

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK E. PAULAT, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION, and Director,
OFFICE OF STATE EMPLOYMENT RELATIONS**, Respondents.

Case 4
No. 66502
PA(sel)-35

Decision No. 32207

Appearances:

Mark E. Paulat, appearing on his own behalf.

Dennis Fay, Assistant Legal Counsel, Department of Agriculture, Trade and Consumer Relations, P.O. Box 8911, Madison, Wisconsin 53708-8911, appearing on behalf of the Department of Agriculture, Trade and Consumer Relations and the Office of State Employment Relations.

ORDER GRANTING MOTION TO DISMISS CLAIM

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Respondents' motion to dismiss one of Appellant's claims as untimely filed and for lack of standing. The appeal arises from actions by Department of Agriculture, Trade and Consumer Protection (DATCP), either independently or on a delegated basis from the Office of State Employment Relations (OSER), to fill a vacant position as well as to classify the position. The final written argument was filed on August 8, 2007.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. No later than June 30, 2006, and as part of the procedure for filling the vacant position, Respondent DATCP prepared a position description for Position No. 309159.

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2. On July 10, 2006, upon authority delegated to it by OSER, DATCP approved classifying Position No. 309159 at the level of Environmental Analysis and Review Specialist-Senior (EARS-Senior).

3. DATCP issued a Job Announcement for the EARS-Senior position on August 17, 2006, with application materials due by September 5, 2006. The announcement included a separate paragraph setting forth the job duties assigned to the vacant position.

4. Appellant Mark Paulat filed a written application for the vacancy on August 30.

5. Paulat was interviewed on October 5 and by letter dated November 1 and received on November 3, was informed that he was not selected. The letter erroneously referred to the position at the EARS-Advanced level, rather than the Senior level.

6. Paulat filed a letter of appeal with the Commission on November 29, 2006, contending that the failure to select him was an abuse of discretion. The letter of appeal mimicked the incorrect reference to EARS-Advanced.

7. During a prehearing conference on January 25, 2007, the parties agreed to an issue for hearing on the non-selection decision and Paulat first identified a claim relating to the classification of the vacant position. He subsequently submitted the statutory fee for filing an appeal of a classification decision.

8. Paulat first received a copy of the position description for the vacant position on May 17, 2007, in response to an open records request. He claims that the position was better classified in a classification other than EARS-Senior.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Appellant has the burden of establishing that his appeal of the decision to allocate the position to the classification of EARS-Senior was timely filed in accordance with the 30-day time limit established in Sec. 230.44(3), Stats.

2. The Appellant has failed to sustain that burden.

3. The appeal of the classification decision is untimely.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's motion is granted and Appellant's claim relating to the proper classification level for the vacant position is dismissed as untimely filed.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

DATCP & OSER (Paulat)

**MEMORANDUM ACCOMPANYING ORDER
GRANTING MOTION TO DISMISS CLASSIFICATION CLAIM**

Respondents contend that the appeal of the decision to assign the position to the EARS-Senior classification was untimely filed and also contend that Paulat lacks standing to contest the classification decision. Respondents' motion does not relate to Paulat's separate claim arising from the decision not to select him to fill the vacant position.

The Commission's authority to review a classification decision is based on Sec. 230.44(1)(b), Stats. The time limit for filing a classification appeal is found in Sec. 230.44(3), Stats., which reads, in part:

Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later.

Assuming the classification claim is construed as an amendment to the non-selection appeal that Paulat filed with the Commission on November 29, 2006, the amendment relates back to the original appeal. *ZENCHENKO V. OSER*, DEC. NO. 31614 (WERC, 2/2006), citing *VAN ROOY V. DILHR*, CASE NO. 84-023-PC (PERS. COMM. 4/12/85) for the proposition that an amendment relates back if the claim asserted in the amendment arises out of the occurrence or transaction set forth in the original pleading. Therefore, in order to be timely, either the effective date or the date of notification of the classification decision would have to have been no more than 30 days before November 29, 2006.

The signatures on the position description and on the related certification request show that the effective date, i.e. the date EARS-Senior classification was approved, was July 10, 2006, which is well outside of the 30-day window.

Appellant contends that he learned of the classification decision on May 17, 2007, when he received a copy of the position description for the position in question. He also contends that the sole notice that he received in this matter was the notice of non-selection that he received on November 3, 2006.

Certain classification actions require writing notification to the position incumbent:

Approvals or denials of reallocations or reclassifications shall be made to the appointing authority in writing. The appointing authority shall immediately notify the incumbent in writing. Sec. ER 3.04, Wis. Adm. Code.

The classification decision that Paulat seeks to have reviewed was the decision to initially allocate¹ the vacant position to a particular classification, rather than a decision to either reallocate² or reclassify³ a position with an incumbent. Consequently, the requirement in Sec. ER 3.04, Wis. Adm. Code, did not apply to notifying Paulat of the allocation of Position No. 309159. The job announcement that was issued on August 17, 2006, nevertheless provided Paulat with written notice of the allocation decision. The announcement specified the position's job duties and placed the applicants on notice that the position had been classified as EARS-Senior. Paulat saw the announcement no later than August 30, the day he filed his job application. His appeal received on November 29 was not filed within the requisite 30 days of the date he received notice of the allocation decision.

Because the November 29 appeal was not filed within 30 days of either the effective date or the date Appellant was notified of the allocation decision, the classification claim must be dismissed as untimely filed. The Commission does not address Respondents' separate objection based on standing.

A member of the Commission's staff will contact the parties to schedule a hearing on the remaining claim arising from the selection decision.

Dated at Madison, Wisconsin, this 10th day of September, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

¹ The "initial assignment of a position to the appropriate class. . . ." Sec. ER 3.01(1), Wis. Adm. Code.

² Reallocation is based upon a "change in concept of the class or series," "creation of new classes," "abolishment of existing classes," "change in the pay range of the class," "correction of an error in the previous assignment of a position," a "logical change in the duties and responsibilities of a position," or a "permanent change in the level of accountability." Sec. ER 3.01(2), Wis. Adm. Code.

³ The "assignment of a filled position to a different class . . . based upon a logical and gradual change. . . ." Sec. ER 3.01(3), Wis. Adm. Code.