

5. By memo to the Department of Employment Relations (DER) dated August 19, 1985 (Appellant's Exhibit 4), Mr. Mrazik forwarded Ms. Popp's reclass request and advised that while he supported a PA 2 classification, he "would leave to your judgment the decision as to whether the position merits a Program Assistant 3 classification."

6. By memo to Ms. Popp dated October 16, 1985 (Appellant's Exhibit 5), Mr. Mrazik informed her that her position had been reclassified to PA 2 effective August 18, 1985. Neither in this letter nor in any other manner in connection with this transaction was appellant advised of her right to have appealed the reclassification to the Commission pursuant to §230.44(1)(b), Stats. Appellant did not appeal this transaction but would have had she been aware of her appeal rights.

7. On February 20, 1987, DRL requested that DER conduct a survey of the PA and AA (Administrative Assistant) positions in DRL to determine their appropriate classifications. On May 8, 1987, DRL submitted to DER certain supporting material with a memo dated May 8, 1987 (Appellant's Exhibit 7).

8. DER conducted the requested review and reallocated appellant's position from PA 2 to PA 3 with an effective date of May 10, 1987.¹ The rationale for this decision was set forth in a letter to Ms. Popp from DER classification analyst Thomas Marx dated December 9, 1987 (Appellant's Exhibit 7) which included the following:

" ... The changes which occurred in your position were logical since you performed other duties related to the same program area such as processing registrations of charitable organizations. However, your position should have been classified initially at a level higher than it is currently classified.

¹ This was originally established as September 28, 1987, but subsequently was changed to May 10, 1987.

* * *

In summary, we have determined that there have been some changes to the duties and responsibilities of your position but, your position should have been classified as a Program Assistant 3 (PR 02-09). Therefore, we will reallocate your position to the Program Assistant 3 level according to ER-Pers 3.01(2)(e), i.e., to correct an error in the position's previous classification and will regrade you to that level."

9. Ms. Popp filed an appeal of this transaction by letter dated January 6, 1988 (Appellant's Exhibit 8), whereby she requested an effective date of August 18, 1985.

10. DER's policy for determining the effective date of reclassifications and reallocations is set forth in Chapter 332 of the Wisconsin Personnel Manual (Respondent's Exhibit 1) entitled "Job Classification - Policies and Procedures," as follows:

"Both delegated and nondelegated reclassification regrade actions and reallocation regrade actions taken under ER-Pers 3.01(1)(e), (f) or (g) will be made effective at the beginning of the first pay period following effective receipt of the request...."

11. DER followed the aforesaid policy in establishing the effective date of the reallocation as May 10, 1987.

12. There are over 35,000 classified civil service employees and over 2,000 classifications, in about 40 agencies and other entities, which DER must administer, either directly or indirectly. The foregoing policy promotes administrative uniformity and convenience.

DISCUSSION

The examiner provided notice of hearing in this matter that incorporated the following statement of issue:

"Whether the respondent's decision setting May 10, 1987 as the appropriate effective date for the reallocation of the appellant's position from Program Assistant 2 to Program Assistant 3 was correct."

In so doing, the examiner rejected respondent's proposed statement of issue:

"Whether the respondent correctly applied its effective date policy in establishing May 10, 1987, as the effective date for the reallocation of the appellant's position from Program Assistant 2 to Program Assistant 3 pursuant to its 1987 review of appellant's position."

The examiner provided the following rationale for his decision on the appropriate statement of issue for hearing:

This statement of issue better reflects the Commission's role in such an appeal, which is to review the transaction for compliance with the civil service code, particularly §230.09, Stats. Respondent's proposed statement of issue appears to unduly restrict the inquiry on appeal to whether respondent followed its own effective date policy, which apparently does not have the force and effect of law. While a decision that accurately applies this policy may well be the correct decision under the civil service code in a particular case, the issue for hearing should not be phrased in a manner that would limit the inquiry to the question of whether respondent complied with its own guidelines in handling this transaction.

In his posthearing brief, respondent reiterates his disagreement with the examiner's statement of issue. Respondent points out that the scope of the Commission's authority on a §230.44(1)(b), Stats., appeal of this nature is limited by the terms of §230.44(1)(b) to the secretary's decisions under §230.09(2)(a), which provides:

"After consultation with the appointing authorities, 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."

Respondent then argues that the decision as to effective date is outside the scope of this statutory framework:

"... The policies and procedures established by DER for determining how it goes about assigning or reassigning positions to classifications, including such matters as what materials must be submitted, to whom such materials must be submitted and when to establish an effective date are matters outside the scope of sec. 230.44(1)(b), Stats. The commission in setting the above quoted issue for hearing is layering on to its quasi-adjudicative contested case hearing responsibility a policy making responsibility that the legislature has vested directly and exclusively in DER."

The Commission views the decision as to the effective date of a classification as more than merely a procedural adjunct of the underlying

classification decision, akin to matters such as the kind of form that should be used to make a reclassification request. Rather, the decision as to effective date is in effect a decision as to the appropriate classification for a certain period of time. It is DER's decision in this case, for example, that a position should be classified at the PA 2 level on and before May 9, 1987, and at the PA 3 on and after May 10, 1987. This is in effect a decision that it is not appropriate to classify the position at the PA 3 level prior to May 10, 1987. Presumably, DER could base such a decision on one of two premises -- one, that the duties and responsibilities of the position were not at the PA 3 level prior to May 10, 1987, or two, that for administrative reasons, as opposed to the actual relationship between the duties and responsibilities of the position and the class specifications, DER would limit the reach of its reclassification decision to the date that the reclassification review was requested. In this case, the decision was grounded on the second basis. Notwithstanding, it has exactly the same effect on the position in question and the incumbent/employee as if it were based on the first premise. Furthermore, it is no less a decision under §230.09(2)(a), because respondent is refusing the request of the appellant/incumbent to reclassify or reallocate the position "on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process" at an earlier point in time, and this failure or refusal to act can be just as much an appealable decision under §230.44(1)(b), Stats., as an affirmative decision. Therefore, the issue of effective date is part of the reclassification decision under §230.09(2)(a), Stats., and is appealable under §230.44(1)(b), Stats., as the Commission previously recognized in Baggott v. DNR & DER, 87-0012-PC (4/29/87).

Turning to the merits, this is somewhat of an unusual case in that the letter granting the reclassification to PA 3 in 1987 explicitly stated that the earlier decision, in 1985, to reclassify the position to the PA 2 level, was erroneous, and the position should have been made a PA 3 at that time. Therefore, there is no question that the position was performing at the PA 3 level at least as of August 18, 1985, the date sought by appellant, and the case frames very clearly the question of whether under the civil service code a position with duties and responsibilities at a higher level can be denied reclassification for the period of time prior to the request for reclassification, as respondent did here pursuant to its internal policy reflected in Chapter 332 of the Wisconsin Personnel Manual.

The key provisions in the civil service code governing the classification system are found in §230.09, Stats., as follows:

"(1) The secretary shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications for, all positions in the classified service. Each classification so established shall include all positions which are comparable with respect to authority, responsibility and nature of work required...."

* * *

(2)(a) After consultation with the appointing authorities, 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."
(emphasis supplied)

Subsection (1) contains the basic principle governing the classification system -- positions which are comparable from the standpoint of duties, responsibilities, etc., are to be in the same classification. Section 230.09(2)(a), Stats., provides that "the secretary shall allocate each position" (emphasis supplied) on this basis. However, §230.09(2)(a), Stats., provides with respect to reclassifications and reallocations (as opposed to the initial allocation of positions) that "the secretary may

reallocate or reclassify" (emphasis added). The juxtaposition of the words "shall" and "may" in the same subsection strongly supports the conclusion that the terms were intended to have mandatory and permissive effect, respectively, Rubi v. Paige, 139 Wis. 2d 300, 310, 407 NW 2d 323 (Ct. App. 1987). This conclusion is also supported by the fact that the use of the word "may" in §230.09(2)(a), Stats., with respect to reclassifications and reallocations was created by a specific statutory amendment which changed "shall" to "may:"

"230.09(2)(a) of the statutes ... is amended by substituting 'The administrator may reclassify or reallocate positions on the same basis' for 'He shall likewise reclassify or reallocate positions on the same basis whenever he finds such action warranted.'" Laws of 1977, ch. 273, §114. (emphasis added)

Both versions of this statute provide for respondent to reallocate or reclassify positions "on the same basis" as obtains with regard to the initial determination of the classification, and which is the general governing principle for the classification system -- i.e., "on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process." However, the amendment effected by Laws of 1977, Ch. 273, §113, changing the mandatory "shall likewise reclassify or reallocate positions on the same basis" to the permissive "may reclassify or reallocate positions on the same basis" (emphasis added) makes it discretionary with the secretary whether to effectuate a reclassification or reallocation that would appear to be otherwise warranted -- i.e., warranted on the basis of the duties, responsibilities, etc., of the particular position. This statutory language provides the secretary with discretionary authority to delay, in effect, the effectuation of a reallocation or reclassification until the date of a request for such reallocation or reclassification. Such a decision would have to be upheld

on an appeal of the transaction unless the Commission had a basis on which to conclude the decision constituted an abuse of discretion. Therefore, the Commission must consider whether this record supports a conclusion that respondent's decision to establish the effective date of the reclassification of appellant's position as May 10, 1987, rather than August 18, 1985, constituted an abuse of discretion.

An abuse of discretion has been defined as "a discretion exercised to an end or purpose not justified by and clearly against reason and evidence." Lundeen v. DOA, Wis. Pers. Commn. No. 79-208-PC (6/3/81).

Appellant contends that had she been aware of her appeal rights at the time she was notified of the reclassification of her position to PA 2 in 1985, she would have appealed the transaction then. Arguably, had she appealed at that time, it would have resulted in the identification and correction of respondent's error in having failed to have reclassified her position to PA 3 initially. Implicit in respondent's reliance on its Personnel Manual policy relying on the date the reclassification request is received is that the respondent will not look to the date of earlier requests on which action had already been taken. Therefore, rather than examining this aspect of the decision at this point, the Commission will consider the underlying rationale for respondent's decision.

The most significant basis for appellant's posture on this appeal is that it is undisputed that her position was at the PA 3 level as of August 18, 1985, and therefore it should carry that classification as of that date. Respondent's position, in keeping with its policy, is that regardless of what date the duties and responsibilities of a position would support a higher level classification, no reclassification or reallocation can be effective prior to the date this state of affairs is pointed out through

a request for reclassification or reallocation by the incumbent employe or the appointing authority. Regardless of how the Commission might view this approach from its own policy viewpoint, it is difficult not to find a rational basis for it in administrative economy and convenience.

There are over 35,000 classified civil service employes and over 2,000 classifications which DER must administer, directly or indirectly. DER's policy on effective date ultimately puts the onus on the employe to come forward with a reclassification or reallocation request if he or she believes reclassification or reallocation is warranted and sees nothing forthcoming from the appointing authority or DER. This policy protects DER from having to attempt to trace back, perhaps for many years, the development of a position prior to the date the reclassification/reallocation request presumably brings into sharp focus the duties and responsibilities of the position that are seen as supporting the higher level classification. At the same time, an employe who is aware of his or her rights under the civil service law (a presumption which the law recognizes, see Jabs v. State Board of Personnel, 34 Wis. 2d 245, 251 (1967)) can always protect his or her interests in the classification level of his or her position by submitting a reclassification or reallocation request and thus freezing the effective date of any subsequent classification transaction.

In an individual case, of course, the general considerations underlying a policy may not be present. This is the case here, where given the analysis done in deciding the 1987 classification request for classification review, there was no dispute or question as to whether Ms. Popp's position was at the PA 3 level in terms of its duties and responsibilities as of August 18, 1985, the earlier requested effective date. However, the fact that a particular case does not raise the

policy concerns that underlie a general rule does not render the general rule irrational.

With respect to the decision, inherent in respondent's ultimate decision and in keeping with its effective date policy, to ignore the earlier reclassification request, this has the same rational basis in administrative convenience as does respondent's overall policy. There is no room in this case for the application of some sort of an equitable estoppel theory that would estop respondent from applying its general theory, because respondent did not mislead appellant as to her appeal rights but rather did not explicitly advise her of them. However, as was held in Jabs, the state does not have a legal obligation to advise employees of their rights.² Furthermore, respondent's decision is consistent with the general principle that once a decision has been made and not appealed, it can be relied on in the future. In its most technical sense, this principle is what is called res judicata, or "the matter has been decided." While it is questionable whether res judicata strictly speaking could be applied to the administrative decision that was made in this case in 1985, the same basic principles that underlie that doctrine³ help to provide at least a rational basis for respondent's handling of this aspect of the matter.

² At least there is no such obligation in the absence of a specific statute or rule requiring it in connection with a particular transaction. The respondents did comply with s. ER 3.04, Wis. Adm. Code, which requires written notification to the position incumbent of "[a]pprovals or denials of reallocations or reclassifications."

³ The basis of the doctrine is that once a decision has been made, the parties to the transaction ought to be able to rely on it in the future, without having to face the confusion and expense of having to repeat the process and possibly change the decision several years later. 46 Am Jur 2d JUDGMENTS §395.

ORDER

Respondent's decision establishing the effective date for the reallocation of appellant's position as May 10, 1987, is affirmed and this appeal is dismissed.

Dated: March 8, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

AJT:rcr
VIC01/3

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