

STATE OF WISCONSIN

PERSONNEL COMMISSION

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GARTH L. STEVENS,

Appellant,

v.

Secretary, DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

Case No. 92-0691-PC

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DECISION
AND
ORDER

This matter is before the Commission on appeal of respondent's decision restoring appellant to a position after being removed, during a probationary period, from a position to which he had been promoted. The particular issue is: Whether appellant was restored to a "similar position" within the meaning of §ER-Pers 14.03(1), Wis. Adm. Code. The parties submitted the case for a decision on the filing of a joint stipulation of facts and exhibits, and then filed briefs in accordance with an agreed briefing schedule. The following findings of fact are those stipulated by the parties. They are as follows:

Pursuant to a letter dated August 14, 1989, (Exhibit 1), Garth L. Stevens', hereinafter referred to as Appellant, request for a transfer as a permanent Ranger 2 (Pay Range 03-08) at Kinnickinnic State Park to the Northern Unit, Kettle Moraine State Forest at Campbellsport, Wisconsin was approved effective August 20, 1989. At Kettle Moraine State Forest, the Appellant performed those duties reflected in his position description dated November 16, 1989, (Exhibit 2). The Appellant continued to perform these duties until his appointment (December 29, 1991) as a Conversation [sic] Warden-1 (Pay Range 5-09) with the Department of Natural Resources' Bureau of Law Enforcement. His appointment letter (Exhibit 3), states in pertinent part:

Your hourly salary rate for this appointment will be \$10.822. You will be required to serve a probationary period of 24 months on this assignment with a probationary increase of \$.279 per hour after satisfactory completion of the first six months. Reclasses normally occur after one year (Conservation Warden 2) and again after two years (Conservation Warden 3). Your first line supervisor will be Pat Harkins during the first year of employment. Thereafter you will be assigned to a warden supervisor. (Emphasis added).

In a letter (Exhibit 4) dated May 19, 199[2], the Appellant was advised that he was terminated as a Conservation Warden 1, effective May 19, 1992, inclusive.

In a letter (Exhibit 5) dated June 29, 1992, the Appellant was advised of his appointment (transfer) to the permanent position of the Facility Repair Worker-3 (Pay Range 03-08) at the Northern Unit of the Kettle Moraine State Forest, effective June 28, 1992. The Appellant's duties as a Facility Repair Worker 3 are reflected in the position description (Exhibit 6) currently unsigned by the Appellant but signed by Paul Willihnganz dated June 15, 1992.

The Appellant's payroll card (Exhibit 7) shows that the pay ranges (PR 03-08) for the Ranger-2 and the Facility Repair Worker-3 are identical and his hourly rates of pay (\$9.985) were unchanged.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §230.44(1)(c), Wis. Stats.
2. Appellant has the burden to show that respondent failed to restore him to a position in compliance with §ER-Pers 14.03(1), Wis. Adm. Code.
3. Appellant has sustained this burden.
4. Restoration of appellant to his current position was not done in compliance with §ER-Pers 14.03(1), Wis. Adm. Code.

OPINION

In comparing appellant's Ranger 2 (R-2) position and Facility Repair Worker 3 (FRW-3) position, the position descriptions show that, as an R-2, appellant spent fifty percent (50%) of his time performing maintenance and development duties, while, as a FRW-3, sixty percent of appellant's time was assigned to maintenance and development of grounds and trails. And, while appellant argues that more than one-half of the specific tasks under the maintenance heading in the FRW-3 position are new and unrelated to duties performed under the R-2 maintenance heading, the Commission cannot discern that clear distinction between the two. Rather, the Commission believes the list of maintenance tasks in the R-2 PD are inclusive of the longer list of maintenance tasks listed in the FRW-3 PD.

Still, as appellant argues, the most significant difference between the R-2 and FRW-3 position is the absence of law enforcement duties in appellant's

present position. Forty percent of appellant's former R-2 position consisted of law enforcement duties. The specific question is whether the subject FRW-3 position meets the requirement of "a similar position" as provided in §ER-Pers 14.03, Wis. Adm. Code,¹ when forty percent of the duties in appellant's former R-2 position are clearly absent. Respondent argues that these positions are similar because the majority of the duties performed by the two positions are either identical or similar, at the same pay range level, and at the same work site.

What is meant by "a similar position" in §ER-Pers 14.03, Wis. Adm. Code, is not defined. In view of the apparent intent of this administrative code provision to encourage state employees to seek state intra-departmental promotional job opportunities by providing a safety net in instances of failures, the Commission concludes that the position to which an employee is restored should be nearly alike to the original position in all essential respects. This conclusion is consistent both with the synonyms offered for the term "similar" in Words and Phrases, Permanent Edition, i.e., "same," "like," "comparable," "equivalent," "alike," and "corresponding;" and with the conclusions reached in Gonzalez v. Ohio Bureau of Employment Services, 68 Ohio App. 2d 243, N.E. 2d 448, 22 O.P 3d 243 (the term "similar" does not require that the duties of the new position be identical, as it is sufficient that they be nearly alike); Johnson v. Goodyear Tire & Rubber Co., 790 F.Supp. 1516 (E.D.

¹ ER-Pers 14.03 Kinds of promotion; status and rights. (1) PROMOTION WITHIN THE SAME AGENCY. In accordance with s. 230.28(1), Stats., the promoted employee shall be required to serve a probationary period. At any time during this period the appointing authority may remove the employee from the position to which the employee was promoted without the right of appeal and shall restore the employee to the employee's former position or a similar position and former rate of pay, as determined under s. ER 29.03(7)(a). Any other removal, suspension without pay, or discharge during the probationary period shall be subject to s. 230.44(1)(c), Stats. If the position to which the employee has restoration rights has been abolished, the employee shall be given consideration for any other vacant position in the same or counterpart pay range for which the employee is determined to be qualified by the appointing authority to perform the work after being given the customary orientation provided for newly hired workers. If no such vacant position exists, the employee shall be treated as if he or she had been restored to the position held prior to promotion and the provisions for making layoffs under ch. ER-Pers 22 shall apply.

Note: For pay on promotion, new promotion and restoration, see ss. ER 29.03(4)(b), (4)(c) and (7)(a), respectively.

Wash. 1992) (two jobs are "similar" if nearly but not exactly the same or alike); Mathis v. U.S. Postal Service, 865 F.2d 232 (Fed. Cir. 1988) (positions are "similar" if they involve related or comparable work that requires the same or similar skills--if experience in a position demonstrates the knowledges, skills, and abilities required to perform the work of the other job).

In the instant case, the law enforcement duties of the Ranger 2 position consumed 40% of the position's time and, as a result, constituted an essential component of the R-2 position. There are no duties assigned to the FRW-3 position which are "nearly like" these law enforcement duties of the R-2 position. Although an employe who had performed the duties and responsibilities of the R-2 position could reasonably be expected to be able to perform the duties of the FRW-3 position with little or no training, it would not be reasonable to expect that an employee who had performed the duties and responsibilities of the FRW-3 position could perform the duties and responsibilities of the R-2 position. The Commission concludes that, because of these differences, the duties and responsibilities of the R-2 position and the FRW-3 position are not "similar positions" within the meaning of §ER-Pers 14.03, Wis. Adm. Code.

Since respondent did not "restore the employe [appellant] to the employe's former position or a similar position," §ER-Pers 14.03(1), Wis. Adm. Code, appellant's removal or discharge from the Conservation Warden 1 position must be considered subject to this language from the rule: "Any other removal, suspension without pay, or discharge during the probationary period shall be subject to §230.44(1)(c), Stats." id. Therefore, appellant's removal or discharge from the Conservation Warden 1 position is subject to §230.44(1)(c), Stats. A status conference will be scheduled to discuss further proceedings.

Order

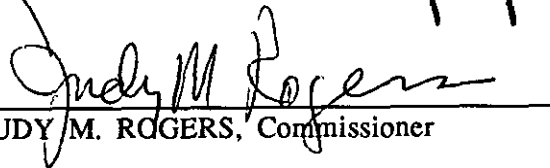
On the basis of the foregoing, the Commission will process this case pursuant to §230.44(1)(c), Stats., and will schedule a status conference to discuss further proceedings.

Dated: May 27, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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