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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 \*

\* \* \* \* \*

INTERIM  
DECISION  
AND  
ORDER

This matter is before the Commission on the respondents' motion to dismiss and motion for summary judgment. During a prehearing conference held on October 7, 1991, the appellant agreed that the following statement accurately reflects the allegations he seeks to raise in his appeal:

1. The respondents improperly failed to reclassify the appellant's position from Agriculture Supervisor 5 to Administrative Officer 3 in 1985 or subsequently and failed to pay him accordingly.
2. The following allegations relating to the appellant's service as acting bureau director for responsibilities relating to meat inspection for a period of approximately two years and ending on or about July 1, 1991:
  - a. The acting assignment exceeded the legally permissible duration.
  - b. The acting assignment effectively became permanent over time, thereby generating rights by the appellant to continue in that assignment.
  - c. The respondent failed to compensate the appellant accordingly.
3. The respondent acted improperly with respect to the decision to transfer the appellant to an Administrative Officer 1 position rather than to an Administrative Officer 3 position effective approximately July 1, 1991.

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

The parties have filed briefs.

#### FINDINGS OF FACT

1. By 1983, the appellant was employed as the chief of the Bureau of Compliance in the Meat Inspection Division of respondent Department of Agriculture, Trade and Consumer Protection (DATCP). The civil service classification of the appellant's position was Agricultural Supervisor 5-Management.

2. In May of 1985, DATCP's Meat Inspection Division and Food Division were merged and the appellant served in position number 010379 (appellant's "old" position) as the director of the Bureau of Compliance with responsibilities for dairy, food, meat and poultry products. Appellant's position remained classified at the Agricultural Supervisor 5-Management level.

3. Early in 1988, the appellant completed a questionnaire as part of the Agricultural Supervisor and Specialist mini-survey. The purpose of the survey was to develop "updated classification specifications for the Agriculture Supervisor 1-6 and Agriculture Specialist 1-4 series." One question of the questionnaire asked the appellant to explain how his duties had changed since he had first been assigned to the Agricultural Supervisor 5-Management class. Appellant's response read:

I was hired as the Director of the Bureau of Compliance for the DATCP Meat Inspection Division in May of 1983. I was responsible for compliance as it related to Meat Inspections only. I supervised four Field Investigators. In approximately July of 1985, the Meat Inspection Division was merged with the Food Division. My duties as Director of the Bureau of Compliance increased greatly. The staff of the Division doubled. I now supervise seven subordinates, which now include labeling of food products. Meat Inspections consisted of approximately 480 licensed meat plants. Food Division includes about 70,000 licenses, e.g. Grade A Producers, Bakeries, Cannerys, Retail Stores, Dairy Plants, Food Processors, etc.

4. During the period from 1985 through June 30, 1991, the appellant never filed a formal written request for reclassification of his position.

5. In August of 1989, the Administrator of the Food Division, William Mathias, temporarily assigned responsibility for the meat program to the appellant and for the food program to Steve Steinhoff. This assignment was described by Mr. Mathias in a September 27, 1989 memo as follows:

[A]t our Region Manager Meeting in mid August, Gary [Bauer] and Steve [Steinhoff] were give[n] full responsibility for the Meat and Food Program respectively. Of course, this had to be a temporary responsibility until permanent changes can be made, such as the potential of creation of separate bureaus.

The Food Division's organizational charts reflect that both before and after this assignment, the appellant's position was identified as supervisor in the Bureau of Compliance and Mr. Steinhoff's position was identified as supervisor in the Food Division's Technical Services Unit. Appellant's role during the period from August of 1989 until June of 1991 is reflected in his performance evaluation issued on June 29, 1990:

Gary does an excellent job of coordinating Food Division compliance activities. The system guides progressive compliance and effectively tracks formal legal actions & Meat investigations. Gary acts as a supervisor, program coordinator and advocate for compliance activities. In addition, Gary is the Acting Bureau Director for the Meat Program. He has handled these duties well. He working [sic] a position in an active [sic] status has its share of pitfalls and limitations. Gary has worked hard to foster teamwork designed to give direction & focus to the Meat Program. Encouraging input in a balance which keeps the program focused & directed is a difficult responsibility. The task is even more difficult given the limited authority of an acting status. Gary has used his diplomatic & persuasive skills well. Gary's overall job performance is well above job standards.

6. In March of 1990, DATCP proposed a reorganization of its Food Division, specifically to abolish (1) the Bureau of Compliance and (2) the Bureau of Technical Services and to create (1) a Bureau of Meat Safety and Inspection, (2) a Bureau of Food Safety and Inspection and (3) a Bureau of Administrative Services. The proposal included the following language:

Essentially staff in the current compliance and technical services bureaus are reassigned between meat and food bureaus. Administrative functions remain essentially as at present, structurally.

The number of key management personnel in the division remains at three.

Currently, there is an Administrative Officer, an assistant to the Administrator at a range 17 (highest civil service level now used in the Division). This position has no line management duties. In the reorganization, this position is redeployed to be a line manager of an Administrative Services Bureau, instead of a senior staff position. The Chief of Technical Services is reallocated to be Director of the Bureau of Food Safety & Inspection. Finally, the Director of Compliance is reallocated to be Director of the Bureau of Meat Safety & Inspection.

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The assignment of individuals to positions will be done through usual personnel processes. Open or competitive promotional examinations will be used to fill bureau director and section chief slots in most instances, except where current staff have rights at these levels. (Respondent's Exhibit G, pages 4 and 12)

In addition, the proposed Personnel Assignment Chart showed that the appellant, who was the incumbent in position number 010379 "will be moved to Compliance Chief, Meat Bureau or may successfully compete for this [i.e., 010379] position." The chart showed that position number 010379 would be filled by competitive exam at the Administrative Officer 3 (AO 3) level and would have the title of Director of the Meat Safety and Inspection Bureau. The chart also showed that position number 041653 (appellant's "new" position) would be classified at the AO 1 level, would have the title of Compliance Chief, and would be filled "by competitive exam or transfer of G. Bauer "

7 In December of 1990, DATCP's reorganization plan was approved by the Department of Administration.

8. On March 17, 1991, the position of Director of Meat Safety and Inspection classified at the Administrative Officer 3 level was announced. The application deadline was March 29, 1991. The appellant applied, was tested and passed into the interview process. Another candidate was selected and the position was filled by that person in late June of 1991.

9. By letter dated June 28, 1991, respondent confirmed the appellant's appointment, on a lateral transfer basis, to the "new" position of Administrative Officer 1 in the Food Division.

10. During the period from August of 1989 until June of 1991 when the appellant was temporarily exercising responsibility for the meat program, respondent DATCP did not seek approval from the Administrator of the Division

of Merit Recruitment and Selection to make an acting assignment of those duties to the appellant.

#### OPINION

The motion before the Commission is respondent DER's "motion to dismiss and/or for summary judgment" with respect to "certain claims of Appellant." The motion is based upon §§230.44(3), 802.01(2), 802.06 and 802.08, Stats. Section 230.44(3) establishes the time limit for filing appeals with the Commission. The remaining provisions are all part of the statutory chapter entitled "Civil Procedure--Pleadings, Motions and Pretrial Practice." Section 802.08 is entitled "Summary judgment." Respondent DATCP joined in DER's motion.

The purpose of summary judgment is to eliminate the need for trial where there is no genuine issue as to any material facts. The parties to the present case have not questioned the Commission's authority to decide a motion for summary judgment. In a previous decision in which the Commission addressed a motion for summary judgment, the Commission referenced the language in §227.42(1)(d), which provides for a right to a hearing where "there is a dispute of material fact." Southwick v. DHSS, 85-0151-PC, 8/6/86. However, the appellant is appearing in this matter pro se and cannot be assumed to have an understanding of the procedure for filing affidavits to oppose the motion. Therefore, the Commission has treated the appellant's factual allegations as if they had been supported by affidavit.

In their brief, the respondents acknowledge that certain aspects of this case are properly before the Commission:

The only contentions (and issues) that can properly be before the Commission are:

- a) Respondent allegedly acted improperly in the competitive process (the interview phase) by not selecting Appellant as the successful candidate for the AO 3 position; and/or
- b) Appellant's position is correctly classified at the AO 1 level, rather than the AO 3 level.

All other contentions suffer from several defects, preventing the Commission to exercise jurisdiction over them. Some are premised on personnel decisions which were made substantially more than 30 days prior to July 25, 1991, when Appellant filed his appeal, appeals based on those allegations are therefore untimely. Other contentions do not

involve appealable personnel decisions; still others involve personnel decisions which are to be made by DMRS which is not a party.

Issue b) identified by the respondent is understood by the Commission to relate to the correct classification of the appellant's current position, i.e. position number 041653, rather than his former position (position number 010379).

The first allegation identified by the appellant is:

- 1) The respondents improperly failed to reclassify the appellant's position from Agriculture Supervisor 5 to Administrative Officer 3 in 1985 or subsequently and failed to pay him accordingly.

In light of the respondents' concession that the classification of position number 041653 (appellant's "new" position) is properly before the Commission, the Commission will proceed to analyze the appellant's first allegation only in terms of position number 010379 (appellant's "old" position).

The respondent's argument with respect to appellant's first allegation is that the appellant failed to file a request for reclassification during the entire period from 1985 through July 1, 1991, so there was no "triggering event" which required the respondent to make a reclassification decision regarding the appellant's position and that in the absence of such a reclassification decision, there is nothing from which to appeal to the Commission. While in many instances a reclassification appeal will arise from a classification decision made after a written request has been filed with the agency's personnel office, the Commission has identified at least certain circumstances in which the absence of a written request is not determinative. In Guzniczak & Brown v. DER, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87; the Commission rejected the effective date established by the respondent for reclassifying the appellant's positions where that date was based upon receipt of written reclass requests. Respondent's employees had failed to inform the appellants that they were required to submit their reclassification requests in writing and circumstances suggested that the appellant's verbal reclass requests were being acted upon. The respondent's conduct was characterized as a ministerial error and, based upon an equitable estoppel theory, justified using an effective date arising from the date on which the respondent first indicated the appellant's verbal requests were under consideration.

The appellant's contentions with respect to his first allegation, are as follows.

I had several discussions with Erwin Sholts, Personnel Manager, regarding reclassification. It was my understanding that many positions were being studied for reclassification after the merger and that was the purpose of the Agriculture Supervisor & Specialist mini-survey in August of 1988. Since the purpose of the mini-survey was to study my position for reclassification I was patient and expected the Department to use the information I gave them on the mini-survey and realize that my duties and responsibilities had doubled, thereby warranting reclassification.

The record does not indicate what, if any, classification actions were taken as a consequence of the mini-survey.

The Commission's jurisdiction over classification matters is derived from §230.44(1)(b), Stats., which grants the Commission the authority to hear an

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

In the present case, there is no evidence that the either DATCP or DER issued a written decision<sup>1</sup> regarding the proper classification of the appellant's "old" position (number 010379) prior to the time the classification was changed from Agriculture Supervisor 5-Management to AO 3 as a consequence of the reorganization. The appellant has not alleged that there was a written decision nor has he contested the accuracy of respondent's log of reclassification request activities. That log has no entry for any request regarding the appellant's position during the period from 1985 through June of 1991. The remaining question is whether, even though there was no formal written request for reclassification from the appellant, the respondents could be said to have either initiated a reclassification review on their own or could be said to have represented to the appellant that they were initiating a reclassification review on their own.

If the respondent DATCP informed the appellant that there was no need for the appellant to formally initiate a reclass request because the respondent

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<sup>1</sup> Pursuant to §ER 3.04, reallocation and reclassification decisions are to be made in writing and supplied to the position incumbent.

was going to review it anyway as part of a planned classification survey, and if the survey never reached the issue of the proper classification of the appellant's position for whatever reason, the appellant could argue that he had reasonably relied on the agency to pursue a reclassification and that because he has never been informed of the results of the review, the respondents' inaction should be construed as a constructive denial of his reclassification request.<sup>2</sup> Based upon the liberal reading to which it is entitled, there is a fair inference to be drawn from the general statement in appellant's brief that the appellant is alleging that the conduct of the respondents, either in statements by Mr. Sholts or in the circumstances of the mini-survey, caused him to reasonably believe the respondents were carrying out a reclassification review of his position so that he did not file a formal reclass request on his own.

The Commission will confer with the parties in preparation for convening a hearing on the limited topic of whether a reclassification of appellant's "old" position was constructively denied.<sup>3</sup> If the Commission finds

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<sup>2</sup> The conclusion that a formal reclassification denial may not be required in order to pursue a reclassification appeal with the Commission is supported by Sersch v. DILHR & DER, 86-0075-PC, 4/1/87. In that case, the appellant showed that her request for the "audit" of her position should have been considered by respondents as a request for the reclassification of her position and that the failure to respond in writing constituted a constructive denial.

<sup>3</sup> In an effort to draw a better focus to any future proceedings in this matter, the Commission notes that the administrative rules define the terms "reclassification" and "reallocation" in such a way that the consequence of the mini-survey, i.e. developing "updated classification specifications for the Agriculture Supervisor 1-6 and Agriculture Specialist 1-4 series" would appear to be a reallocation rather than a reclassification of positions. Pursuant to §ER 3.01, Wis. Adm. Code:

(2) Reallocation. "Reallocation" means 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;

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that there was a constructive denial, the remedy would be to remand the matter to the respondents for the purpose of issuing a classification decision.

The appellant's second allegation refers to the period during which he was assigned responsibilities as temporary or acting director for meat inspection:

- 2) The following allegations relating to the appellant's service as acting bureau director for responsibilities relating to meat inspection for a period of approximately two years and ending on or about July 1, 1991:
  - a. The acting assignment exceeded the legally permissible duration.
  - b. The acting assignment effectively became permanent over time, thereby generating rights by the appellant to continue in that assignment
  - c. The respondent failed to compensate the appellant accordingly.

The administrative rules relating to acting assignments are found in ch. ER-Pers 32, which provides:

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(f) A logical change in the duties and responsibilities of a position; or

(g) A permanent change in the level of accountability of a position such as that resulting from a reorganization when the change in level of accountability is the determinant factor for the change in classification.

(3) Reclassification. "Reclassification" means the assignment of a filled position to a different class by the secretary as provided in s 230.09(2), Stats., based upon a logical and gradual change to the duties or responsibilities of a position or the attainment of specified education or experience by the incumbent.

The sudden effect of the merger of the Food and Meat Divisions on the appellant's position might be considered consistent with either §ER 3.01(2)(f) or (g), but appears to be inconsistent with the "gradual" change which is a necessary element for the reclassification of a position. In addition, assigning a position to a different class due to the issuance of updated class specifications appears to be consistent with the definition of reallocation in §ER 3.01(2)(a), (b) and (c) but not with the "logical and gradual change to the duties or responsibilities of a position" as required in the definition of reclassification

ER-Pers 32.01 Acting assignments. When a position is vacant and the needs of the service require the performance of the duties of that position, a permanent employe may be temporarily assigned to perform those duties.

ER-Pers 32.02 Approval of the administrator. The appointing authority shall submit a written request to make acting assignments which exceed 45 calendar days in length to the administrator for approval. This request shall state the anticipated duration of the acting assignment and provide such additional information as the administrator requires. Acting assignments not to exceed 45 calendar days shall be made at the discretion of the appointing authority.

ER-Pers 32.03 Duration of acting assignments. (1) The acting assignment shall not exceed a total of 6 months, except as provided in sub. (2).

(2) If the appointing authority is unable to make a permanent appointment to that position within that 6-month period, a written request for approval to extend the acting assignment shall be submitted to the administrator. The extension request shall indicate the expected date by which a permanent appointment shall be made

ER-Pers 32.04 Letter of notification. The appointing authority shall give written notice to the employe of the acting assignment. This letter of notification shall identify the nature of the duties to be assigned, the planned duration and other conditions of the acting assignment, including the fact that no adjustment in pay shall be made. The appointing authority shall send a copy of the notice of the acting assignment to the administrator.

The Commission has previously held that it lacks the authority to review a contention that an appointing authority violated the provisions of ch. ER-Pers 32 by failing to seek and obtain approval from the Administrator of the Division of Merit Recruitment and Selection (DMRS) for an acting assignment. Hagman v. DNR, 84-0194-PC, 1/30/85. The respondent contends that the appellant also cannot pursue a claim against DMRS because the administrator is not a party to the appeal and because any effort to now add DMRS as a party would be untimely. The respondent also offers an affidavit by DATCP's Human Resource Director which set forth the following:

7. Affiant has checked Appellant's personnel file and other appropriate and potential sources of information and has been unable to locate any paperwork required by law from DMRS or DATCP supporting Appellant's claim that he was made an acting director (or received an extension) of the Meat Safety and Inspection Bureau (AO 3) which was to be created under the planned DATCP reorganization in 1989 or at any time thereafter.

8. Prior to the reorganization approval and DER's approval of the classification levels (in late 1990), there was no Bureau position for which Appellant could have been given an acting assignment.

In his brief, the appellant states:

I am not aware of the proper procedures for appointing people to "acting" positions, nor is it my responsibility to know. Administrators, Deputy Secretaries and Secretaries [who in various performance evaluations and other correspondence referred to the appellant as serving as the Acting Director of the Meat Inspection Bureau] should possibly know and since they represent the Department, it is my contention, the Department is responsible for their actions.

Given that the Commission lacks the authority to review DATCP's conduct relative to the acting assignment question and given the absence of any contention as well as any indication that some sort of request to formally assign acting responsibilities to the appellant was actually before the Administrator of DMRS, the appellant's claim that the acting assignment exceeded the legally permissible duration must be dismissed.

The appellant's second allegation in this area is that the acting assignment turned into a permanent one so that the appellant obtained certain rights to continue performing those duties. This contention incorrectly assumes that once duties are assigned to an employee, they may not be reassigned and if they are, the action of doing so is appealable. The Commission has held that the reassignment of job duties is not appealable. Kienbaum v. UW, 79-246-PC, 4/24/80; Roberts v. DHSS & DP, 87-44-PC, 7/27/81.

The appellant's third allegation relating to the alleged acting assignment is that the respondent failed to compensate him in accordance with assigning him added duties. Again, the Commission lacks subject matter jurisdiction over an appeal arising from the level of pay awarded to an employee, except to the extent it might arise as part of the hiring process after certification pursuant to §230.44(1)(d). Here there was no certification associated with the acting assignment, so there is no jurisdictional basis on which the Commission can review the appellant's pay level during the period of the acting assignment.

Of the appellant's remaining allegations, the respondent has only raised an objection to the one which is based upon the action of transferring the appellant:

- 3) The respondent acted improperly with respect to the decision to transfer the appellant to an Administrative Officer 1 position rather than to an Administrative Officer 3 position effective approximately July 1, 1991.

The appellant explains his contention as follows:

It is my understanding that when a position is abolished it is the Department's responsibility to offer a person the next available position of equal status. The Department acted improperly with respect to the decision to transfer me to an Administrative Officer 1 position because it was not equal to the job I had been performing for the past 18+ months.

In its reply brief, the respondent refers to the definition of "transfer" found in §ER-Pers 1.02(33) and argues that the appellant could not transfer into the AO 3 position because it was at a higher pay range than his Agricultural Supervisor 5-Management position:

"Transfer" means the permanent appointment of an employe to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employe's current positions is assigned.

The key question is whether the Commission can review the transfer decision. According to Witt v. DILHR & DER, 85-0015-PC, 9/26/85, the only aspect of the transfer process that is appealable to the Commission is the action of the administrator of DMRS authorizing the transfer. That authorization is described in §ER-Pers 15.02:

The administrator will authorize a transfer when requested by an appointing authority providing the appointing authority has determined that the employe meets the eligibility requirement under s ER-Pers 15.01 and that the position to which the employe is transferring is assigned to a class in the same or counterpart pay rate or pay range to which any of the employe's current positions is assigned, and such documentation is provided to the administrator. The administrator may delegate this authority to appointing authorities.

The underlying action of the appointing authority in transferring an employe is not subject to review unless it is "related to the hiring process" and occurs "after certification" as provided in §230.44(1)(d). Here, there is no indication how DATCP's action of transferring the appellant into the vacant AO 1 position (number 041653) was initiated. The Commission will confer with the parties in terms of the nature of any claim by the appellant in this area and whether any jurisdictional facts are in dispute. Also, as to any potential claim involving the Administrator of DMRS, the Commission will confer with the parties to determine whether the appellant wishes to pursue such a claim.


ORDER

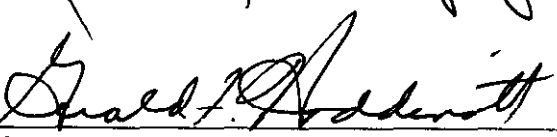
The respondents' motion is granted in part and denied in part. The Commission will contact the parties with respect to further proceedings.

Dated: April 1, 1992

STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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