman bricklayer and mason work. Under general supervision, employees in this class perform bricklayer and mason work at the journeyman level of skill, normally on a full time basis; however, other related duties may also be assigned as necessary. In addition, positions in this class may also direct and instruct apprentices, helpers and other assistants.

8. (continued)

Examples of Work Performed:

Erects cement, concrete block, or brick foundations and walls.

Performs bricklaying and stone work according to blueprint or sketch.

Does interior and exterior bricklaying and masonry maintenance and repair work.

Erects scaffolds.

Sets ceramic tile

Sets and repairs marble.

Directs and instructs apprentices, helpers and other assistants in the trade.

Keeps records.

Makes reports.

9. Of the duties performed by Mr. Radish, only brick and block construction clearly falls within the B&M classification. The remaining work is more appropriately described by the FRW 3 definition and work examples.

10. Mr. Radish's LTE position is better described by the FRW 3 position standard than the B&M position standard.

11. The Commission takes official notice that the representation by the Wisconsin State Building Trades Negotiating Committee, AFL-CIO, and its appropriate affiliated locals (of which the appellant union is one) of state civil service employees classified as Bricklayer and Mason does not extend to limited term employees.

CONCLUSIONS OF LAW

1. Appellant union has standing in this matter with respect to seeking the reclassification of Mr. Radish's position.

2. Mr. Radish may be added as a co-appellant to this proceeding.

3. The appellants have the burden of proving that the respondent's decision to classify Mr. Radish's position as a Facilities Repair Worker 3 rather than a Bricklayer and Mason was incorrect.

4. The appellant has failed to meet that burden of proof.
5. The respondent's decision to classify Mr. Radish's position as a Facilities Repair Worker 3 was not incorrect.

OPINION

The respondent has objected to the appellant union's standing in this matter. The facts in this case indicate that the appellant union has standing to appeal the classification of Mr. Radish's position, but not to seek monetary relief.

As a general matter, associations have standing to sue on behalf of their members, Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

Even in the absence of injury to itself, an association may have standing solely as the representative of its members.... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1974) (Emphasis added)

There is no question that in the instant case, Mr. Radish, a member of the appellant union, could have filed a classification appeal on his own behalf. Instead of having Mr. Radish proceed as an individual, the appellant union chose to file the appeal itself, essentially on behalf of its member.

A 1976 ruling by the Commission's predecessor, the State Personnel Board, supports a finding that the union has standing to request the reclassification of its member's position. In Hoefl v. Carballo v. Knoll, Case No. 74-37 (5/24/76), the Board held that a president of a union local had standing to appeal a decision to reallocate positions held by various

union members, even though the interests involved were individual rather than collective. In the instant case, the position incumbent is a union member even though in filling the particular LTE position, he was outside of the scope of the collective bargaining agreement. The fact that Mr. Radish was not covered by the building trades agreement has no effect on the standing of the appellant union to represent Mr. Radish, who maintained his membership in the union during all times relevant to this matter. Compare Kaukl v. Earl, Case No. 74-127 (Personnel Board) (2/23/76) where in the course of ordering the appellant union president to file a written statement of the relief being sought, the Board stated that the union would lack standing to represent "non-union member L.T.E.'s" who were requesting that they be afforded permanent status.

An additional standing requirement, relating to the individual participation of the organization's members, is also relevant to this appeal:

[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to involve the court's jurisdiction.

* * *

[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

The present case, however, differs significantly as here an association seeks relief in damages for alleged injuries to its members. Home Builders [an association of firms engaged in residential construction in the Rochester, NY area] alleges no monetary injury to itself, nor any assignment of the damages claims of its members. No award therefore can be made to the association as such. Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of Home Builders who claims injury as a result of respondent's practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf. Warth v. Seldin, 422 U.S. 490, 511, 516, 517 (Emphasis added)

The net effect of this additional requirement is that an association may invoke a forum's power to grant declaratory, injunctive or other prospective relief, but may not seek individualized damages or back pay on behalf of its members. See also Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343; RWDSU, Local 194 v. Standard Brands, Inc., 540 F. 2d 864 (7th Cir., 1976); Wisconsin Federation of Teachers v. DP, Case No. 79-306-PC (4/2/82). It should also be noted that there is some question whether the Commission has the authority to award back pay in reclassification cases. See Department of Employment Relations v. Wisconsin Personnel Commission (Ralph Doll), Case No. 79 CV 3860, Dane County Circuit Court (8/18/80).

Because the appellant union specifically sought to require the respondent to pay Mr. Radish at the Bricklayer and Mason rate, the appellant

must be found to lack standing as to any such back pay issue. However, the Commission concludes that the appellant union does have standing to represent a member's interest in reclassifying his LTE position.

Adding Mr. Radish as a Party.

At the hearing in this matter, counsel for the appellant union moved that Randall Radish be allowed to be added as an additional appellant. The respondent objected.

The motion is properly construed as a request by the union to amend the pleadings and add Mr. Radish as a party. Parties before the Commission should be permitted substantial liberality in amending pleadings and amendments are not required to meet the standards applicable in court proceedings. Oakley v. Commission of Securities, 78-66-PC (10/10/78)

In proceedings conducted pursuant to the Federal Rules of Civil Procedure, substitution of parties may occur after the applicable statute of limitation has run where the "change is merely formal and in no way alters the known facts and issues on which the action is based." Staren v. American National Bank & Trust Co. of Chicago, 529 F. 2d 1257, 1263 7th Cir., 1976). In Staren, the court cited Moore's Federal Practice with approval for the proposition that new parties may be added "when the new and old parties have such an identity of interest that it can be assumed, or proved, that relation back is not prejudicial." Staren (supra) at 1263. While appeals before the Commission are not bound by the Federal Rules of Civil Procedure, the Commission does not believe that any stricter rule is called for in its administrative proceedings.

In the present case, counsel for the appellant indicated that he would also be representing Mr. Radish if the motion were granted. It is

also apparent that no prejudice could be shown to result from granting the motion, given the timely filing of the union's appeal and the identity of interest between the union and Mr. Radish. For the above reasons, the motion should be granted.

Respondent's Exhibit #7

In the course of the testimony by Mr. Anthony Tomaz, Jr., supervisor for the position in question, counsel for the respondent asked the witness whether he had used an activities log to reach his conclusions as to the time spent by Mr. Radish on different tasks and responsibilities. Mr. Tomaz stated that he had reviewed the log and it was the basis for his time estimates. Then on cross-examination of Mr. Tomaz, counsel for the appellant asked numerous questions regarding the precise meaning or interpretation to be given to various entries on the log. On redirect, the respondent had the log marked as Respondent's Exhibit #7 and moved its admission into evidence. Appellant objected, arguing that respondent had failed to comply with the Commission's rule requiring the parties to submit copies of their exhibits more than two working days prior to hearing. PC. 2.01, Wis. Adm. Code.

Under the circumstances presented here, the objection is inappropriate given the appellant's questions regarding the document during the cross-examination of Mr. Tomaz before the exhibit had been offered. Therefore, Respondent's Exhibit #7 should be admitted into the record.

Merits

Mr. Radish worked in the position in question for a period of three months. Both Mr. Radish and his supervisor, Mr. Tomaz, testified as to what tasks Mr. Radish actually performed during the period. Their testi-

mony showed that during the first month on the job, Mr. Radish spent roughly 70% of his time doing brick and block work, primarily at Ferber Hall. The rest of this period was spent moving furniture, cleaning a garage/work area, pouring a concrete slab, storing fixtures and patching some steps at the Vocational School Building. During the second month, Mr. Radish did some additional concrete block work at the "old carpenter's shop." However, Mr. Radish admitted that he spent roughly 50% of the second month doing road patching, approximately two days (i.e. 10%) pouring a sidewalk, as well as caulking and completing the Vocational School stair patching. On this record, the Commission concludes that Mr. Radish spent less than 20% of his time on brick and block work during the second month.

The final month on the job found Mr. Radish spending another 2-3 days on road patching, pouring some more concrete slabs at the gatehouse and hauling sand. However, for the bulk of the month (approximately three weeks) he repaired and replaced ceramic and quarry tile in various buildings at the school.

In determining whether the above named duties are better described in the position standards for the FRW 3 or B&W classifications, primary reliance must be placed on the work examples. An analysis of those work examples indicates that brick and block work is clearly described in the B&M examples ("Erects cement, concrete block, or brick foundations and walls,") but that the remainder of Mr. Radish's duties during the period are properly described in the FRW 3 examples:

Builds forms and pours and finishes concrete floors, foundations steps, retaining sidewalks and curbs.

Inspects, maintains and repairs parking lots.

Maintains and repairs roofs, cabinets, shelves, and internal and external trim.

Repairs tile walls and floors.

Other assigned work may include tasks not specifically enumerated above which are of a similar kind and level.

Some of the distinctions between the two classifications (i.e., setting tile vs. repairing tile and erecting concrete foundations vs. pouring and finishing concrete floors, foundations, steps and sidewalks) are narrow. However, the burden in this case is on the appellant to show that the position was incorrectly classified, and that burden has not been met.

In passing, it should be noted that the Commission's decision in this matter is based upon the position standards currently in force rather than any analysis of what is traditional mason and bricklayer work. The Commission is powerless to look beyond the legally adopted position standards.

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ORDER

Mr. Randall J. Radish is added as an appellant in this matter.
The respondent's decision in classifying Mr. Radish's position is affirmed
and this matter is dismissed.

Dated: _____, 1982 STATE PERSONNEL COMMISSION

KMS:jmf

DONALD R. MURPHY, Chairperson

JAMES W. PHILLIPS, Commissioner

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