

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 DAVID J. GHILARDI, *
 DAVID A. LUDWIG, *
 *
 Appellants, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *
 *
 Respondent. *
 *
 Case Nos. 87-0026, 0027-PC *
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FINAL
 DECISION
 AND
 ORDER

This matter is before the Commission on consideration of a proposed decision and order issued by the hearing examiner, a copy of which is attached. The Commission has considered the parties' objections and arguments and has consulted with the examiner. The Commission amends the proposed decision and order in a number of particulars in order to better reflect both the record and the Commission's analysis of this matter, and issues the following as its final disposition of these appeals.

NATURE OF THE CASE

The appellants in this matter are before this Commission on an appeal of a decision by the respondent to deny a request for reclassification of their positions from Attorney 13 (PR09-73) to Attorney 14 (PR09-74). A hearing was held on appellants' allegations, testimony was given, exhibits were received as evidence and the parties submitted posthearing briefs. Based on the evidence presented at the hearing, the Commission enters the following findings.

FINDINGS OF FACT

1. Appellant David A. Ludwig was hired as Chief Counsel for the Hospital Rate Setting Commission (HRSC) in November, 1983. Initially classified as an Attorney 12, in February, 1985, his position was reallocated and he was regraded as an Attorney 13.

2. Appellant David J. Ghilardi was hired as Legal Counsel for HRSC in March, 1985. His position also was classified as an Attorney 13.

3. Respondent, under the direction of its secretary, is responsible for implementing state personnel and employment relations laws, rules and regulations.

4. On September 16, 1986, appellants initiated a request for classification review and analysis of their positions. In a memo dated November 3, 1986 (Appellants' Exhibit 6), they requested that their positions be reclassified or, in the alternative, reallocated from the classification of Attorney 13 to that of Attorney 14.

5. By a memorandum dated February 5, 1987, respondent denied appellants' alternative requests.

6. Appellants appealed respondent's denial of their alternative requests to this Commission on March 2, 1987.

7. Respondent's review in response to appellants' reclassification or reallocation requests consisted of comparing old and new position descriptions for each position, reviewing legal audit questionnaires for each position, analyzing any change in the positions, and comparing appellants' positions to other attorney positions in state classified civil service.

8. About Ghilardi's position, respondent stated in its turndown memorandum that the position description (PD) submitted with the request reflected a 5% increase in goal A for a total of 80% of all appellant's duties. Respondent also noted some other lesser changes in the PD and concluded, overall, that no substantial changes or shifting of the primary purpose of the position had occurred and that it was within the allocation pattern of Attorney 13 level positions for litigating attorneys in a specific program area.

9. Respondent stated that Ludwig's position had changed from, principally, a chief counsel position to a litigation attorney in a specific program area, that it was essentially the same as the Ghilardi position and that it fit within the Attorney 13 allocation pattern.

10. As the newly formed HRSC moved from its initial start-up toward full operation, appellants' legal responsibilities progressed accordingly: their duties changed from planning HRSC responsibilities and developing procedures to implementing established procedures and performing as litigating attorneys.

11. Appellants' positions logically and gradually changed over a 12-month period preceding their request for a classification review. This change is reflected in Mr. Ludwig's testimony which described three stages in the development of the appellants' positions.

a. The first stage began at the inception of HRSC in July, 1983. Mr. Ludwig, as the agency's sole attorney, was principally responsible for putting into place policy and rules as authorized by law. This included drafting both policy documents and administrative rules and processing them through hearing proceedings to final approval.

b. The second stage began in January, 1985, shortly after Mr. Ghilardi joined the agency. At this point HRSC had begun rate setting. During this stage, appellants were primarily responsible for counseling HRSC commissioners and staff analysts in the matter of rate setting and the administrative law process.

c. The third stage began in July, 1985. The state biennial budget had been adopted, HRSC remained in effect and the hospital industry was faced with a minimum of two more years of rate setting by the HRSC. At that point, rate setting requests increased and appellants' positions changed from a focus on administrative law to a focus on litigation. Attorneys for the hospital industry defined their cases in terms applicable to presentation in circuit court and the process became more adversarial. During this same period, the hospital industry was undergoing organizational changes. These changes resulted in more complex issues involving corporate restructuring being brought before the Commission. It became clear to HRSC that issues were being defined for presentation to a court. In some instances, instead of a corporate entity, HRSC was dealing with a corporate holding company operating several affiliate corporations. As the attorneys for HRSC, appellants were responsible for legal discourse of these matters.

12. About both positions, respondent stated there was no error in their previous classification and, therefore, reallocation, which is employed to correct classification errors, was not appropriate; and that both positions met the allocation pattern for Attorney 13, "litigating attorney in a specific area" positions.

Appeals Commission warranted the status of a "specialty court"; therefore, DOR attorneys who primarily practiced before the Commission qualified as trial attorneys -- Attorney 14's.

17. The LRB is utilized by respondent to review non-routine attorney position reclassification requests. However, for the four-year period, between 1978 and 1982, respondent did not use the Board's services.

18. The Board, which meets approximately twice a year, was not asked to review appellants' reclassification requests.¹

19. The legislature created the Hospital Rate Setting Commission (HRSC) in 1983 with a termination date of July 1, 1989. In 1985, the termination date was changed to July 1, 1987. The HRSC replaced the Wisconsin Hospital Rate Review Program, and was charged with responsibility for controlling hospital costs and maintaining quality health care in this state.

20. The HRSC, including the attorney positions, was modeled after the Public Service Commission. The HRSC chairperson and former PSC member testified that Mr. Ludwig's position was modeled after the chief counsel position in the PSC and the Commission so finds. Later, after appellants' positions evolved into performing litigation work, they continued to be modeled after comparable PSC attorney positions.

21. Attorneys from many law firms which have high reputations in the legal community for quality of representation appear before the HRSC.

¹ Respondent makes a number of arguments in its posthearing brief as to why this occurred and who was responsible, and asserts that the LRB ultimately reviewed these positions after the commencement of the hearing. However, none of this is reflected in the hearing record.

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- 20% B. Provide general advice and counsel to the Commission and its staff.
 - B.1 Consult and advise Commission and staff members on the application of federal and state court decisions, statutes, regulations and rules to Commission policies, powers, duties, precedents and procedures.
 - B.2 Consult and advise Commission and staff members on policy direction.
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 - B.6 Research and draft administrative rules.
- 10% C. Provide full scope of supervision for the Commission's other legal counsel.
 - C.1 Hire, train, discipline and evaluate the legal counsel.
 - C.2 Supervise and assign cases and matters to legal counsel; as needed, approve and review work product for legal content, consistency and adherence to precedent.

23. Appellant Ghilardi's September, 1986 position description for his attorney position at HRSC is as follows:

Act as general counsel for the Commission and Commission staff. Represent the Commission in all court proceedings in which the Commission is a party, in its administrative hearings and in front of all levels of state and federal agencies.

Time % Goals and Worker Activities

- 80% A. Represent the Commission in hearings before administrative agencies and in judicial proceedings before courts.

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B.5 Propose revisions of statutes and advise the Commissioners and staff on law and legal policy with respect to pending or proposed legislation; appear before the Legislature as needed.

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24. The Attorney 13 positions can be distinguished from positions at level 14 from a classification standpoint on the basis that most of these (Attorney 13) positions do not have responsibility for litigation beyond the administrative level. Most of the state attorney positions at level 13 are primarily responsible for providing legal advice, preparing written opinions and conducting legal research. There are two Attorney 13 positions involved in litigation (see Respondent's Exhibit 10, position No. 76 (Veterans Affairs, Staff/Court Attorney) and No. 73 (Revenue, Litigating Attorney; Field Compliance Bureau)). However, the areas of law involved in the litigation for which these positions are responsible are relatively narrow and are less complex than that associated with the HRSC positions.

25. In the course of functioning as attorneys for the HRSC, appellants deal with issues which involve areas of law including tax, corporations, securities, finance, trusts, bankruptcy and several health programs.

26. Appellants' positions are comparable to many Attorney 14 positions in state government:

a. Mr. Oestreicher, former Public Service Commission (PSC) commissioner and chairman of HRSC, testified, and the Personnel Commission finds, that appellants' duties compare very favorably to those of PSC attorneys; that the posture of the HRSC chief counsel position was identical to that of the PSC chief counsel; that the quality of opposition was comparable and the complexity of litigation was comparable; and that the PSC had almost ninety years of precedent

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terms of the scope and complexity of the law involved than appellants' health care area.

e. Appellants' positions also appear to be stronger than an Attorney 14 position at the Department of Industry, Labor and Human Relations (Appellants' Exhibit 12). At the appeals level, this position appears to be restricted to enforcement actions. Also, this position answers to a section chief, while appellants answer to the head of the agency. Clearly, this position has less scope than appellants'.

f. Approximately twenty Department of Revenue (DOR) positions, represented by Appellants' Exhibit 13, appear to be comparable to appellants' positions. Again, no distinction is made regarding type of litigation, i.e., administrative hearing or court proceedings. The evidence established that these positions were so classified because of their work before the Tax Appeals Commission, but their position descriptions make no distinction regarding the time spent before that administrative body and other administrative bodies. These positions must have the consent of the Attorney General before they can represent the agency in court proceedings. There is a great deal of precedent in tax law, as opposed to the area of law for which appellants' positions are responsible.

g. The Attorney 14 position in the Office of the Commissioner of Banking (Appellants' Exhibit 14) appears more limited in scope than appellants'. This position has a low emphasis on litigation. Appearances in court are made jointly with the assigned assistant attorney and appear to be restricted to enforcement actions.

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g. The Attorney 14 position in the Office of the Commissioner of Banking (Appellants' Exhibit 14) appears more limited in scope than appellants'. This position has a low emphasis on litigation. Appearances in court are made jointly with the assigned assistant attorney and appear to be restricted to enforcement actions.

h. Another DOR Attorney 14 position (Appellants' Exhibit 15), different from those previously discussed, is comparable to appellants' positions. This position represents the agency in fiduciary, inheritance and gift tax law matters in the state circuit courts. It does not appear to be involved in any administrative hearings. Appellate court and Supreme court litigation is restricted to assisting the Office of the Attorney General. This position is more limited in scope and responsibility than appellants', but is stronger in trial court litigation.

27. Appellants' positions are more closely comparable to the Attorney 14 positions offered in the hearing record for comparison purposes and are more appropriately classified at the Attorney 14 level.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over appellants' appeal of a personnel action by respondent under §230.44(1)(b), Wis. Stats.

2. Appellants have the burden of proving by a preponderance of the credible evidence to a reasonable certainty, that respondents erred in denying the requested reclassification of their positions.

3. Appellants have satisfied that burden.

4. Respondent erred in denying the requested reclassification of appellants' positions.

5. Appellants' positions are more properly classified at the Attorney 14 level.

DISCUSSION

At the prehearing conference, the parties agreed to the following issue:

Was the decision of respondent to deny appellants'

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including the testimony of Mr. Peshek, who was instrumental in drafting the legislation setting up the HRSC and who had extensive experience practicing before the HRSC, that practice in hearings before the HRSC also was comparable in a great many respects to judicial proceedings.

The evidence shows that respondent's method of reviewing appellant's positions for classification purposes was inconsistent with the position standard. Respondent's Executive Personnel Officer, Mary J. Hewitt, testified that the classification standards for Attorney positions are allocation patterns developed from a comparison of all state attorney position descriptions. Respondent's Exhibit 10 is entitled "Allocation Pattern for all Attorney Series" and contains a listing of all state attorney positions. However, in the present case, respondent chose not to consider some of the positions listed on this chart because they had not been reviewed by the LRB. Respondent contended that the classification decisions made during the period of time respondent did not use the LRB's services were questionable and might not accurately reflect true allocation patterns.

Ms. Hewitt also testified that respondent's written allocation pattern summary was not comprehensive and was not a replacement for actual allocations created by position descriptions, yet the written summary was used by respondent in making its decisions.

However, once respondent has developed what amount to position standards for a classification series, as represented by Respondent's Exhibit 10, it cannot simply ignore parts of it. Respondent contends that its approach is consistent with Thompson v. DER, Wis. Pers. Commn. No. 86-0138-PC (12/23/87), relied on for the proposition that an improperly classified position may not be utilized as a basis for comparison.

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However, unlike Thompson, here there are no position standards other than the allocation pattern itself. Further, in Thompson there was specific, uncontested evidence that the position in question was improperly classified. Here, respondent does not contend that the Attorney positions which were not reviewed by the LRB are incorrectly classified; rather, their classification has been characterized generally as "questionable."²

The clear evidence is that appellants are responsible for all litigation involving their agency, but other state agency attorneys, regardless of class level, except for PSC attorneys, appear in court proceedings only upon the invitation of the Department of Justice. By statute, DOJ is responsible for providing legal representation in civil cases in which state agencies are a party.

In the instant case, distinctions between appellants' positions and Attorney 14 - litigating attorney positions based on type of litigation, skill level of attorneys, complexity of issues, scope of subject matter, consequence of error, and quality of opposition are minimal.

Also, the clear evidence is that appellants' positions changed in a logical and gradual manner during the course of the development of the newly created HRSC, as set forth in finding 11. However, respondent argues that the change was not significant enough to warrant reclassification. Ms. Hewitt testified that significant change is that amount of change which causes the majority of a position's duties to be at a different class level; the Commission agrees. In the present case, at the point of the

² Even if the Commission restricted its consideration to those Attorney 13 and 14 positions relied on by respondent, it would reach the same result regarding the incorrectness of the reclassification denial.

reclassification request, the majority of appellants' duties were comparable to those of other attorney positions in the Attorney 14 classification.

Appellants have requested that the Commission clarify its decision to make it explicit that they are entitled to back pay and benefits for the period of time since the date the reclassification should have been effective, and to provide the appellants the ability to exercise three full years of reinstatement eligibility at the Attorney 14 level. The improper denial of a reclassification does not give rise to entitlement to back pay, Seep v. DHSS, Wis. Pers. Commn. 83-0032-PC, 83-0017-PC-ER (10/10/84); affirmed, Seep v. Pers. Commn., 140 W. 2d 32 (Ct. App. 1987).³

With respect to reinstatement, §230.31, Stats., provides, inter alia:

(1) Any person who has held a position and obtained permanent status in a class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations for a 3-year period from the date of such separation:

(a) Such person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

The authority to decide on reinstatement rests with the appointing authority, §230.06(1)(b), Stats. The instant cases are appeals pursuant to §230.44(1)(b), Stats., of reclassification denials by the Secretary of the Department of Employment Relations pursuant to §230.09(2)(a), Stats. The Commission's authority after rejecting respondent's action is limited to the issuance of "an enforceable order to remand the matter to the person


³ However, as respondent notes in its opposition to this request, salary transactions normally are effectuated by the employing agency following finalization of a Commission decision rejecting a reclassification denial.


taking the action for action in accordance with the decision,"
§230.44(4)(c), Stats. (emphasis added). Since respondent DER has no
authority with respect to reinstatement, it is not apparent how this
Commission can effectuate the remedy sought by appellants -- extension of
appellants' reinstatement rights at the Attorney 14 level.


ORDER

The action of respondent is rejected and this matter is remanded to
respondent for action in accordance with this decision.

Dated: April 14, 1988 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

DRM:jmf
JANE/4

Parties:

David J. Ghilardi
2037 Dunn Street
Madison, WI 53713

David Ludwig
5 Beach Street
Madison, WI 53705

John Tries
Secretary, DER
P. O. Box 7855
Madison, WI 53707

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occasionally employed to correct classification errors, was not necessary; and their positions met the allocation pattern for Attorney 13, "litigating attorney in a specific area" positions.

11. Respondent, although authorized, has not developed classification specifications for attorney positions in state service. Instead, allocation patterns were used in the review of appellants' positions. The attorney allocation patterns were developed by respondent at the request of its Legal Review Board and are not all-inclusive, i.e., do not utilize or include all attorney positions in the state classified civil service.

12. The Legal Review Board (LRB), a three-member advisory body established by respondent in 1969, assists and recommends classifications for attorney positions in state classified civil service.

13. The following are the attorney position allocation patterns developed by respondent for the LRB.

Attorney 13: 1) Staff counsel in a somewhat broader area of program concerns; 2) Chief counsel with limited policy influence and program concerns; 3) Litigating attorneys in a specific program area.

Attorney 14: 1) Chief counsels with greater policy influence and program concern; 2) Litigating attorneys in a broader spectrum of the law.

14. The original LRB assessed state legal positions in terms of comparable positions in the private sector. It was the Board's belief that trial (litigating) attorneys should be given higher recognition than attorneys doing non-trial work. Litigation was defined as judicial contests in a court of law. Several years later, the current LRB viewed Department of Revenue attorneys who appeared before the Tax Appeals Commission as litigating attorneys. It was the Board's belief that the Tax

Appeals Commission warranted the status of a "specialty court", therefore, DOR attorneys who primarily practiced before the Commission qualified as trial attorneys -- Attorney 14's.

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19. Attorneys from many of the state's notable law firms, representing the hospital industry, appear before the HRSC. Issues are defined for presentation to a civil court. The process is adversarial and the procedure comparable to civil procedure practiced in the courts.

20. Appellant Ludwig's position description for his attorney position at HRSC is as follows:

Act as general counsel for the Commission and Commission staff.
Represent the Commission in all court proceedings in which the

Commission is a party, in its administrative hearings and in front of all levels of state and federal agencies.

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- 70% A. Represent the Commission in hearings before administrative agencies and in judicial proceedings before courts.
- A.1 Represent the Commission in litigation before the circuit courts, the Court of Appeals and the State Supreme Court.
 - A.2 Represent the Commission before federal courts or in litigation before other state or federal agencies.
 - A.3 Research and prepare documents, including pleadings, affidavits and briefs with respect to pending court and agency proceedings.
 - A.4 Prepare witnesses, testimony, cross-examination and argument for court and agency proceedings.
 - A.5 Develop litigation strategies; write memoranda and correspondence related to litigation.
 - A.6 Prosecute hospitals or seek other judicial remedies for failure to comply with statutory requirements or with Commission rules or orders.
 - A.7 Assure the adequacy and completeness of the Commission's record for decision-making, including making evidentiary appeals as needed.
 - A.8 Negotiate settlements of disputed issues.
 - A.9 Attend settlement conferences when needed to clarify issues for hearing and facilitate negotiation of disputed issues.
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- 60% A. Represent the Commission in hearings before administrative agencies and in judicial proceedings before courts.
- A.1 Represent the Commission in litigation before the circuit courts, the Court of Appeals and the State Supreme Court. Independently develop own litigation strategies for cases assigned to counsel.
 - A.2 Represent the Commission before federal courts or in litigation before other state or federal agencies.
 - A.3 Research and prepare documents, including pleadings, affidavits and briefs with respect to pending court and agency proceedings.

- A.4 Prepare witnesses, testimony, cross-examination and argument for court and agency proceedings.
 - A.5 Write memoranda and correspondence related to litigation.
 - A.6 Prosecute hospitals or seek other judicial remedies for failure to comply with statutory requirements or with Commission rules or orders.
 - A.7 Assure the adequacy and completeness of the Commission's record for decision-making, including making evidentiary appeals as needed.
 - A.8 Negotiate settlements of disputed issues.
 - A.9 Attend settlement conferences when needed to clarify issues for hearing and facilitate negotiation of disputed issues.
- 20% B. Provide general advice and counsel to the Commission and its staff.
- B.1 Consult and advise Commission and staff members on the application of federal and state court decisions, statutes, regulations and rules to Commission policies, powers, duties, precedents and procedures.
 - B.2 Consult and advise Commission and staff members on policy direction.
 - B.3 Research legal questions and analyze problems and prepare memoranda and correspondence.
 - B.4 Confer with and advise public officials and private parties with respect to legal rights and obligations under regulatory law and Commission rules.
 - B.5 Propose revisions of statutes and advise the Commissioners and staff on law and legal policy with respect to pending or proposed legislation; appear before the Legislature as needed.
 - B.6 Research and draft administrative rules.

22. As the newly formed HRSC moved from its initial start-up toward full operation, appellants' legal responsibilities progressed accordingly: their duties changed from planning HRSC responsibilities and developing

procedures to implementing established procedures and performing as litigating attorneys.

23. The Attorney 13 positions can be distinguishable from positions at level 14 on the basis that none of these (Attorney 13) positions have sole responsibility for litigation beyond the administrative level. Most of these positions at level 13 are primarily responsible for providing legal advice, preparing written opinions and providing legal research.

24. In the course of functioning as counsels for the HRSC, appellants deal with issues which involve areas of law including tax, corporations, securities, finance, trusts, bankruptcy and several health programs.

25. Appellants' positions are comparable to several attorney 14 positions in state government. Unlike most positions, they are responsible for all litigation, including court proceedings involving their agency.

26. Appellants' positions are better described at the Attorney 14 class level.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over appellants' appeal of a personnel action by respondent under §230.44(1)(b), Wis. Stats.

2. Appellants have the burden of proving by a preponderance of the credible evidence to a reasonable certainty, that respondents erred in denying the requested change in the classification of their positions.

3. Appellants have satisfied that burden.

4. Respondent erred in denying the requested change of classification of appellants' positions.

5. Appellants' positions are more properly classified at the Attorney 14 level.

OPINION

The basic question before the Commission is whether appellants' positions are more properly classified at the Attorney 13 level, their current classification, or at Attorney 14, the next higher level in the Attorney classification series. Appellants stated in their classification request that they were "eligible" for reclassification, but if not, the only other conclusion was reallocation. Respondent in its turndown letter addressed both questions of reclassification and reallocation. At the prehearing conference, the parties agreed to the following issue:

Was the decision of respondent to deny appellants' reclassification requests from Attorney 13 (09-73) to Attorney 14 (09-74) correct?

While the particular language of the agreed upon issue may be sufficiently ambiguous to cause dispute, it is clear respondent considered reallocation as well as reclassification when it reviewed appellants' requests. Also, it is clear that proper allocation of a position is subsumed in the question of reclassification.

Absent class specifications or position standards, as in this instance, proper classification of appellants' positions rests upon comparing these positions with positions in the Attorney 13 and Attorney 14 classes. Based upon this method of review, the more persuasive evidence favors the appellants.

Appellants' witness, Attorney John Oestreicher, the HRSC chairperson, testified that appellants' positions were modeled after attorney positions in the Public Service Commission recognized by respondent as being at the 14 level, and were comparable to them. Oestreicher's professional background includes being a Public Service Commissioner.

Attorney Peter A. Peshik testified that appellants were confronted with very complex legal issues and their duties were similar in scope to

attorney positions in the state Department of Justice (DOJ). As a private practitioner, Peshik was counsel for the Wisconsin Hospital Association and developed drafts of legislation which created HRSC. After HRSC was created, he was appointed to an advisory committee which functions as "watch dog" of the Commission. Prior to his private position, Peshik served 14 years in DOJ -- seven years in the Criminal Prosecution program and seven years as Public Intervenor. Peshik had extensive contact with HRSC. With the exception of jury trials and use of prefiled testimony, he found little distinction between administrative hearings and contests in courts of law. He stated that all civil statutes pertaining to discovery, preparation of witnesses, identification and examination of witnesses are the same whether before an administrative hearing body or civil court.

Appellant David Ghilardi testified that he reviewed all the Attorney 14 position descriptions. Eight Attorney 14 position descriptions of positions in several state agencies were introduced as being comparable to appellants' positions. Mr. Ghilardi's work history includes serving two years with respondent as the assistant to its chief legal counsel. During this period, Ghilardi's duties included litigating respondent's reclassification cases.

The evidence shows that respondent's method of reviewing appellant's positions for classification purposes was irregular and its reasons for denying reclassification were, in many instances, inconsistent: Respondent's Executive Personnel Officer, Mary J. Hewitt, testified that the classification standards for Attorney positions are allocation patterns developed from a comparison of all state attorney position descriptions. However, in the present case, respondent used standards from a fabricated

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allocation pattern based upon a select group of position descriptions.

Respondents' explanation for this latter process of setting standards was that, during a four year period between 1978 and 1982, the advisory LRB had no input into the attorney classification decisions; therefore, the classification decisions made during this period of time were questionable and might not accurately reflect true allocation patterns.

Ms. Hewitt also testified that respondent's written allocation pattern summary was not comprehensive and was not a replacement for actual allocations created by position descriptions, yet the written summaries were used by respondent in making its decisions.

The LRB chairperson, Attorney Reiser, testified that standards for Attorney 14 - litigating attorney position were based on the view that litigators were generalists. Also, it was his testimony that "litigation" meant courtroom preparation and work. The clear evidence is that most, if not all, of the Attorney 14 litigating attorneys are not generalists and the percentage of courtroom or related duties performed by them is ambiguous. Most Attorney 14 position descriptions do not separate courtroom and non-courtroom litigation. They are presented together as litigation responsibilities.

Mr. Reiser also testified that attorney positions in the Department of Revenue which litigate only administrative hearings before the Tax Appeals Commission are classified at the 14 level because these hearings are more like court proceedings. The evidence does not suggest this distinction. Mr. Peshik's unrebutted testimony was that except in instances of jury trials, administrative and court proceedings are similar.

It is the Commission's belief that the above-described "gaps," i.e., the use of only certain positions in the development of allocation patterns for the Attorney classification, and the above-described problems with the factual underpinnings of the LRB's classification standards, calls into question the validity of the standards used for the entire Attorney classification.

The clear evidence is that appellants are responsible for all litigation involving their agency, but other state agency attorneys, regardless of class level, except for PSC attorneys, appear in court proceedings only upon the invitation of the Department of Justice. By statutory law, DOJ is responsible for providing legal representation in civil cases in which state agencies are a party.

In the instant case, distinctions between appellants' positions and Attorney 14 - litigating attorney positions based on type of litigation, skill level of attorneys, complexity of issues, scope of subject matter and consequence of error are minimal.

Also, the clear evidence is that appellants' positions changed during the course of the development of the newly created HRSC. And it was not contested that the change was not logical and gradual. However, respondent argues that it was not significant enough to warrant reclassification. Ms. Hewitt testified that significant change is that amount of change which causes the majority of a position's duties to be at a different class level; the Commission agrees. In the present case, at the point of the reclassification request, the majority of appellants' duties were comparable to other attorneys in the Attorney 14 classification.

ORDER

The action of respondent is reversed and this matter is remanded to respondent for action in accordance with this decision.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Commissioner

DRM:jmf
JANE/2

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

Parties:

David J. Ghilardi
2037 Dunn Street
Madison, WI 53713

David Ludwig
5 Beach Street
Madison, WI 53705

John Tries
Secretary, DER
P. O. Box 7855
Madison, WI 53707