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ROBERT B. ECKDALE,
 ANDREW M. STEWART,
 RAJ VAKHARIA,
 IMELDA R. STAMM,

Appellants,

v.

Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,

Respondent.

Case Nos. 91-0093, 0094, 0095,
 0096-PC

* * * * *

RULING ON
PETITION FOR
REHEARING

This matter is before the Commission on respondent's petition for re-hearing pursuant to §227.49, Stats., filed on October 24, 1991. The parties argued the petition before the Commission on November 20, 1991.

The petition for rehearing addressed the Commission's interim decision and order dated October 3, 1991, which denied respondent's motion to dismiss these appeals.¹ The Commission's opinion included the following:

While not identifying them as such, the respondent's motion to dismiss raises two separate issues: 1) May the appellants now pursue reallocation appeals with the Commission in terms of the correct classification of their own positions, and 2) may the appellants pursue reallocation appeals with the Commission as to the correct classification of Mr. Hubbard's appeal?

The Commission first determined that the appellants could not pursue appeals with respect to the correct classification of their own positions,

¹ It is questionable whether this is an appropriate matter for a petition for rehearing under §227.49, stats., which applies by its terms only to "final orders." However, since the Commission has implied authority to reconsider any order entered in a proceeding when the matter is still before it, see 2 AM JUR 2d Administrative Law §522, p. 332 ("While a proceeding is pending before a tribunal, there is no limit to the power of such tribunal to review any rulings it may have made."), the Commission will construe this as a motion for reconsideration and address it as such.

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because they had not complied with the time deadline for appealing established by §230.44(3), Stats. The Commission then addressed the second issue:

The second issue raised by respondent's motion relates to the proper classification of Mr. Hubbard's position. This issue turns on the question of whether the appellants have legal standing to seek review of the respondent's decision to deny Mr. Hubbard's informal appeal and to classify his position at the Air Management Engineer - Advanced I level rather than at the Advanced II level.

The Commission has cited with approval the two-part test for determining issues of standing found in Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 10, 230 N.W. 2d 243 (1975):

The first step is to determine whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law.

The Commission went on to hold that the appellants had standing because they could expect to have their positions reallocated to the Advanced 2 level if respondent reallocated Mr. Hubbard's position to that level (and assuming they were "performing the same job duties at the same level of performance"), that therefore their "interests have been directly and adversely affected by respondent's decision not to reallocate Mr. Hubbard's position," and that their interest in having their positions properly classified was recognized by the Civil Service Code.²

The petition for rehearing runs solely to the latter determination — i.e., that appellants have standing with respect to the respondent's decision regarding the proper classification of Mr. Hubbard's position. The petition asserts a number of errors of law and fact.

In reanalyzing this matter in response to the petition for rehearing, the Commission has independently reached the conclusion that its

² The Commission observed in footnote 2 to its decision: In the event the appellants and Mr. Hubbard are successful with their appeals, the Commission's order would apply solely to the position now occupied by Mr. Hubbard and would make no reference to either the proper classification or proper effective date for the appellants' positions.

October 3, 1991, decision unnecessarily addresses the question of whether appellants in these cases have the right to maintain independent appeals with respect to respondent's decision concerning the reallocation of Mr. Hubbard's position. This issue should not have been addressed because of the following:

1) It was determined that appellants had no right to pursue appeals with respect to the question of the proper classification of their own positions;

2) It is undisputed (see Finding of Fact #10, October 3, 1991, decision) that before these appeals were filed, Mr. Hubbard had filed a timely appeal of respondent's decision with respect to the classification of his position which is pending as Case No. 91-0082-PC;³

3) The only possible function of appellants' ongoing litigation is to participate in appealing respondent's decision as to the classification of Mr. Hubbard's position, as acknowledged in the October 3, 1991, decision (see note 2);

4) Therefore, once the Commission decided appellants could not pursue their own appeals with respect to the classification of their own positions, the matter before the Commission was functionally equivalent to a decision as to whether appellants should be allowed to participate as parties to Mr. Hubbard's appeal;

5) Section 227.44(2m), Stats., provides that: "[a]ny person whose substantial interest may be affected by the decision following the hearing shall, upon the person's request, be admitted as a party." (emphasis added);

6) Therefore, once the Commission had decided in its October 3, 1991, decision that appellants had no right to pursue appeals with regard to the classification of their own positions, there was no reason to have addressed the question of whether appellants had the right to have pursued independent appeals regarding the proper classification of Mr. Hubbard's position, as if he (Mr. Hubbard) did not have an appeal pending. In addressing that question the Commission focused on whether respondent's decision as to the reallocation of Mr. Hubbard's position directly caused injury to appellants' interests, which is the test for standing to initiate an independent appeal. The

³ That case has been scheduled for hearing on January 23-24, 1991, on a consolidated basis with these appeals.

Commission should have addressed the question of whether appellants had the right to participate in the pending appeal of respondent's reallocation decision regarding Mr. Hubbard, where the test as to standing is whether the Commission's decision of that appeal may affect appellants' substantial interests in the classification level of their position. Since it appears beyond any dispute that appellants have a substantial interest in the classification level of their positions that may be affected by the Commission's decision of Mr. Hubbard's appeal, it follows that they have an absolute right to be admitted as parties to that appeal pursuant to §227.44(2m), Stats.

Accordingly, the Commission will rescind so much of the October 3, 1991, decision as relates to the issue of standing, substitute the aforesaid discussion of standing in its place, construe the appeal letters as petitions, pursuant to §227.44(2m), Stats., to intervene as parties in Hubbard v. DER, 91-0082-PC, grant said petitions, and dismiss these appeals to the extent they can be construed as independent appeals with respect to the classification of appellants' own positions.

Because of this approach, the Commission does not need to and will not address the substantive points raised in the petition for rehearing, which run to the legal adequacy of that portion of the decision that will be rescinded. Respondent's objection to the absence of specific conclusions of law is inapposite because this requirement only applies to a "proposed or final decision of an agency . . . following a hearing and every final decision of an agency," §227.47, Stats., and the October 3, 1991, decision did not fit into any of these categories. However, since this ruling is final with respect to the existence as separate appeals of these four cases, the following conclusions of law are entered.

CONCLUSIONS OF LAW

1. The Commission's October 3, 1991, decision was erroneous in that it required the appellants to meet a standard for standing applicable to parties attempting to pursue an appeal independently when in effect appellants were attempting to participate in an appeal of Mr. Hubbard's reallocation decision that was already pending, and standing for this purpose involves a different standard, as set forth in §227.44(2m), Stats.

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2. Appellants meet the standard set forth in §227.44(2m), Stats., since their substantial interests may be affected by the Commission's decision following a hearing in Case No. 91-0082-PC, and therefore they have the right to participate as parties in that proceeding.

ORDER

1. The petition for rehearing filed October 24, 1991, is granted to the extent and for the reasons set forth above;

2. That portion of the Commission's October 3, 1991, interim decision and order, beginning with the first full paragraph on p. 5 and continuing through the order on page 8, is rescinded on the ground that the Commission addressed the wrong issue and applied a standard inapplicable to the correct issue, as set forth above, and the above discussion and this order are substituted in its place;

3. The appeal letters in these matters are construed as petitions pursuant to §227.44(2m), Stats., to intervene as parties in Hubbard v. DER, No. 91-0082-PC, and said petitions are granted and appellants herein are made parties-appellants in that case;

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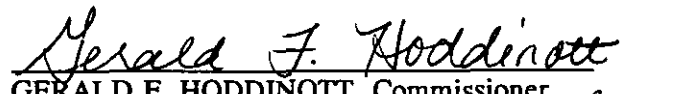
4. These appeals (i.e., Nos. 91-0093-PC, 91-0094-PC, 91-0095-PC, and 91-0096-PC), to the extent that they may be construed as appeals with respect to the classifications of appellants' own positions, are dismissed as untimely filed.

Dated: November 25, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner *lrm*


GERALD F. HODDINOTT, Commissioner *lrm*

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