

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

WILLIAM DUSSO,

Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Secretary, DEPARTMENT OF
REGULATION AND LICENSING.

Respondents.

Case No. 94-0490-PC

* * * * *

RULING ON APPELLANT'S
REQUEST FOR CLARIFICATION

PROCEDURAL HISTORY

The parties submitted the above-noted appeal to the Commission based upon stipulated facts, reciprocal summary judgment motions and written argument. The Commission issued its decision on November 1, 1995, as an interim decision to provide Mr. Dusso with an opportunity to submit a request for fees and costs. Mr. Dusso notified the Commission by letter dated November 30, 1995, that he would not be filing a request for costs. On December 5, 1995, the Commission received written arguments regarding the merits of the appeal from the Department of Employment Relations (DER), which Mr. Dusso and DER agreed to treat as a motion for reconsideration. The Commission issued its final decision on March 8, 1996, after providing the parties with an opportunity to file written arguments.

Mr. Dusso filed a request for clarification of the Commission's final decision, by cover letter dated April 18, 1996. Both respondents were provided an opportunity to file a written response by May 17, 1996. DER's response was received by the Commission on May 1, 1996. The Department of Regulation and Licensing (DRL) did not file a response.

NATURE OF REMAINING DISPUTE

The fact stipulation presented to the Commission included the following pertinent facts, shown below with the same paragraph numbers referenced in the interim decision.

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.
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.)
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).

The Commission's final decision resolved the question of appellant's correct rate of pay upon restoration to the classified service. (See the agreed-upon statement of the hearing issue shown in the Conference Report dated January 20, 1995.) The Commission did not determine whether such higher rate of pay should begin as of 1/25/94, when Mr. Dusso first requested restoration; or as of 8/22/94, when Mr. Dusso first worked in the classified position to which he was restored. This question is the remaining dispute over which Mr. Dusso filed a request for clarification. DER believes the Commission's final decision results in beginning the higher salary as of August 22, 1994. Mr. Dusso, however, claims entitlement to the higher salary as of January 25, 1994.

DISCUSSION

Mr. Dusso raised three main arguments in support of his belief that he is entitled to the higher wage as of January 25, 1994, as noted below (from his letter to DER dated April 18, 1996, which is attached to his request for clarification dated April 18, 1996):

1. By virtue of granting appellant's motion for summary judgment, the Personnel Commission ordered that back pay is to be calculated from January 25, 1994.
2. The date of January 25, 1994, is reasonable and fair under the circumstances. Delay in making an appointment to the position was caused by DER's reluctance to accept the regrade pay calculation and a miscommunication that Secretary Litscher and

I had about whether he was going to respond to the letter I submitted on June 2. The correspondence attached to the appeal letter filed with the Commission shows the history of correspondence concerning pay rate.

3. The theory of the appeal was that DER committed an error. In personnel actions, the Commission and DER have often recognized the necessity to award back pay to correct an error.

1. Nature of the Commission's Prior Decisions

It is unclear to the Commission at this point in time whether the beginning date for the higher salary was an issue overlooked by the Commission; or whether the Commission thought the issue had been resolved by the parties and, accordingly, no need existed for the Commission to address it. The beginning date of the higher salary was not part of the issue agreed to by the parties at the prehearing conference of January 20, 1995, as shown below from the Conference report of January 20, 1995:

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

However, Mr. Dusso specifically raised this question as part of the relief sought in the summary judgment motion he filed on May 10, 1995, in which he requested commencement of the higher salary as of January 25, 1995. He later corrected the sought commencement date to January 25, 1994, by letter dated July 28, 1995, which contained the following pertinent information:

The date in appellant's motion should be January 25, 1994, as shown in the amended motion, not January 25, 1995. . . . I talked briefly with Ms. McCorack (DRL) and Mr. Vergeront (DER) about correcting the back pay starting date and they indicated they had no problem with this change. (Emphasis added.)

It was the later representation which could have lead the Commission to believe there was no need to resolve the issue. Nor did the parties bring this "omission" to the Commission's attention in briefs filed in connection with DER's motion for reconsideration.

The Commission can say with certainty that its prior decisions resolved the issue of what Mr. Dusso's correct pay should be "upon restoration". The Commission also can say with certainty that its prior decisions did not attempt to resolve the exact date upon which such higher salary should commence. While the "ORDER" section of the Commission's prior decisions stated broadly that "Appellant's motion for summary judgment is granted"; such language must be read in context of the entire decision. For example, the third conclusion of law stated: "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". (Emphasis added.) Nowhere in the Commission's prior decisions is there any language to support a conclusion that the Commission considered whether such pay should start as of January 25, 1994, or as of August 22, 1994.

2. Mr. Dusso's argument that delay was caused by DER.

A summary of pertinent aspects of the record is included below for purposes of this discussion.

1. 11/5/93, Mr. Dusso sends letter to DER Secretary, pointing out that the salaries under the "new attorney contract" resulted in others receiving a higher wage than him, a situation which he perceived as "an intolerable disparity between responsibility and salary". (Dusso's summary judgment (SJ) motion, page entitled: "Appellant's Affidavit, Attachment C".)
2. 11/24/93, DER Secretary responded listing 3 options to address Mr. Dusso's concern including the option of converting his unclassified position to classified status. (Dusso's SJ motion, page entitled: "Appellant's Affidavit, Attachment D").
3. 1/25/94, Mr. Dusso letter to DRL Secretary indicating that when DRL is reorganized to include his position in the classified service, that he wishes to exercise his restoration rights in regard to that position. (Dusso's SJ motion, page entitled: "Appellant's Affidavit, Attachment E".)
4. 4/13/94, internal DRL memo to DRL Secretary looking at three methods to restore Mr. Dusso to classified service, and comparison of the starting wage under each option. Notes Mr. Dusso's hourly wage in the unclassified position as \$27.313; as compared to \$24.501 under the first option of restoration, annual increases of \$12.427 under second option of reinstatement, and perhaps reaching Mr. Dusso's desired salary figure under the third option of original

- appointment (with loss of seniority-based vacation time). (Dusso's SJ motion, page entitled: "R&L's Discovery Responses, p. 6", 7 and 8.)
5. 5/3/94, DER Secretary's reply to "recent letter" regarding computation of Dusso's pay upon restoration resulting in a figure of \$28.223/hour as of 6/27/93. (Dusso's SJ motion, page entitled: Appellant's Affidavit, Attachment F", and stipulated fact shown in par. 3 of the Interim Ruling and Order.)
 6. 6/2/94, Mr. Dusso sent DER Secretary a letter explaining why he felt a starting salary of \$34.462 per hour would be more appropriate. Mr. Dusso also stated in the letter as follows: "Recently an attorney position in the classified service was created in the Department of Regulation and Licensing as agency legal counsel. On January 25, 1994, I submitted a letter requesting restoration to this classified service position under sec. 230.33, Stats. Following approval of the position, Secretary Cummings indicated she would grant my request and sought the assistance of (DER) in calculating the appropriate pay." (Stipulated fact shown in par. 9 of the Interim Ruling and Order.)
 7. 8/16/94, DER Secretary's reply to "materials and arguments" Mr. Dusso provided, confirming a starting wage of \$28.223/hour. (Dusso's SJ motion, page entitled: "Appellant's Affidavit, Attachment G".)
 8. 8/19/94, DRL Secretary letter confirming Mr. Dusso's appointment to classified service, "as of August 22, 1994", earning \$32.466 per hour. (Dusso's SJ motion, page entitled: "Appellant's Affidavit, Attachment H" and stipulated fact shown in par. 12 of the Interim Ruling and Order.)

It appears from the foregoing recitation of the record, that Mr. Dusso would have been restored to the classified position very soon after he requested restoration, but for his concerns over pay and respondents' attempts to address his concerns. Such attempts included exploring options other than restoration, as well as attempting to determine what the salary would be if restoration occurred. DER's response of 5/13/94, was a prompt response to Mr. Dusso's letter of 4/13/94 -- especially considering the complexity of the wage calculations and the number of years necessarily covered by the calculations. Under these circumstances, the Commission cannot agree with Mr. Dusso's contention that the delay in making his appointment to the classified position was "caused by DER". Mr. Dusso's dissatisfaction with the wage figure recited in DER's response would not have prevented him from accepting the civil service position at that time. Indeed, he accepted the classified position in August 1994, despite his continued dissatisfaction.

Mr. Dusso's argument that DER caused delay in his restoration to the classified position, as noted above, lacks a factual basis. Furthermore, even if

the argument could be construed as contending that the doctrine of equitable estoppel should be applied to provide the higher wage as of January 25, 1994, his claim would fail. The Wisconsin Supreme Court noted in State v. City of Green Bay, 96 Wis.2d 195, 203, 291 N.W.2d 508 (1980), as show below (cites omitted).

In several cases this court has stated that in order to estop the government, the government's conduct must be of such a character as to amount to fraud. . . . But this court has noted that the word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable:

"The term 'fraud' used by the court is not to be construed here as it is used in the ordinary sense--as an artifice, a malevolent act, or a deceitful practice.

"The meaning here [in the application of the doctrine of estoppel] given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable."

While the Commission ultimately disagreed with DER's calculation of Mr. Dusso's starting wage, DER had an arguable basis for the same. DER's conduct under these circumstances clearly cannot be characterized as "unconscientious" or "inequitable".

In Porter v. DOT, 78-1541-PC (5/14/79), the Commission noted three factors essential for equitable estoppel to lie: (1) action or inaction which induces (2) reliance by another (3) to his detriment. DER promptly responded on 5/3/94, to Mr. Dusso's initial inquiry about his starting wage which was dated 4/13/94. Mr. Dusso was dissatisfied with DER's response and by letter dated June 2, 1994, requested a second response from DER. It is true that DER's second response was not made until August 19, 1994, but even Mr. Dusso characterized such delay as due to "a miscommunication that Secretary Litscher and I had about whether he was going to respond to the letter I submitted on June 2". (Taken from Mr. Dusso's letter of April 18, 1996, which was attached to Mr. Dusso's Motion for Clarification.) The Commission cannot see how these circumstances could be subject to any interpretation that Mr. Dusso had relied upon a prompter response by DER or that such reliance worked to his detriment. Mr. Dusso already had received DER's initial response, had no reasonable basis to believe the reply would change based upon

repeated inquiry, and could have accepted restoration without a second response from DER.

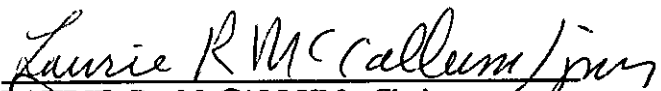

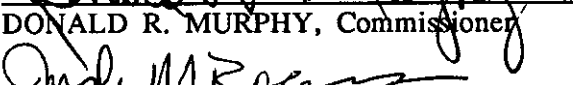
3. Mr. Dusso's argument that DER "committed an error".

Mr. Dusso contends he is entitled to back pay from January 25, 1994, because DER "committed an error". He cites no case law in support of his contention. Although the Commission disagreed with the starting salary argued by DER, such disagreement is not a basis for awarding back pay prior to the actual date of restoration. Nor is the Commission aware of any case law to support Mr. Dusso's contention of entitlement to back pay from January 25, 1994. In fact, cases concerning related matters suggest a contrary result. See, for e.g., Nunnellee v. State Pers. Bd., Case No. 185-464 (Dane Co. Cir Ct., 9/14/78) and Seep v. State Pers. Comm., 140 Wis.2d 32 (Ct. App. 1978), affirming Seep v. DHSS, 83-0032-PC, 83-0017-PC-ER (10/10/84).

ORDER

The Commission amends the final decision issued on March 8, 1996, to include the contents of this clarification ruling; and remands the matter to respondents for action in accordance with the final decision, as amended herein.

Dated May 28, 1996.


LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR

Parties:

William Dusso
9 Holt Court
Madison, WI 53719

Jon E. Litscher
Secretary, DER
137 E. Wilson St.
P.O. Box 7855
Madison, WI 53707-7855

Marlene A. Cummings
Secretary, DRL
Washington Square Bldg.
1400 E. Washington Ave.
P.O. Box 8935
Madison, WI 53708-8935

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95