STATE OF WISCONSIN PERSONNEL COMMISSION

TOM ACKLEY,
Appellant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 00-0135-PC

RULING ON PETITION FOR REHEARING

The Commission issued a final decision and order (FDO) in the above-noted case on August 1, 2001. The appellant filed a petition for rehearing on August 14, 2001 (by letter dated August 13, 2001).

As background, the hearing involved classification specifications, which became effective on May 21, 2000. The agreed-upon statement of the hearing issue is shown below (Conference Report dated October 26, 2000):

> Whether respondents' decision to reallocate the appellant's position to Forestry Technician rather than to Forestry Technician – Advanced was correct.

The Commission found in the FDO that respondents' decision was correct.

OPINION

Petitions for rehearing are governed by section 227.49(3), Stats., which provides as noted below:

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

The appellant first contends that he has discovered new evidence sufficiently strong to reverse the final decision and order His argument is shown below:

> [The] new evidence . was unknown and not received by the appellant from the union in time to submit with my original evidence. In my efforts to gather supporting documents to prove my case I was not informed of correspondence between Gene Francisco, Director of the Bureau of Forestry, and Sue Steinmetz, Chief Classification Specialist; and also between Mr Francisco and Larry Severtson, former Forestry Technician and union representative, that directly address and attempt to clarify the distinction between the Forestry Technician positions. These communications should be regarded as representing current and recognized guidelines when considering these positions as Mr Francisco makes it clear that both forest management and fire control are "professional disciplines" and "should be classified as such."

The appellant attached two documents to his petition. The first is a letter from Mr Francisco to Mr Severtson dated April 20, 1998. Mr. Francisco states therein that the Bureau of Human Resources believes "fire control and forest management are both professional disciplines" and that positions performing both "should be eligible for the Forestry Technician 5 classification if they meet certain criteria." He did not define or expand upon the phrase "if they meet certain criteria." This letter does not have the potential to change the FDO. The appellant, apparently, is contending that the cited phrase in Mr Francisco's letter means positions performing both fire control and forest management duties should be classified under the current specifications at the Advanced level. This contention is unpersuasive. First, Mr Francisco's comments related to the old specifications and not the current specifications at issue in this case. Even if it were assumed that the comments have some application to the new specifications, Mr Francisco did not state that *all* positions performing both types of duties should be at the Advanced level but only those meeting "certain criteria." Nowhere in the letter does Mr Francisco state what the additional criteria should be. Furthermore, the current specifications at the Technician level encompass a degree of forest management work

activities.[1] It cannot be concluded, accordingly, that the current specification adopted appellant's interpretation of what Mr Francisco said in the letter.

The second document attached to the petition is a memo from Mr. Francisco to Ms. Steinmetz dated July 9, 1999. Mr. Francisco provides feedback in this memo on the draft of the classification specifications at issue in this case. The appellant does not specify which portion of this memo is important to his case. It appears he is relying upon the following language:

> Classification levels -- The two level classification system is an improvement over the current five level system. The differentiation between the proposed two levels seems generally appropriate, however, we are concerned that the language may not be clear enough to appropriately classify those positions that our closest to the "middle;" what we judge to be the current Technician 3's.
>
> Classification descriptions -- The language describing the proposed Forestry Management Technician includes reference to "specific geographic area" and "assigned area." These terms are problematic if they are defined narrowly. Our foresters are responsible for specific geographic areas, within which our technicians are assigned projects. For example, a technician would not be assigned to "develop a management plan for an assigned area," if assigned area refers to a pre-determined number of townships. Rather, a technician would be assigned to complete management plans for specific tracts of land that correspond to ownership boundaries. The location of assignments would be based on ensuring efficiency and minimizing the delivery costs for services within the team's geographic area of responsibility, balancing the relative workloads of the staff within the team, and matching the complexity of a given project (professional/technical) with the appropriate classification level. The specifications for this classification should reflect this functional situation and be based on the complexity of tasks and level of responsibility, rather than a pre-set and static piece of ground.

This information also is insufficient to change the FDO. First, the draft specifications Mr Francisco was providing comments about are not in the record or attached to the petition. It is not possible, accordingly, to place the comments into a meaningful context. Second, the final classification specifications at issue in this case do not contain two of the phrases quoted in Mr

[1] The Representative Position in the Technician classification specification entitled "Forestry Technician" specifically states that in addition to fire control duties the position performs "forest management work activities."

Francisco's memo ("specific geographic area" and "develop a management plan for an assigned area"). One phrase ("assigned area") is found in the Advanced classification specification ("Definitions" section), but in relation to an "assigned area of responsibility" rather than as a geographic reference to which Mr. Francisco was commenting.

Based on the foregoing, the Commission disagrees with appellant's assertion that the documents attached to the petition "should be regarded as representing current and recognized guidelines" for the classification specifications at issue in this case.

The Commission further notes the appellant has not shown that the documents attached to his petition could not have been discovered previously by "due diligence," within the meaning of section 227.49, Stats. The documents clearly existed prior to the hearing. The appellant apparently relied upon his union to provide documents he could use at hearing and he bears the resulting risk that the union might fail to provide all documents that he deems relevant. There is no indication that he requested respondents to provide documentation or that respondents failed to provide any information he may have requested.

The appellant also claims that material errors of fact exist in the FDO. His contention is shown below (emphasis appears in the original):

> Also, littered thruout (sic) the analysis are material errors of fact. As noted in the FDO, the testimony of the classification expert regarding a minimum of at least 15% forest management 'not only relies upon a criterion which is <u>not reflected</u> in the specifications in the Advanced classification, but also <u>conflicts</u> with the language in the "Purpose" section of the specifications to the effect that the "best fit" is determined by the majority (more than 50%) of the work assigned to and performed by the position. Further compounding this error is the attempt to assign percentages to specific tasks. At no time in either the appellant's or respondents' presentations were worker activities or goals broken down in the percentages indicated. These fractions, which do not conform with my position, were arbitrarily arrived at by the Personnel Commission and cannot be used as a basis for proper disposal of this case. Because of these mistakes the FDO is poorly reasoned and flawed, and with the inclusion of the previously noted new evidence it is important that this petition to rehear case no. 00-0135-PC be granted.

The Commission does not understand the first part of the appellant's argument. He filed objections to the proposed decision and order (PDO), by letter dated June 19, 2001 He

specifically took issue with the PDO's adoption of the classification expert's testimony that positions must perform at least 15% of forest management duties to qualify at the Advanced level. The Commission agreed with his argument as noted in the FDO (p. 5) and as noted in the above quote. To the extent that the appellant may now be claiming that the Commission erred in rejecting the 15% cutoff, such argument is rejected.

The appellant also contends that the Commission erred in assigning percentages to PD tasks. The Commission analyzed the appellant's position description (PD) and others in the record utilizing the presumption that all tasks within a goal contribute equally to the time spent on the goal. For example, if goal A of a PD accounted for 50% of the position's time and 5 tasks were listed in the goal, it was presumed that each task accounted for 10% of the position's time (50% goal divided by 5 tasks = 10% per task). The appellant objects to use of the presumption.

The Commission has used the presumption that each task within a goal contributes equally to the time spent on the goal (*see*, e.g., *Sunstand v. DER*, 5/28/96, p. 7, item #9). The Commission has deviated from this method where differing percentages were noted in the PD (*see*, e.g., *Seidel v. DER*, 95-0081-PC, 7/23/96, pp. 6-7) or where differing percentages were supported by testimony in the record (*see*, e.g., *Sandow v. DER*, 94-0180-PC, 3/8/95 and *Jacobson v. DER*, 94-0147-PC, 4/20/95).

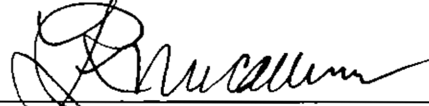
The record in this case lacked information on how to determine the time percentage attributable to tasks within PD goals. In the absence of contrary information in the record, it was reasonable and consistent with its prior cases for the Commission to assume that tasks contributed equally to a PD goal. The appellant has the burden of proof in this case (e.g., *Harder v. DNR & DER*, 95-0181-PC, 8/5/96) and did not provide any method to apportion the tasks within a goal for his own PD or for any other PD in the record.

ORDER

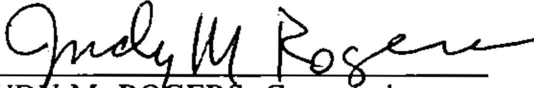
Appellant's petition for rehearing is denied.

Dated: September 5, 2001.

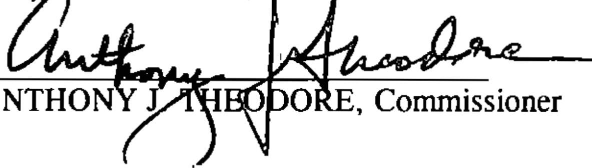
STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



JUDY M. ROGERS, Commissioner



ANTHONY J. THEODORE, 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