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WILLIAM DUSSO,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOY-  
MENT RELATIONS, and Secretary,  
DEPARTMENT OF REGULATION AND  
LICENSING,

Respondents.

Case No. 94-0490-PC

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INTERIM RULING & ORDER  
ON RECIPROCAL  
SUMMARY JUDGMENT MOTIONS

Mr. Dusso filed his appeal on September 19, 1994. The Department of Employment Relations (DER) raised the question in November 1994, of whether the Commission had subject matter jurisdiction to review Mr. Dusso's appeal. Both parties submitted briefs and the matter ultimately was resolved in Mr. Dusso's favor by Commission ruling issued on December 23, 1994.

A prehearing conference was held on January 20, 1995, at which time the parties agreed to a hearing date of June 15, 1995, and to certain stipulated facts. The hearing was not held because Mr. Dusso filed a motion for summary judgment on May 10, 1995, which was followed by DER's motion for summary judgment on June 27, 1995. A briefing schedule was established under which the final brief was received by the Commission on August 3, 1995.

The facts necessary to resolve this matter include the stipulated facts which are recited in the following section, as well as information submitted by the parties in briefs.

STIPULATED FINDINGS OF FACT

1. Mr. Dusso was employed by the Department of Regulation and Licensing (DRL) as a classified attorney starting in 1977, and including a period as DRL's legal counsel from 8/77 to 3/80, at an Attorney 13 classification. His pay in 3/80, as a classified Attorney 13 at regrade point C was \$12.427 per hour.
2. In 3/80, Ms. Haney, then Secretary of DRL, appointed Mr. Dusso as Administrator of the Division of Administrative Services, an

unclassified position which he held until 8/21/94. His duties in the unclassified position were similar to the duties of his classified position as legal counsel, except he became the supervisor of DRL's classified attorneys and he no longer was routinely expected to draft administrative rules or to conduct hearings.

3. If Mr. Dusso had remained in his classified position rather than accept the unclassified position, he would have achieved Attorney 13 regrade to point D on 9/25/80.
4. At a date unspecified by the parties, DER reallocated classified legal counsel positions from the Attorney 13 to the Attorney 14 level. If Mr. Dusso had stayed in the classified position, it would have been reallocated to the Attorney 14 level.
5. Mr. Dusso, having been appointed from a classified to an unclassified position within the same department, was entitled to certain restoration rights pursuant to s. 230.33(1), Stats., as shown below in pertinent part.<sup>1</sup>

**230.33 Leave of absence and pay while serving in unclassified position.** Employees who have completed an original appointment probationary period in the classified service and are appointed to a position in the unclassified service shall be subject to the following provisions relative to leave of absence, restoration rights, reinstatement privileges and pay:

(1) A person appointed . . . by any other appointing authority when both the classified and unclassified positions are within his or her department, shall be granted a leave of absence without pay for the duration of the appointment and for 3 months thereafter, during which time the person has restoration rights to the former position or equivalent position in the department in which last employed without loss of seniority. . . .

6. The union contract for classified attorneys settled in or about 6/93. Mr. Dusso realized he might receive a higher wage under the new union contract in a classified attorney position than if he remained in the unclassified position. He first explored the possibility of obtaining a

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<sup>1</sup> Mr. Dusso also had reinstatement rights under s. 230.33(1), Stats., which are not at issue in this case. The dividing line between restoration and reinstatement rights in s. 230.33(1), Stats., is the timing of the request to return to classified service. Restoration rights exist for the duration of the appointment and for an additional 3 months, after which time reinstatement rights apply.

- higher wage in his unclassified position, but was unhappy with the results. (See the following letters attached to Mr. Dusso's appeal letter: a) Dusso letter to Secretary Litscher dated 11/5/93, and b) Litscher's reply dated 11/24/93.)
7. On 1/25/94, Mr. Dusso requested restoration to an attorney 14 classified position at DRL. (See 1/25/94 Dusso letter to Secretary Cummings, attached to Mr. Dusso's appeal letter.)
  8. On 5/3/94, DER Secretary Litscher, informed Mr. Dusso that the maximum starting pay in a classified attorney position pursuant to Mr. Dusso's restoration rights would be \$28.33 per hour as of June 27, 1993. (See 5/3/94 letter attached to Mr. Dusso's appeal letter.)
  9. On 6/2/94, Mr. Dusso sent Secretary Litscher a letter which explained why he felt a starting salary of \$34.462 per hour would be more appropriate. (See 6/2/94, 15-page memo attached to the appeal letter).
  10. On 8/16/94, Secretary Litscher responded to Mr. Dusso's letter of June 2nd, providing details of why he continued to disagree with Mr. Dusso's calculations. (See 8/16/94 letter attached to Mr. Dusso's appeal.)
  11. Copies of Mr. Dusso's and DER's calculations for Mr. Dusso's wage entitlement upon restoration are included with the appeal letter. One major difference between the calculations is Mr. Dusso gave himself the regrade to point D as if he had remained in the Attorney 13 classified position, whereas DER did not. A second major difference is Mr. Dusso gave himself annual merit increases from 1981 through 6/27/93, whereas DER calculated merit increases only from 3/10/91 through 6/27/93.<sup>2</sup>
  12. On 8/22/94, Mr. Dusso returned to a classified position in DRL as an Attorney 14; earning an hourly total wage of \$32.466 (\$30.416 as a base salary, plus \$2.05 as an add-on allowed by the compensation plan).

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<sup>2</sup> This footnote is not part of the parties' stipulation but is added by the Commission for clarification. As discussed below at page 6, DER contends that appellant was not entitled to these increases because they were conditioned on the employe having completed movement through regrade point D. However, after the abolishment of regrade points, DER concedes his eligibility for such increases.

WAGE CALCULATIONS IN BRIEFS

13. The pay plans of DER's Secretary during the time period at issue in Mr. Dusso's case have contained the following information (taken from Dusso's brief in support of summary judgment, attachment pages numbered: "Appellant's Affidavit-Attachment K", which pertain to the 1979-1981 compensation plan):

VI. Pay Provisions:

A. Beginning Pay: . . .

B. Assignment to Regrade Points: . . . [T]he pay range for each of the Attorney 11-15 classifications is divided into regrade points for within range pay progression purposes. Upon appointment to an attorney position, each employe shall be assigned to a regrade point as follows:

1. Upon Initial Appointment to an Attorney Position: . . .
2. Upon Promotional Appointment to an Attorney Position: . . .

C. Probationary Pay Increase: . . .

D. Within Range Pay Progression:

1. General: Attorney positions are filled at their objective classification level. In order to recognize and compensate for increases in responsibility, complexity and independence within a classification level, a regrade system has been created to provide for within range pay progression to the midpoint of the pay range which is considered the compensation objective level of the position.
2. Regrade Eligibility: In order for an Attorney to be regraded, all of the requirements listed below must be met.
  - a. Must have permanent status in class i.e., not be on either permissive or mandatory probation.
  - b. Must meet the minimum regrade time frame requirements (i.e., calendar years of employment at a regrade level).
    1. The time frames are absolute and may not be waived.
    2. Must be time served as a permanent, classified attorney at any level i.e., changing levels or positions does not interrupt accumulation of employment for the purposes of regrade eligibility (except as noted in c. below).
  - c. Must have spent the last 6 months of the time frame in the employe's current position.

d. Must not have received written notice from the appointing authority, prior to the minimum regrade effective date, indicating that he or she will be denied the regrade due to unsatisfactory performance.

14. The parties agree that the following wage figures would apply if Mr. Dusso shows entitlement to Regrade D as of 9/25/80. The figures are shown in Exh. 3 of Jeanne Meyer's affidavit in support of DER's motion. Mr. Dusso stated agreement with these figures in his reply brief.

Adjust- ment #	BASE DATE	OLD INTERVENING RATE ADJUSTMENT	NEW BASE RATE	AMOUNT GENERATED BY EMPLOYEE
1.	09/25/79	\$12.427	\$12.427	Last rate received.
2.	03/03/80	... TO UNCLASSIFIED SERVICE ...		
3.	06/29/80	\$12.427 7.00%	\$13.297	Across the board (ATB)
4.	09/25/80	\$13.297 REGRADE TO D	\$14.335	
5.	09/06/81	\$14.335 6.00%	\$15.196	ATB
6.	09/06/81	\$15.196	\$15.339	Str.Adj.RP-D Min.
7.	10/04/81	\$15.339 \$0.684	\$16.023	\$119/mo. Discretionary Performance Award (DPA)
8.	06/27/82	\$16.023 6.00%	\$16.985	ATB
9.	06/27/82	\$16.985 \$0.684	\$17.669	\$119/mo. DPA
10.	06/24/84	\$17.669 1.84%	\$17.995	ATB
11.	06/24/84	\$17.995 \$0.535	\$18.530	\$93/mo. DPA
12.	07/07/85	\$18.530 4.00%	\$19.272	ATB
13.	07/07/85	\$19.272 \$0.541	\$19.813	\$94/mo. DPA
14.	07/06/86	\$19.813 4.00%	\$20.606	ATB
15.	07/06/86	\$20.606 \$0.587	\$21.193	\$102/mo. DPA
16.	02/28/88	\$21.193 0.541	\$21.734	DPA
17.	07/03/88	\$21.734 0.518	\$22.252	DPA
18.	06/03/90	\$22.252 \$0.616	\$22.868	Pay Adj resulting from reallocations (FY 88-89 Step Atty. 14)
19.	06/03/90	\$22.868 3.75%	\$23.726	ATB
20.	07/01/90	\$23.726 \$1.160	\$24.886	(Merit Step-Atty. 14)
21.	07/01/90	\$24.886 4.25%	\$25.944	ATB
23.	03/10/91	\$25.944 \$1.210	\$27.154	(Merit Step-Atty. 14)
24.	06/13/93	\$27.154 1.27%	\$27.499	ATB
25.	06/13/93	\$27.499 \$1.372	\$28.871	(FY 91-92 Merit-Atty. 14)
26.	06/13/93	\$28.871 3.00%	\$29.738	ATB
27.	06/13/93	\$29.738 \$1.413	\$31.151	(FY 92-93 Merit-Atty. 14)
28.	06/13/93	\$31.151 1.25%	\$31.541	ATB
29.	06/27/93	\$31.541 1.50%	\$32.015	ATB
30.	06/27/93	\$32.015 \$1.452	\$33.467	(FY 93-94 Merit-Atty. 14)
31.	06/26/94	\$33.467 2.50%	\$34.304	Semi-Auto Increase
32.	06/26/94	\$34.304 \$1.488	\$35.792	(FY 94-95) Merit-Atty 14, Supv/Confidential

STIPULATED ISSUE

Whether respondents correctly established the appellant's rate of pay upon his restoration to the classified service. If not, what is the correct rate of pay?

Conference Report dated January 20, 1995.

BRIEF SUMMARY OF THE PARTIES' POSITIONS

DER & DRL: Respondents contend Mr. Dusso is not entitled to the regrade to point D (adjustment #4 in par. 14). They further assert that subsequent entitlement to merit (DPA) money was conditioned upon being through the regrade points and, accordingly, Mr. Dusso is ineligible for any such increases prior to 3/10/91, after which time his entitlement is clear due to the abolishment of regrade points. Respondents acknowledge Mr. Dusso's entitlement to the reallocation pay adjustment (adjustment #18 in par. 14). (See DER Bulletin #CC-246/CB-41, attached to Mr. Dusso's brief and numbered as: "R&L Discovery Responses", p. 1-5.) Further, DER acknowledges Mr. Dusso's entitlement to all across-the-board (ATB) adjustments shown in par. 14.

Mr. Dusso: Appellant claims entitlement to all adjustments shown in par. 14.

DISCUSSION

Mr. Dusso's pay upon restoration is governed by s. ER 29.03(7), Wis. Adm. Code, shown below in relevant part. This code section applies to Mr. Dusso because he was considered as being on an approved leave of absence while he worked in the unclassified administrator position. Accordingly, his restoration occurred after an approved leave of absence without pay under s. ER 18.14, Wis. Admin. Code.

ER 29.03 (7) PAY ON RESTORATION. (a) For the purpose of this subsection, "last rate received" means the last base pay rate received in the position from which restoration rights are derived.

(b) When an employe is restored following . . . approved leave of absence without pay under s. ER 18.14, . . . the employe shall receive a base rate equal to the last rate received plus intervening adjustments identified under s. ER 29.04 (13) or (14).

...

The intervening adjustments identified under s. ER 29.04, Wis. Admin. Code, are shown below.

ER 29.04 Multiple pay adjustments on same date, order of application.

- ( 1) Completion of the first 6 months of a probationary period, career executive trial period, or project appointment.
- ( 2) Regrading an employe as a result of a reallocation decision.
- ( 3) Regrading an employe as a result of a reclassification decision.
- ( 4) Assignment of an attorney to a regrade point.
- ( 5) Promotion.
- ( 6) Career executive voluntary movement to a higher class.
- ( 7) Demotion.
- ( 8) Career executive reassignment or voluntary movement to a lower class.
- ( 9) Transfer.
- (10) Career executive reassignment or voluntary movement to a class assignment to the same pay range.
- (11) Reinstatement.
- (12) Restoration.
- (13) Compensation plan or contractual adjustments pursuant to ss. 230.12 (3) or 111.92, Stats., respectively, including but not limited to within range pay adjustments other than those made under subs. (1) through (12) and (15).
- (14) Compensation plan schedule adjustments under s. 230.12, Stats. New minimums, PSICMs and regrade point minimums of the pay schedules go into effect after adjustments listed in subs. (1) through (13) are made.
- (15) Establishment of a raised minimum rate.
- (16) Original appointment.

Respondent DER assert that appellant's salary computation should not include the September 25, 1980, regrade to Regrade Point D in the Attorney's Pay Plan because such transactions are excluded by operation of s. ER 29.03 (7)(b) and ER 29.04(13), Wis. Adm. Code:

Appellant is entitled to his last rate received, plus Comp. Plan contract adjustments, including within range pay adjustments, except those listed in s. ER 34.04 [sic] (1) through (12) and (15), Wis. Adm. Code. Sub. 4 states: "Assignment of an attorney to a regrade point." Thus, by clear language, appellant was not entitled to a regrade in computing his pay upon restoration. (Respondent DER's brief, pp. 5-6.)

However, the Commission agrees with appellant's contention that the movement of an attorney from one regrade point to another within a pay schedule is not equivalent to the "[a]ssignment of an attorney to a regrade point," as set forth in s. ER 29.04(4), Wis. Adm. Code, but rather falls in the category of "within range pay adjustments other than those made under subs. (1) through (12) and (15)." s. ER 29.04(13), (emphasis added.)

The foregoing terms are not explicitly defined by either the statutes or the administrative code rules. However, the 1979-1981 Compensation Plan (Appellant's Affidavit Attachment K) includes the following particularly relevant provisions in Pay Schedule 9 (Legal), s. VI. (The underlining appears in the original document. The italics were added for emphasis.)

**B. Assignment to Regrade Points:** As shown in the chart at the end of this schedule, the pay range for each of the Attorney 11-15 classifications is divided into regrade points for within range pay progression purposes. *Upon appointment to an attorney position, each employe shall be assigned to a regrade point as follows:*

1. **Upon Initial Appointment to an Attorney Position:** Once the beginning pay rate for an employe has been established (as described in A.), the employe shall be assigned to a regrade point in the pay range based on his/her beginning pay plus the expected probationary increase. . .
  - a. If the employe's pay after the probationary increase will fall between the dollar amounts of two regrade points, the employe will be assigned to the lower of the two points.
  - b. If the employe's pay after the probationary increase will be equal to the dollar amount of a regrade point, the employe will be assigned to that regrade point.
  - c. If the employe's pay after the probationary increase will be below the dollar amount for Regrade Point A, the employe will not be assigned to a regrade point.
2. **Upon Promotional Appointment to an Attorney Position:** Once the promotional pay rate for the employe has been established (in accordance with the Rules of the Administrator), the employe shall be assigned to a regrade point in the new class based upon his/her promotional pay rate plus any promotional probationary increase if authorized under the Rules of the Administrator. Such



assignments to a regrade point shall be in the same manner as described for an initial appointment to an attorney positions.

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D. Within Range Pay Progression

1. General: Attorney positions are filled at their objective classification level. In order to recognize and compensate for increases in responsibility, complexity and independence within a classification level, a *regrade system* has been created to provide for *within range pay progression* to the midpoint of the pay range which is considered the compensation objective level of the position.
2. Regrade Eligibility: In order for an Attorney to be regraded, all of the requirements listed below must be met.
  - a. Must have permanent status in class i.e., not be on either permissive or mandatory probation.
  - b. Must meet the minimum regrade time frame requirements (i.e., calendar years of employment at a regrade level).
    1. The time frames are absolute and may not be waived.
    2. Must be time served as a permanent, classified attorney at any level i.e., changing levels or positions does not interrupt accumulation of employment for the purposes of regrade eligibility (except as noted in c. below).
  - c. Must have spent the last 6 months of the time frame in the employe's current position.
  - d. Must not have received written notice from the appointing authority, prior to the minimum regrade effective date, indicating that he or she will be denied the regrade due to unsatisfactory performance.

The foregoing makes it clear that when an attorney enters a position, either by initial or probationary appointment, the attorney is "assigned" to a

regrade point<sup>3</sup>, which is the term used in s. ER 29.04(4), Wis. Adm. Code. Subsequently, the employe experiences regrading through the remaining regrade points. The pay plan states explicitly that this "regrade system has been created to provide for within range pay progression", s. VI. D. 1. This language corresponds to the language in s. ER 29.04(13), Wis. Adm. Code, which includes: "Compensation plan . . . adjustments pursuant to ss. 230.12(3) . . . including, but not limited to, within range pay adjustments other than those made under subs. (1) through (12) and (15)". (Emphasis added) The movement from one regrade point to another is a within range pay adjustment, it is not the original "assignment of an attorney to a regrade point" identified by s. ER 29.04(4), Wis. Adm. Code.

Respondent DER contends at page 6 of its brief as follows:

Appellant attempts to make distinctions between a within pay range progression and an assignment of an attorney to a regrade point (pp. 18-20 of his Brief). An initial assignment would be the original appointment which is addressed at s. ER 29.04(16), Wis. Adm. Code. A promotional appointment is addressed at s. ER 29.04(5), Wis. Adm. Code. And an assignment of an attorney to a regrade point is addressed at s. ER 29.04(4), Wis. Adm. Code. Obviously, a regrade is different from an initial or promotional appointment.

This argument is ultimately unpersuasive. Initial or promotional appointments are personnel transactions which are common to all classifications in the classified service. The assignment of an attorney to a regrade point, s. ER 29.04(4), Wis. Adm. Code, is peculiar to the attorney classification. The original appointment or promotion of an attorney is a discrete personnel transaction which may or may not be accompanied by an assignment to a regrade point. For example, the 1979-1981 Compensation Plan, Schedule #9 (Legal) (Appellant's Affidavit attachment K) provides at s. VI.B.1.c. that "[i]f the employe's pay after the probationary increase will be below the dollar amount for Regrade Point A, the employe will not be assigned to a regrade point." (Emphasis added.) Salary adjustments on promotion (s. ER

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<sup>3</sup> Except under certain circumstances; e.g., if the employe's pay after the probationary increase will be below Regrade Point A, no regrade point would be assigned. s. VI, B.1.c., Pay Schedule #9 (Legal).

29.04(5), Wis. Adm. Code) and original appointments (s. ER 29.04(16), Wis. Admin. Code) are not coextensive with the assignment of an attorney to a regrade point (s. ER 29.04(4), Wis. Adm. Code), and the presence of these three separate subsections in s. ER 29.04, Wis. Adm. Code, does not mandate the conclusion that s. ER 29.04(4), Wis. Adm. Code, could not include the assignment of an attorney to a regrade point in connection with another personnel transaction, as opposed to the movement of an attorney from one regrade point to the next after having completed the minimum time and performance requirements.

The foregoing interpretation of s. ER 29.04, Wis. Adm. Code, is reinforced by the provision in s. 230.33(1), Stats., that a person, after serving in an unclassified position as appellant did, "has restoration rights to the former position or equivalent position in the department without loss of seniority" (emphasis added). Respondent contends that this refers to seniority in its narrowest sense. While the civil service code does not provide further elucidation of this term, precedent involving other similar provisions support a broader approach to the concept of seniority that would include incidents of employment emanating from time in grade. For example, Power v. Northern Illinois Gas Co., 280 F. Supp. 163, 166 (N.D. Ill. 1967), includes the following discussion of the concept of "seniority", as used in the Universal Military Training and Service Act (50 USC App. Supp. V, s. 459):

"Seniority" covers those benefits which result from the length of tenure on the job, whether the benefits consist of the right to a better job classification, . . . or the right to better working hours and less chance of layoff . . . or the right to higher separation allowances, . . . or the right to pay increases. . . (Citations omitted.)

The Court rejected the contention that a personnel transaction that nominally was linked to an employe's ability should not be considered an attribute of seniority:

As applied to the LaGrange meter shop, it would seem that the term "ability" as used in the agreement only required continued satisfactory job performance. The *Tilton* case, supra, made it clear that continued satisfactory job performance is not such a contingency as will preclude advancement, if the promotion is, in other respects, automatic. *Id.* (Underlining added.)

The Court held that under these circumstances the employe was entitled to be treated as he would have been but for his entry into the armed forces.

In the instant case, the only criterion for regrade besides the passage of time is "continued satisfactory job performance," *id.*, in the sense that regrade is automatic unless the appointing authority takes the step of providing written notice that the regrade will be denied due to unsatisfactory performance. There is no reason to believe that appellant would not have achieved regrade point D on September 25, 1980, if he had remained in the classified service; in fact, the parties so stipulated. Conference report dated January 20, 1995, and par. 3 of this ruling.

Related to the foregoing is respondent's argument in reliance on the statement in the pay plan that the regrade system has been created "to recognize and compensate for increases in responsibility, complexity, and independence within a classification level," Pay Schedule #9 (Legal) ss. VI.D.1. Respondent contends that:

There is no mention of time as a factor. Equally important is the fact that those factors can only be used when a person is actually in the position. That is the only way a person could be judged on those factors. Respondent DER's brief, p. 6

However, as noted above, the only criteria for regrade are permanent status in class; satisfaction of the regrade time frame requirements; and satisfactory performance (or more precisely the absence of a written notice of unsatisfactory performance from the appointing authority). The concepts of increased complexity, responsibility, etc., may be considered implicit in the passage of time, but the pay plan does not require that the employe be evaluated with respect to these factors.

Respondent also argues that appellant is not entitled to the regrade in question because he did not meet the other requirements for regrade:

Appellant did not meet b(2) and c above [these are references to the requirements in the 1979-81 pay plan at s.s. VI.D.2.b.2. and VI D.2.c.] since Appellant did not serve the required time frame as a permanent classified Attorney and he did not spend the last six months of the time frame in the restored position. Respondent DER's brief, p. 3.

However, this approach ignores the basic thrust of s. 230.33(1), Stats., and s. ER 29.04(7)(b) and ER 29.04(13) and (14), Wis. Adm. Code, which is "[t]o permit employes who are restored to the same or counterpart pay range to be paid the rate they would have received if they had continued in pay status." This interpretive language is taken from DER's rationale for its 1988 rule revisions, which created the current text of these rules and is contained in DER's discovery responses. DER's interpretive language supports Mr. Dusso's arguments.

In conclusion, due to respondent's incorrect interpretation of the civil service code, appellant's rate of pay was incorrectly established. Since the parties appear to agree on the salary calculations involved on the basis of the appellant's legal theory, with which the Commission has agreed, this matter will be remanded for action in accordance with this decision.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to s. 230.44(1)(d), Stats.
2. Appellant has satisfied his burden of proof and persuasion.
3. Appellant is entitled as a matter of law to have included in the calculation of his salary on restoration to the classified service the regrade to regrade point D as of September 25, 1980, and the merit steps and other pay adjustments occurring thereafter, all as set forth in Finding #14, at page 5 of this ruling.

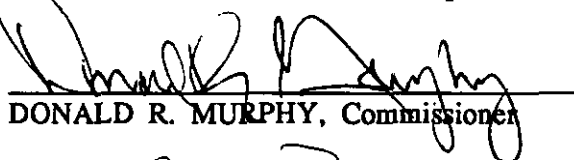
#### ORDER

Respondent DER's motion for summary judgment is denied. Appellant's motion for summary judgment is granted. Respondents' action calculating appellant's salary on restoration to the classified service without the items set forth in conclusion of law #3 above, is rejected, and this matter is remanded for action

in accordance with this decision. This decision is issued as an "interim" ruling to provide Mr. Dusso with an opportunity to submit a request for fees and costs.

Dated November 1, 1995.

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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