

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 GARY L. MICHALSKI, *
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 Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 TRANSPORTATION, *
 *
 Respondent. *
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 Case No. 82-228-PC *
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DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), stats., of the denial of a reclassification from Trooper II to Trooper III.

FINDINGS OF FACT

1. At all times material, the appellant has been employed in the Department of Transportation (DOT), Division of State Patrol (DSP), District II, as a State Patrol Trooper.

2. On June 16, 1982, the appellant received an evaluation by his immediate supervisors, Sgt. Cravillon, and Deputy District Commander, Lt. Holt. This evaluation, appellant's exhibit 1, covered the period from November 1, 1981 to May 1, 1982. This evaluation rated the appellant at "meets standards" or better with respect to each of the five rating factors with the exception of "Initiative and Performance of Duties," with respect to which the appellant was rated "Unsatisfactory." The comment that was included with respect to this rating factor was as follows:

Initiative & Performance of Duties

During the six-month period 11/1/81 to 5/1/82, your performance on arrests was one arrest every 3.5 hours, which is deficient when compared with a statewide MSA of 2.2 hours per arrest. Your performance on contacts was one contact every 3.7 hours of enforcement patrol, which is deficient when compared to the statewide MSA of 1.9 hours per contact. Because of deficient performance during the previous six months, you were placed in a counselling program in an effort to improve your arrest and contact performance. Sgt. Schreiber spent many hours working with you during that period. Although you have shown some improvement in two months, overall you have shown a decrease in activity in both areas. Your occasional good performance demonstrates that you have the ability, necessary skills and knowledge to perform the job. You have a speed computer assigned to you and have the radar available whenever it is needed. Additionally, on April 29, 1982, you received a Letter of Reprimand for a Violation of Work Rules, as it relates to work performance. [This was based on failure to meet the MSA.] Your performance problems are based solely on a lack of personal motivation. You must take the steps necessary to turn yourself around and become an active and productive member of this organization.

3. With respect to the aforesaid evaluation, the sole reason for the appellant's unsatisfactory rating with respect to "Initiative and Performance of Duties" was his failure to have met the statewide MSA (Measurable Standard of Activity) with respect to arrests and contacts.

4. The statewide MSA is a statewide average of hours per arrest and contact per trooper, over a three-year period, which is used by DOT to evaluate trooper performance. It includes a 25% deviation or latitude.

5. In order to be reclassified to Trooper 3, a Trooper 2 must satisfy certain requirements, including having performed at the objective level for the prior six months.

6. On the form used for the district's recommendation as to the Trooper 3 reclassification, the appellant was recommended for reclassification by both Sgt. Cravillon and Lt. Holt, who signed the form, Appellant's Exhibit 2, on June 1 and June 16, 1982, respectively, notwithstanding the

fact that the box indicating that "trooper has not performed at the objective level for the past six months" was marked.

7. The sole reason why the aforesaid box indicating that the appellant had not performed at the objective level for the past six months was marked was because of the appellant's failure to have met the MSA during the period in question.

8. The documents referred to above, Appellant's Exhibits 1 and 2, were sent by the district to the Bureau of District Operations, DSP, where they were received on June 18, 1982, and forwarded to the Bureau of Support Services, DSP, where they were received on June 24, 1982. The documents then were sent to Col. Goetsch, Deputy Administrator, DSP.

9. Following his receipt of these documents, Col. Goetsch evaluated the matter of whether the appellant's position should be reclassified to Trooper 3. This process included a review of personnel records and discussions with District II supervisory personnel.

10. By letter of August 6, 1982, Appellant's Exhibit 3, Col. Goetsch advised Capt. Jorgenson that he would not approve the appellant's reclassification. This letter stated in part as follows:

Upon careful review of Trooper Gary L. Michalski's Trooper 3 Evaluation and recommendation, it is not presently possible for this office to approve his reclassification to Trooper 3.

The employee has failed to perform at an acceptable level for the period of January, 1982 through June, 1982. The employe's knowledge of responsibilities and ability to function independently have not been clearly demonstrated during the evaluation period. Additionally, his failure to respond to counseling/supervision and his demonstrated lack of personal initiative have reflected a lack of problem-solving capability.

However, we will review the employe's record again in September 1982. If the improvement in the employe's performance you have cited continues through July and

August, the employe's reclassification would be regarded favorably at that time.

11. The aforesaid refusal to approve the reclassification of appellant's position was based solely on the appellant's failure to have met the statewide MSA during the period in question.

12. The secretary of DOT had not formally delegated the final authority to act on classification decisions delegated to the appointing authority, pursuant to §230.05(2)(a), stats., to the DSP Deputy Administrator. Such authority was delegated to the head of the Bureau of Personnel Management. However, as a result of internal DOT policy and procedure, the DSP Deputy Administrator had effective approval authority over Trooper 2-3 reclassifications, since if DSP recommended denial of the reclassification, the policy or procedure was not to forward it to the Bureau of Personnel Management. Therefore, as a consequence of the Deputy Administrator's decision as reflected in Appellant's Exhibit 3, no further or higher level review of the transaction was made at that time.

13. After the appellant became aware that the reclassification had not been approved by the Deputy Administrator, he wrote to the Bureau of Personnel Management, in a letter dated August 17, 1982, Appellant's Exhibit 4, and expressed his disagreement with the Deputy Administrator's decision, and asked for a further review of the matter.

14. Following further communications with the Bureau of Personnel Management, the appellant formally requested a review of the reclassification in a letter dated September 22, 1982, Appellant's Exhibit 6.

15. After the Bureau began to consider this request, it was advised by the DSP that it was now formally recommending reclassification. This recommendation was based on the additional review of the appellant's improved job performance in August and September, 1982.

16. With respect to the appellant's job performance in August and September, 1982, the sole improvement during this period was his successful meeting of the statewide MSA.

17. Subsequently, the reclassification of the appellant's position from Trooper II to Trooper III was approved by the Bureau of Personnel Management, with an effective date of November 14, 1982. The appellant was advised of this by letter dated November 3, 1982, from DSP, Appellant's Exhibit 9.

18. Following the filing of the instant appeal on November 29, 1982, DOT unilaterally changed the effective date of the transaction to September 5, 1982. The establishment of this date was based on the policy set forth in the Wisconsin Personnel Manual published by the Division of Personnel in the Department of Employment Relations that reclassifications are to be made effective at the start of the second pay period following effective receipt of the reclassification request at a level within the agency that has the authority to approve the request, and the theory that the Bureau of Personnel Management was such a level and that it did not receive the request for reclassification earlier than August 17, 1982, the date of the appellant's letter marked Appellant's Exhibit 4.

19. The Trooper 2 to Trooper 3 reclassification with respect to Brian F. Turner in 1980, was filed with the Support Services Bureau on August 12, 1980, and by the head of the Bureau of Personnel Management on August 28, 1980, with an effective date of August 24, 1980, see Appellant's Exhibits 10-12. In this case, Trooper Turner had been certified by the district as having met all the requirements for reclassification, including the statewide MSA.

CONCLUSIONS OF LAW

1. This matter is properly before the commission pursuant to §230.44(1)(b), stats.

2. The appellant has the burden of proving that the respondents' decision as to the effective date of the reclassification of appellant's decision was incorrect.

3. The appellant has satisfied his burden.

4. The respondents' decision determining the effective date for the reclassification of the appellant's decision was incorrect, and should have been determined using August 6, 1982, as the date the request was approved by DSP.

OPINION

DOT has argued in its post-hearing brief that the Commission lacks the authority to consider events that occurred before this transaction came to the attention of the Bureau of Personnel Management, since a final decision on reclassification could not have occurred at a lower level:

In Loy v. UW, 81-421, the Personnel Commission held that §230.44(1)(b), allows for review by the Commission only when a final reclassification decision has been made. The testimony is clear that only the Bureau of Personnel has final decision-making authority and therefore, the Commission's jurisdiction is limited to events that occurred after August 17, the date of effective receipt of Michalski's request for reclassification. Since the Department has already recognized the August 17 letter as a request, the September 5 effective date must be upheld.

The only way for the Commission to reach below the level of the Bureau of Personnel is on the theory of constructive denial. Loy raises the possibility of constructive denial if the appointing authority refuses to act on an employe's request for reclassification. In this case, however, the appointing authority is John Roslak, not Col. Goetsch.

The Commission's jurisdiction under §230.44(1)(b), stats., is not limited to approvals or denials of reclassifications, rather, it authorizes the commission to hear appeals of "actions." In this case, the "action"

appealed from was the action approving the reclassification with a particular effective date. It is not disputed that the appellant filed a timely appeal of that action and that the commission has jurisdiction over that appeal. Unlike the situation in the Loy case, here there has been a final reclassification decision.

In deciding this appeal, the commission must determine whether the respondents' determination of the effective date was correct. There is simply no basis for circumscribing the Commission's inquiry as to this facet of DOT's reclassification decision so as to exclude evidence of events which clearly impacted on this and had a determinative effect. Based on the facts of record, it is clear that while the Deputy Administrator did not have delegated authority to have formally approved the reclassification, he had been delegated the authority to effectively deny the reclassification because under the standard procedures within DOT, if he refused to approve the reclassification, it would not reach the Bureau of Personnel management, which had formal approval authority. Rather, it would be sent back to the district, as happened here. Thus, Col. Goetsch's refusal to have approved the reclassification on August 6th was an effective denial.

His action was just as much the action of the appointing authority as that of the head of the Bureau of Personnel Management in finally approving the request. Compare, Ulanski et al v. DHSS & DP, Wis. Pers. Comm. Nos. 82-2, 6, 7, 9-PC (9/7/82):

If, as here, the appointing authority requires such requests to be handled by line management before being submitted to the agency personnel offices, it is nonetheless a part of that [reclassification] process. Therefore, it cannot be argued that what occurs between the time that employes submit their position descriptions and other documents to their supervisors and the time this material reaches the employing agency's personnel office is divorced from the classification process.

The next question presented is whether there was an excessive amount of time taken to process the reclassification request.

On this record, there is no basis for a determination that the period of time it took Col. Goetsch to reach his decision, from on or about June 24, 1982, to August 6, 1982, was unreasonable or otherwise excessive. It was established that another reclassification was processed in 12 days, versus 43 days here. However, there are many factors which can contribute to the length of time needed to process a reclassification, including the workload within an agency. There is no time limit provided by statute, rule or internal policy, and it cannot be concluded that a 43 day period was unreasonable solely because another reclassification was handled in 12 days.

With respect to the handling of this transaction by the Bureau of Personnel Management after the appellant contacted that unit, again, there is no basis for a determination that the amount of time taken to process the transaction was excessive.

The final question is whether the transaction appealed involved an improper use of the MSA.

In Wisconsin Department of Transportation v. Personnel Commission, Dane County Circuit Court No. 81CV0648 (9/30/81), the court reviewed a Commission decision in Jansen v. DOT & DP, 78-170-PC (1/8/81), which concerned the use of the MSA in the Trooper 2 - Trooper 3 reclassification process. The court's opinion included, in part, the following:

[The Commission] points out in its revised finding that the reclassification to Trooper 3 as developed by the Department pursuant to the Division of Personnel's delegation involves not only passing the examinations but five different rating factors as well as a basis for the recommendation of the trooper's supervision. One of the factors was "Initiative and Performance of Duties" which

was defined as "Wise use of time, punctual, willingness to carry out assignments as directed and on own initiative, performs well under limited supervision, demonstrates leadership capabilities, diversification of enforcement activities, ability to assume responsibility." To say that a failure to meet the MSA standard alone represents a failure of the class 2 trooper to meet the requirement of "Initiative and Performance," with its many defined facets, is to ignore the many questions for inquiry.

This is exactly what has occurred in this case. It is clear from both the documentary evidence in this record and the unequivocal testimony of both of the appellant's immediate supervisors, Sgt. Cravillon and Lt. Holt, that the only aspect of the appellant's performance during the period in question that was not up to the Trooper 3 level was with respect to the MSA. Once the appellant met the statewide MSA in August-September, 1982, the reclassification was approved. The efforts to suggest that the failure to have met the MSA was indicative of problems in other areas were unpersuasive.

The Commission also cannot accept the department's attempt to distinguish this appeal on the ground that in this case: "... the MSA was used historically as a relative criterion of performance. Between 1975, and 1980, Trooper Michalski had met or exceeded statewide MSA average. Suddenly, in 1981, his performance dropped off dramatically and his MSA was well below the statewide average." Reply brief, pp. 2-3, to say that the appellant's performance was deficient because, after a number of years of meeting the statewide MSA average, he "suddenly" fell below the statewide MSA average, does not take this matter out of the realm of reliance on the statewide MSA average.

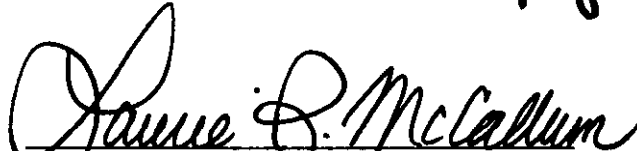
The department also argues that the circuit court decision in DOT v. PC "... does not prohibit the use of MSA in a reclassification determination. It only prohibits the Department, not the Division of State Patrol, from using the statewide MSA as an absolute criterion for reclassification." Reply brief, p. 2. While the department has the ultimate authority for delegated classification transactions, it has delegated the effective authority for performance evaluations used in the Trooper 2 - Trooper 3 reclassification process to the Division of State Patrol. The head of the department is legally responsible for the actions of his agents.

ORDER

The respondent's action is rejected and this matter is remanded for action in accordance with this decision.

Dated: June 9, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner

AJT:lmr

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