

**ROBERT TIEDEMAN, and
DEBRA MARX,**
Appellants,

v.

**Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES
[DEPARTMENT OF HEALTH AND
FAMILY SERVICES]¹, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,**
Respondents.

FINAL
DECISION
AND
ORDER

Case Nos. 96-0073, 0085-PC

A proposed decision and order was issued in the above matter on March 7, 1997. Appellants filed written objections on March 31, 1997. After considering the objections and conferring with the hearing examiner, the Commission adopts the proposed decision and order, a copy of which is attached hereto, and adds the following discussion in response to the objections.

Complainants acknowledge that they spend the majority of their time serving as the therapist for clients in their assigned units, but contend that Mr. Freidig, whose position is classified at the Therapist 3 level, has a similar assignment. This contention is premised on the duties described in Mr. Freidig's 1993 position description. However, it is undisputed that respondent based its decision to classify Mr. Freidig's position at the Therapist 3 level on the information contained in his 1988 position description. That position description shows he was primarily responsible for developing and coordinating the "Individual Adaptive Physical Education Treatment Program for adult multiply handicapped clients throughout the Center." Even though the 1993 position

¹ Pursuant to the provisions of 1995 Wisconsin Act 27, effective July 1, 1996, the Department of Health and Social Services was renamed the Department of Health and Family Services.

description was admitted into the record as an exhibit in this matter, it has limited relevance to the determination of this case because it was not relied upon for the decision to classify Mr. Freidig's position as a Therapist 3. It was not maintained in the files of respondent DHSS's Bureau of Personnel and Employment Relations as Mr. Freidig's position description. Only the 1988 position description was in those files.

In their objections, appellants also incorrectly describe the testimony relating to Ms. Marx's responsibilities at the institution's pool. According to the appellants, "Mr. Wilson testified that the aquatics program is a significant clinical therapy program." Mr. Wilson's actual testimony indicates otherwise. In response to a question from Ms. Marx he stated that the aquatic program is a "clinical program." However, he subsequently offered the following testimony in response to questions by respondents' counsel:

Q Is Mr. Tiedeman recognized by Southern Center as an authority . . . in a clinical . . . as an institution-wide authority in a clinical program area?

A As an institution-wide authority, no sir, other than he is recognized as a recreational specialist, a therapist, institution-wide. If you are speaking of a specific area of specialty, other than his position for which he was hired, no sir.

Q Are there other recreational therapists that perform duties similar to Mr. Tiedeman?

A There would be some other people who would do some things are similar, perhaps not exactly similar.

Q In regards to Ms. Marx, is she recognized by management at Southern Center as an authority within a specific clinical program area, center-wide?

A I would say about the same thing for Ms. Marx with one exception. At one point, three . . . three years ago, I had Deb in an acting position. . . I think in an acting lead position three years ago. Other than that, people know that Deb has a swimming program and she has a part in the Halloween program that's coming up and she would take people out and participates in the Friday night movie. It's a normal type of, I think, responsibility. Is she a specific expert on a center-wide responsibility? Not in terms of an appointment, no.

Finally, the Commission notes that its decision in this matter is based solely on the record rather than on extra-record information found in appellants' objections.

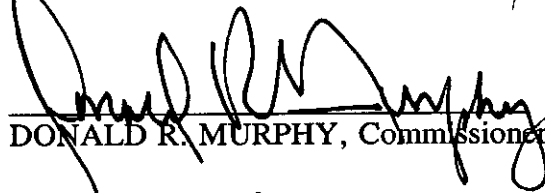
ORDER

The Proposed Decision and Order is adopted as the final order of the Commission, respondents' decisions denying the appellants' requests to reclassify their positions from Therapist 2 to Therapist 3 are affirmed and these appeals are dismissed.

Dated: April 24, 1997 STATE PERSONNEL COMMISSION

KMS
960073Adec3.doc


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Robert Tiedeman
545 Sara Lane
Racine, WI 53402

Debra Marx
243 Kendall Street
Burlington, WI 53105

Joe Leann
Secretary, DHFS
1 W. Wilson St., 6th floor
P.O. Box 7850
Madison, WI 53707-7850

Jon E. Litscher
Secretary, DER
137 E. Wilson St.
P.O. Box 7855
Madison, WI 53707-7855

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

**ROBERT TIEDEMAN, and
DEBRA MARX,**
Appellants,

v.

**Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES
[DEPARTMENT OF HEALTH AND
FAMILY SERVICES]², and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,**
Respondents.

**PROPOSED
DECISION
AND
ORDER**

Case Nos. 96-0073, 0085-PC

These matters are before the Commission as appeals from decisions denying their requests to reclassify their positions from Therapist 2 to Therapist 3. The parties stipulated that the effective date of the transaction would be in March of 1994.

The relevant portions of the class specifications read:

Therapist 2

Definition:

This is full performance level work as a therapist in a state institution. Employees at this level are responsible for designing, coordinating, implementing and evaluating therapy program components as part of a multi-disciplinary treatment and rehabilitation program for disabled or injured patients. Employees at this level may delegate some aspects of treatment to lower level therapists or therapy assistants. The work is performed in accordance with overall treatment goals and under the general supervision of a supervising therapist or treatment director.

² Pursuant to the provisions of 1995 Wisconsin Act 27, effective July 1, 1996, the Department of Health and Social Services was renamed the Department of Health and Family Services.

Areas of Specialization

Music Therapy, Pre-vocational Therapy or Recreation Therapy

Therapist 3

Definition:

This is advanced level therapy work in a state institution. Employees at this level are responsible for developing and implementing a significant clinical therapy program area and are recognized as the authority within the institution for the clinical program area. In addition to responsibility for the clinical program area, employees may also be responsible for directing and reviewing the work of other therapists, therapy assistants or therapy students in the performance of the activities of the clinical program area. Employees are responsible for initiating program changes within established guidelines and principles of the therapy profession. Positions at this level differ from those at the lower levels by the overall responsibility for the clinical program area. Work is performed under the general supervision of a supervising therapist or treatment director.

Areas of Specialization

Music Therapy, Pre-vocational Therapy or Recreation Therapy

Examples of Work Performed:

Perform all functions of the Therapist 2 and in addition:

Provide consultation in the area of expertise to other clinical program areas or disciplines.

Evaluate effectiveness of treatment methods and programming and identify necessary program revisions.

Implement program changes to meet the needs of the patients in the clinical area and evaluate the appropriateness and effectiveness of such changes.

Review current literature pertaining to treatment modalities and determine the appropriateness of implementing changes to the program area.

Develop and present justification for changes to and improvement in the clinical program area to management, clinical directors and staff of other disciplines for discussion and approval. . .

Develop and conduct training sessions to demonstrate proper procedures or new techniques for providing treatment activities.

Both appellants serve as the therapist for a specified group of residents at Southern Wisconsin Center (SWC). Mr. Tiedeman's clients reside within Unit B of SWC. Ms. Marx's clients reside in Unit A. Both appellants spend the majority of their time serving as the therapist for the clients in these assigned groups.

Appellants contend that in addition to their role as the therapist for a specified group of SWC residents, they have specific responsibilities which qualify their positions for classification at the higher Therapist 3 level.

Mr. Tiedeman testified that he: 1) Functions as the lead therapist on Unit B approximately 10% of his time;³ 2) has written program descriptions for various programs on the unit; 3) has functioned as a substitute vocational teacher in that person's absence from Unit B; and 4) has lead and conducted staff meetings of the Recreation Department. This last responsibility is rotated between 11 SWC employes, all of whom are classified at the Therapist 2 level. Each individual serves as meeting coordinator for a 1 to 2 week period before the responsibility rotates to another therapist. During that 1 to 2 week period, the therapist spends approximately 5% of his/her time on the responsibility.

Ms. Marx testified about her role in two programs which, she claimed, supported her reclassification request. The first program is entitled "Safe Behavior Management." It provides training to other staff members in order to reduce injuries to staff and to residents. The training includes avoiding and dealing with potentially assaultive behavior by the clients and safe lifting techniques for moving clients. Ms. Marx is one of two individuals who provide instruction on these topics to new employes. All SWC employes must also take a refresher course on this topic every year. There are a total of approximately 10 employes who conduct this annual training. The second program relied upon by Ms. Marx relates to SWC's pool. Ms. Marx is one of

³ Although Mr. Tiedeman indicated he was functioning as a leadworker, he acknowledged he did not prepare annual performance evaluations nor did he schedule the work of the other therapists.

two certified lifeguards at the facility. The indoor pool is open approximately 20 hours per week and one of the two lifeguards must always be present.

OPINION

Appellants have made several arguments regarding the methods relied on by respondent in making the decision that is being reviewed. Appellants suggest that the Commission may not consider information that was not considered by the personnel analyst who denied their reclassification request. Contrary to appellants' arguments, the proceeding before the Personnel Commission is a hearing *de novo*. The Commission is not limited to reviewing the analysis carried out by the personnel analyst. The Commission considers all admissible relevant evidence at the hearing regardless of whether it had been available to respondents at the time of the initial decisional process. *Bluhm v. DER*, 92-0303-PC, 6/21/94;⁴ *Klein v. UW & DER*, 91-0208-PC, 2/8/93.

Mr. Tiedeman served as Acting Director of the Hospital Improvement Project program for nine months for Unit B and Ms. Marx served as Acting Recreation Coordinator. Because these responsibilities were temporary rather than permanent assignments, they do not constitute duties on which the Commission will base a review of the appellants' reclassification requests. *Dolsen v. UW & DER*, 93-0066-PC, 6/21/94; *Siewert v. DER*, 91-0235-PC, 9/18/92.

The appellants also point to various permanently assigned duties in support of their requests for classification at the Therapist 3 level. The key distinction between the two class levels in question is that Therapist 3s are "responsible for developing and

⁴ In their rebuttal brief, appellants contend that prior decisions of the Commission that were cited by respondents in respondents' brief "cannot be considered in this case as the Appellants did not have fair and equal access to this case." Contrary to appellants' contention, the Commission may choose to analyze the current cases in a manner that is consistent with previous Commission decisions, even though neither Mr. Tiedeman nor Ms. Marx were parties to those earlier Commission cases. Today's decision is consistent with principles enunciated in prior decisions which are available to the public and are accessible via the Commission's Digest of Decisions. The instant case has not been decided based upon evidence or information obtained without the presence of the appellants. Compare; *State ex rel. Cities Service Oil Co. v. Board of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963).

implementing a significant clinical therapy program area and are recognized as the authority within the institution for the clinical program area.”

None of the responsibilities identified by Mr. Tiedeman satisfy the requirements for classification at the Therapist 3 level. Mr. Tiedeman was never assigned, on a permanent basis, institution-wide responsibility for a significant clinical therapy program area. For the most part, his responsibilities have been limited to Unit B. The one exception is his role coordinating meetings of SWC Recreation Department staff. However, this responsibility is rotated every week or two to another Therapist 2 and Mr. Tiedeman cannot be viewed as “the authority within the institution” for this area.

Ms. Marx’s case is less clear. She relied on her roles in two programs to support her reclass request. The focus of the “Safe Behavior Management” training that Ms. Marx and others provide to staff members is to reduce injuries to staff and to residents, rather than as a method of providing therapy to SWC residents. The record also does not support a conclusion that Ms. Marx is “the authority within the institution” for this program. She is one of two persons who provides training to new employees and one of approximately 10 who provides annual refresher training.

Ms. Marx also relies on her role with SWC’s pool. She testified that she spends approximately 25% of her time on the aquatics program including 5% on pool maintenance. This correlates with testimony that she is one of 2 certified lifeguards for the pool which is open approximately 20 hours per week. The other lifeguard, Richard Cooper, is also classified at the Therapist 2 level. A lifeguard must be present whenever the pool is in use. The 20 hours per week includes one or more “free swim” periods when the appellant’s role is solely one of a lifeguard. Ms. Marx also spends some of her time at the pool with her own clients from Unit A. Whenever a SWC resident is in the pool during other than a “free swim,” a recreation therapist assigned to the resident’s unit is also present. In some cases, the therapist does not have a background in aquatics and Ms. Marx or Mr. Cooper may provide assistance. Depending on their level of disability, the resident is taught swimming techniques or range of motion exercises. In some cases, the therapist actually manipulates the resident’s body.

The assistance that Ms. Marx provides is primarily with respect to swimming strokes. Ms. Marx is a certified water safety instructor.

Ms. Marx has not sustained her burden of establishing that her role at the SWC pool meets the Therapist 3 class requirement that she be “responsible for developing and implementing a significant clinical therapy program area” or that she is recognized as “the authority” for a clinical program area.

SWC management has not denominated the pool as a separate and significant clinical therapy program area as those terms are used in the class specifications. Ms. Marx is one of two Therapist 2s who serve as lifeguards at the pool and she clearly has more expertise in swimming instruction than the vast majority of other therapists at SWC. However, she has not been assigned the overall responsibility for developing and implementing an aquatics therapy program, or for initiating program changes. Other therapists who are comfortable in the pool may instruct or manipulate a client in the pool, without appellant’s involvement other than as a lifeguard. Ms. Marx’s role is more as a lifeguard and in maintenance of the pool rather than in developing and implementing a therapeutic aquatic program.

The parties also presented evidence relating to a number of comparison positions classified at the Therapist 2 or 3 levels. The comparisons include the following:

a. The Therapist 3 position description for the position filled by Kristine Martineau at Northern Wisconsin Center. The position description includes, as goal B: “Consultant and resource responsibilities for the promotion and expansion and [sic] of music therapy theories and practices throughout the institution and for the community.” (Resp. Exh. 10) This language relates directly to the specific reference in the Therapist 3 specifications to specialization in the area of music therapy and being recognized within the institution as the authority for that program area. Appellants’ positions must be distinguished on these points.

b. The Therapist 3 position at Central Wisconsin Center (CWC) filled by Daniel VanRiper. Mr VanRiper was recognized by management as the authority within CWC for “supported employment” programs which matched CWC residents with em-

ployment opportunities within CWC, with other agencies and within the local community. Goal B of Mr VanRiper's 1993 position description (App. Exh. 11), shows that he was responsible to "[p]rovide on-going staff training on supported employment, and other pertinent vocational issues, to CWC, interagency, and community staff." This evidence is consistent with the language of the Therapist 3 specifications and differentiates this position from the appellants' positions.

c. The Therapist 3 position at CWC filled by Don Freidig. The record establishes that respondents classified Mr. Freidig's position at the Therapist 3 level based upon the duties and responsibilities he was assigned in 1988 (Resp. Exh. 9) which identified his primary responsibility as developing and coordinating the "Individual Adaptive Physical Education Treatment Program for adult multiply handicapped clients throughout the Center." Appellants submitted a portion of a 1993 position description (App. Exh. 1, p. 9) for Mr. Freidig's position which merely showed it as responsible for a full range of recreation activities for Murphy Hall residents,⁵ a set of duties which arguably are comparable, in terms of class level definitions, to those performed by the appellants. The problem with the 1993 position description is that there is no indication that it had been signed by the CWC personnel manager.⁶ Therefore, appellant have not established that it was a valid position description that is binding on respondents for the purpose of analyzing classification levels.

⁵ According to Mr. Freidig's testimony, he oversaw the work of two other therapists and three assistant therapists with responsibilities encompassing approximately 80 Murphy Hall residents in four separate living units of Murphy Hall.

⁶ Respondents' witness testified the 1993 position description was not the position description kept on file for Mr. Freidig's position at DHFS's Bureau of Personnel and Employment Relations.

ORDER

Respondents' decisions denying the appellants' requests to reclassify their positions from Therapist 2 to Therapist 3 are affirmed and these appeals are dismissed.

Dated: _____, 1997 STATE PERSONNEL COMMISSION

KMS
960073Adec2.doc

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Robert Tiedeman
545 Sara Lane
Racine, WI 53402

Debra Marx
243 Kendall Street
Burlington, WI 53105

Joe Leann
Secretary, DHFS
1 W. Wilson St., 6th floor
P.O. Box 7850
Madison, WI 53707-7850

Jon E. Litscher
Secretary, DER
137 E. Wilson St.
P.O. Box 7855
Madison, WI 53707-7855