

* * * * *

MICHAEL J. MERGEN, *

Appellant, *

v. *

President, UNIVERSITY OF *

WISCONSIN SYSTEM (Platteville), *

and Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, *

Respondent. *

Case No. 91-0247-PC *

* * * * *

INTERIM
DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Stats., of the effective date of a reclassification. The issue is: "[w]hether the decision to establish November 4, 1990, as the effective date for the reclassification of appellant's position was correct." Prehearing Conference Report dated March 10, 1992.

FINDINGS OF FACT

1. Appellant has been employed in the classified civil service at UW-Platteville in the University Computing Services (UCS) Department since 1966.

2. The duties and responsibilities of appellant's position are basically accurately described in a November 19, 1990, position description signed by appellant, his immediate supervisor John E. Johnson, UCS director, and by the UW-Platteville Personnel Manager, Kathleen Kelley (Respondent's Exhibit 4). Goal 1, which comprises 95%, is: "[s]upervise the Production Section of a Medium/Large Sized Computer System and Management of Total University Computing Operations."

3. The computer system with which appellant has been involved has changed, in summary, as follows:

a) 1982 — The system consisted of a Honeywell 64/40 involved solely in administrative functions. This system was found to be small by the Commission in Mergen v. UW & DP, 83-0064-PC (2/15/84).

- b) 1984 — The system consisted of the Honeywell 64/40, an IBM 4331 J1, and a VAX 780.
- c) December 1985 — The system acquired an IBM 4361.
- d) January 1986 — The system acquired two VAX 8300's.
- e) June 1986 — The Platteville Social Area Network (PLANet) was initiated. The PLANet system involved linkage of the existing multi-vendor systems throughout the campus in around the clock operation. Work on the PLANet system has been ongoing ever since and as of the date of hearing, the system had not been absolutely finalized.
- f) 1986 — Merger of the administrative and academic computing systems was initiated.
- g) 1986 (fall) — The computerized preregistration system was implemented.
- h) 1987 (spring) — An accounts receivable system was initiated and the registration system was expanded.
- i) 1987 (summer) — Financial aid and residence hall systems were implemented.
- j) 1987 (fall) — An alumni development system was implemented and a VAX 8350 was acquired.
- k) 1988 (August) — The Honeywell 64/40 was removed.
- l) 1989 (August) — Another VAX 8350 was acquired.
- m) 1989 (fall) — The IBM 9375/60 was acquired, replacing the IBM 4331.
- n) 1990 (September) — A VAX 6210 was acquired, replacing the VAX 11/780.

4. The MIS position standard (Respondent's Exhibit 1) includes the following definitions:

MANAGEMENT INFORMATION SUPERVISOR 2 (PR1-13)

Computer Operations

Positions allocated to this class will function as ... :

- 1) The supervisor of a computer operation containing a small computer system. Such a system will have limited capabilities and will characteristically involve a small number of primarily non-complex applications processed in a limited multi-processing environment, a small number of users, and no teleprocessing network. Overall operations objectives, priorities and deadline are normally established by the production supervisor, but the review of the technical soundness of decisions made by these positions is limited

* * *

MANAGEMENT INFORMATION SUPERVISOR 3 (PR1-14)

Computer Operations

Positions allocated to this class will function as ...:

- 1) The supervisor of a computer operation containing a medium computer system as identified at the Management Information Supervisor 1 level. Overall operations objectives, priorities and deadlines are normally established by the production supervisor, but the review of the technical soundness of decisions made by these positions is limited.

* * *

MANAGEMENT INFORMATION SUPERVISOR 1 (PR1-12)

Computer Operations

Positions allocated to this class will function as the supervisor of a full-operating shift within a computer operation containing a medium computer system such as might be found at a University of Wisconsin System campus. Such a system will characteristically involve a variety of complex applications processed in a multi-processing mode, a variety

of academic or administrative users, and either no teleprocessing or a teleprocessing network involving a small number of terminals and non-complex applications. Objectives, priorities and deadlines are normally established by the operations supervisor who also reviews the work for operational soundness, appropriateness and conformance to policy and requirements. (emphasis added)

5. By a September 11, 1986, letter to his supervisor (Appellant's Exhibit A-1), appellant requested an audit of his position (then classified as Management Supervisor 2 (MIS 2)) due to changes that had occurred with respect to his position. Included with this letter were a reclassification analysis form, an organization chart, a position description, and a position description update form.

6. Mr. Johnson at that time indicated that he supported a reclassification of appellant's position and would forward the materials to the personnel office.

7. By a memo dated June 20, 1988, to Ms. Kelley (Appellant's Exhibit A-3), appellant inquired as follows:

I would appreciate the status of my position audit request dated September 11, 1986, to Mr. James E Johnson and also a second memo regarding the status of my audit dated December 12, 1986,.

To the best of my knowledge, all of the supporting materials were submitted for review.

8. A November 14, 1988, memo to Mr. Johnson from appellant (Appellant's Exhibit A-4) contains the following:

I know that your schedule has been very busy, but I am concerned about a matter that was addressed to your attention on September 11, 1986. That being a request for an audit of my position.

A second letter regarding this matter was sent to your attention on December 12, 1986, and a third letter sent on June 20, 1988.

Since I have received no response to any of the above, I would like to know what happened to the supporting materials that were sent to your office and what action, if any, has been taken.

Your prompt attention to this matter would be greatly appreciated.

9. As of the date of this memo, appellant had received no substantive response to his inquiries about his audit request.

10. In August 1989, after a series of conversations about the matter with Mr. Johnson, they agreed to discuss the situation in September 1989.

11. Following a discussion between appellant and Mr. Johnson in October 1990, Mr. Johnson forwarded the materials necessary for a reclassification request to Ms. Kelley by memo dated October 25, 1990 (Appellant's Exhibit A-6), in which he stated he was "in full support of this reclass."

12. Neither Mr. Johnson nor appellant had submitted to the personnel office the documents requesting and documenting the audit or reclassification of appellant's position prior to October 25, 1990.

13. Following an on-site audit in August, 1991, the reclassification request for MIS 3 was effectively granted by John Fitzpatrick, Personnel Manager, on November 19, 1991, with an effective date of November 4, 1990. See Respondent's Exhibit 5.

14. Respondent's determination of November 4, 1990, as the effective date was based on two factors:

a. The DER (Department of Employment Relations) classification and compensation manual, §332.060 A. ("Effective Date Policy"), provides in part as follows:

Both delegated and nondelegated reclassification regrade actions ... will be made effective at the beginning of the first pay period following effective receipt of the request.... Effective receipt of a request may be made by any office within the operating agency that has been delegated, in writing, effective receipt authority by the appointing authority. A request may be initiated in one of the following ... ways through submission of appropriate documentation:

1. If the first line supervisor or above in the direct organizational chain of command requests that the position be reviewed for proper classification level or recommending a specific classification level change, the required documentation is an updated Position Description and written reasons for the request.
2. If a position incumbent requests his/her supervisor to review the level of the position and the supervisor takes no action or declines to initiate further action, the required

documentation from the incumbent is a written request which includes a statement of the events (including the dates when the events took place) which have occurred in regard to the request for a classification review.

Since neither Mr. Johnson nor appellant had submitted a written reclassification request with supporting documentation to the personnel office prior to October 25, 1990, that became the operative point for the establishment of an effective date.

b. The key substantive factor with respect to reclassification to the MIS 3 level was the evolution of the computer system with which appellant was involved from a small to a medium size computer system. This change occurred gradually over a period of years. Respondent determined that a medium-sized system was in place as of September 1990 with the acquisition of a VAX 6210 computer system.

15. Respondent led appellant to reasonably believe that his original request for an audit of his position dated September 11, 1986, had been submitted to the personnel office and was awaiting processing.

16. The evidence in this record concerning the evolution of the computer system with which appellant has been involved, summarized above in finding #3, supports a finding that as of January 1, 1987, the computer system was medium in size, as that term is defined in the MIS position standard (Respondent's Exhibit 1).

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proof to establish by a preponderance of the evidence the facts necessary to show that respondent erred when it established November 4, 1990, as the effective date of the reclassification of his position.

3. Appellant has satisfied his burden of proof.

4. Respondent's decision establishing November 4, 1990, as the effective date of appellant's reclassification was incorrect, and it should have established June 30, 1987, as the effective date.

OPINION

This case does not involve a dispute as to the ultimate classification level of appellant's position, but rather the effective date of the reclassification. This question in turn involves two subissues — whether the principle of equitable estoppel prevents respondents from applying DER's effective date policy, and at what point in time did the UCS computer system make the transition from small to medium-sized.

According to respondent DER's internal policy on effective date (Respondent's Exhibit 2) an effective date is not established until a written request for reclassification with accompanying documentation is received by the designated agent in the personnel structure (here, the UW-Platteville personnel office). Since neither Mr. Johnson nor appellant forwarded the reclassification materials to the personnel office until October 25, 1990, this would establish the beginning of the next pay period, or November 4, 1990, as the effective date pursuant to DER's policy. However, there are circumstances under which DER's policy will not be controlling.

In Porter v. DOT, 78-0154-PC (5/14/79); affirmed, DOT v. Pers. Comm., Dane Co. Cir. Ct. 79CV3420 (3/24/80); the Commission discussed the legal principle of "equitable estoppel" as follows:

Equitable estoppel may be defined as the effect of voluntary conduct of a party whereby he or she is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. The person who in good faith relied on that conduct acquires some corresponding right, either of contract or remedy. (citations omitted)

The elements of equitable estoppel against a state agency are: "reasonable reliance by an employe to his or her detriment on conduct by the agency or its agents which amount to fraud or a manifest abuse of discretion." (citations omitted) Warda v. UW-Milwaukee & DER, 87-0071-PC (6/2/88). In this case, the record supplies the elements of equitable estoppel. Appellant submitted a request for an audit of his position accompanied by supporting documents, to his immediate supervisors. As will be discussed below, the record evidence supports a finding that the actions and inactions of his supervisor and the UW-Platteville personnel manager led him to believe that this request was pending in the personnel office, and no further action by him was necessary. Since

the actual and implicit representations came from agents of respondent who presumably would have been familiar with the reclassification process, it was reasonable for appellant to have relied on their representations. Since Mr. Johnson had not forwarded the audit request to personnel, and respondent's policy required receipt of the documents by personnel to establish an effective date, the actions and inactions of respondent's agents amounted to a manifest abuse of discretion.

The testimony of the central actors in this scenario contrasted sharply. Appellant testified that Mr. Johnson assured him that the papers had been forwarded to personnel, and that he (appellant) never received any written response from personnel to his communications concerning the status of the transaction. Ms. Kelley testified that she had numerous conversations with appellant prior to October 25, 1990, when Mr. Johnson submitted the audit request, and that she told appellant that after having submitted the supporting documents and a written request for reclassification to his supervisor, if there were no response, he should submit them to the personnel office. Appellant denied that he had been told this. Mr. Johnson testified that he had verbally discussed the situation with complainant from time to time and that appellant was well aware from these conversations that he (Mr. Johnson) had questions both about some of the documents appellant had submitted and the appropriateness of the MIS 3 level for appellant's position, and that he had not submitted anything to personnel.

All three of these witnesses testified credibly. However, the Commission has resolved this factual dispute in favor of appellant because his version of what occurred is supported by contemporaneous documents that by and large are consistent with his version of events and inconsistent with the version given by respondent's agents. Appellant's December 12, 1986 and June 20, 1988, memos to Ms. Kelley (Appellant's Exhibits A-2 and A-3), requesting advice as to the status of his September 11, 1986, audit request (Appellant's Exhibit A-1), are fundamentally inconsistent with the notion that he had had conversations with Ms. Kelley and Mr. Johnson which had informed him that Mr. Johnson had problems with the reclass request and that appellant could implement the request himself by submitting it in writing to Ms. Kelley. Similarly, appellant's November 14, 1988, memo to Mr. Johnson (Appellant's

Exhibit A-4) recites his original audit request and subsequent memoranda and states:

Since I have received no response to any of the above, I would like to know what happened to the supporting materials that were sent to your office and what action, if any, has been taken.

In the Commission's opinion, it is illogical and out of character for appellant to have continued to write these memos over the years if indeed he had been informed that Mr. Johnson did not support a reclassification and, in order to "get the ball rolling" and establish an effective date for retroactive pay purposes, he had to have submitted his request to Ms. Kelley in writing. It seems likely that, if he had been so informed, he would have submitted the documents to Ms. Kelley then and there. Also, it strikes the Commission as unlikely that Mr. Johnson and Ms. Kelley would continue to receive these memos which (from their standpoint) misstated the facts as to what was going on, yet not respond in writing to set the record straight. Finally, appellant called as a witness Mr. Johnson's secretary, Laura Schuler. She testified that appellant had submitted all the necessary documentation with his initial audit request, and that Mr. Johnson never told appellant that he had not submitted the request to personnel or that he did not support the reclassification. While Ms. Schuler was not necessarily in a position to have been privy to every possible conversation appellant and Mr. Johnson may have had, her testimony does lend support to appellant's contentions.

Appellant also has satisfied his burden of proof on the second issue — i.e., by establishing that his position was at the MIS 3 level prior to the effective date established by respondent (November 4, 1990).

The material distinction between the MIS 2 and MIS 3 levels is that the MIS 2 level is responsible for a small computer system while the MIS 3 level is responsible for a medium computer system. MIS position standard, Respondent's Exhibit 1. This position standard provides that a small system: "will have limited capabilities and will characteristically involve a small number of primarily non-complex applications processed in a limited multi-processing environment, a small number of users, and no teleprocessing network." A medium system: "will characteristically involve a variety of complex applications processed in a multi-processing mode, a variety of academic or

administrative users, and either no teleprocessing or a teleprocessing network involving a small number of terminals and non-complex operations." It is undisputed that the UCS computing system evolved over the period in question from small to a medium in size. Respondent offered the opinions both of Mr. Johnson and Mr. Fitzpatrick that the system finally achieved a medium status with the acquisition of the VAX 6210 in September 1990. Appellant contends an appropriate effective date would be January 1, 1987.

The record reflects that a number of changes occurred prior to January 1, 1987. In June 1986, the Platteville Local Area Network (PLANet) was initiated. This system included the Honeywell System 64 that previously had been appellant's responsibility in Administrative Data Processing, as well as a VAX 11/780, VAX 8300-A and VAX 8300-B (both acquired in January 1986) and an IBM 4361 (acquired in December 1985). The PLANet system involved linkage of the existing multivendor systems throughout the campus and 24 hour a day, seven days a week operation. Later in 1986 the merger of the administrative and academic computing systems was initiated. Also, in the fall of 1986, a computerized pre-registration system was implemented. There have been a number of changes that have occurred subsequent to January 1, 1987, including changes in the registration system, implementation of accounts receivable, financial aid, residence hall, alumni development, and general ledger and accounts payable systems. Added equipment since January 1, 1987, has consisted of two VAX 8350's (October 1987 and June 1989), an IBM 9375 Model 60 (September 1989) which replaced the IBM 4331, and a VAX 6210 (September 1990).

In his November 19, 1991, analysis of this classification transaction (Respondent's Exhibit 5), Mr. Fitzpatrick stated:

Under Mr. Mergen's 1982 position description, the computer system he worked with in his capacity as a Management Information Supervisor 2 was a 64/40 Honeywell card system. This system, by Management Information Supervisor (Operations) classification specification standards, was basically small in size. It had limited multi-processing ability, no real data base, operated on one small shift with a staff of three, and no teleprocessing network.

As time progressed, this system was replaced by a system consisting of (3) Vax 8300's, (1) 11/780 and (1) IBM 4361 system. This presently has been upgraded to a system consisting of (2) Vax 8300's, (2) Vax 8350's, (1) 6210, and (1) IBM 9375 system.

This current system, that has evolved over a period of years, can be classified as medium by Management Information Supervisor (Operations) classification specification standards. A variety of complex applications are processed in a multi-processing mode; a variety of academic or administrative users as well as students are served; a small data base and two shifts with a permanent staff of three perform the work required, and a teleprocessing network is present. (emphasis added)

The definition of a medium system found in the MIS position standard (Respondent's Exhibit 1) is as follows:

Such a system will characteristically involve a variety of complex applications processed in a multi-processing mode, a variety of academic and administrative users, and either no teleprocessing or a teleprocessing network involving a small number of terminals and non-complex applications.

It is undisputed that the system that was in place as of September 1990 was at least a medium size system. The question that must be addressed is whether the system as of January 1, 1987, also could be considered medium in size.

As of January 1, 1987, PLANet had been initiated as had the merger of the academic and administrative computer operations. Hardware consisted of a Honeywell 64/40, a VAX 11/780, two VAX 8300's, and an IBM 4361. At least on the face of it, this system appeared to fit the definition of medium sized system as involving: "a variety of complex applications processed in a multi-processing mode, a variety of academic and administrative users, and either no teleprocessing or a teleprocessing network involving a small number of terminals and non-complex applications." In Mr. Fitzpatrick's memo (Respondent's Exhibit 5), he does not address why he utilized September 1990, rather than an earlier date, as the line of demarcation for a medium system. At the hearing, he testified it was significant that in September 1990, when the VAX 6210 was acquired, it replaced the VAX 11/780, and thus the last piece of hardware that had been present in the 1984-85 era had been replaced. In the Commission's opinion, this approach to analyzing the effective date issue, in the context of the definitions contained in the MIS position standard, is somewhat circular in nature. While September 1990 indeed was a final transition point from the system in place in 1984-85 to the current system, this analysis

does not address the question of whether the evolving system could be considered to have been medium in size at some earlier point.

Appellant's supervisor, Mr. Johnson, was asked specifically on direct examination: "[w]hen do you feel the conditions within the computing center actually evolved to reflect the fact that Mr. Mergen was doing higher-level duties in regard to a medium-sized system?" He responded by first providing some background information about the system's functioning and continued as follows:

You asked me when it started to become extremely complex. It was not with the installation of PLANet but when we began to develop the infrastructure using service. When faculty began getting PC's on their own desktops and we began developing an APPLE or a MAC lab ... the latter part of 1989 is when it began ... when we installed an IBM lab in the library ... I would say somewhere about the fall of 90 I could honestly say, with the 6210 coming in, we basically completed what we considered the core of computers, and I would think at that point there the responsibilities, I would have to say — would have to go to medium sized ... you'd have to go to much more than a small-sized system, that's my guess. (emphasis added)

In the Commission's opinion, it is not simply semantic hair-splitting to point out that Mr. Johnson's response to the question of when the system became medium in size was couched specifically in terms of when the system became "extremely complex." The definition of a medium computer system does not use the term "extremely complex," but refers to a "variety of complex applications processed in a multi-processing mode." (emphasis added) Therefore, this considerably lessens the amount of weight that can be given Mr. Johnson's testimony on this issue.

In conclusion, as Mr. Fitzpatrick stated in his reclassification analysis memo (Respondent's Exhibit 5), the system with which appellant worked in 1982, consisting of a Honeywell 64/40, was definitely small. By the beginning of 1987, the system included not only the Honeywell 64/40, but also a VAX 11/780, an IBM 4361, and two VAX 8300's. The PLANet system had been initiated, as had the computerized pre-registration system and the merger of the academic and the administrative computer operations. On its face, this system appears to meet the definition of medium. Respondent's evidence on this issue tends to focus on the completion of the transition from the 1984-85 system to

the current system, and the transition to an "extremely complex" system, rather than the criteria for a medium system contained in the position standard. The preponderance of the evidence supports appellant's contention that the system was medium in size by January 1, 1987.

Section ER 3.015(3)(b), Wis. Adm. Code, provides that the incumbent of a position that will be reclassified may not be regraded "[u]ntil the incumbent has performed the permanently assigned duties and responsibilities for a minimum of 6 months." The record reflects that appellant's position had been undergoing significant change during the period prior to the date (January 1, 1987) that he contends, and the Commission has found, marks the line of demarcation for the transition of the system from small to medium. Therefore, the actual effective date for the reclassification of appellant's position, and his regrade for salary purposes, must be six months after January 1, 1987, or June 30, 1987.¹

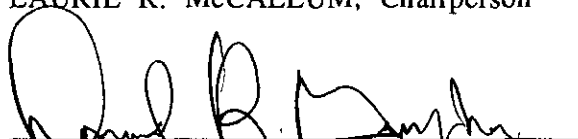
ORDER

The Respondents' action establishing the effective date for reclassification as November 4, 1990, is rejected, and this matter is remanded to respondents for action in accordance with this decision.

Dated: November 13, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

¹ Pursuant to the DER Classification and Compensation Manual §332.060 A. (Finding #14a.), the actual payroll transaction would be effective at the beginning of the first pay period following this date.