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STATE OF WISCONSIN PERSONNEL COMMISSION

KIM E. PERO, Appellant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondents. Case No. 83-0235-PC	DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Stats. of the effective date of a reclassification, as a reclassification from Officer 1 to Officer 2 was delayed due to a disciplinary suspension without pay. Two interim decisions have been entered.

In the first, dated March 29, 1984, the Commission denied the respondents' motion to dismiss, which was based on the theory that there had been no decision by the Secretary of DER that would form a jurisdictional basis for an appeal. In a second interim decision dated August 31, 1984, the Commission resolved a dispute as to the proper statement of issues for hearing and ordered that the case proceed to hearing on the basis of the following issue:

> Whether or not the respondents' decision to effectively deny the reclassification of the appellant's position from Officer 1 to Officer 2 was correct.
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> Subissues:
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> 1. Whether or not respondent improperly refused to provide a written denial of reclassification of the appellant's position in November, 1983.

2. Whether the investigating officer, in recommending discipline, was required to advise the appellant in writing that the reclassification of his position would be affected by the imposition of discipline.

FINDINGS OF FACT

1. The appellant at all relevant times has been employed by DHSS in the classified civil service as an Officer at Dodge Correctional Institution (DCI).

2. Pursuant to standards established within the Division of Corrections (see Respondents' Exhibit 1), reclassification from Officer 1 to Officer 2 requires a "formal discipline free work record" for 6 months prior to the reclassification target date.

3. Copies of the aforesaid standards were sent to "concerned staff" at DCI, including appellant, but not including his supervisor, Captain Vandenhoek, under cover of memo dated March 10, 1983, Respondents' Exhibit 1, but the appellant did not receive a copy of said document.

4. At some time after September 20, 1983, and before September 27, 1983, the appellant and a union representative were involved in a predisciplinary meeting with the appellant's supervisor, Captain Vandenhoek, with respect to an Employe Conduct Report (ECR), concerning an alleged unauthorized leave.

5. At this meeting, the appellant asked Captain Vandenhoek whether the ECR would affect the date of his upcoming reclassification to Officer 2, and he responded that he did not know.

6. On September 27, 1983, the appellant was notified of a one day suspension without pay, effective October 4, 1983, for the aforesaid alleged unauthorized leave.

7. The appellant attempted to cause this suspension to be grieved under the collective bargaining agreement. However, the grievance

apparently was lost by the union representative before filing at the initial step and hence was not timely filed and the grievance was never heard on the merits.

8. On October 26, 1983, Captain Vandenhoek, having learned that the suspension would cause a delay in appellant's Officer 2 reclassification, pursuant to the policy set forth in finding #2, informed appellant of that fact.

9. The appellant eventually received a reclassification to Officer 2 with an effective date of March 18, 1984, approximately 6 months after the suspension.

10. The appellant never received any written notice that the effective date of his reclassification was being delayed because of the suspension.

11. Authority for reclassification from Officer 1 to Officer 2 has at all relevant times been delegated to DHSS by DER pursuant to §230.04(1m), Stats.

OPINION

Officer 1 and Officer 2 are part of a "progression series," and reclassification from Officer 1 to Officer 2 is pursuant to Ch. ER Pers 3, Wis. Adm. Code:

> §ER-Pers 3.015(3), RECLASSIFICATION. Reclassification means the assignment of a filled position to a different class ... based upon ... the attainment of specified education or experience by the incumbent.
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> * * *
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> §ER-Pers 3.015(2) Incumbents of filled positions which will be reallocated or reclassified may not be regraded if:
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> (a) The appointing authority has determined that the incumbent's job performance is not satisfactory;

> (b) The incumbent has not satisfactorily attained specific training, education or experience in a position identified in a classification where the class levels are differentiated on this basis....

The department's right to require a six-month period free of formal discipline as a prerequisite to reclassification/regrade to Officer 2 has not been challenged and is not at issue. What is at issue is whether the department had the obligation to have provided a written denial of reclassification in November 1983, when the effective date of the transaction was delayed due to the suspension, and whether the investigating officer, Captain Vandenhoek, had the obligation to have advised Mr. Pero in writing that the reclassification of his position would be affected by the imposition of discipline.

In order to address these issues, it is first necessary to examine the nature of the respondents' statutory responsibilities with respect to the classification process. Section 230.09, Stats., provides in part as follows:

> (1)... Each classification so established shall include all positions which are comparable with respect to authority, responsibility and nature of work required....
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> * * *
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> (2)(a)... the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The secretary may reclassify or reallocate positions on the same basis.

This statutory scheme provides a general mandate to DER (here, DHSS through delegation from DER) to accurately classify and reclassify positions. In a case such as this, DHSS has the responsibility to accurately evaluate the performance of the incumbent/appellant.

The subissues set forth above are primarily concerned with notice to the appellant related to his ability to protect his rights. While the

statutes do not address the question of what notice of this nature is required, this is covered to some extent in the Wisconsin Administrative Code. §ER-Pers 3.04 provides:

> Notice of reallocation or reclassification. Approvals or denials of reallocations or reclassifications shall be made to the appointing authority in writing. The appointing authority shall immediately notify the incumbent in writing.

Obviously, the first sentence of this rule has no application, in this case because, since authority for the transaction had been delegated to DHSS, the appointing authority itself made the decision on reclassification. The question is whether the second sentence -- "the appointing authority shall immediately notify the incumbent in writing" -- applies to a situation like this where there is not an open-ended denial of reclassification, but rather the reclassification is deferred due to the occurrence of a disciplinary action.

It is clear that had it not been for the suspension, the appellant's reclassification would have occurred six months before it did, and that someone in management or acting for management must have taken some action in this regard. In its interim decision and order dated March 29, 1984, the Commission characterized this as an effective denial of reclassification for purpose of appeal under §230.44(1)(b), Stats.

This raises the specific question of whether the requirement of written notice in §ER-Pers 3.04 applies to what may be characterized as a constructive denial of reclassification such as occurred here.

Since there is some ambiguity concerning the applicability of the rule, it is appropriate to consider the intent underlying the rule.

It seems fairly clear that the intent of the rule is to ensure notice to the employe of the transaction so that the employe will be aware of his or her employment status, and will be able to take steps to safeguard his

or her interests, such as by filing an appeal. To the extent that in a situation involving a "constructive" denial of reclassification, these goals are already provided by something other than written notice, it would seem less likely that it was intended that written notice be required with respect to such a transaction.

There are two basic types of reclassification transactions, see §ER-Pers 3.01(3), Wis. Adm. Code.

> Reclassification means the assignment of a filled position to a different class by the administrator as provided in §230.09(2), Stats., based upon a logical and gradual change to the duties or responsibilities of a position or the attainment of specified education or experience by the incumbent. (emphasis added)

If an employe requests a reclassification due to a "logical and gradual change to the duties or responsibilities of a position, §ER-Pers 3.03(3), Wis. Adm. Code, the employe will not know if the request is denied unless he or she receives specific notice to that effect. Requiring such notice in writing avoids ambiguity and establishes with some certainty when the time for appeal begins to run.

However, in a "progression series" such as Officer 1 - Officer 2, an employe could be expected to have some idea that a reclassification was not granted even in the absence of an explicit notice to that effect. In a typical case, it is likely that an employe would know he or she could expect under normal circumstances to be reclassified after a period of time and after having attained certain training and experience. The employe would know that no reclassification had been granted because he or she would not have received notification of same, after the expiration of that period, and would not have received the commensurate salary increase, see §ER-Pers 29.03(c), Wis. Adm. Code.

The likelihood of such actual notice is even greater where the employe has been given notice of the reclassification process. In this case, the employer distributed to affected officers a memorandum, Respondent's Exhibit 1, which contained the criteria and time frame for reclassification from Officer 1 to Officer 2.[1] In addition, from a legal standpoint, an employe has some obligation to know his or her rights under the civil service code. Compare, Jabs v. Personnel Board, 34 Wis. 2d 245, 250-251 (1967).

Finally, even if an employe were not aware that such a reclassification had been effectively denied, the employe would not lose the right to appeal the denial, as he or she still would be able to contest the effective date of the reclassification, assuming that it ultimately was granted and that an appeal was taken at that time. See Conley v. DHSS & DP, Wis. Pers. Commn. No. 83-0075-PC (9/28/83).

In conclusion, given the greater likelihood of constructive notice of a constructive reclassification denial, and the fact that a failure of constructive notice would not necessarily lead to a forfeiture of appeal rights, the Commission cannot conclude that §ER-Pers 3.04, Wis. Adm. Code, should be interpreted to require written notice of a constructive reclassification denial in a case such as this.[2]

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[1] Although the appellant testified that he never received his copy of this document, and the Commission so found, this does not negate the department's efforts to provide the notice, and does not change the probability that the typical Officer 1 would be aware of the failure or refusal of reclassification without formal notice that he or she was not being reclassified/regraded.

[2] This holding in this case that such written notice is not required as a matter of law in this case does not address the question of whether such notice would be preferable from the standpoint of personnel management.

The second subissue is whether the investigatory officer (Captain Vandenhoek) was required to have advised the appellant in writing that the reclassification of his position would be affected by the imposition of discipline.

There are no specific provisions in the civil service statutes or rules, which would require such notice. An argument could be made that some notice along this line is required by the due process clause contained in the Fourteenth Amendment to the United States Constitution. It could be argued that the failure to provide such notice of an essential criteria for reclassification would amount to an arbitrary deprivation of a property interest.

The Commission does not have to resolve this question. In its opinion, if some such notice were constitutionally required, the requirement would have been satisfied by the promulgation to all affected officers, including the appellant, of Respondents' Exhibit 1, the criteria for reclassification from Officer 1 to Officer 2, including a 6 month period free of formal discipline. That the appellant apparently did not receive this document is immaterial on this point, since any departmental obligation to provide notice would not include ensuring that it was actually received by each addressee.

The Commission further notes that the failure to provide the written notice sought by the appellant did not lead him to decide not to contest the suspension. He did try to grieve it, and it apparently was not the fault of either party the grievance was not timely filed. It is not apparent how his actual course of action would have been any different if such written notice had been provided.

CONCLUSION OF LAW

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

2. The appellant has the burden of proof.

3. The appellant has not satisfied his burden of proof.

4. The respondent did not improperly refuse to provide a written denial of reclassification of the appellant's position in November, 1983.

5. The investigating officer, in recommending discipline, was not required to have advised the appellant in writing that the reclassification of his position would be affected by the imposition of discipline.

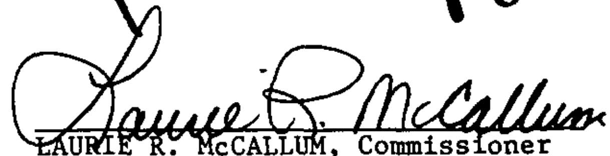
6. The respondents' decision to effectively deny the reclassification/regrade of appellant's position from Officer 1 to Officer 2 was not incorrect.

ORDER

The respondents' actions are affirmed and this appeal is dismissed.

Dated: April 25, 1985 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Commissioner



LAURIE R. McCALLUM, Commissioner

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