STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER M. ZENCHENKO, Appellant,

v.

Director, OFFICE OF STATE EMPLOYMENT RELATIONS, Respondent.

Case 672
No. 64791
PA(der)-111

Decision No. 31614

Appearances:

Christopher M. Zenchenko, appearing on his own behalf.

Michael D. Scott, Assistant Legal Counsel, Department of Natural Resources, P.O. Box 7921, Madison, Wisconsin, 53707-7921, appearing on behalf of the Office of State Employment Relations.

ORDER DENYING MOTION TO DISMISS

This matter, which arises from a classification action taken in 1997, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss the appeal as untimely filed. The parties reached a stipulation of facts and neither party requested an evidentiary hearing. Respondent filed two exhibits along with its initial brief and Appellant submitted an affidavit with his response. The matter was ready for decision once the Commission received Respondent's reply brief on August 19, 2005.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT[1]

1. In 1993, the Appellant's position in the Bureau of Solid and Hazardous Waste Management of DNR was reclassified to the Administrative Assistant 4 level and his role identified as the bureau's Data Coordinator. Early in 1996, the Appellant approached his supervisor about the possibility of a reclassification to the Administrative Assistant 5 (AA 5) level. He was told by his supervisor that no reclassification requests not directly related to the agency reorganization would be accepted at that time.

[1] The parties stipulated to Findings 1 through 10.

2. DNR reorganized the Bureau in 1996, creating the Bureau of Waste Management and the Bureau of Remediation and Redevelopment.

3. DNR assigned Appellant's position into the Bureau of Remediation and Redevelopment. During the transition period (about a year or so), the Appellant continued to manage IT resources for both bureaus. The only visible change accorded to the reorganization during that time was the eventual movement of the Appellant's office across the hall to the area where the new bureau staff were housed.

4. Appellant contends that during the analysis preceding implementation of the AA classification survey, based on his actual job duties, his position should have been reallocated to the Management Information Specialist (MIS) classification series. However, his position description was only reviewed by Human Resources and not updated. Thus it remained at the Administrative Assistant 4 level.

5. Effective May 11, 1997, Respondents implemented a classification survey that reallocated Appellant's position to the Natural Resources Bureau Data Coordinator-Objective (NRBDC-Objective) classification.

6. Appellant, who is blind, was informed, verbally, by his supervisor that his position had been reallocated to the NRBDC-Objective level. This conversation occurred in 1997. However, discussion of appeal rights and procedures was omitted from the conversation, and Respondents did not supply the Appellant with an electronic version of the official reallocation notice.

7. Again, in 1998, 2000, and 2001, Appellant informally sought to have his position reclassified but his bureau management did not submit a formal request on his behalf until April 2, 2003. The effective date for the formal request was April 6, 2003.

8. The IS Business Automation (ISBA) Analyst classification series was created and became effective on December 31, 2000. However, the MIS series was abolished in March 1997 and a number of new series was created in its place. The closest of these new series to IS Business Automation, was IS Program Area Liaison. In turn, the IS Program Area Liaison was abolished in 2000 when the IS Business Automation series was created.

9. Respondents issued a written decision regarding Appellant's outstanding reclassification request in January of 2005. The decision reclassified the Appellant's position to the ISBA Analyst classification level rather than to the ISBA Senior level as sought by the Appellant. However, Respondents decided not to regrade the Appellant and based their decision on Sec. ER 3.015(2)(b) and (c), Wis. Adm. Code. The transaction was effective on April 6, 2003.

10. Appellant filed a letter of appeal with the Commission on February 17, 2005.

11. The February 17th appeal (2005 appeal) was denominated DNR & OSER (Zenchenko) Case 3, No. 64516, PA(der)-107. The appeal stated, in part:

> [T]he following text constitutes a formal appeal of certain personnel actions under s. 230.44(1)(b). The decision being appealed is dated January 19, 2005. A written copy of the decision was delivered to the appellant on January 20, 2005. . . .
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> In 1996, the Appellant – then an Administrative Assistant 4-Data Coordinator – was told reclassification requests would not be accepted during the agency reorganization period (ultimately 1995-97). Immediately following the agency reorganization, the IS classification survey was undertaken, and the Administrative Assistant classification series was simultaneously abandoned.[2] As a result, the Appellant's position was reclassified as Natural Resources Data Coordinator 4,[3] without benefit of a job analysis.
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> At the first opportunity (2000), Appellant began the reclassification request process. . . . Because the Appellant's job duties had not substantially changed in nature since his reclassification to AA4 in 1993, the 2000 request was mainly to re-title the position in the IS Professional classification series – at the senior level, which matched the substantiated job duties.
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> The Appellant submitted his original request to bureau management early in 2000. Various negotiations between the bureau and Human Resources ensued, and in April, 2003, the request was finally formally submitted to Human Resources for action. . . .
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> On January 19, 2005, a written decision was rendered on the Appellant's 2003 reclassification request. The Appellant's position was reclassified to IS Business Automation Analyst (not "senior") as was originally requested). The Appellant, however, was not re-graded due to failure to show a logical and gradual progression of job duties over time.

12. The Commission convened a pre-hearing conference regarding the 2005 appeal on April 7, 2005. Respondents raised an objection to addressing classification actions that occurred prior to April 6, 2003, which was the effective date of the decision in January of 2005 that generated the appeal.

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[2] This sentence appears to be inconsistent with the stipulated facts.

[3] This is apparently an inaccurate reference to the 1997 action to reallocate Appellant's position from Administrative Assistant 4 to NRBDC-Objective, which is the personnel transaction that is the subject of the instant appeal.

13. On May 12, 2005, Mr. Zenchenko filed a second appeal (1997 appeal) with the Commission. The May 12th appeal related to the 1997 reallocation decision, was denominated OSER (Zenchenko) Case 672, No. 64791, and included the following statement:

> The decision being appealed is dated June 10, 1997. The Appellant, who is totally blind, never received notification that this decision constituted a reallocation or that it could be appealed. He did not receive any information on how to submit an appeal or what the deadlines were. He was told, verbally, by his supervisor only that his position's "title had changed, due to the DNR reorganization." A written copy of this decision was first delivered to the Appellant on April 13, 2005. . . .

14. In Mr. Zenchenko's affidavit dated August 16, 2005, he states:

> The reallocation notice dated May 10, 1997 was never received in hardcopy, presumably due to the inaccessible location of my employee mailbox. Because no verbal or electronic indication of the existence of such a document was ever given to me, I was unable to have it picked up and read to me. As a result, I was never notified that the change of job title was actually an official reallocation and that I had appeal rights under Wisconsin statutes.
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> According to the DNR Human Resources office, notification of this action and appeal rights was also included in the next pay stub after the effective date of the action. Because my pay is directly deposited, and the pay stubs are printed in a non-scannable format and delivered to the same inaccessible employee mailbox, I do not make any effort to collect them, as they are unusable to me. Since HR made no attempt to effectively communicate the existence of such a document, I was unable to have it picked up and read to me. Therefore, I was never notified of my appeal rights.
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> On April 13, 2005, a copy of the reallocation dated May 10, 1997, was provided to me as a courtesy during review of a more recent HR decision. On July 12, 2005, an imaged copy (PDF image format) of the paystub insert was sent to me electronically. Based on the appeal language in these documents, "30 days from the effective date of the action or the date of notification, whichever is later," I filed my appeal of the May 10, 1997 HR action on May 12, 2005 – 30 days after I received notification via the copy of the reallocation notice.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that his 1997 appeal was timely filed in accordance with the 30-day time limit established in Sec. 230.44(3), Stats.

2. The Appellant has sustained that burden.

3. The appeal of Respondent's decision to reallocate the Appellant's position, effective May 11, 1997, is timely, based on the record that is before the Commission.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's motion is denied without prejudice. The Commission will contact the parties regarding further proceedings.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

OSER (Zenchenko)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The issue in this matter is whether Mr. Zenchenko, who is blind, complied with the time limit for filing a State classified service personnel appeal arising from the 1997 decision to reallocate his position. The time limit is established in Sec. 230.44(3), Stats., which reads, in part:

> Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later.

Mr. Zenchenko seeks review of the decision by the Office of State Employment Relations[4] (OSER) reallocating his position from Administrative Assistant 4 (AA4) to Natural Resources Bureau Data Coordinator-Objective (NRBDC-Objective) that was effective May 11, 1997. The May 12, 2005 appeal was clearly filed more than 30 days after the effective date of the reallocation. The sole question is whether it was filed within 30 days after Appellant was notified of the action.

The Director of OSER is granted authority under Sec. 230.09(2), Stats., to allocate and reallocate every position in the classified service "to an appropriate class." The Director has promulgated various administrative rules relating to its classification authority, including Sec. ER 3.04, Wis. Adm. Code:[5]

> Approvals or denials of reallocations or reclassifications shall be made to the appointing authority in writing. The appointing authority shall immediately notify the incumbent in writing.

This language, in conjunction with Sec. 230.44(3), Stats., has been consistently interpreted so that *written* notice of a classification decision commences the 30-day period for filing an appeal *but verbal notice does not*. PIOTROWSKI V. DER, CASE NO. 84-0010-PC (PERS. COMM. 3/16/84) (January 11th appeal was timely even though the employee did not dispute having been told of the reallocation decision in October, where she did not receive written notice until December 27th); KAESKE V. DER, CASE NO. 90-0382-PC (PERS. COMM. 11/14/91); HEATH & MORK V. DOC & DER, CASE NO. 93-0143-PC (PERS. COMM. 6/23/94).

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[4] OSER was created by 2003 Wis. Act 33, effective July 26, 2003. Even though the 1997 reallocation decision in question is attributable to OSER's predecessor agency, the Department of Employment Relations (DER), the Commission's ruling references OSER rather than DER in order to minimize any confusion.

[5] There have been no changes to the rule since 1981.

The analysis in PIOTROWSKI included the following:

> In the absence of the specific requirements set forth in the administrative rules, the Commission would be inclined to define the term "notify," as it is used in Sec. 230.44(3), Stats., to include written or verbal notice. This result would be consistent with the general definition of the term as found in BLACK'S LAW DICTIONARY, revised Fourth Edition:
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> > To give notice to; to inform by words or in writing, in person or by message, or by any signs which are understood; to make known; to "notify" one of a fact is to make it known to him; to inform him by notice. (citation omitted)
>
> However, as applied to reclassification and reallocation decisions, the Secretary has adopted a more stringent definition of "notify" that requires written notice to both the appointing authority and to the position incumbent. In order to comport with the requirements set forth in Sec. ER-Pers. 3.04, Wis. Adm. Code, the thirty day period for filing an appeal under Sec. 230.44, Stats., does not commence until an appellant has received written notice of a reclassification or reallocation decision.

Mr. Zenchenko has the burden of establishing that his appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04). He must establish, by a preponderance of the evidence, that he did not receive written notice of the reallocation decision in 1997, when notices were issued, or at some other time more than 30 days before he filed his appeal.

Respondent's initial brief in support of its motion sets forth the key assertions regarding the 1997 appeal as follows:

> During a prehearing conference regarding the 2005 appeal, the parties discussed the 1997 reallocation decision and how it might marry into the 2005 appeal. The DNR was against adding it because the time for appealing would have been 1997, and because[,] if heard, it would have an impact on the course of the 2005 appeal. Appellant claimed during the prehearing conference that he had never gotten a written copy of the reallocation decision in 1997. The DNR believed that the original document would [have] been provided to Appellant, but agreed that it would provide him with a written copy, as a courtesy. Subsequent to receiving the copy, Appellant filed the appeal of the 1997 reallocation decision. . . .

> The DNR[6] makes the assertion that [the June 10, 1997 notice] was delivered to Appellant sometime shortly after June 10, 1997 and although it cannot verify that it was, it has no reason to believe that it had not been delivered. Indeed, the burden is on Appellant to provide adequate proof that he never received the document. The very fact that a copy of this document exists,[7] means that it was written, was in existence, and creates a clear presumption that it had been provided to Appellant. Thus, Appellant would have received actual notice of the reallocation, back in the summer of 1997.

In support of his position, Mr. Zenchenko filed an affidavit stating, in part, the following:

> The reallocation notice dated May 10, 1997 was never received in hardcopy, presumably due to the inaccessible location of my employee mailbox. . . .
>
> On April 13, 2005, a copy of the reallocation dated May 10, 1997, was provided to me as a courtesy during review of a more recent HR decision. . . . I filed my appeal of the May 10, 1997 HR action on May 12, 2005 – 30 days after I received notification via the copy of the reallocation notice.

The only question before the Commission is to determine when Mr. Zenchenko received written notification of the 1997 reallocation so as to have commenced the 30-day period for filing an appeal of the transaction.[8] In his affidavit, Zenchenko clearly avers that the formal notice did not reach him until April 13, 2005, after he had filed his initial appeal. While Respondent suggests that Appellant must have received a hard copy of the notice in 1997, it has failed to submit any evidence to support this argument and to counter Appellant's affidavit. Nothing in the case file indicates that OSER or DNR supplied Zenchenko with any document (official notice or otherwise) that reflected the change in the classification of his

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[6] Even though Respondent references the Department of Natural Resources in its brief, the Commission understands that the reallocation decision was an undelegated transaction attributable solely to OSER.

[7] While Respondent indicates there is a copy of the 1997 notice, it is not of record.

[8] In his brief in opposition to the motion to dismiss, Mr. Zenchenko argues that in order to be provided notice for purposes of Sec. 230.44(3), Stats., he had to be informed of the meaning of "reallocation" and be provided with all of the information set forth in the written notice supplied to sighted employees. In light of its conclusion relating to the much narrower question of whether/when he received written notice of the change in the classification of the position he occupied, the Commission does not reach either argument. However, the Commission notes the existence of a previous ruling holding that the 30-day time limit in Sec. 230.44(3), Stats., is based on notice of the "action" rather than notice of the right to appeal the action. BROOKS V. UW-MADISON, CASE NO. 00-0111-PC-ER (PERS. COMM. 6/27/03).

position to NRBDC-Objective until sometime within 30 days of the date the appeal was filed. There is no inherent implausibility to Mr. Zenchenko's statement that he was *told* that the classification of his position had been changed, but that he never received a copy of the written notice of the change until 2005. Appellant is blind. Even if it was the general practice to provide position incumbents with written notice of the reallocations, there is a highly plausible reason for Respondent's agent to stray from the norm when informing Appellant of a personnel transaction. Also in part because of Appellant's blindness, the Commission is unwilling to assume that there was some other document he actually received before 2005 that showed his position had been reallocated to the NRBDC-Objective class.

Respondent argues that there was sufficient information contained in Mr. Zenchenko's pay stubs or other documents that were placed in his mailbox to inform him of the reallocation. Again, the alleged documentation is not part of the record in this matter and evidence suggests that the pay stubs never reached the Appellant. Zenchenko avers that he "does not make any effort to collect" his pay stubs because he is unable to use them. Merely placing a document in the mail does not constitute notice. DPI (HER), DEC. NO. 31170 (WERC 1/2005) (notification of a non-selection decision occurs on receipt rather than on mailing). Written notification occurs upon actual receipt of the notification document, rather than on the date it was placed in the employee's mailbox. KAESKE V. DER, CASE NO. 90-0382-PC (PERS. COMM. 11/14/91).[9]

Respondent also contends that information associated with the 2003 reallocation of the Appellant's position served as the requisite notice of the 1997 action. However, nothing submitted with Respondent's motion shows that Mr. Zenchenko received written notification of the later event or that Respondent's decision to verbally notify Appellant of a reallocation in 1997 would have changed by 2003 when his position had again been reallocated.[10]

To the extent the Commission considers the January 19, 2005 written decision on the reclassification request to have provided Zenchenko with written notice of the 1997 reallocation decision,[11] Respondent's timeliness objection to the appeal of the 1997 reallocation

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[9] In KAESKE, the employee's work duties required him to travel extensively. While the notification letter was delivered to his office mailbox on September 5th and his supervisor spoke with him about the reclassification denial on September 13th, his appeal filed on October 15th was considered timely because he had not retrieved the letter from his mailbox until September 21st.

[10] There is not even any indication that Zenchenko was supplied with a hard copy of the formal reclassification request in 2003.

[11] In his February 17, 2005 letter of appeal, Mr. Zenchenko acknowledged that the January 19th written decision "was delivered to (and summarized for, but not read to) the Appellant, who is blind, on January 20, 2005." The January 19th decision by Human Resources Specialist Cornell Johnson included the following statement: "I have completed my review and analysis of the request to reclassify the position held by Chris Zenchenko from Natural Resources Bureau Data Coordinator-Objective . . . to IS Business Automation Analyst. . . . As a result of this review and analysis it is determined that the requested IS Business Automation Analyst is the most appropriate class as opposed to the current class Natural Resources Bureau Data Coordinator-Objective. . . . [H]owever the incumbent cannot be regraded. . . ."

would still be denied. Zenchenko's initial letter of appeal reached the Commission on February 17th and it included language relating to the 1997 reallocation decision as well as to the 2005 reclassification decision:

> To properly calculate relief amounts, it will be necessary to determine whether the NR Data Coordinator classification made in 1997 was correct and how long the Appellant was in that position. . . .
>
> FACTS UPON WHICH THIS APPEAL IS BASED
>
> The Appellant was mis-classified as a Natural Resources Data Coordinator 4 [sic] in 1997. This mistake has never been admitted or rectified by DNR.

What has been denominated as Appellant's 1997 appeal was filed on May 12, 2005, but it could be construed as merely an amendment to the 2005 reclassification appeal and the amendment would relate back to the date the initial document was received, February 17. VAN ROOY V. DILHR, CASE NO. 84-0253-PC (PERS. COMM. 4/12/85) (An amendment relates back to the date of filing of the original pleading if the claim asserted in the amendment arises out of the occurrence or transaction set forth in the original pleading.) If the 2005 reclassification decision was the first written notice received by Zenchenko of the 1997 reallocation, then an appropriate amendment that related back to the February 17th filing would satisfy the limitations period.

Finally, Respondent argues that Appellant's disability should override the language of Sec. ER 3.04, Wis. Adm. Code.

> The DNR would opine that for purposes of determining notice, a supervisor reading or relaying information to a person who is sight-impaired from a written document they received in their in-box, is analogous to a sighted person reading the information from the same document.

Respondent has not offered any legal authority as support for its contention. In contrast, the cases cited above supply strong support for the conclusion that a conversation with an employee explaining that his position has been reallocated does not comply with the requirement in the Administrative Code. There has to be written notice.

While the Commission believes that Mr. Zenchenko had actual knowledge in 1997 that the classification of his position had been changed, actual knowledge does not satisfy the specific requirements of the administrative rule.[12]

Given Mr. Zenchenko's affidavit and the absence of any evidence to the contrary, the Commission must conclude, based on the existing record, that he did not receive written notice of the 1997 reallocation action until April 2005. Respondent's motion to dismiss is denied, without prejudice.[13]

Dated at Madison, Wisconsin, this 21st day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[12] Respondent cites CRONIN V. DHSS, CASE NO. 82-118-PC (PERS. COMM. 9/23/82), as supporting the conclusion that working in a position for 4 years means an employee must have "constructive notice" of her classification for purposes of calculating the 30-day time limit. The CRONIN decision stands for a different concept. When Ms. Cronin was hired as a Program Assistant 1 in 1970, she signed a position description that included certain language stating she was a supervisor while other language in the same position description specified that she was not a supervisor. She sought reclassification of her position to the Program Assistant 2 level early in 1982. In March, two months after she had submitted her request, a personnel analyst wrote Ms. Cronin's supervisor directing him to remove all of the supervisory functions assigned to the position because the Program Assistant 1 classification "is not designated as a supervisory classification." In her appeal to the Commission, Ms. Cronin contended that from 1970 until the date she saw the analyst's note to the supervisor, "it was reasonable for me to assume that [the employer] had assigned me a job classification commensurate with the duties required, and that I had no possible means of knowing that . . . I had been wrongly classified." She argued that she complied with the 30-day filing requirement because 2 weeks after the March memo, she initiated a first-step grievance seeking back pay for the 12 years she had served as a supervisor. The Commission rejected Ms. Cronin's contention that she had 30 days from when she saw the analyst's memo to file an appeal of the 1970 decision allocating her position, and quoted the following language from 51 Am Jur 2d *Limitation of Actions 146:* ". . . the mere fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns of his rights thereunder. . . ." In contrast to the present case, there was no requirement noted in the decision that the employer provide Ms. Cronin with written notice of the transaction she sought to appeal. Ms. Cronin sought review of the decision initially allocating her position rather than of a decision to subsequently reallocate her position.

[13] The Commission cannot rule out the possibility that there is some additional evidence showing Mr. Zenchenko received written notice of the reallocation of his position more than 30 days prior to filing his 2005 appeal. Because this Order is being issued without prejudice, the Respondent may choose to reassert its timeliness objection in the event it obtains such evidence.

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