

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NANCY FULK, CHARLES JAGEMANN,
 WILLIAM WALBRUN, LOUIS FUSCO,
 MARK BRIGGS, KENNETH MILLER,
 JUDITH HEINE and ALLAN CREVIER,

Appellants,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 and Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,

Respondents.

Case Nos. 95-0004-PC, 95-0005-PC
 95-0007-PC, 95-0008-PC
 95-0009-PC, 95-0010-PC
 95-0011-PC, 95-0012-PC

* * * * *

INTERIM
DECISION
AND
ORDER

A proposed decision and order was mailed to the parties on January 19, 1996. The Department of Employment Relations (DER) filed written objections, to which appellants filed a reply on March 19, 1996.

The Commission considered the arguments filed by the parties and consulted with the hearing examiner. The Commission adopts the proposed decision and order as its own (copy attached), with the amendments and supplemental discussion shown below.

Amendments

1. Delete the first sentence of Finding of Fact number 4, and replace with the following sentences.¹

DER created the Parole Board Member position standard (hereafter, PBM Pos. Std.) in February 1974, at which time the Parole Board was attached to the Secretary's Office at DHSS. The Parole Board as originally created had responsibility for release functions for juvenile and adult offenders. Also in 1974, the Division of Corrections was housed within DHSS.

¹ The first amendment is necessary to accurately reflect information in the record, as both parties have pointed out in their briefs.

2. Change the final two sentences in the third paragraph on page 16 of the proposed decision and order, as shown below.²

However, the use of comparable positions is a tool which can provide guidance to interpret unclear aspects of the position standard: and Ms. White knew the members of the Parole Board no longer met the PBM Pos. Std. requirements, ~~yet there is no indication that she reported this discrepancy to anyone at DHSS, DOC or DER.~~

DISCUSSION

DER argued that the proposed decision and order was contrary to prior cases of the Commission which "consistently held that 'comparable' positions that are erroneously classified at a certain level do not provide a basis for also classifying an appellant's position at that level", citing Danielski, et al. v. DER, 85-0196-PC (9/17/86), McCord v. DER, 85-0147-PC (3/13/86), and Augustine & Brown v. DATCP, 84-0036, 0037-PC (9/12/84). DER's reliance on the cited cases is misplaced.

The situation presented in Fulk, et al. is significantly different than circumstances of the cases cited by DER. The Parole Board Members were not misclassified under the position standard entitled "Parole Board Member" (hereafter, PBM Pos. Std.).³ Rather, the Parole Board Members were correctly classified under the PBM Pos. Std., but the PBM Pos. Std. became outdated and no longer matched what the Parole Board Members were doing. A degree of leeway in interpreting the PBM Pos. Std. became necessary to justify the conclusion that the Parole Board Members continued to be correctly classified under the outdated PBM Pos. Std. The question then became whether appellants were entitled to the same degree of interpretive leeway when

² DER objected to the deleted language and provided information regarding what Ms. White did when she learned that the Parole Board Members no longer met the PBM Pos. Std. The examiner does not recall that such explanation was included in the hearing record. In any event, the cited language is not key to the Commission's decision and was, therefore, deleted to avoid potential unnecessary controversy.

³ In fact, DER continues to maintain that the Parole Board Members were correctly classified under the PBM Pos. Std. (DER's Brief, p. 4.)

considering whether their positions met the requirements of the outdated PBM Pos. Std.

The distinction noted in the prior paragraph is not new. In fact, it was recognized in the Danielski, et al., case cited by DER. Specifically, page 12-13 of the decision contains the following language:

The appellants have raised a serious question as to whether the reclassification of these two (comparable) positions, and especially the Williams (comparable) position, was correct in terms of the specifications that exist. To the extent that either the McCarthy or the Williams (comparable) positions or both are erroneously classified at the TCS 2 level, they would not provide a basis for also reclassifying the appellants' positions to the 2 level. To the extent that the McCarthy or Williams position or both are correctly classified at the 2 level, they should be compared to the appellants' positions and the comparison should be considered as a factor in reaching a conclusion as to the proper classification of the appellants' positions. Where, as here, the respondent has specifically contended that the comparison positions are properly classified, the Commission is reluctant to conclude that the positions were, in fact, classified incorrectly.

The Commission recognizes the difficulty which DER likely faces in keeping position standards or classification specifications up to date. DER may not have sufficient staff to review the viability of standards on a periodic, regular basis; or even (as occurred here) when one agency splits into separate agencies by legislative directive. The consequence inherent in such circumstances is that the language of position standards will become outdated to such degree that an even-handed interpretation of those standards will become the "best fit" for positions which were not contemplated when the standards were written.

The second main argument raised by DER is that appellants' positions do not meet the PBM Pos. Std. because appellants do not make release decisions for inmates of adult institutions for a majority of their positions' time. As already explained in the proposed decision and order (starting with the final paragraph on page 17), the PBM Pos. Std. contains no language requiring that a majority of a position's time be spent making release decisions for inmates of adult correctional institutions. Nor does the history of developing the standard support such a conclusion. The PBM Pos. Std. was initially written to cover members of the Parole Board which, at the time, made release decisions for

inmates of both adult and juvenile institutions. There is no indication in the record that if the Parole Board members had split the work leaving juvenile release decisions to one member that DER would have said that the one member no longer met the PBM Pos. Std. requirements. The test created by the PBM Pos. Std. is whether a position spends the majority of time performing the tasks listed in the PBM Pos. Std., regardless of whether such tasks relate to inmates of adult or juvenile institutions.

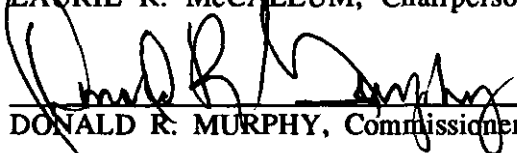
ORDER


The proposed decision and order is adopted, with the amendments and supplemental discussion contained herein.

Dated April 4, 1996.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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

STATE OF WISCONSIN

PERSONNEL COMMISSION

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* * * * *

PROPOSED
DECISION
AND
ORDER

The above-noted cases were combined for hearing held on July 10-12, 1995, and continued on August 31, 1995. The parties submitted written arguments after hearing, with the final argument received by the Commission on December 19, 1995.

The hearing issue was agreed to by the parties in a status conference held on February 27, 1995, as shown below:

Whether the respondents' decisions denying the appellants' request to reclassify or reallocate their positions from Social Services Specialist 2-Juvenile Review Specialist to Parole Board Member, were correct.

FINDINGS OF FACT

Appellants' request for reclassification or reallocation.

1. Appellants requested reclassification or reallocation (R/R) of their positions by memo to their supervisor, Elaine M. Olson, Director of the Office of Juvenile Offender Review (OJOR), dated March 28, 1994. (Exh. A-4) OJOR is in the Department of Health and Social Services (DHSS).

Appellants' request ultimately was forwarded to DHSS' Bureau of Personnel and Employment Relations (BPER), pursuant to standard procedure. The request was received by BPER on April 26, 1994, resulting in an undisputed potential effective date of May 2, 1994. (Exh. PC-1)

2. The Department of Employment Relations (DER) was conducting a survey of positions (including appellants') at the time BPER received appellants' R/R request. DER coordinated the review of appellants' R/R request with BPER staff. DER and BPER issued a jointly-authored memo dated December 8, 1994, which rejected appellants' R/R request. (Exh. A-9)
3. The joint memo referenced in the prior paragraph represented DER's final decision on the matter, a decision which was never delegated to DHSS. Accordingly, the parties agreed at hearing that DHSS is not a proper party to these appeals and should be dismissed as a party.

DOC creation and resulting split between adult versus juvenile offenders.

4. DER created the Parole Board Member position standard (hereafter, PBM Pos. Std.) in February 1974, at which time the Parole Board was in the Division of Corrections within DHSS with responsibility for release functions for juvenile and adult offenders. A change occurred in about 1978, whereby the Governor and the DHSS Secretary desired staff to specialize in release decisions either for juvenile or adult offenders. Accordingly, decisions concerning adult offenders continued to be the responsibility of the Parole Board. Decisions concerning juvenile offenders (JOs) were the responsibility of the newly-created Juvenile Offender Review Board (JORB) (formerly called the Child Monitoring Board). In 1979, the statutes were changed to give JORB potential jurisdiction of JOs up to age 19 (previously jurisdiction was to age 18). Both the Parole Board and the JORB operated within DHSS until about January 1, 1990, when the legislature separated the Division of Corrections from DHSS, and created a separate agency called the Department of Corrections (DOC). (1989 Wis. Act 31, effective 1/1/90)
5. After creation of DOC, the Parole Board was re-named as the Parole Commission and was attached to DOC with responsibility over release

decisions concerning adult offenders. (Exh. R-10) Under the new organization, Parole Commission members make a release recommendation to the Parole Commission Chairperson. The Chairperson makes the final release decision.

6. After 1/1/90, DHSS remained responsible for release decisions concerning JOs. The function previously performed by JORB remained within DHSS' Division of Youth Services (DYS). What was formerly called "JORB" was re-named as the Office of Juvenile Offender Review (OJOR). (Exh. R-11) Unlike their counterparts at the Parole Commission, the appellants have final authority to make most types of release decisions. This has been true since December of 1981, when release decisions were changed from being made by a 2-person review panel to being made by individuals in appellants' positions.
7. The PBM Pos. Std. was not updated to reflect the changes noted in the prior 3 paragraphs until 1994,¹ at which time the classification title was changed to Parole Commission Member effective October 16, 1994.

Juvenile offender process in relation to appellants' positions.

8. Appellants' positions are administratively attached to OJOR in DHS' central office in Madison. Appellants' positions, however, are outstationed to serve specific juvenile correctional facilities. Appellants Judith Heine and Kenneth A. Miller are outstationed in Delafield, WI. Appellants Mark Briggs, Allan Crevier, and Nancy Fulk are outstationed in Irma, WI. Appellants Louis Fusco and William Walbrun are outstationed in Waukesha, WI. Appellant Charles Jagemann is outstationed in Union Grove, WI.
9. Mr. Briggs' PD dated in April 1985 (marked as Exh. A-3)², is illustrative of the PDs submitted by the appellants with their R/R request. The duties are summarized below using the PD format. Subsequent

¹ The Commission already issued a decision finding that the appellants' positions do not meet the rewritten Parole Commission Member Class Specs. Briggs, et al. v. DER, 94-0750, 0831, 0901-0905, 0945 & 0947-PC (5/26/95).

² Exh. R-20 also was used to prepare the summary of duties shown in par. 9 of the Findings of Fact, to reflect updated terminology used after DOC was created.

paragraphs provide additional detail regarding the duties of appellants' positions. Ninety percent of appellants' positions' time involve tasks related to release decisions.

<u>Time (%)</u>	<u>Goal or Worker Activity</u>
25% ³	<p>A. <u>Determines appropriateness for juvenile to be transferred from department reception center to juvenile correctional institution program or to alternate care facility.</u></p> <p>A1. Reviews & analyzes reports prepared or furnished by local social service and DYS personnel. Interviews the youth. Discusses placement planning w/appropriate planning conference personnel utilizing DHSS criteria to determine most suitable placement for JO.</p> <p>A2. Dictates DHSS order reflecting delegated decision-making responsibility, summary of analysis, to either transfer JO to DHSS juvenile institution or make eligible for release to alternate care facility as specified in s. 48.52, Stats.</p> <p>A3. Complete information and assessment form which provides data for program evaluation and reporting purposes.</p>
45%	<p>B. <u>Reviews progress of JOs retained at institution to determine appropriateness of continued stay, readiness for release and appropriateness of care and rehabilitation programming.</u></p> <p>B1. Reviews & analyzes reports prepared by DYS and institution personnel. Interviews the JO. Discusses JO's progress with appropriate staff.</p> <p>B2. Determines, utilizing DHSS criteria, if the JO is to be retained in the institution program and dictates order/progress review report indicating decision with summary of analysis.</p> <p>B3. Determines if JO qualifies, using DHSS criteria, for release to alternate placement facility, and if so dictates DHSS order authorizing such placement with summary of analysis.</p> <p>B4. Recommends to program director those JOs believed to be qualified for release to their own homes by dictation of DHSS order summarizing analysis and findings.</p> <p>B5. Completes information and assessment form which provides data for program evaluation and reporting purposes.</p>

³ Mr. Briggs' PD shows goal A as 15% of his positions' time, but use of this figure results in a total position time of 90%. Mr. Briggs testified that Goal A should be 25%, to reach a total of 100%.

- 20% C. Monitors juveniles in alternate care placements to determine appropriateness of continued placement and of the care and rehabilitation programming.
 - C1. Visits the alternate care facility, reviews reports prepared by facility staff, interviews the JO and discusses JO's progress with appropriate personnel.
 - C2. Prepare written report for program director indicating recommendations for planning for the JO.
- 5% D. Monitor transfers of juveniles between juvenile correctional institutions and other internal programs.
 - D1. Review JO's file to determine if transfer was in accordance with DHSS criteria guiding such transfers.
 - D2. Prepare written report for program director indicating results of review and assessment.
- 5% E. Participate in periodic consultations and evaluations of program's policies, procedures, process, activities, etc. with the program director.
 - E1. Participate in individual or group staff sessions with program director, or prepare written comments, providing input and recommendation for program development and improvement.

10. The offender process for juveniles commences with a court finding a juvenile delinquent. The JO is then placed in "reception status" in a DHSS juvenile correctional institution. Appellants must make an initial retention decision within 30 days after the JO's admission to the institution. This is a formal review involving input from the JO, the JO's family, a social worker from the institution, county staff and other interested parties. If OJOR determines the JO should remain in custody, OJOR issues an order that the JO will not be paroled and directs the institution to keep the JO on "permanent status" which triggers the institution's responsibility to establish a program for the JO and to give the JO a permanent cottage (housing) assignment at the institution. If OJOR determines the JO will not remain in custody, OJOR also must determine the conditions of release as detailed in the following paragraph.
11. Several options exist when OJOR releases a JO. OJOR could release a JO without continued custody. Alternatively, the release could be made with continued custody in an "after care" setting with physical custody outside the institution (such as release to the JO's house with electronic monitoring). It is appellants who make the decision of whether to

release and, if so, appellants determine the conditions of release (if any).^A One type of after care is called the Corrective Sanctions Program which involves appellants negotiating terms of release with the JO and imposing those terms as a condition of release. If the JO violates the negotiated release terms the JO would be returned to the institution for up to 72 hours without hearing, or for a longer period after revocation proceedings held by the Office of Administrative Hearings.

12. The formal review process described in the prior 2 paragraphs for the initial retention decision is repeated by appellants every 6 months. Court commitment of JOs is for 2 year periods, with the option of going back to court any time prior to the JO's 18th birthday to obtain extended custody for additional 2 year periods until the JO reaches age 19. Appellants have the responsibility to decide whether DHSS will return to court to request extended custody. A routine (less formal) review is conducted by appellants every 90 days and requires appellants to obtain input from the JO and the JO's social worker.
13. Except as noted in pars. 15-16 below, the appellants make release decisions for all JOs, whether they are youths or adults. The majority of their decisions (about 840 of 900 yearly) involve youth.
14. Appellants are involved in making release decisions for adult JOs under extended jurisdiction where those adults remain housed in a juvenile facility. Extended jurisdiction occurs when a person under the age of 16, is tried as a juvenile and convicted of a serious offense (such as murder). A JO under these circumstances initially is housed at one of DHSS' juvenile institutions where the JO may remain up to the age of 21 or 25 (depending on the severity of the offense), or the JO may be transferred to a DOC adult offender institution any time after reaching the age of 18. Appellants' positions do not have the authority to determine if the JO will be transferred to an adult institution. Such transfer decisions are made based upon the recommendation of the adult institution to John Ross, the Director of the Bureau of Residential

^A The Commission adds for clarification that appellants have this decision making authority with the exception that release to a JO's home is a recommendation made by appellants, as noted in task B4, of their PDs. (See par. 9 of the Findings of Fact.)

Services in the Division of Youth Services at DHSS, subject to the approval of his Division Administrator. Appellants continue with their formal and informal reviews of these adult JOs even if the JO is transferred to an adult institution.

15. The release decision for a JO under extended jurisdiction when incarcerated in an adult institution is made by the courts. Such release responsibility does not rest with the Parole Board/Parole Commission or with OJOR. The appellants, however, have the responsibility to recommend, on behalf of DHSS, release to the court.
16. Youth between the ages of 14 and 18, may be tried as adults by decision of the courts. These JOs, if convicted, come under the release authority of the Parole Board and are the only non-adults handled by the Parole Board. Appellants have no involvement with these youth.

Parole Board Member (PBM) Position Standard.

17. The PBM Pos. Std. (Exh. A-26) is shown below in pertinent part.

This is professional corrections work relating to the selection of inmates of adult correctional institutions for parole and the program placement and subsequent release of delinquents committed to juvenile correctional institutions. The work involves reviewing applications, conducting hearings and making recommendations on matters pertaining to the parole of adults. It also involves reviewing diagnostic and classification work-ups, holding placement and release hearings and making decisions on program placement and release to field supervision of juveniles.

Examples of Work Performed:

1. Reviews adult parole applications, including the reports of institution heads, guidance and classification committees, institution social workers, psychologists, psychiatrists, field agents and other treatment and security staff.
2. Participation in parole hearings for eligible applicants at adult correctional institutions, farms and camps.
3. Analyzes and evaluates each case as to the degree of rehabilitation effected, resources available, and potential of the individual for successful adjustment in the community and makes appropriate recommendations to the Secretary of the [DHSS].
4. Interviews parole violators and makes determinations regarding reparole.
5. Negotiate and renegotiate Mutual Agreement Program contracts.
6. Conducts initial interviews and makes judgments pertaining to first parole eligibility dates.
7. Participates on a consultative basis in the Assessment

- and Evaluation Program at adult reception centers.
8. Assists in the formulation of parole policies and procedures.
 9. Negotiates regarding detainers and enters into parole planning with parole authorities of other states which have concurrent jurisdiction.
 10. Reviews reception center evaluation work-ups on committed juvenile delinquents and participates in hearings at juvenile correctional institutions.
 11. Makes decisions as to program placement and release of committed delinquents.
 12. Confers with professional staff, family and relatives, courts and law enforcement agencies, attorneys, or other interested persons on individual applications as necessary.
 13. Contributes to public education and public relations programs, accepts speaking engagements, and participates in professional conferences and meetings.
18. DER historically has assigned the PBM classification only to positions serving as members of the Parole Board or as members of the Parole Commission. The Parole Board members included 8 civil service employees, plus a non-classified position serving as chairperson. (s. 46.03 (6) (c) and 230.08 (2) (pd), Stats. (1985-86 text) & Exh. R-6) The Parole Commission is comprised of 5 members; a chair appointed by the Governor to an unclassified position, as well as four members appointed by the chair to civil service positions. (s. 15.145 (1), Stats. (1993-94 text))
19. Prior to the hearing in this matter, Llean White thought that members of the Parole Board and Parole Commission only performed parole reviews for adults. Ms. White is the DER classification expert who made the decision to deny appellants' 1994 R/R request.

Social Services Specialist Position Standard.

20. The Social Services Specialist position standard (hereafter, SSS Pos. Std.) is in the record as Exh. R-2. The SSS Pos. Std. is dated December 1972 and provides, in pertinent part, as shown below.

Introduction: Social service, as currently used, denotes the full range of organized activities of voluntary and governmental agencies that seek to prevent, alleviate, or contribute to the solution of recognized social problems, or to improve the well-being of individuals, groups or communities. . . . Social service agencies seek to meet the needs of these people through (1) the reaffirming of family and societal relationships,

(2) the provision of financial assistance to meet basic care and maintenance needs, (3) the furnishing of rehabilitative services to bolster the economic potential and earning power of the individual and (4) strengthening the person himself to withstand the stresses of modern life and to make non-economic contributions to his family and community.

Social Service at the State Level: Federal, state and local governments as well as private organizations are involved in the deliverance of social services which include a wide variety of activities ranging from mental health programs to probation and parole services. In Wisconsin . . . State social service activity is administered at the central office, institution, and field (generally a geographic entity) levels and has these identifiable functional components:

- (1) direct services - These activities are concerned with the provision of social work services to persons who are assigned to the custody of the state because of dependency, neglect or delinquency, or for criminal rehabilitation. This involves the administration of on-going social work programs and the supervision of casework activity at varying levels, either in the district or in an institution.
- (2) services to counties and community organizations - . . .
- (3) consultation services - These activities, which have been defined as "indirect" services, provide a nucleus of "experts" for the state with specialties in a given service field, such as day care, medical social work, community clinics, juvenile court work, etc. These specialists generally act in an advisory and coordinative capacity to the state, county and community agencies bringing their specialized knowledges to bear in resolving problems inherent in the establishment and continuation of social work program efforts.

It is not suggested here that these are "pure" functional types. There does exist an overlap of types in which functions tend to merge necessarily in the provision of services.

Inclusions:

This series encompasses a wide range of functional activities geared to providing the full spectrum of professional social services for the state. These activities include the administration and supervision of social welfare programs directly or through county and local agencies, the provision of consultative services to the administrative staff and the community, and the maintenance of a professional staff concerned with social services operations management. The positions for which this series was designed are found primarily in the [DHSS] in the Divisions of Family Services, corrections, and Mental Hygiene, with other similar programs identified in closely related agency operations. The majority of positions both in the central office and in the field units are included, except those listed below under Exclusions.

* * *

Areas of Specialization: This classification series is to be used for administrative, supervisory and specialist positions in social service programs. Positions in this series usually fall within the broad areas of Public Assistance, Public Health, Corrections, Mental Health and Child Welfare. However, because of the scope of activities within this series, some positions may require more definitive specialization such as: adoptions, community organization, juvenile court work, mental retardation, mental illness, alcoholism, staff development, etc.

Subtitles: Subtitles may be used in this series to provide appropriate options for recruitment, examination and certification purposes. Supported by job analysis data, such options shall reflect specialized skills and knowledges requirements, special program emphasis, or other recognized employment considerations pertinent to the class or position.

Allocation Factors: The State of Wisconsin's involvement in social services at various levels and in different fields creates situations wherein no single allocation or classification factor can be universally applied. For example, it is impossible to develop such a factor which could apply equally to casework supervisors and community consultants since their duties are extremely dissimilar. As a result the following factors can be applied and reviewed only in terms of similar positions.

* * *

4. Coordination, Specialization and Consultation Responsibilities - Positions responsible for providing coordinative, consultative and specialized services to the administration of the social services program must be evaluated in terms of the total impact of these services, the exclusivity of the function and the level of decision-making involved. Also an analysis should be made of the type of contacts necessitated in the providing of these services and whether or not the position has line responsibility in addition to its staff role.

Social Service Specialist 2:

This level represents the primary functional area of responsibility for providing social services consultation in specialized program areas. Specialized staff consultative service in a district or region can be included at this level depending upon the organizational relationship, the duties assigned and the depth and scope of the program involved. Central office consultants and program specialists at this level, in addition to their consultative roles, are involved in the planning, development and implementation of services and service related programs under the direction of higher level program supervisors or administrators. A limited number of field

consultants are allocated to this level on the basis of providing consultative services in selected program areas which require highly specialized training and skills.

Representative Positions

County Liaison Specialist - Division of Family Services - provides program supervision to counties in the delivery of services.

Special Program Consultants - Divisions of Family Services and Mental Hygiene - provide consultative services to counties and community agencies in a highly specialized program area which requires advanced technical knowledge and competency.

Unit Coordinators - Division of Family Services - Responsible for directing and coordinating the activities of a program unit (day care or social services) in a region.

Central Office Consultants and program Specialists, including Recruitment and Stipend Coordinators, and Staff Development Coordinators - all positions responsible for planning and administering, and providing consultative services for a major statewide program at the division level except those as specified in the next higher level in the series.

Field Consultant - Division on Aging - plans, promotes and organizes demonstration projects and other activities to develop effective programs for services to the aging at the community level.

Prior Reclassification Information

21. The joint denial memo dated December 9, 1994 (see par. 2 above), indicated that prior reclassification activity occurred for some of the appellants' positions. The pertinent information is found on p. 2 of the memo and is shown below:

The Social Services Specialist 2 - Juvenile Review Specialist . . . positions were last classified: July 1981 for Louis Fusco and William Walbrun; April 1985 for Mark Briggs; January 1988 for Allan Crevier; July 1992 for Judith Heine; August 1993 for Nancy Fulk; September 1993 for Charles Jagemann and April 1994 for Kenneth Miller.

22. The record indicates that appellants' prior reclassification requests did not include a request for reclassification as a PBM. (For example, see Exh. A-5, Attachment 1 dated 12/11/81, wherein it is noted that

appellants sought reclassification to SSS-3 and that DER's analysis did not compare appellants' positions to the PBM Pos. Std.)

23. The denial memo dated December 8, 1994, recognized that changes had occurred in appellants' positions but concluded that the changes did not warrant reclassification as a PBM. The following excerpts from the denial memo are pertinent to this point. The emphasis shown below appears in the original document.

Based on the PDs submitted with the reclass request and audit of the position occupied by Mark Briggs, along with other information provided, our review indicates the following changes: positions spend more time in determining the appropriateness for juveniles to be transferred from department reception center to juvenile correctional institution programs or to alternate care facilities; less time in monitoring juveniles in alternate care placements to determine appropriateness of continued placement and of the care and rehabilitation programming; more time in monitoring transfers of juveniles between juvenile correctional institutions and other internal programs; new responsibility as chairperson of the juvenile program review process and responsibility for gathering educational assessment information used by the OJOR board in making program placement; new provisions have been established for extended jurisdiction where youth can be committed to the Department up to age 25; OJOR has been moved from the Office of the Secretary, DHSS to the Division of Youth Services in 1989 and is overseen by the Division Administrator.

In order for reclassification to occur, there must be a "logical and gradual change in duties and responsibilities of the position" as indicated in Wisconsin Administrative Code section 3.01 (3). Furthermore, since any position will experience change over time, the actual changes in the job must be substantive in terms of level and nature of the new duties and responsibilities such that a higher class is warranted. Our review indicates that the changes which have occurred in the positions do not represent a significant enough change to warrant a higher classification level.

24. The denial memo further contained a statement that appellants had the right to appeal the denial to the Personnel Commission.
25. The change which resulted in appellants' positions acting as chair of the program review process for JOs, occurred in 1988. (Exh. A-5, cover letter, p. 3) The increased time in monitoring transfers of JOs between correctional institutions (secured placement) and other internal

programs (non-secured placement) occurred in 1989, the same time the appellants' positions gained responsibility for extended jurisdiction (1989 Act 31). Appellants' positions were given responsibility for gathering educational assessment information in 1988. (Exh. A-5, cover letter, p. 3-4).

26. DER did not fully understand the 1988 change which resulted in appellants' positions acting as chair of the program review process. (Exh. A-5, attachment 10 - memo dated 6/3/93, p. 1) Initially, appellants' positions served as coordinator of the program review process which required the appellants to be more involved with the provision of direct services to JOs. The 1988 change from coordinator to meeting chair further removed appellants' positions from duties which could be characterized as provision of direct social services. This coordinative function was assumed by existing SSS positions.

Positions DER points to for comparison

27. Positions exist at institutions which provide direct social services to inmates and these positions have been classified by DER under the SSS Pos. Std.
28. The SSS-1 classification has been used by DER for positions at institutions which participate in program review activities for inmates. (Exh. R-33, Vanslanski PD) The institution program review activities result in program information/advice given to appellants in regard to specific JOs and appellants use the information to fulfill their position responsibilities. For example, appellants use such information to determine if the JO is to be retained in the institution or released to alternate care (responsibility items B-2 and B-3 of Mr. Briggs' PD, as noted in par. 9 above).
29. The SSS-2 classification has been used by DER for positions at institutions which coordinate functions such as coordinator of the institution's Program Review Committee (PRC) (Exh. R-35, Kestin PD) or coordinator of the institution's intensive sanction program (Exh. R-34, Bloednow PD). The Kestin PD is pertinent to appellants' positions because the PRC gathers information which appellants need to perform their own responsibilities (such as information pertinent to release

decisions). A similar arrangement exists at DOC, where institution staff provide information to the Parole Commission which Parole Commission members use in making parole recommendations to the Chairperson of the Parole Commission. The Bloednow PD is pertinent to appellants' positions because the intensive sanction program is DOC's equivalent to the corrective sanctions program for JOs.

30. One main distinction between Appellants' positions and those positions discussed in the prior two paragraphs is that only the appellants have responsibility to make release decisions for JOs, and such decision is based upon information provided from various sources - including information (such as progress reports concerning a particular JO) from the direct service providers at the institution.

DISCUSSION

Concerns raised under s. 230.09(1), Stats., are beyond the Commission's power to review.

Appellants' arguments include the notion that their jobs are so similar to the duties performed by PBMs that it is unfair to have more than one classification and/or pay grade. (Appellants' initial brief, dated 10/21/95.) This argument is addressed first because it is clear that the Personnel Commission lacks jurisdiction to consider complaints of this nature.

The Secretary of DER has the statutory responsibility to establish grade levels and classifications for all positions in the classified service, pursuant to s. 230.09(1), Stats. Such responsibility includes the determination of which factors will be used to distinguish one classification from another, such as whether a distinction will be drawn between PBMs and appellants' positions on the basis that appellants mostly deal with juvenile release decisions whereas PBMs mostly deal with parole recommendations for inmates in adult institutions. Decisions made by the DER Secretary under s. 230.09(1), Stats., are not within the scope of the Personnel Commission's jurisdiction. The Personnel Commission's jurisdiction is noted in s. 230.45, Stats., and does not include authority to review decisions made by the DER Secretary under s. 230.09(1), Stats.

Best Fit Analysis

The Personnel Commission's role in appellants' appeals is to determine which is the best fit for appellants' positions, the position standard for SSS-2 or the position standard for PBM. The analysis is somewhat more complex in the present appeals because the position standards were outdated at the time of appellants' R/R request which was made in 1994, about 20 years after the position standards were written for SSS (1972) and for PBM (1974).

The PBM Pos. Std. when created in 1974, was intended to include only members of the Parole Board. Members of the Parole Board in 1974, made parole decisions for inmates of adult correctional institutions and release decisions for JOs committed to juvenile correctional institutions. But circumstances changed. The JO function was removed from the board in about 1978, with no change to the PBM Pos. Std. Another change occurred in 1990, with attachment of the Parole Commission to the newly-created DOC. Again, the PBM Pos. Std. was not changed to reflect the new circumstances.

All parties here agree that the position standards are outdated. A difficult aspect in dealing with two outmoded position standards is to draw a reasonable line in determining which portions of the position standards should now be ignored. Certain language must be ignored because, for example, certain programs referenced therein no longer exist (such as the Mutual Agreement Program, referenced in work example #6 in the PBM Pos. Std.) and/or because certain circumstances no longer exist (such as reference in the SSS Pos. Std. to DHSS Bureaus which no longer exist, as shown in the Inclusions section).

Interpreting the PBM Pos. Std.

As noted above, DER's initial intent in creating the PBM Pos. Std. was to include only members of the Parole Board. The Commission, however, is unpersuaded that DER re-visited the question of intent after significant changes occurred in the PBM jobs, such as spinning off review of JOs to appellants and creating the Parole Commission attached to the newly-created DOC. The Commission's conclusion in this regard is based, in part, on the

hearing examiner's impression of witness testimony at hearing as more fully described in the following paragraphs.

The first requirement of the PBM Pos. Std. is repeated below. (Emphasis added.)

This is professional corrections work relating to the selection of inmates of adult correctional institutions for parole and the program placement and subsequent release of delinquents committed to juvenile correctional institutions.

DER's expert witness, Llean White, made the decision to deny appellants' R/R request. At hearing she testified that the PBM Pos. Std. required positions to perform work relating both to: 1) "selection of inmates of adult correctional institutions for parole" and 2) program placement and release of JOs "committed to juvenile correctional institutions". She opined that appellants' positions did not meet the PBM Pos. Std. because they do not meet the first requirement. Yet Ms. White acknowledged that at the time she denied appellants' R/R request, she knew the members of the Parole Board did not meet the second criteria of releasing JOs from juvenile correctional institutions.

No witness explained to the Commission's satisfaction why DER's interpretation of the PBM Pos. Std. created two requirements for appellants' positions, but only one requirement for members of the Parole Board. DER's basic explanation was that Ms. White's assigned task was to evaluate appellants' R/R request, not to evaluate whether members of the Parole Board were correctly classified. However, the use of comparable positions is a tool which can provide guidance to interpret unclear aspects of the position standard. Ms. White knew the members of the Parole Board no longer met the PBM Pos. Std., yet there is no indication that she reported this discrepancy to anyone at DHSS, DOC or DER.

Ms. White was unaware prior to hearing that appellants have responsibility for release decisions of adults. At one point in her testimony, she said such information would be "key" to considering whether appellants' positions meet the PBM Pos. Std. requirements. Appellants make release decisions for adult JOs housed in a juvenile correctional facility. They also perform the required periodic reviews for adult JOs housed in adult

correctional facilities and make release recommendations on behalf of DHSS for the same group of JOs. (See, pars. 13-15 in the Findings of Fact.)

Appellants' positions make release decisions for adult JOs housed in a juvenile correctional institution. DER acknowledged this correction to DER's prior misunderstanding of what appellants' positions do, but argued the duties remained insufficient to meet the PBM requirements because appellants' decisions are release decisions rather than parole decisions. DER may be technically correct. "Parole" is a term used in Ch. 304, Stats., to describe release for "prisoners", as defined in s. 301.01(2), Stats. The statutory definition of "prisoner" for purposes of parole (under Ch. 304) specifically excludes JOs confined under ss. 48.19-48.21, Stats. The hearing record establishes, however, that the terms "parole" and "release" involve similar policy considerations and analyses, and are considered to be roughly equivalent terms by professionals in the correctional field. However, certain terminology in the PBM Pos. Std. would require modification for members of the Parole Board to meet the requirements too. Members of the Parole Board deal with juveniles (18 years of age or less) but only if housed in an adult correctional institution. Accordingly, the Parole Board Member positions did not meet the PBM Pos. Std. requirement of making "release" decisions for JOs and the requirement that such release decisions be made for JOs housed in a "juvenile correctional facility". (See par. 16 of the Findings of Fact.) The Personnel Commission feels DER should apply the same degree of interpretive leeway when considering whether appellants' positions should be classified under the PBM Pos. Std. as is required to place the Parole Board Members under the same outdated position standard.

DER further argues that appellants' release decisions for JOs housed in adult correctional institutions is insufficient for classification as PBM based on DER's contention that the PBM Pos. Std. requires positions to perform parole decisions of inmates at adult correctional institutions a majority of the position's time. There is no such stated requirement in the PBM Pos. Std. and DER has presented insufficient evidence to justify adding a "majority of time" requirement. DER bases its argument on the fact that the majority of examples of work performed in the PBM Pos. Std. involve tasks associated with adult inmates of adult correctional institutions. The Personnel Commission, however, found such argument unpersuasive for at least two reasons. First,

some of the examples listed in the PBM Pos. Std. are outdated and, accordingly, inapplicable at the relevant time period considered in these cases. Second, DER's own administrative code specifically states that positions are not expected to perform all of the work examples listed in a classification specification.⁴ See, s. ER 2.04 (3), Wis. Admin. Code.

The PBM Pos. Std. describes appellants' positions in more specific detail than the general language contained in the SSS Pos. Std. The Personnel Commission in prior cases has favored the position standard (or classification specification) which specifically describes the duties and responsibilities of a position as providing a closer fit than a specification which only generally describes such duties and responsibilities. See, for example, Schermetzler v. DER, 94-0342-PC (4/17/95), Coequyt v. DER, 92-0189-PC (8/11/93) and Steinhauer, et al. v. DER, 90-0216-PC (3/30/93). Under this rationale, the PBM classification is the best fit for appellants' positions.

Appellants' positions have changed and such changes warrant reallocation to PBM.

DER specifically recognized in its denial letter that appellants' positions changed due to their new responsibilities with extended jurisdiction. (See par. 23 of the Findings of Fact.) It is extended jurisdiction which added appellants' responsibility to make release decisions of adult JOs housed in a juvenile correctional institution, as well as appellants' review responsibilities for adult JOs housed in an adult correctional institution (see par. 14 and 15 of the Findings of Fact) and which brought their positions within the PBM pos. std. requirements. The change was logical because it was reasonably connected or related to the prior duties performed by appellants' positions. Accordingly, reallocation is appropriate, pursuant to s. ER 3.01(2)(f), Wis. Admin. Code.

A separate basis exists for reallocation based upon correction of an error in the previous assignment of a position, pursuant to s. ER 3.01(2)(e), Wis. Admin. Code. Despite prior reviews of appellants' positions by DER and/or DHSS (as noted in par. 21 above), the full import of at least two changes in appellants' jobs were insufficiently understood by DER. Specifically, the DER classification expert who denied appellants' R/R request did not realize the full

⁴ "Classification Specification" is a relatively new term used for the concept of "Position Standard".

impact of appellants' new duties relating to extended jurisdiction (as described in pars. 14 and 15 of the Findings of Fact). Nor did DER realize the full impact of the elimination of the coordinative function (as described in par. 26 of the Findings of Fact).

Changes in Appellants' Positions Do Not Warrant Reclassification

The appellants failed to establish entitlement to reclassification. The text of s. ER 3.01 (2) (3), Wis. Admin. Code, is shown below.

(3) RECLASSIFICATION. "Reclassification" means the assignment of a filled position to a different class by the secretary as provided in s. 230.09 (2), Stats., based upon a logical and gradual change to the duties or responsibilities of a position or the attainment of specified education or experience by the incumbent.

The new duties associated with extended jurisdiction brought appellants' positions within the PBM Pos. Std. While appellants showed that the change was logical, they did not show that it occurred "gradually". The record indicates the extended jurisdiction responsibilities were created by statute, which suggests the opposite of a gradual change.

Appellants demonstrated that other changes occurred gradually. The gradual changes, however, were an increase or decrease in existing functions which were not shown to be significant in terms of the PBM Pos. Std. requirements.

Prior Reclassifications

DER argued that the failure of some of the appellants to appeal their prior reclassification requests operates as a bar to appellants' current appeals requesting classification at the PBM level. The Personnel Commission disagrees.

The record indicates that some of the appellants have performed JO release decisions for quite some time. Some appellants have requested and received prior reclassifications at a time when the PBM position standard existed. However, the record does not indicate that the prior reclassifications for any of these appellants included a DER review or an appellant's request for the PBM classification.

The Commission further notes that DER did not raise the potential bar due to prior reclassification requests until the first day of hearing. The alleged bar is in the nature of an affirmative defense which can be waived. (See, Milwaukee Co. v. Labor & Ind. Rev. Comm., 113 Wis. 2d 199, 335 NW2d 412 (Ct. App. 1983), which held that a statute of limitations is an affirmative defense which may be deemed waived in relation to an administrative proceeding.) The Commission determines that DER, by waiting until the first day of hearing, waived its right to raise this issue. The policies encouraging full disclosure of issues prior to hearing supports this conclusion, as does the conservation of resources on the part of the Commission and all parties. If DER had raised this issue sufficiently prior to the hearing and had prevailed, there would have been no need for the three days of hearing which were held for these appeals.

However, the result here would be the same even if DER had raised this issue prior to hearing. The circumstances in these appeals is similar to those in Vesperman, et al. v. DOT & DER, Case Nos. 93-0101, etc.-PC (2/15/94). The Vesperman appellants failed to file a timely appeal of a 1990 reallocation decision. Yet in 1993, DOT with DER's permission, re-visited the prior reallocation decision and issued a denial in writing to the Vesperman appellants. The Vesperman appellants filed timely appeals of the 1993 denial. The Commission ultimately denied DOT and DER's motion to dismiss finding that the Commission had jurisdiction to review the 1993 denial.

The hearing examiner in Fulk, et al., shared a copy of the Vesperman decision with the parties at hearing when she felt DER's hearing presentation suggested DER might claim these appeals should be dismissed on preclusion grounds due to the failure of some of the appellants to appeal the results of their prior reclassification requests. DER has offered no arguments to distinguish the situation in Vesperman from the situation presented in Fulk. Nor is the Commission aware of any distinguishing feature which would dictate or justify a different result.

ORDER

Pursuant to the parties' agreement, DHSS is dismissed as a party. Further, DER's denial of appellants' R/R request for classification as PBMs is

rejected and this matter is remanded to DER for action consistent with this decision.⁵

Dated _____, 1996.

STATE PERSONNEL COMMISSION

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Donald R. Murphy, Commissioner

Judy M. Rogers, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

⁵ Appellants in their final post-hearing brief dispute DER's interpretation of what will occur if appellants prevail. DER believes that if appellants prevail, they would be entitled to a back-pay check representing the difference in wages between the PBM and the SSS-2 classification to compensate for the period commencing on 5/2/94 (the agreed-upon effective date of appellants' R/R request) up to 10/16/94. The ending date is based on implementation of new classification specification covering appellants' positions, a reallocation decision already upheld by the Commission in Briggs, et al. v. DER, 94-0750, 0831, 0901-0905, 0945 & 0947-PC (5/26/95). The appellants disagree. They argue that the new classification specifications effective 10/16/94, might have been assigned to a higher pay range if DER had been informed by the Commission previously that appellants' positions prior to 10/16/94, were a best fit with the PBM pos. std. However, as noted in the discussion section of this decision, the pay associated with any classification is an issue beyond the scope of the Commission's jurisdiction to consider.

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