STATE OF WISCONSIN PERSONNEL COMMISSION

DANIEL J. PETTIT,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 92-0145-PC

FINAL DECISION AND ORDER

This matter is before the Commission on the following issue:

Whether the respondent's decision to deny the appellant's 1987 request to reclassify his position from Maintenance Mechanic 3 to Engineering Technician 4 was correct.

A hearing on this appeal was held on January 27, 1994, before Adam C. Korbitz, designated hearing examiner.[1] The parties filed post-hearing briefs, and the final brief was received on March 15, 1994.

BACKGROUND

The appellant began work for the Plant Engineering Department (PED) of the University of Wisconsin Clinical Science Center (UW hospital) in 1981, classified as a Maintenance Mechanic 2. The appellant was promoted to Maintenance Mechanic 3 (MM3) in 1983. His position remained classified at

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1 This case was originally consolidated for hearing with three other cases: Miller v. DER, Case Nos. 92-0095-PC & 92-0851-PC; Burnson v. DER, Case Nos. 92-0096-PC & 92-0847-PC; and Riley v. DER, Case Nos. 92-0097-PC & 92-0849-PC. The hearing in those cases was held on November 11 and 12, 1993. The appellant requested and was granted a separate hearing date because of a conflict with the original hearing date.

that level until it was reallocated to the HVAC Specialist classification in 1992. From November 1983 until at least the date of his reclassification request in January 1987 (the entire time period that is relevant to this appeal), the appellant worked as a MM 3 leadworker in the Building Maintenance Section of the PED. His supervisor during that time was Greg Seeley, who at that time was classified as a Maintenance Supervisor 1.

On or about January 20, 1987, the UW hospital's personnel office sent the UW-Madison's personnel office a reclassification request, requesting a change in the appellant's position from MM3 to Engineering Technician 4 (ET4). The UW's initial in-house review of the appellant's reclassification request was delayed because it was not recognized as a formal request. Sometime prior to September 9, 1987, the request was reviewed by Kenneth Kissinger, an employee of the UW-Madison's personnel office. On September 9, 1987, Mr. Kissinger sent the UW Hospital a memo indicating that he had reviewed the request and had forwarded the request to the respondent for review. Mr. Kissinger, who was not a classification specialist, stated his support of the reclassification request in the memo.

In September 1987, Jim Pankratz worked for the respondent as a senior classification analyst and was involved with all decisions regarding the movement of MM3 positions to the ET4 classification. He reviewed the appellant's reclassification request and determined that the MM3 classification was the best fit for the appellant's position. Mr. Pankratz returned the matter to the UW for further consideration.

Time passed and Mr. Pankratz was promoted to the administrator of the respondent's Division of Classification & Compensation. In 1992, Troy Hamblin (a classification specialist with DER) served as the manager of the respondent's survey of maintenance mechanics. Mr. Hamblin learned about the appellant's 1987 reclassification request during the survey process.

The respondent did not respond formally to the appellant's 1987 reclassification request until December 1, 1992 (about five years after DER received the request), at which time it denied the request.

DISCUSSION

I. Merits

The question presented by this appeal is whether, during the relevant timeframe (November 1983 until January 1987) there was a logical and gradual change in the appellant's duties which justified reclassification to the Engineering Technician 4 level. A position cannot be reclassifed unless there is a logical and gradual change in the duties or responsibilities of the position. Section ER 3.01(3), Wis. Admin. Code. In a reclassification appeal, the appellant bears the burden of proving, by a preponderance of the evidence, that the respondent's denial of his reclassification request was incorrect. Vranes v. DER, 83-0122-PC (7/19/84). The appellant has failed to sustain that burden.

The appellant signed a position description on December 20, 1983, which ostensibly reflected his duties at that time. However, evidence adduced by both parties at hearing impeached that document as a reliable indication of what the appellant's duties were in 1983. The evidence adduced by both parties indicates that the 1983 position description was a generic one that was not tailored to the appellant's duties and did not accurately reflect the responsibilities of his position at that time. The appellant signed a new position description for his reclassification request on January 16, 1987.

If one did accept the 1983 position description as accurate (which the hearing examiner does not), a comparison of that position description and the 1987 position description would indicate a change of at least 60% in the appellant's duties, as shown in the following chart. Specifically, the leadworker functions would appear to have changed from 80% of the position's duties in 1983 to less than 20% of the position's duties in 1987.

% Time	1983 PD		% Time	1987 PD	
60%	A.	Leadworker Duties	40%	A.	Maintenance of Existing Control Systems
20%	B.	Additional Leadworker Duties	25%	B.	Energy Conservation Procedures and Activities
20%	C.	Assist Program Area Supervisor	20%	C.	Energy Management System Coordination and Leadwork Duties
			10%	D.	Reporting and Making Recommendations
			5%	E.	Related Maintenance Responsibilities

The hearing record indicates, however, that this change in leadworker duties of approximately 60% never occurred. Greg Seeley, the appellant's supervisor during the relevant time, testified that the 1983 position description was written in 1979 and was a generic one used for several positions (positions which varied greatly in terms of actual duties). Seeley also testified that in 1983, as well as in January 1987, the majority of the appellant's duties involved the maintenance of HVAC control systems. The appellant argued persuasively in his post-hearing brief that the apparent change in leadworker duties of 80% to 20% was not an actual change in duties but was merely the result of an accurate position description replacing an older, inaccurate one. The apparent 60% change in leadworker duties never occurred.

The impeachment of the 1983 position description as a reliable indication of what the appellant's duties were at that time leaves a gap in the hearing record, a gap which the appellant did not adequately fill with other evidence: what, exactly, were the appellant's duties when he transferred into the position in 1983? (In other words, what was the baseline against which to measure any *subsequent* changes in duties and responsibilities?) For the reasons discussed below, the only other available evidence -- primarily Seeley's testimony and the 1987 position description -- indicates that the appellant's duties were substantially the same in 1983 and January 1987 and that during that time no logical and gradual change in duties occurred that justified reclassification to the ET4 level.

At hearing, the appellant introduced evidence ostensibly showing two periods of change in the duties of his MM3 position. Some evidence related to changes in his duties that supposedly occurred approximately six to nine months before he filed his reclassification request in January 1987. Other evidence related to changes that evidently occurred in the position's duties prior to 1983 -- before the appellant transferred into his MM3 leadworker position. These changes should be distinguished and will be discussed in chronological order.

Much of the appellant's evidence, such as App. Exh. 8 (the memo from Jim Cimino to Jim Pankratz, dated May 5, 1983, and its attachments) and App. Exh. 1 (the memo from Ken Kissinger to Lew Cole, dated September 9, 1987), concerns changes in the appellant's position that occurred *before* the appellant transferred to his position in November 1983. The question presented by this appeal is whether or not there were logical and gradual changes in the appellant's position, changes which justified reclassification to the ET4 classification. Evidence of changes that occurred in the appellant's position before he transferred into that position might, under at least some circumstances, be relevant to the question of whether or not a logical and gradual change justifying reclassification had occurred. However, in this case, the evidence of pre-1983 changes is slight and, in itself, insufficient to constitute a showing of a logical and gradual change in duties. Moreover, the evidence of pre-1983 changes, even when coupled with changes alleged by the appellant to have occurred in 1986, is still insufficient. This is because, as

discussed further below, any evidence presented by the appellant relating to changes in 1986 is itself quite tenous.[2]

The appellant also presented evidence at hearing concerning changes that supposedly occurred in his position approximately six to nine months before he requested reclassification in January 1987. The appellant's supervisor, Greg Seeley, testified that the appellant's duties remained the same from 1983 until 1986. According to Seeley, the appellant's duties changed in the spring of 1986 due to an energy conservation project at the hospital. This project required the installation of new digital controls on the hospital's existing HVAC equipment. The actual installation of these controls was done by contractors; the appellant was involved in calibrating the new controls and ensuring that they were working.

Seeley testified that it was the energy conservation project that was viewed as the justification for requesting that the appellant's position be reallocated to ET4. However, except for what is discussed here, the appellant presented very little evidence regarding how that project altered his duties. Seeley's testimony does not indicate how this project added new duties or changed, to any significant extent, the *nature* of the appellant's duties. (At hearing, the appellant did not testify himself about his own job duties.) As noted above, Seeley testified that the majority of the appellant's duties, in both 1983 and January 1987, involved the maintenance of HVAC control systems. That did not change as a result of the 1986 energy conservation project; what changed was only the nature of a *minority* of the controls the appellant was working with. (Seeley also testified that, by early 1987 -- when the appellant filed his reclassification request -- only about one-third of the controls that the appellant was responsible for had been converted to the new digital system.)

Although Seeley testified that the 1986 energy conservation project justified, in his view, the appellant's reclassification request, Seeley also testified that these supposedly new duties were not even listed or referred to in the appellant's 1987 position description -- the position description that had

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2 Language in this paragraph and the preceding paragraph has been modified because the original language in the proposed decision raised an issue that the Commission does not need to address in order to decide this appeal.

been drafted for submission with the appellant's reclassification request. The actual scope and significance -- indeed, the very existence -- of any changes resulting from the energy conservation project is called into question by the fact that they were not listed on the appellant's position description in 1987.

Seeley's testimony that any such changes resulting from the energy conservation project were significant (or even occurred) is impeached by another fact. In December 1986, Lann Johnson, a MM2 under Seeley's supervision, promoted to a MM3 position in the Building Maintenance Section of the PED -- the same section that the appellant worked in at that time. Johnson's promotional position description, signed by Seeley on November 7, 1986, states that Johnson was, at that time, performing duties similar to the other MM3's in the department -- including the appellant. If Johnson, an MM3, was peforming duties similar to the appellant's duties at that time, that fact contradicts what sparse evidence the appellant did introduce of any significant changes in his duties, whether pre- or post-hire.

The evidence presented by the appellant at hearing is wholly inadequate to support a conclusion that any significant technological changes occurred in the duties of his position in 1986. The appellant himself did not testify about his own job duties. Even if there were changes in the appellant's duties in 1986, he did not present any evidence at hearing that enabled the hearing examiner to judge the significance of those changes as compared to his old duties. This is particularly true in light of the fact that the appellant failed to establish at hearing a clear picture of what his duties were when he transferred into the position in 1983.

The appellant has the burden of proof and is required to show that his position had undergone a logical and gradual change. While he presented a small amount of evidence to this effect, he did not present nearly enough evidence to conclude that there had been a logical and gradual change in the position. Completely lacking from the appellant's evidence was any indication of the specific percentages of the changes alleged to have occurred due to the 1986 energy conservation project. Compare, Haak v. DHSS & DER, 85-0130-PC (4/30/86) at 13-14.

The respondent's decision to deny the appellant's 1987 reclassification request was correct. The appellant did not present evidence demonstrating a

logical and gradual change in the duties of his position that justified reclassification, as required by sec. ER 3.01(3), Wis. Admin. Code. Because the appellant did not demonstrate such a change, the reclassification inquiry ends here without considering other arguments that the appellant made relating to the merits of the case.[3]

II. Equitable Estoppel

In addition to contesting the reclassification denial on its merits, the appellant also argues that the respondent should be equitably estopped from denying his reclassification request because the respondent did not respond to his request for over five years. For the reasons discussed below, equitable estoppel does not apply to this case.

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 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). (There is also precedent for the proposition that a party asserting equitable estoppel against a state agency must also demonstrate that the agency's action or inaction amounts to fraud or manifest abuse of discretion. Surety Savings & Loan Assoc. v. State, 54 Wis. 2d 438, 445, 195 N.W.2d 464 (1972). In this case, however, it is not necessary to consider the presence of fraud or abuse of discretion on the respondent's part because, as disussed below, the appellant has made no showing of detrimental reliance.)

The only detriments advanced by the appellant in his brief are that he was left uncertain and frustrated and that he was placed at a disadvantage in

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3 Much of the appellant's evidence concerned comparison ET4 positions at UW System campuses. However, because the appellant presented so little evidence demonstrating changes in his duties in 1986, these comparison positions are not relevant. The appellant is not entitled to reclassification unless he demonstrates the logical and gradual change required by sec. ER 3.01(3), Wis. Admin. Code.

litigating facts that arose five years ago. Except for mention of the delay itself, the hearing record is devoid of evidence supporting these claims. The disadvantages claimed by the appellant are not (even if assumed to be true) sufficient to warrant application of the doctrine of equitable estoppel.

ORDER

The respondent's decision to deny the appellant's reclassification request is affirmed, and this appeal is dismissed.

Dated: October 24, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

ACK:RULINGS/ORDERS:Pettit

Parties:

Daniel J. Pettit
U.W. Hospital & Clinics
Dept. of Plant Engineering
600 Highland Avenue, Room D4/160
Madison, WI 53792

Jon E. Litscher, Secretary
Department of Employment Relations
P.O. Box 7855
137 East Wilson Street
Madison, WI 53707-7855

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 per-

sonally, 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.