STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT VANOVER,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 89-0128-PC

DECISION AND ORDER

A proposed decision and order was issued in this matter on August 21, 1990. The respondent filed objections and requested oral arguments. The appellant also filed objections. A copy of the proposed decision and order is attached hereto. After hearing the parties' arguments, reviewing the written arguments filed by the parties and consulting with the hearing examiner, the Commission rejects certain portions of the proposed decision and order as noted below. The remaining portions of the proposed decision and order are adopted.

Finding of fact #8 is revised by adding the following entry after finding #8a:

am. The complainant interviewed the initial employer shortly after that employer had filed the narrative described in finding 8a. During the interview, the employer gave the following information as to the date on which the claimant gave notice of quitting: "9/19/88 was not doing what told ect."

Finding of fact #8c is revised to read as follows:

c. Complainant interviewed Village Bar's personnel director. The notes from that telephone conversation include the following question and answer:

WHAT DATE WAS NEW EMPLOYE OFFERED THE JOB: 9/21/88 9/19/88 ok too?

The punctuation was written in such a way that it was not clear whether it was an exclamation point or a question mark. Although it was not expressly indicated anywhere in the Frederick file, the appellant had twice asked the personnel director during the interview about the date of the offer. The first time, the personnel director stated it was September 21st. The appellant subsequently asked: "Are you sure of that date: Could it have been a date other than that? The employe said 9/19." The personnel director then said it could have been that date, too.

Conclusion of law #3 is revised to read:

3. The appellant has failed to sustain his burden as to any of the files in dispute.

That portion of the Discussion section of the proposed decision and order relating to the Frederick case and commencing on page 11 is replaced with the following language:

In order for a claimant to qualify to receive unemployment compensation under a quit-to-take theory, the offer for the new job must be made before the employe quit the prior job. The first question raised in the review of Frederick file is whether the punctuation shown on the appellant's notes from his conversation with the take employer is so unclear that a reviewer could not be reasonably confident it was an exclamation point or a question mark. The Commission has reviewed the document, the relevant portion of which has been reproduced as part of finding of fact 8c, and concludes that the notation is unclear. The notation includes elements of both punctuation marks. Someone reviewing the Frederick file, whether that reviewer was Mr. Roche or a representative of the federal government, could reasonably conclude that the mark is a question mark. If it were a question mark, the resulting phrase ("9/21/88 9/19/88 ok too?") would cause the file to be ambiguous at best in terms of whether the offer from the "take" employer was made before or after the date the employe quit his first job.

Had Mr. Roche asked the appellant to clarify whether the punctuation was intended to be an exclamation point or a question mark, the appellant would have been able to explain that he wrote it as an exclamation point. However, the concept of the QPI review is that the file must be able to stand by itself, without any additional clarification or explanation by the adjudicator. This requirement is suggested by the following language found in the adjudicator's handbook:

> In scoring the QPI, the adequacy or inadequacy of an investigation is based on the necessary elements for an issue, the information the investigation actually contains and the application of the law to that information.
>
> The scorer will consider only those facts which are documented in the investigation. Facts which are only implied or are referred to in the rationale but appear nowhere else in the investigation will not be considered adequately documented. Where necessary information is not presented, the scorer will assume that there was no attempt to obtain such information unless there is documentation that the party was unable to provide that information to the adjudicator. (Emphasis added)

Whether the file review is occurring as part of a reclassification request or as part of a U.S. Department of Labor analysis of adjudications in Wisconsin, the reviewer cannot count on having access to the adjudicator for a "translation" of the markings found on in the file. The adjudicator's efforts must be graded on what can be read in the file.

Here, because it is unclear what the punctuation is and because there is no explanation elsewhere in the file that would allow the reviewer to conclude that both the employe and the "take" employer agree the offer was made on September 19th, and that this was after the employe quit his job with Personnel Corp., a crucial element in the quit-to-take analysis remains unestablished. This means that the file is not entitled to a passing grade.

The Order is revised to read:

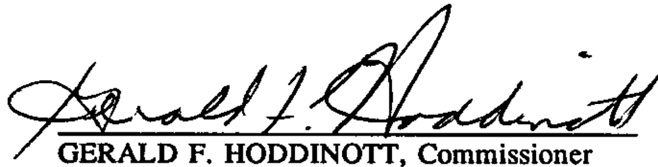
The respondents' decision to reclassify the appellant's position and not to regrade the appellant is affirmed and this matter is dismissed.

Dated: November 16, 1990 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner GFH



GERALD F. HODDINOTT, Commissioner

Parties:

Robert Vanover	Gerald Whitburn	Constance Beck
UC Div., DILHR	Secretary, DILHR	Secretary, DER
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STATE OF WISCONSIN | PERSONNEL COMMISSION

ROBERT VANOVER,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 89-0128-PC

PROPOSED DECISION AND ORDER

This is an appeal from a decision denying the reclassification of the appellant's position. The parties agreed to the following issue for hearing:

> Whether respondent's decision denying appellant's reclassification request from Unemployment Benefits Specialist (UBS) [1] to Unemployment Benefits Specialist 2 was correct.
>
> Subissue: If not, is appellant's position more appropriately classified as a UBS 1 or a UBS 2.

FINDINGS OF FACT

1. At all times relevant to this matter, the appellant has been employed as an adjudicator of disputed unemployment compensation claims in the Milwaukee North office of respondent DILHR's Unemployment Compensation Division.

2. A request was made to reclassify appellant's position from UBS 1 to UBS 2. After review, and in a decision reflected in a memo dated October 5, 1989, the respondent reclassified the position but declined to regrade the appellant because the appellant did not attain the minimum performance evaluation score. The memo stated, in part:

> The review of the request to reclassify your position from Unemployment Benefit Specialist 1 (12-02) to an Unemployment Benefit Specialist 2 (12-03) has been completed. This review consisted of a comparison of the duties and responsibilities of the

position with the position standards, a comparison of the position with other positions within the Unemployment Compensation Division, and a verification of satisfactory performance via the Wisconsin Quality Performance Index by the Bureau of Benefits and production reports produced by the Bureau of Local Operations.

As a result of the review of your position, I have determined that the position is most appropriately classified as an Unemployment Benefits Specialist 2.

After a determination is made to reclassify a position, a second determination must be made regarding the regrading of the incumbent. Regrade means the incumbent of a filled position should remain in the position without opening the position to other candidates. Incumbents of filled positions <u>may not</u> be regraded:

- If the incumbent's job performance is not satisfactory.

- If the incumbent has not satisfactorily attained specified training, education or experience in a position identified in a classification series where the class levels are differentiated on this basis.

The Unemployment Compensation Division, Bureau of Local Operations, requires that minimum timeliness, productivity and quality standards be achieved for an adjudicator at the Unemployment Benefit Specialist 2 level. The minimum standards expected for a developmental level adjudicator are 80% for timeliness (cases issued timely divided by total cases assigned), 93% for productivity (productivity units earned divided by total hours worked), and 80% for quality (number of [Quality Performance Index] cases passed divided by number of QPI cases).

Although you have obtained training and experience and have met the timeliness and productivity standards associated with the developmental level adjudicator, you have been unable to achieve the minimum quality standards. According to the Bureau of Benefits, during the time frame from October 9, 1988 to April 8, 1989, your achievement for the quality standard was 60%. Therefore, you cannot be regraded to the Unemployment Benefit Specialist 2 level at this time.

Because you cannot be regraded at this time, your position will be structured as an entry level adjudicator at the Unemployment Benefit Specialist 1 classification. Reclassification of your position and your regrade could be considered at a later time.

3. The respondent has stipulated that the appellant's productivity and timeliness in processing unemployment compensation claims has been at or above the required level for reclassification/regrade during the relevant period of time.

4. According to the Adjudicator Handbook:

> The U.S. Department of Labor (DOL) annually conducts a QPI analysis of nonmonetary determinations. Wisconsin has incorporated the Federal QPI as a means of evaluating the state's performance and as an aid in identifying areas in the initial determination process which need improvement.

5. The QPI involves the review of 20 cases pulled randomly from those claims adjudicated by the employe being reviewed. Fourteen of the 20 cases must score 81% or higher for the employe's performance to be considered satisfactory. If 12 or fewer cases are scored at or above the 81% level, the employe has failed the review. In the event 13 of the 20 cases are rated at or above 81%, an additional 7 cases are reviewed and scored and from the combined sample of 27, 19 must score 81% or above in order for the employe's performance to be considered satisfactory.

6. The QPI review for adjudicators throughout the state is conducted by the staff of DILHR's Bureau of Benefits. The initial review of the appellant's cases was performed by Al Frank. In addition, all of the cases which served as a basis for not regrading the appellant were reviewed by John Roche, section chief of the Disputed Claims Section of the Bureau of Benefits and Mr. Frank's superior. Mr. Roche's responsibilities include providing training to new adjudicators, providing advanced training for existing adjudicators, providing technical assistance to managers and lead workers in the various field offices throughout the state and reviewing the quality of investigations. Mr. Roche reviews thousands of files during the course of a year.

7. Mr. Roche concluded that 8 of the 20 cases failed to score at or above 81%. Appellant concedes that 3 of the 8 were appropriately scored. The 5 remaining cases are treated in separate paragraphs, below.

8. Mr. Frederick[1] (75% score). This claim raised an issue of "quit-to-take" which refers to the situation where an employe "terminated his or her

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[1] Pseudonyms have been used for each claimant and employer.

employment to accept another job" as long as the new job is for an equal or higher wage, more hours, longer term employment or is closer to the employe's domicile. §108.04(7)(L), Stats. The quit-to-take situation is an exception to the general rule that someone who quits is not entitled to unemployment compensation benefits. One element which must be determined as part of the adjudicator's investigation of a quit-to-take case is the date on which the new job was offered to the employe. (Resp. Ex. 4B, UC Manual) The job offer has to occur before the quit in order for the quit-to-take theory to apply. The adjudicator's file showed the following:

a. The initial employer (Personnel Corp.) completed a statement which indicated that September 16, 1988, was the last day for which Mr. Frederick received any type of pay and included the following narrative:

> Employee quit. According to the terms of employment Allan signed he quit without any notification, didn't call at all. He isn't interested in working with us according to our conversation on 9/16/88.

b. The claimant completed a form on which he stated that he worked for Personnel Corp., until September 26, 1988, and then commenced working with a new employer, Village Bar, on October 6, 1988. Complainant also completed a statement on which he sated that he quit his job with Personnel Corp. "because on 9/19/88 I was offered a new job by [Village bar]" that paid more than the prior job and was also a permanent position.

c. Complainant interviewed Village Bar's personnel director. The notes from that telephone conversation include the following question and answer: What date was new employe offered the job? "9/21/88 9/19/88 ok too!" The exclamation point was written in such a way that it was not clear whether it was an exclamation point or a question mark. Although it was not expressly indicated anywhere in the Frederick file, the appellant had twice asked the personnel director during the interview about the date of the offer. The first time, the personnel director stated it was September 21st. The appellant subsequently asked: "Are you sure of that date? Could it have been a date other than that? The employe said 9/19." The personnel director then said it could have been that date, too.

d. Appellant's written findings and determination regarding Mr. Frederick's claim made no mention of the fact that the claimant stated he had

been offered the position with Village Bar on September 19th, while Village Bar's statement referred to both the 19th and the 21st.

9. Mr. Hope (55% score). This claim is grounded on the quit versus discharge issue. The adjudicator's file showed the following:

a. The employer, [State] Cleaning Systems, completed a statement which indicated that Mr. Hope had quit and was unavailable for work, making him ineligible for unemployment compensation benefits.

b. The employe signed a statement which included the following language:

> I worked for [State] Cleaning Systems from 3/87 through 1/6/89 when I was told to go home after returning with a broken truck ...
>
> On 1/6/89 I took the truck out to do a job. The truck's belts blew on it and I returned it to the shop at between 1 & 2 p.m. I told Todd in the office that the truck was down. He told me to take the truck to [Saturn] the mechanics. I could not until [the owner] called which he did in about 15-20 min. He told me ... not to take the truck to [Saturn]. He told me to us a portable [cleaning] unit with my own truck. I explained to him that it was impossible to use my truck and the portable unit because the area was too soiled. He said then use the work truck but with a portable unit. I told [the owner] I could not do that because the work truck was overheating. He said he would be back to the shop shortly. When he returned I again explained the situation, I said it would be a 10-15 minute fix at the mechanic. He said that he did not need these headaches its a new year just go home, so I did.
>
> .... I did not work at all after the 6th. I was not scheduled to work after that day 1/6/89. I called in on 1/9, 10, & 11/89 and talked to Todd. He said there was no work for me. He said there was no work for me, he also said that he would leave a message for [the owner] to call me but [the owner] never did .... I feel that is lack of work that was the reason for my separation.

c. The appellant interviewed the owner of the cleaning service. The notes reflect, in part, the following statement by the owner:

> When I returned to the shop 45 min later [Mr. Hope] was there. I asked why he was still there and he told me he refused to use a portable unit. I told him if he did not want to use the portable equipment he could go home. After he had left I learned that he was calling other employes to do his cleaning. He was a good worker but this refusal was not the first.

> I did not hear from him again. He called once and I asked him to hold because I was on a long distance call, when I got to him he was gone. I tried to reach him he has an answering machine. There was work available he refused to do it.

d. The appellant's written initial determination includes the conclusion that the claimant "quit when he refused to do the work that was available and went home." Appellant supported this conclusion with the following rationale:

> Er alledges ee quit. Based upon the statement of both the ee and the er I believe that when he refused to do the work available he quit the employer. After he refused and left there was no further er/ee relationship. It should be further noted that the employe did nothing to continue the [relationship] for 3 days after he left which is inconsistent with the er/ee relationship.

e. The appellant made no effort to contact Todd, the person referred to by the claimant as having received the claimant's telephone calls on January 9, 10 and 11. Appellant also did not follow up on the claimant's contention that he was not scheduled for work after January 6th.

10. Mr. Richards (75% score). This claim again raises the issue of quit versus discharge. The adjudicator's file showed the following:

a. In his initial claim, Mr. Richards stated that he separated from his job as a salesperson for Setter, Inc., due to lack of work after 6 weeks of employment.

b. The employer's report indicated that during 5 weeks of employment, Mr. Richards was paid $1241 and that he "voluntarily quit with no notice given."

c. The claimant completed a written statement which read, in part:

> I worked for [Setter, Inc.] from January 1989 through 3/2/89 when I quit without any notice. I worked there as a factory representative making $200 per week on commission sales. I worked 70 hours per week.
>
> I quit because I was not selling anything .... There was a draw on commissions but I did not go in the hole .... The day I quit I thought i had been fired. I was never told I was fired. I could have been working but I was not selling.

> I did not report that I quit because I assumed I was fired. I did not report that I was fired because I thought that Lack of Work ment I was not selling anything.

d. The appellant issued an initial determination that the employe had quit his job. Neither the initial determination nor the determination rationale provided any basis for the appellant's conclusion that the employe had quit rather than had been fired.

11. Ms. Carpenter (65% score). This claim raises issues of suitable work and approved training. According to page 28 of the Adjudicator's Manual:

> An adequate suitable work investigation must first establish that there was a bona fide job offer or referral. Once that is established, the investigation must address suitability. If the work is suitable, the investigation must establish if there was good cause for refusing the work or for failing to apply.
>
> In all cases, the adjudicator must consider the claimant's ability to work and availability for work.

According to Part VII, Chapter 5, Page 21 of the Unemployment Compensation Manual:

> Benefits shall not be reduced or denied for a claimant ... who failed to return to the former employer if the employe is enrolled in "approved training".
>
> The "approved training" protection is statutory (but is not a "good cause" factor). The department must apply "approved training" if the claimant would other wise be denied when all of the following [7] conditions [such as full-time, likely to increase opportunities for employment, satisfactory progress, etc.] have been met.

The records maintained by the respondent included the adjudicator's file prepared by the appellant and several other adjudication files relating to the same claimant and the same employer.

a. The claimant, who had received short term employment offers from a firm which places health care workers, completed a form on which she stated as follows:

> I refused work for this employer in week 8 because they called me at 6:00 in the morning I go to school at 10:00. I could not accept the offer of work. I was to start at 7:00 A.M. The job would

> have paid $7.50 per hour. I have worked for the company for over a year.
>
> I refused the job offer in week 10/89 because the company wanted me to work in [Skillful] Nursing home in Waukeshaw. I refused it because I did not have transportation. That job would have paid $7.50 per hour. I was to start at 3:00 p.m.
>
> I am not able and available to accept full-time first shift work. I am attending classes to get my LPN. I have been approved for Approved Training.

b. A telephone statement obtained from the employer confirmed the dates of the employment offers, although there were minor discrepancies with the name and location of the nursing home and the hourly wage offered.

c. The appellant issued an initial determination which included the finding that the claimant was "in a course of approved training." The only explanation in appellant's determination rationale was the statement: "Both wks client is on approved training. 2 LIDs issued. Only difference is date of offer." Neither the initial determination nor the rationale made reference to bona fide offer, suitability, good cause or able and available. Neither made any reference to whether the claimant continued to make satisfactory progress in her training.

d. J. Hargons, another adjudicator in the Milwaukee North office, processed claims relating to weeks 3 and 8 during 1989 involving the same employe and employer. The files for these other two claims, which have the notation "2 LIDS," on them include specific references to bona fide offer, suitability, able and available and approved training.

e. When appellant met with Mr. Frank to discuss the results of the QPI and to review the cases in which the appellant did not receive a passing grade, Mr. Frank agreed that the existence of the additional files prepared by Adjudicator Hargons justified a passing grade for Ms. Carpenter's file. However, Mr. Roche did not agree to the change so the initial score of 65% was not revised.

f. Appellant's supervisor, Phil Kalmerton, has informed adjudicators that accessibility to computerized records of prior determinations can constitute adequate documentation.

g. At the time the employer made the short term employment offers that were the subject of the claim investigated by the appellant, the employer

was already advised of the initial determinations issued by Adjudicator Hargons which concluded that the claimant was in approved training. The employer's subsequent offers could be interpreted as harassment of the claimant. If an employer makes an offer for purposes of harassing a claimant, that offer might not be considered a bona fide offer.

12. Mr. Edwards (75%). This case also involves issues of able and available and approved training. The adjudicator's file indicates, in part:

a. The claimant signed a statement which read, in part:

> I worked for [Dairy, Inc.] from 12/29/87 through 2/9/89 when I was laid off due lack of work .... While working there i attended school at Acme Institute of Technology where i am persuing a course in Tool & Die Design ....
>
> I am not able or available for full-time, first-shift work Monday through friday. I am available for second & Third shift and weekends. I would transfer to night shchool if I were offered full-time, first-shift work monday through friday. There are the same courses offered at night .... I have worked as a laborer, a military policeman, and that is about it. I have training in no other areas. I have attended 13 yeaRS OF SCHOOL.

b. The claimant completed a school attendance form which indicated that he attended school from 7:30 a.m. until 12:30 p.m. Monday through Friday, and that he was available for work from 2:00 p.m. until 10:00 p.m.

c. The representative of the Acme Institute of Technology completed a training institution certification which indicated that the claimant was enrolled full-time in a specific course of study (tool and die design) which would result in granting of a diploma but no credits toward a bachelor's degree. It also indicated that the claimant was attending class regularly and making satisfactory progress in the course of study.

d. The appellant obtained labor market information that a person with experience as a laborer and military policeman and with 13 years of schooling who is available 2nd, 3rd shifts and weekend is available for 25% of the suitable work in the local labor market.

e. The appellant issued an initial determination which stated:

> The claimant is a student enrolled in a course which qualifies as approved training under section 108.04(16). He attends regularly and is making satisfactory progress in such course.

> Section 108.04(16) provides that the claimant is not required to be able to work or available for work while enrolled in approved training.

f. The determination rationale for the able and available issue read as follows:

> Client is not A & A per [labor market information]. Client is attending approved training[. Claim] is allowed under that.

g. In reaching his conclusion that the claimant was not able and available for employment, the appellant ignored the appellant's statement that if he were offered a full-time, first shift position from Monday through Friday, he would transfer to night school because the same courses he was taking were also offered at night.

CONCLUSIONS OF LAW

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

2. The appellant has the burden of proving the the respondents' decision to reclassify his position but not to regrade him to the UBS 2 level was incorrect.

3. The appellant has met his burden of proof as to the Frederick file but not as to any other of the files in dispute.

DISCUSSION

Issue for Hearing

The parties stipulated to the issue for hearing set out at the commencement of this decision which refers to whether "the respondents' decision denying appellant's reclassification request from Unemployment Benefits Specialist (UBS) [1] to Unemployment Benefits Specialist 2 was correct." However, the letter from the Chief of the Classification Section of DILHR's Personnel Office (set out in finding of fact 2) which served as the final decision that was appealed to the Commission clearly indicates the appellant's position had been reclassified to the UBS 2 level but the appellant

could not be regraded due to the failure to achieve minimum quality standards. The letter goes on to state that the position was to be restructured as an entry level adjudicator at the UBS 1 level. Neither party pointed out the discrepancy between the issue for hearing and the underlying decision during the course of the hearing or in post-hearing briefs. Given the posture of the case and the fact that the focus of the arguments of the parties properly was on the quality of the appellant's performance as reflected by the QPI analysis rather than on the classification of the position itself, the Commission will liberally interpret the issue for hearing as referencing the regrade decision. The other aspects of the appellant's performance, i.e. timeliness and productivity, are not in dispute.

The 5 claimant files which received a failing grade as part of the QPI and which are being contested by the appellant are treated separately, below.

Frederick

The first question is whether the punctuation is an exclamation point or a question mark or whether it is so unclear that a reviewer could not be reasonably confident it was one or the other. Here, the punctuation is unclear. The next question is whether the reviewer must then ask the adjudicator to clarify the marking or whether the ambiguity created must in itself require a failing grade because the determination must be based on the information found within the 4 corners of the file and without some outside explanation obtained from the adjudicator. The logical response is that the reviewer should not be able to ignore information simply because it is illegible or unclear and where the adjudicator is available. However, this conclusion does not mean that the adjudicator can then supplement the file with additional information not initially found within it. As a general matter, the file must stand on its own. This conclusion is supported by the following language found in the adjudicator's handbook:

> In scoring the QPI, the adequacy or inadequacy of an investigation is based on the necessary elements for an issue, the information the investigation actually contains and the application of the law to that information.
>
> The scorer will consider only those facts which are documented in the investigation. Facts which are only implied or are referred to in the rationale but appear nowhere else in the investigation will not be considered adequately documented.

> Where necessary information is not presented, the scorer will assume that there was no attempt to obtain such information unless there is documentation that the party was unable to provide that information to the adjudicator.

If the reviewer must be credited with having access to the appellant and therefore knowledge that the punctuation was an exclamation point but does not have access to the appellant's explanation provided at hearing[2], the next question is whether some explanation is required in terms of indicating why the adjudicator adopted the 19th as the date of the offer. Obviously it would have been preferable for the appellant to have explained the employer's reference to both dates rather than simply listing them both in the space for the date of the offer. However, the Commission concludes that the information on the form is reasonably unambiguous and indicates that the employer made an employment offer on the same date as was provided by the claimant. Given this agreement, the Commission also concludes that the Frederick file is entitled to a passing grade.

Hope

The problem with the appellant's determination in the claim filed by Mr. Hope is that there is conflicting information from the parties in terms of whether the employe voluntarily quit his job or was fired. The claimant contended he was told to "go home," that he was not scheduled to work after that and that he called in to the employer on three different occasions and was told that the employer would get back to him but never did. On the other hand, the owner of the business stated the employe left work voluntarily and never returned. The respondent correctly points out that the appellant did not attempt to verify the appellant's version of events, even though it would have been relatively straightforward to have spoken with Todd in the employer's office and to have sought documentation or other verification of whether the appellant was scheduled to work on July 7 and 8. The case must be viewed as falling below the 81% level.

Richards

In its brief, respondents conclude that the "documents produced by the appellant are not at all clear as to the voluntariness of the employe's actions."

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[2]Finding of fact 8c.

Respondents point to the statement by the employe as being "full of ambiguities:"

> the day I quit I thought I had been fired. I was never told I was fired .... I did not report that I quit because I assumed I was fired.

Appellant's brief provides, in relevant part, as follows:

> The information from the employer and employe shows that he was, based upon the best available information, not fired he quit. The information shows that while he may have felt he was fired, he stated he quit, he stated he was never told he was fired, and the employer also states he quit without notice! Department rules state that when no more information is available, the employer as is documented failed to refute the information available, you must rule based on the best available information.

The question raised by the documents in the file is why did the claimant think he had been fired? He clearly states that at the time of his separation he thought that he was fired, even though he was never told that he was fired, on his initial claim form he gave "lack of work" as the reason for separation and elsewhere in his statement he also makes several references to having quit. However, the statement obtained by the appellant from the claimant should not have left hanging the question of why, on the last day of work, claimant felt he had been fired. A more extensive statement from the claimant could have clarified the reference to having been fired and provided an explicit rationale for the appellant's conclusion that this was a quit rather than a discharge.

<u>Carpenter</u>

The claim arising from Ms. Carpenter's refusal to accept an offer to return to work with her prior employer raises a variety of side issues. Appellant's supervisor testified that he taught adjudicators that they could rely on computerized information derived from other determinations involving the same employe and employer as long as that information was accessible. Mr. Frank, when going over the Carpenter file with the appellant as part of the QPI "close out" was satisfied with the status of the file once he was made aware of the information found in the other files prepared by Adjudicator Hargons. However, it was Mr. Roche who had the final authority to accept or fail the case as part of the QPI, and Mr. Roche was not satisfied with the references to

the records prepared by Adjudicator Hargons. The key evidence relating to the Carpenter file arises from a question posed by the appellant of his supervisor.

> Question (by appellant): Did the employer then know that the person was in approved training. Had the employer been given any notice of that?
>
> A: It appears that on two previous decisions issued where it was ruled that the claimant had good cause for failing to refuse the work that the approved training was mentioned.
>
> Q OK. So the employer could use this process of the department to harass the employe even if the employer already knew that the employe did not have to accept work?
>
> A: I suppose that is possible, yes.
>
> * * *
>
> Question (by respondent): If an employer makes an offer for harassing purposes, is that a bona fide offer?
>
> A: Possibly could not be bona fide.

This testimony points out clearly the need for the adjudicator to go through the various steps of the analysis set out in the adjudicator's handbook before reaching the approved training question. In the event the offers of employment were found to be harassment rather than a bona fide offer, the case would be determined without resort to the approved training issue. In addition, even assuming that the findings in the other files are relied on in terms of bona fide, suitability, good cause and able and available, the appellant did not verify that subsequent to the date of Adjudicator Hargons' determination, the claimant continued to make satisfactory progress in her course of training which is one of the requirements for a finding of "approved training."

In his brief, the appellant argues that the determination of approved training makes all of the preliminary requirements irrelevant:

> The fact remains that the claimant was already in Approved Training !!! No matter if the job was found to be bona fide or not, no matter if the work was suitable or not, no matter whether the refusal was for good cause or not and since we have already ruled the person is in approved training, which means we have

> already ruled she is not able and available, the final decision is the same and the effect is the same, we cannot as a department deny benefits!!!

This argument reflects a result-oriented view which is simply inconsistent with the procedures which appellant referred to in his testimony as "dotting i's and crossing t's." The appellant may feel that certain procedures are unnecessary and actually interfere with the timely completion of work. However, as someone who is seeking to be regraded from UBS 1 to 2, based, in part on an analysis of work quality, the appellant does not have the luxury of ignoring procedures on which determinations of quality are based, even if an argument can be made that the procedures are unwieldy.

Edwards

Appellant's brief contains the following argument regarding the Edwards claim:

> First the claimant states himself that he is not able for and available for full-time, first-shift work Monday through Friday. I agree that the claimant contradicts himself, BUT respondents' exhibit 14 page 11 states that "self serving statements have limited credibility" and also training states that self damaging testimony, that which can only serve to harm the witness holds a great credibility. Looking at the claimant's statement one can only rule that he is not able for and available for work and deny his eligibility under the able and available statues, but since the claimant also shows that he is attending school he was ruled to be under approved training.

The respondent acknowledges that the "appellant's method may well have been a shorter way to resolve the case" but contends that it was not the correct procedure. As previously noted in the findings related to the Carpenter file, the adjudicator must address the elements in sequence and here, the appellant was required to address the able and available issue prior to the approved training issue. The claimant's statement contains what appears to be a contradiction in that he first says he is not available for first shift work but then says he will change his class schedule so that he could work on the first shift. The respondent notes that the appellant could have easily confirmed the availability of the night classes by contacting the technical school. However, the appellant effectively ignored the complainant's statement to that effect, a statement that was contrary to complainant's interest and, instead, the

appellant chose to rely on the claimant's self-serving statement that he was not able and available.

Credibility

As to most of the claimant files that were the subject of this hearing, the Commission was placed in the position of weighing the appellant's testimony, as to whether the procedures he followed were proper, versus Mr. Roche's testimony on the same question. Mr. Roche has responsibility for overseeing the QPI program statewide and he reviews thousands of cases annually for the sole purpose of determining whether the procedures followed were in compliance with departmental standards. Mr. Roche has years of experience in performing this function. The Commission found that there was insufficient reason to find that Mr. Roche's decision to assign the appellant a failing grade for 4 of the 5 cases was incorrect. In terms of weighing the testimony interpreting the adjudicator's handbook and determining what procedures are required, the Commission has generally accorded Mr. Roche's testimony more weight given his expertise in the area and given the absence of any testimony other than from the appellant which would tend to show that Mr. Roche's analysis was incorrect. The appellant did offer the testimony of his supervisor, Mr. Kalmerton, to the effect that the Carpenter case should pass the QPI standard of 81%. Of the 5 cases being reviewed, the Carpenter case is the most difficult to decide, in part because of Mr. Kalmerton's view that the Carpenter file was satisfactory. However, Mr. Kalmerton also testified that the file did not reflect the conclusion as to whether the offer of employment constituted harassment or whether the claimant continued to make satisfactory progress in her course of approved training. This testimony undercuts Mr. Kalmerton's view that the appellant's handling of the Carpenter file was satisfactory. As to the Frederick file, Mr. Roche read an exclamation point as a question mark and this reading, while not unreasonable given the clarity of appellant's writing, was still incorrect. The punctuation had a major effect on the respondent's scoring of the Frederick file and, as a consequence, that grade of 75% must be increased to a passing level.

The appellant makes several references in his briefs to the unfairness of a system of reclassification/regrade which places an undue emphasis on an analysis of the 20 cases chosen at random from a much larger number of determinations made by the adjudicator. The appellant correctly notes that the

established system will reward an adjudicator who produces the bare minimum in terms of the number of cases but spends extra time "jumping through the hoops" to insure that all of the various adjudication procedures are religiously followed. The QPI has been adopted by the respondents as part of the reclassification/regrade process for the UBS series. The Commission has previously ruled that it must apply existing class specifications and position standards as they have been approved by the Department of Employment Relations and the Commission lacks the authority to reclassify a position or regrade an employe merely on a theory that such an action would compensate for problems or inequities in the class specifications. Kennedy et al. v. DP, 81-180, etc.-PC, 1/6/84.

The net effect of the Commission's decision is to give the appellant 13 of 20 passing scores. This result requires the respondent to review an additional 7 cases as described in finding of fact 5

ORDER

The respondents' decision to reclassify the appellant's position and not to regrade the appellant is affirmed in part and reversed in part and this matter is remanded to the respondents for further action in accordance with this decision.

Dated:______________________, 1990 STATE PERSONNEL COMMISSION

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LAURIE R. MCCALLUM, Chairperson

KMS:kms

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DONALD R. MURPHY, Commissioner

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GERALD F. HODDINOTT, Commissioner

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