STATE OF WISCONSIN PERSONNEL COMMISSION

EUGENE H. THOMPSON,

Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 88-0037-PC

FINAL DECISION AND ORDER

NATURE OF THE CASE

In an interim decision and order entered June 29, 1988, denying DER's motion to dismiss, the Commission set forth at some length the factual background of this matter. At the time, the Commission noted that the findings were based on material which appeared to be undisputed, and in further proceedings since then, the parties have not expressed disagreement with these findings. Therefore, a copy of the aforesaid interim decision and order is attached hereto to provide the underlying facts concerning this appeal.

By way of further background, following the issuance of the aforesaid interim decision and order, a prehearing conference was held at which time "the parties agreed to submit this matter for a decision on the merits without an evidentiary hearing...," prehearing conference report dated August 17, 1988. The conference report contained the following statement of issue:

> "... whether respondents' failure or refusal to grant reclassification from State Patrol Inspector 1 to 2 with an effective date of

> September 20, 1985, with a commensurate retroactive salary adjustment, was correct under the civil service code (subchapter II, Chapter 230, Stats., and ER-Pers, Wis. Adm. Code)...."

Both parties have submitted briefs on the merits. In addition, appellant is relying on the documents he submitted earlier in this case.

DISCUSSION

Respondent DOT's brief on the merits, filed October 4, 1988, includes the following:

> Even if Mr. Thompson were still employed by the Division of State Patrol and had been reallocated to SPI 2 he would not be eligible for reclassification because he has not completed the required formal training program. This program was at the heart of the underlying case. The Division of State Patrol has always believed that an entry level inspector can not obtain the skills necessary to advance to the objective level only by experience. The Department of Employment Relations originally took the position, now advanced by Mr. Thompson, that experience was enough to qualify Inspectors for advancement to the objective level. This contention was rejected by the Personnel Commission and the Court of Appeals. The fact that Mr. Thompson was a competent Inspector 1 for many years does not mean he was qualified to be an Inspector 2. Reclassification may require completion for a formal training program. (See ER 3.01(3).) The Personnel Commission and the Court of Appeals have recognized the State Patrol's right to require this training prior to reclassification. Mr. Thompson did not complete the training and therefore he is not eligible to be reclassified.

Mr. Thompson does not contest that he retired before the initiation of the formal training program to which DOT refers. However, in his brief filed October 13, 1988, he contends as follows:

> It is my contention that had the inspectors been paid only after receiving the formal training and passing of an exam (after being June 6, 1987), there would be no grounds for my pursuing this matter. However, that was not the case; since they were paid retroactively from September, 1985 up until April 1, 1986, during which time I was an active Inspector that I am disputing. During this time period, none of the Inspectors had anymore (and some perhaps less) training or actual on the job training than I had.

The Commission's decision of September 20, 1985, in DOT v. DER, Nos. 84-0071-PC, etc., clearly held that the appellants (including Mr. Thompson) were not eligible for classification at the Motor Vehicle Inspector 2

(MVI 2) level on the basis of the training and experience they had acquired prior to August 22, 1984 (the effective date of the original reallocations). See, e.g., Finding #5:

> "... None had received training in conducting those types of investigations previously performed by MVI 2's (See Finding of Fact #2)."

Finding #7:

> "The appellants' positions are better described at the SPI 1 level than at the SPI 2 level because they lack the experience necessary to perform the investigative responsibilities that are to be performed by a SPI 2."

Discussion, p. 11:

> "Because the SPI series is a progression series and because knowledge and skill are required 'upon appointment', the Commission looks to see whether all of the requirements for reclassification at the higher level have been met. The concept of classifying a position based upon the majority of the duties is not appropriate under these circumstances. Here, the appellants do not have the training and experience to perform the investigatory responsibilities required at the SPI 2 level. As a consequence, their positions should have been reallocated to the SPI 1 classification."

Since Mr. Thompson was a party to the first appeal and was one of the appellants who, the Commission found, did "not have the training and experience to perform the investigatory responsibilities required at the SPI 2 level," and because he retired prior to the formal training program conducted by DOT, it is apparent that he was not eligible to have been reclassified to SPI 2 along with the other inspectors effective June 7, 1987. Therefore, Mr. Thompson's case essentially rests on the argument in his brief, quoted above, that relies on the fact that after the reclassified inspectors appealed the June 7, 1987, effective date of the reclassifications, there was a settlement that resulted in the establishment of a September 20, 1985, effective date. This date was before the formal training program and the successful completion of an exam by these employes. Accordingly, if one focuses on the September 20, 1985,

date, it would appear that these employes were no more qualified than Mr. Thompson to have been reclassified to SPI 2 as of that date.

However, the September 20, 1985, effective date was established as part of a settlement agreement that was designed to settle a number of claims.[1] The fact that DOT was willing to agree to an effective date of September 20, 1985, does not establish that the employes involved in those appeals were entitled to that date as a matter of law independent of the agreement, and a third party cannot rely on the agreement to establish respondent's liability on his or her claim. By way of analogy, if a bus passenger were injured in an accident and sued the common carrier for negligence, the passenger could not rely on cash settlements the carrier had reached with other passengers in different lawsuits to establish that the carrier was liable for the passenger's injuries.

Furthermore assuming for the sake of argument that the settlement of the other cases could be relied on somehow as precedent for Mr. Thompson's situation, he is not on the same footing as these other employes because he never had the formal training program for SPI 2. The settlement resulted in an effective date of September 20, 1985, that preceded the formal training program. While this arguably could be a precedent for an earlier effective date for someone who had completed the training program, it is more difficult to see how it could be cited for an earlier effective date for someone who had never completed the training program.

Based on the foregoing, the Commission must conclude that appellant has failed to establish that respondents' failure or refusal to have

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[1] DOT's rationale for agreeing to the September 20, 1985, effective date, has never been set forth on this record.

granted him a reclassification from SPI 1 to SPI 2 with an effective date of September 20, 1985, with a commensurate retroactive salary adjustment, was incorrect under the civil service code, and this appeal must be dismissed.

ORDER

Respondents' action which is the subject matter of this appeal is affirmed and this appeal is dismissed.

Dated: November 23, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

Gerald F. Hoddinott did not take part in the consideration of this matter.

AJT:rcr
RCR03/3

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STATE OF WISCONSIN PERSONNEL COMMISSION

EUGENE H. THOMPSON,

Appellant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 88-0037-PC

INTERIM DECISION AND ORDER

NATURE OF THE CASE

This case involves an appeal concerning a reclassification transaction. This matter is before the Commission on a motion to dismiss filed by respondent Department of Employment Relations (DER) on May 17, 1988. The findings which follow are made solely for the purpose of deciding this motion and are based on material which appears to be undisputed, including certain information about related cases set forth in the Commission's own files.

FINDINGS OF FACT

1. In 1984, appellant was employed in the classified civil service by the Wisconsin Division of Transportation (DOT).

2. As a result of a personnel survey, DER reallocated his position from Motor Vehicle Inspector (MVI) 1 to State Patrol Inspector (SPI) 2, effective August 22, 1984.

3. A number of DOT employes whose positions were thus reallocated, including appellant, were involved in appeals of said transaction to this Commission pursuant to §230.44(1)(b), Stats.

4. The Commission decided these appeals on a consolidated basis by a decision and order entered September 20,1 985. This decision in effect agreed with appellants' contention that their positions should have been reallocated to the SPI 1 level rather than SPI 2. The SPI 1 level is the entry level for this series, whereas the SPI 2 level is the objective, or full-performance level. The SPI series is a progression series in which the employes are reclassified from SPI 1 to SPI 2 upon the attainment of specified training and experience, §ER-Pers 3.01(3), Wis. Adm. Code. The Commission noted in the decision that the economic advantage to the appellants of having their reallocations changed from SPI 2 to SPI 1 is that this opened the door to a subsequent progression via reclassification to SPI 2, which carries a one step pay increase. This increase was not available to them through the reallocation route that DER had taken and which had generated the appeals. In its final order, the Commission reversed respondent DER's decision to reallocate the positions to SPI 2, and remanded the matter to DER for action in accordance with the decision.

5. DER petitioned for judicial review of the Commission's decision, and the Dane County Circuit Court reversed the Commission. However, the Circuit Court decision was appealed, and on January 22, 1987, the Court of Appeals reversed the Circuit Court and affirmed the Commission. No appeal was taken to the Supreme Court.

6. DER then proceeded to implement the Commission's decision. Following reallocation to SPI 1, 33 employes, not including Mr. Thompson, were reclassified to SPI 2 with an effective date of June 7, 1987. On

July 20, 1987, John Steffek filed an appeal on behalf of the thirty-three inspectors involved, again, not including Mr. Thompson, contesting the effective date of this transaction. This appeal in effect was brought by the Wisconsin State Employes Union (WSEU) which represented this group of employes.

7. Appellant in the meantime had retired from state service on April 1, 1986. The employer took the position that because appellant and 9 other inspectors had retired prior to the completion of this litigation, they would not be reclassified.

8. The Steffek group appeal ultimately was settled. The settlement agreement was signed by Mr. Steffek and Ron Orth, WSEU Field Representative, as appellants' representatives, and by representatives of DER and DOT. Among other things, it called for the effective date of the reclassifications to be changed from June 7, 1987, to September 20, 1985, and for each appellant to be paid back pay of $1047.60. This settlement agreement was filed with the Commission on November 23, 1987, and the Commission entered an order on December 3, 1987, dismissing the appeal on the basis of the settlement agreement.

9. Mr. Thompson first learned of this settlement in late December, 1987, when he read an article about it in the Division of State Patrol December 1987 newsletter. He then sent letters dated January 12, 1988, to Mr. Steffek and Ron Discher, President, Wisconsin State Patrol (Local 55). These letters included the following:

> The News Letter indicates that all 33 inspectors who were part of the 1984 class action (of which I was one of the original 33) have now received back pay as a result of this action. As I indicated, I was one of the original 33 inspectors involved; however, I was not among those receiving such back pay. My question is -- why did I not receive such back pay?

> I retired from state service on April 1, 1986, and I see the back pay is retroactive to September in 1984 [sic][1] I feel that since I was one of the original inspectors participating in the class action from the very beginning, I should be entitled to the same retroactive pay up until the date of my retirement on April 1, 1986, which is, of course, 18 months. If I am denied this back pay, I want to know, in writing, exactly why; and just who made the decision to exclude those not employed as of June 5, 1987. This appears to be unjustified and, once again, a typical bureaucratic State Government "foul-up"; of course, in the State's favor. Any further explanations and/or suggestions you would have would be appreciated, as I may decide to seek further legal advice regarding this matter.

10. Both Mr. Steffek and Mr. Disher responded. Mr. Disher's letter, dated January 22, 1988, included the following:

> In your letter dated January 12, 1988, you inquired as to the reason why you were not included in the back pay settlement. The reason is that when the state completed the infighting that occurred on this matter between the Department of Employee Relations and the Department of Transportation the date was in the Spring of 1987. The actual reclass took place on June 6, 1987. Local 55 then filed an appeal on behalf of the 33 Inspectors who were still in the employment of the State.
>
> Since you had already retired by that time you could not be covered by this appeal....

11. Mr. Thompson also contacted his state senator in January 1988. By letter dated January 28, 1988, Senator Davis advised him:

> I have called the State Patrol and asked them to respond to your questions regarding this back pay issue. I have asked for a response in writing which you should receive very soon.

12. By a letter to appellant dated February 18, 1988, James N. Van Sistine, administrator of the Division of State Patrol responded as follows:

> You contacted Senator J. M. Davis regarding the recent settlement of the Inspector Reallocation Case. Senator Davis has asked if I could address your concerns.

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[1] The reference to this date in the article was erroneous.

> I wish I had better news for you, but because you retired from state service on April 1, 1986, before the appeal was won, you and nine other inspectors were not included in either the reclass or the settlement.
>
> The Inspector Reallocation Case was a result of the 1984 Law Enforcement Classification Survey in which 43 of the Divisions Inspectors 1 were reallocated from Motor Vehicle Inspector 1 to State Patrol Inspector 2.
>
> The State Patrol, on behalf of those 43 inspectors, appealed the reallocation to the Personnel Commission. After several years of legal appeals, the State Patrol and the inspectors won the case.
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> All the inspectors were reallocated to State Patrol Inspector 1 and on June 7, 1987 reclassified to State Patrol Inspector 2. This resulted in a settlement agreement for those people who were reclassified on June 7.
>
> I hope this answers your questions regarding this case. If we can be of further assistance or provide additional information, please don't hesitate to call or write.

13. On March 18, 1988, appellant filed this appeal with this Commission which stated, in part as follows:

> I am, hereby, appealing the decision of the Department of Transportation and the Division of State Patrol for denial of backpay covering the period of September, 1985 through April 1, 1986, in the amount of $303.80, which I feel is rightfully due me, having worked during such period as a State Patrol Inspector....

DISCUSSION

This case involves a rather unusual and convoluted set of circumstances. To begin with, Mr. Thompson was among a group of employes who appealed the reallocation of their positions to SPI 2, contending it should have been to SPI 1.[2] The employes won their appeal before this Commission

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[2] As noted above, in Finding #4, the apparent underlying motivation of this approach was to make it possible to progress from SPI 1 to 2 by reclassification (vs. reallocation) and thereby obtain a one-step pay increase that was not available by direct reallocation to SPI 2.

on September 20, 1985, but this was followed by a process of judicial review that culminated in the Court of Appeals upholding the Commission's decision on January 22, 1987. While this litigation was going on, Mr. Thompson retired from state service on April 1, 1986.

After the Court proceedings ultimately ended, respondents implemented the Commission's decision, which involved reallocation to SPI 1 followed by reclassification to SPI 2. This reclassification carried an effective date of June 7, 1987. It appears from Mr. Van Sistine's letter (see Finding #14), that respondents made the decision that employes who had been included in the original appeal but who had retired would not be included in the reclassification.[3] It appears to be undisputed respondents did not notify Mr. Thompson at the time of this decision that he would not be reclassed.

After the incumbent inspectors appealed the effective date of the reclassification in July, 1987, the parties reached agreement on a new effective date of September 20, 1985, and the payment of lump sum retroactive salary. Since Mr. Thompson was not a party to this appeal, he was not included in the settlement.

Mr. Thompson subsequently learned of this settlement through the division newsletter and began the string of inquiries, set forth in the findings, that preceded this appeal.

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[3] Although this was not enunciated in the various correspondence on file with the Commission, it is noted that §ER-Pers 3.03(4), Wis. Adm. Code, provides in part: "Requests for reallocation, reclassification or regrade are cancelled when an employe resigns, retires or is terminated from pay status in the position prior to the effective date of the requested action." (emphasis added) Therefore, on the basis of the June 7, 1987, effective date, it appears probable that Mr. Thompson would not have been legally entitled to the reclassification to SPI 2.

DER's motion to dismiss raises a number of legal issues. Respondent's first argument is summarized in its brief filed May 17, 1988, as follows:

> Since the appeal concerns the recovery of wages by a retiree for wages allegedly owed to him while he was a state employe represented by a labor organization, the Commission's jurisdiction over the appeal is barred by operation of s. 111.93(3), Stats., which provides in pertinent part:
>
> > If a collective bargaining agreement exists between the employer and a labor organization representing employes in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes... related to wages, fringe benefits, hours and conditions of employment whether or not the matters contained in those statutes... are set forth in the collective bargaining agreement.

In a recent decision, Popp v. DER, No. 88-0002-PC (5/12/88), the Commission rejected this theory:

> ...as to employes in represented positions, the provisions of a collective bargaining agreement supersede civil service statutes related to wages, fringe benefits, hours and conditions of employment. However, not everything involving the broad subject of wages is subject to bargaining. Section 111.91(1)(a), Stats., requires bargaining on:
>
> > "...wage rates, as related to general salary scheduled adjustments consistent with sub (2), and salary adjustments upon temporary assignments of employes to duties for a higher classification or downward reallocations of an employe's position..."
>
> A back pay award based on an erroneous classification decision does not fit within a "general salary scheduled adjustment" or a salary adjustment "upon temporary assignment of employes to duties of a higher classification or downward reallocation...." It cannot be inferred that by the use of the term "wages" in §111.93(3), Stats., the legislature intended that as to non-bargainable matters covered by the civil service code, the civil service provisions should be superseded as to represented employes. See Taddey v. DHSS, Wis. Pers. Commn. No. 86-0156-PC (6/11/87). Therefore, §111.93(3), Stats., has no application to this case.

DER also contends that complainant lacks standing because "the challenged action [did not] cause the petitioner injury in fact," Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 10, 230 N.W. 2d 243 (1975). DER argues in its brief: "Since he was not eligible for reclassification due to retiring from state service, the Appellant could not have been reclassified. Since he could not have been reclassified, the appellant did not have the standing to challenge the effective date of the reclassification...." However, this argument really runs to the merits. Appellant did suffer "injury in fact" when respondents failed or refused to include him in the group of 33 inspectors who were reclassified to SPI 2 after the conclusion of the litigation described above, since if he had been included in that group he presumably would have received a back pay award for the period prior to his retirement.

DER further contends that this appeal does not involve an appealable action under §230.44(1), Stats., and, in any event, that DER took no action with respect to appellant. The essential subject matter of this appeal involves the failure or refusal of the employer to have granted Mr. Thompson a reclassification to SPI 2 with an effective date of September 20, 1985, with an indicated loss of salary between that date and his retirement date of April 1, 1986, of $303.80. While apparently the decision with respect to reclassification was made by DOT, all reclass decisions are attributable to DER, either directly, §230.09(2)(a), Stats., or on the basis of delegation, §230.04(1m), Stats. Section 230.04 (1m), Stats., also provides that delegated actions "may be appealed to the personnel commission under §230.44(1)(b). The secretary [of DER] shall be a party in such an appeal." Therefore, there was an appealable action and DER is a necessary party.

Respondent DER further asserts that the appeal is untimely, contending that the settlement agreement in Steffek was effected no later than November 20, 1987, and the appeal was filed more than 30 days thereafter. However, this approach to timeliness is premised on DER's categorization of the subject matter of the appeal as "his exclusion from the settlement agreement...." While it was the settlement that precipitated Mr. Thompson's inquiries, the subject matter of this appeal from a jurisdictional basis involves respondents' failure or refusal to have granted Mr. Thompson a reclassification with an effective date of September 20, 1985. Section 230.44(3), Stats., provides a time limit for appeals of this nature of 30 days after the effective date of the action or 30 days after the appellant receives notice of the action, whichever is later. Clearly, the appeal was filed more than 30 days after the effective date of respondents' denial of appellant's reclassification. The key issue then is when he would be deemed to have had notice of the decision.

In December 1987, when he read the Division of State Patrol newsletter, Mr. Thompson could have inferred, and apparently did infer, that he had been excluded from receiving back pay in connection with the appeal he had been involved in, which commenced in 1984. However, at that time he had no notice that respondents had failed or refused to grant him reclassification due to his retirement from state service prior to the conclusion of the litigation in connection with his earlier appeal and prior to what originally had been fixed as the effective date for reclassification (June 7, 1987). He had no way of knowing from the article whether the exclusion was based on an irreversible decision or possibly an oversight. Furthermore, the article was, at least in part, erroneous, see footnote 1.

Mr. Thompson received subsequent correspondence from union officials Steffek and Disher. It is questionable whether they legally could have provided him notice of respondents' decision concerning appellant's classification status, but in any event all that was explained to him was why the union had not included him in the appeal.

Based on the documentation before the Commission, it cannot be said that appellant was actually advised of respondents' decision not to include him in the reclassification until he received Mr. Van Sistine's letter of February 18, 1988, which explained DOT's decison and told him that from the department's standpoint he was "out of luck" as to his back pay. It was only at this time that he had notice sufficient to trigger the running of the 30 day time for appeal under §230.44(3), Stats.

This conclusion is reinforced to some extent by the provisions of §ER-Pers 3.04, Wis. Adm. Code:

> Notice of reallocation or reclassification. Approval 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.

In Pero v. DHSS & DER, No. 83-0235-PC (4/25/85), the Commission interpreted this rule to require generally that the employing agency, when acting on a delegated basis, provide written notice to the incumbent of a denial of reclassification. However, in that case appellant's reclassification from Officer 1 to Officer 2 had been delayed for 6 months due to the application of a departmental rule requiring a 6 months discipline-free work record prior to reclassification. The Commission held that under these circumstances there was what amounted to a constructive denial of reclassification, and respondent was not required to have given written notice of this constructive denial. The Commission expressed the opinion

that it was somewhat ambiguous whether the rule by its terms applied to this kind of written denial, and it looked to the policy concerns addressed by the rule:

> ...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.

In a typical progression series where the employe is reclassified after the satisfactory completion of a specified period of training and experience, an employe would be expected to realize that reclassification in effect had been denied even without specific notice, since he or she would expect it at a certain point (e.g., after 6 months), and would be aware that the pay increase that accompanies reclassification had not occurred. Furthermore, the Commission pointed out that in such a case, even if the employe did not become aware of the reclassification denial at the time the reclassification normally would have occurred, he or she would receive notice of the effective date when the reclassification ultimately occurred, and could appeal the effective date at that time.

In the case of Mr. Thompson, these factors were obviously not present due to his retirement and the fact that the decision not to include him in the reclassifications was only made after the convoluted events connected with the underlying litigation. He was not in a position to have expected a reclass after a fixed period, and because he was no longer in state service, he could not expect a reclass eventually that would give him an opportunity to appeal the effective date.

On the other hand, in this case there is even more of an argument that the language of §ER-Pers 3.04, Wis. Adm. Code, would not apply under these circumstances. This is because the rule refers to notification of the incumbent, and arguably, at the time of the decision not to include appellant in the group to be reclassed, he could not be considered the incumbent of the position. On the other hand, he was the incumbent with respect to the period of time for which reclassification was in effect denied.

In any event, regardless of whether one would conclude that §ER-Pers 3.04, Wis. Adm. Code, applied and required written notice to appellant that he was not being included in the reclassification, the foregoing underscores the importance from a policy standpoint under the civil service code that affected persons receive notice of reclassification decisions. Even if DOT were not required to have provided appellant of written notice of its classification decision at the time it occurred, appellant at least was entitled to some kind of notice of this transaction from respondents before the time for taking an appeal would begin to run, and it cannot be argued that the limited notice he received from third parties was sufficient to commence the period for appeal.

Finally, respondent argues that even if the appeal were deemed timely, appellant should be barred by the doctrine of laches[4] from pursuing this appeal. Based on the record to date, there is nothing to suggest either

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[4] "The equitable doctrine of laches is a recognition that a party ought not to be heard when he has not asserted his right for an unreasonable length of time or that he was lacking in diligence in discovering and asserting his right in such a manner so as to place the other party at a disadvantage." Bade v. Badger Mutual Insurance Co., 31 Wis. 2d 38, 47, 142 N.W. 2d 218, 22 (1966).

that appellant was less than diligent in pursuing this matter, or that respondents have been disadvantaged by any delay in the surfacing of his claim.

ORDER

For the foregoing reasons, DER's motion to dismiss filed May 17, 1988, is denied. This matter is to be scheduled for another prehearing conference which should include a discussion of the possibility of submitting this matter for decision on the merits on the basis of written arguments, and without evidentiary hearing.

Dated: June 29, 1988 STATE PERSONNEL COMMISSION

AJT:jmf
JMF09/2

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner