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PAUL SPRAGGINS,
 Appellant,

v

Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondent.

Case No. 90-0390-PC

* * * * *

DECISION
 AND
 ORDER

After reviewing the Proposed Decision and Order and the objections and arguments with respect thereto and after consulting with the hearing examiner, the Commission adopts the Proposed Decision and Order as its final resolution of this matter with the following changes:

The Proposed Decision and Order at page 6, note 1, discusses the relationship between the statutory language characterizing the various programs in question and the issue of whether appellant is responsible for three or more statewide programs as follows:

However, respondent argues that appellant's position oversees only two (2) programs: WEOP, as expressed in §115.28(23) Wis. Stats., and Minority Groups Scholarships, as expressed in §115.43, Wis. Stats. Respondent contends that §115.28(23) is clear, unambiguous and proof that WEOP is only one program with several components including talent search, TIP and EIP.¹

¹ No evidence was presented establishing that the statutory description of WEOP as one program was intended for classification purposes. Therefore, this argument was not considered in the analysis. Also, subsequent submission of evidence on this subject by appellant and response by respondent was not considered. The record was closed and the subject matter was not a part of the analysis.

In the Commission's opinion, the Proposed Decision and Order could be construed as overstating the case in its emphasis on the absence of evidence

"establishing that the statutory description of WEOP as one program was intended (presumably by the Legislature) for classification purposes." In determining whether particular parts of an agency's program responsibilities constitute "separate" programs or "statewide" programs for classification purposes, there is no reason not to consider the legislative handling or treatment of the programs. That the Legislature may not have intended the description of an activity as a "program" for classification purposes does not mean that such references in the statutes have no probative value, although it may affect the amount of probative value involved. For example, if a case involves a comparison between parts of an agency's program activity and one is statutorily mandated while the other is not, this fact could be probative as to the question of whether each position would be considered responsible for a program. With respect to the instant case, §115.28(23), Stats. (1989-90), which was in effect at the time of the reclassification decision¹ provides as follows:

(23) Wisconsin Education Opportunity Program.

Administer a Wisconsin educational opportunity program to assist minority and economically disadvantaged youth and adults in pursuing higher education opportunities. The program shall consist of the following separate components:

(a) A talent search program which shall provide information to youths and adults about postsecondary education and counseling to aid pupils in defining educational goals, applying and enrolling in postsecondary institutions and obtaining financial aid.

(b) A talent incentive program which shall provide supplemental aid to financially needy pupils to promote attendance at postsecondary institutions.

(c) An early identification program which shall provide services to pupils under s. 115.44.

While this statutory treatment of WEOP is not determinative of the question of whether WEOP should be considered as one program or three programs, it does have some probative value and should be considered.

Since this subsection refers to the "Wisconsin Educational Opportunity Program" (emphasis supplied) which "shall consist of the following separate components, (emphasis supplied) this supports the proposition that WEOP is but one program with three components. However, as complainant points out

¹ The effect of the subsequent change in the law will be discussed below.

in his reply brief, this statutory formulation is not dispositive. For example, §115.43, Stats., (1989-90)², "minority group pupil scholarships," which respondent admits is a program for purposes of the EAO classification series, does not include the word "program."

The Proposed Decision and Order also rejected any consideration of the post-hearing amendment of §115.28(23), Stats. -- 1991 Senate Bill 4831; §611-- which appellant submitted (see page 6, note 1 of the Proposed Decision and Order). This statutory change also should be considered. The fact that it was enacted after the reclassification decision in question does not necessarily mean it could have no bearing on this appeal. However, the general rule is that "legislation is presumed to be prospective unless the statutory language clearly reveals by express language or necessary implication an intent that it apply retroactively." (citation omitted) State v. DILHR, 101 Wis. 2d 396, 403, 304 N.W. 2d 758 (1981). In addition to a copy of the legislation in question, appellant submitted, apparently as "legislative history," an unsigned, undated, unattributed and unexplained copy of a memorandum discussing the legislative intent behind the amendment. This clearly is not something the Commission can consider as "legislative history."

Furthermore, even if the statutory change were given a retroactive reading, such a change would not necessarily be dispositive, as appellant has argued with respect to the original language and as discussed above. The comparison of appellant's position to the other EAO 3 positions in the record strongly support respondent's decision to deny the reclassification request.

Therefore, the Commission enters the following:

Order

I. Footnote 1 on page 6 is deleted for the reasons set forth above.

II. Finding of Fact 21 should be modified to state as follows:

21. EAO 3 positions offered for comparison purposes in the hearing record have broader scope and impact on a larger percentage of the Wisconsin public school population than appellant's position.

² Pursuant to 1991 Wisconsin Act 39, this provision became §115.28(23)(d), Stats.

III. Finding of Fact 22 should be modified to state as follows:

22. Positions in DPI appropriately classified at the EAO 3 level include the position of Lond Rodman which functions as the Director of the Bureau of Teacher Education, Licensing, and Placement. This position supervises two positions at the Educational Administrative Officer 2 (EAO 2) level and is responsible for the administration of more than three programs including, but not limited to, statewide public and non-public teacher licensing, license renewal, approval of teacher certification programs at Wisconsin's 32 independent and public colleges and universities, the staff development program for administrators and faculty serving institutions of higher education and in elementary and secondary schools, the program for beginning teachers (induction year program), the program for future educators, the teacher world program, the internship program (WIP), teacher recruitment and retention. These programs are significantly wider in scope than those administered by appellant's position and directly impact a larger percentage of the Wisconsin public school population.

IV. Finding of Fact 23 is modified to state as follows:

23. Another position at the DPI appropriately classified at the EAO 3 level is the position of Richard Mortenson, the Director of the Bureau for Food and Nutrition Services. This position supervises an EAO 2 position, an EAO 1 position, and an Educational Services Assistant 3-Supervisor position and is responsible for the administration of DPI's role in relation to five federal Child Nutrition programs; the Nutrition Education and Training Program; the USDA Donated Food Distribution program; the Elderly Nutrition Improvement program; and the Wisconsin Morning Milk program. These programs are wider in scope than those administered by appellant's position and directly impact a larger percentage of the Wisconsin public school population.

Modifications I., II., and III., were made to provide more detail regarding the comparison of the scope and impact of the duties of appellant's position and positions at DPI which the Commission concludes are appropriately classified at the EAO 3 level, and to eliminate duplicative findings.

V. Finding of Fact 24 is deleted due to the fact that the Commission does not agree with the Finding and the Commission does not find that it is necessary to classify the two programs administered by appellant's position as

"benefits" programs or "educational" programs in order to make the subject classification decision.


VI. The last three paragraphs of the Opinion section are modified to state as follows:

The evidence shows that appellant's position can be differentiated from those at the EAO 3 level. First, positions heading WEOP components and the Pre-College Scholarship Program have lower classifications than positions heading programs in bureaus directed by EAO 3 positions. In addition, these EAO 3 positions administer programs with significantly greater scope than those programs administered by appellant's position and which have a broader impact on a larger percentage of the Wisconsin public school population (See Findings of Fact 22 and 23, above). Although the two programs administered by appellant's position, i.e., the WEOP program and the Pre-College Scholarship Program, should be considered "statewide" programs within the meaning of the applicable classification specifications, these two programs do not have the scope or impact of the programs administered by the representative EAO 3 positions. In addition, in order to be classified at the EAO 3 level, a position must administer three or more statewide programs and the Commission concludes that appellant's position administers only two.

Based on the record and the reasons stated above, the Commission concludes that appellant's position is appropriately classified at its current level.

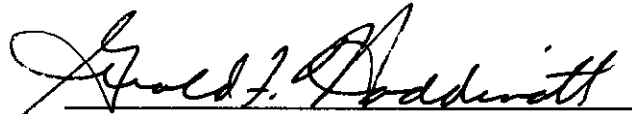
VII. Respondent's action is affirmed and this appeal is dismissed.

Dated: September 22, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel

Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

- 3.) a review of Spraggins' most recent position description dated 12/19/88 and the prior description dated 9/23/83,
- 4.) a comparison to other relevant positions,
- 5.) a review of the organizational structure and some of the positions supervised, and a
- 6.) discussion with other DER staff members.

6. Spraggins' position description, dated 9/23/83, shows goals and work activities, as follows:

- A. Time: 60% Administration of the six district state-wide Wisconsin Educational Opportunity offices of the Wisconsin Educational Opportunity Program (WEOP), the Early Identification Program (EIP) and the state-wide Talent Incentive Grant Program (TIP) which involves the accountability and recommendations of student aid awards to students participating in public and private non-profit post-secondary institutions and vocational/technical adult education schools throughout the state. Represent the State superintendent when requested and provide a Dept. of Public Instruction presence in the Milwaukee and Southeastern part of the state through the local DPI office in that area.
- B. Time: 20% Planning, developing, implementing and evaluating functions required for the administration of the Bureau of Education Opportunity
- C. Time: 10% Determination of staffing needs and training of bureau employees.
- D. Time: 10% Participation in federal, state and local conferences, meetings, hearings, and preparation of written materials to facilitate dissemination and exchange of information.

7. Spraggins position description, dated 12/19/88, shows goals and worker activities, as follows:

- A. Time: 20% Development of Bureau and agency policy on educational opportunity program instructions and services.
- B. Time: 35% Program Management
- C. Time: 20% Determination of personnel needs and training of bureau employees.
- D. Time: 5% Provision of liaison activities with other agencies and associations and representation of the state superintendent.

- E. Time: 10% Participation in federal, state, and local conferences, meetings, hearings, and preparation of written materials to facilitate dissemination and exchange of information.
- F. Time: 10% Administration of minority pre-college scholarship program.

8. The State position standard for Educational Administrative Officer 2 (PR 1-17) provides:

A position allocated to this class functions as a section chief or bureau director with responsibility for the development of new educational guidelines, methods, and program directions in addition to the coordination, administration and review of existing programs. Bureau director positions at this level typically administer one of two statewide educational programs and normally have fewer than four subordinate professional employees. Positions functioning as section chiefs in this class usually have several subordinate professional employees working in a variety of subject areas. Decisions made at his level normally do not significantly affect programs of other bureaus within the agency, and are occasionally considered be among the most complex program decisions made in the program area.

9. The state position standard for Educational Administrative Officer 3(PR 1-18) provides:

A position allocated to this class level functions either as (1) a director of a medium to large-sized bureau typically having at least three statewide programs and from four to twenty subordinate professional positions, or (2) as a section chief with responsibility for the administration of major state and/or federal programs which have significant and numerous ongoing projects and twelve or more subordinate professional positions. Bureau director positions at this level are responsible for planning, developing, implementing, and evaluating those normally administered by higher-level bureau directors. Programs normally administered by sections chiefs at this level are greater in size and scope than those usually administered by lower-level section chief or bureau director positions. Employees in this class usually make the most complex decisions affecting their program, with some of these decisions subject to only occasional administrative review.

10. The Wisconsin Educational Opportunity Program (WEOP), administered by appellant's bureau, assists minority and economically disadvantaged youths and adults in pursuing higher education. This program is expressed in state statutes as consisting of the following separate components:

a talent search program, a talent incentive program (TIP) and an early identification program (EIP).

11. The talent search program is designed to provide educational counseling and recruitment/admission/financial aid information to minority and economically disadvantaged secondary students.

12. TIP is a grant program set up to provide supplemental financial aid and to high need, non-traditional students, who qualify for post-secondary education.

13. EIP is focused upon middle school minority and economically disadvantaged students. It offers academic counseling and provides information about post-secondary institutions and financial assistance to those students in junior high school.

14. In 1985 the state legislative enacted a minority group pupil scholarship law. This law provided for a minority pre-college scholarship program, which was added to appellant's bureau for administration.

15. For fiscal year 1989, WEOP expended \$719,406.87. During that same period, WEOP had 3945 new students.

16. In the 1988-1989 school year, the minority pre-college scholarship program had 879 participants and expended \$232,700

17. The total elementary and secondary public school population in Wisconsin for the 1988-89 school year was 918,505 students.

18. In 1988-89, the total minority enrollment in Wisconsin elementary and secondary public schools was 107,825. The Milwaukee School district had 68% of the total enrollment. Seven school districts, including Milwaukee had 75% of the total minority enrollment. Thirty-two districts of Wisconsin's 430 school districts did not report any minority enrollment.

19. The organizational structure of the appellants bureau does not compare favorably with other bureaus, where the director is at the EAO 3 level. Unlike directors at the EAO 3 level, appellant does not have any subordinates, who are EAOs.

20. The positions heading WEOP components and the minority pre-college scholarship program have a lower classification (Educ Spec. 3) than positions heading programs in bureaus whose directors are EAO 3s.

21. Representative EAO 3 positions have state wide programs which directly affect the Wisconsin public school population as a whole, while appel-

lant position administers programs directed toward specific groups within the entire student population.

22. Education Administration Officer 3 (EAO 3) positions in DPI are exemplified by that of Lond Rodman, who is the Director of the Bureau of Teacher Education, Licensing and certification. Rodman's responsibilities, regarding teacher licensing and certification, directly impacts upon the entire Wisconsin Public School student population.

23. The Bureau for Wisconsin Educational Opportunity Programs focused on minority and disadvantaged students versus the total public school student population. Its scope is narrower than that of the Bureau of Teacher Education, Licensing and Certification or the Bureau for Food and Nutrition Services, which is responsible for the school lunch program.

24. WEOP provides support services and assistance to minority and economically disadvantaged students, who wish to continue their education. As such, these services, i.e. programs, are benefits programs and not "educational programs" as understood in the Position Standards.

25.. Appellants' position is more appropriately classified at the Education Administrative Officer 2.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to § 230.44(1)(b) Stats.

2. Appellants has the burden of proving respondent's decision to deny reclassification of his position was incorrect.

3. Appellant has failed to sustain this burden of proof.

4. Respondent's decision to deny reclassification of appellant's position was correct.

OPINION

The question before the Commission is whether appellants' position is more appropriately classified at the Educational Administrative Officer (EAO) 2 or 3 level. As described in the state position standard, the clear distinction between the two classifications, as applicable to this case, is that, typically, EAO 2 positions administer one (1) or two (2) statewide programs, while EAO 3 positions, typically, administer at least three (3) or more statewide programs.

Appellant argues that his position is responsible for three or more statewide programs. In support, appellant presented several witnesses. C Richard Nelson, former Deputy State Superintendent of the Department of Public Instruction (DPI) and supervisor of appellant, testified that appellant's bureau administered four programs. Nelson testified that when the bureau initially joined DPI there were two (2) programs, the talent search program and the talent incentive program (TIP). Subsequently, the Early Identification Program (EIP) and, later, the Pre-college minority Scholarship program was added. This testimony was corroborated by another witness, Roger Sunby, recently retired former executive assistant to the superintendent of DPI.

Other witnesses for appellant included, Charles McDowell, former Director of the Bureau of Classification and compensation, DER. McDowell testified that in his opinion, appellant's position met the position standard requirements for an EAO 3 classification. It was McDowell's opinion that appellant's position was responsible for three (3) statewide programs. They were: TIP, EIP, and the Pre-College Minority Scholarship Program.

Respondent in its briefs concedes that if appellant's position oversees three (3) or more programs it should be reclassified at the EAO 3 level. However, respondent argues that appellant's position oversees only two (2) programs: WEOP, as expressed in § 1115.28(23) Wis. Stats. and Minority Groups Pupil Scholarships, as expressed in § 115.43 Wis Stats. Respondent contends that §115.28(23) is clear, unambiguous and proof that WEOP is only one program with several components including talent search, TIP and EIP.¹

Respondent's sole witness was Cornell A. Johnson, III, one of its staff personnel specialists. Johnson testified to conducting an in-person job audit with appellant and his supervisor, Roger Sunby. He also reviewed appellant's current position description, his pre-reclassification request position description and relevant position standards; compared relevant positions at the EAO 2 and 3 levels; reviewing the organizational structure and some of the positions appellant supervised, and discussing the matter with other staff members of

¹ No evidence was presented establishing that the statutory description of WEOP as one program was intended for classification purposes. Therefore, this argument was not considered in the analysis. Also, subsequent submission of evidence on this subject by appellant and response by respondent was not considered. The record was closed and the subject matter was not a part of the analysis.

his division. Afterwards Johnson concluded that appellant's position was appropriately classified at its current level.

In order to prevail in an appeal of reclassification, appellant must prove there were changes in the duties and responsibilities assigned to his position; such changes occurred gradually and logically and the changes were such that more than fifty percent of the position's time was spent performing functions identified by the higher level. As previously stated, respondent in effect concedes there were logical and gradual changes in appellant's position. Therefore, the only question is whether appellant's position is responsible for a minimum of three (3) programs as required by the position standard for positions at the EAO 3 level.

The specific question is what constitutes a statewide educational program under the EAO position standard. However, language in the position standard provides little insight regarding the term "statewide educational program". In such instances, the commission looks outside the language of the position standard or classification specification for guidance. Sopher v. UWS and DER Case No. 89-0112-PC (5/4/90).

The clear evidence shows that appellant's position can be differentiated from those at the EAO 3 level. First, positions heading WEOP components and the Pre-College Scholarship Program have lower classifications than positions heading programs in bureaus directed by EAO 3 positions. Also, unlike representative EAO 3 bureau director positions, appellant's position focuses on a very small percentage of the total public school population. Further, comparison EAO 3 positions have statewide programs which impact on the entire K-12 population. These differentiations establish that programs in appellant's bureau lack the scope and complexity of programs identified as statewide programs and directed by EAO 3 positions.

Finally, respondent has consistently adhered to the same interpretation of the term, "statewide educational program". In 1986 reclassification transaction involving subordinate positions in appellant's bureau, it determined that TIP, EIP, and TS were sub-programs of WEOP.

Clearly, WEOP and pre-college scholarship program are extremely important to the state's educational system, but the dimensions are inconsistent with statewide programs. Therefore, based on the record and the reasons stated the commission believes appellant's position is appropriately classified at its current classification level.

ORDER

The action of respondent is affirmed and this appeal is dismissed.

Dated: _____, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM:rlr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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