

* * * * *

RODNEY K. MILLER,
 Appellant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 and Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,

 Respondents.

Case No. 92-0840-PC

* * * * *

DECISION
 AND
 ORDER

This is an appeal of the denial of a request for reclassification from Psychologist 5-Doctorate (Management) to Psychologist 6-Doctorate (Management). (These classifications are referred to hereafter as Psychologist 5 and Psychologist 6.)

Appellant is employed in a position at Mendota Mental Health Institute (MMHI) in the Division of Care and Treatment Facilities (DCTF), Department of Health and Social Services (DHSS). This position is classified as a Psychologist 5. Its duties and responsibilities (and their percentages) can be summarized as follows.

This position serves as the chair of the DCTF Behavior Treatment Techniques Committee (BTTC) for 25%. The BTTC has been established by division policy to oversee the use of behavioral programming in its state facilities (three state centers and two mental health facilities). The BTTC oversees the operations of institutional committees at each institution, to ensure uniform standards throughout DCTF. The BTTC includes 15 members, including institutional and central office staff, as well as staff from institutions outside DHSS. The membership includes or has included other Psychologist 5's. Appellant has been a member of BTTC since 1985, and became the chairperson in 1991.

The BTTC is summarized in Exhibit 10 as follows:

This divisional committee was established in 1978 to oversee the use of behavioral programming in our three state centers and two mental health institutes. The BTTC's mandate and procedures for conducting behavioral programs are established by divisional policy in Internal Operations Memo (IOM) 10.01. Each facility has its own "agency committee" to review and approve programs. The BTTC visits each facility annually to review the work of the agency committees and ensure the quality of behavioral programming. In addition to agency committee approval, those programs considered to be highly aversive must also be approved by the BTTC prior to implementation. Members are appointed annually by the division Administrator; the current terms will expire at the end of 1991. The committee meets on the third Thursday of each month.

As part of his BTTC role, appellant is involved in developing division wide guidelines for the use of isolation and restraint. These guidelines go beyond the areas of behavioral treatment, and the development of these guidelines goes beyond traditional BTTC functions.

Appellant also has been serving on other committees and acting in a consultative capacity, activities which have division-wide impact. Some of these are temporary assignments, but these kinds of assignments recur relatively frequently. The record does not reflect the percentage of time spent on these activities.

The majority (approximately 65-75%) of appellant's duties and responsibilities involve his role as Director of the MMHI Psychology Department. This involves personnel supervision, clinical training, administrative work, research and clinical activities.

The determination of the appropriate classification for appellant's position is difficult because it is undisputed that the class specifications for Psychologist 5 and 6, which were drafted in 1971, are outmoded and do not reflect the current situation in DHSS. The class definitions for these classifications are as follows:

Psychologist 5:

This is very responsible and specialized consultative work in the professional practice of psychology. Positions allocated to this level function as statewide program consultants in recognized areas of clinical specialization, such as Child Psychology. The work involves

providing program evaluation and reinforcement services in the area of expertise to operational programs throughout the state, and assisting in the planning and initiation of new programs and services. The consultant advises central office program administrators relative to the development of program models, goals and standards. The work is performed under general administrative review with considerable latitude for the exercise of initiative and independent judgment.

Psychologist 6:

This is highly responsible administrative and professional work in coordinating major psychological programs at the state level. Employees in this class serve as: (1) chief divisional psychologist in the Division of Family Services or the Division of Mental Hygiene with responsibility for general program development, consultation and review functions relative to the provision of clinical psychological services in institution, regional and community settings; or (2) clinical research coordinator or clinical training coordinator in the Division of Corrections with operational responsibility for the conduct of these programs on a statewide basis, including the functional supervision of all staff engaged therein. The work of the class requires significant involvement in division level policy-making and program planning and budgeting activities. The work is performed under broad administrative and program guidelines and review is accomplished through periodic staff conferences and reports.

Neither of these definitions describe the bulk of appellant's activities. DHSS has developed an allocation pattern which classifies institutional psychologists at the Psychologist 4 level and chief institutional psychologists or psychology department directors at the Psychologist 5 level. There are no Psychologist 6 level positions in state service at this time. However, DHSS takes the position that positions at this level would be primarily involved with "responsibility at the division level for the determination, development and implementation of psychological programs for the institutions as well as responsibility for assessing the clinical psychological programs at the institution and providing professional consultation on such programs." (Exhibit 2, DHSS memo denying reclass request). DHSS denied the request for reclassification on the grounds that:

While some of the functions Dr. Miller performs related to the BTTC may be similar to the functions intended by the Psychologist 6 classification specification, these responsibilities would have to represent the majority of the time of the position. In addition, the position would not carry primary responsibility for the direction of an institution psychology program. id.

Appellant contends that his position should be classified at the Psychologist 6 level because, while it does not fit within either obsolete definitions, it is closer conceptually to the Psychologist 6 level rather than the Psychologist 5 level. He also contends that the position is distinguished from the other Psychologist 5 positions identified on this record because of his greater level of involvement with division level activities. He contends that he is the de facto Chief Divisional Psychologist, and the only psychologist whose work impacts all the facilities within the division.

While neither class specification (Psychologist 5 or Psychologist 6) describe the majority of appellant's position which functions at the institutional level, the general thrust of the Psychologist 5 definition involves a professional consultative statewide role. The Psychologist 6 definition runs more to responsibility for actual policy making and program development at the divisional level. To this extent, the Psychologist 5 level seems closer to appellant's division level work, which is more consultative and advisory in nature rather than being involved in policy making and program development. However, this is not determinative because of the undisputedly obsolete nature of these class specifications.

As mentioned above, appellant argues that his position should be at a higher level than the other Psychologist 5 positions because of his greater division-wide role. Each of these employees has served on the BTTC, and Mr. Kessling's PD shows some other division level activity. However, appellant's work outside the institution is more extensive, primarily due to his role as BTTC chairperson. The question is whether respondents erred in not recognizing this differential, by denying his request for reclassification of his position to Psychologist 6.

In deciding this issue, it must be kept in mind that appellant has the burden of proof and must establish by a preponderance of the evidence that respondent's decision was incorrect. See Vranes v. DER 83-0122-PC (7/19/84); Jackson v. State Personnel Board, Dane Co. Cir. Ct., 164-086 (02/06/79). Another factor to be considered is the principle that in deciding between one of two class levels for a position, the decision usually will turn on which level the majority of the duties and responsibilities of the position can be identified. ¹

¹ Certain classifications turn on specific activities, such as supervision or lead work, which may not consume a majority of time but which distinguish the

See, e.g., Bender v. DOA, 80-0210-PC (07/01/81; Fonte v. UW, 82-0131-PC (04/15/83).

In the Commission's opinion, appellant has not satisfied his burden of proof. Certainly a good argument can be made that the difference between appellant's position and the other Psychologist 5's should be recognized by a higher classification and pay range. However, the only basis for distinguishing appellant's position from the Psychologist 5 level positions is his division-level activities. If the institution-level work, which is essentially identical to the other Psychologist 5's, is 65% to 75% of his position, the majority of the position is not at a higher level.

A corollary of the principle that classification decisions are based on a majority of the duties and responsibilities of a position is that two positions do not have to be identical to be classified in the same classification. That is, two positions (particularly professional positions) may be somewhat different in *terms of their levels of responsibility, authority, etc., but would still properly be in the same classification if the degree of difference is not sufficient to justify classification at the higher level.* The Commission simply does not find a basis to conclude on this record that respondents' decision not to grant the reclassification on this basis was incorrect.

classification from other similar classifications. This case does not involve a specific provision of this kind.

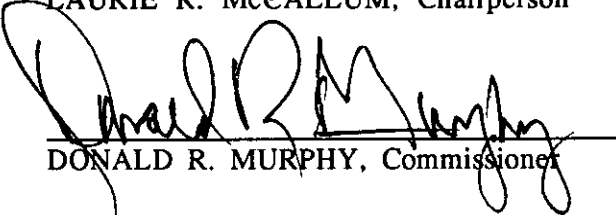
ORDER

Respondent's action denying the request for reclassification of appellant's position from Psychologist 5 to Psychologist 6 is affirmed and this appeal is dismissed.

Dated: January 25, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:jah


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Rodney Miller
301 Troy Drive
Madison, WI 53704

Gerald Whitburn
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

Jon Litscher
Secretary, DER
P.O. Box 7855
Madison, WI 53707

**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.)