

STATE OF WISCONSIN

PERSONNEL COMMISSION

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GARY J. BAUER, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

AGRICULTURE, TRADE AND *

CONSUMER PROTECTION, and *

Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, *

Respondents. *

Case No. 91-0128-PC *

* * * * *

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of respondent's failure to change the classification of appellant's position and failure to hire appellant for an Administrative Officer 3 position. The parties requested that the Commission decide the case based on a stipulation of facts. The Commission agreed and established a schedule for the submission of briefs based on the stipulation. This briefing schedule was completed on April 30, 1993.

FINDINGS OF FACT

- I. The parties' stipulation of fact states as follows:
 - 1. The document marked as A-4 represents the organization of the Food Division and the classification of the positions within that organization preceding July 16, 1987. The only positions represented on A-4 which were classified above pay range 1-16 were the assistant administrator positions (pay range 1-17), and the administrator position (pay range 1-19).
 - 2. On July 17, 1987, a reorganization was implemented. The organization and classification of positions which existed on July 17, 1987, is represented by the attached document identified as R-1.

3. Another reorganization was implemented on or about October 8, 1990. The organization and classification of positions which existed on October 8, 1990, is represented by the attached document identified as A-3.

4. The most recent reorganization was implemented during the spring of 1991. The organization and classification of positions which existed after that reorganization was in place is represented by the attached document identified as R-2.

5. From at least 1985 through July 17, 1987, the assistant administrator positions were filled by the individuals described in A-4. As shown on R-1, the reorganization that occurred on or about July 17, 1987, moved the Assistant Administrator position filled by Frank Allie to a position classified as Vet. Supv. 1 (1-17) supervising the Meat Special Services unit. Don Konsoer remained in his Administrative Officer 2 position as assistant administrator until February 1991.

6. The following class specifications are attached and identified as indicated: R-3 - Agricultural Supervisor 5 (1-16); R-4 - Agricultural Supervisor 5 (Mgr., 1-16); R-5 - Agricultural Supervisor 6 (Mgr., 1-17); R-6 Administrative Officer 1 (1-16); R-7 - Administrative Officer 1-Confidential/Supervisor (1-16); R-8 - Administrative Officer 2 (1-17); and R-9 - Administrative Officer 2-Confidential/Supervisor.

II. The following Findings of Fact are based upon the documents submitted to the Commission as part of the parties' stipulation:

7. The parties stipulated to the authenticity of Document A-1 which is entitled "Respondent's Interrogatories and Request for Documents," and to the truthfulness of statements made in Document A-1 which is appellant's response to Document A-2. The following are the interrogatories stated in Document A-2 and the responses stated by appellant in Document A-1:

INTERROGATORY NO. 1: As of what date (month, date and year) do you believe your position was entitled to a reclassification (reallocation)?

Response: I believe my position should have been reclassified in approximately May, 1985, when the DATCP Food and Meat programs were merged.

INTERROGATORY NO. 2: Please describe each and every reason why you believe your position was entitled to a reclassification (reallocation) as of that date.

Response: In 1984 when Inspectors were reclassified, Supervisors were promised the same consideration. The Supervisors, however, were never reclassified. Several meetings were held from 1984 to 1988 with Irvin (Bud) Sholts, our personnel Manager and several administrators, to discuss the reclassification of Ag. Supervisors.

In 1988, a mini-survey was completed and submitted by other Ag. Supervisors and Specialists and me. In that document, (copy attached) I explained why I should be reclassified.

I have also enclosed as evidence two Food Division organizational charts. The chart dated February of 1986 shows that I was the Director of the Bureau of Compliance and that besides the four Investigators that served under me, they had added Bill Hansen. That chart dated October 8, 1990, the chart shows that I had nine people that I supervised and that answered directly to me.

In June of 1989, the Deputy Secretary of DATCP, Helene Nelson, and William Mathias, Administrator of Meat Inspection, decided that the Meat program needed some direction and identification. It was at that time that I was named to be responsible for the Meat Division by Bill Mathias. I have included memos from Bill Mathias to the Regional Managers with copies to Helene Nelson and Howard Richards, Secretary of Ag. On Sept. 27, 1989, Bill Mathias again sent out a memo stating that as of mid-August, "Gary and Steve were given full responsibility for the Meat and food Program respectively." He goes on to say that this would need to be temporary until permanent changes could be made. I have included all the performance evaluations done by both Bill Mathias and Steve Steinhoff in the following 22 months telling me what a good job I was doing as "acting director" of Meat Inspection, culminating with a letter of commendation and a \$300 award for my "extraordinary effort" in acting as an "Acting" Bureau Director of the Meat Division.

INTERROGATORY NO. 3: To what class series and class level were you advised that your position would be reclassified (reallocated)? In answering this interrogatory, please identify who so advised you and how and when you were advised, including what was specifically told to you.

Response: It was never stated by anyone to me exactly what level of classification I should or would be reclassified to. Since my duties had more than doubled since 1985 and since the Bureau Directors in Arm (?) Division and Consumer Protection had been

reclassified to A.O.3's, I assumed that would be my reclassification. Also, the proposed organizational chart showed that the Bureau Director positions would be A.O. 3's.

INTERROGATORY NO. 4: To what class series and class level did you believe that your position would be reclassified (reallocated)? In answering this interrogatory, please specify all of the reasons why you hold such a belief, identify all individuals who caused you to so believe, what those individuals said or did (or did not do) which caused you to so believe, and identify all actions or inactions and how they lead you to so believe, and identify all documents and how they lead you to so believe.

Response: I believed that I would be reclassified to an A.O. 3 since I was already a Bureau Director of Compliance and since I was "acting" Director of Meat Inspection. My belief was supported for many months by my superiors in that they not only instructed me to perform the duties of these positions but also commended me for the job I was doing. I was told by Helene Nelson that I would be well taken care of in the reorganization of the Meat and Food Divisions. I certainly did not expect that to mean that my title, my responsibilities, and my reclassification would be taken away or kept from me. If there had been any time during that period or any other period of my service to the Department that I had not done my job or had had a negative performance evaluation I may have thought there was a reason behind it. However, there are no reasons or explanations and none have ever been offered by the Department.

INTERROGATORY NO. 5: Describe each and every way in which the statements, actions or inactions and/or documents which you stated in your answers to Interrogatories Nos. 2 through 4 caused you to believe that Respondents were carrying out a reclassification (reallocation) review of your position.

Response: For several years Irvin (Bud) Sholts told us that he was working on getting Ag. Supervisors reclassified. The mini-survey that I answered in March of 1988 also clearly states that the information that we supplied would be used to develop updated classification specifications for the Ag. Supervisors. The fact that I was and had been a Bureau Director with Compliance would give me priority since I had been a Bureau Director since 1983 and if that position had kept up with the times and been reclassified I would have automatically been eligible for the positions that opened up as A.O. 3's in the reorganization.

INTERROGATORY NO. 6: Describe each and every way in which the statements, action, inactions and/or documents which you stated in your answers to Interrogatories Nos. 2 through 5 caused

you to not file a formal reclassification (reallocation) request on your own.

Response: I believed that the mini-survey of March, 1988, was a formal request since I was asked to describe at length how my position had grown and changed. I also feel that the Department has a responsibility to their employees that when they more than double their duties and responsibilities and require them to take on the additional work and responsibility that an "acting" position requires of them, they should compensate that employee either in advancement or monetary awards. Is the Department obligated in any way to act morally?

INTERROGATORY NO. 7: What position description (give date you signed) do you contend sets forth the duties assigned to your position (as of the time you contend your position should have been reclassified--reallocated) which supports your contention that your position should have been reclassified (reallocated)?

Response: I don't have a copy of the 1986 Job Description. Cheryl Anderson says in her statement that there is one on file. The 1986 Job Description was changed to reflect the additional Food Compliance duties. Only a few words were added, so it reads very much the same. I explained my added duties in the 1988 mini-survey.

INTERROGATORY NO. 8: Using the duties which were assigned to your position and which you performed from and after the time you believe your position should have been reclassified (reallocated) to the class series and class level answered by you in Interrogatory No. 3 or 4, please explain how those duties would support such a reclassification (reallocation) of your position to that class series and class level. In answering this interrogatory, please utilize the class definition, representative positions and/or examples of work performed found within the classification specification or position standards which would have been used for the reclassification (reallocation) of your position to the class level and class series stated in answer to Interrogatory No. 3 or 4.

Response: In 1983 when I was employed by the Department as Bureau Director of Compliance, I supervised four people and my job was to direct and supervise the Bureau of Compliance for Meat Inspection. In 1985, Food and Meat were merged and I took on the duties of compliance for the food Division as well as Meat Inspection. My position should have been looked at by the Department and adjustments made at that time. Morally, the Department had a responsibility to me to upgrade my classification since they doubled all of my duties and since I specifically outlined all of that in the mini-survey specifically for that purpose. I was extremely busy doing my job plus my

additional duties and always felt that good, hard work would be rewarded. I was always commended by my superiors for the good job I was doing and because I did handle responsibility well, I'm sure had some bearing on why Bill Mathias appointed me as "acting" Bureau Director of Meat Inspection. You also have to realize that this was in addition to my already very busy job as director of the Compliance Bureau. I performed both of these positions for twenty-five months, from June of 1989 to July, 1991.

INTERROGATORY NO. 9: A reclassification transaction must involve a logical and gradual change of duties of at least 25%. Please indicate each and every reason why you contend that the changes of the duties of your position met that requirement as of the date and times set forth in your answer to Interrogatory No. 1. In answering this interrogatory, please use the differences found in the position description described in your answer to Interrogatory No. 7 and the predecessor position description.

Response: I believe that I just answered this in depth in Interrogatory No. 8. It is obvious that from my employment in 1983 to the merger of Food and Meat in 1985, my duties more than doubled. I took on the responsibility of the compliance for the Food Division as well as the Meat Inspection that I already had and the number of people that I supervised grew from four to nine.

INTERROGATORY NO. 10: Please identify each and every reason why you believe that you were entitled to the AO 3 position which was filled in June 1991. In answering this interrogatory, please explain why each of those reasons supports your belief.

Response: Again, in 1983, I was a Bureau Director. In 1985 when Meat and Food merged, my duties more than doubled, my position was no longer the one for which I had been hired in 1983. It was now a bigger job with more people to supervise and should have been studied for a reclassification. In 1988 when the mini-survey was done, I believed that the Department was finally getting around to looking at the changes and added responsibilities that had been added to my position and would then act accordingly. In 1989 when the responsibilities of "acting" Director of Meat were added to my duties, I believed it when I was told by Helene Nelson that I would be taken care of and I believed it when Bill Mathias, Steve Steinhoff and Alan Tracey told me that I was doing a good job and putting forth extraordinary effort. I did not expect to be rewarded for this "commendable" work by being demoted, my responsibilities reduced and the Department acting as if the years and the work I had proudly done between 1985 and 1991 did not exist. Had the Department acted responsibly in 1985 when the two divisions merged or had they acted responsibly again in 1988 when the

mini-survey was done, I would already have been an A.O. 3 and entitled to one of the positions that were opened up in the reorganization in 1991.

INTERROGATORY NO. 11: In what ways do you contend DER's or DATCP's decision to not select you for the AO 3 position in June 1991 was wrong, illegal or an abuse of discretion? In answering this interrogatory, please identify each and every way (process, procedure, rule, etc.) and explain why that process, procedure, rule, etc. was wrong, illegal or an abuse of discretion.

Response: I will simply repeat again my exact statement in Interrogatory No. 10 for my reasons for being entitled to an A.O. 3 reclassification. I don't believe that the Department did anything illegal in not reclassifying me at any of those times. I feel that what they did was ethically and morally wrong. I believe that when they hire Deputy Secretaries, Administrators and even Secretaries of Ag., they are obligated to uphold the actions of these people. All of these people have stated in writing in memos and performance evaluations that I was "acting" Director of Meat. Since these people were all my superiors, I certainly believed what they said. However, now the Department is saying that they did not have the authority to appoint me to this position. Who, then, had the authority to assign me all of the additional work and responsibility that I performed from 1985 to 1991 without compensation, advancement or awards? And, who had the authority to eliminate all of these same responsibilities and now pretend that I never performed this work? The Department had a responsibility to reclassify my position when they doubled the work load and the duties and were negligent in performing these responsibilities.

8. From at least 1983 until August of 1987, the Food Division had two deputy administrator positions responsible for supervising one or more bureaus. These positions were classified at the Agricultural Supervisor 6 level.

9. Effective August, 1987, the bureau supervision responsibilities were removed from one of these deputy administrator positions and the classification of this position was changed to Administrative Officer 2.

10. Some time in 1988, respondent DATCP began a mini-survey of the classifications of certain positions, including appellant's. During the spring of 1991, a reorganization of the Food Division was effected concurrently with the implementation of the mini-survey. This reorganization abolished the Bureau of Compliance and created the Bureau of Meat Safety and Inspection. As a result, appellant's position as Director of the Bureau of Compliance was

abolished and two positions were created, one an Administrative Officer 3 (AO 3) position (PR01-18) and one an Administrative Officer 1 (AO 1) position (PR01-16).

11. Appellant was transferred into the newly created AO 1 position.

12. Appellant competed for the newly created AO 3 position but he was not the successful candidate.

13. At all times relevant to this matter, the position standard for the Agricultural Supervisor 5 (Mgt) classification has stated as follows, in pertinent part:

This is responsible administrative work in the Department of Agriculture, Trade and Consumer Protection as the Director of a program Bureau such as the Bureau of Plant Protection, Bureau of Weights and Measures, or the Bureau of Economic and Market Development.

14. At all times relevant to this matter, the position standard for the Agricultural Supervisor 6 (Mgt.) classification has stated as follows, in pertinent part:

This is highly responsible administrative work in the Department of Agriculture, Trade, and Consumer Protection as an Assistant Division Administrator and Director of a program Bureau within the agency or as the Director of the Bureau of Laboratory Services.

CONCLUSIONS OF LAW

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

2. The appellant has the burden to show that the conduct of the respondents caused the appellant to reasonably believe that the respondents were carrying out a reclassification or reallocation review of appellant's position so that the appellant did not file a formal reclassification or reallocation request of his own.

3. The appellant has failed to sustain this burden.

4. The appellant has the burden to show that the decision not to select the appellant for the position of Administrative Officer 3, Bureau of Meat Safety, during approximately June of 1991, was illegal or an abuse of discretion.

5. The appellant has failed to sustain this burden.

OPINION

The Commission, in an Interim Decision and Order issued September 21, 1992, established the following as the sole issues for hearing in this appeal:

Whether the the conduct of the respondents caused the appellant to reasonably believe that the respondents were carrying out a reclassification or reallocation review of appellant's position so that the appellant did not file a formal reclassification or reallocation request of his own.

Whether the decision not to select the appellant for the position of Administrative Officer 3, Bureau of Meat Safety, during approximately June of 1991, was illegal or an abuse of discretion.

In his answers to respondents' interrogatories, appellant states that his position as the Director of the Bureau of Compliance in the Food Division should have been reclassified in May of 1985 "when the Food and Meat programs were merged."

In these answers, appellant points to three instances of conduct on respondent DATCP's part which allegedly caused him to believe that a reclassification or reallocation review of his position was being conducted. In answer to Interrogatory No. 2, appellant states that "[i]n 1984 when Inspectors were reclassified, Supervisors were promised the same consideration." This time period predates, however, the date on which appellant claims his position merited reclassification, i.e., May of 1985.

In answer to Interrogatory No. 2, appellant also states that "[s]everal meetings were held from 1984 to 1988 with Irvin (Bud) Sholts, our personnel Manager and several administrators, to discuss the reclassification of Ag. Supervisors." In those cases in which the Commission has concluded that employees were justified in their belief that a classification review of their positions was being conducted, they were actually led to believe that a request for a change in the classification of their position had been prepared and was being processed. See, e.g., Guzniczak & Brown v. DER, 83-0210-PC (5/13/87). Such a situation is not present here where the only allegation is that a series of meetings was held over a four-year period of time to discuss the classifications of several positions, including appellant's.

It appears from appellant's answers to Interrogatories No. 2 and No. 5 that he believed, as the result of the fact that a mini-survey of certain positions, including his, was being conducted, that respondents were reviewing, as a part of this mini-survey, the proper classification of his position since May of 1985. However, he also acknowledges in his answers to the interrogatories that he understood that the purpose of the mini-survey was to develop updated classification specifications for the Agricultural Supervisors. Appellant does not allege that anyone told him that the review of the duties and responsibilities of his position as part of the mini-survey would address his concerns, dating from May of 1985, relating to the classification of his position under the existing classification specifications. In fact, surveys and mini-surveys of positions are not designed to retroactively modify the classification of positions under existing classification specifications but to effect classification changes, usually based upon the application of newly-developed classification specifications to the present duties and responsibilities of a position, upon the completion of the survey or mini-survey.

Appellant has failed to show that conduct on the part of respondents led him to believe that a request for the reclassification or reallocation of his position had been prepared and was being processed. The main thrust of appellant's argument in regard to this issue appears to be that respondent DATCP had an obligation, primarily moral, when the duties and responsibilities of appellant's position changed, to undertake a review of, and to effect a change in, the classification of his position. However, the existing framework of the state's classification system makes it clear that the primary burden is on an employee to initiate a request for a change in the classification of his or her position. As a supervisor and management employee, it is difficult for the Commission to believe that appellant was unfamiliar with this framework and this burden. The record here shows that appellant did not file a formal reclassification or reallocation request and was not led to believe that one had been filed on his behalf.

The second issue deals with the decision not to select appellant for the newly created AO 3 position resulting from the 1991 reorganization. The appellant has alleged no illegality in regard to this issue other than his contention that he was entitled to transfer into this AO 3 position. The Commission has already ruled, in an Interim Decision and Order issued on

September 21, 1992, that " [b]ecause of the classification of his previous position at the Agricultural Supervisor 5-Management level, appellant was ineligible to transfer into an AO 3 position because it was assigned to a higher pay range."

Appellant has introduced no other evidence relating to the subject selection decision. There is nothing in the record relating to the selection process followed by respondent, the selection criteria utilized, the comparative qualifications of the candidates based upon these criteria, etc. In the absence of such evidence, it is apparent that appellant has failed to sustain his burden to show an illegality or an abuse of discretion.

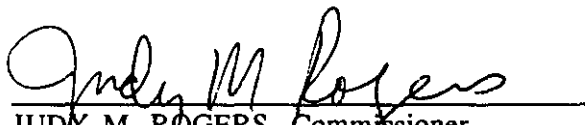
ORDER

The actions of respondents are affirmed and this appeal is dismissed.

Dated: June 25, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:rcr


JUDY M. ROGERS, Commissioner

Parties:

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for

the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.