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 *
 FRED McCABE, *
 *
 Appellant, *
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 v. *
 *
 Secretary, DEPARTMENT OF *
 INDUSTRY, LABOR AND HUMAN *
 RELATIONS, and *
 Secretary, DEPARTMENT OF *
 EMPLOYMENT RELATIONS, *
 *
 Respondents. *
 *
 Case No. 83-0204-PC *
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ORDER

The Commission issued its decision and order in the above matter on July 10, 1984. On July 30, 1984, respondent, Secretary, Department of Industry, Labor and Human Relations, filed a petition for rehearing, and argued that the Commission's ruling was premised upon two issues which were not noticed for hearing.

During a prehearing conference held on November 7, 1983, the parties agreed to the following issue for hearing:

Whether or not the respondent's decision denying the reclassification of the appellant's position from the Job Service Specialist 2 to Job Service Specialist 3 level was correct.

Subissue: Whether the Quality Performance Index review provided a proper basis for the reclassification decision.

At a subsequent prehearing conference, certain matters were specifically excluded from the scope of the hearing:

The parties agree that the grading of the Quality Performance Index is not at issue and that the results of the QPI are therefore agreed upon. The appellant agrees that he will not offer arguments regarding the adequacy of training.

A hearing was held on January 16, 1984, and a schedule was established for filing post-hearing briefs. On April 12, 1984, the hearing examiner issued a proposed decision and order pursuant to §227.09(2), Stats. The proposed decision would have affirmed respondent's reclassification decision and dismissed the appeal. One of the proposed findings of fact made by the examiner was that "[a]s utilized by DILHR for adjudicator positions, the JSS series is a progression series." (Proposed finding of fact 7)

The appellant objected to the proposed decision and requested oral argument before the Commission. Oral argument was held on June 6, 1984. The appellant specifically argued that the position standards failed to indicate that the classifications involved constitute a progression series.

In its final decision and order issued on July 10, 1984, the Commission concluded that there was "nothing in the JSS position standard, either express or implied, upon which to base a conclusion that reclassification from JSS 2 to JSS 3 is a progression-type of reclassification." The Commission found that respondents had erred in their determination. However, the Commission concluded that the appellant was not entitled to backpay and that a subsequent reclassification of the appellant's position made it unnecessary for the respondents to change appellant's status in light of the decision.

Respondent, DILHR argues that the Commission's decision resolved two issues that were not noticed for hearing:

Whether or not adjudicator reclassifications in DILHR constituted a progression series.

Whether or not it is required that a progression series be labeled as such in the class specifications as opposed to standards developed by an agency under the authority of a delegation from DER.

While neither of these two issues was specifically identified by the parties prior to the hearing, both issues fall within the scope of the issue agreed

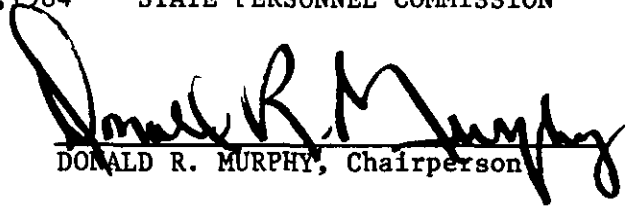
to at the November 7th prehearing conference. As a consequence, the Commission's final decision did not go beyond the issue previously agreed upon, i.e., whether the reclassification decision was correct and whether the Quality Performance Index provided a proper basis for the decision. Respondent's citation of Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR, 62 Wis. 2d 392, 215 N.W. 2d 443 (1974) is clearly distinguishable from the present facts. In the Chicago case, the department had made a finding that respondent railroad had discriminated against the complainant and had ordered respondent to "cease and desist its discriminatory employment practices against the complainant and like situated employes or applicants for employment." The court found that the department's order was overbroad because the required notice of hearing had "failed to specify any 'ongoing acts of discrimination' other than that perpetrated in the complaint (sic)." 62 Wis. 2d 392, 299 In the Chicago, case, the department's order extended to persons other than the complainant even though the respondent had no way of knowing that its actions relative to other employes were also in issue. In contrast, the respondent in the present cases agreed to an issue that is broad enough to include the two subissues identified earlier in this paragraph.

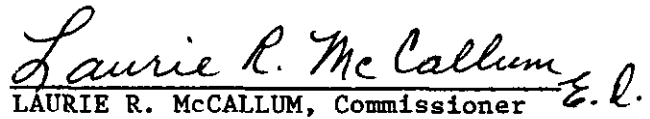
There are three bases on which a petition for rehearing may be granted:

- 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. §227.12(3), Stats.

The respondent has failed to meet the statutory requirements necessary for the Commission to grant the petition. Respondents' petition for rehearing is, therefore, denied.

Dated: August 31, 1984^{FN} STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

KMS:ers

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^{FN} The Commission considered respondent's petition on August 20, 1984 and reached a decision on that date. However, due to an oversight, the written order was not signed until August 31, 1984.