STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM DUSSO,

Appellant,

v.

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

Respondents.

Case No. 94-0490-PC

DECISION AND ORDER

An interim decision and order (IDO) was issued by the Commission on November 1, 1995, rejecting the respondents' action and remanding the matter for action in accordance with the decision and providing appellant with an opportunity to file an application for costs. Mr. Dusso decided not to file an application for costs and so notified the Commission by letter dated November 30, 1995.

On December 5, 1995, the Department of Employment Relations (DER) filed arguments regarding the merits of the case. A conference was held on December 7, 1995, which resulted in an agreement between Mr. Dusso and DER to treat DER's arguments as a Motion for Reconsideration. A briefing schedule was established whereby the final argument was filed on January 17, 1996. The Commission has considered every argument raised by DER but does not specifically address those which it does not deem of sufficient significance or which the IDO sufficiently addresses. After consideration of all these arguments, the Commission adopts the IDO as its final decision and order, as supplemented by the following discussion. Before addressing the matters raised on this request for reconsideration, the commission will briefly summarize the IDO.

This case concerns a dispute concerning the calculation of appellant's salary upon his restoration to the classified service from the unclassified service, pursuant to s. 230.33 (1), Stats. Appellant had been appointed to an unclassified position from a classified Attorney 13 position in 1980, and

returned to a classified Attorney 14[1] position in 1994. DER's calculation of appellant's salary on restoration included all the adjustments that would have occurred had appellant remained in the classified position throughout this period, with one exception. Appellant was denied the salary increase he would have received in September 1980, in connection with a move from regrade point C to regrade point D on the Attorney 13 pay schedule, as well as subsequent merit-related increases that were contingent on the regrade.[2]

The Commission concluded that appellant was entitled to have the regrade included in the calculation of his salary on restoration. Because of the interplay of the personnel rules involved, this decision turned substantially on the interpretation of ss. ER 29.04 (4) and (13), Wis. Adm. Code, and language in the attorney's compensation plan. According to the rules, salary on restoration includes transactions identified in s. ER 29.04 (13), Wis. Adm. Code, as "within range pay adjustments." Language in the 1979-1981 attorneys' compensation plan explicitly characterized attorney regrades as "within range pay progression," which supports the conclusion that an attorney regrade should be in the calculation of salary on restoration. On the other hand, the rules exclude from salary on restoration transactions identified in s. ER 29.04(4), Wis. Adm. Code, as "[a]ssignment of an attorney to regrade point," which DER contended encompassed attorney regrade points. However, other language in the compensation plan includes under the heading "assignment to regrade points" the initial assignment of an attorney to a regrade point following appointment, and not attorney regrades.

DER disagrees with the Commission's conclusion that the movement of an attorney from one regrade point to another within a pay schedule is not equivalent to the term "Assignment of an attorney to a regrade point", within the meaning of s. ER 29.04(4), Wis. Adm. Code.

DER disagrees with the Commission's conclusion stated in the first paragraph on page 8 of the Interim Decision and Order, as shown below:

---

[1] The change in class level was due to an intervening survey and structural changes in the Attorney series.

[2] Appellant was given credit for the merit-related increases which occurred after 1990, when the regrade system was eliminated.

> However, the Commission agrees with appellant's contention that the movement of an attorney from one regrade point to another within a pay schedule is not equivalent to the "[a]ssignment of an attorney to a regrade point," as set forth in s. ER 29.04(4), Wis. Adm. Code, but rather falls in the category of "within range pay adjustments other than those made under subs. (1) through (12) and (15)." s. ER 29.04(13), (emphasis added.)

1. Commission's use of the 1979-81 Compensation Plan Language.

Respondent contends as follows:

> Respondent DER would point out that the disputed Rule [s. ER 29.04, Wis. Adm. Code] terminology, "assignment of an attorney to a regrade point," was created and set in its current place in the sequence of pay adjustments in 1982. DER believes that it is erroneous for the Commission to use the language of the 1979-81 Compensation Plan as the sole and ultimate source for guidance on the definition of the term "assignment of an attorney to a regrade point." Respondent DER contends that if the Compensation Plan is to serve in this capacity, then those Compensation Plans produced concomitant and subsequent to the creation of the rule terminology would be more valid resources. Respondent DER believes that such Compensation Plan would support its conclusions and not those of the Commission. (Respondent's Proposed Changes, p. 2)

To begin with, the 1979-81 compensation plan is the only compensation plan in the record. There are a number of DER "bulletins" providing DER's interpretive guidance to the agencies for the implementation of compensation plans, but obviously these documents are not the same as the compensation plans themselves. This distinction is of particular significance not only because the compensation plan requires legislative approval, ss. 230.12 (3)(b), 230.12 (1)(bf), Stats., but also because s. 230.12 (1)(a)3., Stats., provides: "Provisions for administration of the compensation plan and salary transactions shall be provided in either the rules of the secretary or the compensation plan." (Emphasis added). These statutory provisions place compensation plans on at least an equal footing with the material administrative code rules. Clearly the compensation plans themselves are more authoritative than the bulletins providing DER's interpretation of the compensation plan provisions. The DER bulletins cannot be accepted as restatements of the plans.

Furthermore, it is entirely appropriate to focus on the 1979-1981 compensation plan (which is in the record), because this compensation plan was the first one to utilize the attorney regrade system. The administrative code rule (then s. ER-Pers. 29.04 (4), Wis. Adm. Code), which first refers to the attorney regrade system was first published in the administrative register of February 1983, No. 326, with an effective date of March 1, 1983 -- i.e., it was promulgated after the 1979-1981 compensation plan. From these facts, and given that the 1979-1981 compensation plan is the only plan either party made part of this record, it can be inferred that when s. ER-Pers 29.04 (4) uses the terminology "[a]ssignment of an attorney to a regrade point," it did so in the context of the utilization of this terminology in the 1979-1981 compensation plan. As discussed in the IDO at pp. 8-10, that compensation plan uses the term "assignment to regrade points" (emphasis added) to describe the transaction which occurs when an attorney is appointed: "Upon appointment to an attorney position, each employe shall be assigned to a regrade point as follows . . ." (1979-1981 compensation plan, pay schedule 9 (Legal), s. VI. B. (Appellant's affidavit, attachment K)) (Emphasis added). The compensation plan refers to the regrade process (movement of an attorney from one regrade point to another) in s. VI. D., which is entitled "Within Range Progression", as follows: " a regrade system has been created to provide for within range pay progression . . ." (emphasis added). This language in the 1979-1981 compensation plan creates an extremely strong inference that the use in s. ER-Pers 29.04, of the terms "[a]ssignment of an attorney to a regrade point" (s. ER-Pers 29.04 (4)) (emphasis added) and "[w]ithin range pay adjustments other than those made under subs. (1) through (12)" (s. ER-Pers 29.04 (16), Wis. Adm. Code) (emphasis added) have the same meanings as they do in the compensation plan. Since there have not been any significant changes in s. ER-Pers 29.04 since its initial enactment in 1983[3], and there are no other pay plans in the record, the foregoing conclusion is equally applicable now, and it follows that the disputed regrade is a within range pay adjustment which should enter into the calculation of appellant's pay on restoration.

---

[3] In addition to relying on the language of the various versions of the rule, the Commission also notes that respondent asserted (DER's discovery responses, p. 17, attached to appellant's initial brief) that no substantive changes were intended by the 1988 rule revisions.

2. Question of law presented.

Respondent asserts at several points in its request for reconsideration and its reply to appellant's response thereto, that the IDO conflicts with overwhelming, uncontradicted evidence in support of DER's position. However, this case involves a question of law concerning the application of s. ER 29.04, Wis. Adm. Code, to a personnel transaction (appellant's salary on restoration following his employment in the unclassified service). The parties do not dispute the underlying facts concerning that personnel transaction. The evidentiary materials to which respondent refers are primarily the statements by respondent's employes that respondent has consistently interpreted s. ER 29.04, Wis. Adm. Code, as they did in this case, and the bulletins reflecting DER's interpretation of the compensation plans. For a number of reasons, this evidence of the respondent's interpretation is entitled to little weight.

First, the Commission does not hear an appeal of this nature in the same posture as a court on a s. 227.53, Stats., petition for review of an administrative decision. Rather, the Commission hears such matters de novo:

> The Commission conducts a de novo hearing at which the parties can make a completely new evidentiary record, and the Commission then determines whether the reallocation was correct under statutory guidelines based on the evidence presented at the hearing. See Ryczek v. Wettengel, Wis. Pers. Bd., No. 73-26 (7/3/74), and Jallings v. Smith, Wis. Pers. Bd., No. 75-44 (8/23/76), which cited 73 C.J.S., Public Administrative Bodies and Procedures, s. 159 (b); State ex rel Spruck v. Civil Service Board, 32 N.W. 2d 574 (Minn. 1948); J.C. McCrory Co. v. Commnr. of Corporations, 182 N.E. 481, 483 (Mass. 1932); Block v. Glander, 86 N.E. 2d 318, 321 (Ohio 1949). Newport News Shipbuilding Co. v. U.S., 374 F.2d 516, 530 (U.S. Court of Claims 1967).
>
> Werth v. DP, 81-130-PC (8/5/81).

Second, while respondent may have maintained the same opinion regarding the application of s. ER 29.04, Wis. Adm. Code, to this type of transaction, this appeal presents a very narrow issue -- whether an attorney's pay on restoration under s. 230.33 (1), Stats. (return from unclassified service) should include a regrade that would have occurred but for the move to

unclassified service. The regrade system was only in existence for about eleven years, there was only one instance of a similar transaction besides appellant's restoration, and respondent's opinion about the other transaction was not the subject of administrative or judicial review.

3. Historical overview of the applicable statutes and rules support the conclusions made in the IDO.

Of more significance than respondent's administrative interpretations of s. ER 29.04, Wis. Adm. Code, is the fact that the personnel rules found in the administrative code have always equated restorations under s. 230.32 (1), Stats. (return from military service) and s. 230.33 (1), Stats. (return from unclassified service) for purposes of the computation of beginning salary following restoration, and both the case law interpreting similar federal legislation concerning post-military service restoration, and respondent's policies concerning post-military service restoration under s. 230.32, Stats., strongly support appellant's claim for including the regrade in his post-restoration salary computation.

DER's current rules treat restorations under s. 230.32, Stats. (return from military service) and s. 230.33, Stats. (return from unclassified service), exactly the same with respect to pay on restoration. Section ER 29.03 (7)(b) provides:

> When an employe is restored following military service, pursuant to s. 230.32, Stats. [or] following approved leave of absence without pay under s. ER 18.14 [s. ER 18.14 (2)(b) explicitly encompasses "leave to serve in unclassified position [under] s. 230.33, Stats.] . . . the employe shall receive a base rate equal to the last rate received plus intervening adjustments under s. ER 29.04 (13) or (14).

Section 230.32, Stats. (return from military service), was created in 1945 (L. 1945, chs. 433 and 506), and s. 230.33, Stats. (return from unclassified service), was created in 1949 (L. 1949, c. 377). Both provisions have remained essentially the same ever since. These subjects were not both explicitly mentioned in the administrative code personnel rules until 1971. Section Pers. 16.05 (4), Wis. Adm. Code, "Salary on restoration", then provided at subsections (a) and (b) that employes in both restoration categories (military and

unclassified services) "shall be paid the last rate received plus intervening service-wide salary adjustments and shall be eligible to receive merit increases." All subsequent versions of this rule through the present have treated these two kinds of restoration exactly the same for pay purposes.

This uniform treatment is particularly significant because it seems clear that if Mr. Dusso's transaction had involved a return from military service instead of a return from unclassified service, appellant should have and would have received credit for the regrade in question.

As appellant pointed out in his original reply brief, DER's own bulletin addressing the "Treatment of Employes Called up for Active Military Duty" (number CC-270 and 05-50, September 4, 1990, Appellant's second affidavit, Attachment U), provides at s. VIII. E:

> To determine eligibility for pay, pay advancement and performance awards, the courts have developed a "reasonable certainty" test. If it is "reasonably certain" that an employe would have been promoted, reclassified, reallocated, or demoted had they not been called to military duty, this must be reflected upon their return. In most cases, this should not affect the restoration of state employes. The employe is to be placed in the highest position for which he is actually qualified for and has rights to.
>
> Reclassifications of positions are not automatic, but rather require a logical and gradual change in the duties performed and their satisfactory performance for a minimum of six months. It may seem that the returning employe would have been reclassified had he been present and given the benefit of *additional training and experience, but military service may* have prevented him/her from actually requiring these additional qualifications. The employe cannot be required to "start the clock" over; however, care should be taken to ensure that potential reclassifications are tracked in a timely manner.
>
> When an employe returns from military service the rate of pay should be computed at his previous rate plus any intervening pay adjustments. This includes any performance pay that the employe would have received with "reasonable certainty" had the employe remained in state service for the time he was in the military. For example: If it is reasonably certain that an employe would have performed satisfactorily, had he/she been employed for the entire time period, the employe would be eligible for the guaranteed minimum award for satisfactorily performing employes. The same applies if an employe historically has been an outstanding performer. He/she should get the rate of award *that* other outstanding performers received.

Clearly, under the provisions of this bulletin, it was "reasonably certain" that appellant would have been regraded had he stayed in the classified service. As explained in the IDO, the only performance-related requirement for regrade is that the employe not have received written notice that he or she will be denied the regrade because of unsatisfactory performance. The parties stipulated that appellant would have been regraded on schedule had he remained in the classified service. Since DER's rules provide for exactly the same treatment with respect to salary or restoration for both the return from military service and the return from unclassified service, appellant's salary should be calculated in the same manner as set forth in the preceding bulletin for post-military service restoration.

While respondent has not made this particular argument, it could be argued that the more extensive language concerning restoration in s. 230.32 (1), Stats. (return from military service); as compared to s. 230.33 (1), Stats. (return from unclassified service)[4], suggests that the legislature intended to limit the rights of the employe restored after unclassified service leave to "seniority" in its strictest sense meaning crediting prior years of classified service.[5] However, such an approach would be inconsistent with DER's own provision (now s. ER 29.04, Wis. Adm. Code) that has for many years addressed salary on restoration under s. 230.32, Stats. (return from military service) and s. 230.33, Stats. (return from unclassified service) exactly the same, and, as conceded by respondent in this case, provides many salary and other benefit equivalency, besides seniority per se, for an employe restored under s. 230.33 (1), Stats. As set forth in the IDO, respondent calculated appellant's salary on

---

4 Section 230.32 (1), Stats., provides that an employe restored following military leave "shall be given all the benefits of seniority, status, pay; pay advancement, performance awards and pension rights under ch. 40 as though the state employment was continuous." Section 230.33 (1), Stats., provides that an employe restored following unclassified service leave shall be restored "without loss of seniority."

5 Respondent did contend in its initial brief on motion for summary judgment that s. 230.33 (1), Stats., is designed to protect seniority in the sense of continuous service, and benefits which are determined by continuous service, but not wages. However, respondent relied on policy arguments in making such contention and did not rely on the different terminology used in ss. 230.32 (1) and 230.33 (1), Stats.

restoration to include intervening across the board increases, a reallocation (from Attorney 13 to Attorney 14) increase, and even those merit-related increases which were not conditional on the regrade in question. None of these increases would have been appropriate if s. 230.33 (1), Stats. (return from unclassified service), were read to apply only to restoration of seniority in the strictest sense. Furthermore, to restrict the application of s. 230.33(1), Stats. (return from unclassified service), to seniority per se would be at odds with the apparent legislative intent of protecting an employe who takes a leave of absence to serve in an unclassified position in his or her own agency. If such an employe, on restoration to the classified service, were only protected as to seniority, and had no right to some currency as to his or her salary, such an employe would have very limited protection against the vicissitudes of being replaced while serving in the unclassified position.

While there is virtually no legislative history available with respect to the original enactment of ss. 230.32 and 230.33, Stats., there are two things which suggest the legislature did not intend to treat employes restored from military service any differently than employes restored from unclassified service. First, the original version of s. 230.32(1), Stats.[6], was enacted in July 1945, when the end of World War II was imminent. The substantive language of the Wisconsin statute was somewhat similar to the wording of the analogous federal provision, the Selective Service Training and Service Act of 1940, 50 USC Appendix s. 301, et seq. Neither s. 16.276 (1), Stats., nor the current version (s. 230.32 (1), Stats.) provide for a leave of absence during the term of military service, but both address the rights of the employe to restoration. The provision applicable to employes leaving the classified service for the unclassified service[7] mandated "a leave of absence without pay from his former position in the classified service . . . during which time he shall be entitled to return to such position or to one with equivalent responsibility and pay in the classified service without loss of seniority or civil service status." s. 16.274, Stats. (1949). At the time this statute was enacted in 1949, the applicable personnel rule governing leaves without pay provided that such leaves "be

---

6 Section 16.276 (1), Stats. (1945); L. 1945, chs. 433, 506.

7 Section 16.274, Stats. (1949) (now s. 230.33(1)); L. 1945, ch. 377.

requested in writing and approved in like manner by the director before becoming effective in order to protect the accumulated sick leave, and not interrupt the seniority or salary advancement consideration of the absent employe." Personnel Board Rule XV. 8., 1948 Red Book, p. 304 (emphasis added). The interplay of s. 16.274, Stats. (1949), and this rule apparently provided for essentially the same treatment of salary on restoration for an employe returning from unclassified services as s. 16.276 (1), Stats., provided for an employe returning from the military service. This factor suggests that the legislature did not intend that employes restored following service in an unclassified position receive different treatment as to salary than an employe restored following military service.

Furthermore, the legislature has amended both s. 230.32 (1), Stats. and s. 230.33 (1), Stats., a number of times since DER's personnel rules first (in 1971) explicitly provided for exactly the same salary treatment of employes restored following military service and following leave to serve in an unclassified position, without having taken legislative action to require DER to change its rules. This factor also supports the conclusion that the legislature did not intend that employes restored after unclassified service be treated differently than employes restored after military service with respect to salary status. See, State ex rel Parker v. Sullivan, 184 Wis. 2d 668, 701-02, 517 N.W.2d 449 (1994).

4. Attorney regrades versus reclassification regrades.

Respondent also contends that its interpretation of s. ER 29.04 (4), Wis. Adm. Code, is supported by "the uncontradicted point that the attorney regrades were established to be like reclassification regrades," as evidenced by the placement of s. ER 29.04 (4), Wis. Adm. Code ("Assignment of an attorney to a regrade point") "proximal to its direct correlate (s. ER 29.04 (3), Wis. Adm. Code, 'Regrading an employe as a result of reclassification decision')." (Request for reconsideration, p. 3).

The persuasive force of this argument is undermined by the actual wording of ss. ER 29.04 (2), (3) and (4), Wis. Adm. Code:

> (2) Regrading an employe as a result of a reallocation decision.
> (3) Regrading an employe as a result of a reclassification decision.
> (4) Assignment of an attorney to a regrade point.

If this rule were intended to equate these subsections, it seems more likely that the terminology of (4) would parallel that of (2) and (3), and read something like: "Regrading an employe as a result of a decision under the attorney regrade system."[8]

---

8 In fact, some of DER's bulletins providing guidance on the compensation plans use similar terminology. The May 27, 1988, Bulletin, No. CC-163 & CB 21 (DER's discovery responses, pp. 85-88, attached to appellant's affidavit in support of summary judgment) uses the following sequence at s. II. E. ("Multiple Base Pay Adjustments with the same Effective Date"):

1. Probationary period adjustment
2. Reallocation/regrade
3. Reclassification/regrade
4. Attorney regrade.

The June 9, 1982, bulletin No. P-142 (id, pp. 30-35) uses this sequence:

1. Probationary increase
2. Reallocation increase
3. Reclassification increase
4. Regrade increase

The June 20, 1980, bulletin no. P-53 (id., pp. 23-26) uses the following sequence:

1. Reallocation (use the 1979-80 regrade table)
2. Regrade (use the 1979-80 regrade table)
3. Probationary increase (use the 1979-80 regrade table)

The May 2, 1984 bulletin no. CC-14 (id., pp. 39-52) does not refer to attorney regrade transactions in a readily identifiable manner, although it may have been intended that the subject was to have been included in one of the more general categories. This is also true of the February 29, 1988, bulletin No. CC-150 (id., pp. 78-84), which also goes from "2. Reallocation/regrade adjustment" and "3. Reclassification/regrade adjustment" to "4. Promotion adjustments." (Since the only regrades mentioned in the latter bulletins' enumeration of pay adjustments are specifically identified ((2) and (3)) as regrades associated with reallocation or reclassification, it is difficult to see any categories other than "Structure adjustment" and " Pay schedule adjustment" that could be construed as possibly encompassing attorney regrades under the compensation plan.) The May 31, 1990, bulletin no. CC-246/CB-41 (id., pp. 96-103) mentions attorney regrade increases only in the context of the phaseout of that salary transaction. Only the May 29, 1986, bulletin no. CC-82, CB-9 (id., pp. 56-77) uses the rule terminology:

2. Reallocation/regrade adjustment
3. Reclassification/regrade adjustment
4. Assignment of attorney to a regrade point

Finally, the materials respondent submitted in support of its assertion that "the attorney regrades were established to be like reclassification regrades" adds further support to the conclusion that the movement of an attorney from one regrade point to another is a "within range pay adjustment" as that term is used in s. ER 29.04 (13), Wis. Adm. Code.

The affidavit of Jeanne Meyer submitted by DER on the motions for summary judgment includes the following:

> 3. The concept of regrade for the attorney classification was designed to parallel and be akin to a classification transaction for a class series which did not permit reclassification and thus pay progression which is available for other professional positions in sate service. Attached hereto as "Exhibit 1" and incorporated herein by reference, is a true and correct copy of a document which explains the rationale for a regrade system which was implemented in 1978.

The actual document (Exhibit 1 to affidavit) explains that the attorney regrade system was designed to address the problems created because the salary structure for attorneys then in effect did not provide the same kind of salary progression provided most other professional classifications, which had a system of position classification involving entry, developmental and objective levels.[9] Since the attorney classification series was not a "progression series," this kind of pay advancement was unavailable.

---

[9] Such a classification structure is known as a "progression series" which s. ER 1.02 (32), Wis. Adm. Code, defines as follows:

> (32) "Progression series" means a classification grouping whereby the class specifications or position standards *specifically identify an entry and full performance objective* level. The full performance objective level within a progression series means the classification level that any employe could reasonably be expected to achieve with satisfactory performance of increasingly complex duties or the attainment of specified training, education, or experience.

Since each classification has a different pay range, the employe whose position is reclassified from the entry to the developmental to the objective level usually can expect to receive associated salary increases, see s. ER 29.03 (3)(c), Wis. Adm. Code.

V. Proposed Salary Structure Recommendation for Represented Attorneys

As previously stated, our analysis indicates that the current salary structure for Attorneys does not [emphasis in original] provide pay progression [emphasis added] similar to that which is available for other professional positions in state service. . . . Therefore, we recommend the following:

* * *

C Reclassification Increase - Since "reclassification" by definition is the reallocation of a position from one class to another class, the term would be inappropriate to use for pay progression *[emphasis added]* within [emphasis in original] a pay range for a single class. However, the adjustment to the employe's pay as a result of a reclassification action is called a "regrade" and we feel that the regrade concept is also a viable concept for within range progression [emphasis added] since:

1. the regrade increase in the reclassification process is intended to compensate employes as the duties and responsibilities of their positions gradually increase from entry level through developmental level(s) to an objective level; and
2. the lengthy pay range for each Attorney class is also intended to compensate for all levels of duties and responsibilities, but within a single class concept.

Therefore, we are recommending that the within range pay progression provisions [emphasis added] as shown in Attachment B be included in the represented Attorney pay schedule. (See Attachment C)

The foregoing demonstrates that while some aspects of the attorneys' regrade concept were based on the operation for pay purposes of a progression or classification series, the attorney series regrade system is conceptually different and was designed primarily as a method of within range pay progression. This conclusion is further reinforced by the different criteria for moving through the classifications in a progression series as opposed to moving through the regrade points within an attorney classification.

As noted above, movement from a lower classification to the objective level in a progression series requires either the "satisfactory performance of

increasingly complex duties or the attainment of specified training, education or experience." s. ER 1.02 (32), Wis. Adm. Code (emphasis added). Also, see, e.g., Turner-Strickland v. DER, 88-0042-PC (3/24/89) (reclassification in progression series from Personnel Specialist 4 (PS4) to Personnel Specialist 5 (PS5) denied because employe's work was not "sufficiently complex [and not] performed with the high degree of independence and judgment required to distinguish it from PS4 level work and justify classification at the PS5 level."). As opposed to a requirement of satisfying such criteria, movement from one regrade point to another after the prescribed time has passed is automatic "provided the employe has performed the duties and responsibilities assigned to the position in the manner expected by the appointing authority."[10] Meyer Affidavit Exhibit 1.

5. Assignment of an attorney to a regrade point is a salary and personnel transaction.

Respondent further contends in its reply brief in support of reconsideration that the IDO is erroneous because the initial assignment of an attorney to a regrade point "does not, however, involve a personnel transaction in and of itself and it is not a pay adjustment" (footnote omitted). Respondent further argues in a related vein that the interpretation of s. ER 29.04 (4), Wis. Adm. Code, in the IDO creates a conflict between the compensation plan and s. ER 29.04, Wis. Adm. Code, because the sequence in the compensation plan for assigning an attorney to a regrade point is inconsistent with the order of application of multiple pay adjustments occurring on the same date, set forth in s. ER 29.04, Wis. Adm. Code.

With respect to the first point, the assignment of an attorney to a regrade point can be considered both a salary and a personnel transaction, because it directly affects the employe's future salary progression. For example, the assignment of an attorney to a regrade point determines how many future regrades the employe will be eligible to receive. Also, as set forth

---

[10] In the actual 1979-1981 compensation plan (Appellant's affidavit on motion for summary judgment, Attachment K) this criterion is codified as: "Must not have received written notice from the appointing authority, prior to the minimum regrade effective date, indicating that he or she will be denied the regrade due to unsatisfactory performance."

in DER's bulletins, the regrade point can determine salary in connection with other transactions under certain circumstances. For example, the May 2, 1984, bulletin No. CC-14 (DER's Discovery Responses attached to appellant's affidavit on motions for summary judgment, pp. 39-55) provides at s. II. B. ("Structure adjustments") as follows:

> 2. Amount of Increase
>
> The increase must equal the amount necessary to raise the pay of eligible employes to the new minimum, PSICM, or Attorney regrade point minimum. Attorneys serving a probationary period must be paid at least the 1984-85 pay range minimum. Attorneys with permanent status in class must be paid at least the 1984-85 PSICM or the assigned regrade point minimum. (Emphasis added.)

Thus, an attorney might be entitled to more than the general across the board increase if that were necessary to raise the attorney to the minimum for his or her regrade point. Again, the regrade point directly affects the salary of the attorney. Two attorneys at the same salary prior to the implementation of the compensation plan might have different salaries after the implementation of the compensation plan if they were assigned to different regrade points and their salary after the across the board increase fell below the minimum of the higher regrade point.

6. Potential conflict between s. 29.04, Wis. Adm. Code, and the compensation plan.

Respondent also asserts that the Commission's interpretation of s. ER 29.04 (4), Wis. Adm. Code, creates a conflict between the rule and the compensation plan. According to DER, this is because the compensation plan provides that the assignment to a regrade point occurs only after the beginning pay rate has been determined, and this contradicts the sequence implicit in the Commission's interpretation of s. ER 29.04 (4), Wis. Adm. Code, as a reference to the initial assignment of an attorney to a regrade point. For example, s. ER 29.04(4), Wis. Adm. Code, precedes s. ER 29.04 (16), Wis. Adm. Code, "Original appointment". DER argues that if the Commission were correct, the rule would list original appointment before assignment of an attorney to a

regrade point. While this can be viewed as a conflict, it does not compel a different result, for two reasons.

First, the interpretation respondent urges creates an even more significant conflict than the conflict DER sees in the Commission's interpretation. The specific conflict to which DER refers is between a provision of the compensation plan which sets forth the manner in which attorneys are to be assigned to regrade points, and a rule (s. ER 29.04, Wis. Adm. Code) which addresses the order of application of multiple pay adjustments which occur on the same date. The compensation plan does not address the subject of the rule, although the two provisions are interlinked by the reference in s. ER 29.03 (7)(b), Wis. Adm. Code (covers pay on restoration from military service, from unclassified service, etc.), to s. ER 29.04, Wis. Adm. Code -- i.e., s. ER 29.03 (7)(b) provides: "When an employe is restored . . . the employe shall receive a base rate equal to the last rate received plus intervening adjustments identified under s. 29.04 (13) or (14).". Thus the conflict DER mentioned occurs when the construction of s. ER 29.04, Wis. Adm. Code, which is used for one purpose -- to determine salary on restoration under s. ER 29.03 (7)(b), Wis. Adm. Code -- is used for a different purpose -- i.e., applying s. ER 29.04, Wis. Adm. Code, to its stated purpose of determining the order of application of multiple pay adjustments which occur on the same date. Such a conflict is of less significance than the conflict which would result from respondent's interpretation. Respondent's approach results in the exclusion of the movement of an attorney from one regrade point to the next from the concept of within range pay progression, which involves a subject the compensation plan explicitly addresses. The compensation plan specifically includes attorney regrade under the heading of "Within Range Pay Progression." 1979-1981 Compensation Plan, Schedule 9 (Legal), s. VI. D. (Appellant's Affidavit on motions for summary judgment, Attachment K), which is distinct and separate from the section entitled "Assignment to Regrade Points" id., s. VI. B. Section VI. D.1. of the Compensation plan specifically states that "a regrade system has been created to provide for within range pay progression", which is consistent with other references in the compensation plan as well as other material of record discussed above. Thus respondent's approach creates a far more substantial conflict than any conflict created by the alternative construction.

Furthermore, the interpretation the Commission adopted in the IDO, which results in an attorney regrade being treated as a within range pay adjustment, is consistent with a proposition endorsed by both parties and with which the Commission agrees -- in case of a conflict between the compensation plan and the rule which cannot be harmonized, the compensation plan controls. This approach is in keeping with s. 230.12, Stats., which provides:

> (1) Compensation plan. (a) General provision.
>
> * * *
>
> 3. Provisions for administration of the compensation plan and salary transactions shall be provided in either the rules of the secretary or the compensation plan. (Emphasis added.)

This provision puts the compensation plan on the same footing with the personnel rules in Chapter ER, Wis. Adm. Code[11], which is consistent with the fact that the compensation plan requires legislative approval, pursuant to s. 230.12 (3)(b), Stats. Because of this requirement of explicit legislative approval, and because the compensation plan establishes a specific framework for the compensation of state employes while it is effective, it is an appropriate conclusion that the compensation plan should control in the event of a conflict with a rule that cannot be harmonized. The only way the compensation plan can be given its clearly-intended effect is to treat the attorney regrade in question as a within range pay adjustment, which, as discussed above, is in keeping with several express references in the pay plan as well as a number of other documents of record.[12]

---

[11] In the absence of this provision, presumably the compensation plan would not be on the same footing as the rules, because a rule "has the effect of law," s. 227.01 (13), Stats., and normally a rule would control over conflicting administrative provision that has not been promulgated as a rule.

[12] Respondent continues to contend that giving effect to the compensation plan also means denying appellant credit for the regrade in question because of the language in the compensation plan requiring that the employe serve six months in his or her position as a prerequisite to regrade, and appellant was not actually in the position in question during the six month period in 1980 that preceded the regrade (he was in the unclassified service then). As discussed in the IDO, this approach ignores the basic thrust of the relevant statutory and code provisions, which, according to DER's own rationale for its

7. Conclusion

In conclusion, express language in the compensation plan and related documents clearly establishes that the attorneys' regrade system was intended to provide a means of within pay range progression. The compensation plan itself clearly states that the "regrade system has been created to provide for within range pay progression" (emphasis added), and incorporates the subject of the movement of attorneys from one regrade point to another under the section entitled "D. Within Range Pay Progression". 1979-1981 Compensation Plan, Schedule 9 (Legal), s. VI. D. (Attachment K to appellant's affidavit on motion for summary judgment). This conclusion is also supported by other material of record. For example, the document prepared by DER to explain the rationale for the regrade system includes the following:

> [O]ur analysis indicates that the current salary structure does not [emphasis in original] provide pay progression similar to that which is available for other professional positions . . .
> * * *
>
> C. Reclassification Increase - Since "reclassification" by definition is the reallocation of a position from one class to another class, the term would be inappropriate to use for pay progression within [emphasis in original] a pay range for a single class. However, the adjustment to the employe's pay as a result of a reclassification action is called a "regrade" and we feel that the regrade concept is also a viable concept for within range progression [emphasis added] since:
>
> 1. the regrade increase in the reclassification process is intended to compensate employes as the duties and responsibilities of their positions gradually increase from entry level through developmental level(s) to an objective level; and
> 2. the lengthy pay range for each Attorney class is also intended to compensate for all levels of duties and responsibilities, but within a single class concept.
>
> Therefore, we are recommending that the within range pay progression [emphasis added] provisions as shown in

---

1988 rules revisions, is "'[t]o permit employes who are restored to the same or counterpart pay range to be paid the rate they would have received if they had continued in pay status.'" IDO, p. 13.

Attachment B be included in the represented Attorney pay schedule. (See Attachment C)

(Exhibit 1, Jeanne Meyer affidavit on motions for summary judgment.) While the attorney regrade system assumes that increased seniority will be accompanied by increased responsibility, independence and work complexity, these factors are not reflected in any criteria that must be satisfied before regrade can occur. In fact, regrade is automatic unless the employing agency certifies in writing that the attorney's work has not unsatisfactory.

Since it is clear that an attorney regrade is a within range pay progression transaction, and the parties have stipulated that appellant would have received the regrade in question but for his leave to serve in an unclassified position (in fact he performed essentially the same duties in both the classified and unclassified positions), that regrade must be included in the calculation of appellant's salary on restoration, and he is entitled to back pay and any associated benefits.

ORDER

Respondent's action is rejected and this matter is remanded for action in accordance with this decision (which supplements the IDO). Appellant having waived a claim to costs under s. 227.485, Stats., they are not awarded. This order is final in all respects.

Dated March 7, 1996.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT

Parties:

William Dusso
9 Holt Court
Madison, WI 53719

Marlene Cummings
Secretary, DRL
P.O. Box 8935
Madison, WI 53708

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 (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