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 CONLEE COX,
 Appellant,
 v.
 Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondent.
 Case No. 92-0806-PC
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ORDER

The Commission has reviewed the hearing examiner's proposed decision and order and the parties' responses with respect thereto. The Commission declines to consider those exhibits attached to appellant's submission that were not offered into evidence at the hearing. Appellant has provided neither an indication that these documents are newly-discovered evidence that could not have been discovered before the hearing with the exercise of due diligence, nor any other basis for reopening the record at this time. Rather, it appears that appellant is trying to shore up his case after the fact in light of the proposed decision's discussion of certain weaknesses in his evidence. See Conley v. DHSS, 83-0075-PC (5/18/84).

Laying to one side the new evidence involved in appellant's submission, appellant has presented no arguments which are persuasive that the proposed decision and order is erroneous and should not be adopted. Appellant stresses something that the proposed decision recognizes -- that there is considerable overlap between the SO 3 and PO 2 classifications. Therefore, it is not surprising that there are a number of aspects of appellant's work that are consistent with a PO 2 classification, as the proposed decision also recognized. However, appellant appears to agree with a key conclusion of the proposed decision, as he states that the hearing examiner "correctly states that my P.D. is consistent with a greater emphasis on security." (Response to proposed decision, p. 6).

ORDER

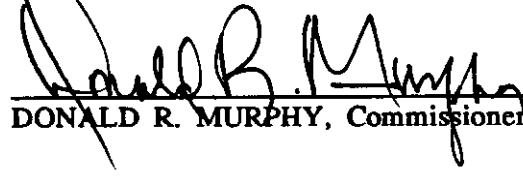
The attached proposed decision and order, with the correction of certain typographical errors, is adopted as the Commission's final disposition of this

matter, and the respondent's action denying appellant's request for reclassification of his position to PO 2 is affirmed and this appeal is dismissed.

Dated: November 3, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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.)

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PROPOSED
 DECISION
 AND
 ORDER

This is an appeal, pursuant to §230.44(1)(b), Stats., of the denial of a request for reclassification of appellant's position from Security Officer 3 (SO 3) to Police Officer 2 (PO 2). This request was denied by both the Department of Military Affairs (DMA) and the Department of Employment Relations (DER).

Appellant is employed by the DMA at Truax Field in Madison in a position classified as SO 3. His position is essentially accurately described in a position description (PD) dated December 16, 1991 (Respondent's Exhibit 1).¹ This PD provides the following under Goal A:

- 50% A. Perform security and resource protection duties for the Air National Guard areas of responsibility. Ensure the availability of resources necessary for mission accomplishment and the enhancement of National Defense.
- 25% A1. Provide armed patrol to ensure that owned/leased Federal, State, and County property occupied by the Truax ANG and operational/nonoperational resources are properly secured. Perform security measures required to protect against sabotage, fire, espionage, thefts, and/or acts by individuals, mobs or force. Maintain surveillance of the ANG flightline.
- 20% A2. Control entry and exit of all personnel, vehicles and other equipment at entry points to the base. Includes preventing entrance of unauthorized personnel to the installation. Ensure adherence to regulations and base policies concerning registration of vehicles, persons and equipment entering the base. Prevent entrance of unauthorized aircraft into restricted area and/or

¹ Appellant's areas of disagreement with this PD will be set forth below.

monitor movement of civilian aircraft across ANG ramp. Issue parking and warning notices.

- A3. Provide response to emergency situations. Respond, protect and take appropriate measures to control emergencies until appropriate key personnel are contacted. Apprehend/detain suspects within jurisdictional limitations in accordance with local policies and to obtain assistance in performing the above duties.
- A4. Ensure adherence to regulations, policies and safety on the installation.

Goal B of the PD consists of the following:

20% B. Conduct law enforcement desk operations, to include monitoring alarms, use of base telephone system(s) and assisting personnel in the ANG area. Coordinate communications with base law enforcement desk, security posts, patrols, and other agencies as directed.

- 10% B1. Monitor base alarm system(s) for security, duress, fire, or trouble alarms, and notify security posts and patrols as appropriate. Notify and coordinate with other agencies in accordance with policies and procedures pertaining to alarm activations.
- B2. Use base telephone system for performance of official duties. Includes answering the law enforcement desk phone(s), make official calls to persons on/off base, transfer calls as needed, and use the base paging system.
- B3. Direct/assist and may escort military/civilian personnel and resources including munitions in ANG area as required.
- B4. Comply with proper use of Security Police Brevity Codes.
- B5. Monitor and update Aircraft Location Board as required.

Goal C (15%) involves record keeping and report preparation. Goal D (10%) involves the maintenance and operation of property, equipment, and supplies, including firearms and vehicles. Goal E (5%) involves training and other duties. Special requirements for this position include firearms qualification and a military security clearance.

Appellant attached to this PD an "amendment" which sets forth his points of disagreement with the official PD. In addition to setting forth his disagreement with the statement in the position summary that his position "does not have arrest powers as defined by state statutes or other applicable directives," this addendum

includes the following additional information appellant felt should have been added to his PD:

A1. Patrol would also include weapon storage areas and ammunition, aircraft equipment and maintaince [sic] facilities, fuel storage areas, classified and sensitive materials and hazardous materials and controlled areas.

A3. Disagree in part. I would like the following on the end of A3. "To prevent entry of Anti-war protestors." to be added on the last part. Special Note*Mitchell Field: Respond to base club and breakup disturbances and fights and Apprehend subjects if necessary.

A4. I disagree with ensure adherence rather than enforce standards.

New Addition: A5. I would like a new section added on the P.D. Use of Force: the use of force shall consist of and be consistent with U.S.A.F. policy on Deadly Force. All force which is necessary up to and including deadly force can be used per U.S.A.F. policy on deadly force signed by all employees effected.

D1. Disagree with just the use of the term firearms. Also I would like the following added. Firearms to [sic] carried on duty shall include ([sic] M-16 auto/semi-automatic rifle with 120 rounds for flightline patrol and 9mm Beretta with 30 rounds for patrol/(CDAH)/Dispatch and the main gate. Special Note: Mitchell Field include expandable steel baton can be used per their directives on use of force on base.

E1. Disagree with this not being added. Participate in drills such as Anti-Terrorism, hostage negotiations, drug enforcement, bomb threats, and handling mentally disturbed subjects.

The SO position standard (Respondent's Exhibit 2) includes the following statement of "inclusions" and definition of SO 3:

I.B. Inclusions

This position standard encompasses positions having responsibility for maintaining security and protecting property and persons at a state facility. Positions included in this standard may perform some enforcement duties when providing assistance to police officers or higher level law enforcement personnel. Positions having arrest powers, but primarily performing security and protection services are also described by this standard. Positions described by this standard perform security duties by maintaining a watch and patrol of State owned or leased buildings and immediate grounds to protect against trespass, vandalism, fire, theft, property damage and other hazards.

* * *

II. SECURITY OFFICER 3

(PR 5-08)

This is objective or lead level security and protection work. Positions at the objective level are responsible for providing security and protection services at a state facility. In addition, positions at this level perform limited enforcement activities such as those pertaining to parking regulations, traffic rules and regulations at the facility, and investigating complaints resulting from traffic incidents or possible law

violations. Lead positions guide and direct the work of positions classified as Security Officer 2. In both cases, work is performed under general supervision.

The PO position standard (Respondent's Exhibit 3), includes the following statement of inclusions, exclusion, and PO 2 definition:

I.B. Inclusions

This series encompasses patrol and law enforcement positions which exercise arrest authority and are responsible for enforcing state and local laws and agency rules and regulations pertaining to the protection of persons, property and the rights of the general public against injury, loss or disturbances resulting from criminal or disorderly acts, accidents, and hazards on state-owned property.

C. Exclusions

Excluded from this series are the following types of positions:

* * *
3) Positions that perform routine security work but do not have arrest powers;

* * *

II. POLICE OFFICER 2 (PR 5-09)

This is developmental or objective level law enforcement work performed on the site of a state agency or institution. Positions at the objective level possess arrest powers but are primarily responsible for security and patrol activities. Positions allocated to this level are distinguished from positions at the Police Officer 3 level by the narrower range of assignments which emphasize enforcement activities and by the involvement in security and patrol activities. Positions functioning in a developmental capacity perform patrol and law enforcement on the site of a state agency or institution under close supervision and are provided the opportunity to develop the knowledge and skill necessary to perform at the Police Officer 3 level. Positions at this level, developmental or objective, must have completed a certified law enforcement program.

At the outset, there are a number of potentially confusing aspects to this case that will be addressed.

The statement in the "exclusions" section of the PO position standard that excludes "[p]ositions that perform routine security work but do not have arrest powers" (emphasis added) suggests the obverse is true --i.e., that if a position performs routine security work and does have arrest powers, it is to be included in the PO series. However, the SO position standard makes it clear that this is not the case, since the SO statement of inclusions includes the following: "[p]ositions having arrest powers, but primarily performing security and protection services are also described by this standard." (emphasis added). Therefore, the presence or absence of arrest powers is not in and of itself determinative of the proper class series.

In a somewhat related vein, respondent's rationale for its position shifted as this matter progressed. Initially, respondent relied heavily on the contention that appellant's position does not possess arrest powers as required for the PO series.² However, in its post-hearing brief, respondent now in essence concedes that appellant's position has "'limited arrest powers' confined to the jurisdiction of military base property."³ However, as discussed above, the mere presence of arrest powers does not resolve the classification question.

² As noted above, this statement appears on appellant's "official," management-approved PD.

³ During the hearing, appellant contended that he has arrest powers on the base pursuant to the following two statutory provisions:

§21.17 Encroachment on military areas and interference with military personnel. (1)The officer in charge of any area used or to be used for military purposes may cause the area to be marked in such a manner so as to warn against encroachment by unauthorized persons, but not to unnecessarily obstruct travel on any public highway. No person may encroach or enter upon the area without the consent of the officer.

(2)No person may intercept, molest, abuse or otherwise interfere with any member of the national guard or any other military force organized under the laws of this state while the member is in the performance of military duty.

(3)Any person who violates sub.(1) or (2) shall forfeit not less than \$50 nor more than \$200. The officer in charge or a designee may arrest and detain the person for such reasonable time as may be necessary to deliver the person to civil authorities. (emphasis added)

§175.05 (2)UNLAWFUL ENTRY ON PROPERTY. (a)Any person or state or any political subdivision thereof engaged in, or preparing to engage in, the manufacture, transportation or storage of any product to be used in the preparation of the United States or of any of the states for defense or for war or in the prosecution of war by the United States...is surrounded by a fence or wall, or a fence or wall and buildings, may post around his or its property at each gate, entrance, dock or railway entrance and every 100 feet of water front a sign reading "No Entry Without Permission:."

(b)Whoever without permission shall wilfully enter upon premises so posted shall be punished by a fine of not more than \$50, or by imprisonment in the county jail for not more than 30 days, or by both such fine and imprisonment.

(3)QUESTIONING AND DETAINING SUSPECTED PERSONS. Any peace officer or any person employed as security person, guard, or in a supervisory capacity on premises posted as provided in sub.(2) may stop any person found on any premises to which entry without permission is forbidden by said subsection and may detain and demand of him his name, address and business in such place. If such peace officer or employe has reason to believe from the answers of the person so interrogated that such person has no right to be in

One other collateral matter concerns the efforts of appellant and his fellow SO's to be included in the protective occupation status under the State's retirement program, Ch. 40, Wis. Stats. This subject matter is not within the Commission's jurisdiction and was not part of the issue for hearing. Therefore, this decision does not address this issue.

Turning to the specific question of whether appellant's position is a better fit under the SO 3 or the PO 2 classification, there is language in these position standards which are quite similar. The PO 2 definition includes the following: "This is developmental or objective level law enforcement work performed on the site of a state agency or institution. Positions at the objective level possess arrest powers but are primarily responsible for security and patrol activities." (emphasis added). The SO inclusions statement provides that "[p]ositions having arrest powers, but primarily performing security and protection services are also described by this standard." (emphasis added). Based on the language in the class definitions, as augmented by the foregoing provisions in the position standards, it would be at least plausible to classify appellant's position in either the SO 3 or the PO 2 classifications. In cases of this nature, the appellant has the burden of proof, *see e.g.*, §PC 5.03(4), Wis. Adm. Code; *Jackson v. State Personnel Board*, Dane Co. Cir. Ct. 164-086 (2/16/79), and must establish by a preponderance of the evidence the facts necessary to show that DER's decision that his position should remain in the SO 3 classification was in error, *see e.g.*, *Tiser v. DNR & DER*, 83-0217-PC (10/10/84). Appellant has not sustained his burden of proof.

Other parts of these position standards are useful in drawing a distinction between these two classifications. The PO series has more of an emphasis on law enforcement, while the SO series places more emphasis on the security and safeguarding of state property.

The introductory paragraph (I.A. "Purpose and use of this Position Standard") of the SO position standard refers to "positions performing security work in the protection of State owned or leased property and the safeguarding of State owned or leased buildings." The inclusions section (I.B.) of the SO position standard states that "[p]ositions described by this standard perform security duties

such place, such peace officer or employe shall forthwith release or arrest such person without a warrant on a charge of violating the provision so sub.(3) and such employe in case of arrest shall forthwith turn him over to a peace officer. (emphasis added)

The parties now apparently agree that these provisions provide a certain degree of arrest authority to appellant's position, and the Commission agrees that this is an appropriate reading of these statutory provisions.

by maintaining a watch and patrol of State owned or leased buildings and immediate grounds to protect against trespass, vandalism, fire, theft, property damage and other hazards." On the other hand, the PO position standard introductory paragraph refers to "positions performing patrol and law enforcement duties on state-owned or leased properties." The PO inclusions section also places more emphasis on law enforcement:

This series encompasses patrol and law enforcement positions which exercise arrest authority and are responsible for enforcing state and local laws and agency rules and regulations pertaining to the protection of persons, property and the rights of the general public against injury, loss or disturbances resulting from criminal or disorderly acts, accidents, and hazards on state-owned property.

Based on the foregoing provisions, if appellant could have established that his duties and responsibilities involved more of an emphasis on law enforcement than contemplated by the SO position standard, this would have been helpful to his case. While appellant did produce some evidence to this effect, it falls short of establishing this proposition.

There are a number of facets of appellant's work which are consistent with the concept of law enforcement. For example, he carries a number of different kinds of firearms and other police-type paraphernalia. He responds to intruders and other security problems on the base. He does have some statutory arrest authority, which is limited to the arrest of illegal intruders pursuant to §§21.17(3) and 175.05(3), Stats.

With respect to his arrest powers, appellant claims in his post-hearing brief that:

By State of Wisconsin Statutes 967.02(5) I find we fit the definition of law enforcement officers, as we have the power to arrest. By the definition of arrest in Blacks Law Dictionary, we have the power of arrest which apprehend and detain by U.S.A.F. definition of "Apprehend" to be "arrested, we have the power to arrest." [sic] By Wisconsin State Statute 968.07, we have all the arrest powers as law enforcement would. By 968.24, Wis State Statutes, I question temporarily without arrest as a law enforcement officer and by Wi. Statute 968.25, we can search during temporary questioning like law enforcement officers. What police officers do with suspects resembles what we do as security officers according to our Air Force Security Policies Operating Instructions.

By this argument, appellant in effect is attempting to leverage the limited power to arrest unlawful intruders bestowed by §§21.17(3) and 175.05(3), Stats. to result in the broader arrest powers held by any law enforcement officer.

Section 967.02(5), Stats., defines "law enforcement officer" as "any person who by virtue of his office or public employment is vested by law with the duty to

maintain public order or to make arrests for crimes while acting within the scope of his authority." Section 968.07, Stats., delineates the arrest powers of a law enforcement officer, and includes the authority to make an arrest when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime." Section 968.24, Stats., provides that a law enforcement officer may, under certain circumstances, stop and question, without arresting, a criminal suspect. Section 968.25, Stats., gives a law enforcement officer authority under certain circumstances to stop a person for temporary questioning under §968.24, Stats.

Section 967.02(5), Stats., cannot reasonably be interpreted as conferring law enforcement officer status, and the attendant broad powers exemplified by the foregoing statutory provisions, merely on the basis of the limited arrest authority granted under §§21.17(3) and 175.05(3), Stats. Under these provisions, arrest authority is limited to particular offenses (encroachment on military areas and interference with military personnel, and unlawful entry on property, respectively), and primarily to particular locations (military bases), and then only to the extent of detaining the arrestee until he or she can be turned over to "civil authorities," §21.17(3), Stats., or "a peace officer," §175.05(3), Stats. It would be an irrational result to use these statutes, involving such a limited grant of authority, as a basis for a conclusion that appellant is a "law enforcement officer" as defined by §967.02(5), Stats. This is clearly a situation involving "the cardinal rule of statutory construction that when a general statute and a specific statute relate to the same subject matter, the specific statute controls." (citation omitted) *Frostman v. State Farm Mut. Ins. Co.*, 171 Wis 2d 138, 144, 491 N.W. 2d 100 (Wis. Ct. App. 1992). Therefore, it must be concluded that appellant does not have the extent of arrest power that he claims on the basis of this group of statutes.

Appellant's reliance on Air Force regulations also adds little to his case. For example, AF Regulation 125-3 Security Police Policies and Procedures (appellant's Exhibit 18), by its terms only applies to civilian personnel who have been "designated by proper authority to perform US Air Force security police duties." Air Force security police have relatively broad arrest powers on base (see Section J of appellant's Exhibit 18) which is inconsistent with appellant's limited grant of arrest powers under §§21.17(3) and 175.05(3), stats.

Appellant's PD is consistent with a greater emphasis on security than on law enforcement. The PD (Respondent's Exhibit 1) reflects a 25% goal (A1) of patrol and surveillance, 20% controlling entry and exit to and from the base (A2), and 10% monitoring base alarm systems (B1). There are also a 15% goal (C) for

preparing and maintaining records and documents, and a 10% goal (D) for maintaining and operating property, equipment and supplies.

Another factor which weights against an overall law enforcement orientation for this position is that while appellant may detain suspects under certain circumstances, his role is limited to turning the detainees over to law enforcement officers. This is specifically provided for by the statutes (§§21.17(3) and 175.05(3), Stats.) which confer arrest powers on this position, and the practice is reflected at other points in the record. For example, the incident report submitted as Appellant's Exhibit 10 reflects that while checking buildings on the base, appellant detained an unauthorized individual on the base and turned him over to the Madison Police Department.

Another factor which adds some weight to respondent's case in this area is that this position is not required to have completed the state law enforcement certification program. However, the amount of weight to be given this factor is limited by the fact that there is nothing in this record to suggest that the decision that such certification is not required was made by anyone other than DMA, which denied the request for reclassification to PO 2. Presumably, if DMA had agreed with appellant that his position should be in the PO 2 classification, it would have added a law enforcement certification requirement for this position.

Given the degree of overlap between the two series (SO and PO) at issue in this case, an analysis of other classified civil service positions found in these series may well have provided some relevant information. However, there were no PD's for such positions in this record, although some of the witnesses compared appellant's work with police work generally.⁴

In conclusion, while there was evidence on both sides of the issue before the Commission, appellant failed to satisfy his burden of proof and failed to establish by a preponderance of the evidence that respondent's decision to deny his request for reclassification of his position to PO 2 was incorrect. Therefore, respondent's decision must be affirmed.

ORDER

Respondent's action denying appellant's request for reclassification of his position to PO 2 is affirmed and this appeal is dismissed.

Dated: _____, 1994 STATE PERSONNEL COMMISSION

⁴ Appellant referred in his post-hearing brief to certain other state PO positions. Arguments in briefs cannot be considered as evidence.

LAURIE R. McCALLUM, Chairperson

je:Decisions-Cox

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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