

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROBIN E. ZENTNER,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 93-0032-PC

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INTERIM
DECISION
AND
ORDER

This case is before the Commission on each party's respective motion for summary judgment. The dispute concerns the appropriate effective date for appellant's regrade. The facts as set forth in this interim decision and order are drawn from the parties' briefs and appear to be undisputed. (At a status conference on February 2, 1994, each party stipulated to the facts as stated in the opposing party's briefs.)

FACTS

Appellant is currently classified as a Civil Engineer Advanced 2 (CE Adv 2) with the Department of Industry, Labor and Human Relations (DILHR). The position had formerly been occupied by Gerald Marx (Marx Position), until Mr. Marx transferred to another position sometime prior to April 21, 1991.

Effective June 17, 1990, the respondent, Department of Employment Relations, reallocated the Marx Position to the newly-created classification of Civil Engineer Advanced 1 (CE Adv 1). The reallocation was the result of respondent's statewide Engineering Survey. Marx filed a timely appeal of this reallocation, contending that his position was more properly classified at the CE Adv 2 level. The Marx appeal was still pending Commission review when Mr. Marx transferred to another position.

Effective April 21, 1991, the appellant, Robin E. Zentner, transferred into the vacant Marx Position at the CE Adv 1 classification. Appellant left another CE Adv 1 position within DILHR in order to accept this transfer. At the time appellant transferred to the Marx Position, he asked DILHR's personnel office whether he needed to file an appeal of his own, separate from Mr. Marx's appeal. He was told that an additional appeal was unnecessary.

On or about February 25, 1993, the Commission issued its final decision in the Marx appeal (Case No. 91-0087-PC). The Commission reversed respondent's decision and held that the Marx Position was more appropriately classified at the CE Adv 2 level. In response to the Commission's decision, and pursuant to ER 3.01(2)(e), Wis. Admin. Code, respondent **reallocated** the Marx Position to the CE Adv 2 level, with an effective date of June 17, 1990. The cited section of the administrative code allows reallocations to correct an error in the previous assignment of a position.

In addition to reallocating the Marx Position effective June 17, 1990, respondent also **regraded** appellant, as the incumbent in the Marx Position, to the CE Adv 2 level, pursuant to ER 3.01(4), Wis. Admin. Code. This section of the administrative code authorizes regrade where a position has been reallocated and the respondent's secretary determines that the incumbent should remain in the position without opening the position to competition. Respondent set the effective date of appellant's regrade as March 21, 1993, approximately 24 days after the Commission issued its decision in the Marx appeal.

Appellant filed a timely appeal, contending that the effective date of his regrade should be April 21, 1991, the date he transferred to the Marx Position and the (approximate) date he was told by DILHR personnel that he did not need to file a separate reallocation/regrade request.

DISCUSSION

Effective Date Issue

Section 3.03(4), Wis. Admin. Code, states in its entirety:

Requests for reallocation, reclassification or regrade are cancelled when an employe resigns, retires or is terminated from pay status in the position prior to the effective date of the requested action. *The effective date of the requested action shall be determined in accordance with s. ER 29.03(3).* [Italics added.]

Section ER 29.03(3)(a), Wis. Admin. Code, in turn provides:

(a) *Pay adjustments resulting from regrade.* Pay adjustments resulting from regrading an employe shall be effective in accordance with the policies established by the secretary.

Respondent argues that the effective date of appellant's regrade should be the first pay period subsequent to receipt of the Commission's final decision and order in the Marx appeal, citing Chapter 332.060 of the Wisconsin Personnel Manual, Administration, Classification, Compensation (Effective Date Policy), as respondent's relevant policy on this question. The policy provides that certain reallocation/regrade actions, including those taken under ER 3.01(2)(e), Wis. Admin. Code:

will be made effective at the beginning of the first pay period following effective receipt of the request.

Respondent argues that the effective regrade date for appellant should be the first pay period subsequent to receipt of a "request" for a reallocation/regrade. Respondent contends that the earliest possible date for such a "request" would be the date it received the Commission's decision in the Marx appeal - on or about February 26, 1993.

One problem with respondent's argument is it presumes that a "request," as used in the Effective Date Policy, refers to a regrade request from the incumbent (the appellant). There never was any such "request" from appellant in this case.^{1,2} Furthermore, respondent's argument incorrectly implies that a reallocation action is somehow personal to the individual occupying the position. It is the position, not the incumbent occupying the position, that is reallocated.

The only request made was for reallocation of the *position*, a request which Mr. Marx made in 1990. In the Marx appeal, the Commission ordered reallocation of the position to the CE Adv 2 level, effective June 17, 1990.

¹ Appellant's inquiry of the DILHR personnel office on or about April 21, 1991, cannot be considered as a "request" to DER for reallocation. Equitable estoppel principles cannot lie against DER based upon alleged mis-information given by DILHR. See Goeltzer v. DVA, 82-11-PC (5/12/82), where the Commission held that the doctrine of estoppel cannot be applied where the conduct on which the appellant relied was the conduct of another state agency and not the respondent agency.

² The Commission's final decision and order in the Marx appeal was not a "request" that the position be reallocated.

Respondent then reallocated the Marx Position effective retroactively to June 17, 1990, the classification error date according to the Commission's decision in the Marx appeal.

Respondent's regrade action in relation to appellant was based on the reallocation of the Marx Position. In other words, the underlying basis for appellant's regrade was to correct the error which occurred on June 17, 1990. Accordingly, appellant is entitled to be regraded and to be compensated at the CE Adv 2 level, effective the date he became the incumbent in that position -- April 21, 1991. The Commission knows of no logical or legal authority which would support any other result.

Competition Issue

Respondent also raised a question of whether appellant would be required to compete to remain in the Marx Position. Appellant transferred into the Marx Position on April 21, 1991, pursuant to ER-Pers 15.02, Wis. Admin. Code. Appellant was permitted to transfer under that rule because he was at the CE Adv 1 level transferring into the Marx Position, which at that time was classified at the same level. Respondent argues that if the appropriate effective date of appellant's regrade is April 21, 1991, then appellant's transfer would be invalid because he would have been a CE Adv 1 transferring into a CE Adv 2 position, in violation of the applicable rule. Respondent asserts that under these circumstances, respondent would be required now to retroactively void appellant's transfer and to open his position for competition.

Respondent's argument ignores the fact that, at the time the transfer actually took place, the transfer was legitimate under ER 15.02, Wis. Admin. Code. The position to which appellant transferred was, in fact, classified at the CE Adv 1 level at the time of the transfer. It was not until two years later, as a result of the Marx appeal, that the Commission ordered the reallocation of the Marx Position to the CE Adv 2 level, retroactive to June 17, 1990. It does not follow that, because the reallocation was made retroactive for classification purposes, the reallocation would therefore have a retroactive effect with respect to a different type of personnel transaction, i.e., transfer.

The Commission also notes that the contention about competition was raised by respondent as arising only if the Commission disagreed with

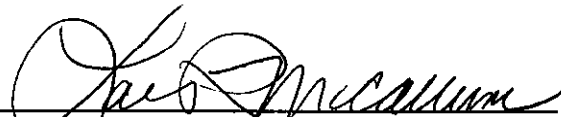
respondent's proposed effective date of March 21, 1993, for appellant's regrade. A weakness of respondent's contention is shown by the fact that the "problems" identified by respondent would exist even if the Commission were to accept March 21, 1993, as the effective date for appellant's regrade.


Specifically, the situation would still exist that appellant, classified at the CE Adv 1 level, was allowed to transfer into the Marx Position on April 21, 1991, even though the position was reallocated to the CE Adv 2 level effective June 17, 1990. Simply stated, the retroactive effective date for reallocation of the Marx Position would pose the same competition issue regarding appellant's entitlement to remain in the position (as framed by respondent) whether the Commission adopted the effective date urged by appellant (April 21, 1991) or the effective date urged by respondent (March 21, 1993).

ORDER

Respondent's decision setting March 21, 1993, as the effective date for appellant's regrade is rejected, and this matter is remanded to respondent for action consistent with this interim decision and order.

Dated: June 23, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

ACK:Rulings/Orders:Zentner

Parties:

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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.)