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SHERWOOD K. ZINK, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

EMPLOYMENT RELATIONS, \*

Respondent. \*

Case No. 90-0391-PC \*

\* \* \* \* \*

DECISION  
AND  
ORDER

Nature of the Case

This is an appeal of the denial of a request for the reclassification of appellant's position. A hearing was held on June 27 and 28, 1991, before Laurie R. McCallum, Chairperson, and the briefing schedule was completed on November 15, 1991.

Findings of Fact

1. Effective November 24, 1975, appellant was appointed to the position of Chief Program Counsel in the Department of Health and Social Service's Office of Child Support. This position was then classified at the Attorney 13 level and had been created to assist the Office of Child Support in establishing a federally-mandated child support program based on cooperative agreements between the state and localities.

2. The primary emphasis of appellant's position subsequently changed to that of developing proposed legislation for modifying the state's family-support collection process and the state's paternity determination process.

3. Once the family-support collection process and the paternity determination process had been modified through legislation, the primary emphasis of appellant's position changed to that of monitoring and participating in litigation arising from these processes. This was the primary emphasis of appellant's position at the time he filed the subject reclassification request and six months prior thereto. Appellant's litigation responsibilities involve the following:

1. In those cases at the trial court level in which the State is a party, appellant advises and assists district attorneys and county corporation counsels in initiating and prosecuting actions to establish paternity or enforce child support awards; and has the authority to direct the district attorneys or county corporation counsels to file motions to reconsider or to initiate appeals of trial court decisions. In these actions at the trial court level, appellant has the discretion to serve as counsel of record and to personally litigate the case and he does so if he feels that an issue of significant statewide concern is involved. In these actions, appellant also has authority delegated to him by the Attorney General to approve settlement of certain types of cases.

2. In those cases at the trial court level in which the State is not a party, appellant has the discretion to request leave of the court to file an amicus curiae brief and has the authority to prepare and file such a brief upon leave of the court.

3. In cases at the appellate level, appellant serves as co-counsel with an Assistant Attorney General. Appellant actually authors the written brief and the text of the oral argument and the Assistant Attorney General reviews them primarily for form, not substance. The Assistant Attorney General generally delivers the oral argument to the court.

This litigation component of appellant's position consumes more than 85% of appellant's time.

4. The remainder of appellant's position's duties and responsibilities involve providing advice relating to child support enforcement and paternity determinations to legal practitioners and organizations, including preparing uniform pleadings and related forms, providing training, and recommending legislative changes; and providing advice to the Office of Child Support and other state government entities on the requirements of state and federal laws and their potential impact on state programs. Appellant's position is supervised by the Director of the Office of Child Support. This position is not classified in the Attorney series. Appellant's position does not function as a supervisor but does direct many of the day-to-day activities of an Attorney 12 and an Administrative Assistant 5 position.

5. Both the Attorney 14 and the Attorney 15 classifications have two primary allocations, i.e., chief counsel positions and litigating positions. Appellant's position does not function as a chief counsel.

6. Certain litigating positions at the Attorney 14 level were offered for comparison purposes in the hearing record. Each of these positions reports to a supervising Attorney position. These Attorney 14 positions include:

a. David Pearson--Labor and Industry Review Commission (LIRC)--This position is primarily responsible for representing LIRC in Unemployment Compensation court cases which involves preparing pleadings, motions, briefs and other legal documents for trial and appellate courts; preparing and delivering oral arguments for trial and appellate courts; analyzing case records and transcripts for court cases; preparing judgments and orders at the direction of the court; analyzing court decisions and making appeal recommendations to LIRC; and analyzing court decisions for implementation.

b. Barbara James--Public Service Commission (PSC)--This position is primarily responsible for representing the PSC in proceedings before all levels of state and federal courts and before state and federal agencies such as the Department of Energy, the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, and Interstate Commerce Commission, and the Nuclear Regulatory Commission. This litigation component of this position entails researching and preparing necessary documents such as briefs, pleadings, affidavits and orders with respect to pending court and agency proceedings; initiating court and/or administrative proceedings when appropriate; preparing witnesses, testimony, cross-examination and argument for court and agency proceedings; advising PSC on litigation strategies; writing litigation-related memoranda and correspondence; representing PSC staff at PSC hearings and calling additional witnesses as necessary; analyzing records and petitions for rehearing and recommending actions and orders related thereto; and assuring adequacy and completeness of PSC record for decision-making including making evidentiary appeals if appropriate. The remaining duties and responsibilities of this position include providing legal advice to the PSC, its commissioners, and staff; providing legal advice to public officials and representatives of political subdivisions, public utilities, and federal officials regarding the proper interpretation and application of utility regulatory laws and rules; suggesting appropriate language and providing legal and policy advice with respect to proposed or pending legislation and testifying at legislative hearings.

c. Michael Mathis--Department of Industry, Labor and Human Relations (DILHR), Unemployment Compensation Division, Bureau of Legal Affairs, Enforcement Section--This position is responsible for representing DILHR before administrative agencies and each level of state courts in cases involving disputed determinations of employer status, assessments of unemployment compensation taxes and benefit overpayments.

This includes representing DILHR at administrative hearing where the record of the case is created and preparing briefs and presenting oral argument to state circuit and appellate courts upon appeal of administrative decisions. This position is also responsible for representing DILHR in state and federal court proceedings seeking recovery of delinquent unemployment compensation taxes owed by employers and benefit overpayments owed by claimants. This involves legal oversight and assistance of DILHR collection staff; commencing and prosecuting court actions based on previously issued warrants, including use of execution, garnishment, supplementary proceedings and injunctions; asserting DILHR's rights in bankruptcy, receivership and foreclosure proceedings; preparing briefs and presenting oral argument in state and federal courts; and prosecuting contempt proceedings against employers who fail to respond to subpoenas of employment records.

7. The only litigating position at the Attorney 15 level offered for comparison purposes in the hearing record was as follows:

Donald Johns--Assistant Attorney General, Department of Justice--This position provides a variety of legal services, through counsel and representation, to the Legislature, Governor, state agencies, corporation counsel, and district attorneys; and enforces the statutes under the Attorney General's jurisdiction. This includes providing legal counsel to client agencies, the Governor, the Legislature, corporation counsels, and district attorneys; representing client agencies, the Governor, the Legislature, corporation counsel, and district attorneys in administrative and judicial proceedings, including all aspects of litigation at the administrative, circuit court, and appellate court levels; and drafting opinions in response to requests from client agencies, the Governor, the Legislature, and corporation counsel; providing the general public with information relating to state laws and rules; analyzing proposed legislation and interpreting its impact on clients; and appearing before the Legislature and its committees for testimony and advice pertaining to proposed legislation. The primary client agency of this position is the Department of Health and Social Services. As a result, this position provides counsel and representation covering a wide variety of issues relating to public health, mental health, public health, care and treatment facilities, community social services, vocational rehabilitation, and juvenile services and institutions. Child support and paternity determination are two of these issues. This position is supervised by an Attorney position which functions as a unit head.

8. On April 24, 1988, appellant filed a request for the reclassification of his position to the Attorney 15 level. Respondent subsequently reclassified

appellant's position to the Attorney 14 level based on this request and appellant filed a timely appeal of this reclassification.

9. The duties and responsibilities of appellant's position are more closely comparable to those of the Attorney 14 positions referenced above than those of the Attorney 15 position referenced above and appellant's position is more appropriately classified at the Attorney 14 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 to show that respondent's decision denying the request for the reclassification of his position was incorrect.

3. The appellant has failed to sustain this burden.

4. The decision by respondent to deny appellant's request for the reclassification of his position was correct and appellant's position is appropriately classified at the Attorney 14 level.

#### Opinion

In sustaining his burden of proof, appellant would have to show that there had been a logical and gradual change in the duties and responsibilities of his position and that the best classification fit for these duties and responsibilities was the Attorney 15 classification. The parties do not appear to dispute that there has been a logical and gradual change in the duties and responsibilities of appellant's position and the record confirms this. The remaining question then is which classification, Attorney 14 or Attorney 15, provides the best fit.

The Commission usually has available to it, in making a "best fit" determination, the language contained in the Definition section of a classification position standard. However, in this instance, the position standard consists of an allocation pattern, i.e., a listing and brief description of positions classified at the various levels within the Attorney series. As a result, the "best fit" analysis must be based upon a whole job comparison of appellant's position with the positions at the Attorney 14 and Attorney 15 levels in the allocation pattern. See Ghilardi and Ludwig v. DER, Case Nos. 87-0026,0027-PC (4/14/88).

A review of the allocation pattern reveals that the distinction between litigating attorney positions at the Attorney 14 and Attorney 15 levels rests primarily on the scope and diversity of the program area for which the position is responsible. Applying this criterion, the program area for which appellant's position is responsible is more closely comparable to that of the Attorney 14 positions described in Finding of Fact 6, above, than that of the Attorney 15 position. Appellant's position is responsible for litigating issues in the areas of child support enforcement and paternity determinations, a very small part of the total program for which the Department of Health and Social Services is responsible. In contrast, Mr. Johns' Attorney 15 position is responsible for litigating issues encompassing DHSS's total program responsibility, including such diverse issues as public health, mental health, public assistance, care and treatment facilities, community social services, vocational rehabilitation, and juvenile services and institutions. The scope and diversity of the program areas for which appellant's position and Mr. Johns' position have litigation responsibilities is not comparable.

The Attorney 14 positions referenced in Finding of Fact 6, above, have litigation responsibilities relating to unemployment compensation and utility regulation. The PSC position responsible for utility regulation litigation practices before a variety of state and federal administrative bodies as well as state and federal courts in relation to a technically complex subject area. Appellant's position does not have administrative hearing responsibilities, does little litigation at the trial court level, and does not practice in federal court. In addition, appellant has not shown that the program area for which he is responsible is as complex or as varied as that of the PSC Attorney 14 position. The program area for which the LIRC position is responsible appears to be narrower than that for which appellant's position is responsible but the scope is more comparable to appellant's position than the scope of that for Mr. Johns' Attorney 15 position. The scope of the program area for which the DILHR position is responsible also appears to be narrower than that for which appellant's position is responsible but more closely comparable to that of appellant's position than that of Mr. Johns' Attorney 15 position. Moreover, this position has administrative hearing responsibilities and practices in federal court while appellant's position does not. In addition, this DILHR

position is responsible for determination as well as enforcement litigation and this aspect of the position parallels appellant's.

Appellant argues that the fact that his litigation responsibilities require him to be proficient in certain areas of constitutional law, conflict of laws, real property law, bankruptcy law, lien law, criminal law, contempt law, civil procedure, and probate law, as well as family law provides a contrast with the Attorney 14 litigating positions. However, the variety of administrative bodies before which the PSC Attorney 14 position practices necessarily implies a required proficiency in certain areas of securities law, transportation or common carrier law, conflict of laws, environmental law, etc. The description of the DILHR Attorney 14 position also necessarily implies proficiency in certain areas of bankruptcy law, lien law, contempt law, probate law, and real property law. In addition, since each of these positions practices in trial and appellate courts, a proficiency in the law of civil procedure and certain areas of constitutional law is necessarily implied. Appellant has failed to show a significant distinction in this regard.

Appellant also implies in his brief that the practice of these Attorney 14s before administrative bodies is not comparable to his practice in state trial and appellate courts. Any distinction, for Attorney position classification purposes, between administrative and court litigation was found by the Commission to be minimal in Ghilardi and Ludwig v. DER, supra.<sup>1</sup>

Appellant also argues that the fact that he is not supervised by another Attorney, as the Attorney 14 positions referenced above are, requires him to function significantly more independently than they. Appellant implies that this lack of oversight of his work by another attorney and this lack of another attorney with whom to consult justifies a higher classification. The record reveals little about the specific nature of the oversight provided to these Attorney 14 positions by their supervisors other than they function under general supervision, the least supervision provided to a classified position. The record also reveals little about the familiarity of these supervisors with the

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<sup>1</sup> The distinction appellant makes between judicial and administrative practice is not grounded on evidence presented at hearing. While the finding in Ghilardi, which was based at least in part on expert testimony, is not binding with respect to this proceeding, it illustrates that this distinction cannot be presumed.

technical aspects of the legal work performed by these Attorney 14s. In addition, although the record shows that appellant does not consult with his supervisor in regard to legal issues, it does show that he does consult with Mr. Johns at the Department of Justice as well as corporation counsel and district attorneys, all of whom must be assumed have some degree of expertise in child support enforcement and paternity determinations since these issues are a part of their assigned responsibilities. Appellant has not shown what practical effect this difference in supervision has on the relative strengths of his position and the above-referenced Attorney 14 positions from a classification standpoint.

Appellant also cites the testimony of Edward Marion, chief counsel for DHSS and former Assistant Attorney General, that appellant's duties are "substantially identical" to those of an Assistant Attorney General to show that his position is properly classified at the Attorney 15 level. The record does show that appellant's position performs many of the same tasks as Mr. Johns' position. However, the record does not show that appellant's position performs these same tasks in a program area as broad in scope or as diverse as that served by Mr. Johns' position. It should be noted that the record shows that appellant's position performs many of the same tasks as the Attorney 14 positions described in Finding of Fact 6, above. The key distinction, as discussed above, is the scope and diversity of the program area served by the position.

Finally, respondent argues that appellant's position cannot be classified at the Attorney 15 level because it is not assigned to the Department of Justice and does not function as an Assistant Attorney General. However, if appellant had been able to show that his duties and responsibilities and authority and program area were comparable to those of an Assistant Attorney General, classification at the Attorney 15 level would be appropriate regardless of the agency to which appellant is assigned or his title. In addition, respondent argues that the requirement that appellant submit the appellate briefs and oral arguments he prepares to Mr. Johns for approval alone justifies classification of appellant's position at a lower level. However, the record shows that this review and approval primarily relates to format as opposed to content and has been viewed as a mere technicality by appellant and Mr. Johns. Reliance upon this factor as the basis for a classification distinction under this particular set of facts appears to be an elevation of form over substance.




Order

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

Dated: February 21, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

  
DONALD R. MURPHY, Commissioner

  
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