

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHERYL BELL-MAREK, Appellant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES;
Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondents.

Case 606
No. 62900
PA(der)-66

(Personnel Commission Case No. 02-0044-PC)

Decision No. 30748

Appearances:

Cheryl Bell-Marek, 1301 Manchester East, Waunakee, WI 53597, appearing on her own behalf.

Paul Harris, Attorney at Law, P.O. Box 7850, Madison, WI 53707-7850, appearing on behalf of the Department of Health and Family Services.

FINAL DECISION AND ORDER

Pursuant to s. 230.44(1)(b), Appellant Cheryl Bell-Marek filed a timely appeal of a denial of a reclassification from Program and Planning Analyst 5 to Program and Planning Analyst 6 with the Wisconsin Personnel Commission on August 30, 2002. Commissioner Kelli S. Thompson was designated as the hearing examiner and presided over the contested case hearing on December 9, 2002 at the Commission's office in Madison, Wisconsin. A briefing schedule was established and the record closed on February 20, 2003, after receipt of Appellant's reply brief. 1/ While the matter was still pending, the Personnel Commission was abolished pursuant to 2003 Wis. Act 33, effective July 26, 2003, and the authority for processing this matter was transferred to the Wisconsin Employment Relations Commission (WERC). Because a proposed decision was not issued before the Personnel Commission was abolished, those Commissioners of the WERC who are signing this decision have listened to the entire tape recording of the hearing and have reviewed the exhibits introduced at hearing.

Dec. No. 30748

1/ In her reply brief, Appellant contends that Respondent's brief was hand delivered to her on Monday, February 10, 2003, a day later than the due date of February 9, 2003. Respondent's brief was submitted on time to Appellant and the Commission, in accordance with the briefing schedule established prior to the close of the hearing in this matter.

The issue in this matter reads as follows:

Whether respondents' decision to deny the request for reclassification of appellant's position from Program and Planning Analyst 5 (PPA 5) to PPA 6 was correct?

The Appellant, Cheryl Bell-Marek, has been employed in her current position in the Department of Health and Family Services, Division of Supportive Living, Bureau of Quality Assurance, Provider Regulation and Quality Improvement Section since July 16, 2001.

Over her first year in this position, Appellant's position also became the back up for the resident relocation work done by the Health Services Specialist 2 in the office. Resident relocation work increased significantly. Not only did this result in Appellant's participating in more meetings and traveling to nursing homes that were closing, but it also resulted in an increase in the amount of work that she needed to do in connection with rules and statutes relating to nursing homes.

The following portions of a draft position description accurately describe Appellant's duties during the relevant time period:

Position Summary

Under the general supervision of the BQA, PRQI, Training/QI unit supervisor, this senior level position's primary objective is to oversee and coordinate the development and promulgation of administrative rules to implement the Bureau of Quality Assurance's (BQA) programs. The position is responsible for directing the drafting of administrative rules and providing the leadership necessary to move the proposed rules through the Department and legislative review process to promulgation. As part of this process the position works closely with management of the Department rulemaking process to resolve issues concerning rule language, adherence to process, meeting deadlines and

achieving quality products. The rules coordinator reviews and analyzes state and federal laws, rules and regulations for health care and community based programs and recommends the revision or repeal of current Bureau rules. This position also develops guidelines, training programs and resources for health care and community based programs within the Bureau's authority. This senior level staff position provides leadership for the review, evaluation and analysis on issues relating to providers regulated by the Bureau. As programs, policies and administrative rules cut across Divisions throughout the Department, this lead analyst must know where and who to contact to direct the coordination of efforts; such knowledge and sense comes only through experience with the Department. This position has frequent independent work interactions with the Department's Office of Legal Counsel staff, the Administrative Rules Officer, Bureau Administrators, Bureau Directors, industry representatives and other major stakeholders involved in the administrative rulemaking process. In addition this position also serves as project manager on various special assignments and as a liaison with Division and Department staff to ensure coordination of programs and initiatives. Incumbents in this position are expected to use their knowledge and experience to assist the Bureau's less experienced staff in their day-to-day duties. The work of this position impacts 275 Bureau staff (located in five regions through the state), numerous Division and Bureaus throughout DHFS, 45 Health Care provider types and thousands of consumers that use health care facilities and services.

<u>Time</u>	<u>Goals and Worker Activities</u>
50%	A. Conduct the development and promulgation of administrative rules to implement the Bureau programs.
25%	B. Review and analyze state and federal laws, rules and regulations for health care and community based programs regulated by the Bureau of Quality Assurance and develop guidelines, training programs and other resources to enable the Bureau to implement its various responsibilities for the regulation of health care and community based programs.
10%	C. Conduct program evaluation and policy analysis activities on issues regarding providers regulated by the Bureau of Quality Assurance.
10%	D. Serve as a backup for the analyzing, researching and recommending Bureau response to issues related to resident movement or facility closure, such as relocation, transfer and discharge.
5%	E. Provide assistance to Bureau Managers and Unit Supervisor in performance of a variety of responsibilities. . . .

The Position Standard for the Program and Planning Analyst and related classifications defines both the PPA 5 and PPA 6 positions as “full performance objective or advanced levels for positions which have point values within the ranges listed.” The point range for PPA 5 is 410-500 and the point range for PPA 6 is 505-605. The points refer to a method of analysis (the Factor Evaluation System) that is based on five factors:

Factor 1 – Scope and Impact of Work:

- a. Scope (range or extent) of the goals and accomplishments; and
- b. Impact of the work both internal and external to the work unit.

Factor 2 – Complexity of Work:

- a. Nature of the work;
- b. Difficulty in deciding what needs to be done; and
- c. Difficulty in performing the work.

Factor 3 – Knowledge and Skills Required:

- a. Breadth (variety) and depth (degree of detailed understanding) of knowledge required and used in doing acceptable work; and
- b. Breadth and depth of skill needed to apply knowledge.

Factor 4 – Personal Contacts and Their Purpose:

- a. Nature of the contact (who with and how received);
- b. Frequency of the contact (how often and for what duration); and
- c. Purpose of the contact.

Factor 5 – Discretion and Accountability

- a. Extent to which the work is structured or defined;
- b. Nature and extent of the work review; and
- c. Extent to which one is responsible to other authority for actions taken or decisions made.

Appellant and respondents agree that the Appellant’s position is entitled to 70 points for factor 2, Complexity of Work and 75 points for factor 4, Personal Contacts and Their Purpose. The remaining 3 factors are in dispute. Respondents’ ranking of Appellant’s position results in a total of 445 points. In order to achieve a total of the 505 points required for the position to be a PPA 6, Appellant’s position must be ranked at the higher level on at least two of the three factors in dispute.

Factor 1, Scope and Impact of Work, consists of two subfactors: Scope [or S] and Impact [or I]. The parties agree that the Appellant's position is correctly assigned to Scope level S-3. However, the parties disagree on the Impact subfactor. The two levels at issue are I-3 (combined with S-3 to generate 140 points) and I-4 (combined with S-3 to generate 170 points), which are described in the class specifications as follows:

I-3

The position is responsible for such things as: the development of theories, methodologies, or concepts used in a wide range of other studies; plans which control the overall design/location of major capital facilities such as highways, public utilities, or institutions; . . . the development of plans or policies which control the provision of services to a client group or industry; the development of plans or standards for the protection of the state's air or water quality; evaluation or similar studies which provide the basis for major modifications of programs or policies controlling the scope and intensity of services to a large client group (e.g., AFDC recipients, unemployed youth); or similar work with comparable impact.

I-4

The position is responsible for such things as:

- effective recommendations of policy positions on major issues such as welfare reform, medical care cost control, energy conservation, transportation funding, or toxic waste disposal;
- effective recommendation of regulation or decisions which directly influence profit levels, investment decisions, or methods of organization or similar aspects of economic well-being of major industrial/commercial sectors such as health care, housing, capital goods manufacturing, agri-business, or insurance; . . .

Or similar products which directly affect the design and management of major state functions involving hundreds of millions of dollars of resources and affect the state's economy or large segments of the population.

The Appellant's position is better described by the language in the I-3 level because her primary role relates to coordinating the development and promulgation of administrative rules affecting the facilities regulated by the Bureau of Quality Compliance rather than effectively recommending regulations that "directly influence profit levels . . . or similar aspects of economic well-being of . . . health care."

The parties disagree as to whether Appellant's position is more correctly ranked at the Knowledge and Skills Required level of KS-3 (80 points) or the KS-4 (110 points) level. Appellant's position description lists 17 items under knowledge and skills necessary to perform the position. However, this list must be read in conjunction with the Appellant's statement in Exhibit C-1 where she wrote: "My position requires extensive knowledge of *several* laws, policies, programs, and public issues relating to health." (emphasis added)

This language parallels that found in the definition of KS-3:

Knowledge of the program area includes not only the broad range of elements described at level KS-2, but also a particularly expert and extensive knowledge of the particular program or subject matter area. This knowledge is applied by the analyst to provide authoritative consultation and interpretation on program policy, history, and operation, or develop major policy recommendations. Typically, the analyst is considered the primary agency "expert" in a specialized area such as an income maintenance program shoreland management, the programs and problems pertaining to a client group, farmland preservation, job training for disadvantaged youth.

Appellant's position is not at the KS-4 level, as that definition requires:

[C]onsiderable to extensive knowledge of almost all the laws, policies, programs, and public issues relating to a major field of government endeavor, (e.g. education, health, employment security, social services, transportation) as well as familiarity with current professional thinking in the area, functional relationships to other program areas, and history of government involvement in the field.

While Appellant's expertise is significant and broad, it does not encompass a "major field" such as health. Her expertise extends to "several laws, policies, programs and public issues relating to health" which is a subset of a major field.

Factor 5, Discretion and Accountability, consists of two subfactors: Discretion [or D] and Accountability [or A]. The parties agree that the Appellant's position is not covered by the Accountability subfactor. However, the parties disagree on the Discretion subfactor. The two levels at issue are D-3 (80 points) and D-4 (115 points). In the Reclassification Review Request, Appellant's supervisor states, "Although this position is performed under the general

supervision of the unit supervisor, a large amount of the work is performed with a high level of independence. This position has significant discretion to represent the Division and Bureau in policy analysis, development and planning discussion development and promulgation of administrative rules to implement Bureau programs and public forums. While general objectives and priorities are defined in broad terms by Division Management, this position has and is expected to undertake latitude in determining scope and methods in completing work assignments. Work products are *reviewed by the supervisor for general content and consistency with agency and division goals and policies. . . .*” (emphasis added)

On balance, this description (which accurately describes the Appellant’s position) matches more closely with the D-3 definition that provides, in pertinent part, “Incumbent exercises discretion by independently establishing new methods or approaches, setting unit objectives and utilizing staff resources, and/or independently interpreting laws or policies. . . . Incumbent may have considerable input into the development of the guidelines that apply. . . . Normally, products are reviewed only for consistency with agency policy and responsiveness to objectives and priorities.”

Appellant contends that her position is more correctly ranked as D-4. However, the definition at this level includes “Objectives and priorities are defined in terms of the broad functions or goals of the agency or in terms of broad policy directions established by the agency’s top management. . . . Review is for accomplishment of broad objectives and priorities only.” There is no doubt that portions of the D-4 description, specifically, “Typically, the incumbent will be responsible for initiating modifications to the rules or statutes that apply” match Appellant’s work. However, on balance, Appellant’s position more closely fits within the D-3 definition, especially in light of the very specific statement by Appellant’s supervisor that the work is reviewed “for general content and consistency with agency and division goals and policies.”

Using the Factor Evaluation System, Appellant’s position is awarded 445 points, which falls within the 410 to 500 point range for a PPA 5. As the “major task” of Appellant’s position is the development and promulgation of administrative rules, it is useful to note that the comparable position of Administrative Rules Coordinator 3 is within the same pay range as the PPA 5, while also recognizing that the work performed by Appellant and the Administrative Rules Coordinator differ in many respects.

Appellant has the burden of proof to demonstrate that her actual duties at the time of the request for the reclassification are a best fit with the classification sought. JACKSON V. STATE PERSONNEL BOARD, DANE COUNTY CIRCUIT COURT, 164-086, 2/26/79. Appellant Cheryl Bell-Marek’s request for reclassification was made sometime in July 2002. By the time of the hearing in this case, December 2002, it is quite clear that the amount of time spent on resident relocation was greater than the 10% that is listed on the position description submitted after the

date of the reclassification request. Reclassification decisions are to be based upon the duties assigned to the position as of the effective date of the request. *GUTIERREZ V. DOT & DER*, 96-0096-PC, 4/11/97.

Appellant clearly demonstrated that the position description that she signed when hired in July 2001 no longer correctly describes her position. The position description submitted to the Department Personnel Bureau following the classification audit conducted in July 2002 accurately reflects the work Appellant performed at that time. She has the burden of proving that this position is a Program and Planning Analyst 6. This can be done by proving that the position has enough points, between 505 and 605, using the Factor Evaluation System (FES) to be a PPA 6. She may compare her position to other positions that have been analyzed in terms of specific factors or subfactors of the Factor Evaluation System to support her contention that her position is entitled to the 505 to 605 points necessary in order to be classified as a PPA 6.

Appellant was at a disadvantage in that neither her Supervisor nor Section Chief testified at the hearing, either in person or through utilization of written statements. Appellant was advised of ways that she could compel these people to be at the hearing, and was offered the opportunity to request a postponement of the hearing until the Supervisor and Section Chief were available. Appellant did not choose this option and went forward with the hearing.

It is Appellant's burden to show that her position is correctly classified at the higher or requested level, rather than merely showing that the decision to classify at the lower level was incorrect. *SVENSSON V. DER*, 86-0136-PC, 7/22/87. She must establish facts "to a reasonable certainty by the greater weight or clear preponderance of the evidence." *REINKE V. PERS. BD.*, 53 WIS.2D 123, 137, 191 N.W.2D 833 (1971)

Here, Appellant failed to show that her position should have been classified as a PPA 6. She offered no comparison positions to demonstrate that the work she did was comparable to that of any other position classified as a PPA 6 nor did she provide any information about other positions to support her contentions that her position met the definitions of S-3/I-4 rather than S-3/I-3, KS-4 rather than KS-3, or D-4 rather than D-3. Based on the definitions of the factors, and Appellant's failure to provide evidence to the contrary, we must conclude that the position, as of July 2002, did not score sufficient points in the FES analysis to be reclassified to PPA 6.

The only other position descriptions presented at hearing other than those describing the Appellant's position are the PPA 6 Tritz position and the PPA 5 Cohen position, presented by Respondent. Tritz's position impacts directly on 100,000 adults with severe disabilities through a multi-disciplinary planning process. While Appellant's position affects thousands of consumers, the direct impact of her position is on health care providers. Clearly, Appellant's work is that of the "development of plans or policies which control the provision of services to a client group or industry," language in the definition of I-3.

Appellant has failed to show that her job duties are more comparable to the Tritz position than to the Cohen position in terms of the factors established in the PPA specifications.

The Commission believes it is also appropriate to comment on certain testimony offered by the personnel specialist who audited the Appellant's position. The specialist testified that had the Appellant been performing department-wide rather than division-wide administrative rules coordination work, her position would have properly been classified at the Administrative Rules Coordinator 3 level, which is assigned to the same pay range (15) as the PPA 5 classification. He testified that this comparison meant that irrespective of the classification series, Appellant's position would rise no higher than a class level assigned to pay range 15 or its equivalent.

This testimony incorrectly suggests that positions are classified by pay range, rather than by classification specification. Under certain circumstances, pay range comparisons can provide helpful information when assigning individual positions to a particular class level. However, the pay range comparison is hardly determinative in a situation such as the present case, where the PPA specifications create an extensive structure by which individual positions are to be classified. Once created, a class specification cannot simply be ignored.

The Commission also notes that the Appellant in this matter failed to provide information relating to the appropriate classification level for her line responsibilities dealing with facility closures. Beginning in approximately September of 2001, and due to a significant increase in the number of facility closures, Appellant performed resident relocation work as the "backup" to a Health and Social Services Specialist 2 (HSSS 2) position that was also in her Division. The HSSS 2 position was only supposed to spend 5% of the time on resident relocation work, but by September of 2001, it had reached 85% of the work day. Appellant argued that her resident relocation work, which included time she spent both on site and on the telephone dealing with specific closures, was at a higher level than PPA 5. However, the PPA specifications describe positions that spend the majority of their time engaged in policy analysis, program planning, program evaluation, or comparable analytic functions. The PPA series does not describe the work of relocating nursing home residents from closing facilities. The position description for the HSSS 2 position is not of record, nor are the specifications for the HSSS series. There was testimony that the HSSS 2 pay range is comparable to the PPA 6 level, but it is impossible to tell from this record whether the 5% resident relocation work played any role whatsoever in assigning the position of Appellant's co-worker to the HSSS 2 classification. The mere fact that the 5% resident relocation work was assigned to a position classified at the HSSS 2 level does not mean that resident relocation work is a HSSS 2 level responsibility. *DUNN-HERFEL V. DOJ & DER*, 94-0043-PC, 12/1/94 The Appellant, therefore, failed to tie the resident relocation work into a specific classification so that it could have any sort of an effect on the classification of her own position.

Given all of the foregoing, we conclude that Respondents' decision should be affirmed.

ORDER

Respondent's decision is affirmed and Appellant's appeal is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate in the consideration of this matter.

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