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STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

HARLEY C. BURNSON, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, *

Respondent. *

INTERIM
DECISION
AND
ORDER

Case No. 92-0096-PC *

* * * * *

HARLEY C. BURNSON, *

Appellant, *

v. *

Secretary, DEPARTMENT OF *

EMPLOYMENT RELATIONS, *

Respondent. *

FINAL
DECISION
AND
ORDER

Case No. 92-0847-PC *

* * * * *

Oral arguments were heard in the above-noted cases before the Commission on August 31, 1994. The Commission addresses below only the major arguments which are not addressed fully in the proposed decision and order.

Mr. Burnson's position should have been reclassified.

The examiner ruled in Mr. Burnson's favor on the reclassification issue. DER contended this ruling is not supported by Mr. Burnson's 1987 position description (PD). The examiner, however, found that Mr. Burnson's hearing testimony better described his work in 1987, than the PD. (See second full paragraph on page 3 of the proposed decision.) Accordingly, the Commission rejected DER's contention that the decision should change due to duties listed in the 1987 PD.

DER also argued that Mr. Burnson's PD is more like Mr. Pettit's PD, and the hearing examiner denied Mr. Pettit's reclassification request. This argument

ignores the examiner's ruling discussed in the prior paragraph that Mr. Burnson's 1987 PD was inaccurate. This argument also fails to recognize that the hearing record (and examiner) in Mr. Burnson's case was different than in Mr. Pettit's case. (Pettit v. DER, Case No. 92-0145-PC.)

The Commission must base its decision on the hearing record specific to each case. Mr. Burnson and Mr. Pettit first needed to show that their positions underwent a logical and gradual change, which is a prerequisite to reclassification entitlement pursuant to ER 3.01(3), WAC. Mr. Burnson met this threshold showing, but Mr. Pettit did not. Therefore, the examiner in Pettit could not reach the question of whether other positions existed at the ET4 level which were similar to Mr. Pettit's. It could be (as DER suggests) that Mr. Pettit and Mr. Burnson perform similar duties warranting similar classifications. However, Mr. Pettit's failure to show a logical and gradual change to his position foreclosed a detailed comparison in his case of any similar positions at the ET4 level.

Pettit decision was not used as precedent:

Mr. Miller also asked the Commission to refrain from using as precedent, its decision in Pettit v. DER, Case No. 92-0145-PC. The Commission anticipated this request and purposefully refrained from issuing a final order in Pettit, until after consideration of oral arguments in Mr. Burnson's case and in Miller v. DER, Case No. 92-0095-PC and Riley v. DER, Case No. 92-0097-PC.

Equitable Estoppel Argument Rejected for Reallocation Issue:

Mr. Burnson's case includes the 1987 reclassification issue and the 1992 reallocation issue. He raised equitable estoppel in post-hearing briefs as an issue related to the 1987 reclassification, but the argument was not reached in the proposed decision because the hearing examiner ruled in Mr. Burnson's favor on the reclassification issue. Accordingly, it was unnecessary to address the equitable estoppel issue.

He did not raise equitable estoppel as an issue related to the 1992 reallocation, until after the proposed decision was issued and he submitted his June 6th request for oral arguments. This newly-raised argument is rejected by the

Commission. There is no evidence in the record to indicate that DER delayed in processing Mr. Burnson's 1992 reallocation, nor were any specific delays on DER's part alleged at oral arguments held on August 31, 1994.

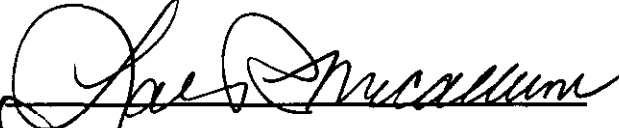
ORDER

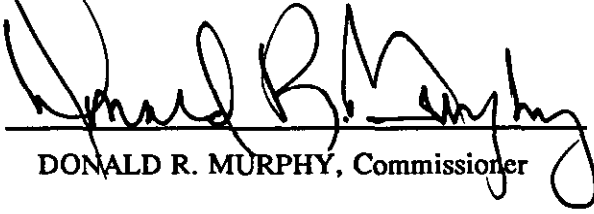
That the Proposed Decision and Order be adopted as the Commission's Final Decision, as supplemented by the discussion herein.

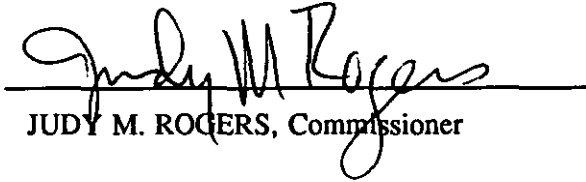
Date: October 24, 1994.

STATE PERSONNEL COMMISSION

JMR/jmr


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

* * * * *
 HARLEY C. BURNSON,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondent.
 Case No. 92-0096-PC
 92-0847-PC
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

A hearing was held in the above-captioned matter on November 11-12, 1993, and was consolidated with the following additional matters: Miller v. DER, case nos. 92-0095 & 0851-PC, and Riley v. DER, case nos. 92-0097 & 92-0849-PC. Appellant requested and was granted an opportunity to file post-hearing briefs, with the final brief due on March 10, 1994.¹

The hearing issues were agreed to by the parties, pursuant to a status conference held on September 17, 1993, as follows:

Case No. 92-0096-PC: Whether respondent's decision to deny appellant's 1987 request to reclassify his position from Maintenance Mechanic 3 to Engineering Tech 4 was correct. Relevant time frame: Six-month period prior to reclassification request date.

Case No. 92-0847-PC: Whether respondent's decision to reallocate appellant's position to Maintenance Mechanic 3 instead of Heating, Ventilation, Air Conditioning/Refrigeration Specialist was correct. Relevant time frame: Job duties as of February 9, 1992.

RECLASSIFICATION REQUEST - Case No. 92-0096-PC

Mr. Burnson worked at the UW Hospital & Clinics, at the Clinical Health & Science center in the Plant Engineering Department. He held this position for about 15 years (starting in or around 1978).

¹ The initial briefing schedule was extended to end on March 10, 1994, at appellant's request.

On January 20, 1987, the personnel office at UW Hospital forwarded to the UW-Madison's personnel office, a reclassification request to change Mr. Burnson's position from a Maintenance Mechanic 3 (MM3) to an Engineering Technician 4 (ET4). (A's Exh. 8, p. 2)

The UW's initial in-house review of Mr. Miller's reclassification request was delayed because it was not recognized as a formal request. Sometime prior to September 9, 1987, Kenneth Kissinger from UW-Madison's personnel office, reviewed the request. On September 9, 1987, Mr. Kissinger sent the UW Hospital a memo indicating he had reviewed the request and had forwarded the same to the Department of Employment Relations (DER) for approval. Although Mr. Kissinger stated his support of the reclassification request in the memo, he admitted at hearing that he is not a classification specialist and could not give an informed opinion on whether the MM3 or ET4 classification was the best fit for Mr. Burnson's position.

DER did not respond formally to Mr. Burnson's reclassification request until December 1, 1992 (R's Exh. 13), about 5 years after DER apparently received the request. Jim Pankratz, in September 1987, worked with DER as a Senior Classification Analyst and was involved with all decisions regarding the movement of MM3 positions to the ET4 classification. He reviewed Mr. Burnson's reclassification request and determined that the MM3 classification was the best fit for Mr. Burnson's position. Mr. Pankratz returned the matter to the UW for its further consideration. He heard nothing else about it. Neither the UW nor Mr. Burnson made further inquiries of DER.

Time passed and Mr. Pankratz was promoted in DER to the Administrator of the Division of Classification & Compensation. In 1992, Troy Hamblin worked for DER as a classification specialist and was involved with DER's survey of maintenance mechanics. Mr. Hamblin learned (sometime between February and December 1992) about Mr. Burnson's 1987 reclassification request during the survey process.

The assigned duties of Mr. Burnson's position prior to the reclassification request are noted in the position description (PD) which he signed on 3/19/79 (R's Exh. 11). His later duties are inadequately reflected in the PD submitted with his reclassification request which he signed on January 16, 1987 (R's Exh. 12).

Mr. Hamblin correctly noted in his written analysis (R's Exh. 13), that reclassification requests require a logical and gradual change to the duties of the position, pursuant to ER 3.01(3), Wis. Admin. Code. The 1979 and 1987 PDs indicate changes in about 75% of the total job, as shown in the following chart. Specifically, the lead worker functions appear as 80% of the duties in 1979, and as 5% of the duties in 1987.

<u>% Time</u>	<u>1979 PD</u>	<u>% Time</u>	<u>1987 PD</u>
60%	A. Lead worker duties.	45%	A. Maintenance of refrigeration units and air conditioning systems.
20%	B. More lead worker duties-continuity of maintenance.	15%	B. Reporting and making recommendations
20%	C. Assist program area supervisor.	15%	C. Energy conservation procedures and activities.
		15%	D. Checking and testing.
		10%	E. Energy management system coordination (5%) and leadwork responsibilities (5%).

Mr. Burnson's duties at the time of his reclassification request are better described by his hearing testimony than by the 1987 PD. At hearing, Mr. Burnson agreed that his lead worker duties changed from 1979 to 1987. The change started in 1983, when Mr. Burnson was asked to straighten out the "N & R" building on East Washington Avenue. This building housed a contagious hospital before the UW purchased it in the 1950s and turned it into a research hospital. In 1983, the building required a lot of work because it was old and falling apart. Mr. Burnson credibly testified that 80% of his time in 1987, was spent performing HVAC work. Initially this was envisioned as a temporary assignment until the building was sold. The sale, however, did not occur until an unknown date in 1989.

Mr. Burnson remained responsible for the N & R building from 1983, until it was sold sometime in 1989. The extraordinary amount of effort required for this building left less time for Mr. Burnson's lead worker activities. Due to the envisioned temporary nature of the HVAC work which

extended past anyone's estimate, the Commission concludes that the change in Mr. Burnson's job was the result of logical and gradual changes.

Mr. Kissinger recommended Mr. Burnson's reclassification to the ET4 level, based upon the rationale stated by Jim Cimino of the UW personnel office. Mr. Cimino advocated that the MM3 classification was no longer adequate for those positions responsible for performing non-mechanical controls maintenance on HVAC systems a majority of the time. (A's. Exh. 9, p. 1.) Mr. Kissinger further noted that several positions were reclassified from MM3 to ET4 using Mr. Cimino's rationale. Mr. Kissinger specifically noted the following positions all of which performed HVAC work a majority of the time: 1) John Thorson position at the Eau Claire campus, 2) Thomas Ducklow position at the River Falls campus, 3) Laurie Koepke position at the Oshkosh campus, 4 & 5) Robert Moats and Dale Bartelson positions at the Stout campus, 6) Phillip Davis position at the LaCrosse campus, and 7 & 8) Michael Way and Gregory Galecki positions at the Stevens Point campus.

Mr. Hamblin testified that the 8 positions listed above were reclassified by mistake. The examiner, however, did not find his opinion controlling for several reasons. First, he was not involved in the 1987 reclassification requests. Second, Mr. Pankratz who was involved in the 1987 decisions noted there was a consensus in 1987 that the HVAC positions had become more complex and the individuals in those positions were not being paid the market price. Third, the examiner found the remaining explanations given by DER for the positions reclassified from MM3 to ET4, unpersuasive; as discussed in the following paragraphs.

Mr. Pankratz and Mr. Hamblin testified that only a few select positions were intended to go from MM3 to ET4. They thought only advanced HVAC work warranted the ET4 classification and only if such advanced work was performed a majority of the time. According to DER, ET4 positions involved a majority of time spent in construction, supervision and/or design of HVAC/refrigeration systems; and a minority of the time spent in HVAC maintenance work. Duties relating to control (non-mechanical) work, HVAC systems on a JC-85 computer, installation of new systems and/or improving the energy efficiency of existing systems were given as intended advanced HVAC duties justifying the higher classification at the ET4 level.

The examiner rejected DER's argument because she could not verify its premise in the 8 PDs cited by Mr. Kissinger. The examiner found it unclear from the language and the time breakdowns listed in the PDs that only positions performing the advanced HVAC duties noted by Mr. Pankratz and Mr. Hamblin for a majority of the time were granted the ET4 classification. Also, there is no record testimony from a HVAC expert familiar with the positions to supplement the information contained in the PDs.

Furthermore, some of the MM3 PDs offered as comparisons by DER contain factors which DER cited as justification for the ET4 level. Yet, why the ET4 level was not granted in these MM3 positions remains unclear. The following examples illustrate this point: a) R's Exh. 20 shows a MM3 classification for HVAC duties which included design and control work. b) R's Exh. 21 shows a MM3 classification for HVAC work involving a JC-85 computer. c) R's Exh. 26 shows an MM3 for a position involving HVAC remodelling and installation. d) R's Exhs. 28-31 show four MM3 positions involving HVAC remodelling and control work. e) R's Exh. 33 shows a MM3 HVAC position involved with installation and control work. R's Exh. 36 shows a MM3 position involved with HVAC systems controlled by a JC-85.²

In summary, Mr. Burnson's PD is too similar to the PDs cited by Mr. Kissinger for the Commission to now deny Mr. Burnson's reclassification request. The ET4 classification is the best fit for Mr. Burnson's position from 1979 until an unknown date in 1989, when the N & R Building was sold.

Effective Date of Reclassification

A question remains as to the effective date of the reclassification. The general rule applicable to Mr. Burnson's appeal is that reclassification requests, if granted, are given effect retroactively to the first pay period following the date upon which DER received the request. In Mr. Burnson's case, DER's receipt of his request was delayed from January to September 1987, because the UW personnel office did not recognize it as a formal

² It could be that DER determined the positions did not perform advanced HVAC work for a majority of time. However, the time percentage breakdowns and language contained in the PDs were insufficiently clear to verify this possibility.

reclassification request. When the UW finally did forward the matter to DER in September 1987, the UW recommended an effective date of February 15, 1987, to compensate for the delayed referral to DER. (See A.'s Exh. 8.)

The Commission has allowed deviation from the effective date established under general policies, to an earlier date where it appeared that a management ministerial error caused a delay in processing the reclassification request. Ulanski, et al. v. DHSS & Div. of Personnel, Case Nos. 82-2, 6, 7 & 9-PC (9/7/82). The UW's recommended effective date of February 15, 1987, is accepted by the Commission as consistent with the Ulanski case type of adjustment for ministerial error.

REALLOCATION - Case No. 92-0847-PC

DER surveyed maintenance mechanics and related positions. The survey resulted in revised class specifications for maintenance mechanics (R's Exh. 41) and new class specifications for HVAC positions (R's Exh. 42). Mr. Burnson's PD used for the survey is in the records as R's Exh. #45, which he signed on December 16, 1991. As a result of the survey, his position was reallocated under the new class specifications for MM3s, effective February 9, 1992. Mr. Burnson appealed the reallocation because he felt his position should have been reallocated to a HVAC Specialist.

A general overview of Mr. Burnson's position is shown below using the organization of his PD (R's Exh. 45). The PD supports Mr. Burnson's testimony that he performed HVAC work 55-60% of his time in 1992.

<u>Time %</u>	<u>Goals and Worker Activities</u>
40%	A. University Station Building servicing the following equipment: HVAC, plumbing, doors/windows, fire alarm, medical gas system, electrical systems, patient care equipment and office equipment.
25%	B. Sports Medicine Clinic Building servicing the same equipment as noted in "A".
2%	C. Eating Disorders Clinic Building servicing the same equipment as noted in "A".
5%	D. DeForest Clinic Building servicing the same equipment as noted in "A".
20%	E. 112 North Lake Warehouse Building servicing the same equipment as noted in "A".

- 5% F. Middleton Clinic Building servicing the same equipment as noted in "A".
- 2% G. 2710 Marshall Court Building servicing the same equipment as noted in "A".
- 1% H. 2709 Marshall Court Building servicing patient care dental equipment.

The class specifications for HVAC Specialist contain the following language from the "Inclusions" section.

This classification encompasses positions which function as system experts in the HVAC and/or refrigeration area. These positions must spend a significant portion of the time (typically 90% or more) performing advanced work on HVAC and/or refrigeration equipment and systems. This classification is limited to only those few positions which are specifically assigned to perform advanced systems setup, monitoring, adjustment and control; troubleshooting, repair and systems modification; planning and coordinating HVAC and/or refrigeration maintenance and repair of sophisticated HVAC and/or refrigeration equipment systems. The more routine adjustment, maintenance and repair to the systems is typically performed by positions allocated to the Maintenance Mechanics series, however, some routine work may be done by these types of positions as an incidental portion of their primary function as systems experts.

The following language appears in the "Exclusions" section of the HVAC class specifications.

Excluded from this series are the following types of positions:

1. Maintenance Mechanic positions whose work may include HVAC and/or refrigeration repair and maintenance, but are not assigned advanced systems control work involving significant portion of the time;

* * *

5. All other positions which are more appropriately identified by other series.

DER undertook a labor market survey as part of the classification survey for maintenance mechanics and related positions. The higher classification for HVAC was based upon the gathered labor market information which lead DER to believe that state agencies would be unable to retain workers with HVAC specialties without an added inducement.

Mr. Burnson concedes that the HVAC class specifications call for 90% of the position's duties to be performed on HVAC or refrigeration systems. He feels, however, that his position should be classified as HVAC because he spends the majority of his time on HVAC systems.

Mr. Burnson would prefer that the 90% figure used in the HVAC/refrigeration class specifications were lowered to include his level of involvement with HVAC/refrigeration systems (55-60%). The Commission, however, lacks authority to rewrite class specifications. Zhe et. al. v. DHSS & DP, 80-285, 286, 292, 296-PC, 11/18/81; aff'd by Dane County Circuit Court, Zhe et. al. v. Pers. Comm., 81-CV-6492 (11/82).

The best fit for Mr. Burnson's position under the new (post-survey) class specifications is MM3. The class specifications contain the following pertinent language about the MM3 level.

This is advanced level mechanical maintenance and repair work. Employees in this class operate, maintain and make repairs on electrical, plumbing, heating, refrigeration, air conditioning and other mechanical systems and apparatus commonly used in office and institutional buildings and building complexes. There are five general allocation patterns for this level: 1) General Maintenance - employees who repair, maintain and install electrical and electronic, plumbing and various other types of mechanical and related equipment associated with elevators, water systems, kitchen and food service, health care and commercial laundry. In addition, employees perform one or a combination of the following two tasks: operate, service and maintain high pressure boilers and all related equipment; and/or perform preventive maintenance, make repairs and perform minor installations to HVAC equipment. This may include performing technical maintenance a portion of the time and operating all computerized building systems to help identify mechanical malfunctions. . . .

Mr. Burnson's position specifically meets the MM3 inclusion language contained in the class specifications regarding examples of work performed. The referenced language is shown below.

- Inspect, repair and maintain commercial HVAC equipment including boilers, chillers and their control units.
- Install and repair air conditioners and climate control devices.
- Monitor computerized environmental control center making adjustments as needed and/or dispatching other mechanics, building trades or other professionals as required.

Mr. Burnson's position does not fall within the exclusionary language of the class specifications for all Maintenance Mechanics. Specific **exclusions** exist for HVAC and/or refrigeration specialist positions whose work includes the design, modification, repair, maintenance and installation of complex HVAC and/or refrigeration controls and related equipment.

The Commission concludes from the foregoing that post survey, the MM3 class specification is the best fit for Mr. Burnson's position.

DISCUSSION

Three issues were raised in the companion cases of Miller v. DER, Case Nos. 92-0095 & 0851-PC, and Riley v. DER, Case Nos. 92-0097 & 0849-PC, which are not discussed here. The two issues relating to the reclassification issue ("Theel Rationale - Reclassification Issue" and "Equitable Estoppel - Reclassification Issue") do not pertain to Mr. Burnson because the Commission's decision grants his reclassification request. The third issue ("Supervising MM3s - Reallocation Issue") does not pertain to him because he had no lead worker duties during the reallocation time period (February 9, 1992).

Mr. Burnson prevailed on the reclassification issue. He was able to show that several positions had duties similar to his own, yet were given the ET-4 higher classification. The burden of persuasion then shifted to DER to explain why different classifications were justified. DER's failure to explain may be due, at least in part, to the 5 year passage of time between the reclassification request and DER's formal decision on Mr. Burnson's request. Specifically, it appeared to the examiner that DER witnesses found it difficult to reconstruct past rationale. Furthermore, the rationale given by the DER witnesses did not appear consistently applied to positions as detailed in the decision.

ORDER

Respondent's decision to deny Mr. Burnson's 1987 reclassification request is rejected and case number 92-0096-PC is remanded to DER for action consistent with this decision. Also, respondent's decision to reallocate Mr. Burnson to Maintenance Mechanic 3 instead of HVAC/Refrigeration Specialist is affirmed and case number 92-0847-PC is dismissed.

Dated _____, 1994.

STATE PERSONNEL COMMISSION

Laurie R. McCallum, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

cc: John Talis
David Vergeront