

STATE OF WISCONSIN

PERSONNEL COMMISSION

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STEVE CRARY,

Appellant,

v.

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

Respondents.

Case No. 89-0133-PC

* * * * *

FINAL
DECISION
AND
ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by a hearing examiner, a copy of which is attached. The Commission has considered the objections submitted by the respondent and has consulted with the examiner.

This case involves the appeal of DNR's denial of a request for reclassification from SK1 (Storekeeper 1) to SK2 or PA1 (Program Assistant 1) or PA2. The proposed decision upholds the denial of reclassification to PA1 and PA2, but rejects the denial of reclassification to SK2. The basis for the latter conclusion was that although the SK2 class specification clearly requires leadwork responsibilities, subsequent to DNR's denial of the reclassification request DER apparently changed its application of this specification so that this responsibility was no longer required. The proposed decision in essence analogizes the DER action to a court's interpretation of a statute and concludes that the interpretation should be given what amounts to a retroactive effect to lead to the conclusion that the SK2 reclassification was denied incorrectly.

The entire record regarding the DER action was provided by the testimony of the DNR personnel specialist. This testimony is set forth in the proposed decision as follows:

The other thing that came to my attention is that late in 1989 the Department of Employment Relations in their class determinations had

started going outside the requirements of the Storekeeper 2 classification, that they felt that that was — I don't know what their decisions were, but they had begun to make some positions elsewhere in state government Storekeeper 2's that were not leadworkers but did have that complete responsibility for everything of a program.

While DER apparently made some classification decisions that resulted in SK2 classifications for positions without leadwork responsibilities, the rationale for these decisions is entirely unclear on this record. DNR's decision denying the SK2 classification was obviously correct at the time it was made based on the clear language of the class specification requiring leadworker responsibilities. If that decision had been based on an interpretation of some arguably ambiguous language in the SK2 class specification, the Commission would not quarrel with the notion of considering an interpretation or construction of that language by DER issued after the reclassification denial but before the hearing. Here, however, there is absolutely nothing ambiguous about the leadwork requirements in the SK2 class specification, while the basis for what DER began doing in December 1989 is completely undeveloped on this record. This is an insufficient basis for the use of the DER actions to overturn a decision that manifestly was dictated by clear language in the class specification.

Furthermore, the Commission's view are not swayed by the fact that as part of a settlement DNR offered appellant an SK2 classification, at least in partial reliance on the DER actions.¹ Parties can be motivated by a number of factors in making settlement offers. That an agency relies on something as a basis for making an offer of a classification it previously had determined had to be denied does not automatically make the thing relied on a sufficient basis on which to conclude the initial decision was erroneous. The specific factor would have to be evaluated to determine what weight or influence it should have in deciding the question before the Commission here on appeal — i.e., whether the decision which was appealed was correct. As was discussed above, the nature of and rationale for the DER actions are on this record entirely too vague to serve as the sole basis for overturning DNR's SK2 reclassification denial which obviously was dictated by the clear language of the SK2 class specification.


¹ This testimony came in without objection by respondent.

ORDER

The Commission adopts and incorporates by reference as its final disposition of this matter the following parts of the proposed decision and order (a copy of which is attached hereto): Nature of the Case, Findings of Fact, Conclusions of Law 1, 2 and 5, and the Discussion, with the exception of the last sentence thereof on page 11. The Commission rejects those portions of the proposed decision and order not adopted, concludes that appellant did not sustain his burden of proof in any regard and that respondent's action denying the request for reclassification of appellant's position from SK1 to SK2 was not incorrect, affirms respondent's action denying the request for reclassification of appellant's position from SK1 to SK2 or PA1 or PA2, and dismisses this appeal.

Dated: June 1, 1990

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:gdt/2


GERALD F. HODDINOTT, Commissioner

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Perform program support for the statewide Hunter Education Program, Boating Safety Program, Snowmobile Safety Prog., and All Terrain Vehicle Safety Prog. The primary function of this position is implementation of program development and program materials maintenance. Perform support duties for three administrators of the recreational safety programs, the dept. law enforcement training officer and six district law enforcement safety specialists. Provide support and assistance to the supervisor of warehouse services upon request.

3. Appellant's position has experienced a logical and gradual change over a relevant period of time, primarily as a result of growth in the department's safety education programs, and appellant's increased involvement in the programmatic aspects of these programs. One example of this is as set forth at II.C.2. of appellant's PD (Respondent's Exhibit 11):

Discuss and decide with program assistants and safety specialists which of the available training aids would best satisfy the needs of volunteer instructors' requests.

4. Appellant's position is not a lead worker.

5. On August 20, 1987, DNR personnel in the person of Sue Steinmetz acting on a delegated basis from DER pursuant to §230.04(1m), Stats., denied a request for reclassification of appellant's position and determined that it remained most appropriately classified as SK 1. See Respondent's Exhibit 6. Appellant appealed this decision to this Commission as Case No. 87-0180-PC. This case was settled prior to hearing. This settlement included the provisions that appellant's PD would be redrafted with help available from Ms. Steinmetz and that if reclassification were granted it would have an effective date of the submission of the revised PD. See Appellant's Exhibit 1.

6. Ms. Steinmetz ultimately denied reclassification, again on a delegated basis, by a memo dated October 2, 1989, Respondent's Exhibit 12. Ms. Steinmetz ruled out both the Program Assistant (PA) 1 and 2 and the SK 2 classifications and determined appellant's position remained most appropriately classified as SK 1. Her primary rationale for denying the SK 2

classification level was that appellant's position did not have ongoing leadwork responsibilities. Her primary rationale for denying the PA 1 or 2 classifications was set forth as:

[T]he duties assigned to your position are not oriented to the clerical functions. While you may perform some of the duties listed and on face value some of the specification language could be interpreted as it relates to your position, the primary emphasis of your position and the majority of job duties are not identifiable within the Clerical Assistant or Program Assistant classification series.

7. Appellant filed an appeal of the foregoing decision with this Commission on October 31, 1989, and it was assigned Case No. 89-0133-PC.

8. On December 15, 1989, respondent offered appellant an SK 2 classification with an effective date of July 1, 1989, which offer appellant declined. Respondent based its offer on two points. First, Ms. Steinmetz had learned that DER had been reclassifying positions to the SK 2 level notwithstanding they lacked ongoing leadwork responsibilities as required by the class definition set forth in the SK 2 class specification, Respondent's Exhibit 2.¹ Second, she had been informed by certain persons within DNR management that there were certain changes in the duties and responsibilities of appellant's position in conjunction with the physical relocation of the stores operation to Darwin Road in January 1989 that enhanced the class level of appellant's position. Therefore, respondent concluded that, assuming everything fell into place and the proper paperwork was submitted, etc., appellant would be eligible for regrade to SK 2, after the new duties and responsibilities had been in place for six months pursuant to §ER 3.015(3)(b), Wis. Adm. Code, or on July 1, 1989.

¹ The reason for this approach by DER was never explained on this record.

9. Respondent's conclusion that the requisite SK 2 duties and responsibilities were not acquired until after the relocation to Darwin Road was supported by respondent on this record by certain hearsay testimony presented through Ms. Steinmetz. Appellant presented testimony by persons with first-hand knowledge that there was very little change in his position associated with the relocation and that the key duties and responsibilities referred to by Ms. Steinmetz had been performed for some time prior to the relocation. The Commission concludes that appellant has sustained his burden of proof on this issue and finds that, laying to one side the question of leadwork duties and responsibilities, appellant had been performing at the SK 2 level for at least 6 months prior to October 2, 1989, when respondent denied his reclassification request.

10. The class definition and examples of work performed for SK 1 are as follows:

This is responsible lead work guiding the activities of a departmental or large divisional stores unit or functioning as the assistant to the supervisor of one of the largest stores or warehouse units. Under limited supervision positions in this class are responsible for the complete stores operations of a department or large division or unit with a wider variety and larger turnover of items than is characteristic of the lower class. Positions allocated to this class who assist Supervisors III in the operation of one of the largest stores unit are responsible for a major function within the unit. Employees in this class have their work reviewed by administrative superiors although the day to day operation is the employee's responsibility. The work usually involves the guidance of others.

Examples of Work Performed:

Inspects items received or prepared for shipment to see that they conform to specifications and regulations.

Accepts or rejects goods as indicated and may approve invoices for payment.

Prepares necessary requisitions for stock replacement generally subject to approval of a supervisor.

Plans and guides the work of several other employes in the proper receiving, storing, or issuing of materials.

Develops efficient storage or shipping methods, including the allocation and arrangement of bins and storage spaces.

Maintains or supervises proper maintenance of records incident to inventories, receipt and issuances.

Makes minor local purchases or specializes in the purchase of one type of item such as clothing.

Confers with administrative superiors concerning the operation of the storeroom or mailroom.

Performs related work as required. (Respondent's Exhibit 1)

11. Appellant performs all of the SK 1 examples of work performed.

12. The class definition and examples of work performed for SK 2 are

as follows:

This is responsible lead work directing the operations of a large state institutional or departmental stores or warehouse. Under general supervision employees in this class are responsible for the complete store operation including estimating, requisitioning, receiving, storing, issuing and maintaining inventory records and may also do a limited amount of local purchasing. Positions allocated to this level differ from those allocated to the lower storekeeper level in that they involve a more complex stores operation as characterized by the volume of turnover, nature and variety of items as well as the lead worker role and duties performed by the storekeeper. The work is performed with considerable latitude in the operation of the stores unit. Work is subject to review by administrative superiors for conformance to rules and regulations governing the requisitioning, purchasing, issuing or shipping of supplies and materials.

Examples of Work Performed:

Estimates stock needs and initiates requisitions for same.

Consults with supervisors and departmental officials as to changes in inventory levels and purchasing requirements.

Inspects goods received and approves invoices for payment.

Maintains inventory and other stores records involving large stocks of a varied nature.

Plans and guides the work of employes engaged in various stores and shipping operations.

Screens surplus property to determine if it is usable.

Directs the receipt, storage, issuance and delivery of supplies frequently requiring special care for proper storage.

Directs proper distribution of goods in filling requisitions.

Contacts vendors in ordering and expediting deliveries of supplies.

Submits periodic reports to superiors concerning the operation of the storeroom.

May purchase items directly from local vendors within the limits established by the Bureau of Purchases.

Performs related work as required. (Respondent's Exhibit 2)

13. The class definition and examples of work performed for PA 2 are as follows (appellant performs those examples marked by asterisks):

This is work of moderate difficulty providing program support assistance to supervisory, professional or administrative staff. Positions are allocated to this class on the basis of the degree of programmatic involvement, delegated authority to act on behalf of the program head, level and degree of independence exercised, and scope and impact of decisions involved. Positions allocated to this level are distinguished from the Program Assistant 1 level based on the following criteria: (1) the defined program area for which this level is accountable is greater in scope and complexity; (2) the impact of decisions made at this level is greater in terms of the scope of the policies and procedures that are affected; (3) the nature of the program area presents differing situations requiring a search for solutions from a variety of alternatives; and (4) the procedures and precedents which govern the program area are somewhat diversified rather than clearly established. Work is performed under general supervision.

PROGRAM ASSISTANT 2 - WORK EXAMPLES

* Provides administrative assistance to supervisory, professional and administrative staff, head of a department or program.

* Schedules department facilities usage.

* Maintains inventory and related records and/or reports and orders supplies.

Conducts special projects: analyzes, assembles, or obtains information.

Maintains liaison between various groups, both public and private.

Directs public information activities and coordinates public or community relations activities.²

Prepares budget estimates, plans office operations, controls bookkeeping functions and handles personnel transactions.

Plans, assigns and guides the activities of subordinate employees engaged in clerical program support work.

Corresponds with various outside vendors or agencies to procure goods or information for program operation.

* Develops and recommends policies, procedures, guidelines and institutions to improve administrative or operating effectiveness.

* Screens and/or reviews publications; drafts or rewrites communications; makes arrangements for meetings and maintains agendas and reports; arranges schedules to meet deadlines.

² Appellant's testimony on this point ("This includes going yearly to the state fair and Wisconsin deer classic to set up and take down the display, arrange proper handouts and brochures..."), while uncontested, is simply not equivalent to "Directs public information activities and coordinates public or community relations activities." This note also applies to appellant's assertion that he performs the PA 3 work example beginning with "[M]ay be in charge of public relations...."

* Maintains extensive contact with other operating units within the department, between departments or with the general public in a coordinative or informative capacity on a variety of matters.

* Prepares informational materials and publications for unit involved, and arranges for distribution of completed items.

* Attends meetings, work shops, seminars. (Respondent's Exhibit 3)

14. Appellant also performs the following PA 3 work example:

Answers questions regarding the program or division via telephone, correspondence or face-to-face contact.

15. The PA position standard, Respondent's Exhibit 3, includes the following "exclusion":

C.4. Positions that are more appropriately identified by another class series (such as any specialized class series where the majority of time is spent in the functions of the specialty).

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proof.

3. Appellant has satisfied his burden of proof in part.

4. Respondents' action denying the request for reclassification of appellant's position from SK 1 to SK 2 was incorrect.

5. Respondents' action denying the request for reclassification of appellant's position from SK 1 to PA 1 or PA 2 was not incorrect.

DISCUSSION

In order to establish that respondent erred in denying reclassification to PA 2,³ appellant must show that the majority of his work is PA 2 in nature. Otherwise, since the SK series is more specialized than the PA series, an SK classification is more appropriate. While appellant did show that a number of

³ Appellant's case focused essentially entirely on the PA 2 level so this decision will not address the PA 1 level other than to note that appellant also failed to make out a case for PA 1.

his activities were programmatic in nature as opposed to storekeeping or warehouse-type tasks, he fell short of showing this was a majority of his work. While appellant was able to point out a number of PA work examples he performed, he admitted he performed all of the SK 1 work examples. Therefore, while the position is obviously hybrid in nature, the Commission cannot conclude that the PA aspects of the job are predominant.

As to the SK 1 versus SK 2 issue, appellant's lack of lead worker duties and responsibilities is inconsistent with the requirements of the SK 2 class specification. However, this issue is complicated by the fact that DER has apparently seen fit to waive the leadwork requirement for SK 2 reclassification. Ms. Steinmetz testified:

The other thing that came to my attention is that late in 1989 the Department of Employment Relations in their class determinations had started going outside the requirements of the Storekeeper 2 classification, that they felt that that was -- I don't know what their decisions were, but they had begun to make some positions elsewhere in state government Storekeeper 2's that were not leadworkers but did have that complete responsibility for everything of a program.

The Commission must address the effect, if any, of this DER policy change on the DNR decision under review on this appeal. In order to do that, it is helpful to review the general principles applicable to the decision of reclassification appeals.

It is well-settled that appeals of reclassification decisions are heard de novo -- i.e., the Commission is not limited to a review of the "record" made before the respondent when the reclassification was made, but rather the parties can present any evidence to the Commission that is relevant to the reclassification issue. Jallings v. Smith, Wis. Pers. Bd. No. 75-44, 45 (8/23/76). At the same time in order to be relevant to an appeal of a reclassification decision, normally the information in question would have had to have been in existence at the time of the decision under review. As an example of how

this operates, an employe appealing a reclass denial can properly present evidence at the hearing of other purportedly comparable positions in other agencies notwithstanding that the respondent may not have considered these position descriptions as part of its original decision. However, the employe could not properly present evidence concerning changes in his or her position that occurred after the reclassification denial, because the respondent had to make its decision, which constitutes the subject matter of the appeal, on the basis of the makeup of the position at the time of the decision.

In the instant case, we are dealing with the question of the effect of a change in DER's interpretation and/or application of the SK 2 class specifications which apparently occurred sometime shortly after October 2, 1989, which is when respondent decided to deny the reclass request. Once respondent learned of this change in approach by DER, which pursuant to §230.09, Stats., has primary responsibility for the administration of the classification system, it determined that it could reclassify appellant's position to SK 2 notwithstanding the absence of an ongoing leadwork function. The specific question is whether, on an appeal of respondent's October 2, 1989, decision, the subsequent DER interpretation or application of the class specification should be considered to have retroactive effect.

The Commission has been unable to find a great deal of authority that bears on this point. The general rule regarding the retroactivity of judicial interpretations of statutes is that an interpretation has a retroactive effect on pending matters unless special circumstances are present. Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 575-578, 157 N.W. 2d 595 (1968). There is some support for a similar approach with respect to the administrative process. Dictum contained in Klepinger v. DER, Wis. Pers. Commn. No. 83-0197-PC (5/9/85) (Section A), reversed other grounds, DER v. Personnel Commission,

85 CV 3022 (Dane Co. Circuit Court, 1/2/86) suggests that a change in the interpretation of class specifications which would result in the reclassification of certain peer positions subsequent to an appeal would result in an effective date going back to the original effective date of the appealed transaction. Also, see Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281-282, 89 S.Ct. 518, 526, 21 L.Ed. 2d 474 (1969), which involved a tenant who was evicted from a federally assisted housing project without notice of the reasons or an opportunity to be heard. While the tenant's judicial challenge to this action was pending, the Department of Housing and Urban Development (HUD) issued a circular directing that local housing authorities provide notice and hearing prior to eviction. The Housing Authority argued that the circular could not be considered to apply to a proceeding that commenced prior to the circular's issuance. The Court held that it was proper to send the matter back to the Housing Authority for a hearing pursuant to the new circular:

The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision ... Chief Justice Marshall explained the rule over 150 years ago as follows:

'[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the law which governs, the law must be obeyed or its obligation denied ... if it be necessary to set aside a judgment, rightful when rendered but which cannot be affirmed but in violation of law, the judgment must be set aside':

This same reasoning has been applied where the change was constitutional, statutory, or judicial. Surely it applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization. *id.* (footnotes omitted)

While the foregoing precedent obviously is not directly on point, it does provide some guidance. In the instant case, the Commission is conducting a de novo review of respondent's October 2, 1989, administrative decision to deny reclassification of appellant's decision. The way this case played out at

the hearing was that Ms. Steinmetz testified that she had been informed by certain members of management that significant changes were made to appellant's position when the stores operation was moved to Darwin Road in January 1989. Therefore, this aspect of respondent's case was supported by hearsay. Appellant, on the other hand, produced first-hand testimony that there had been no significant changes in the position in connection with the move, and the key elements of the job Ms. Steinmetz referred to as supporting reclassification had been in place for many months. Therefore, based on this record it can be concluded that the only thing standing in the way of granting the SK 2 reclassification on October 2, 1989, with an effective date of May 1988, was the fact that appellant's position did not have ongoing leadwork responsibility as required by the SK 2 class specification. As discussed above, DER's construction and/or application of that class specification changed sometime prior to the hearing of this appeal. Inasmuch as the Commission is conducting a de novo hearing, it is appropriate pursuant to the foregoing authority to provide a retroactive effect to the DER rule change and remand this matter to DNR to effectuate the SK 2 reclassification/regrade with an effective date in May 1988.

ORDER

Respondent's action of denying the reclassification of appellant's position and the regrade of appellant to SK 2 with an effective date in May, 1988, is rejected, and this matter is remanded for action in accordance with this decision.

Dated: _____, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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