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ROBIN E. ZENTNER,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondent.

Case No. 93-0032-PC

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RULING ON FEE
APPLICATION
AND
FINAL ORDER

This matter is before the Commission on appellant's Motion for Payment of Fees filed July 6, 1994. Both parties have filed briefs.

In the June 23, 1994, ruling on the merits of this matter, the Commission addressed the question of the effective date of the reallocation of appellant's position from Civil Engineer Advanced 1 to Civil Engineer Advanced 2. In summary, appellant transferred into the position in question after the previous incumbent (Gerald Marx) had transferred out. Before that, Mr. Marx had initiated an appeal of the reallocation of the position which had occurred with an effective date of June 17, 1990. On February 25, 1993, subsequent to the transfer, the Commission decided Mr. Marx's appeal in his favor, and in response to this decision, respondent reallocated the position with an effective date of June 17, 1990. However, this effective date was made applicable via regrade only with respect to Mr. Marx's employment status, not Mr. Zentner's. Respondent set the effective date of Mr. Zentner's regrade as March 21, 1993 -- i.e., subsequent to the date of the Commission's decision of Mr. Marx's appeal. Mr. Zentner subsequently filed the instant appeal challenging this effective date.

The Commission's decision on the merits of this appeal involved an interpretation of DER's own effective date guidelines as set forth in Chapter 332.060 of the Wisconsin Personnel Manual, Administration, Classification, Compensation, which provides that reallocation regrade actions taken under now §ER 3.01(2)(e), Wis. Adm. Code (reallocation based upon "correction of an error in the previous assignment of a position") "will be made effective at the beginning of the first pay period following effective receipt of the request." The Commission rejected respondent's contention that the earliest possible date

for such a "request" with respect to Mr. Zentner would have been when it received the Commission's decision in the Marx case -- i.e., on or about February 26, 1993. The Commission observed that the only request for a §ER 3.01(2)(e), reallocation of the position had been made in 1990 when Mr. Marx filed his appeal of the reallocation of his position following the engineering survey, and that:

Respondent's regrade action in relation to appellant was based on the reallocation of the Marx Position. In other words, the underlying basis for appellant's regrade was to correct the error which occurred on June 17, 1990. Accordingly, appellant is entitled to be regraded and to be compensated at the CE Adv 2 level, effective the date he became the incumbent in that position -- April 21, 1991. The Commission knows of no logical or legal authority which would support any other result. Commission decision, p. 4.

The Commission also rejected respondent's argument that such an effective date would create a competition problem because it would nullify the lateral nature of Mr. Zentner's transfer into the position in 1991. It noted that the transfer was valid at the time it was made, and that utilizing a retroactive date for classification purposes does not require a retroactive effect for a staffing transaction. The Commission also observed that if this potential competition problem were a valid concern, it would be equally valid even under the effective date for regrade (March 21, 1993) used by respondent, because this would leave the effective date of the reallocation of the position as June 17, 1990, prior to Mr. Zentner's transfer.

Pursuant to §227.485(2), Stats., costs are to be awarded to the prevailing party in a case of this nature unless the Commission finds that respondent "was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Section 227.485(1)(f) provides: "[s]ubstantially justified" means having a reasonable basis in law and fact." In Sheely v. DHSS, 150 Wis. 2d 320, 338, 442 N.W. 2d 1 (1989), the Supreme Court held as follows:

Losing a case does not raise the presumption that the agency was not substantially justified ... when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, this court will defer to the agency's conclusions if they are reasonable; even if we would not have reached the same conclusions. (footnote and citations omitted)

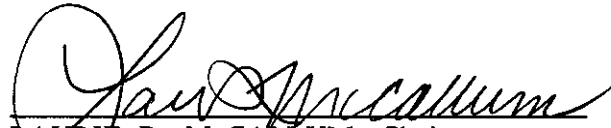
While the Commission ultimately ruled in appellant's favor in this case, under these circumstances, as exemplified by this portion of appellant's brief, it does not find that respondent's position did not have a reasonable basis in law. There is no provision in any of the statutes, rules or policies potentially governing this transaction which specifically addresses the question this case presents -- i.e., the effective date of the regrade or an employee who transfers into a position prior to the completion of an ultimately successful appeal by the prior incumbent seeking a higher classification level for the position. Respondent's use of §332.060 of the Wisconsin Personnel Manual, was not without a reasonable basis, albeit it required a construction of the word "request" (which was not defined in the policy) which the Commission considered unconvincing. Contrary to appellant's contention, an opposite

approach, but rather that neither the briefs nor the Commission's own analysis had led to any logical or legal basis which would have required a different result.

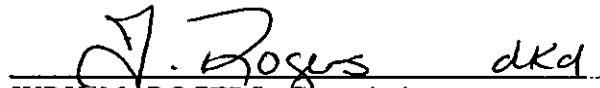
ORDER

Appellant's motion for payment of fees filed July 6, 1994, is denied, and the Commission's June 23, 1994, decision and order is finalized as the final disposition of this matter.

Dated: August 18, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr

 dkd
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.)