



STATE OF WISCONSIN

PERSONNEL COMMISSION

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JOHN H. VESPERMAN,
GERALD MUELLER,
ALLAN J. KIMBER,
JON OBENBERGER,
TERRY SOSSAMAN,
DAN JASHINSKY,
BRIAN REVELLO,

Appellants,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 93-0101, 109, 110, 114,
118, 125, 126-PC

* * * * *

RULING
ON MOTIONS
TO
DISMISS

These matters are before the Commission on the respondents' motions to dismiss these appeals as untimely filed. A briefing schedule was established and the facts set out below do not appear to be in dispute.

1. Appellants are employed by respondent DOT and have engineering-related responsibilities.
2. Respondent DER implemented a classification survey of engineering positions on June 17, 1990. Numerous employees in positions affected by the survey filed appeals with the Personnel Commission. DER also established an "informal" appeal process which allowed its staff to review the individual classification decisions in more depth, reach a classification decision and issue a written decision to the employee involved. The employee was given an opportunity to file a new appeal with the Commission within 30 days of receipt of the decision rendered with respect to the "informal" appeal.
3. Because of the large number of cases involved, the processing of the informal appeals has taken several years to complete. During this period, numerous engineering employees of DOT who had not pursued either a formal appeal to the Commission or the informal review process within 30 days of the

implementation of the underlying survey, have contacted DOT and requested a classification review of their position.

4. In a memo dated August 28, 1991, DOT's survey coordinator, Shelagh Cullen summarized the results of discussions with DER regarding the "process by which we will attempt to correct classification inequities resulting from decisions made in the appeals process":

Although an employe who did not file appeals within thirty days after receiving the survey notice no longer has appeals rights, an employe can request a classification review of the current position. In order to initiate this, a letter should be submitted to Survey Coordinator, Bureau of Human Resource Services, Department of Transportation. The letter should contain the rationale for the request as well as comparable positions.

Prior to beginning these additional reviews, analysis and determination of pending Engineering Survey appeals will be completed. Once the appeal process is complete, we will provide each affected division the results of the appeals process. We will ask that each division determine which employes are performing the same duties as positions reallocated to higher levels in the appeals process. This information along with supporting documents will be submitted through each division's central administrative office to the Bureau of Human Resource Services. We anticipate that this will address most of the resulting inequities. Once this process is complete, we will review the remaining requests we have received from individuals.

If the review indicates an error was made on June 17, 1990, a reallocation will be completed with an effective date of June 17, 1990 to correct the error and properly classify the job. If we determine that the assigned duties and level of performance occurred after June 17, 1990, we will complete a reclassification request with an effective date based on the Administrative Rules. It is our understanding that if the original reallocation is determined to be correct, individuals do not have appeal rights to the Personnel Commission for the survey implementation date of June 17, 1990.

5. In a memo dated August 26, 1992, representatives of DOT's Division of Highways and of the Bureau of Human Resources Services issued a memo to Bureau Directors, State Engineers and District Directors stating in part:

Last summer, in the midst of the appeals process, the Department of Employment Relations informed us and a number of the Division's employes that, after all survey appeals were addressed, each agency would identify and reallocate positions that per-

formed the same duties as those moved to a higher level in the appeals process. Specifically, Judy Burke indicated in a May, 1991 letter to employees that we would "reallocate all employes who are performing the same job duties at the same level of performance as positions that have been approved through the survey appeal process". Subsequent to this letter, the Department of Employment Relations informed SEA, that because of the staff time involved in the formal appeals, the Department of Employment Relations would not be involved in this effort.

However, it is clearly the intent of the Bureau of Human Resource Services and the Division of Highways to provide managers an opportunity to correct those situations which Judy Burke referred to in her May, 1991 letter. It is our goal to identify and address only those positions that were clearly and directly affected by the resolution of the appeals process; i.e., those performing the same duties. This in no way offers individuals the right to continue to submit appeals to decisions in the 1990 survey; nor does it offer individuals who have had appeals denied by DER or the Personnel Commission another avenue to debate the denials. We are asking DOH management to expeditiously identify and submit the names of staff who appear to meet the conditions identified in this memo.

* * *

It is important for you to realize also that the Bureau of Human Resource Services has received a number of requests from employes to have their positions reviewed in light of the results of the appeals process. These requests are currently being reviewed by Personnel. They may or may not meet the criteria of being the same as a position moved in the appeals process. Each will be assessed based on its individual merit. You may contact the Bureau of Human Resource Services to determine who from your organization has already submitted requests.

6. Appellants had all submitted written requests to DOT for review of the classification of their positions. These requests were all submitted more than 30 days after appellants had first received notice in 1990 that their position had been reallocated effective June 17, 1990.

7. By letters dated June 22 and 23, 1993, respondent DOT informed each appellant that DOT had determined that the original reallocation decision made as part of the classification survey had been correct. Included in DOT's letter was the following information:

Subsequent to the completion of the engineering survey informal appeals process, the Department of Employment Relations authorized us to consider the engineering classification reviews.

The intent of this review was to address positions that performed the same duties as those moved to a higher level in the appeals process. The possible results of that review are as follows:

1. If an error was made June 17, 1990, then a reallocation would be completed effective June 17, 1990. DER authorized us to reallocate positions retroactive to June 17, 1990 only if employees were performing the same job duties at the same level of performance as positions that were approved through the survey appeals process.

2. If your level of performance changed appropriately after June 17, 1990, then action would be taken with a later effective date based on law.

3. If the original reallocation determination was correct, then no action would be taken and there would be no appeal rights for the survey implementation date of June 17, 1990.

8. Within 30 days after receiving written notice of this decision, the appellants filed separate letters of appeal with the Commission. Appellants all seek review of the classification level of their positions effective in June of 1990.

Discussion

The key question raised by these appeals is whether, by responding to a request made by the appellants, reviewing the classification levels of these positions, affirming the correctness of the original reallocation decisions that had been made effective June 17, 1990, and then issuing a written decision to that effect, the respondents have made a decision which is appealable to the Commission pursuant to §230.44(1)(b), Stats. Respondents contend that the appellants, having failed to timely appeal the reallocation decisions in 1990, are prohibited from using the June, 1993 letters as a premise for appealing the reallocation decision. While the Commission agrees with this proposition as far as it goes, it concludes that the June, 1993 decisions do constitute transactions that in and of themselves are appealable pursuant to §230.44(1)(b), Stats.

According to §230.44(1)(b), the Commission has authority to hear an appeal "of a personnel decision under s. 230.09(2)(a)" made by the Secretary of DER, or by an appointing authority under authority delegated by the Secretary. Section 230.09(2)(a) provides:

After consultation with the appointing authorities, the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The secretary may reclassify or reallocate positions on the same basis.

The original reallocation decision, made in approximately June of 1990, clearly was a personnel decision that was appealable, either by way of a formal appeal to the Commission or via the informal appeal process. Over the course of the next several years, a number of additional classification decisions were made as part of the formal and informal review processes. Respondents concluded that these changed circumstances placed in issue the classification of a number of other positions which had not been reallocated through the appeal process. Each of the appellants had submitted, during this period, a written request to DOT for review of the classification of their position. DOT, with DER's approval, reexamined the original reallocation decisions to determine whether they were correct in light of the changed circumstances and issued a letter reflecting their conclusion.

Did these June 1993 letters reflect personnel decisions which are appealable to the Commission pursuant to §230.44(1)(b)? The letters make it clear that the review was authorized by DER but conducted by DOT, that it involved analysis of the duties being performed by the appellants in comparison to other positions, that the effect of the review was the determination of the appellants' proper classification level and that the results of the review were not merely advisory but were binding on both DOT and DER. Had the respondents concluded that an individual appellant's position was more properly described at a higher (or a lower) level, a personnel transaction would be effectuated to reflect that conclusion. Respondents also notified the appellants in writing of the results of the review. All of these characteristics of the June 1993 review establish that the respondents made appealable "personnel decisions" with respect to the classification level of appellants' positions that were appealable pursuant to §230.44(1)(b).

As noted above, this conclusion is not the same thing as a conclusion that appellants can now appeal the June 17, 1990, reallocations *per se*. Those were final decisions conveyed in writing via reallocation notices. By not ap-

pealing within 30 days of those notices, appellants lost the right to appeal those transactions. *See* §230.44(3), Stats.¹

This result is consistent with previous decisions issued by the Commission. In Adams v. DHSS, 83-0050-PC, 8/17/83, which arose from a failure to hire, there were essentially three separate decisions, represented by three letters. The last one, which was made by the agency head, very clearly indicated that it represented a review of the non-selection decision and reflected a conclusion that there had been no improper or discriminatory action. The Commission held that the appeal was timely because it was filed within 30 days of this "final decision" even though it was filed more than 30 days after the appellant was first notified that he had not been selected for the vacancy.² Also, in Stellick v. DOR & DP, 79-211-PC, 4/10/81, the appellant, who received notice of his pay rate upon regrade, questioned the accuracy of the information and contacted the "compensation coordinator" of the Division of Personnel, the predecessor to the DER. That person said he would respond to the appellant's concerns in writing which could form the basis of an appeal or grievance. The Commission concluded that the "conversation, particularly the reference to a letter which could serve as the basis for a possible appeal, provides the basis for a conclusion that the matter was not final but was being reconsidered as a result of the appellant's inquiry."³

The facts of the present case are easily distinguishable from those cases where an employe has asked an agency to reconsider a prior (appealable) de-

¹The Commission held in Popp v. DER, 88-0002-PC, 3/8/89, that DER's decision as to effective date of a classification transaction is part of the substantive classification decision because it is "in effect a decision as to the appropriate classification for a certain period of time." *Id.*, at p. 5. The Commission also held that DER has the "discretionary authority to delay, in effect, the effectuation of a reallocation or reclassification until the date of a request for such reallocation or reclassification." *Id.* It appears that as to some of the classification changes, respondents unilaterally chose to utilize as effective dates the survey reallocation effective date (June 17, 1990). The Commission does not address the effective date issue for those positions respondent has not reallocated. This presumably will be an issue for hearing along with the substantive issue relating to the decision as to the classification level.

²In its decision, the Commission focused on the fact that the final letter was written by the agency head "who clearly has the authority to render the agency's final decision."

³The Commission went on to find that the elements of equitable estoppel were also present.

cision and the agency has declined to do so. In LaRoche v. DHSS & DER, 85-0227-PC, 4/30/86, the appellant had requested that the agency reconsider a classification decision made more than one year earlier. The respondent declined to reconsider its decision, merely stating that the request was too late. In that case, the merits of the request were never considered (and the previous decision was never reconsidered) by the respondent. The Commission held that an appeal filed within 30 days of the date of the reconsideration denial was untimely filed where it was received more than 30 days after the underlying classification decision. A similar conclusion was reached in Junceau v. DOR & DP, 82-112-PC, 10/14/82.

In the instant cases, whether or not the respondents had an obligation to do so, they chose to review their previous decisions in order to insure there were no inconsistencies as a result of changes which had been made to the classification of other positions as part of the formal and informal review process. The appellants had requested that their positions be reviewed on a substantive basis and respondents acceded to the requests. Respondents notified the appellants of the results of their review. The appellants appealed from those decisions on a timely basis. Therefore, the respondents' motions to dismiss must be denied.

Appellants Vesperman, Obenberger, Sossaman, Jashinsky and Revello all had their positions reclassified by the respondents after June of 1990 and before June of 1993. The individual letters sent to appellants Vesperman, Obenberger, Sossaman and Jashinsky in June of 1993 included observations to the effect that their positions were "appropriately classified" at that (higher) level as of the effective date of the reclassification. While it could be argued that the review carried out in June of 1993 also provides the appellants with a vehicle for obtaining review of these reclassification decisions, the materials filed by the appellants indicate that their appeals relate solely to the reallocation decisions. The Commission will process these matters on that basis.

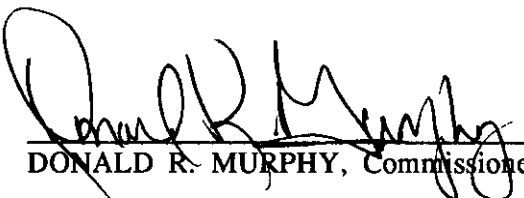
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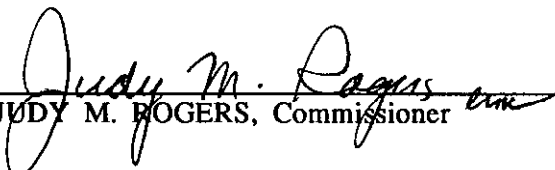
Respondents' motions to dismiss are denied. The Commission will schedule a prehearing conference.

Dated: February 15, 1994 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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K:D:temp-12/93 DOT


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner