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DOUGLAS WELCH,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 92-0630-PC

* * * * *

DECISION
AND
ORDER

The parties agreed to the issue in the above-noted case at a prehearing conference held on April 20, 1993, as shown below.

Whether respondent's decision to reallocate appellant's position to Fisheries Biologist - Senior instead of Fisheries Biologist - Advanced was correct.

The hearing was held on March 11, 1994. The parties gave closing arguments at hearing, in lieu of filing post-hearing briefs. The information provided in the following paragraphs is based upon evidence presented at hearing.

Mr. Welch has worked in the same position since March 8, 1988, for the Department of Natural Resources (DNR), as an area fisheries biologist in the Bong Work Unit of the Southeast District. His position was included in the survey of science positions conducted by the Department of Employment Relations (DER). The position descriptions (PDs) for all affected positions (about 1,000 total) were updated in 1991. The survey came to a close in about December 1991, after which DER prepared draft class specifications and circulated them among agencies for internal review and comment. Final class specifications were developed, after which individual positions were assigned a level under the new class specifications with an effective date of April 19, 1992.

The position held by Mr. Welch was classified as a Natural Resource Specialist 6 prior to the survey, and was reallocated to a Fisheries Biologist - Senior as a result of the survey. All five area fisheries biologists in the Southeast District were reallocated to the Senior level. He appealed this result, feeling his position should have been reallocated to a Fisheries Biologist - Advanced.

Mr. Welch's job duties at the time of survey are as shown in his PD which he signed on June 28, 1991 (C's. Exh. 4), and as updated by his hearing testimony regarding his involvement as a member of certain DNR committees which addressed specific statewide issues. A brief overview of the duties of his position are shown below using the organization of his PD.

<u>Time %</u>	<u>Goals and Worker Activities</u>
44%	A. Administration of the Area Fisheries Program.
17%	B. Development and implementation of fisheries management plans for the complex fishery resources in a multi-county area, typically consisting of lakes, trout streams, and warm water streams.
5%	C. Develop and implement a land acquisition program to protect and allow for management and public access to the water resources within a multi-county area. This area contains named fishery properties, critical habitat remnants, easement and access sites.
11%	D. Plan and implement various development and maintenance activities on fishery properties and state access sites.
10%	E. Implement a proactive public relations and education program to inform the public of resource management activities, the environmental protection program and various regulations, services and information programs.
10%	F. Integrate fisheries program with other Department functions, other units of government and the private sector.
2%	G. Improve job skills to increase effectiveness in conducting duties.
1%	H. Assist DNR efforts to attract, employ, and retain protected group employees in permanent, project and LTE positions.

The position held by Mr. Welch fits the first of four allocation patterns found in the class specifications for Fisheries Biologist - Senior. All four allocation patterns are shown below.

- 1) a senior fisheries biologist responsible for developing, administering and evaluating the fisheries program in the assigned geographic area;
- 2) a senior fisheries biologist responsible for developing, administering and evaluating a major portion of the fisheries management program being implemented district wide;
- 3) a senior central office fisheries biologist responsible for serving as the assistant to a higher-level fisheries biologist/supervisor having responsibilities for a major aspect of a program, or
- 4) as a program specialist responsible for the implementation of a program which is smaller in scope and complexity and does not have the interaction and policy development that is found at higher levels.

Mr. Welch's position does not meet either of the two allocation patterns for the Advanced level as contained in the class specifications and shown below.

- 1) department expert for a significant segment of the fisheries program, or
- 2) a districtwide expert with multi-faceted responsibilities (providing districtwide expertise and coordination for multiple and significant segments of the fisheries management program),. . .

He is not a "department expert" within the meaning of the first allocation pattern. His participation in committee work may qualify; but only comprises about 3% of his work in the year prior to April 19, 1992, the effective date of the survey. Further, he is not a "districtwide expert" as contemplated under the second allocation pattern. He does not provide expertise for the entire southeastern district. Rather, he provides expertise for the Bong Work Unit portion of the southeastern district.

Mr. Welch felt his position involved the same duties as the positions held by James Talley in the Black River Falls Work Unit of the Western District and by Eugene Van Dyck in the Dodgeville Work Unit of the Southern District. The PD for Mr. Talley's position shows his classification at the Advanced level (C's Exh. 1). The PD for Mr. Van Dyck's position (C's Exh. 2) shows his position at the Advanced level too.

The PD offered for Mr. Van Dyck's position (C's Exh. 2) has not been approved by DER and, therefore, was not helpful for use as a comparison to Mr. Welch's position. Mr. Van Dyck's classification prior to June 1993, was Natural Resources Supervisor 3 (Supervisor). The Supervisor classification requires

that the position supervise at least two permanent employees. In or around June 1993, Mr. Van Dyck's position duties were changed and reduced his supervisory responsibilities from 3 to just 1 permanent employee, leaving him no longer qualified for the "Supervisor" classification. The PD for his position (C's Exh. 2) is the PD which was submitted to reflect his changed duties after June 1993, with a request for classification as a Fisheries Biologist - Advanced. Ms. Steinmetz indicated that the requested Advanced classification is at the same pay level which Mr. Van Dyck's position has at the Supervisor classification. Such request is still pending review by DNR and/or DER.

Ms. Steinmetz testified that Mr. Talley's position has been identified previously to DNR as a classification problem in relation to other positions. She has requested an updated PD for Mr. Talley to determine if the duties reflected in the survey PD (C's Exh. 1) are correct. She plans to continue with her review of the classification for Mr. Talley's position.

A review of the Talley and Van Dyck positions confirms Mr. Welch's view that the duties are very similar, if not identical. Ms. Steinmetz acknowledged that if Mr. Talley and Mr. Van Dyck perform the duties stated in the PDs (C's Exhs. 1 & 2), then those individuals also would not meet the class specifications for the Advanced level.

DISCUSSION

The hearing record verifies Mr. Welch's concerns regarding the classification of his position as compared to the positions held by Mr. Talley and Mr. Van Dyck. As conceded by respondent, the duties performed by Mr. Talley and Mr. Van Dyck (as reflected by their PDs) appear equivalent to the duties performed by Mr. Welch, yet Mr. Welch's position has a lower classification.

It also is clear from the record, however, that Mr. Welch's position does not meet either of the allocation patterns contained in the class specifications for the Advanced level. The Commission in Augustine and Brown v. DATCP [& DER], 84-0036, 0037-PC, 9/12/84, declined to raise the classification of one position to match the erroneous classification of another position. Simply stated, the Commission felt such action would only compound the error where neither position met the class specification requirements.

Mr. Welch made it clear in his closing argument that it was not his intent by bringing his appeal to adversely affect the classification of the positions held by Mr. Talley and Mr. Van Dyck. He further indicated he felt those positions, as well as his own, merited the Advanced classification.

As noted previously, however, it would be improper for the Commission to award a classification not warranted by the class specifications. Nor does the Commission have the authority to rewrite the class specifications to include different requirements for the Advanced level as would qualify the positions held by Mr. Talley, Mr. Van Dyck and Mr. Welch for the higher classification. 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).

An evidentiary ruling was made by the examiner as described here. Mr. Welch, in answer to interrogatories and again in a telephone conference call held 10 calendar days before the hearing, indicated his hearing theory was that his position met the second allocation pattern for the Advanced level classification, but not the first. At the start of hearing, he indicated a desire to argue that his position met both allocation patterns. Respondent objected because it had not prepared for hearing to address both allocation patterns based on Mr. Welch's prior statements. The hearing examiner ruled that Mr. Welch could present evidence on both allocation patterns solely for the purpose of making a complete record for court review (akin to an offer of proof); but that his responses prior to hearing constituted, in effect, a waiver of his ability to include the first allocation pattern as part of his arguments before the Commission.

The Commission's decision addresses both allocation patterns to illustrate that even considering all of Mr. Welch's arguments, the evidence was insufficient to support his claim for the Advanced level classification of his position. The fact that both allocation patterns were discussed in this decision should not be interpreted in any way as a change in the examiner's ruling at hearing.

ORDER


The Commission affirms DER's decision to reallocate appellant's position to Fisheries Biologist - Senior, instead of Fisheries Biologist - Advanced; and this appeal is dismissed.

Dated May 16, 1994.

STATE PERSONNEL COMMISSION


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.)