

STATE OF WISCONSIN

PERSONNEL COMMISSION

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GENE TISER,

Appellant,

v.

Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS, and  
Secretary, DEPARTMENT OF  
NATURAL RESOURCES,

Respondent.

Case No. 83-0217-PC

\* \* \* \* \*

ORDER

The Commission hereby adopts as its final resolution of this matter the proposed decision and order of the hearing examiner, a copy of which is attached hereto and incorporated by reference as if fully set forth. The Commission adds the following comments on the question of the burden of proof in proceedings such as this.

The term "burden of proof" simply means "the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises, whether civil or criminal." 29 Am Jur 2d Evidence §123. In an administrative proceeding, the burden of proof normally "is on the party asserting the affirmative of an issue... this is usually the claimant, complainant, or applicant...." 2 Am Jur 2d Administrative Law §391. The degree of proof or quantum of evidence that must be established in an administrative proceeding is "a preponderance of the evidence," 2 Am Jur 2d Administrative Law §392, or the

"greater weight" of the evidence. See Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833(1971).

These are familiar principles of administrative law. In a reclassification appeal such as this, the employe or appellant who is asserting that his position should be reclassified to a higher level has the burden of proof, and must establish the requisite facts by a preponderance of the evidence. If the trier of fact feels that the evidence on each side of a disputed issue of fact is equally weighted, or that the respondent's evidence is more weighty, then the appellant can not prevail as to that factual issue.

This basic legal concept was reviewed by the Dane County Circuit Court in a judicial review of a decision by the Personnel Board, the predecessor agency to this Commission, of a reclassification appeal:

The court finds no error in the Board having stated in conclusion of law 2 that the burden of proof was on Jackson to show that he be reclassified as requested...the burden of proof in an administrative proceeding is generally on the party seeking affirmative relief in the absence of any statute or administrative rule to the contrary.

The court further finds no error in this conclusion of law's statement that the standard of judgment is that of a reasonable certainty, by the greater weight of the evidence..." Jackson v. State Personnel Board, Dane County Circuit Court No. 164-086 (2/26/79) (per Reserve Circuit Judge Currie).

Dated: Oct. 10, 1984 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

AJT:jab  
ORDER

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STATE OF WISCONSIN

PERSONNEL COMMISSION

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PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Wis. Stats., of the denial of a request for reclassification of appellant's position from Natural Resources Patrol Officer 1 (NRPO 1) to Natural Resources Patrol Officer 2 (NRPO 2).

FINDINGS OF FACT

1. At all times relevant to this appeal, appellant has been employed in the classified service by the Department of Natural Resources (DNR), as a NRPO 1.
2. The appellant's duties and responsibilities, in summary, include the following: Maintenance of forest visitor safety, security, and protection of resources by enforcing administrative codes and state laws pertaining to the protection of park, forest, fish and game resources and the regulation of human conduct on state forest and park properties; provision of information to forest visitors about forest regulations, features, and services; inspection of forest facilities from a safety and

signing standpoint to comply with Manual Code 2527.2; enforcement of state timber sale contracts and regulations; cooperation with other functions on the forest and in the Woodruff area; and the provision of assistance to conservation wardens. The assistance to conservation wardens accounts for not more than 30% of appellant's time.

3. The appellant is not a lead worker "for all law enforcement activities in (one of) the largest parks." (See Exhibit 2, NRPO 2 class specifications.) Although appellant does guide the work of certain interns and LTE's when they are assigned to his area, this is not a function appellant's position performs on a continuing basis. Although appellant guides the activities of certain permanent employees on special assignments, this is not a continuing function of appellant's position.

4. The duties and responsibilities of appellant's position do not fall within the NRPO 2 class specifications (See Exhibit 2), and are better described by the NRPO 1 class specifications (See Exhibit 1).

5. On October 25, 1983, appellant filed a timely appeal of respondent's denial of his request for the reclassification of his position from the NRPO 1 to NRPO 2 level.

6. Subsequent to the denial of appellant's request for reclassification, the DER, as part of a survey, reallocated appellant's position to a level three salary ranges above appellant's salary range as an NRPO 1.

#### 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 proof.
3. The appellant has not sustained his burden.

4. The respondents' decision to deny the request for reclassification from NRPO 1 to NRPO 2 was not incorrect.

OPINION

The NRPO 2 class specifications are very specific. In order to be classified at this level, employes must:

"... function as (1) lead workers for all law enforcement activities in the largest parks, or (2) perform a full range of law enforcement activities as assistants to conversation wardens." (Respondents' Exhibit 2)

Clearly, the appellant satisfies neither one of these criteria. Even though he disputed the accuracy of some of the data and information relied on by DNR in its review of his position, his activities assisting conservation wardens do not consume more than 30% of his time. In order to be reclassified, more than 50% of his work must be at the higher level. See, e.g., Bender v. DOA & DP, Wis. Pers. Commn., No. 80-210-PC (7/1/81).

What appellant apparently has attempted to do by his evidence is to show that the law enforcement and other related work he performs is at such a level that it should be evaluated for classification purposes at the same level as an assistant to a conservation warden, or even on the same level as a conservation warden.

The problem with this approach is that the NRPO 2 definition, as set forth in the class specifications, is both specific and explicit. It clearly states that there are only two bases upon which a position can be classified at the NRPO 2 level, and the appellant's position meets neither criterion. What the appellant is asking the Commission to do is to rewrite the class specifications so that the NRPO 2 definition would encompass his position. The Commission lacks the authority to do this, even if it believed that, in the abstract, the appellant's position deserved to be in a higher pay range. The appellant's position can only be reclassified to

NRPO 2 if it meets the specific criteria set forth in the class specifications.

The Commission discussed this type of problem in Shepard v. DP, 80-234, 237, 239-PC (6/3/81):

"Class specifications and position standards are the framework for the state's classification system. Once they are approved by the Personnel Board [this body is entirely separate from the Personnel Commission], §230.09(1)(a), Stats., they provide an objective basis for assignment and reassignment of positions to classifications, §230.09(2)(a), Stats. The Board also approves the assignment and reassignment of classifications to pay ranges, §230.09(2)(b), Stats.

Thus, while the administrator [now Secretary, DER] has the authority to assign and reassign positions to classifications, the legislature by statute has imposed a system of checks and balances on this process. The classification process must be accomplished within the parameters of a classification structure, provided by the class specifications and position standards, which has been approved by the Personnel Board. Once the classification structure has been established, individual personnel transactions occur, subject to review by this Commission pursuant to §230.44(1)(a) and (b), Stats. These individual reclassification decisions must be made in accordance with the established class specifications. Otherwise, the process circumvents the legislative mandate that the Personnel Board play a key role from a policy standpoint in the establishment of the classification structure, and classification transactions become ad hoc decisions by the administrator." pp. 7-8.

To the same effect, see Zhe v. DHSS & DP, Wis. Pers. Commn., No. 80-285-PC (11/19/81), affirmed, Dane County Circuit Court, No. 81CV6492 (11/82).

It appears to the Commission that there may be underlying this appeal a fundamental disagreement with the classification structure for law enforcement employes in DNR, particularly with respect to the distinctions between Wardens and Natural Resources Patrol Officers. Since the Commission can only hear appeals from specific classification decisions, and in so doing must adhere to the existing class specifications or position standards, it could not address this kind of contention. Such fundamental issues normally must be addressed by the conduct of a classification survey

by the Secretary of the Department of Employment Relations, followed by the development of revised class specifications or position standards, and their approval by the Personnel Board.<sup>FN</sup>

Appellant also argues that DER's reallocation of appellant's position subsequent to respondent's denial of appellant's reclassification request confirms that respondent erred in its denial. However, respondent based its decision on the position standard in effect at the time, not the revised position standard applied by DER in its survey. There is no inconsistency between respondent's and DER's actions in regard to the classification of appellant's position.

In his post-hearing brief, appellant contends that a review of the record can only lead to the conclusion that appellant should be classified as a conservation warden. However, the issue in this appeal, as agreed to by the parties at the hearing, was whether appellant's position was more appropriately classified as an NRPO 1 or 2, not whether the appellant's position should be classified as a conservation warden.

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<sup>FN</sup>This footnote is added to the proposed decision to point out that 1983 Wisconsin Act 27, §1609c, amended §230.09(2)(am), Stats., to delete the requirement of board approval. The Commission still lacks jurisdiction over the Secretary's development of position standards, since the Secretary's authority in this area is set forth in §230.09(2)(am), Stats., and §230.44(1)(b), Stats., limits the Commission's jurisdiction to hear appeals of decisions of the Secretary to decisions made under §230.09(2)(a) or (d) or 230.13.



Also in his post-hearing brief, appellant alludes to certain artificial barriers in general and to his perception that appellant's supervisor does not know what appellant does or where he does it. The Commission cannot ascertain from the record what these artificial barriers may be. In addition, the Commission's conclusion that appellant is assigned to a conservation warden not more than 30% of his time is drawn from appellant's testimony, not that of his supervisor.

Appellant further argues in the brief that the Commission's reliance on the record and on the law allocating the burden of proof is contrary to the statutes and that burden of proof has never been adequately defined and is not applicable in this dispute. This is a truly remarkable statement particularly in view of the fact that appellant cites no authority for his position. Surely, the appellant and his representative realize that the orderliness such requirements lend to the process of resolving a dispute benefit all the parties seeking such a resolution before the Commission.

ORDER

The respondents' action denying the request for reclassification of the appellant's position from NRPO 1 to NRPO 2 is affirmed and this appeal is dismissed.

Dated: \_\_\_\_\_, 1984      STATE PERSONNEL COMMISSION

LRM:jab

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