

DAVID W. HERRICK,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 90-0395-PC

DECISION
AND
ORDER

This matter is before the Commission on the respondent's motion to dismiss. The parties have filed briefs and the following facts appear to be undisputed.

FINDINGS OF FACT

1. At all times relevant to this matter, the appellant has been employed in the Department of Natural Resources (DNR) as the Northwest District Water Supply Program Supervisor.

2. Prior to August 17, 1990, respondent Department of Employment Relations (DER) conducted a classification survey of numerous positions within DNR, created some new engineering supervisor classifications, broadened the pay ranges for these classifications and provided "compression" pay to eliminate certain pay inequities. The appellant's position was not included by the respondent in this classification survey.

3. By August 17, 1990, it became obvious to the appellant that he was not going to be notified by DNR personnel of the survey results and that his position had been excluded from the survey.

4. On August 17, 1990, the appellant called Paul Willihnganz, Chief of the Recruitment, Classification and Surveys Section of DNR Personnel, to confirm that his position had been excluded to find out why. Mr. Willihnganz said he would check on the appellant's situation and get back to him.

5. After not hearing from Mr. Willihnganz, the appellant called him on September 10, 1990. Mr. Willihnganz told the appellant that it didn't appear anything could be done about the appellant's situation.

6. On September 18, 1990, the appellant met with Judy Burke, a Classification Specialist with DER. Ms. Burke advised the appellant he could contact Rick Henneger, a DNR attorney involved with personnel matters, to determine if the matter could be grieved and also advised the appellant to use the language "I would like to appeal ..." in the memo the Mr. Henneger.

7. On September 20, 1990, the appellant sent a memo to Mr. Henneger. The memo stated, in part:

I would like to appeal my position being excluded from the recent engineering survey supervision action implemented by personnel.

* * *

I am asking that my position and work be recognized for what it is by receiving the same pay and classification considerations as other Water Supply Supervisors and the NWD Wastewater Supervisor.

8. Mr. Henneger met with the appellant and on October 15, 1990, advised him that nothing could be done because no engineer was assigned to the appellant's position for supervisory purposes and also advised him that he could pursue the matter with the Personnel Commission if the Commission would take it on.

9. On November 2, 1990, the appellant filed an appeal with the Commission of the exclusion of his position from the classification survey. The appellant subsequently characterized his appeal as being based on:

DNR Personnel not recognizing that I do "supervise" engineers in the district's municipal water supply program, not receiving the change in classification title as a result, and not receiving the compression pay that was awarded to the other program supervisors.

OPINION

The respondent's motion to dismiss is based on two distinct arguments. The first is that the exclusion of a particular position from a classification survey is not an appealable action. The second is that the appellant failed to timely file his appeal with the Commission.

The Commission's jurisdiction over decisions rendered by the Secretary of DER is found in §230.44(1)(b), Stats:

Appeal of a personnel decision under s. 230.09(2)(a) or (d) or 230.13 made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m).

The provision relating to classification decisions is §230.09(2)(a), Stats:

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.

The respondent has defined the term "reallocation" in s. ER 32.01(2), Wis. Adm. Code, as:

the assignment of a position to a different class by the secretary as provided in s. 230.09(2), Stats., based upon:

- (a) A change in concept of the class or series;
- (b) The creation of new classes;
- (c) The abolishment of existing classes

In addition, the respondent has established a notice requirement in §ER 3.04, Wis. Adm. Code:

Approvals 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.

If each decision not to include a specific position within the scope of a classification survey was construed as a reallocation denial, the practical effect would be to require written notice be sent to every classified employe following every survey. Most such notices would simply indicate that the employe's position was not reviewed as part of the survey. The other notices

would advise the employees whose positions were reviewed as to the consequences of that review.

The decision not to review a particular position as part of a classification survey cannot be equated with a decision to deny reallocation of that position. There is no indication that there was an individualized review of the appellant's position relative to the particular duties represented in the survey classifications prior to the reallocation of the positions which were included in the survey. The Commission construes its authority under §230.44(1)(b), Stats., over decisions to reallocate positions as part of the classification survey process not to extend to decisions setting the scope of the survey. However, this is not to say that an employee who concludes his/her position was wrongfully excluded from a survey is barred from any effective relief. Such an employee may follow the normal procedure for initiating a reallocation or reclassification request and identify a new classification, created as a consequence of the survey, as better describing his or her position.

Here, there is insufficient evidence to indicate that the appellant, in his contacts with DER and DNR, specifically requested reallocation of his position. The appellant did write Mr. Henneger, an attorney with DNR, a memo which explained that his position should have been included in the survey and referenced other Water Supply Supervisors. However, there is no evidence that the appellant's memo of September 20, 1990 was treated as a formal reallocation request or that Mr. Henneger constructively denied such a request. Mr. Henneger merely informed the appellant by telephone on October 15th that there was nothing DNR could do. It is reasonable to interpret Mr. Henneger's response as relating to the appellant's request to have his position included in the survey, rather than to a reallocation request.

Upon submission of a proper reallocation request and a formal denial by the Secretary of DER or as may be delegated by the Secretary, the appellant may obtain review of any such denial by filing a new appeal with the Personnel Commission.

ORDER

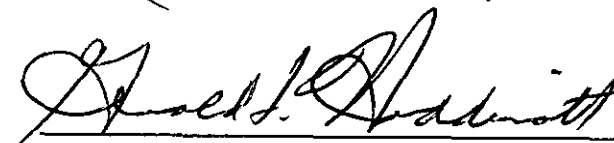
The respondent's motion to dismiss is granted.

Dated: February 8, 1991 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
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DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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