

* * * * *

VERNON SEAY,
 Appellant,

v.

Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondent.

Case No. 89-0117-PC

* * * * *

DECISION
 AND
 ORDER

This matter is before the Commission as an appeal of a classification decision. The parties agreed to the following issue for hearing:

Whether respondent's decision to deny the request for reclassification of appellant's position from Facilities Repair Worker 1 to Painter was correct.

If not, what is the appropriate effective date.

FINDINGS OF FACT

1. The class description for the Facilities Repair Worker (FRW) 1 classification includes the following definition:

This is general buildings and grounds maintenance repair work. Employees in this class: 1) perform a variety of maintenance and minor repair work at a small outlying facility such as an armory; or 2) function as helpers to craftsmen, or assistants to locksmiths, or mechanical repair personnel. Work is performed under the direct supervision of higher level maintenance personnel.

2. The class description for the Painter classification includes the following definition:

This is journeyman painter work. Under general supervision, employes in this class perform painting work at the journeyman level of skill, normally on a full time basis; however, other re-

lated duties may also be assigned as necessary. In addition, positions in this class may also direct and instruct apprentices, helpers and other assistants.

3. Employees in the Painter classification are entitled to substantially higher wages than are paid to FRW1's.

4. In 1986, the appellant had been employed as a Facilities Repair Worker (FRW) 1 by the Department of Military Affairs.¹

5. The University of Wisconsin-Madison's College of Agricultural and Life Sciences operates various agricultural research stations including the Arlington Research Station (Arlington). Dale Schlough is the Associate Director of the agricultural research stations.

6. Prior to 1987, Arlington had employed James R. Whittington as a full-time Painter. In 1987, Mr. Whittington retired and Arlington moved to fill the vacant position as a FRW 2 rather than as a painter.

7. The appellant was one of approximately 20 candidates who were interviewed for the FRW 2 job. The interview panel consisted of Dale Schlough, Bob Vetter, Craftsworker Supervisor, and Dwight Miller. Mr. Vetter reports to Dwight Miller who is the facilities manager for Arlington. During the course of his interview, the appellant was primarily asked questions relating to painting rather than to any other of the duties normally performed by a Facilities Repair Worker.

8. After the interview, the appellant was offered the FRW 2 position. However, the offer was withdrawn once the UW realized that appellant's reinstatement eligibility extended only to FRW 1 positions.

9. The UW later revised the classification for the vacant position from FRW 2 to FRW 1 which had the effect of making the appellant eligible.

10. The appellant commenced working in the FRW 1 position at Arlington on August 29, 1987. His immediate supervisor was Bob Vetter. At the time the appellant began working, Arlington also employed a FRW 3, Jim Norland, and another FRW 1, Robert Lytle.

11. The appellant's position description listed Mr. Whittington, Painter, as the former incumbent of the position. The position's goals and activities included the following entries:

¹This finding has been modified to more accurately reflect the record.

- 30% Maintenance of all surfaces needing paint, varnish, stain or shellac
- 20% Maintenance, repair, and remodeling of wood facilities [not including painting]
- 20% Maintain, repair, and build new fences
- 20% Maintenance and repair of all types of masonry
- 10% General

12. On the first day of his employment, Mr. Vetter told the appellant that he had been hired because he had the strongest painting background. Mr. Vetter also said the classification had been changed from FRW 2 to 1 because none of the other 20 persons interviewed had a comparable painting background.

13. Appellant worked side-by-side with Mr. Vetter for a period of 5 weeks performing FRW 1 activities. At the end of that time, Mr. Vetter took the appellant into the paint shop and pointed out the various pieces of painting equipment which were available. Mr. Vetter gave appellant the clipboard for the painter and told the appellant it would be to his advantage to keep track of everything he painted and the dates he painted them. Mr. Vetter told the appellant to use the clothes locker in the paint shop which had been previously used by Mr. Wittingham. Mr. Vetter told the appellant that the paint shop would be his "home" so he should "settle in."

14. The other two FRW's at Arlington Farms maintain lockers in the repair shop rather than the paint shop.

15. During the Fall of 1988, Mr. Vetter informed the appellant that Mr. Norland had resigned from the FRW 3 position and asked whether the appellant had a civil service examination score for the FRW 2 classification. At Mr. Vetter's request, the appellant provided Mr. Vetter with a photocopy of the notice of FRW 2 exam results. Mr. Vetter later informed the appellant that he would not get the job because someone had transfer rights to it.

16. Mr. Vetter later told the appellant to take the civil service examination for the Painter classification and suggested that he could prepare for the exam by studying materials found in the Arlington library.

17. The appellant took the Painter exam and reported to Mr. Vetter on December 30, 1989 that he ranked in the top third but that he did not get an excellent score. Mr. Vetter responded by saying he was unsure Arlington needed a full time Painter. Appellant suggested that if Mr. Vetter was uncomfortable with a full-time Painter position, someone from the personnel office should

audit the position and decide whether it should be a full-time, 10 month or other duration position. Mr. Vetter said he would take up the matter with Dale Schlough.

18. After the appellant had not heard from Mr. Vetter for 2 weeks, he contacted Tom Kiesgen of the Painters Union, Local 802. Mr. Kiesgen visited the job site on January 23, 1989.

19. In the morning of January 24, 1989, Mr. Vetter told the appellant he would be taken off painting for the day. At noon on the same day, Mr. Vetter and the appellant had a discussion about the appellant's position description and agreed to disagree about the time percentages reflected on the position description. Mr. Vetter repeated that Mr. Schlough and the personnel office would work out the dispute to everyone's satisfaction.

20. After the first five weeks of his employment and prior to January 24, 1989, at least 80% of the duties performed by the appellant fell within the Painter classification.

21. Commencing with January 25, 1989, the appellant performed duties which were consistent with those percentages described in his position description and the FRW 1 classification.

22. On January 26, 1989, Mr. Kiesgen spoke with David Prucha of the UW Classified Personnel Office, explained the appellant's situation and stated they wished to have the appellant reclassified and wanted to get the machinery going to accomplish that. Mr. Prucha said that he would look into the matter and that it was not necessary for the appellant to follow up the request with a letter.

23. On February 20, 1989, the appellant mailed a written request for an audit of his position and of his classification to the UW Classified Personnel Office.

24. By letter dated July 10, 1989, the appellant was notified by Mr. Prucha that it was not appropriate to reclassify his position from FRW 1 to Painter because there had been no logical and gradual change in his duties.

25. The appellant requested DER review the reclassification decision. By letter dated September 13, 1989, DER denied appellant's reclassification request on the grounds that as of February 26, 1989, the effective date of the appellant's February 20th written request for reclassification, the appellant was performing duties in the FRW 1 classification.

26. The respondent's effective date policy is established in §332.060 of the Wisconsin Personnel Manual, which provides, in part:

Both delegated and nondelegated reclassification regrade actions and reallocation regrade actions taken under ER-Pers 3.01(e), (f) or (g) will be made effective at the beginning of the first pay period following effective receipt of the request.

* * *

Effective receipt of a request may be made by any office within the operating agency that has been delegated, in writing, effective receipt authority by the appointing authority. A request may be initiated in one of the following three ways through submission of appropriate documentation:

* * *

2. If a position incumbent requests his/her supervisor to review the level of the position and the supervisor takes no action or declines to initiate further action, the required documentation from the incumbent is a written request which includes a statement of the events (including the dates when the events took place) which have occurred in regard to the request for a classification review.

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 establishing the respondent's classification decision was incorrect.
3. The appellant has not sustained his burden of proof.
4. The respondent's classification decision was not incorrect.

DISCUSSION

The definitions of the terms reallocation, reclassification and regrade found in §ER 3.01, Wis. Adm. Code, outline the distinction between the reallocation process and the reclassification process and explain the secondary decision of whether the incumbent is to be regraded:

(2) Reallocation. "Reallocation" means the assignment of a position to a different class by the secretary as provided in s. 230.09(2), Stats., based upon:

* * *

(e) The correction of an error in the previous assignment of a position;

(f) A logical change in the duties and responsibilities of a position;

* * *

(3) Reclassification. "Reclassification" means the assignment of a filled position to a different class by the secretary as provided in s. 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. "Regrade" means the determination of the secretary under s. 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.

The agreed upon issue for hearing refers only to the respondent's decision to deny the appellant's request for reclassification and makes no reference to the distinct terms of reallocation or regrade. However, during the course of the hearing and in his post-hearing brief, the appellant clearly argued that even if the decision not to reclassify his position was incorrect, the position should have been reallocated based on the need to correct an error in the previous classification assignment. The respondent has not argued that this contention extends beyond the issue for hearing, so the Commission will address both the reclassification and the reallocation claims.

The initial question is one of determining the appropriate date for analyzing the duties performed by the appellant. The only relevant evidence in the record is the testimony by Cornell Johnson, a classification analyst for DER. Mr. Johnson testified that in performing a reclassification analysis, DER looks at the duties being performed on what would be the effective date of the reclassification, and at the six months prior to that date to make sure the duties have been continuous during that period. Mr. Johnson testified that one consequence of this practice is that it would be possible for an appointing authority to remove significant duties from a position one day every 6 months and to thereby prevent the reclassification of that position.

The respondent's effective date policy, summarized in finding of fact 26, keys in on the date on which the reclassification or reallocation request was received by an appropriate office of the employing agency. The Commission has previously upheld the effective date policy as an appropriate basis on which to make decisions as to an effective date. Popp v. DER, 88-0002-PC, 3/8/89. Here, the appellant did not submit a written reclassification request until February 20, 1989. However, on January 26, 1989, Mr. Kiesgen of the union had raised the matter with David Prucha of the UW Classified Personnel Office. Mr. Prucha said he would look into the matter and that it was not necessary for the appellant to follow up Mr. Kiesgen's classification request with a letter. The appellant was entitled to rely on Mr. Prucha's statement and the Commission finds that the classification request was effectively received on January 26th. See Guzniczak & Brown v. DER, 83-0210, 0211-PC, 5/13/87; petition for rehearing granted and decision reaffirmed, 6/11/87. Appellant's prior discussions with his supervisor were not specific enough to constitute a formal request for a classification review because it did not comply with the respondent's effective date policy set out in finding 26.

From the appellant's perspective, a problem arises from the fact that even though he had been performing Painter duties for the period from October, 1987 to January 24, 1989, he was once again assigned FRW 1 duties starting January 25th. Therefore, at the time the classification request was received by Mr. Prucha, the appellant was no longer performing duties and responsibilities at the Painter level². Respondent correctly notes that the appointing authority is specifically granted the power to assign duties to employees under §230.06(1)(b), Stats. The UW exercised that authority in such a way that appellant was performing FRW 1 duties at the time he filed his classification request.

For the reasons set out above, the Commission concludes that the appellant was not performing Painter duties on the dates that are crucial to the classification decision. This conclusion compels the Commission to affirm the respondent's classification decision and to dismiss the appeal. However, even if

²The respondent stipulated that prior to January 24, 1989, at least 80% of the duties performed by the appellant were duties that fell within the Painter classification. If the Commission were hearing a classification case in which the effective date was, for example, January 1, 1989, proper classification of the position would be at the Painter level.

the Commission could focus solely on the duties performed by the appellant between October of 1987 and January 24, 1989, the appellant would have to meet the other requirements for reclassification or reallocation. There is no question that the duties performed by the appellant during this period are better described by the Painter classification than the FRW 1 classification. A Facilities Repair Worker is a "generalist" while the Painter is a single craft. A FRW position can be assigned painting duties as one of a variety of responsibilities, e.g. plumbing, painting, masonry and carpentry, but the position is typically structured in such a way that no one area will constitute a majority of the work. Theoretically, a FRW will also act more as a helper than as someone finally responsible for the work.

In addition to performing work at the new classification level, reclassification also requires both a logical and gradual change in duties. The appellant's superiors in Arlington chose to abruptly change the responsibilities assigned to the appellant by assigning him at least 80% painting work instead of just 30% as had been reflected in his position description. This change occurred after the appellant had performed FRW 1 work for about 5 weeks and amounted to a wholesale change of his duties as reflected by the fact that he was given a locker in the paint shop. The assignment of the additional painting responsibilities and the removal of non-painting FRW duties did not constitute a gradual change of the nature required for reclassification of a position.

There are several different bases for reallocating a position. The appellant contends that the position was incorrectly allocated at the time it was initially filled and that it should have been initially classified at the Painter level. However, given the duties initially assigned to the position as reflected in the position description as well as the duties actually assigned to the appellant during the first several weeks of his employment, the initial allocation of the position was properly made to the FRW 1 level.

The second basis relevant to this appeal for reallocating a position is a logical change in the duties of the position. No evidence was presented as to the standard to be used in determining whether a change in duties has been logical for reallocation purposes. However, §332.040 of the Wisconsin Personnel Manual includes the following guidelines for determining if a change is logical for purposes of reclassification.

a. Logical changes are changes which are reasonably related to the previous duties or responsibilities of the position. Generally, if the changes are reasonably related to the previous duties, satisfactory performance of the original duties or responsibilities of the position should provide any incumbent with a reasonable expectation that the changed duties or responsibilities will be satisfactorily performed.

b. If more than 50% of the duties or responsibilities of a position have changed since written notice was last given to the administrator and the employee of changes in assigned duties and responsibilities which may affect the classification of the position, the changes are not a logical change to a position but are the creation of a new position.

In the present case, the change amounted to at least 50% of the duties of the position. Therefore, based on this guideline for determining whether a change is logical for purposes of reviewing the classification of a position, the change in duties assigned to the appellant's position would not meet the requirements for reallocation.

Assuming, arguendo, the reclassification or reallocation of the position could be justified, the record still shows the appellant would not be entitled to regrade along with the position. According to §ER 3.015, Wis. Adm. Code:

(2) Incumbents of filled positions which will be reallocated or reclassified may not be regraded if:

* * *

(c) The secretary determines that the position should be filled by competitive examination under s. 230.15(1), Stats.

Cornell Johnson testified that given the circumstances here of 3 employes (FRW's) at Arlington performing essentially similar work, it would be illogical to give one employe the 80+% work assignment and disregard the other two, especially where the appellant was a new employe and there was a seniority factor in that the higher level work could lead to a higher classification. In this situation, if all the prerequisites had been present for classifying the position at the higher level, it would still be properly filled by competition instead of regrading the appellant. This result is consistent with the general policy language found in §230.15(1), Stats: "Appointments to and promotions

in the classified service, shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination."

The initial basis for affirming the respondent's decision in this matter is the need to focus on the duties being performed by the appellant on what would be the effect date of any reclassification or reallocation decision. The Commission has, nevertheless, proceeded to address additional requirements which would have to be met by the appellant in order for his position to be re-allocated/reclassified and for him to be regraded. For all of the above reasons, the appellant is not entitled to reclassification or reallocation of his position from FRW 1 to Painter and to a regrade to the higher level.

The Commission's authority over this matter is limited to reviewing the respondent's classification decision and, as a general matter, does not extend to the other personnel actions which are described in the record. However, the evidence of record compels the Commission to offer some additional observations. Irrespective of the bottom line of this decision, the available evidence strongly suggests the UW manipulated the process in such a way as to hire someone with extensive painting skills as a FRW and to have that person perform duties in the Painter classification for a period of more than one year, thereby avoiding the expense of paying the employe at the rate to which a journeyman painter would have been entitled. Once the UW learned the Painters Union had become aware of the scheme, duties were immediately re-assigned so that the employe began to perform duties consistent with his classification. The Commission does not condone the procedures followed here in an apparent effort to circumvent the civil service code.²

³The only possible mechanism for the appellant to obtain a remedy to compensate him for his work during the period from October, 1987 to January 24, 1989, would appear to be the Claims Board.


ORDER

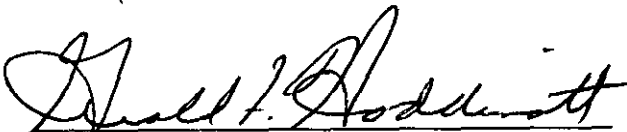
The respondent's decision is affirmed and this appeal is dismissed.

Dated: January 24, 1991

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Vernon Seay
6104 Gateway Green
Monona, WI 53716

Jon E. Litscher
Secretary, DER
137 East Wilson Street
P.O. Box 7855
Madison, WI 53707