

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIAM DUSSO,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Secretary, DEPARTMENT OF
REGULATION AND LICENSING.

Respondents.

Case No. 94-0490-PC

* * * * *

RULING ON APPELLANT'S
PETITION FOR REHEARING

PROCEDURAL HISTORY

The parties submitted the above-noted appeal to the Commission based upon stipulated facts, reciprocal summary judgment motions and written argument. The Commission issued an interim decision¹ on November 1, 1995, which rejected respondents' calculation of pay due to Mr. Dusso upon restoration. On December 5, 1995, the Commission received written arguments regarding the merits of the appeal from the Department of Employment Relations (DER), which Mr. Dusso and DER agreed to treat as a motion for reconsideration. The Commission issued its final decision on March 8, 1996, which essentially affirmed the interim decision and order.

Mr. Dusso, by cover letter dated April 18, 1996, filed a request for clarification of the Commission's final decision. Mr. Dusso claimed entitlement to the correct restoration salary as of January 25, 1994, when he first requested restoration. DER claimed the first day of entitlement would have been as of August 22, 1994, when Mr. Dusso first worked in the classified position to which he was restored. By ruling issued on May 28, 1996, which

¹ The Commission's decision of November 1, 1995, was issued as an interim decision to provide Mr. Dusso an opportunity to file a request for costs. By letter dated November 30, 1995, Mr. Dusso informed the Commission that he would not be filing a request for costs.

was mailed to the parties on June 3, 1996, the Commission rejected Mr. Dusso's claim.

On June 24, 1996, Mr. Dusso requested further consideration of the issue raised in his request for clarification. The cover letter indicated he was filing a petition for rehearing and further indicated he would have no objection if the Commission treated the petition as a motion for reconsideration "in the same manner as the arguments and motion submitted by DER following the Commission's Interim Decision and Order of November 1, 1995." The Commission, however, does not have the option to treat Mr. Dusso's current submission as a motion for reconsideration because the Commission already has issued a final decision in this case. The prior situation with DER's motion for reconsideration was different because no final decision had been issued prior to receipt of DER's motion. The Commission heard oral arguments on July 17, 1996.

DISCUSSION

Petitions for rehearing are governed by s. 227.49, Stats., which provides in pertinent part as shown below.

- (3) Rehearing will be granted only on the basis of:
 - (a) Some material error of law.
 - (b) Some material error of fact.
 - (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Mr. Dusso contends that the clarification ruling contains material errors of law and of fact, within the meaning of s. 227.49 (3)(a) and (b), Stats. Each contention is addressed in the following paragraphs.

Page four of the clarification ruling starts a list of 8 items in the record, upon which the Commission reaches the conclusion (on p. 5) that "DER's response of 5/13/94, was a prompt response to Mr. Dusso's letter of 4/13/94 -- especially considering the complexity of the wage calculations and the number of years necessarily covered by the calculations." Mr. Dusso's petition for rehearing is correct that the recitation of the 8 record items is incomplete as failing to include a ninth item -- Mr. Dusso's letter to Secretary Litscher dated April 29, 1994. His petition further is correct in that DER's letter was dated May 3, 1994,

rather May 13, 1994. These differences, however, are not "material" within the meaning of s. 227.49 (3)(b), Stats., because the conclusions drawn remain true. Specifically, DER's letter of May 3, 1994, was a prompt response to Mr. Dusso's letter of April 29, 1994, especially when the complexity of the wage calculations and the number of years involved are considered. Mr. Dusso contended in oral argument that DER's letter of May 3, 1994, was not a "prompt response" because it did not include the detailed supporting wage calculations. The Commission also rejects this contention as being contrary to the record and to common sense.

The Commission also made the following conclusion on page 5 of the clarification ruling: "It appears from the foregoing recitation of the record, that Mr. Dusso would have been restored to the classified position very soon after he requested restoration, but for his concerns over pay and respondents' attempts to address his concerns." In his written petition for rehearing, Mr. Dusso claimed the cited "statement of cause and effect" was a material error because "it was based on speculation as to what would have happened if appellant had kept silent about pay rate concerns." At oral argument, however, Mr. Dusso agreed with the Commission's characterization of the record as containing the inference that pay was the factor which caused delay in his restoration and that no other explanation could be inferred from the record. Under these circumstances, "speculation" is an inappropriate term to describe the only inference available from the record.

Mr. Dusso claims that a material error of law was made in the clarification ruling. Specifically, he contends in pertinent part (p. 4 of his petition for rehearing):

Section 230.33, Stats., does not specify a time limit for restoration. Unless restoration is made effective as of the date requested, an employe's right to restoration may be avoided and abused by delay. . .

The Commission disagrees. There is no authority under the civil service code for the commencement of the salary in a new position prior to the date of restoration or other form of appointment to the position. Absurd results would occur under the effective date policy Mr. Dusso advocates. As noted in s. 230.33 (1), Stats., individuals in Mr. Dusso's situation have mandatory restoration

rights "for the duration of the [unclassified] appointment and for 3 months thereafter." Hypothetically, an individual could wait until after the unclassified position had ended (when the individual was no longer employed by the State) to request mandatory restoration and then, like Mr. Dusso, delay the actual restoration date in an attempt to reach agreement over the starting salary. Clearly, it would be absurd to argue that the individual in the hypothetical should receive pay as of the date restoration was requested because the individual would receive pay for time not worked.

Mr. Dusso also claims that the Commission's clarification ruling contains material errors of law for failing to order back pay retroactive to January 25, 1994 (the date he requested mandatory restoration) and for failing to order interest on the back pay awarded. DER contended at oral argument (on July 17, 1996) that the Commission lacks authority not only to order back pay retroactive to January 25, 1994, but to order any back pay. This contention was not previously analyzed by the Commission due to DER's agreement to provide retroactive payment to August 22, 1994 (Mr. Dusso's first day of work in the classified position to which he was restored). DER's current contention must be addressed here to resolve Mr. Dusso's claimed material errors of law. The Commission lacks authority to order any back pay award in a restoration appeal. A similar question was presented to the Wisconsin Court of Appeals in the context of a reinstatement case. Seep v. Pers. Comm., 140 Wis. 2d 32, 409 N.W.2d 142 (Ct. App. 5/6/87). The Court of Appeals held that the Commission *lacked authority to award back pay in Seep's reinstatement appeal because the Commission's authority to award back pay is limited by s. 230.44 (4), Stats., to cases involving "removal", "demotion" or "reclassification."* Circuit court opinions, similarly, have noted that the statute allows a back pay award for "reclassification," but not for denying a reclassification request. DER v. Wis. Pers. Comm. (Doll), 79-CV-3860 (Dane Co. Cir. Ct., 9/2/80) and DER v. Wis. Pers. Comm. (Cady), 79-CV-5099 (Dane Co. Cir. Ct., 7/24/81). The same rationale would prevent the Commission from awarding back pay in a restoration appeal because "restoration" is not listed in s. 230.44 (4), Stats., as a transaction entitled to back pay.

Nor could the Commission agree with Mr. Dusso's arguments that he is entitled to back pay under s. 230.44 (4), Stats., because he was "demoted." The

term "demotion" is undefined by statute, but is defined by s. ER 1.02 (8), Wis. Adm. Code, as shown below:

"Demotion" means the permanent appointment of an employe with permanent status in one class to a position in a lower class than the highest position currently held in which the employe has permanent status in class . . .

Mr. Dusso started with DRL in 1977, in an Attorney 13 classified position until 3/80, when he was appointed to an unclassified position. He was making \$12,427 in the classified position when he accepted the unclassified position. (See stipulated facts in ¶¶1 & 2, of the Commission's decision in Mr. Dusso's case issued on 11/1/95). On August 22, 1994, he returned to classified service at DRL as an Attorney 14 (higher) classification, and at an hourly wage of \$32.466 (Id., 12). These circumstances do not meet the rule definition of demotion or even a common sense notion of a demotion.

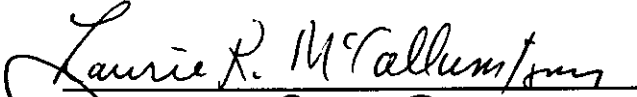

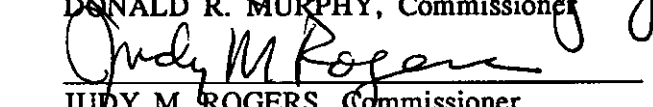
Mr. Dusso's final argument of error in the clarification ruling pertains to the following statement on p. 6: "While the Commission ultimately disagreed with DER's calculation of Mr. Dusso's starting wage, DER had an arguable basis for the same. DER's conduct under these circumstances clearly cannot be characterized as 'unconscientious' or 'inequitable'". Mr. Dusso's objection is based upon what he perceived to be a resolution of his entitlement to fees and costs under s. 227.485, Stats. The Commission acknowledges that the word choice might have been clearer to avoid the confusion raised by Mr. Dusso. The context of the comment in the clarification ruling, however, expressly pertains to Mr. Dusso's back-pay arguments based on equitable principles and was not intended for broader application.

In summary, Mr. Dusso has not shown the existence of a material error of fact or law, within the meaning of s. 277.49 (3), Stats.

ORDER

That Mr. Dusso's petition for rehearing is denied.

Dated July 23, 1996.


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

2/3/95