

section provides that a person who drives an automobile is deemed to have given his consent to have his blood, breath, or urine tested to determine whether he was driving while under the influence of an intoxicant. It further provides for the establishment of a program of training and licensing operators to run the breathalysers. This program was to be implemented by the Department of Transportation.

Since the passage of the above section, Appellants' jobs have increased considerably in volume and in actual duties and responsibilities. This increase caused the Department of Transportation to recommend to the Bureau of Personnel, Department of Administration, that the classifications of Chemical Test Technician (PR5-09) and Chemical Test Supervisor (PR1-12) be revised to reflect the broader duties and be reassigned to pay ranges PR5-10 and PR1-13 respectively. This recommendation was essentially adopted and brought before the Personnel Board pursuant to Section 16.07(1) for its approval which was given at the March 29, 1974 meeting. The classification of Chemical Test Supervisor (PR1-12) was revised and reassigned to pay range PR1-13. The classification of Chemical Test Technician (PR5-09) was abolished and the classification of Chemical Test Coordinator (PR1-10) was created. The following is the Definition of the classification found in the Class Specification for Chemical Test Coordinator:

This is coordinative work in an assigned area of the state involving the certification of equipment and operators utilized in the analysis of breath for alcohol content and testifying in court as to the validity and implication of test results. Employees in this class are responsible for training and testing local enforcement personnel, maintaining equipment, selecting senior operators and assisting local law enforcement agencies in establishing and maintaining programs which are consistent with appropriate statutory provisions particularly the Implied Consent Law. Work is performed under general supervision and is evaluated by supervisors through conferences, observations and review of reports.

Appellants' positions were reallocated from Chemical Test Technician to Chemical Test Coordinator. By letter dated June 3, 1974 Appellants appealed this reallocation. Appellants contend that the revised pay range of PR5-10

section provides that a person who drives an automobile is deemed to have given his consent to have his blood, breath, or urine tested to determine whether he was driving while under the influence of an intoxicant. It further provides for the establishment of a program of training and licensing operators to run the breathalysers. This program was to be implemented by the Department of Transportation.

Since the passage of the above section, Appellants' jobs have increased considerably in volume and in actual duties and responsibilities. This increase caused the Department of Transportation to recommend to the Bureau of Personnel, Department of Administration, that the classifications of Chemical Test Technician (PR5-09) and Chemical Test Supervisor (PR1-12) be revised to reflect the broader duties and be reassigned to pay ranges PR5-10 and PR1-13 respectively. This recommendation was essentially adopted and brought before the Personnel Board pursuant to Section 16.07(1) for its approval which was given at the March 29, 1974 meeting. The classification of Chemical Test Supervisor (PR1-12) was revised and reassigned to pay range PR1-13. The classification of Chemical Test Technician (PR5-09) was abolished and the classification of Chemical Test Coordinator (PR1-10) was created. The following is the Definition of the classification found in the Class Specification for Chemical Test Coordinator:

This is coordinative work in an assigned area of the state involving the certification of equipment and operators utilized in the analysis of breath for alcohol content and testifying in court as to the validity and implication of test results. Employees in this class are responsible for training and testing local enforcement personnel, maintaining equipment, selecting senior operators and assisting local law enforcement agencies in establishing and maintaining programs which are consistent with appropriate statutory provisions particularly the Implied Consent Law. Work is performed under general supervision and is evaluated by supervisors through conferences, observations and review of reports.

Appellants' positions were reallocated from Chemical Test Technician to Chemical Test Coordinator. By letter dated June 3, 1974 Appellants appealed this reallocation. Appellants contend that the revised pay range of PR5-10

does not adequately reflect the breadth of responsibility and the increase in duties which the position of Chemical Test Coordinator entails.

III. Conclusions

The Personnel Board Does Have Jurisdiction To Consider The Pay Range Assigned To A Newly Created Position.

Respondent contends that the Personnel Board does not have jurisdiction to hear this appeal because the final decision as to the pay range for any classification is made by the Board pursuant to Section 16.07(1), Wis. Stats.. We do not agree with this contention.

The immediate decision which gave rise to the instant appeal was one made by Respondent Director. He decided to reallocate Appellants. Therefore, the appeal is properly before the Personnel Board under Section 16.05(1)(f), Wis. Stats. which states in part that the Board shall "hear appeals of interested parties and of appointing authorities from actions and decisions of the Director."

It is true that Respondent decided to reallocate Appellants pursuant to the establishment of the new classification of Chemical Test Coordinator. This new classification was created in accordance with Section 16.07 which states in pertinent part:

(1) The director shall ascertain and record the duties, responsibilities and authorities of, and establish grade levels and classifications for, all positions in the classified service subject to approval by the Board . . .

(2) After consultation with the appointing authorities, the director shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority and responsibilities or other factors recognized in the job evaluation process. He shall likewise reclassify and reallocate positions on the same basis whenever he finds such action warranted.

(a) . . . The director shall establish, modify or abolish classifications as the needs of the service require, and subject to the approval of the board. (Emphasis added.)

It is clear from the above language that the Director plays an active role in the development and determination of appropriate classifications for jobs within state service. The Personnel Board, however, acts passively in simply approving or rejecting the Director's actions and decisions. In Ryczek v. Wettengel, Case No. 73-26, July 3, 1974, pp. 3-4, a case involving a similar issue, we stated:

The Board's approval of the abolishment and recreation of classifications with assigned pay ranges does not prevent it from considering this appeal. Respondent argues that the appeal does not concern an action or decision of the Director, but of the action of the Board itself. Section 16.07(1), Wis. Stat., 1971 provides that "the director shall... establish grade levels and classifications...subject to the approval of the board." The board only has a negative control over the director's action at that point. The board does not act, it only approves or rejects the action of the director. If the director's action is approved it is no less his action. It becomes subject to Section 16.05(1)(f), Wis. Stats., 1971, which provides that interested parties may appeal actions of the director to the Board. That section makes no express exception of director actions, which were subject to approval by the Board. Pers. 26.02, Wis. Adm. Code, October 1972 provides "Personnel actions which are appealable include: (1) Position..., reallocations..." The director's action in abolishing and creating classifications is subject to board approval, while the reallocation of individual former positions in an old class to a new class, or reallocation, is appealable. We conclude that the latter action is not the action of the Board, but of the director and may be the subject of an appeal. (Emphasis added.)

Therefore, we reaffirm our holding in Ryczek (supra) and conclude that we have jurisdiction over this appeal.

The Pay Range In The Class Specification For Chemical Test Coordinator Adequately Reflects The Duties And Responsibilities Of The Appellants' Positions As Of May 12, 1974.

Appellants contend that the pay range PR5-11 should have been assigned to the new Chemical Test Coordinator. We do not agree with this contention.

Candidates for the Chemical Test Coordinator positions must go through a one week formal training program. In addition, the Class Specification

for the classification requires that their training and experience include:

Three years of law enforcement experience which involved substantial involvement in the operation and maintenance of Breathalyser equipment. Experience must have been gained after graduation from high school or age 18. An equivalent combination of training and experience may also be considered.

Appellants claim that since they were all State Patrol Troopers II (PR5-9, now PR5-10) and since the latter classification requires additional training, their rate of compensation should be PR5-11 instead of PR5-10. However, a close look at the above Training and Experience requirement reveals that to be eligible one does not have to be a State Patrol Trooper which involves a twenty week training program. It is sufficient to be a "law enforcement officer" which status requires only 240 hours or about five weeks of approved training. (Section 165.85 (4)(b), Wis. Stats.)

It is true that Appellants must keep abreast of the most recent developments in their field. This is necessary for their teaching and training function as well as for their function as expert witnesses. However, when their positions were reclassified to Chemical Test Technicians from State Patrol Troopers II, they were no longer law enforcement officers. They no longer had to maintain the training and skills required for their work as Troopers. They were civilians who were employed to do work which required some law enforcement training.

Therefore, we conclude that the change from State Patrol Trooper II to Chemical Test Coordinator involves more of a move akin to a transfer than to a promotion. Appellants undoubtedly performed well as Troopers, which is one reason they were selected for the Chemical Test Program. Further, they are evidently doing a good job as Coordinators. However, we do not find that the difference in the degree of expertise between the two classifications is sufficient such that one should be one step higher in pay.

Finally, when comparing the Chemical Test Coordinator classification with others, we conclude that it is assigned to the proper pay range. The

* * * * *

STEPHEN GETSINGER,
 Complainant,

v.

President, UNIVERSITY OF
 WISCONSIN SYSTEM (Stevens Point),
 Respondent.

Case No. 91-0140-PC-ER

* * * * *

RULING
 ON
 MOTION
 TO DISMISS

This matter is before the Commission on respondent's motion to dismiss on the bases of untimely filing (as to FEA discrimination) and for failure to state a claim (as to "whistleblower" retaliation). The parties have filed briefs and various supporting documents.

The general rules for deciding this kind of motion are:

[T]he pleadings are to be liberally construed, [and] a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

... A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.

Phillips v. DHSS & DETE, 87-0128-PC-ER (3/15/89) (quoting Morgan v. Pa. Gen. Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979) (citations omitted)); affirmed, Phillips v. Wis. Personnel Comm., 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

This complaint was filed on September 19, 1991. It alleges that complainant was hired in 1988, by Assistant Chancellor Dr. Frederick Leafgren as Executive Director of the Student Enrichment and Retention Services at UW-SP. The complaint also states that it is complainant's "belief that he was hired by Dr. Leafgren based upon the mistaken belief that Dr. Getsinger was a homosexual." The complaint further alleges that Dr. Leafgren engaged in a course of sexual harassment and took "aggressive steps to obtain a sexual relationship" with him, and that after he failed to respond positively to these