

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK PRODOEHL, Appellant,

vs.

**WISCONSIN DEPARTMENT OF HEALTH SERVICES and
OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 5
No. 68773
PA(der)-252

Decision No. 32808-B

CINDY BOOTH, Appellant,

vs.

**WISCONSIN DEPARTMENT OF HEALTH SERVICES and
OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 6
No. 68774
PA(der)-253

Decision No. 32809-B

MAKALAH WAGNER, Appellant,

vs.

**WISCONSIN DEPARTMENT OF HEALTH SERVICES and
OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 7
No. 68775
PA(der)-254

Decision No. 32810-B

No. 32808-B
No. 32809-B
No. 32810-B

Appearances:

Mark Prodoehl, Makalah Wagner and Cindy Booth, appeared on their own behalf.

Paul A. Harris, Attorney, Office of Legal Counsel, Department of Health Services, P.O. Box 7850, Madison, Wisconsin 53707-7850, appeared on behalf of Respondents Department of Health Services and Office of State Employment Relations.

DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission on Appellants' appeal of Respondents' decision regarding the effective date of the reallocation of their positions from the Contracts Specialist-Advanced class (CS-Adv.) to the Program and Policy Analyst-Advanced class (PPA-Adv.).¹ Appellants contend the effective date should have been in September 2008 rather than in January 2009. The Appellants filed their appeals on March 31, 2009, and the parties stipulated to consolidation.

A hearing on the consolidated appeal was held on October 14, 2009, before Commission Attorney Kurt Stege, serving as the designated hearing examiner, with authority to prepare a proposed decision pursuant to Sec. 227.46(1), Stats. During the hearing, the parties stipulated to the admission of a joint exhibit that was not received by the Commission until October 21, 2009. On that date the record was closed, as no post-hearing briefs were submitted. The examiner issued a proposed decision on March 16, 2010. Any objections were due by April 15, 2010 but none were filed. By correspondence dated May 25, 2010, the Commission asked whether the parties would be willing to reach a stipulation of fact relating to an aspect of the record that was unclear. The parties entered into a stipulation effective June 30, 2010. The Commission has modified the proposed decision to reflect the parties' stipulation. Those and other substantive changes to the proposed decision are indicated by footnotes.

In this decision, the Commission typically uses the term "reorganization" in an informal sense rather than to mean a formally approved change to agency organizational structure.

At all times material, Scott Thompson has been the Chief of the Bureau of Human Resources in the Department of Health Services (DHS). The Bureau includes two teams that conduct classification reviews and determinations.

¹ The specifications for the Program and Policy Analyst Classification Series were promulgated October 12, 2008. The predecessor of this Classification Series was entitled, "Program and *Planning* Analyst Classification Series" (emphasis added). The differences in title and content of these two classification series are immaterial to the resolution of the issue in this matter regarding the correct effective date of the reallocation of Appellants' positions.

Prior to December 2007, the Appellants were employed in CS-Adv. positions within DHS's Division of Health Care Financing (DHCF). A plan for reorganizing the DHCF to become the Division of Health Care Access and Accountability (DHCAA) was announced no later than November 6, 2007, and described in a PowerPoint presentation to Division staff. That presentation included the following statements under the heading of "Effective Date":

DAY ONE (December 1, 2007) DHFS would begin operating under the new organizational structure even though official approval is expected to take six to twelve months to obtain. The official reorganization would not be effective until we receive final approval from [the Department of Administration] and upon realignment of fiscal and human resources structures.²

Despite the statement during the PowerPoint presentation, the reorganization of DHCF to become DHCAA required DHS approval but did not require Department of Administration approval. The reorganization received the necessary review and approval by DHS in December, 2007.³

As a result of the reorganization,⁴ the Appellants ultimately and logically acquired different duties described by the PPA-Adv. level rather than the CS-Adv. level. The Appellants became part of the Contract Compliance Team within the Managed Care Compliance Section in the Bureau of Benefits Management. Jim Vavra was the Director of that Bureau.

At all relevant times, the Office of State Employment Relations (OSER) had delegated to the Department of Health Services the authority to make classification decisions relating to the CS-Adv. and PPA-Adv. class levels.

The CS-Adv. and PPA-Adv. classifications are not differentiated on the basis of accountability.

² As provided in Sec. 15.02(4), Stats., formal approval must be obtained for certain organizational changes to a department's structure. The Commission has deleted a portion of footnotes 2 and 4 in the proposed decision to reflect the stipulation of the parties reached after the proposed decision was issued.

³ The Commission has changed this paragraph in the proposed decision to reflect the parties' factual stipulation reached after the proposed decision was issued.

⁴ The structural changes to DHS could not become an "official reorganization" until after the approval process had been completed. The evidence also shows that the new duties arising from a reorganization do not become permanent until either a certification or reallocation is completed.

On November 7, 2007, Division Administrator Jason Helgerson held a meeting with the Managed Care Compliance Section to announce expectations and introduce the new Chief of that Section, Rachel Currans-Sheehan. Ms. Currans-Sheehan was the Appellants' immediate supervisor, and Rachel Carabell, the Deputy Director of the Bureau of Benefits Management, was their second-level supervisor.

From the inception of the Division's proposed reorganization in December 2007, the Managed Care Compliance Section included positions classified at the CS-Adv. level (*i.e.* the Appellants) and the PPA-Adv. level. Management did not differentiate between CS-Adv. and PPA-Adv. positions in terms of job duties or expectations.

Appellant Prodoehl is a member of the Affirmative Action Advisory Committee of DHS. On June 26, 2008, he attended a meeting of that committee, at which guest speaker Jason Jankoski, one of Scott Thompson's two team leaders, reviewed the concept of broadbanding. Prior to that meeting, various coworkers of Prodoehl had shared with him their concerns regarding the reorganization, about being passed over for opportunities, and about their perception that management failed to follow protocols. His coworkers' concerns prompted Prodoehl to ask how Jankoski was going to handle the reorganization, how his efforts would help staff get promotions, and how positions would be classified if duties were being changed.⁵ Jankoski responded that he was working with Jim Jones, the process was complex, there were a lot of people moving places, and that management was working on the concerns Prodoehl had identified.⁶ Prodoehl interpreted these statements to mean that management was actively pursuing resolutions to the concerns he had identified.

⁵ In email correspondence between Prodoehl and Jankoski on September 21, 2009, in which Prodoehl summarized his recollection of their exchange at the June meeting and asked to meet with Jankoski to discuss that exchange, Jankoski replied that he recalled attending the AAAC meeting but did not recall the discussion Prodoehl claimed had taken place. Jankoski's response is not equivalent to a statement that a discussion did not occur. The Commission has modified the last sentence of this footnote in the proposed decision to more accurately reflect the record.

⁶ Early in the hearing, Respondent's counsel made a standing objection to any hearsay testimony. In addition to Prodoehl's testimony regarding what Jason Jankoski said, the Appellants offered testimony regarding various discussions with their immediate supervisor, Rachel Currans-Sheehan. The examiner properly overruled the objection because the Commission need not strictly apply the hearsay rules, because the testimony did not fall within the general definition of hearsay or because it fell within one of the exclusions to the hearsay rule. As provided in Sec. PC 5.03(5), Wis. Adm. Code, "the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted" In addition, Sec. 908.01(4)(b)1., Stats. excludes from the definition of hearsay a statement offered against a party that is the "party's own statement, in either the party's individual or a representative capacity. . . ." Section 908.01(4)(b)4., Stats. also excludes a statement offered against a party that is a "statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship. . . ." Prodoehl's testimony regarding Jankoski's statements was not offered to prove the truth of the matter asserted (*i.e.* that Jankoski and Jones indeed were working on the issues Prodoehl had raised). Instead, it was offered to establish why Prodoehl was not more proactive in seeking a reallocation of his position and to further the Appellants' theory of equitable estoppel. In any event, we conclude (as discussed below) that the testimony encompassed by Respondents' standing objection is insufficient to establish the elements of equitable estoppel.

While the reorganization was pending, various sections met regularly, at least one Bureau meeting was held, and a representative group of staff met with managers. In June of 2008, Appellant Wagner met with Rachel Currans-Sheehan to discuss the PPD (Performance Planning and Development report) that they had developed for the planning portion of her performance evaluation. In the portion of the PPD for indicating whether the employee's program description is current, an "x" was placed in the box labeled, "No - See PPD Manual". Ms. Wagner and Ms. Currans-Sheehan discussed the selection of the "No" box, the current classification of Ms. Wagner's position as a CS-Adv., and the possibility that everyone in their Section might have the same PPA-Adv. classification.

Ms. Currans-Sheehan, however, did not follow up on these topics or consult the PPD Manual. Nor did she advise Wagner that she (Wagner) needed to request a change in classification to the PPA-Adv. level or refer to the PPD manual to effectuate such a change. Currans-Sheehan acted as she did because she had assumed that the checkmark on the PPD that Wagner's PD was not current would trigger some action by either the Bureau of Human Resources or the Bureau of Operations. Wagner did not discover that Currans-Sheehan had made this erroneous assumption until September 2009, months after these appeals were filed.

Shortly after the PPD meeting with Currans-Sheehan, Wagner became concerned that if the classification of her position were changed from CS-Adv. to PPA-Adv., her pay might be reduced. She checked the pay ranges, minimums and maximums for the two classifications and concluded that her pay would not be changed. Based on her conclusion, Wagner saw no need to be concerned with the timing of the classification change. Had she anticipated a pay increase, she would have investigated what she needed to do in order to obtain it. More specifically, she would have approached the contact person for human resource questions to resolve the classification issue.

In July 2008, a coworker, Jonathan Moody, transferred out of the contract compliance team in the Managed Care Compliance Section. Prodoehl discussed the transfer with Rachel Currans-Sheehan. When Prodoehl asked how Mr. Moody was able to make a lateral move, Ms. Currans-Sheehan said that his PPA-Adv. classification made it easier. Currans-Sheehan and Prodoehl concurred that all team members should be PPAs so they would have more transfer opportunities.

In September 2008, Appellants received a document entitled, "MC Compliance Work Plan". It detailed the work duties assigned to team members (including recent hires) and reflected the duties that existing team members (including Appellants) had been performing for some time.

In November 2008, the Appellants discovered that employees at the PPA-Adv. level had been awarded an hourly wage increase of \$1.20 through the collective bargaining process,

effective October 12, 2008. The salary increase did not apply to CS-Adv. level positions. Following this discovery, the Appellants sought to change the classification of their positions from CS-Adv. to PPA-Adv. The Appellants brought the wage increase to Rachel Currans-Sheehan's attention in November or December 2008. Currans-Sheehan had been unaware of the wage increase and did not delay in working on the Appellants' reallocation request.

By letter dated January 9, 2009, James Vavra, Director of the Bureau of Benefits Management, requested that the Appellants' positions be reallocated from the CS-Adv. level to the PPA-Adv. level with an effective date of September 1, 2008. Vavra's request was addressed to, and received by, Chris Cione, Human Resource Specialist with DHS, on January 9, 2009.

According to Chapter 236 of DHS's *Supervisor's Manual*, the effective date of a reallocation action is "the beginning of the first pay period following effective receipt by the Division/Facility Human Resources office of a request for [reallocation] submitted in accordance with this chapter."

Respondent Office of State Employment Relations⁷ issues the *Wisconsin Human Resources Handbook* which sets forth a much more complicated effective date policy.⁸

Section 370.040 of the same handbook provides, in part: "Positions may not be classified, reclassified, or reallocated based on temporarily assigned or acting duties."

By correspondence dated February 23, 2009, the Appellants' requests for a reallocation from the CS-Adv. level to the PPA-Adv. level were approved with an effective date of January 18, 2009.

January 18, 2009 was the beginning of the first pay period following January 9, 2009, which was the date DHS human resources staff received the request from Mr. Vavra to reallocate the Appellants' positions.

The Appellants did not reasonably rely on either an express or implied representation by management that a request for a change in the classification of their positions had been made or was being processed so as to delay initiating their own requests for reallocation.

⁷ Pursuant to Sec. 230.09, Stats., it is OSER that is responsible for allocating, reallocating and reclassifying positions within the State classified civil service. These responsibilities, which may be delegated to individual State agencies, include setting effective dates.

⁸ The Commission has deleted the remainder of this paragraph in the proposed decision to reflect the parties' stipulation and because it was unnecessary to the resolution of the dispute.

ORDER⁹

Respondents' decisions to reallocate the Appellants' positions effective January 18, 2009, rather than September 2008 were correct, and the Appellants' appeals are therefore dismissed.

Given under our hands and seal at the City of Madison, this 8th day of July, 2010.

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

⁹ Upon the issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to these matters and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as part of this Order.

DEPARTMENT OF HEALTH SERVICES
and OFFICE OF STATE EMPLOYMENT RELATIONS (Prodoehl et al.)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The dispute before the Commission is over the effective date of the reallocation of the Appellants' positions from the CS-Adv. level within the Contracts Specialist Classification Series to the PPA-Adv. level within the Program and Policy Analyst Classification Series.¹⁰ The Commission's subject matter jurisdiction is based on Sec. 230.44(1)(b), Stats.

The parties stipulated to the following statement of issue set forth in a pre-hearing conference memorandum dated May 27, 2009:

Whether the Respondents' decisions to reallocate the Appellants' positions effective January 18, 2009 rather than September 2008 were correct.

The hearing examiner also identified two sub-issues during the hearing:

- 1) Whether the Appellants were performing at the PPA-Adv. level on and prior to September 2008; and
- 2) Whether the doctrine of equitable estoppel bars the Respondent from asserting any date after September 2008 as the effective date of the reallocation of Appellants' positions.

Respondents contend that January 18, 2009, is the correct effective date of the Appellants' reallocation, based on applicable policies. They further contend that during and prior to September 2008, the Appellants' proposed effective date of their reallocation, the Appellants had not been permanently assigned duties at the PPA-Adv. level.

Appellants argue that for at least six months prior to September 2008, they were performing at the PPA-Adv. level, and that the Respondents should be equitably estopped from asserting a later effective date.¹¹ Appellants' sole theory in support of their claim is that absent their reliance on actions of the Respondent DHS, they would have submitted their own

¹⁰ The Commission has deleted the next two sentences in the proposed decision because they are unnecessary for the resolution of the dispute.

¹¹ While Appellants maintain that they had been performing duties at the PPA-Adv. level since the inception of the reorganization in December 2007, they assert that September 2008 should be the effective date of reallocation, presumably because the "MC Compliance Work Plan" expressly identified their duties as of that time. In addition, Appellants argue that as of September 2008, they had been performing their duties for at least six months, in accordance with DHS effective date policy requirements.

reallocation request during (or before) September 2008 and that their request would have triggered a effective date in September tied to the date they submitted their request. In order to prevail under this theory, the Appellants would have to establish: 1) the operative effective date policy was tied to the date they submitted their request; 2) they were induced not to file their own reallocation request by September due to the Respondents' conduct (the equitable estoppel argument); and 3) they were performing the requisite duties by September to justify classification at the PPA-Adv. level.¹²

For the reasons set forth below, the Commission determines the Appellants have failed to establish the requisite elements for applying the doctrine of equitable estoppel. In light of this conclusion the Commission does not address the issue of when the PPA-Adv. duties were permanently assigned to the Appellants.¹³

Equitable Estoppel Argument

The Appellants contend that Respondents should be prevented from using a January 18, 2009 effective date because, in reliance on various comments by Respondents' agents, the Appellants did not act to initiate a reallocation procedure that would have generated an effective date in September 2008.

The Commission has set forth the burden of proof and elements of equitable estoppel as follows:

The level or standard of proof required with regard to the equitable estoppel issue, is that complainant must establish the elements of equitable estoppel by clear and convincing evidence. See, e.g. YOCHERER V. FARMERS INSURANCE EXCHANGE, 2002 WI 41, PARA 25, 252 WIS.2D 114, 643 N.W.2D 457 (defendant bears the burden of proving each element of equitable estoppel by clear and convincing evidence); ST. PAUL RAMSEY MED. CENTER V. DHSS, 186 WIS. 2D 37, 47, 519 N.W.2D 681 (CT. APP. 1994). The latter case summarizes the test to be applied when a litigant attempts to establish equitable estoppel against a state agency:

¹² The Commission has added the last two sentences to this paragraph in the proposed decision in order to more clearly set forth the Appellants' theory of the case.

¹³ The Commission has modified this paragraph and deleted the entire section of the proposed decision entitled "Effective Date Policies" because it is unnecessary to address the question of when the Appellants were permanently assigned the PPA-Adv. duties.

The doctrine of equitable estoppel is not to be freely applied against government agencies. “Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position.” The elements of estoppel are (1) action or inaction by the person against whom estoppel is asserted (2) upon which the person asserting estoppel reasonably relies (3) to that person’s detriment.

ADAMS V. DNR, CASE NO. 01-0088-PC-ER (Pers. Comm. 12/20/02), *quoted with approval in DOT (SOMERVILLE), DEC. NO. 31685 (WERC, 6/06).*

Appellants’ theory of equitable estoppel is unavailing, because they cannot prove by “clear and convincing evidence” the second element noted above, namely, that they “reasonably relied” on any action or inaction by the Respondents.

Past Commission decisions regarding the correct effective date of reallocations and reclassifications establish generally that for reliance to be reasonable and equitable estoppel to apply, there must be a representation by management, either express or implied, that a request for a change in classification has been made or is being processed. WILLIAMS V. DOC AND DER, CASE NO. 99-0092-PC (Pers. Comm. 8/28/2000). *See also* BAUER V. DATCP & DER, CASE NO. 91-0128-PC (Pers. Comm. 6/25/1993) (finding no equitable estoppel where “[a]ppellant failed to show that conduct on the part of respondents led him to believe that a request for the reclassification or reallocation of his position had been prepared and was being processed.”); GUZNICZAK & BROWN V. DER & DHSS, CASE NOS. 83-0210, 0211-PC (Pers. Comm. 5/13/1987) (finding equitable estoppel where appellants received repeated assurances that their reclassification requests were being worked on or considered and where management conduct misled appellants into assuming they were proceeding correctly.)

As demonstrated below, no representations were made to the Appellants in this case stating or implying that management had formally initiated the process for reallocating their positions.

In July 2008 Appellant Prodoehl learned of coworker Jonathan Moody’s transfer, and was informed by Appellants’ supervisor, Ms. Currans-Sheehan, that Moody’s PPA classification made the movement easier. Currans-Sheehan and Prodoehl further discussed that all team members should be classed as PPA-Adv., so that they could make use of additional transfer opportunities. The generality of Currans-Sheehan’s statements hardly suggests that a formal reallocation request had been initiated.

Appellants suggest that comments by Jason Jankoski, a team leader in the Bureau of Human Resources for DHS, provide another basis for applying equitable estoppel. However, Jankoski's remarks to Prodoehl regarding the reorganization and classification of positions, including Jankoski's comments about working with Jim Jones, the complexity of the process, the movement of personnel, etc., were so general in scope that they could not reasonably have been interpreted to mean that a formal request for reallocation of Appellants' positions had been initiated. Nor did Prodoehl interpret Jankoski's remarks in that manner; rather, Prodoehl's understanding of Jankoski's response to his general concerns was merely that management had been working on addressing them and would continue to do so.

Similarly, while Appellant Wagner discussed various issues with Currans-Sheehan in June 2008, including the non-currency of her PD, the existing classification of her position as a CS-Adv., and the merits of everyone in the Section being classified as PPA-Adv., Currans-Sheehan never represented to Wagner (or to any Appellant) that she had initiated, or would initiate, a formal reallocation request. To the contrary, Currans-Sheehan erroneously assumed that because Wagner had identified her PD as not being current, such identification would trigger follow up by the Bureau of Human Resources or the Bureau of Operations.

There are various reasons that Currans-Sheehan's erroneous assumption is not itself a basis for equitable estoppel. First, while management has a duty not to mislead an employee, it does not have a general obligation to inform an employee of his or her rights. *JONES V. DHSS & DER, CASE NO. 90-0370-PC (Pers. Comm. 7/8/92)*. Second, Wagner did not discover that Currans-Sheehan had made this erroneous assumption until after Wagner had filed her appeal to the Commission. Wagner could not have relied on, and been lulled into inactivity by, an assumption that was not communicated to her until well after the Appellants' positions had been reallocated. And even if Wagner somehow had been aware of Currans-Sheehan's assumption at the time it was made and had been aware of Currans-Sheehan's inaction, a supervisor's unstated assumption that another Bureau would follow up on a dated PD is not tantamount to a specific representation by the supervisor, either express or implied, that a request for a change in classification has been made or is being processed. *See, e.g., WILLIAMS V. DOC & DER, CASE NO. 99-0092-PC (Pers. Comm. 8/28/2000)* (finding that where appellant inquired whether his reclassification request was being processed, the supervisor responded he was uncertain but would look into it, and appellant interpreted supervisor's ensuing silence to mean the review process was underway, the appellant's reliance on such silence was unreasonable.)

Wagner herself provided compelling evidence that she did not rely, let alone reasonably rely, on Currans-Sheehan or anyone else in delaying her request for reallocation. Wagner admitted that shortly after the PPD meeting with Currans-Sheehan, she was concerned about the possibility of adverse pay consequences if the classification of her position was changed from CS-Adv. to PPA-Adv. She checked, concluded this was not the case, and took no action.

Conversely, she admitted that had she anticipated a pay increase, she would have taken follow-up steps to secure it. These admissions undermine, if not negate, any inference that she reasonably relied on any representation by management so as to delay her request for a reallocation of her position.

Lastly, there were no statements by management on which Appellant Booth relied, let alone reasonably relied, to the effect that management had initiated a formal reallocation request for her or the other Appellants.

The Commission concludes the Appellants have not established by clear and convincing evidence that they reasonably relied on any representation by management, either express or implied, that a request for a change in classification had been made or was being processed, so as to delay their own requests for reallocation. Accordingly, the doctrine of equitable estoppel is inapplicable in the present case, and the Respondent's decisions to establish January 18, 2009 as the effective date of the reallocation of the Appellants' positions from CS-Adv. to PPA-Adv. must be affirmed.

Dated at Madison, Wisconsin, this 8th day of July, 2010.

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