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GERALD R. MUELLER,

Appellant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 93-0030-PC

* * * * *

DECISION
AND
ORDER

The appellant seeks reallocation of his position, effective June 17, 1990. The respondents have filed jurisdictional objections, and the parties have filed briefs. The findings of fact set out below appear to be undisputed.

1. Effective June 17, 1990, respondent implemented a statewide classification survey of positions performing engineering responsibilities. The appellant was informed that his position was being reallocated to the Engineering Specialist - Transportation - Advanced 1 level.

2. The appellant did not appeal the decision to the Commission, nor did he pursue an informal appeal to the Department of Employment Relations.

3. Other employees filed appeals and, through the appeal process, had their classifications changed from the Advanced 1 to the Advanced 2 level.

4. On April 23, 1991, appellant filed a letter with Judy Burke of DER seeking review of his classification level.

5. The letter of response from DER, dated May 22, 1991, stated in part:

[I]f an employe did not appeal their survey reallocation within 30 days after receiving their survey notice, they do not have appeal rights effective June 17, 1990. However, you may request a classification review of your current position. If you desire, we will consider our letter as a request for review of your position.

Before I can initiate any additional reviews, I must complete the analysis and determination of all pending Engineering Survey appeals....

When your position is reviewed, the classification and level determination will be based upon the specific job duties that you were assigned and were performing on June 17, 1990 as well as your level of supervision. If the job content analysis of your position's duties indicates that an error was made on June 17, 1990, then a reallocation will be completed for you, effective June 17, 1990, to correct the error and properly classify your job. If we determine that your assigned job duties and/or the level of your performance in question occurred after June 17, 1990, we will complete a reclassification request with an effective date based on the Administrative Rules and receipt of your letter. If the original reallocation is determined to be correct, you do not have appeal right to the Personnel Commission for the survey implementation date of June 17, 1990.

6. In a memo dated August 26, 1992, representatives of DOT's Division of Highways and of the Bureau of Human Resources Services issued a memo to Bureau Directors, State Engineers and District Directors stating in part:

Last summer, in the midst of the appeals process, the Department of Employment Relations informed us and a number of the Division's employees that, after all survey appeals were addressed, each agency would identify and reallocate positions that performed the same duties as those moved to a higher level in the appeals process. Specifically, Judy Burke indicated in a May, 1991 letter to employees that we would "reallocate all employees who are performing the same job duties at the same level of performance as positions that have been approved through the survey appeal process." Subsequent to this letter, the Department of Employment Relations informed [the State Engineers Association], that because of the staff time involved in the formal appeals, the Department of Employment Relations would not be involved in this effort....

It is our goal to identify and address only those positions that were clearly and directly affected by the resolution of the appeals process; i.e., those performing the same duties. This in no way offers individuals the right to continue to submit appeals to decisions made in the 1990 survey; nor does it offer individuals who have had appeals denied by DER or the Personnel Commission another avenue to debate the denials. We are asking DOH management to expeditiously identify and submit the names of staff who appear to meet the conditions identified in this memo.

7. Appellant's April 23, 1991 correspondence to DER has been referred to DOT for the purpose of determining whether the appellant is performing the same job duties at the same level of performance as positions that

have been approved through the survey appeal process and, therefore, whether appellant's position is one that should be reallocated. Appellant's is one of approximately 80 separate review requests that were pending before DOT as described in DER's May 22, 1991 letter.

8. As of early in May, 1993, respondent DOT expected to complete the review of the appellant's position by mid-June or the first of July, 1993.

9. On March 24, 1993, the appellant filed a letter of appeal with the Commission, stating in part:

When the original class specifications for Advance 2 were first originated, it looked as if I did not fit that class so I did not appeal within the 30 days; however, right after the 30 day limit was over, the Departments began to look at those class specifications differently so I sent a hand written appeal to Judy Burke of the DER.

Respondent DER raises a timeliness objection, stating that because the appellant failed to file a formal appeal within 30 days of the date of the original reallocation decision, he is precluded from filing now. Respondent DOT contends that if the appellant is seeking to appeal a decision by DOT to review positions and to reallocate employees performing the same job duties at the same level of performance as positions that have been approved through the survey appeal process, the appeal is premature in that no DOT decision has yet been made.¹

The Commission agrees that no appealable decision has been rendered that would make the appellant's March 24, 1993 letter of appeal timely.

The time limit for filing an appeal of a reallocation decision under §230.44(1)(b), Stats., is established in §230.44(3), Stats.:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later. . . .

This 30 day time limit is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79. In the present case, the

¹In its brief, DOT recites the position set forth in Ms. Burke's May 22, 1991 letter, that if the original reallocation determination was found to be correct, there could be no appeal taken.

reallocation decision was effective June 17, 1990. The appellant acknowledges that he did not file an appeal within 30 days of receiving the reallocation notice. The letter of appeal was received by the Commission on March 24, 1993.

No decision has yet been made to modify the original reallocation decision. DER has delegated authority to DOT to review the original decision with respect to the appellant's position in light of subsequent events. According to respondent DOT's reply brief filed, the possible results of the review process are as follows:

1. If an error was made June 17, 1990, then a reallocation will be completed for Mr. Mueller effective June 17, 1990.
2. If Mr. Mueller's level of performance changed appropriately after June 17, 1990, then action would be taken with a **later effective date** based on law and receipt of Mr. Mueller's letter (April 25, 1991).
3. If the original reallocation determination was correct, then no action would be taken and there would be no appeal rights "for the survey implementation date of June 17, 1990." (emphasis in original)

The appellant may, if dissatisfied with the result of DOT's review, seek to appeal that result to the Commission.² However, no decision has yet been rendered, so, to the extent the instant appeal seeks to appeal DOT's decision, the appeal is premature. As to the 1990 reallocation decision by DER, the instant appeal must be dismissed as untimely filed.

²The Commission is expressing no opinion as to whether such decision is appealable under §230.44(1)(b), Stats.

ORDER

This matter is dismissed.

Dated: June 23, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:kms
K:D:temp-8/93 Mueller


DONALD R. MURPHY, Commissioner

Parties:

Gerald Mueller
8808 W. Daphne Street
Milwaukee, WI 53224

Charles Thompson
Secretary, DOT
P.O. Box 7910
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.