

industry liaison, law enforcement, criminal investigation, case review, and filling in for the bureau director in his absence. Appellant supervises a staff of 14 permanent full-time employees.

3. Appellant's position has not changed in any significant material way since 1981, the last time it had been reviewed for classification purposes prior to the instant transaction. There have been increases in the degree of policy development involved, the degree of involvement in professional associations and in the degree of interaction with upper-level officials.

4. The RA 1 class specification (Respondent's Exhibit 1) contains the following:

Definition:

This is administrative and technical work in directing the functions of a small income, sales and excise tax section. Employees in this class are responsible for the collection of tax monies, review of appeals, enforcement of tax laws and regulations, and supervision of personnel performing compliance and/or auditing functions within the section. To perform these duties the employe should be familiar with the laws, rules, and policies pertaining to the enforcement of income, sales, and excise taxes, and be able to formulate policy proposals and apply and interpret them as necessary. The work is performed under general supervision from a Revenue Administrator at the bureau level with reviews made through reports, conferences or appeals.

Examples of Work Performed:

Direct an audit, compliance or enforcement program.
Direct a collection program of current and/or delinquent taxes.
Conducts and reviews through conferences with taxpayers, appeals on the more complex tax cases.
Formulates and recommends for approval policies and programs for the section for which he is responsible, as well as for the bureau and division.
Prepares the annual or biennial budget for the section.
Keeps records and makes reports.
Performs related work as required.

5. The RA 2 class specification (Respondent's Exhibit 2) contains the following:

Definition:

This is administrative and technical work in directing the functions of a medium sized income, sales and excise tax section in central operations or district office. Employees in this class are responsible for the collection of tax monies, review of appeals, enforcement of tax laws and regulations and supervision of personnel performing compliance and/or auditing functions within the section or district. To perform these duties the employe should be familiar with the laws, rules, and policies pertaining to the enforcement of income, sales, and excise taxes, and be able to formulate policy proposals and apply and interpret them as necessary. The work is performed under general supervision from a Revenue Administrator at the bureau level with reviews made through reports, conferences or appeals.

Examples of Work Performed:

- Direct an audit, compliance or enforcement program.
- Direct a collection program of current and/or delinquent taxes.
- Conducts, and reviews through conferences with taxpayers, appeals on the more complex tax cases.
- Formulates and recommends for approval policies and programs for the section or district for which he is responsible, as well as for the bureau and division.
- Directs the preparation of annual or biennial budgets for the section or district.
- Keeps records and makes reports.
- Performs related work as required.

6. Appellant's request for reclassification of his position from RA 1 to RA 2 was denied by DOR personnel on a delegated basis from DER pursuant to §230.04(lm), Stats., as reflected in a memo to appellant dated May 16, 1988 (Respondent's Exhibit 6).

7. The aforesaid memo and the department's decision involved the conclusion that the only distinction between the RA 1 and RA 2 levels is the size of the section supervised (small vs. medium). Appellant's section was compared to the Excise Tax Field Audit section consisting of 16 staff, also considered small, and supervised by a RA 1 (Robert Zellner). Both this and appellant's position are considered central office positions by DOR. Other RA 2 positions in the central office are the Field Compliance

Section, 148 positions (Danielski), the Central Audit Section, 76 positions (Wise) and the Intelligence Section, 11 positions (Mohr). DOR considered the latter position to be improperly classified, but has taken no action to change its classification.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(2)(b), Stats.
2. Appellant has the burden of proof.
3. Appellant has not satisfied his burden of proof and the Commission concludes that respondent's decision denying reclassification of appellant's position from RA 1 to RA 2 was correct.

DISCUSSION

The first question in this case is extremely narrow. The difference in the definitions of RA 1 and RA 2 as set forth in the class specifications is very specific, as illustrated by the following excerpts:

RA 1: This is administrative and technical work in directing the functions of a small income, sales and excise tax section. Employees in this class are responsible for the collection of tax monies, review of appeals, enforcement of tax laws and regulations, and supervision of personnel performing compliance and/or auditing functions within the section....

RA 2: This is administrative and technical work in directing the functions of a medium sized income, sales and excise tax section in central operations or district office. Employees in this class are responsible for the collection of tax monies, review of appeals, enforcement of tax laws and regulations and supervision of personnel performing compliance and/or auditing functions within the section or district.... (emphasis added)

The question is whether in the RA 2 definition, the term "medium sized" applies only to sections in the central office, as respondent contends, or whether "medium sized" also applies to district offices, as appellant contends.

Respondent's position is that central office sections are either small, in which case the section chief is an RA 1, or medium, in which case the section chief is an RA 2, whereas all district office directors are RA 2's. Since the class specifications do not define small or medium, size can only be determined by comparing actual positions. When appellant's section is compared to other central office sections, it is clearly small and therefore carries an RA 1 classification for the section chief.

Respondent contends that it is not appropriate to compare the size of appellant's section with the size of the district offices, many of which are comparable in size of staff to appellant's section, because the district offices are not differentiated in terms of classification (at least as between RA 1 and RA 2) on the basis of size, since the term "medium sized" in the RA 2 definition applies only to central office sections and not to district offices.

Appellant's position is just the opposite. He argues that the term "medium sized" in the RA 2 definition applies both to central office sections and to district offices, and since his section compares favorably in terms of staff size to many of the district offices, his section should be categorized as medium in size and, accordingly, be classified at the RA 2 level.

The relevant language of the RA 2 definition is: "...a medium sized income, sales and excise tax section in central operations or district office," The question is whether the term "medium sized" modifies "section in central office" only, or whether it also modifies "district office." Appellant contends that if "medium sized" had been meant to apply only to the term "section in central office," presumably the above language from

the RA 2 definition would have read: "...a medium sized income, sales and excise tax section in central operations or a district office."

In the Commission's opinion, appellant has a strong argument if one looks solely to the above-quoted clause from the RA 2 definition. However, in the realm of statutory construction, it is axiomatic that:

- , Words and phrases may, however, be supplied... and inserted in a statute where that is necessary to prevent an act from being absurd, to obviate repugnancy and inconsistency in the statute, complete the sense thereof, and give effect to the intention of the legislature manifested therein. This rule prevails where words have been omitted from a statute through clerical error, or by accident or inadvertence. The rule is especially applicable where such application is necessary to prevent the law from becoming a nullity." 73 Am Jur 2d Statutes §203 (footnotes omitted).

Also see State ex rel. Rich v. Steiner, 160 Wis. 175, 151 N.W. 256 (1915).

A related principle of statutory construction is that statutes which are in pari materia (dealing with the same subject matter) must be read together and harmonized where possible. City of Hartford v. Godfrey, 92 Wis. 2d 815, 286 N.W. 2d 10(Ct. App. 1979).

In the instant case, if, in the RA 2 definition, "medium sized" refers to both "section in central operations" and "district office," this creates an absurd effect with respect to the RA 1 definition. This is because the RA 1 definition refers only to small sections but makes no reference to district offices:

This is administrative and technical work in directing the functions of a small income, sales and excise tax section....
(emphasis supplied)

It would make no sense to define a medium sized district office at the RA 2 level and then have no provision for a small district office at the RA 1 level. If the intent underlying these specifications were to have both medium sized sections and district offices at the RA 2 level, it would

follow that both small sections and district offices are at the RA 1 level, not just small sections.

In the opinion of the Commission, in all likelihood the absence of the word "a" in front of the words "district office" in the RA 2 definition was due to oversight, and this omission should be remedied by supplying that missing article, in keeping with the above principles of statutory construction and to avoid the absurd result discussed above.

The Commission is reinforced in its conclusion by the fact that it is dealing here neither with a statute nor even an administrative rule which has the force and effect of law, but rather with an administrative enactment which presumably has not been promulgated with the formality required of a statute or administrative rule. Accordingly, it makes sense to use a relatively more liberal approach to construction of such a provision as opposed to a statute or rule.

Another troublesome aspect of this case involves the position of Chief of the Intelligence Staff, Loyal G. Mohr, incumbent. This position in a central office section is classified at the RA 2 level notwithstanding that it only supervises 11 positions. While it does report to the Assistant Division Administrator versus a Bureau Director for the other positions in question, the RA 1 and RA 2 class specifications have identical language as to reporting relationship. Respondents' reaction to this position comparison is to contend the Mohr position is misclassified because it does not head a medium sized section, although there is no indication on this record of any move by DOR to address this alleged misclassification.

In the Commission's view, an agency cannot avoid the effect of an unfavorable position comparison under circumstances such as this merely by contending that a position is misclassified. Here we have a series wherein

the material distinction between the two levels is solely the size of the section supervised, and size is nowhere defined in the position standard. Therefore, in effect the only way a section can be categorized as medium or small is by comparison to other sections, of which there are five in total. Two of the five are at the RA 1 level (Jenkins and Zellner) and three are at the RA 2 level (Danielski, Wise and Mohr). Although the Mohr position is basically the same size as the other RA 1 positions and very much smaller than the other RA 2's there is no indication on this record that respondent feels the need to do anything about it. Under these circumstances, it is self-serving and arbitrary for DOR to argue that the one position comparison (Mohr) that has a smaller staff than appellant's section and which favors appellant's case is misclassified and cannot be used as a basis for comparison.

However, while the comparison to the Mohr position obviously favors appellant's case, the fact remains that out of the four position comparisons mentioned above (Mohr, Zellner, Wise and Danielski) three favor respondent and only one favors appellant. Appellant's position is substantially smaller than two of the RA 2's, and about the same size as one RA 1 and one RA 2. This is an insufficient showing to sustain his burden of proving that his section should be considered medium sized, and, that his position should be classified at the RA 2 level.

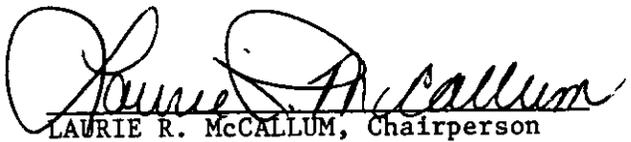
Finally, it is noted that while there were changes in appellant's position, they were not material to reclassification because they did not affect the size of the section. Section ER 3.01(3), Wis. Adm. Code, defines "reclassification" as "...the assignment of a filled position to a different class... based upon a logical and gradual change to the duties or responsibilities of a position...." Under the facts of this case, there

has been no "logical and gradual change" upon which to base a reclassification, and any change in the classification of appellant's position due to a different conclusion about the size of appellant's section would have to be affected by a reallocation pursuant to §ER 3.01(2)(e), Wis. Adm. Code ("...in the assignment of a position to a different class... based upon... [t]he correction of an error in the previous assignment of a position....")

ORDER

Respondent's decision denying appellant's request for reclassification is affirmed and this appeal is dismissed.

Dated: May 31, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

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