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DANIEL L. STROEDE,
 Appellant,

v.

Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondent.

Case No. 94-0403-PC

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RULING ON
 RESPONDENT'S
 MOTION TO
 DISMISS

On June 15, 1995, the Commission received a motion for summary judgment from the Department of Employment Relations (DER). The Commission received on July 24, 1995, written arguments filed by Mr. Stroede's representative. DER's reply was received on August 3, 1995.

The information received in the background section below appears to be undisputed by the parties.

BACKGROUND

1. The issue in the above-noted appeal was agreed to by the parties at a prehearing conference held on December 12, 1994, as shown below:

Whether the respondent's decision to reallocate the appellant's position to the Real Estate Specialist-Journey classification was correct, or should the appellant's position have been reallocated to the Real Estate Specialist-Senior classification.

2. The classification specification (Class Spec) for the real estate specialist series defines the Journey level and the Senior level, as shown below:

Real Estate Specialist-Journey; This is the full performance level. Employees have acquired and utilize a working knowledge of the fundamental concepts, practices and procedures of the real estate field. Duties and tasks are frequently non-routine. Resolves most questions and problems, and refers only the most complex issues to higher levels.

Positions perform work that is varied and difficult in character and spend the majority of time working in one or more of the following functions (numbering added here for clarity):

(1) prepare property appraisals of varying degrees of difficulty and substantiate recommendations and valuation determinations; (2) review non-detailed appraisals and approve offering prices based on these appraisals; (3) negotiate for the acquisition of property or its rights and complete the necessary documentation; (4) interview and counsel individuals who must be relocated and offer information and assistance relating to the housing alternatives available; (5) prepare relocation plans; (6) initiate actions for the public sale of land remnants; (7) arrange public auctions, including preparation of bills of sale, collection of payments and preparation of applicable legal instruments; (8) investigate and review claims for refinancing, moving expenses, housing supplements, and prepare the applicable documents and reports; (9) attend public hearings for the purpose of informing the public and property owners of the nature of proposed projects, the necessity of acquisition, or the purpose of rezoning property; or (10) testify in court, defending actions taken in the real estate program. Assist in the training and direction of other real estate personnel when these employees are assigned as assistants on real estate projects. Work is performed under the limited to general supervision of a Real Estate Supervisor.

Real Estate Specialist-Senior: This is senior level professional real estate work applying considerable knowledge of principles, practices, and procedures to the completion of difficult and complex assignments. Duties and tasks reflect variety and complexity. Positions assigned to the Senior level are differentiated from lower level positions in that positions spend the majority of time: (1) functioning as a district/area coordinator in one functional area AND performing routine to complex duties in two or more other functional areas: O R (2) performing routine to complex duties in two or more of the following functional areas: appraisal, negotiation, relocation, property management, direct housing loan program, or LPA program coordination AND providing on the job training to lower level Real Estate Specialists; O R (3) specializing in one functional area performing routine to complex duties on a statewide basis. Work is performed in accordance with program or project guidelines and is reviewed through program reports and progress conferences. Work is performed under the general supervision of a Real Estate Supervisor, program manager or district manager. (Emphasis and numbering contained in the original.)

3. The term "functional area" is defined in the Class Spec as including the following examples: 1) appraisal, 2) negotiation, 3) relocation assistance,

4) Local Public Agency (LPA) assistance, 5) litigation, 6) project management, 7) property management, 8) direct housing loan program, and 9) site reclamation.

4. Mr. Stroede works for the Department of Transportation (DOT) in the Division of Highways. His position is located in the real estate section of District 7. His official position description (PD) is summarized below based on the PD format.

POSITION SUMMARY: This is a full performance level professional position in the District Real Estate Section. Difficult and complex assignments in appraisal, negotiation, lands management and project coordination are independently carried out at this level. This position carries a significant amount of decision-making responsibility and accountability for actions taken. Supervision is general in nature and limited largely to providing direction at the beginning of an assignment and periodic review of work for technical soundness and compliance to policies and laws. Complies with safety rules and programs, maintains safe-working conditions, and reports any unsafe conditions at all times.

Time (%) Goals and Worker Activities

- 75% A. [Project Management.] Under the direction of the real estate supervisor, the project agent will coordinate and monitor assigned projects from the planning and design stages through to the successful No. 1 project certification.
- A1. Represent real estate section in a districtwide project team assigned to improvement project.
 - A2. Research & provide project team with cost estimates, feasibility studies, and other real estate information required by team to successfully complete the project scope.
 - A3. Represent the real estate section at informational meetings, public hearings, & other meetings with the public, elected government officials, consultants, and WisDOT managers.
 - A4. Prepare or arrange for execution of all types of real estate contracts. Monitor performance and arrange for payment.
 - A5. Prepare or direct the preparation of right-of-way plat and relocation order submittals with project estimates (project and delivery).
 - A6. Provide or arrange for appraisal, negotiation, relocation assistance, or property management services. Recommend work to be contracted out or assigned to other staff.

- A7. Project completion schedule with supervisor for all activities necessary to complete project.
 - A8. Monitor progress on appraisal assignments and report status to supervisor.
 - A9. Monitor progress on acquisition and relocation assistance activities and report status to supervisor.
 - A10. Coordinate the efforts of utilities agent/specialist, encroachment removal or permits specialists, and clerical support unit for project.
 - A11. Draft, update, and submit right-of-way certification reports to assure letting of construction project to contract.
- 25% B. Manage existing right of way and/or arrange for the disposal of excess land and acquired improvements or hazards.
- B1. Investigate and respond to public inquiries regarding remnant state-owned land.
 - B2. Prepare or direct appraisals for excess parcels.
 - B3. Submit documentation to Central Office to secure approval for sale.
 - B4. Prepare bid proposal for disposal of excess lands, advertise and conduct sales by public auction or sealed bid. Complete the closing on the sales.
 - B5. Dispose of buildings and fixtures as required implementing state procedures for control of rodents, and testing for asbestos and other hazardous materials.
 - B6. Maintain an inventory of excess land and maintain status of rental agreements.
 - B7. Assist in providing right-of-way information as requested.

5. Three allocation patterns exist at the senior level in the Class Spec for Real Estate Specialist. The terms of each allocation pattern is discussed in the following paragraphs.

6. The first senior level allocation pattern requires that Mr. Stroede's position function as a district/area coordinator in one functional area, as well as perform routine to complex duties in two or more other functional areas. Mr. Stroede's PD contains no indication that he is a district/area coordinator in a functional area, but his representative said appellant will show at hearing that he has coordinator duties in the functional area of property management. A material question of fact exists as to whether appellant meets this first allocation pattern.

7. The second senior level allocation pattern requires that Mr. Stroede's position perform routine to complex duties in two or more of the following

functional areas: appraisal, negotiation, relocation, property management, direct housing loan program, or LPA program coordination; as well as provide on the job training to lower level Real Estate Specialists. Mr. Stroede's PD indicates his position is responsible (for some as yet undetermined percentage of time) for appraisals, negotiation, relocation, and on the job training to Real Estate Specialists (A6 and B2). He contends he will show at hearing that he also has coordination responsibility for the functional area of property management as well as responsibility for training "other" Real Estate Specialists. He does not specifically claim training responsibility for lower level Real Estate Specialists. DER believes it unlikely that Mr. Stroede's position has responsibility for training lower level positions because the organization chart for his district does not indicate that such lower positions exist. DER presented a copy of the organizational chart with its reply to Mr. Stroede's arguments. Accordingly, Mr. Stroede has not had an opportunity (nor has he requested an opportunity) to submit a reply about the accuracy of the organizational chart.

8. The third senior level allocation pattern requires that Mr. Stroede's position specialize in one functional area performing routine to complex duties on a statewide basis. Mr. Stroede's position does not meet this allocation pattern because there is no indication and no allegation that he performs duties on a statewide basis.

DISCUSSION

Mr. Stroede, through his representative, first disputes the right of DER to bring a motion for summary judgment more than 8 months after Mr. Stroede filed his appeal. He argued that the Commission "has recognized that Section 802.08 of the Wisconsin Statutes is the standard by which motions for summary judgement should be determined", citing Doyle v. DNR & DMRS, 86-0192-PC, 87-0007-PC-ER (Pers. Comm. 11/3/88); and further argued that s. 802.08, Stats., requires summary judgment motions to be filed within 8 months after the action was commenced.

It is true that the Commission has relied on the standard recited in s. 802.08(2), Stats., to resolve summary judgment motions. The Commission will grant a summary judgment motion only if the "pleadings", depositions, etc., "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

The "pleadings" include arguments and materials submitted with the motion for summary judgment, a fact of which appellant appears to be unaware. For example, when DER tenders a copy of the Class Specs with its motion for summary judgment, it is incumbent upon the appellant to inform the Commission that DER tendered the wrong Class Specs. Also, where DER tenders a copy of the appellant's official PD, it is appellant's responsibility to inform the Commission of specific disagreements which the appellant may have with the official PD.

The Commission has never used or adopted the statutory procedures for summary judgment motions. In particular, the Commission has never adopted the 8-month limit for filing summary judgment motions which are followed by courts pursuant to s. 802.08(1), Stats. In fact, the Commission's administrative rules allow the filing of motions without stated time limitations. PC 1.08, Wis. Admin. Code.

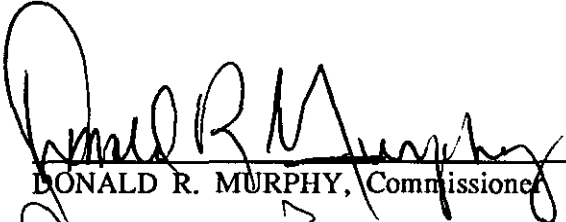
DER has not, however, shown entitlement to summary judgment. A material fact is disputed regarding whether Mr. Stroede's position meets the requirements of the first and second allocation patterns of the senior level in the Real Estate Specialist Class Spec.

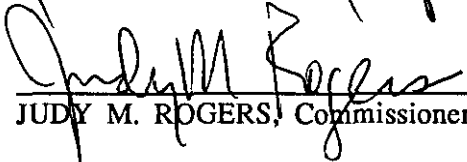
ORDER

That DER's motion for summary judgment is denied. The parties will be contacted in the near future to select a hearing date.

Dated August 17, 1995.

JMR


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner