

* * * * *

FRED L. McCABE, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

INDUSTRY, LABOR AND HUMAN *

RELATIONS, and Secretary, *

DEPARTMENT OF EMPLOYMENT *

RELATIONS, *

Respondents. *

Case No. 83-0204-PC *

* * * * *

DECISION
AND
ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner, a copy of which is attached hereto. The Commission has heard oral arguments by the parties and consulted with the examiner.

The basic facts are not in dispute and are as set forth in the findings of fact in the proposed decision. Since the proposed decision and order is attached, the Commission will not reiterate in detail the facts. In summary, respondent DILHR denied the reclassification of the appellant's position from Job Service Specialist 2 (JSS 2) to Job Service Specialist 3 (JSS 3) because the appellant failed to pass a performance evaluation generally referred to as the Quality Performance Index (QPI), a quality review of 20 actual case files.

Following this denial, DILHR took no further action with respect to the appellant's position or status, in effect holding matters in abeyance until the appellant would have a further chance to be evaluated.

The appellant argues that the respondent should have reclassified his position to the JSS 3 level, since it is undisputed that the assigned duties and responsibilities are at that level, denied him a regrade to the JSS 3 level pursuant to §ER-Pers 3.015(2)(a), Wis. Adm. Code,¹ and opened the position to be filled by competition.

There are two ways a position can be reclassified, see §ER-Pers 3.01(3), Wis. Adm. Code:

Reclassification means the assignment of a filled position to a different class by the administrator as provided in §230.09(2)(d), Stats., based upon a logical and gradual change to the duties or responsibilities of a position or the attainment of specified education or experience by the incumbent. (emphasis added)

The second alternative in the foregoing subsection is associated with what is commonly referred to as a "progression series" wherein employes progress from one level to another based on the "attainment of specified education or experience by the incumbent." In such a series, failure to attain the requisite training and experience obviously is a basis for denial of reclassification under §ER-Pers 3.01(3), Wis. Adm. Code.

In the opinion section of the proposed decision, it is stated that while movement from JSS 2 to JSS 3 does not appear to be part of a progression series based on the JSS position standard, "the series has been routinely applied by the respondents in such a manner." p.9. The proposed decision goes on to state that:

Because the move from JSS 2 to 3 for adjudicator positions constitutes a progression series, and because the appellant had not attained the 'specified ... experience' [§ER-Pers 3.01(3), Wis. Adm. Code] for the higher classification, respondent correctly decided not to reclassify appellant's position. (p.9)

¹ "(2) Incumbents of filled positions which will be reallocated or reclassified may not be regraded if: (a) The appointing authority has determined that the incumbents' job performance is not satisfactory.

The difficulty with this conclusion is that there is no basis to conclude that because a series has in practice been applied to as a progression series, that it is a progression series.

Section ER-Pers 2.04(2), Wis. Adm. Code, provides that "class specifications² shall be the basic authority for the assignment of positions to a class." If the class specifications or position standard for a series do not identify it as a progression series, there is no basis for its administration on an ad hoc basis as a progression series. To do so is to disregard the entire framework of the state civil service classification system. Compare, Shepard v. DP, Wis. Pers. Commn, No. 80-234, 237, 239-PC (6/3/81), Zhe v. DHSS, Wis. Pers. Commn. No. 80-285-PC (11/19/81) (Affirmed, Dane County Circuit Court, 81CV6492 (11/82)).

Since there is 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 reclassification of appellant's position should not have been denied on the ground of failure to meet the QPI. Rather, since it is undisputed that the position had duties and responsibilities assigned to it that were at the JSS 3 level, the position apparently should have been reclassified and the appellant denied an immediate regrade to the higher level pursuant to §ER-Pers 3.015(2)(a), Wis. Adm. Code:

"(2) Incumbents of filled positions which will be reallocated or reclassified may not be regraded if: (a) The appointing authority has determined that the incumbent's job performance is not satisfactory...."

This leads to the question of relief. At oral argument the Commission was advised that since the promulgation of the proposed decision, the

² The terms "class specifications" and "position standards" are functionally equivalent.

appellant satisfied the QPI and his position was reclassified, and he was regraded to JSS 3. Under these circumstances, it would be meaningless to require at this time that the position be reclassified and the appellant denied a regrade.

With respect to the matter of back pay, there are a number of reasons why the Commission cannot conclude that the appellant should have been paid at the JSS 3 rate at any time prior to the point that he actually was.

If one were to accept the appellant's contention that the reclassification of his position should have been denied and it should have been opened to competition,³ it is possible that the appellant would not have been the successful applicant who would have been appointed to the position, so it would be speculative to conclude that he would have been earning at the JSS 3 level as a result of the competitive process.

Furthermore, it does not follow, as the appellant argues, that the position should forthwith have been filled by competition. The appellant relies on §230.09(2)(d), Stats., which provides:

If after review of a filled position the administrator reclassifies or reallocates the position, the administrator shall determine whether the incumbent shall be regraded or whether the position shall be opened to other applicants.

Following reclassification, the administrator "shall determine whether the incumbent shall be regraded." There is nothing in the statutory language which would require that this determination be made on the basis of one QPI evaluation versus two QPI evaluations. If there is a reasonable basis to believe that an incumbent could improve his or her performance after a period of additional exposure to complex adjudications, allowing some additional time permits the state to avoid the additional expense,

³ As will be discussed below, the Commission does not believe that this result necessarily should have followed denial of reclassification.

effort, and dislocation associated with conducting a selection process for the new JSS 3 position, and possibly initiating a layoff process with respect to the appellant.⁴

Finally, the appellant argued that since his position should have been classified at the JSS 3 level because it was assigned the more complex adjudications, it follows that he was working at the JSS 3 level and should have been paid accordingly. The problem with this argument is that it ignores the entire regrade concept. While the appellant's position had assigned duties and responsibilities at the JSS 3 level, the appellant's performance of those duties and responsibilities was not at the JSS 3 level because he had not met the QPI. Hence he was not eligible for regrade and could not earn at the higher level.

Therefore, while the Commission must conclude that the respondent erred in its determinations with respect to the instant transaction, it appears that the subsequent reclassification and regrade have rendered further action with respect to the appellant's status unnecessary. As has been set forth above, the appellant is not entitled to any back pay. However in the event that the appellant were to occupy a JSS 2 position in the future due to a layoff or other transaction, the respondents should handle any future JSS 3 reclassification in accordance with this decision.

⁴ If the appellant were unsuccessful in competition for his position at the JSS 3 position, he presumably would be an "excess" JSS 2, and a layoff might well have to be induced.

ORDER

1. The Commission incorporates by reference and adopts findings of fact #1-11 as set forth in the proposed decision. The Commission rejects proposed finding #12 and substitutes the following in its place:

"12. Based upon the results of the QPI, it can be concluded that the appellant's job performance was not satisfactory."

2. The Commission adds the following finding:

"13. Subsequent to the hearing, the appellant passed the QPI, and his position was reclassified, and he was regraded, to JSS 3.

3. The Commission modifies the proposed conclusions of law as follows:

"1. This matter is appropriately before the Commission pursuant to §230.44(1)(b), Stats.

2. The appellant has the burden of proving that the respondents' decision to deny the reclassification of the appellant's position was incorrect.

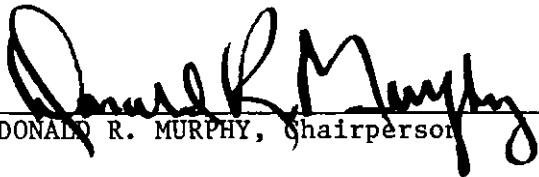
3. The appellant has satisfied his burden of proof.

4. The respondents' decision to deny the reclassification of appellant's position was incorrect.

4. For the reasons set forth above, the Commission rejects the proposed opinion.

5. The respondents' action which is the subject of this appeal is rejected and this matter is remanded for action in accordance with this decision.

Dated; July 6, 1984 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

AJT:jmf
JPD01

Parties:

Fred L. McCabe
3747 E. Tesch Ave.
St. Francis, WI 53207

Howard Bellman
Secretary, DILHR
P. O. Box 7946
Madison, WI 53707

Howard Fuller
Secretary, DER
P. O. Box 7855
Madison, WI 53707

* * * * *

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

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

This matter is before the Commission as a review of a reclassification decision. 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.

The parties specifically agreed that the grading of the Quality Performance Index was not at issue but that the focus of the proceeding would be on whether a competitive examination or the reclass/regrade procedure should be applied to the position in question.

FINDINGS OF FACT

1. At all times relevant to this appeal, the appellant was employed by respondent DILHR as an adjudicator of disputed unemployment compensation claims.
2. Commencing in January of 1983, and while classified as a Job Service Specialist 2 (JSS 2), the appellant was regularly assigned claims involving unusually complex issues.

3. In July of 1983, six months after he was first assigned unusually complex issues on a regular basis, the appellant sought reclassification to the JSS 3 level. The appellant's supervisor supported the appellant's reclassification request.

4. The terms "reclassification" and "regrade" are defined in the Wisconsin Administrative Code as follows:

§ER-Pers 3.01 Definitions

* * *

- (3) RECLASSIFICATION. Reclassification means the assignment of a filled position to a different class by the administrator as provided in §230.09 (2), Stats., based upon a logical and gradual change to the duties or responsibilities of a position or the attainment of specified education or experience by the incumbent.
- (4) REGRADE. A regrade means the determination of the administrator under §230.09 (2) (d), Stats., that the incumbent of a filled position which has been reallocated or reclassified should remain in the position without opening the position to other candidates.

Additional provisions in the Administrative Code further describe the regrade procedure:

§ER-Pers 3.015 Regrading Provisions

* * *

- (2) Incumbents of filled positions which will be reallocated or reclassified may not be regraded if:
 - (a) The appointing authority has determined that the incumbent's job performance is not satisfactory;
 - (b) The incumbent has not satisfactorily attained specified training, education or experience in a position identified in a classification series where the class levels are differentiated on this basis; or
 - (c) The administrator determines that the position should be filled by competitive examination under §230.15 (1), Stats.

5. Respondent DILHR is delegated the authority to make reclassification and regrade decisions for employes in the department seeking reclassification from the JSS 2 to JSS 3 level. DILHR has further delegated responsibility to the Bureau of Benefits, Job Service Division, to determine whether an individual is satisfactorily performing at the JSS 3 level so as to qualify for reclass/regrade to that level.

6. The position standard for the JSS series provides, in part, as follows:

Entrance and Progression Through the Series

The majority of positions included in this position standard will be filled by competitive examination. There are two methods of entrance into this series. At the Job Service Specialist 1 level, positions will be filled by competitive promotional exam or open recruitment of applicants with clerical or paraprofessional-level experience in a job service program area or its equivalent.

Classification Factors

Because of the variety of existing or potential future positions identified in the Job Service series, individual position allocations will in most instances be based upon general classification factors such as those listed below:

- 1) Organizational status as it relates to level of responsibility.
- 2) Availability and applicability of established job service guidelines, procedures, precedents, and legal interpretations.
- 3) Potential impact of policy and/or program decisions on claimants, employers, job seekers, and overall Division operations.
- 4) Degree of internal and external coordination and cooperation required.
- 5) Availability of other staff (either within the Division or at the Regional Office) whose authority it is to make the most difficult and unprecedented program decisions or legal interpretations.
- 6) Complexity of employment services or unemployment compensation work performed.

- 7) Professional and paraprofessional staff size if applicable.

* * *

II. CLASS DEFINITIONS AND REPRESENTATIVE POSITIONS

* * *

Additionally, this position standard is not intended to restrict the allocation of representative positions to a specific classification level if the functions of these positions change significantly in level of complexity and responsibility. It is intended, rather, to be a framework within which classifications can be applied equitably to the present program and also adjusted to equitably meet future personnel relationships and patterns that develop as a result of changing programs and emphasis.

* * *

JOB SERVICE SPECIALIST 2

PR 12-02

Definition

This is responsible job service work in the Department of Industry, Labor and Human Relations.

Positions in the field offices allocated to this class function at the full performance level with responsibility for developing jobs, placing job seekers, and performing related job service program functions of a comparable level of complexity and responsibility.

* * *

Representative Positions

Objective level positions:

Field Offices

* * *

Adjudicator - issues non-monetary determinations on disputed unemployment compensation issues after conducting an investigation and interviews to obtain the facts, explains determinations to involved parties. Positions at this level may assist the Adjudications Supervisor in public relations and public information programs.

* * *

JOB SERVICE SPECIALIST 3

PR 12-03

Definition

This is specialized and advanced professional job service work in the Department of Industry, Labor and Human Relations.

Positions in the field offices allocated to this level are typically located in one of the largest field job service offices with full-time responsibility for one or a combination of the following job service programs: employer relations, labor market analysis, rural job service office operations, special applicant services, CETA contract monitoring and comparable specialties. Functions include responsibility for planning, developing and monitoring the application of program policies and procedures. Also identified at this level are adjudicators responsible for complex unemployment compensation claims adjudications and lead workers over small placement or job development units.

* * *

Representative Positions

Field Offices

Adjudicator - issues non-monetary determinations on disputed unemployment compensation claims involving unusually complex issues after conducting an investigation and interviews to obtain the facts; explains determination to involved parties. Trains less experienced adjudicators. Positions at this level may assist the Adjudications Supervisor in public relations and public information programs.

* * *

III. QUALIFICATIONS

JOB SERVICE SPECIALIST SERIES

Required Knowledges, Skills and Abilities

The level of these qualifications must be related to the specific classification level. As one progresses in this series the degree of ability and knowledges will increase. Also for individual positions, a certain combination of knowledges, skills and abilities may need to be emphasized while for another position different emphasis will be needed. Generally individuals in this series need the following general knowledges, skills and abilities; however, additional qualifications will need to be considered for recruitment and examination purposes:

Knowledge of specific manpower and/or unemployment insurance programs and pertinent related state and federal laws, rules, regulations and procedures.

Knowledge of data processing capabilities and schedules as related to specific programs.

Knowledge of job service district operations and capabilities.

Knowledge of industrial and labor conditions of the community being served and of state and national industrial labor conditions.

Ability to effectively communicate with persons with differing viewpoints, priorities and objectives.

Ability to exercise judgment and discretion in the application and interpretation of departmental policies and regulations.

Ability to write well and concisely, to express thoughts clearly, and to develop ideas in logical sequence.

Ability to accept responsibility for the direction, control, or planning of an activity.

Required Training and Experience

* * *

JOB SERVICE SPECIALIST 2

One year of professional level experience in job service work. Experience shall have been gained after graduation from an accredited college or university. An equivalent combination of training and experience may also be considered. Appropriate graduate school training may be substituted for experience on a year-for-year basis.

NOTE: For positions requiring specialized entry knowledges, skills or abilities, pertinent experience or training in a specialized area may be required.

JOB SERVICE SPECIALIST 3

Two years of professional level experience in job service work. Experience shall have been gained after graduation from an accredited college or university. An equivalent combination of training and experience may also be required. Appropriate graduate school training may be substituted for experience on a year-for-year basis.

NOTE: For positions requiring specialized entry knowledges, skills or abilities, pertinent experience or training in a specialized area may be required.

7. As utilized by DILHR for adjudicator positions, the JSS series is a progression series, i.e. an employe is expected to progress from JSS 1 to

JSS2 and from JSS 2 to JSS 3 without a competitive examination. JSS 1 is the entry level for adjudicators. The objective level is JSS 2 and JSS3 is for adjudicators performing advanced or unusually complex determinations. Respondents grant reclassifications and regrades from JSS 1 to JSS 2 and JSS 2 to JSS 3 based upon performing appropriate duties, achieving a specified level of performance (as measured by an examination) and the passage of a specified period of time as an adjudicator.

8. The Bureau of Benefits conducts the performance exam for reclassification and regrade to the JSS 3 level. The exam is generally referred to as the Quality Performance Index (QPI) and is a quality review of twenty actual case files of completed non-monetary investigations.

9. The appellant failed to meet the minimum scores for passing the QPI that was administered after he requested reclassification to the JSS 3 level. The Bureau of Benefits recommended denial of the reclassification/regrade.

10. Respondent DILHR denied the appellant's reclassification request because the appellant failed the QPI. DILHR maintained appellant's position at the JSS 2 level.

11. Anyone who fails the QPI review is entitled to reapply for reclassification in six months.

12. Based upon the results of the QPI, appellant did not possess the requisite skill, facility or practical wisdom (i.e. experience) necessary for his position to be reclassified from the JSS 2 level to the JSS 3 level.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44 (1) (b), Stats.

2. The appellant has the burden of proving that the respondent's decision to deny the reclassification of the appellant's position was incorrect.

3. The appellant has not met the burden of proof.

4. The respondent's decision to deny the reclassification of appellant's position was correct.

OPINION

This case raises an important question regarding the proper interpretation of the administrative provisions covering the reclass/regrade process. Although the applicable provisions could have been worded more clearly, the Commission is satisfied that the particular facts of this case support a finding affirming respondent's decision.

Typically, reclassification cases that reach the Personnel Commission only address the question of whether the duties assigned to a particular position (for which the appellant is the incumbent) fit better within one classification definition rather than another definition. In the present case, it is undisputed that the duties assigned to the position filled by the appellant are at the JSS 3 level. However, the respondent has argued that the work produced by the appellant is at the JSS 2 level because the Quality Performance Index review of his performance indicated he was not meeting the JSS 3 levels for the quality of the investigations being performed. The respondent therefore concluded that the appellant was not entitled to be regraded and, as a consequence, his position (Number 500324) would not be reclassified. The basis for the respondent's contention is that the JSS series is a progression series for adjudicator positions and one criterion for progressing from JSS 2 to JSS 3 is passing the QPI exam.

While there is nothing on the face of the JSS position standards that expressly indicates that the 1, 2, and 3 levels are to be applied as a

progression series to be adjudicator positions, it is undisputed that the series has been routinely applied by the respondents in such a manner. Respondent DILHR has developed an eight-page section of its "Management Handbook" that specifically describes the "Reclassification Process for UI Job Service Specialist 1 and 2." (Respondent's Exhibit 2). A major focus of the process is the Quality Performance Index.

The definition of the term 'reclassification' found in §ER-Pers 3.01, Wis. Adm. Code, allows for a position to be reclassified if in a non-progression series there has been a "logical and gradual change" in the duties of the position or, in a progression series, if the incumbent has attained "specified education or experience." Although the term "experience" is not defined within the scope of the administrative rules, Black's Law Dictionary, Revised 4th Edition, defines it as follows:

A state, extent, or duration of being engaged in a particular study or work; the real life as contrasted with the ideal or imaginary. A word implying skill, facility, or practical wisdom gained by personal knowledge, feeling, and action, and also the course or process by which one attains knowledge or wisdom. (Citations omitted.)

In the present case, the QPI results indicated that the appellant lacked the "skill, facility or practical wisdom" necessary for producing work at the JSS 3 level. Because the move from JSS 2 to 3 for adjudicator positions constitutes a progression series, and because the appellant had not attained the "specified ... experience" for the higher classification, respondent correctly decided not to reclassify appellant's position.

Even though the respondent focused its decision on §ER-Pers 3.015(2)(a), Wis. Adm. Code, which bars the regrade of an incumbent whose job performance is unsatisfactory, the Commission is satisfied that the QPI results also prevented the reclassification of the appellant's position. The implication of the reclassification and regrade rules is that the reclassi-

fication decision is to be made first and that only then is the regrade issue to be addressed. The experience factor in a progression series may be considered in both the reclassification decision (§ER-Pers 3.01(3), Wis. Adm. Code) and the regrade decision (§ER-Pers 3.015(2)(b), Wis. Adm. Code). Appellant's QPI results applied to the reclassification decision indicate that his position should not be reclassified.

The appellant argues that his position should have been reclassified to the JSS 3 level and the results of the QPI should only be used to deny his regrade. If the appellant's theory would be adopted, the progression series concept would be radically altered. Agencies would be forced to reclassify a position in a progression series based entirely on the duties assigned to the position and regardless of the incumbent's performance. Reclassification without the regrade would open up the position for transfer, promotional exam or even open competitive exam. The agency would have a surplus employe (the former incumbent) and might be forced to initiate a layoff plan if another vacancy did not exist. This result simply does not appear to be consistent with the concept of a progression series as apparent in the definitions of reclassification and regrade found in the Administrative Code and as used in state civil service.

ORDER

Respondents' decision denying the reclassification of the appellant's position is affirmed and this matter is dismissed.

Dated: _____, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

KMS:jat

LAURIE R. McCALLUM, Commissioner

DENNIS P. MCGILLIGAN, Commissioner

Parties:

Fred L. McCabe
3747 E. Tesch Ave.
St. Francis, WI 53207

Howard Bellman
Secretary, DILHR
201 E. Washington Ave.
Madison, WI 53702

Howard Fuller
Secretary, DER
149 E. Wilson St.
Madison, WI 53702