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THOMAS E. MILCHESKY,
 Appellant,

v.

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

Case No. 94-0546-PC

* * * * *

RULING ON
 RESPONDENT'S
 MOTION TO
 DISMISS

On March 7, 1995, counsel for respondents raised a timeliness issue and the parties agreed to a briefing schedule which was confirmed by Commission letter dated March 8, 1995. The final brief was received on April 21, 1995.

The facts recited below are based upon undisputed information from the parties and the Commission's case file.

FINDINGS OF FACT

1. On October 11, 1994, the Commission received Mr. Milchesky's appeal. His appeal letter was dated October 7, 1994, and was mailed by certified mail with a postal cancellation date of October 7, 1994 in Superior, Wisconsin. The text of the appeal letter is shown below:

To: Personnel Commission
 From: Thomas E. Milchesky [Address also given.]
 Subject: File an appeal
 Reason: Unfair and unequal treatment regarding position adjustment and backpay as a result of the engineering survey reallocation in 1992 that should have been corrected on my recent reclass.
 Justification: I have documentation [not attached to the appeal letter] that shows that I have reason to appeal.
 Notification
 Date: Sept. 14, 1994.

2. On October 12, 1994, Mr. Milchesky telephoned the Commission to provide the name and telephone number of the attorney he chose to represent him in his appeal.

3. A prehearing conference was held on March 7, 1995, at which time respondents' attorney noted the potential existence of a timeliness issue. Respondents' concerns were recorded in the Conference Report of the same date, as shown below:

A jurisdictional issue might exist because this case is an appeal of a reallocation decision which was effective June 17, 1990, yet the Commission did not receive the appeal until October 13, 1994. It also could be that the matter would be covered by the Commission's prior decision in Vesperman. . . .

4. The parties agreed at the prehearing to the following statement of the hearing issue, as noted in the Conference Report:

Whether respondents' decision reallocating appellant's position to Engineering Specialist Advanced 1 rather than Engineering Specialist Advanced 2 was correct. (Both parties agreed that the job duties at issue are those prior to June 17, 1990, the effective date of the reallocation.)

5. Respondents argued in their initial brief that: a) Mr. Milchesky's appeal of the 1990 reallocation was untimely filed, b) Mr. Milchesky's appeal letter failed to identify any decision by respondent in the 30 days prior to filing the appeal as the subject of the appeal, and c) Mr. Milchesky's position was reclassified in June of 1993, but no appeal would ensue because such decision was favorable to Mr. Milchesky.

6. On June 17, 1990, the Department of Employment Relations (DER) implemented a survey of engineering and related positions which included the position held by Mr. Milchesky. Mr. Milchesky's position was reallocated to Engineering Specialist-Advanced 1 (Adv.1) pursuant to the survey, a decision which he did not appeal informally with DER or formally with the Commission. This transaction is hereafter referred to as the "Initial Reallocation Decision".

7. On August 28, 1991, Shelagh Cullen, Survey Coordinator for DOT, sent a memo to DOT Divisions which stated as shown below. (Emphasis added.)

The purpose of this memo is to clarify the process by which we will attempt to correct classification inequities resulting from decisions made in the appeals process. We have discussed this with the (DER) and the following is a result of our discussions.

Although an employe who did not file appeals within thirty days after receiving the survey notice no longer has appeal 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, (DOT). 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 appeals 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.

I hope this information is helpful in clarifying this process.

8. Mr. Milchesky did not respond to Ms. Cullen's memo of August 28, 1991, to request a re-review of the Initial Reallocation Decision.
9. On August 26, 1992, Mike Lovejoy from DOT's Division of Highways and Cindy Morehouse from DOT's Bureau of Human Resource Services sent a memo to state engineers, district directors and certain bureau directors, which stated as shown below. (Emphasis added.) The memo created a window of opportunity for a re-review of the Initial Reallocation Decision for positions identified by

the districts for re-consideration. The deadline created was September 16, 1992.

The purpose of this memo is to explain our intent to correct problems you have in your organizations that are directly related to the settlement of Engineering Survey appeals. However, in an effort to clear up some of the confusion related to this issue, we are providing some brief background information.

As you can appreciate, the drawn out nature of the survey appeals process has strained all participants. We are almost at an ending point in the informal appeals process. The remaining 10 appeals (out of 430 filed) should be resolved within two to three weeks.

Last summer, in the midst of the appeals process, the (DER) informed us and a number of the Division's employees that, after all survey appeals were addressed, each agency would identify and reallocate positions that performed the same duties as those moved to a higher level in the appeals process. Specifically, Judy Burke [a DER employe] indicated in a May, 1991 letter to employees that we would "reallocate all employees 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 (DER) informed SEA, that because of the staff time involved in the formal appeals, the (DER) would not be involved in this effort.

However, it is clearly the intent of the (DOT) 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 made 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.

District or Office Directors should work within their organizations to identify employes they would like to have reviewed. At this point, we are not requesting extensive documentation. We ask only that you provide the following: name of employe and working title; brief description of the work performed; others performing the same work; and brief rationale for identifying the position. The information should be submitted to the appropriate Bureau Director. The Bureau Director will then review the request and forward it to the Bureau of Human Resource Services.

We ask that the information be submitted to your Bureau Director within three weeks from the date of this memo. [3 weeks = 9/16/92] Each request will be evaluated on a case-by-case basis and the personnel transaction taken will depend on the specific circumstances.

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. 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.

This is an attempt to address those situations which present clear and obvious problems caused as a result of the appeal settlements. It is not intended to be a large scale review process. It reflects a responsibility we have to correct problems where employes are performing identical work at different levels and one that will be fairly narrow in focus. We look to you for your assistance in containing this effort to its intended purpose and will be happy to respond to any questions you may have.

10. Mr. Milchesky saw the 8/26/92 memo from Lovejoy and Morehouse. On 9/10/92, he sent an e-mail message to his supervisor, James Rausch, the text of which is shown below:

Jim, I understand from reading the 8/26/92 memo . . . that employees performing the same job duties and at the same level of performance as positions that have been approved through the appeal process, can be reallocated. I believe that my duties and level of performance as design squad leader at the time of the survey (6/17/90) were the same as others who have been reallocated to the ES Advanced II. I therefore request that you, if you have the time to do, submit my documentation to the District Management Team for their submittal to our Bureau Director, in accordance with the terms of the 8/26/92 memo. I sincerely feel that I'm deserving of this request and recognition as my work and dedication over the last several years speaks for itself.

* * *

Others performing the same work:

1. Harvey Rieder . . . Design Unit 2, Squad Leader
2. Edward M. Riley . . . Design Unit 3, Squad Leader

Rationale for identifying the position: Prior to and since the evaluation date of June 17, 1990 this employee has been working at a level of Advanced II and this can be substantiated through comparison with the other Advanced II employees.

10. Mr. Rausch forwarded Mr. Milchesky's request by E-mail dated 9/15/92, to Barbara Lund. He included the following information in the E-mail transmission:

"Tom finds it difficult to accept that he was not working at the level of others being submitted for reallocation to ES Adv 2 and feels he deserves the opportunity to be heard. Given these circumstances, I can do nothing else than submit his request to you."

11. Barbara Lund replied to Mr. Rausch by E-mail dated 9/16/92 (final deadline date for submissions). She indicated that Mr. Milchesky's PD was re-reviewed but did not appear to be at the same level of responsibility as others who were being recommended for the Adv 2 level (or who were already at the Adv. 2 level).

12. On 11/6/92, Mr. Rausch met with Ms. Lund and others to discuss why the district was not recommending Mr. Milchesky's position for reconsideration of the Initial Reallocation Decision. Mr. Rausch summarized the contents of this meeting for Mr. Milchesky, by memo dated November 6, 1992, which provided notice that a district decision had been made not to forward his position for reconsideration of the Initial Reallocation Decision because his official PD did not show he was performing the same level of work (in June 1990) as other positions already reallocated to the Adv. 2 level or being recommended for the Adv. 2 level. Mr. Rausch suggested in the memo that Mr. Milchesky attempt to achieve the Adv. 2 level by "the only remaining avenue" of requesting reclassification.

13. Mr. Milchesky did not appeal the decisions described in the memo of November 6, 1992.

14. Mr. Milchesky did not request reclass of his position until June 1, 1993, about 7 months after he received the November 1992, memo. Under usual policies and procedures, the effective date for this request would be June 13, 1993, which is the beginning of the first pay period following receipt of the request.

15. On April 20, 1994, Mr. Milchesky again requested consideration for reallocation at the Adv. 2 level based on the PD of Tom Murray, a DOT employe in a different district, which Mr. Rausch and Milchesky did not have a copy of

previously. On April 21, 1994, Mr. Rausch reported back to Mr. Milchesky that the window of time had closed for requests to reconsider the Initial Reallocation Decision.

16. On April 26, 1994, Carl Richter responded to a prior memo from Mr. Milchesky indicating that if his reclassification request were approved, the effective date would be June 13, 1993, not June 17, 1990. Mr. Richter's memo contained the following additional information:

. . . Once we have made a decision and you don't agree, then you have the opportunity to appeal our decision. So you will have an opportunity to disagree in a very formal process at that time. Until then you have nothing to go to anyone with.

16. On September 6, 1994, DOT granted Mr. Milchesky's reclassification request to the Adv. 2 level, effective June 13, 1993. He received notice of this transaction on September 14, 1994. He filed his appeal with the Commission within 30 days of having received notice that his reclassification request had been granted.

DISCUSSION

Mr. Milchesky's appeal of the reclassification decision was timely filed, pursuant to s. 230.44(3), Stats. However, as the agreed-upon hearing issue indicates, he is trying to use the timely appeal of his reclassification to reopen the reallocation decision which he previously failed to appeal. (See finding #4, supra.)

Mr. Milchesky cites the Commission's ruling in Vesperman, et al. v. DOT & DER, case nos. 93-0101, 109, 110, 114, 118, 125 & 126-PC (2/15/95), as support for an effective date retroactive to June 1990, for his reclassification. His situation, however, is materially different from the appellants in Vesperman and, therefore, his argument is unpersuasive.

The Vesperman appellants either requested a review of their positions or their districts recommended their positions for re-consideration, pursuant to the letters described above in findings numbered 7 and/or 9. Prior to June 1993, several of the Vesperman appellants had requested and been granted reclassification but with an effective date later than June 1990;

decisions which were not part of the issues in the group appeal. (See third par. p. 7 in the Vesperman decision.)

Each of the Vesperman appellants received written notice dated June 22-23, 1993, that DOT had re-reviewed their positions and determined that the Initial Reallocation Decisions of June 1990, were correct. (See finding #7 in the Vesperman decision.) Each appellant filed a timely appeal of the June 1993 decision with the Commission. (See finding #8 in the Vesperman decision.)

Mr. Milchesky's situation is different from the circumstances in Vesperman because he knew on or about November 6, 1992, that his position would not be forwarded by the district for further consideration of the reallocation issue yet he did not appeal the decision. (See Finding of Fact #12, supra.) In Mr. Milchesky's different set of circumstances, there is no persuasive factual or legal basis for the granted reclass request to be given retroactive effect back to June 17, 1990, or to "reopen" the reallocation issue which he failed to appeal.

Mr. Milchesky argued that respondents did not make a "final decision" regarding the effective date associated with placing his position at the Adv. 2 level until the reclassification decision was made. The Commission disagrees for the reasons given below.

The Cullen memo dated August 28, 1991, specifically noted that the effective date would go back to June 17, 1990, only if respondents determined that the Initial Reallocation Decision was made in error based on job duties performed as of June 1990. The Cullen memo also noted that positions which achieve a higher level based upon a reclassification request, would have a different effective date (i.e. other than June 17, 1990) which would be determined by administrative rules. (See underlined portion of finding #7, supra.)

The written notice of November 6, 1992, indicated the district had decided not to forward Mr. Milchesky's position for reconsideration of the Initial Reallocation Decision because his PD did not show the performance of Adv. 2 level duties as of June 1990. Mr. Milchesky, accordingly, knew or should have known that the decision dated November 6, 1992, meant he could not be placed at the Adv. 2 level back to the survey date even if he requested

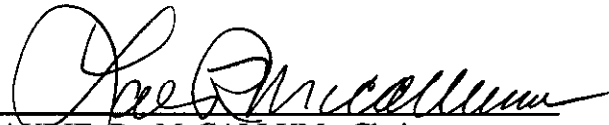
reclassification. Despite this knowledge he failed to file an appeal of November 6, 1992 decision.

Mr. Milchesky did not submit a reclassification request for 7 months after he had received notice the November 1992 decision. No representations were made to him during those 7 months to lead him to believe the reclassification would be effective back to June 1990, even though he failed to appeal the Initial Reallocation Decision and even though he also failed to appeal the re-review in November 1992. Under these circumstances, the reclassification request was a separate transaction from the reallocation issues and there is no basis to find that the granted reclassification somehow "re-opened" the reallocation issue which he failed to appeal.

ORDER

That respondents' motion to dismiss based on an untimely-filed appeal is granted and this case is dismissed.

Dated May 15, 1995.


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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 (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