



STATE OF WISCONSIN PERSONNEL COMMISSION

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DANIEL MILLER,																				*
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Appellant,																				*
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v.																				*
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Secretary, DEPARTMENT OF																				*
EMPLOYMENT RELATIONS,																				*
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Respondent.																				*
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Case No.	92-0095-PC																			*
	92-0851-PC																			*
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FINAL
DECISION
AND
ORDER

Oral arguments were heard in the above-noted cases before the Commission on August 31, 1994. The Commission addresses below only the major arguments which are not addressed fully in the proposed decision and order.

A. **Reclassification Issue**

1. Insufficient change occurred in the job duties of Mr. Miller's position from 1979-1987, to support his reclassification request.

The proposed decision affirmed DER's decision not to reclassify Mr. Miller's position based on the finding that no change in duties occurred between his 1979 and 1987 position descriptions (PDs). Mr. Miller disputed the accuracy of that finding.

Mr. Miller's testimony as tape recorded at hearing, was reviewed again. It is true that on direct examination Mr. Miller indicated his lead worker duties did not change between the 1979 and 1987 PDs. However, he expanded the statement on cross examination, as noted below (with citations to the hearing tapes).

Tape 3 at 3:

Q: You indicated in your testimony that your lead worker duties and responsibilities did not change throughout the years. Do you recall that testimony?

A: Yes, I do.

Q: Can you explain why your leadworker duties go from 60% in the 1979 PD to 10% in the 1987 PD?

(Paraphrased.)

A: Again, the time percentages, I don't quite understand. I know what I'm supposed to do on my job. Percentages on what I spend on the equipment I work on, I don't even think about percentages of time. I just do the work.

Q: Well, you are aware that in a reclassification, there have to be changes in duties and responsibilities, correct?

A: Um-hm.

Q: You indicated there weren't any changes in your leadworker duties and responsibilities over the years, correct?

A: Correct.

Q: So then it would be a fair statement that we could put lead worker back up to 60% in the 1987 PD?

(Paraphrased.)

A: Yes, you could.

Q: So from that standpoint then there wouldn't be any changes in the duties and responsibilities between the 1979 and 1987 PDs, correct? (Paraphrased).

A: Correct.

Tape 3 at 1500, after Attorney Vergeront completed a line of questioning eliciting details of Mr. Miller's typical day.

Q: This routine has not deviated from 1979 to 1987 basically, right?

A: Basically.

It was Mr. Miller's burden to show entitlement to the denied reclassification, yet he failed to provide testimony comparing his job in 1979 to 1987, other than as noted above. The record is insufficient to conclude that changes occurred.

2. The Pettit decision was not used as precedent.

Mr. Miller also asked the Commission to refrain from using as precedent, its decision in Pettit v. DER, Case No. 92-0145-PC. The Commission anticipated this request and purposefully refrained from issuing a final order in Pettit, until after consideration of oral arguments in Mr. Miller's case and in Burnson v. DER, Case No. 92-0096-PC and Riley v. DER, Case No. 92-0097-PC.

3. The Millard decision does not change the outcome of the reclassification issue.

Mr. Miller, in his request for oral arguments, cited as support of his reclassification the case of Millard, et al. v. DOT & DER, Case Nos. 84-0076, 0077 & 0079-PC (6/6/85). Mr. Miller argued that Millard supports his reclassification claim because it recognized lead worker duties as meriting the ET4 classification. The Commission disagrees.

The Millard case went to hearing with the parties agreeing he performed engineering technician (ET) work and the dispute being whether such work was performed at the ET 3 or 4 level. The Commission credited lead work as allowed within the framework of the ET class specifications. Such analysis has little, if any, carry over value in Mr. Miller's case because he failed to show that the majority of work he performed was of the nature intended for inclusion in the ET class specifications.

B. Reallocation Issue

1. Mr. Miller's equitable estoppel argument in relation to the reallocation issue is rejected.

Mr. Miller's case includes the 1987 reclassification issue and the 1992 reallocation issue. He raised equitable estoppel in post-hearing briefs as an issue related to the 1987 reclassification, and such argument is addressed in the proposed decision.

He did not raise equitable estoppel as an issue related to the 1992 reallocation until after the proposed decision was issued and he submitted his June 6th request for oral arguments. This newly-raised argument is rejected by the Commission. There is no evidence in the record to indicate that DER delayed in processing Mr. Miller's 1992 reallocation, nor were any specific delays on DER's part alleged at oral arguments held on August 31, 1994.

2. The Jenkins' case does not change the outcome of the reallocation issue raised by Mr. Miller.

Mr. Miller acknowledged he did not work with HVAC systems for 90% of his time, as required by the HVAC class specifications. He contended he still should be classified at the HVAC level because his work was comparable to work required in the HVAC class specifications. This general argument is addressed on page 6 of the proposed decision.

In his request for oral arguments, Mr. Miller attempted to support his contention by citing page 7 of the Commission's decision in Jenkins v. DOR & DER, Case No. 88-0061-PC (5/31/89). Jenkins, however, involved different class specifications for Revenue Administrators. Further, the Commission sees no language on page 7 of the Jenkin's decision to support Mr. Miller's reallocation case. Instead, page 7 addresses DER's defense that a comparable position was misclassified; an argument not raised in relation to Mr. Miller's reallocation case.

ORDER

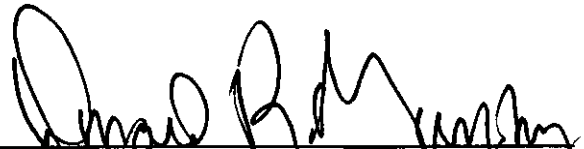
That the Proposed Decision and Order be adopted as the Commission's Final Decision, as supplemented by the discussion herein.

Date: September 9, 1994.

STATE PERSONNEL COMMISSION

JMR/jmr


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

* * * * *

DANIEL MILLER,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 92-0095-PC
92-0851-PC

* * * * *

PROPOSED
DECISION
AND
ORDER

A hearing for the above-captioned matter was held on November 11 and 12, 1993, and was consolidated with the following additional cases: Burnson v. DER, Case Nos. 92-0096 & 0847-PC and Riley v. DER, Case Nos. 92-0097 & 0849-PC. Appellant requested and was granted an opportunity to file post-hearing briefs, with the final brief due on March 10, 1994.¹

The hearing issues were agreed to by the parties, pursuant to a status conference held on September 17, 1993, as follows:

Case No. 92-0095-PC: Whether respondent's decision to deny appellant's 1987 request to reclassify his position from Maintenance Mechanic 3 to Engineering Tech 4 was correct. Relevant timeframe: Six-month period prior to reclass request date.

Case No. 92-0851-PC: Whether respondent's decision to reallocate appellant's position to Maintenance Mechanic 3 instead of Heating, Ventilation, Air Conditioning/Refrigeration Specialist was correct. Relevant timeframe: Job duties as of February 9, 1992.

RECLASSIFICATION REQUEST - Case No. 92-0095-PC

Mr. Miller started working for the state as a Power Plant Equipment Operator at the UW Heating Station from 1969 - 1974 and later, for about 1.5 years at the same location, as a Utility Plant Operator. He then went to work as

¹ The initial briefing schedule was extended to end on March 10, 1994, at appellant's request.

a Maintenance Mechanic 2 at the old UW Hospital when it was located on University Avenue in Madison, Wisconsin. The UW Hospital moved to its present location on Highland Avenue in 1979, at which time Mr. Miller successfully tested for a Maintenance Mechanic 3 position at the hospital's new location where he has worked ever since.

On January 20, 1987, the personnel office at UW Hospital forwarded to the UW-Madison's personnel office, a reclassification request to change Mr. Miller's position from a Maintenance Mechanic 3 (MM3) to an Engineering Technician 4 (ET4). (A's Exh. 8, p. 2)

The UW's initial in-house review of Mr. Miller's reclassification request was delayed because it was not recognized as a formal request. Sometime prior to September 9, 1987, Kenneth Kissinger from UW-Madison's personnel office, reviewed the request. On September 9, 1987, Mr. Kissinger sent the UW Hospital a memo indicating that he had reviewed the request and had forwarded the same to the Department of Employment Relations (DER) for approval. Although Mr. Kissinger stated his support of the reclassification request in the memo, he admitted at hearing that he is not a classification specialist and that he could not give an informed opinion on whether the MM3 or ET4 class specification was the best fit for Mr. Miller's position.

DER did not respond formally to Mr. Miller's reclassification request until December 1, 1992 (R's Exh. 7), about 5 years after DER apparently received the request. Jim Pankratz, in September 1987, worked with DER as a Senior Classification Analyst and was involved with all decisions regarding the movement of MM3 positions to the ET4 classification. He reviewed Mr. Miller's reclassification request and determined that the MM3 classification was the best fit for Mr. Miller's position. Mr. Pankratz returned the matter to the UW for its further consideration. He heard nothing else about it. Neither the UW nor Mr. Miller made further inquiries of DER.

Time passed and Mr. Pankratz was promoted in DER to the Administrator of the Division of Classification & Compensation. In 1992, Troy Hamblin worked for DER as a classification specialist and was involved with DER's survey of maintenance mechanics. Mr. Hamblin learned about Mr. Miller's 1987 reclassification request during the survey process.

The assigned duties of Mr. Miller's position prior to the reclassification request are reflected in his position description (PD) which he signed on March 19, 1979 (R's Exh. 5). He signed a new PD for his reclassification request on January 16, 1987 (R's Exh. 6).

The 1979 and 1987 PDs indicate changes in about 70% of the total job, as shown in the following chart. Specifically, the lead worker functions appear as 80% of the duties in 1979, and as 10% of the duties in 1987.

<u>% Time</u>	<u>1979 PD</u>	<u>% Time</u>	<u>1987 PD</u>
60%	A. Lead worker Duties.	60%	A. Maintenance of Automatic Cart System (ACS), Pneumatic Tube System (PTS) and patient care equipment.
20%	B. More lead work duties.	15%	B. Reporting and making recommendations.
20%	C. Assist program area supervisor.	15%	C. Checking and testing.
		10%	D. Leadwork responsibilities.

Mr. Hamblin correctly noted in his written analysis (R's Exh. 7), that reclassification requests require a logical and gradual change to the duties of the position, pursuant to ER 3.01(3), Wis. Admin. Code. He further indicated that change to more than 50% of the duties is considered as the creation of a new position, rather than a logical and gradual change as required by the administrative code. He concluded that if 70% of the position changed and justified a higher level classification, a new position was created for which Mr. Miller would have to compete. In contrast, Mr. Miller would not have to compete if the position were eligible for reclassification based on a logical and gradual change in duties.

A potential disagreement which the Commission might have with Mr. Hamblin's analysis is to consider that the PDs compared (1979 and 1987) cover about an eight year period. Under these circumstances it is possible that a series of gradual changes occurred over the eight years which might meet the logical-and-gradual-change requirements of the administrative code. In other words, it may not be accurate to assume, for example, that the 70% change perceived by Mr. Hamblin occurred all at once.

Mr. Miller argued that "over a period of years" technological advances occurred which "changed some of the duties that were performed". He

provided no examples of such change in his brief. (See footnote 3 of his post-hearing reply brief dated March 9, 1994.) Furthermore, the record does not support a conclusion that significant technological advances occurred in relation to his position.

In any event, Mr. Miller credibly testified that his duties remained about the same for both the 1979 and 1987 PDs. Only the organization of the duties within the PDs changed.

The Commission concludes from the foregoing that DER's denial of Mr. Miller's 1987 reclassification request was appropriate because no change in duties occurred, as required under ER 3.01(3), Wis. Admin. Code. With this conclusion, the reclassification inquiry ends without reaching Mr. Miller's additional arguments which are now moot.²

REALLOCATION - Case No. 92-0851-PC

DER surveyed maintenance mechanics and related positions. The survey resulted in revised class specifications for maintenance mechanics (R's Exh. 41) and new class specifications for HVAC positions (R's Exh. 42). Mr. Miller's PD used for the survey is in the record as R's Exh. #43, which he signed on December 18, 1991. As a result of the survey, his position was reallocated under the new class specifications for MM3s, effective February 9, 1992. Mr. Miller appealed the reallocation because he felt his position should have been reallocated to a HVAC Specialist.

A general overview of his position is shown below using the organization of his PD (R's Exh. 43).

<u>Time %</u>	<u>Goals and Worker Activities</u>
60%	A. Maintenance of Automatic Cart System (ACS), Pneumatic Tube System (PTS) and Patient Care Equipment.
20%	B. Leadwork Responsibilities.
10%	C. Reporting and Making Recommendations.
10%	D. Checking and Testing.

² Appellant spent considerable effort addressing reclassification arguments which would be relevant only if appellant had first shown a logical and gradual change in his position. He failed to establish this required threshold issue. Therefore, the Commission did not reach his additional arguments.

The class specifications for HVAC Specialist contain the following language from the "Inclusions" section.

This classification encompasses positions which function as system experts in the HVAC and/or refrigeration area. These positions must spend a significant portion of time (typically 90% or more) performing advanced work on HVAC and/or refrigeration equipment and systems. This classification is limited to only those few positions which are specifically assigned to perform advanced systems setup, monitoring, adjustment and control; troubleshooting, repair and systems modification; planning and coordinating HVAC and/or refrigeration projects; and would typically guide Maintenance Mechanics in the maintenance and repair of sophisticated HVAC and/or refrigeration equipment systems. The more routine adjustment, maintenance and repair to the systems is typically performed by positions allocated to the Maintenance Mechanics series, however, some routine work may be done by these types of positions as an incidental portion of their primary function as systems experts.

The following language appears in the "Exclusions" section of the HVAC class specifications.

Excluded from this series are the following types of positions:

1. Maintenance Mechanic positions whose work may include HVAC and/or refrigeration repair and maintenance, but are not assigned advanced systems control work involving significant portion of the time;
- * * *
5. All other positions which are more appropriately identified by other series.

Mr. Miller concedes that the HVAC class specifications call for 90% of the position's duties to be performed on HVAC or refrigeration systems. He further concedes that he does not work on either HVAC or refrigeration systems. He feels, however, that the work on his ACS and PTS are at least comparable to the duties listed in the HVAC class specifications. For example, Mr. Miller typically troubleshoots, guides others in the maintenance and repair of his two systems, and one of his systems involves pneumatic tubes. The HVAC class specification specifically acknowledge such activities, but only if performed on HVAC or refrigeration systems.

Mr. Miller estimated he spends about 40% of his time on tasks for his systems which are as complex as the tasks described in the HVAC class specifications. Therefore, the Commission's conclusion regarding the reallocation decision would be the same even if the comparable duties claimed by Mr. Miller were considered. This is true because the claimed comparable duties do not comprise at least 90% of his duties, or even more than half of his position.

Furthermore, DER undertook a labor market survey as part of the classification survey for maintenance mechanics and related positions. The higher classification for HVAC was based upon the gathered labor market information which lead DER to believe that state agencies would be unable to retain workers with HVAC specialties without an added inducement. The intent was to single-out individuals with HVAC specialties. The record does not support a conclusion that DER also intended to include specialties on non-HVAC systems which used comparable skills. In fact, two other positions perform control work in non-HVAC specialty areas and each is classified at the MM3 level. See R's Exh. 59 (elevator specialty) and R's Exh. 60 (airfield lighting specialty).³

Mr. Miller would prefer that the class specifications treat his specialty systems on the same level as HVAC and refrigeration systems. The Commission, however, lacks authority to create or rewrite class specifications. Zhe et. al. v. DHSS & DP, 80-285, 286, 292, 296-PC, 11/18/81; aff'd by Dane County Circuit Court, Zhe et. al. v. Pers. Comm., 81-CV-6492 (11/82).

The best fit for Mr. Miller's position under the new (post-survey) class specifications is MM3. The class specifications contain the following pertinent language about the MM3 level.

This is advanced level mechanical maintenance and repair work. Employees in this class operate, maintain and make repairs on electrical, plumbing, heating, refrigeration, air conditioning and other

³ Appellant's Exhibit 9 is a memo from Mr. Cimino to Mr. Pankratz dated May 5, 1983. Mr. Miller argued the memo supports a conclusion that a higher classification is justified for positions performing non-mechanical control work. The Commission disagrees. The memo, when read in its entirety, stands for the proposition that only control work performed on HVAC equipment for a majority of the time justifies the higher classification.

mechanical systems and apparatus commonly used in office and institutional buildings and building complexes. There are five general allocation patterns for this level: . . . 2) Leadworkers - employees who perform various types of mechanical maintenance, repair work and function as a leadworker over lower level maintenance mechanics. . . . 4) Area Maintenance - employees who are independently responsible for an entire mechanical operation in an institution, large state office building, a specific assigned area of a complex operation or a fish hatchery. . . .

DER contends that Mr. Miller's position meets the second and fourth allocation patterns noted above. Mr. Miller appears to agree that those allocation patterns could be used to describe the duties of his position.⁴ Mr. Miller feels the MM3 classification is inadequate for his position because it fails to acknowledge the complexity of ACS and PTS. Specifically, both systems are computer controlled and Mr. Miller is expected to repair not only the mechanical components but also the computer components and correcting program changes; duties not expected of any other maintenance mechanic where he works.

The duties performed by Mr. Miller appear to be at a level somewhere between the MM3 and HVAC class specifications. The Commission, however, cannot create a new class specification or rewrite existing specifications. When faced with a choice between the HVAC and MM3 classifications and

⁴ Mr. Miller does not directly dispute that the second allocation pattern is applicable to his position. However, he apparently argues (incorrectly) that a basic rule or policy exists which prevents classifying lead workers at the same level as the employees over which the lead worker duties are performed. This argument could be re-structured as a dispute over the applicability of the second allocation pattern to his position. The examiner therefore considered whether Mr. Miller was functioning as a lead worker over "lower level maintenance mechanics" (as specified in the MM3 class specs) when he is the same classification as the MM3s for which he serves as lead worker.

The phrase "lower level maintenance mechanics" is not a defined term in the class specifications and was not addressed at hearing. The phrase could be used as a reference to a lower classification of mechanic. However, it appears from the "Examples of Work Performed" section of the class specs that the intended reference is simply to lower-level duties within the same classification. Either meaning could exist in any specific class specification. In any event, resolution of this question would not resolve the case because the fourth allocation pattern still would apply to Mr. Miller's position.

where it is clear that his position does not meet the HVAC class specifications, the Commission concludes that the MM3 classification is the best fit for Mr. Miller's position.

DISCUSSION

Theel Rationale - Reclassification Issue

Appellant asserts in his initial brief (starting at p. 34) that his lead work responsibility supports an ET4 classification and he cites as support the case of Theel v. DOT & DER, 84-0074-PC (11/8/84). The Commission disagrees with this assertion.

The Theel case involved a classification choice between an Engineering Technician 3 (ET3) versus an ET4. The Commission, on page 7 of the decision, stated as follows:

[T]he ET4 class specifications identify positions performing "difficult and complex technical and/or supervisory or coordinating duties." The language of the specifications shows that classification to the ET 4 level is appropriate for a position that performs difficult and complex technical duties, even though the position has no lead work responsibility. In the present case [where appellant Teel had no leadwork responsibilities] the appellant failed to establish that his position was comparable to non-lead workers classified as ET4's. (Emphasis supplied in the original.)

Mr. Miller is a lead worker. His lead worker duties could support the ET4 classification only if the Commission had concluded that the ET4 classification was the "best fit" for his position. The Commission's ruling, however, does not support such a conclusion.

Equitable Estoppel - Reclassification Issue

Mr. Miller contends DER should be equitably estopped from denying his reclassification request because it took DER over five years to respond to the request. The Commission disagrees.

The elements which must be established to prevail in an equitable estoppel claim against a state agency are as follows: 1) the claiming individual relied 2) to his/her detriment 3) upon action or inaction by a state agency, 4) that a serious injustice to the claiming individual would result if estoppel were not applied and 5) the public's interest would not be unduly harmed by

application of estoppel. Dept. of Revenue v. Moebius Printing Co., 89 Wis. 2d 610 at 634 and 638, 279 N.W.2d 213 (1979).

The only detriments advanced by Mr. Miller are as follows: 1) he was left "uncertain and frustrated", 2) he was "placed at a disadvantage in litigating facts that arose five years ago" and 3) even though his wages would be paid in full retroactively if he won his appeal, such wages would have less buying power today than they would have had if paid when earned. None of the claimed disadvantages were developed or even discussed in the hearing record.

Mr. Miller requests the Commission to take "administrative notice" of appellant's frustration from, for example, letters in the file. The concept of "administrative notice", however, is not so broad as to allow the Commission's reliance on information from file documents which are outside the record and unconfirmed at hearing.

In summary, the detriments claimed by Mr. Miller were not shown to be sufficient to warrant application of the equitable estoppel doctrine. The Commission further notes that DER's apparent delay in processing Mr. Miller's reclassification request was unintentional. There is no evidence to suggest such delay was due to an intent to harm Mr. Miller's interests. Also, Mr. Miller knew in 1987, that DER's review should take about 6-8 weeks, yet he failed to follow-up for several years.

ORDER

Respondent's decision to deny Mr. Miller's 1987 reclassification request is affirmed and case number 92-0095-PC is dismissed. Further, respondent's decision to reallocate Mr. Miller's position to Maintenance Mechanic 3 is affirmed and case number 92-0849-PC is dismissed.

Dated _____, 1994.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

cc: John Talis
David Vergeront