

ROBERT B. ECKDALE,
ANDREW M. STEWART,
RAJ VAKHARIA,
IMELDA R. STAMM,

Appellants,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case Nos. 91-0093, 0094, 0095, 0096-PC

INTERIM
DECISION
AND
ORDER

These matters are before the Commission on the respondent's motion to dismiss. The parties have filed briefs and the following facts appear to be undisputed.

1. At all relevant times, the appellants have been employed as air management engineers by the Department of Natural Resources.

2. In approximately July of 1990, the appellants were among those engineers who were notified that as a result of a classification survey, their positions were being reallocated by respondent Department of Employment Relations (DER) to the Air Management Engineer - Advanced 1 level.

3. Allen Hubbard, a co-worker of the appellants, likewise was informed that his position had been reallocated to the Air Management Engineer - Advanced 1 level.

4. The effective date of the survey was June 17, 1990.

5. The appellants and Mr. Hubbard were advised that they could initiate an informal appeal of DER's decision. Only Mr. Hubbard initiated such an appeal at that time.

6. By a memo dated March 25, 1991, from Debra Martinelli, DNR's Director of Personnel and Human Resources, the appellants and other DNR engineers were informed as follows:

We are pleased to announce that we have recommended DER upgrade almost 100 Engineer and Engineer Supervisor positions to higher levels and our recommendations have been approved. Most of the Engineer movements will be to the Advanced 1 level.

Why are these upgrades occurring? We discovered that some positions in other agencies were given more generous class levels than had been provided for in the classification specifications. Therefore, we worked with DER to insure that the proper class relationships exist between our class levels and those assigned to positions in these other locations.

* * *

When will you know if you are one of the lucky 100? Your supervisors will be giving verbal notice in the near future, if they haven't already. The Bureau of Personnel will be following up with processing of the official paperwork as soon as possible (this will probably take a few weeks).

Is this the end of upgrades stemming from the Engineering Survey? No, there may also be future upgrades to the Advanced 2 level and some Supervisor levels. Why? Because the final review of these levels has not been completed. Please know that we are looking for opportunities to upgrade DNR employees wherever the opportunity presents itself The implementation of this survey seems to have taken on a life of its own We will continue to pursue higher levels wherever we can make the case to DER. If you are not one of those who are being upgraded rest assured that we are looking out for the interests of everyone. You did not have to appeal to be considered.

7. By letter dated April 12, 1991, one of the appellants, Raj Vakharia, wrote to Judy Burke, DER's Survey Coordinator. The letter referenced the memo from Ms Martinelli and concluded with the following:

In light of this new information it appears that Advanced I is the objective level of the Air Management Engineer Classification Series. As you know, the senior level was thought to be the objective level based on the Statewide Engineering Survey. Based on my position reallocation notice, dated July 11, 1990, the Department of Natural Resources had already made a decision that I was not at the objective level but one level above the objective level. Due to these reasons I did not appeal this reallocation in July of 1990.

If I had known in July 1990, that Advanced I level was the objective level of the classification series as I know now, I would have filed an informal appeal requesting my position to have been reallocated to Advanced II based upon the duties and responsibilities of the position.

With the writing of this letter, I am requesting that my position reallocation be reviewed for upgrade to the Advanced II level for Air Management Engineer as part of the Engineering Survey.

8. At least two other appellants, Mr. Eckdale and Mr. Stewart, also wrote letters seeking review of their classifications.

9. Ms. Burke responded by letters dated May 22, 1991, which stated, in part:

As I explained to those employes that I talked to directly, if an employe did not appeal their survey reallocation within 30 days after receiving their survey notice, they do not have appeal rights effective June 17, 1990. However, you may request a classification review of your current position. If you desire, we will consider your letter as a request for review of your position.

Before I can initiate any additional reviews, I must complete the analysis and determination of all pending Engineering Survey appeals. Each Agency Survey Coordinator has been instructed to reallocate all employes who are performing the same job duties at the same level of performance as positions that have been approved through the survey appeal process. This evaluation may take care of your request (without any further action by you or your supervisor) if your counterpart jobs have been reallocated to a higher classification and level.

When your position is reviewed, the classification and level determination will be based upon the specific job duties that you were assigned and were performing on June 17, 1990 as well as your level of supervision. If the job content analysis of your position's duties indicates that an error was made on June 17, 1990, then a reallocation will be completed for you, effective June 17, 1990, to correct the error and properly classify your job. If we determine that your assigned job duties and/or the level of your performance in question occurred after June 17, 1990, we will complete a reclassification request with an effective date based on the Administrative Rules and receipt of your letter. If the original reallocation is determined to be correct, you do not have appeal rights to the Personnel Commission for the survey implementation date of June 17, 1990. (Emphasis in original)

10. By letter dated May 10, 1991, Ms Burke informed Mr Hubbard that his informal appeal of the reallocation decision had been denied and that he had 30 days in which to file an appeal with the Personnel Commission.

11. Mr. Hubbard filed a letter of appeal with the Commission on June 3, 1991.

12. The appellants filed separate letters of appeal with the Commission on Monday, June 10, 1991 Mr. Eckdale's letter stated, in part:

Had Mr. Hubbard's appeal to DER been granted, I feel that under procedures used by DER in similar cases, my position would have been evaluated and upgraded to the Advanced 2 level even though I had not filed an appeal of my position's original reallocation with DER. Therefore, I hereby appeal DER's reallocation decision of May 10, 1991 on Mr. Hubbard's position, as I feel it directly impacts my position.

OPINION

While not identifying them as such, the respondent's motion to dismiss raises two separate issues: 1) May the appellants now pursue reallocation appeals with the Commission in terms of the correct classification of their own positions, and 2) may the appellants pursue reallocation appeals with the Commission as to the correct classification of Mr. Hubbard's position?

The first issue, which relates to the proper classification of the appellants' positions, is resolved by referencing the time periods that are made available to employees to file appeals of reallocation decisions to the Commission. The time limit for filing such an appeal under §230.44(1)(b), Stats., is established in §230.44(3), Stats.:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later

This 30 day time limit is mandatory rather than discretionary and is jurisdictional in nature. The term "filed" requires physical receipt by the Commission. Richter v. DP, 78-261-PC, 1/30/79.

Here, the appellants received notice in approximately July of 1990 of the decisions to reallocate their positions effective June 17, 1990. Therefore, according to the language of the statute, the appellants had to file any appeals of the reallocation decision within 30 days of the date of notification in order to be considered a timely appeal with the Commission. Nothing in the various case files suggest that because DER granting the appellants an opportunity to pursue an informal appeal (an opportunity utilized by Mr. Hubbard but not by the appellants), the 30 day time period was somehow extended for the appellants until such time as Mr. Hubbard received written notification of the denial of his informal appeal. The letters from Ms. Martinelli and Ms. Burke in-

dicade that positive results obtained by one employe through the survey appeal process should result in the reallocation of all other positions which have been assigned the same job duties. As long as such classification actions meet the definition of a reallocation under §230.09(2)(a), Stats., the actions will be appealable pursuant to §230.44(1)(b), Stats. However, in the interim, there is no indication that the respondent has taken any action regarding the appellants' positions. At least three of the appellants, Messrs. Vakharia, Eckdale and Stewart, apparently have classification review requests pending before DER, as evidenced by Ms. Burke's letters of May 22, 1991. These requests have not yet been acted upon, so there is no appealable decision that has arisen from them.¹

The second issue raised by respondent's motion relates to the proper classification of Mr. Hubbard's position. This issue turns on the question of whether the appellants have legal standing to seek review of the respondent's decision to deny Mr. Hubbard's informal appeal and to classify his position at the Air Management Engineer - Advanced I level rather than at the Advanced II level.

The Commission has cited with approval the two-part test for determining issues of standing found in Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 10, 230 N.W. 2d 243 (1975):

The first step is to determine whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law.

In Peabody & Disterhaft v. DILHR & DER, 85-0060, 0114-PC, 4/16/86, the Commission held that the two appellants had standing to appeal the decision to reclassify a co-worker's position because of the effect of the decision in the event of a future layoff. Prior to the reclassification, the co-worker's position

¹According to respondent's brief:

At best there is pending a request by each of the Appellants to review their positions in light of other upgrades through the informal review process. No decision has been made by Respondent at this time as to the merits of Appellants' request.... When there is a decision, appellants would have appeal rights.

was at the same class level as the appellants' positions. A memo in that case explained the injury to the appellant's as follows:

Shortly after the approval of Ms. Norton's reclassification request, during a staff meeting in the Fond du Lac office, Mr. Grenier announced that Ms. Norton had been reclassified to a Job Service Specialist III and that she was the employer services representative for the Fond du Lac office. The timing of this is significant because during this period of time, the Fond du Lac office was under a threat of staff reductions. Therefore, the employees of the Fond du Lac office were anxious that this reclassification would have an adverse effect on them. Ms. Norton who had less seniority as a Job Specialist II, would now be in a higher classification where no reductions were to take place.

Employees are ranked by seniority within a given class specification for layoff purposes and the Commission held that the injury to the appellants did not need to have an immediate effect to generate standing.

With respect to the present cases, the respondent argues as follows:

Respondent's decision with respect to Mr. Hubbard could hardly involve a substantial interest of Appellants. In June 1990, Appellants were reallocated to Advanced 1; the same decision as respects Mr. Hubbard was made at that time. Mr. Hubbard took an informal appeal; Appellants did not. Appellants were content to pass on their appeal rights. If Appellants did not care enough about their alleged "interests" to take the informal appeal route, those interests certainly can not be deemed substantial.

Nor does Respondent's reaffirmation of the June 1990 decision to reallocate Mr. Hubbard to Advanced 1 directly cause any injury to Appellants. As noted above, the same decision was rendered with respect to them and Mr. Hubbard in June 1990. In not appealing their own reallocations because of that earlier (identical) personnel decision, Appellants demonstrated that there was no injury to them. Further, the most recent decision affecting Mr. Hubbard was adverse to him. How can an adverse decision as to Mr. Hubbard cause injury to Appellants, especially since an earlier and identical adverse decision as to Mr. Hubbard (and the four Appellants) was of no apparent concern to them as they did not appeal? Had the recent decision for Mr. Hubbard been favorable -- from Advanced 1 to 2 -- it might be argued that there was some injury caused to Appellants. Since that is not what in fact occurred, there could not be any injury, direct or otherwise, to Appellants. As such there can be no injury caused by Respondent's recent decision regarding Mr. Hubbard.

Finally, one interest Appellants could have is the right to be classified at the same level as Mr. Hubbard, if they have the same

duties and responsibilities. As things now stand, Appellants and Mr. Hubbard are classified the same -- Advanced 1. Therefore, any "interests" they may have under the law have been acknowledged by Respondent and it is clear those interests have been satisfied. Should Mr. Hubbard be successful on appeal, Appellants have the right to request a reclassification and any interest they have can be protected.

The respondent's arguments fail to give effect to the statements made in Ms. Burke's letter of May 22, 1991. That document clearly indicates that if Mr. Hubbard's position is reallocated to the Advanced 2 level, the appellants (assuming they "are performing the same job duties at the same level of performance") can expect to have their own positions reallocated to the same level, whether or not they pursued an informal appeal. This is consistent with the general proposition found in §230.09(1), Stats., that "Each classification ... shall include all positions which are comparable with respect to authority, responsibility and nature of work required." The memo establishes, for the purpose of ruling on the respondent's motion, that the appellants' interests have been directly and adversely affected by the respondent's decision not to reallocate Mr. Hubbard's position. The appellants' interest in having their civil service positions properly classified is recognized by law in the references found in §230.09(2), Stats., and in the specific right established in §230.44(1)(b), Stats., for appealing classification decisions made under §230.09(2)(a), Stats. Therefore, the Commission concludes that the appellants do have standing to pursue an appeal, arising from the respondent's May 10th letter, relating to the proper classification of Mr. Hubbard's position.²

²In the event the appellants and Mr. Hubbard are successful with their appeals, the Commission's order would apply solely to the position now occupied by Mr. Hubbard and would make no reference to either the proper classification or proper effective date for the appellants' positions.

ORDER

Respondent's motion to dismiss these matters is denied.

Dated: October 3, 1991 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner