

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the matter of the Petition of  
**AFSCME COUNCIL 24, WSEU, AFL-CIO**  
Involving certain employees of  
**DEPARTMENT OF EMPLOYMENT RELATIONS  
(DEPARTMENT OF COMMERCE)**

Case 459  
No. 56565  
SE-16

**Decision No. 11243-O**

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Appearances:

Lawton & Cates, S.C., by **Attorney Ellen S. Hughes**, Ten East Doty Street, Suite 400, Madison, Wisconsin, 53701-2965, appearing on behalf of AFSCME, Council 24, WSEU, AFL-CIO.

Haus, Resnick and Roman, LLP, by **Attorney William Haus**, 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of the State Engineering Association.

**Mr. David J. Vergeront**, Legal Counsel, Wisconsin Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Department of Employment Relations and the Department of Commerce.

**Ms. Mindy Taranto**, Business Representative, Wisconsin Federation of Teachers, WFT, AFL-CIO, 1334 Applegate Road, Madison, Wisconsin 53753, appearing on behalf of the Wisconsin Science Professionals, Wisconsin Federation of Teachers.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT**

On June 9, 1998, the American Federation of State, County, and Municipal Employees, Council 24, WSEU, AFL-CIO (hereafter WSEU) filed a petition with the Wisconsin

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Employment Relations Commission requesting that the Commission clarify a bargaining unit represented by WSEU to include nine Program Managers employed by the State of Wisconsin Department of Commerce (DOC) in the Division of Safety and Buildings (DSB).

On October 15, 1998, Commission Examiner Sharon A. Gallagher held a pre-hearing conference to discuss settlement possibilities and evidentiary matters. Thereafter, WSEU reviewed documents provided by the State. On December 11, 1998, WSEU advised the Examiner that it wished to proceed to hearing in this matter.

By letters dated February 18, 1999, and February 26, 1999, the Wisconsin Science Professionals, Wisconsin Federation of Teachers and the State Engineering Association respectively advised the Examiner that they wished to intervene. Another pre-hearing conference was conducted April 6, 1999, by the Examiner with representatives of the State, WSEU, the Wisconsin Federation of Teachers and Engineering Association. Hearing was scheduled for July 15, 16, 20 and 21, 1999. At the request of WSEU, the July hearings were cancelled, rescheduled and held in Madison, Wisconsin, on October 4, 5 and 6, 1999. The hearings resumed on December 27 and 28, 1999, at which time they were concluded. The Wisconsin Science Professionals, Wisconsin Federation of Teachers did not participate in the hearings.

The hearings were limited to the issue of whether the Program Managers are management employees within the meaning of Sec. 111.81(13) Stats. If the Program Managers are found to be management employees, as argued by the State, then the proceedings are concluded. If the Program Managers are not management employees, then the hearings will reconvene for the purpose of taking evidence regarding the appropriate bargaining unit placement.

Stenographic transcripts of the hearings were made, the last of which was received on March 27, 2000. The parties submitted post-hearing briefs and reply briefs by September 11, 2000.

The Commission, having considered the record and being fully advised in the premises, makes and issues the following

### **FINDINGS OF FACT**

1. Wisconsin State Employees Union , Council 24, AFSCME, AFL-CIO and its affiliated Local Union 333, herein WSEU, is a labor organization having its principal offices located at 8033 Excelsior Drive, Suite C, Madison, WI 53717. WSEU is the collective bargaining representative of certain State employees.

2. The State Engineering Association, herein the SEA, is a labor organization having its principal offices in Madison, Wisconsin. The SEA is the collective bargaining representative of certain State employees.

3. The Wisconsin Science Professionals, Wisconsin Federation of Teachers, herein the WFT, is a labor organization having its principal offices in Madison, Wisconsin. The WFT is the collective bargaining representative of certain State employees.

4. The State of Wisconsin, herein the State, operates the Department of Commerce (DOC) as one of its statutorily authorized administrative agencies. The DOC employs approximately 185 regular full-time employees as well as 200 seasonal or limited term employees. The DOC's annual budget is \$17 million. One of the divisions of the DOC is the Division of Safety and Buildings (DSB). DSB administers various statutory and administrative code provisions related to public health, safety and welfare.

The Division of Safety and Buildings operates in nine functional program areas: code development, finance, plan review, inspection, training, credentialing, long-term planning, investigations and policy making.

The State is represented in labor relations matters by its Department of Employment Relations (DER), which has its offices located at 137 East Wilson Street, Madison, Wisconsin.

5. Prior to July 1996, the DSB was within the Department of Industry, Labor and Human Relations (DILHR). In July, 1996, the DSB became part of DOC. After its reorganization into the DOC, the DSB became more conciliatory rather than enforcement-directed such that enforcement activities decreased from approximately 50% of agency work to 25% agency work.

While the Division of Safety and Buildings was still housed within DILHR, the Division was reorganized. The reorganization was to become fully implemented in July, 1996 with the transfer of the Division to the Department of Commerce.

The May 25, 1995 memo announcing the reorganization identified one of the "four major performance changes from the reorganization" as:

2. A flatter organization structure that eliminates two unnecessary levels of management in the area of policy development.

Although the Program Manager position did not come into formal existence until the Division moved to the Department of Commerce, at least some employees began to perform Program Manager duties prior to the July, 1996 move to Commerce. A September, 1995 memo expressed the following expectations as to such duties:

DO THE FOLLOWING:

- ◆ Planning at high level – setting priorities, goals and methods
  - Strategic Plan
  - Activity Plan
  - Production Work
  - Change Initiatives
- ◆ Policy and Process Development
  - Represent the department while working with code councils and committees
  - Attend code committee meetings, set agenda and direction
  - Responsible for code content
  - Help implement codes by participating in first round training development and “train-the-trainer” sessions
  - Help implement new work processes
  - Code interpretations, with input from production staff
  - Review precedent-setting petition for variance – meeting code intent
  - National code and standards committees – with production staff
- ◆ Information Technology
  - Be aware of computer capabilities
  - MacCubbin and Trapp on Database Team
- ◆ Best Practices
  - Credentialing – Quast and DuPont
  - Plan Review – Miller and MacCubbin
  - Inspection – Kaminski and MacCubbin
  - Participate as program experts as requested
- ◆ DOC Consolidation
  - Assignments may be made

DO NOT DO THE FOLLOWING UNLESS REQUESTED TO DO SO BY THE DIRECTOR OF PROGRAM DEVELOPMENT:

- ◆ Assign work or resources on a day to day basis
- ◆ Review plans

- ◆ Conduct inspections
- ◆ Perform credentialing service delivery
- ◆ Answer the telephone on routine matters
- ◆ Conduct routine training sessions

DO THE FOLLOWING:

- ◆ Perform as facilitator for code committee meetings. Working closely with the program chief, develop a plan, meeting agendas, progress reports, etc.
- ◆ Draft code language
- ◆ Record context and intent of code changes
- ◆ Perform literature searches and other code-related research
- ◆ Help implement codes by participating in first round training development and train the trainer sessions

6. In July, 1996, the Bureau of Program Development was created in the DOC/DSB. Prior to the creation of the Bureau of Program Development, senior managers such as Bureau Directors or Section Chiefs had performed the duties which the Program Managers (PMs) now perform – creating strategic plans, mission and vision statements and goals and objectives for the Department; planning and implementing staffing needs; assessing priorities and the time necessary to accomplish these with current staff; creating scoping statements regarding changes in departmental rules or code; code writing; attending statutorily required advisory councils and analyzing each council's recommendations to the agency; conducting briefing sessions for legislative committees, writing quarterly reports and making recommendations regarding the level of staff necessary to do tasks as well as how existing staff should be deployed; and creating recommended budgetary documents.

At present, the senior managers within the Division are the Division Administrator, the Deputy Administrator, the Bureau Director of Program Development, the Bureau Director of Integrated Services and the Bureau Director of Field Operations.

In creating the Bureau of Program Development, the DOC eliminated nine supervisory positions and created eight PM positions: three in Civil Engineering, four in Mechanical Engineering and one in Industrial Safety. Employees had to compete for the position of PM by taking an examination, submitting an application and being interviewed.

The classification specification (CS) effective July 7, 1996 for the PM position – formally known as Engineering Program Management Consultant - reads as follows:

I. INTRODUCTION

A. PURPOSE OF THIS CLASSIFICATION SPECIFICATION

This classification specification is the basic authority [under ER 2.04, Wis. Adm. Code] for making classification decisions relative to positions primarily responsible for providing a specialized expertise for the analysis and development of the policies, procedures, processes, and expenditures that define the business operations of the Division of Safety and Buildings, Department of Commerce. The Bargaining Unit assignment is determined by the Wisconsin Employment Relations Commission per s. 111.825, Wis. Stats. The duties which are described in this specification are managerial in nature as defined under s. 111.81(13), Wis. Stats.

## B. INCLUSIONS

This classification encompasses specialized engineering positions at the Department of Commerce, Division of Safety and Buildings, Bureau of Program Development, which devote the majority of their time and are primarily responsible for the policies, procedures, processes, and expenditures of the Division's programs.

## C. QUALIFICATIONS

Specific qualifications for a position will be determined at the time of recruitment. Positions included in this series are frequently specialized and may require specific knowledge and skills in one of the recognized engineering disciplines such as structural, architectural, civil, environmental, or mechanical.

## D. EXCLUSIONS

1. Positions that are not located within the Department of Commerce, Division of Safety and Buildings, Bureau of Program Development.
2. Employees who are not engaged for a majority of the time in management work as defined in s. 111.81(13), Wis. Stats., and as administered by the Wisconsin Employment Relations Commission.
3. "Supervisory" positions as defined in s. 111.81(19), Wis. Stats., and as administered by the Wisconsin Employment Relations Commission.
4. Positions which spend the majority of their time reviewing building and other related types of plans or spend the majority of their time inspecting buildings, to assure the minimum safety codes are met.
5. All other positions which are more appropriately identified by other classification specifications.

## E. ENTRANCE INTO AND PROGRESSION THROUGH THIS CLASSIFICATION

Employees enter this classification by competitive examination. The majority (greater than 50%) of a position's duties and responsibilities must be recognized in the classification definition and programs in order for the position to be assigned to this classification.

## II. DEFINITION

Positions work under the general supervision of the Bureau Director for the Bureau of Program Development. The positions have responsibility for at least five significant BUSINESS OPERATION PROGRAM AREAS. The current significant BUSINESS OPERATION PROGRAM AREAS include the following:

Amusement Rides & Ski Tows	Boilers
Commercial Bldgs.	Electrical & Lighting Systems
Elevators	Explosives & Fireworks
Fire Protection	Fire Sprinkler Systems
HVAC Systems	Mine Safety
Mobile Homes	Multi-Family Dwellings
One & Two Family Dwellings	Plumbing Systems
Privately-Owned Wastewater	Public Sector Safety & Clean Indoor
Treatment Systems & Platting	Air
Public Swimming Pools	Refrigeration Systems
Soil Erosion Control & Storm	
Water Management	

For each BUSINESS OPERATION PROGRAM AREA assigned, the positions must have the responsibility to develop, interpret, document, and analyze the policies, procedures, processes, revenues, and expenditures involved in the program area. The positions have responsibility to develop policies that facilitate the development of model codes within the program assignments. They direct and administer the program development processes for designs, devices, products, materials, and constructed environments for their specific program areas. The positions use authority granted by Chs. 1, 101, 145, 160, 167, 227, 236, and 254, Wis. Stats., to prevent detrimental effects on the public health, safety, environment, and water resources of Wisconsin. The positions serve as a member of the Division's and Bureau's management teams and execute the Division's vision, goals, strategies, and priorities; develop and manage critical indicators; and identify and manage process re-engineering projects. They advise the Bureau Director, Deputy Division Administrator,

Division Administrator, and/or Secretary's Office on critical issues affecting the Division and help lead the formulation of strategic direction for Division activities. Their contacts include executives, managers, officials, legislators and other local, state, and federal government officials at the regional and national level. They represent the Division with consultants, designers, executives, engineering managers, and representatives of private concerns to deal with highly controversial and sensitive issues, decisions, and other matters having significant impact on the Division. The positions participate in the development, presentation, and evaluation of mandatory and voluntary continuing education programs, education curriculum development, public relations, and publications.

### III. ADMINISTRATIVE INFORMATION

These positions were created as a part of the re-engineering of the Division of Safety and Building and the transfer from the Department of Industry, Labor and Human Relations to the Department of Commerce.

On August 19, 1996, the State announced job openings for "Engineering Management Consultants" which announcement read as follows:

Department of Commerce; Division of Safety and Buildings. There are currently five vacancies in this classification. The majority of positions are expected to be located in Madison (Area 8), but positions may also be located in any of the following locations: Waukesha (Area 6), La Crosse (Area 14), Green Bay (Area 15), Stevens Point (Area 17), Shawano (Area 21), Chippewa Falls (Area 24), and Hayward (Area 29). Position specializations will be in any one of the three following fields: Civil Engineering, Mechanical Engineering, Industrial/Safety Engineering. Starting pay is \$44,770 per year. A six-month probationary period is required. JOB DUTIES: Develop, interpret, and analyze the policies, procedures, processes, revenues, and expenditures related to a variety of engineering and technical programs within the specialty fields cited in the Division. Plan and analyze division services; assure uniformity and consistency in policy division-wide; participate in strategic planning efforts, review and analyze proposed administrative codes, national engineering codes, and other safety standards; develop and recommend budgets; act as a primary consultant regarding engineering/technical issues; speak at conferences and act as a liaison regarding program issues pertinent to the division for a variety of groups and committees. KNOWLEDGE REQUIRED: General engineering principles, measurements, and calculations (Civil, Mechanical, or Industrial/Safety); Building Safety Programs; Building Safety Administrative Codes; general principles of management; complex engineering and technical program development procedures; policy development



and implementation techniques; budget development; oral and written communications; administrative code/legislative rule development process including national model building safety codes; knowledge of professional organizations and committees associated with building safety issues. Well qualified applicants will possess a four-year degree in engineering, architecture, or related field, professional registration as a Professional Engineer, or Architect, or Engineer in Training, Registered Designer, or equivalency. To request special application/examination materials, write to Department of Commerce; Personnel Office; 123 West Washington Avenue; P.O. Box 7970; Madison, WI 53707-7970. Completed application/examination materials must be received by September 3. Materials will be evaluated to determine those applicants qualified to be considered further in the selection process . . .

The PMs who were originally selected for the eight positions were Terry Halverson (now deceased), Joe Hertel, Roman Kaminski, John Lippitt, Jim Smith, Jim Quast, Larry Swaziek and Loretta Trapp (no longer employed in this position). The DOC later created a ninth PM position.

The disputed positions, current incumbent employees, their prior position and prior bargaining unit status are as follows:

A. Program Managers – Mechanical Engineering

<u>Incumbents</u>	<u>Prior Position</u>	<u>Bargaining Unit Status</u>
1. Roman Kaminski	Chief, Field Operations	Non-rep position eliminated
2. Joseph Hertel	Electrical Unit Supervisor	Non-rep position eliminated
3. John Lippitt	Plumbing Plan Reviewer II	WSEU Bargaining Unit
4. Lynita Docken	Chief, Integrated Services	Non-rep position eliminated
5. Bernice Mattson	Mechanical Engineering – Advanced 2 – Mgmt.	Non-rep position eliminated

B. Program Manager – Industrial Safety

6. Eric Hands	Environmental Health Specialist – Advanced	WFT Bargaining Unit
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C. Program Managers – Civil Engineering

7. Jim Quast	Architect – Advanced 2	SEA Bargaining Unit
8. Jim Smith	Bldg Plan Review Consultant – Advanced	SEA Bargaining Unit
9. Larry Swaziek	Civil Engineer – Sup. 4	Non-rep position eliminated

7. On November 27, 1996, the Director of Program Development issued the following memorandum and attached Program Manager Assignment Matrix, which read in relevant part as follows:

**Subject: Program Manager Assignments and Transitions**

During the last two weeks, I have discussed possible program assignments with each of you. Now it's time to make formal assignments.

Attached to this memo is a chart entitled "Program Manager Assignment Matrix". As you can see, each of you have at least six program areas assigned to you. There are two levels of assignment: primary and secondary.

Also attached is a chart entitled, "Program Manager Assignment Transitions". This chart shows the new primary assignments next to the old.

For each primary program assignment, you must meet with the previously assigned program manager to develop near term transition plans. Identify on-going and near term planned activities within each program. Pay special attention to any problem areas and to programs implementing new codes or work processes.

Include in your transition discussions, additional key program staff from Integrated Services and Field Operations. Ask Randy Baldwin and Ben Burks to identify such key staff in the various program areas.

Some of you will be continuing your program assignments held as acting program managers. In those cases, you must still meet with key program staff from the IS and FO bureaus to make sure you are aware of all on-going and near term planned activities.

If possible, you should hold these transition meetings before the December 12<sup>th</sup> Division Management Team Meeting. At that meeting, among other things, we will begin operational planning for the next fiscal year. Your near term transition plans will address the immediate future—the next three to six months—while the longer term operational plans are under development. We will discuss timelines for planning activities at the December 12<sup>th</sup> Division Management Team Meeting.

I expect that in some program areas, previously assigned program managers may continue some involvement during the transition period. Such proposed continued involvement must be authorized by their respective supervisors. Certainly, our goal is to have smooth transitions that serve our customers well.

Due to Loretta's continued involvement in the Regulated Object Application Development Project, she has not been given any other primary assignments. Once the new computer application is implemented in 1997, Loretta will be assigned as a primary program manager in several programs yet to be determined.

Program Managers will be the department's liaison or designee on Statutory Advisory Councils as follows. Terry Halverson will work with the Fire Prevention Council and the Uniform Dwelling Code Council as Program Manager of those program areas.

Jim Quast, as Credentialing Program Manager, will work with the three licensing councils; the Plumbers Council, the Automatic Fire Sprinkler Contractors and Fitters Council, and the Contractor Financial Responsibility Council. As Multi-Family Dwelling Program Manager, Jim Quast will also work with the Multi-Family Dwelling Council. A code developer will also be assigned to work with each council.

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PROGRAM MANAGER ASSIGNMENT MATRIX										11/25/96
Program Type	Program Name	Program Manager Assigned (P=Primary; S=Secondary)								
		Civil			Mechanical				Safety	
		LS	JQ	JS	LT*	JH	RK	JL	TH**	
	1 Commercial Buildings	S	S	P						
	2 Mobile Homes								P	
	3 Multi-Family Dwellings	S	P	S						
<b>CIVIL</b>	4 One & Two Family Dwellings	S					S		P	
	5 Rental Weatherization	P			S					
	6 Soil Erosion Control	S	P				S			
	7 Structural Welding	P	S							
	8 Boilers				S	P		S		
	9 Electrical & Lighting Systems			S		P				
	10 Fire Sprinkler Systems			S				P		
	11 HVAC Systems			P		S				
<b>MECHANICAL</b>	12 Plumbing Systems				S		S	P		
	13 POWTS & Platting		S		S		P			
	14 Public Swimming Pools				S		S	P		
	15 Refrigeration Systems					P		S		
	16 Wisconsin Fund Administration				S		P			
	17 Amusement Rides & Ski Tows		S						P	
	18 Elevators	P				S				
<b>SAFETY</b>	19 Explosives & Fireworks					S			P	
	20 Fire Prevention							S	P	
	21 Mine Safety					S			P	
	22 Public Safety & Clean Indoor Air			S	S				P	
<b>GENERAL</b>	23 Credentialing		P		S					
	24 Regulated Object Application Development		S		P					

\* LT: Loretta Trapp

\*\* TH: Terry Halverson

PROGRAM MANAGER ASSIGNMENT TRANSITIONS			11/25/96
Program Name	Permanent Manager Assigned	Acting Manager Assigned	
1 Commercial Buildings	Smith	Smith	
2 Mobile Homes	Halverson	Halverson	
3 Multi-Family Dwellings	Quast	Smith	
4 One & Two Family Dwellings	Halverson	Halverson	
5 Rental Weatherization	Swaziek	Halverson	
6 Soil Erosion Control	Quast	Smith	
7 Structural Welding	Swaziek	Verhagen & Quast	
8 Boilers	Hertel	Verhagen & Quast	
9 Electrical & Lighting Systems	Hertel	Hertel	
10 Fire Sprinkler Systems	Lippitt	Miller	
11 HVAC Systems	Smith	Smith	
12 Plumbing Systems	Lippitt	Miller	
13 POWTS & Plating	Kaminski	Kaminski	
14 Public Swimming Pools	Lippitt	Miller	
15 Refrigeration Systems	Hertel	Verhagen & Quast	
16 Wisconsin Fund Administration	Kaminski	Kaminski	
17 Amusement Rides & Ski Tows	Halverson	Schrader	
18 Elevators	Swaziek	Zalewski	
19 Explosives & Fireworks	Halverson	Halverson	
20 Fire Prevention	Halverson	Halverson	
21 Mine Safety	Halverson	Schrader	
22 Public Safety & Clean Indoor Air	Halverson	Schrader	
23 Credentialing	Quast	Quast	
24 Regulated Object Application Development	Trapp	MacCubbin & Trapp	

The most recent Program Manager Assignment Matrix (created in October, 1998) is as follows:

Program Type	Program Name	Program Manager Assigned (P=Primary; S=Secondary)								
		Civil			Mechanical					Safety
		Swaziek	Quast	Smith	Docken	Hertel	Kaminski	Lippitt	Mattsson	Hands
	1 Commercial Buildings	S	S	P						
	2 Energy Efficiency		S						P	
	3 Fire Safety			S				P		
<b>CIVIL</b>	4 Mobile/Manufactured Homes	P							S	
	5 Multi-Family Dwellings		P	S						
	6 One & Two Family Dwellings	P							S	
	7 Rental Unit Energy Efficiency	S							P	
	8 Soil Erosion Control		P				S			
	9 Structural Systems/Welding	P	S							
	10 Anhydrous Ammonia, CNG, LNG & LPG Systems					P		S		

	11 Boilers					P			S	
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<b>MECHANICAL</b>	12 Electrical & Lighting Systems					P			S	
	13 Elevators	P				S				
	14 Fire Protection Systems			S				P		
	15 HVAC Systems					S			P	
	16 Plumbing Systems				P			S		
	17 POWTS and Platting				S		P			
	18 Public Swimming Pools				P		S			
	19 Refrigeration Systems					P			S	
	20 Wisconsin Fund Administration				S		P			
	21 Amusement Rides & Attractions		S							P
	22 Explosive Materials					S				P
	23 Fire Dept. Safety & Health							S		P
<b>SAFETY</b>	24 Manufacture of Fireworks					S				P
	25 Mine Safety					S				P
	26 Public Safety & Clean Indoor Air			S						P
	27 Tramways, Lifts & Tows		S							P
	28 Worker Compensation Accident Investigations			S						P
	29 Credentialing		P		S		S			
<b>GENERAL</b>	30 Fire Department Dues						S	P		
	31 Fire Incident Reporting				S			P		

8. The position description for the three types of PM position is essentially the same. The material that is underlined below varies in each position description based upon the programs each PM is assigned to manage. By way of example, the Program Manager—Civil Engineering position description (incumbent Jim Quast) reads in relevant part as follows:

#### Position Summary

Under the general supervision of the Bureau Director, the position develops, interprets, documents, and analyzes the policies, procedures, processes, revenues and expenditures that define the business operations in the following civil engineering programs of the Division: Commercial Buildings; Multi-Family Dwellings; One- and Two-Family Dwellings; Mobile Homes; Soil Erosion Control and Stormwater Management. These policies and programs serve to provide for safe and healthy constructed environments. “Constructed environments” refer to the structures, devices, products, materials, and appurtenances whose preparation, design, installation, operation, and/or maintenance the Division regulates. Programs are developed and directed to increase the efficiency and effectiveness of Division business activities. The position serves as a member of the Division’s and Bureau’s management teams, working in concert as equal partners with members of the management teams from the Bureaus of Field Operations and Integrated Services. Other duties and responsibilities may be assigned if they are in areas of training, education, and/or experience of the position.

The position provides managerial liaison services, staff functions, and related administrative functions including program development, interpretation, documentation, and evaluation. Managerial liaison services include coordinating policies and spending among bureaus and between the Department and its agents. Staff functions include developing and maintaining archives of policies. The position provides consultant services for professional, engineering, technical, and administrative policies and programs for specified engineering disciplines. Because the Division is moving toward the adoption of model codes, the position has a leading role in developing policies that facilitate the development of model codes within the program assigned to the position.

The methods used to provide safe and healthy environments include the examination of the effectiveness of existing Division programs; identifying the roles and objectives for policy, process, and procedure; and initiating budget changes and administrative code and statute revisions to meet the Division's mission. These methods are used when the position is directed to or identifies inconsistencies, conflicts, or other problems with existing policies within the programs assigned to the position. Through program development processes, the position protects the public health, safety, and the groundwater of the state. The position uses the authority granted by Chs. 1, 101, 145, 160, 227, 236, and 254, Stats, to prevent detrimental effects on the public health, safety, environment, and water resources of Wisconsin and provide residents of and visitors to Wisconsin with the assurance of code-compliant designs and constructed environments that directly affect their health and safety.

The position executes the Division vision, goals, strategies, and priorities; developing and managing critical indicators; and identifying and managing process re-engineering projects. The position provides input in the development, implementation, and evaluation of the Division Strategic Plan, the Division Information Technology Plan, Division initiatives, Division goals and Division's annual budget. In performing these duties, the position actively involves Division staff. The position recommends and collects critical indicators and customer research, then uses the information to recommend changes in Division policies, programs and annual budgets.

The position advises the Bureau Director, Deputy Division Administrator, Division Administrator, and/or Secretary's Office on critical issues affecting the Division and helps lead the formulation of strategic direction for Division activities. The position plays a major role in developing policies, processes, procedures and annual budget for meeting statutory requirements and recommending changes as necessary.

The position has frequent contacts with executives, managers, and officials covering a wide variety of complex issues and concerns. The position has contact with legislators and other local, state, and federal government, including high level officials at the regional and national level. The position may serve as the Division's representative with consultants, designers, executives, engineering managers, and representatives of private concerns to deal with highly controversial and sensitive issues, decisions, and other matters having significant impact on the Division or which are of critical concern/interest to the Bureau Director, Deputy Division Administrator, Division Administrator, and/or Secretary's Office.

Additionally, the position has contact with local government officials including county executives, county board members, city officials, and their respective staffs with regard to Division programs.

The outcome of the position activities is the development, promulgation, documentation, and identification of impacts of engineering and technical programs identified as critical by the Bureau.

All work activities are performed in accordance with Total Quality Leadership (TQL) principles. And while not enumerated for each specific activity, all activities include applicable elements of the TQL philosophy.

#### Goal and Worker Activities

- 50% A. Direct, and administer the Division's complex engineering and technical program development processes for designs, devices, products, materials, and constructed environments in the following program areas: Commercial Buildings; Multi-Family Dwellings; One- and Two-Family Dwellings; Mobile Homes; Soil Erosion Control and Stormwater Management.

A1. Plan and direct services including complex engineering and technical program development using statistical studies, research studies, engineering calculations, measurements, and generally accepted engineering principles.

A2. Initiate, direct, analyze, document, and unify policies and programs.

A3. Identify and participate in standards setting and model code organizations. Recommend changes that facilitate the development of model codes.

A4. Develop and implement policies for the adoption of national model codes.



A5. Estimate the level and type of primary and secondary impacts, including fiscal impacts, that policies will have one, three, and five years from implementation.

A6. Implement written training materials, policy and priorities for the uniform development, promulgation, evaluation, and amendment of Division policies.

A7. Implement a policy tracking system. This system will be used to monitor the progress of all policy development activities, statutory councils, and advisory code committees.

A8. Develop and implement a process and time table for unifying policies for Division activities.

A9. Maintain an archive of program development projects.

A10. Compose or direct the production of technical reports, position papers, memoranda, letters, newspaper articles, as assigned to document program development findings, implement program development policies, respond to requests for program development, assess the cost/benefit of proposed policies and programs, and to facilitate for the protection of public health and safety the coordination of policies and programs.

A11. Implement the Division vision, goals, strategies, critical indicators, customer research plans, and process re-engineering projects.

A12. Provide oversight to respond to the Division mission, customer demands, strategic goals, and strategic objectives in a manner consistent with Division policies, procedures and annual budget for the program area.

A13. Provide coordination to foster effective policies among bureaus executing program policy.

A14. Consult with other Division Bureaus on a day-to-day basis to provide program interpretations to carry out strategic goals, identify performance goals for work products, conduct periodic meetings, provide feedback, and keep managers and others informed of major activities.

A15. Participate in the development and implementation of Division-wide methods of fiscal control, budget, personnel, contracts, information technology, planning, administrative code development and program evaluation.

A16. Provide input in the ongoing development and implementation of the Division Strategic Plan, and actively participate in strategic plan development. Develop, prioritize, direct, and control annual program workload and budget, including the allocation of financial resources, to specific program areas.

A17. Participate in the Information Technology planning efforts.

A18. Plan activities to meet short-range Bureau goals and meet priorities to accomplish Bureau goals, which are consistent with the Division's Strategic Plan.

A19. Recommend and collect critical indicators and customer research for Division programs. Use research data to draft, recommend, and implement changes in policy, procedures and budget of Division programs.

A20. Provide Strategic Plan critical indicators and other written evaluations as requested or necessary.

25% B. Develop, interpret, document, and analyze policies, procedures and budgets related to the specified Civil Engineering programs.

B1. Assess and evaluate proposed and newly-enacted legislation for its impact on new and existing policies, programs and budgets. Develop responses based on the assessments, including development or amendment of policies, programs and budgets.

B2. Perform management studies for the establishment of valid quantitative and qualitative standards for new and existing policies and programs.

B3. Develop policies, procedures and annual budgets for Division programs. Plan, execute, and lead program development in accordance with established work plans and priorities.

B4. Develop and implement processes, procedures and annual budgets to ensure policies and programs conform to Chs. 1, 101, 145, 160, 167, 227, 236, and 254, Stats.

B5. Recommend to the Bureau Director the structure and composition of all councils and advisory code committees.

B6. Serve as a member or act as Department representative, to statutory councils, advisory code committees, intergovernmental study groups, model code groups, professional organizations, and standards-setting organizations.

B7. Develop and implement processes and procedures to document program development activities, including meetings, actions, staff positions and customer meetings.

B8. Review existing plan review, inspection, credentialing, continuing education, and consultation policies, programs programs and budgets and recommend alteration or elimination of policies and programs that cannot be demonstrated to be effective or financially sound, are not within in [sic] the scope of the Division's mission, outside of statutory mandate, or no longer a priority.

B9. Participate in the implementation or [sic] newly-mandated or revised policies and programs.

B10. Act as liaison between affected state, local, and federal agencies.

B11. Implement policies, objectives, processes, priorities, and plans for program development.

B12. Author environmental assessments regarding code revisions. Develop alternative actions.

B13. Undertake program development activities to meet statutory responsibilities.

B14. Provide direction for program development activities based on staff feedback of existing code enforcement.

B15. Identify and recommend to the Bureau Director amendments to existing administrative rules and statutes.

15% C. Provide technical consultation to other Bureau or Division staff, other states, local and federal agencies, model code groups, private organizations, regulated communities, general public, and the legislature. Act as one of four primary/technical consultants and have primary responsibilities in the specified Civil Engineering programs. Consultation is on a variety of complex engineering, technical, legal, and legislative matters.

C1. Implement a policy and procedure information technology and administrative support program.

C2. Develop, in coordination with other Bureaus, the review, investigation, and resolution of technical issues. Develop and implement a process to issue the final determination of technical policies and programs, including petitions for variance.

C3. Coordinate and consult on a variety of complex technical theories and practices used in Wisconsin. Consultant services will be provided to federal agencies and national and international model code organizations to exchange knowledge gained from experience and research.

C4. Represent the Department on interagency engineering and technical work committees to assure adequate consideration of the Department's policies and programs and to contribute information and data gained through research and experience.

C5. Maintain effective working relationships with organizations interested in the policies, procedures, processes, and priorities of the Department.

C6. Coordinate consultation with and recommendations to and from Department counsel and the Attorney General's office with regard to policies and programs.

C7. When directed by the Bureau Director, perform plan, product, or material reviews and/or inspections during critical periods.

10% D. Participate in development, presentation, and evaluation of mandatory and voluntary continuing Civil Engineering education programs, education curriculum development, public relations, and publications.

D1. Participate in mandatory and voluntary continuing education programs related to programs, policies, procedures, processes, and Division priorities.

D2. Participate in training courses for the public, legislature, and other agencies.

D3. Participate in the development of courses and curricula with trade associations, universities, vocational schools, and state apprenticeship programs.

D4. Lecture on technical subjects at continuing education sessions conducted by the Department, institutions of higher education, vocational schools, trade associations, and others.

9. The position synopsis for the PMs' direct supervisor, Program Management Bureau Director DuPont, reads as follows:

Under the general supervision of the Deputy Administrator, this position manages the division-wide activities of strategic planning, policy development and procedure development. The Bureau of Program Development, directed by this position, conducts environmental scans, identifies relative risks and

develops programs that allocate appropriate resources towards (sic) managing those risks. Development, documentation and promulgation of division programs that are effective, efficient and reasonable are the primary goal of this position.

10. In addition to the Program Managers, the Bureau of Program Development employs 1.6 FTE Program Assistants (one exempt Confidential and one represented employee), five Code Consultants (all represented by SEA) and Richard Meyer, Section Chief for the Bureau (an exempt employee). Bargaining unit employees perform some duties which are similar to those of the PMs, as follows. Bargaining unit employees also write scoping documents; they write and consult on code when assigned by their supervisor; they receive calls from external or internal customers on an infrequent basis and respond; they perform code interpretations when assigned to do so; and they perform training for staff up to two times per year when assigned by their supervisors. Unit employees need approval to work overtime and receive time and one-half pay therefor.

Program Managers occasionally perform bargaining unit work to help relieve work overloads.

11. Industry, citizen and advisory councils are either statutorily created or created by the Secretary of DOC. These councils formulate, research, issue and/or receive code revision packages and comment thereon. They meet four to six times per year. PMs are members of and regularly attend industry, citizen and advisory councils and they recommend who should be appointed to these councils. The PMs set the agendas for these councils and PMs decide what information generated there should be reported to senior managers. Bargaining unit employees often take the minutes of these councils but PMs decide what portions of those minutes to report to senior managers and they write summaries regarding the progress of the councils using these minutes. Industry, citizen and advisory councils PM work was previously performed by senior managers.

12. Program Managers have effectively recommended staff training and increases and decreases in staff. If staff make budgetary recommendations, PMs decide whether to pass these on to senior managers. PMs attend weekly supervisory meetings with senior managers, upon request, when questions regarding their programs are addressed. PMs know their duties and thus do not need or receive day-to-day supervision from the Program Development Bureau Director DuPont. Some PMs have received training given only to supervisors or senior managers. PMs regularly train field staff when codes are revised. One PM has recommended the use of outside contractors to inspect elevators and this recommendation was adopted.

PMs regularly interpret and develop code and circulate drafts to staff, supervisors and senior managers for comment. This work was previously done by Bureau Directors.

PMs perform research, review reports, analyze workload and monitor, report and recommend changes to improve or maintain the general effectiveness and efficiency of all Division operations. They regularly gather information by asking staff and managers (by teleconference, e-mail and otherwise) for input before making recommendations regarding code changes, staffing level changes and budget recommendations. PMs regularly draft strategic planning documents including scoping statements, change initiatives and environmental scans which were previously drafted and submitted by Bureau Directors. PMs also regularly write code interpretations. Since 1999, the PMs have written quarterly reports regarding their programs which were formerly written by senior managers.

13. Program Managers conduct public hearings regarding proposed code changes after the DOC Secretary decides such hearings are needed. They have testified at legislative hearings which are held regarding potential code changes. PMs have, on request, briefed legislators regarding proposed changes in rules and legislation. PMs also negotiate with legislators regarding the extent of code changes that are needed.

PMs have represented the Division with members of the press without guidance or direction from above on how to handle such contacts. PMs draft biennial budget documents and recommend fee changes work previously done by senior managers. PMs are authorized to answer questions, provide advice, recommendations and information directly to Section Chiefs, Bureau Directors and other senior managers regarding pending changes in administrative codes and rules. PMs make recommendations to senior managers regarding division-wide problems, long-range policy decisions and the direction each program should take. PMs also answer inquiries from bargaining unit staff and members of the public regarding code changes. These duties were all previously performed by Bureau Directors.

14. Program Managers do not handle grievances or attend labor management meetings. Grievances have been filed over recommendations made by two PMs concerning plan review priorities and contracting out of elevator inspection work. The PMs do not supervise bargaining unit employees although they can request Section Chiefs or Bureau Directors to loan them employees to assist them with their work. When a customer challenges a plan review, the Section Chief and the PM review the work to determine whether the challenge is justified.

15. Program Managers draft scoping statements which are published in the State Register. This work was previously done by Bureau Directors. The PMs then take the public comments received due to the publication and summarize these for senior managers. PMs then convene industry, citizen and advisory councils and seek input from those councils regarding potential code changes. There are approximately 99 Chapters of Wisconsin Administrative Code which cover the programs that the PMs are responsible to manage, in the general areas of Mining, Fire Prevention, Electrical, Elevator, One and Two Family Dwellings, Safety, Boilers, Petroleum, Commercial Buildings and Plumbing.

Final decisions on goals, objectives, mission priorities and the direction of programs rest with the senior managers, not the PMs, although 90% of the PMs' recommendations regarding code interpretation, code changes and budget and staff levels have been followed. Section Chiefs cannot decide policy, although Section Chiefs can recommend changes in policy to senior managers. The PMs have regular biweekly briefings with Bureau Director DuPont.

16. In the area of code development, eight of nine PMs completed various documents for industry, citizen and advisory councils and senior managers including Progress Reports, Summaries of Council Meetings, Administrative Rule Change Packets, Task Group Meeting Notes and Legislative Review documents. (The ninth PM, Mattson, had not been employed long enough as a PM to have completed any code development work as of the dates of the hearing herein.)

In the area of legislative analysis, six of nine PMs completed budgetary documents including Fiscal Notes, Fiscal Estimates and Bill Analysis Control documents. The senior managers decide when legislative analysis should be done and they assign Fiscal Estimates and worksheets to be completed by the PMs. The three PMs who did not prepare any legislative analysis documents during the period relevant to the case were Docken, Hands and Mattson.

17. In the area of strategic planning, all PMs completed various documents in 1997 through 1999, including Change Initiatives, Program Briefs, Background Briefs, Quarterly Reports and Strategic Plans. These documents contained program goals and objectives and varied in length from 1 page up to 23 pages.

18. The Program Managers were paid varying hourly wage rates (from \$21.44 to \$30.24) upon moving from their prior positions into their current PM positions. Three of the PMs received wage increases upon being appointed PMs, which increases ranged from \$1.54 per hour to \$4.21 per hour. No incumbent received less than their prior wage rate upon appointment as a PM.

19. Program Managers are engaged predominantly in managerial functions.

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

### **CONCLUSION OF LAW**

The incumbents in the position of Program Manager employed at the Department of Commerce, Division of Safety and Buildings are management employees within the meaning of Sec. 111.81(13), Stats., and therefore are not employees within the meaning of Sec. 111.81(7), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

**ORDER**

The Program Managers shall remain excluded from any and all bargaining units.

Given under our hands and seal, in the City of Madison, Wisconsin, this 20<sup>th</sup> day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner



DEPARTMENT OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF  
LAW AND ORDER CLARIFYING BARGAINING UNIT

POSITIONS OF THE PARTIES

Initial Briefs

WSEU

WSEU argues that the PMs are not management employees. WSEU asserts that the PMs don't participate in the formulation, determination or implementation of management policy at a relatively high level of responsibility. Indeed, WSEU contends that the PMs have no decision-making or policy-making authority for the Division as a whole. Rather, their authority is limited to certain specific program areas while senior managers (SMs) have division-wide authority and veto power over any decisions recommended by the PMs.

WSEU notes that "senior managers" did not exist before the creation of the PM positions. PMs are the only position in the second level of "management" below the "senior managers" (SMs), indicating that the term "senior manager" was created to distinguish them from the PMs who are not in positions of authority. SMs decide the vision statement, the mission statement as well as the goals, objectives and priorities for the Division, none of which is decided by the PMs. Although the PMs have major responsibility to draft code interpretations, this is subject to strict limitations set down by the SMs. Thus, the PMs at best micro-manage while the SMs broadly manage the entire Division. In addition, the WSEU alleges that there is not very much contact between the PMs and the SMs, indicating that the PMs are merely a conduit for information to the SMs. In this regard, the WSEU asserts that the PMs do not attend regular senior management meetings and only interact with SMs on a scheduled basis once each quarter to give a short oral report in support of the written quarterly report they submit to senior management. WSEU contends that the quarterly reports submitted by the PMs do not rise to the level of actual policy making and notes that the SMs give the PMs the outline to follow for all quarterly reports.

WSEU urges that the PMs do not have authority to commit the agency's resources. In this regard, WSEU notes that the PMs do not establish an original budget; they cannot allocate funds for program purposes which are different from those listed on the original budget; they cannot change staff assignments or change financial resources without receiving approval from senior management; and although one of the PMs has recommended training, the WSEU notes that any staff member can recommend training to the SMs. Thus, in WSEU's view, the PMs merely advise the agency on purchasing decisions and do not have the actual authority to allocate funds required by the statute and the case law in this area.

WSEU argues that the PMs do not determine the kind and number of employees utilized in Division services — only SMs can do this.

WSEU urges that the PMs' interests are not significantly at variance with those of bargaining unit employees. WSEU observes that PMs Smith and Swaziek testified that they did not feel their interests were in conflict with those of staff members and that the PMs actually gather data from the staff and occasionally do production work with line employees, while SMs do not.

PMs have no authority in the labor relations area.

The placement and hire into PM positions did not involve pay increases for six of the nine PMs, the PMs do not have separate offices and they work set schedules about 40 hours per week. WSEU contends that five of the nine PMs took demotions from supervisory positions to become PMs. In all of these circumstances, WSEU urges that the PMs are not management employees but rather are eligible to be placed in an appropriate collective bargaining unit.

## **DER**

The State, through DER, argues that the PMs are management employees who thus cannot be included in any bargaining unit.

DER asserts that the PMs are now assigned to several key management duties which were previously assigned to Bureau Directors. These include planning and policy development functions; rule development and long-term strategic planning; code interpretation and revision; scoping statements and environmental scans; the development of fee schedule recommendations; meeting with advisory code councils and voting thereon; preparing and presenting quarterly reports; making reports regarding staff needs and budgetary recommendations. These duties were all management duties when the Bureau Directors performed them and DER argues that they remain per se management duties now that the PMs perform these duties. Because the PMs perform these management duties more than a majority of their of time (approximately 90% of their time), the PMs are management employees.

DER argues that the PMs participate in a significant manner in the formulation, determination and implementation of management policy. In this regard, DER notes that the PMs are involved with policy virtually all of the time and that the reorganization of the agency allows the PMs to recommend policy across programs, division-wide. DER notes that 20% of all State codes are under the DOC's jurisdiction; that the PMs vote independently on advisory councils without regard for their supervisor's beliefs or wishes; and that the PMs give unsolicited recommendations for Division action. In this regard, the DER notes that PM Lippitt made recommendations regarding risk management and the assessment thereof, which were adopted by the Division.

The PMs have had input on policy which has been at odds or adverse to the interest of rank and file employees. DER notes that PM Swaziek recommended that elevator inspection be done by outside contractors, impacting bargaining unit work. PMs have recommended that unit employees' work time on plan reviews be cut.

DER points out that rank and file employees do not have regular meetings with SMs and they need approval to work more than 40 hours per week unlike the PMs. The testimony of bargaining unit employees Anderson and Draeger, in DER's view, showed that PM Lippitt has interests that were at odds with these employees as well as other rank and file employees. DER notes that the unions involved in this case have challenged policies and practices that were initiated by the PMs. The organizational and reporting structures support management status for the PMs, in DER's view. On this point, DER notes that the PMs work across bureau boundaries and that they disseminate policy to rank and file employees and to supervisors.

Finally, DER argues that WERC should defer to the DOC's conclusions that the PMs are managerial. In this regard, DER noted that State agencies have the right to reorganize to accomplish their missions and that WERC should defer to the agency's decision to delegate certain of the Secretary's and SMs' duties to the PMs pursuant to the Secretary's judgment regarding how best to accomplish agency goals and statutory mandates.

What is clear is that the PMs have "effective" authority but they do not have the last word regarding decision making. DER notes that in terms of ultimate authority, even the Governor's authority can be trumped by the courts. In DER's view, this effective authority is sufficient to require the PMs exclusion from the bargaining unit as managers. The PMs should be declared management employees and excluded from any collective bargaining unit on that basis.

## **SEA**

SEA argues that the PMs are not management employees because they do not significantly participate in the formulation, determination or implementation of management policies. In addition, SEA asserts that the PMs have no authority to commit agency resources.

SEA notes that of 46 listed work activities in the PMs' position descriptions, only 4 refer to the PMs making recommendations and only once is the word "determination" used regarding PM work. In addition, the position summaries state that the PMs work as equal partners with members of the management team from the Bureaus of Field Operations and Integrated Services.

There was no evidence to show that the PMs actually formulate and implement as well as determine management policy.

SEA points out that the PMs perform bargaining unit work and argues that approximately 90% of their work involves code development which is also done by unit members. Of the nine PMs currently occupying those positions, three were formerly SEA members, one was formerly represented by WSEU and four were former supervisors who were demoted to take the PM position they now retain. The PMs have no supervisory authority and no authority to commit agency resources or to make budget expenditures. Nor can they direct any employees or delegate tasks to anyone. In addition, the formatting for documents submitted by PMs was done substantially by SMs, making the PMs' input minor. SEA argues that the SMs direct the PMs heavily so it is not surprising that 90% of PM recommendations are accepted.

SEA contends that the PMs do not "predominantly" manage and that they are not integrated with supervisory personnel such that their community of interest is only with supervisors. In this regard, the SEA notes that in order to "predominantly" manage, one must take more time in management duties than in all other areas of work combined. In regard to the budget, SEA noted that only 10% of the PMs time is devoted to budgetary matters and that less than half of the budget recommendations of PMs were actually approved by the agency's secretary and sent on to the Governor. The PMs gather or produce potential policy but they do not work at a relatively high level of responsibility as do the SMs. The PMs also have no management vote on the management team as they would if they were true managers. The PMs and code writers work together, do the same work and have a community of interest with each other.

PMs cannot commit agency resources in any regard. SEA contends that the PMs have no discretionary power and cannot effectively recommend the amount and manner of funding that will be expended. SEA argues that the PMs merely formulate proposals on pieces of policy that are later compiled and determined by SMs. For all these reasons, SEA urges that the PMs are not management employees.

### **Reply Briefs**

#### **WSEU**

The fact that the PMs do work formerly done by Bureau Directors is insufficient to confer management status on them. In this regard, WSEU notes that the Bureau Directors positions did not cease to exist when the PM positions were created; that none of the PMs previously served as Bureau Directors; and that PM Smith's current duties are much closer in type to those he did as a lead worker prior to his lateral transfer to the PM position. Thus, WSEU argues that the PMs are specialists providing services to management employees and that a salary increase for three of nine of them is a minor consideration which does not tip the scales in favor of their exclusion from any bargaining unit.

WSEU argues that the PMs do not participate significantly in the formulation and implementation of management policies. WSEU asserts that prior to the reorganization, no distinction was made between SMs and anyone else. The SMs decide vision and mission statements of the agency and as well as the goals and objectives of the Division and they identify all priorities. In addition, Program Management Bureau Director DuPont coaches the PMs in their recommendations so that by the time they are submitted, they have been shaped and molded to meet senior management wishes. In this context, 90-95% of PM recommendations understandably are acceptable to SMs. SMs also have veto power and the final say regarding all PM recommendations.

Because the formatting of the quarterly reports has been set by SMs, WSEU argues that the PMs have limited discretion in regard to this and notes that the PMs make only a short presentation to SMs regarding these quarterly reports. WSEU points out that the SMs meet without the PMs on a weekly basis and PMs have no input into senior management discussions during these more frequent meetings. Thus, the PMs opinions are not based on objective and unrestrained opinions, but rather are shaped and formed by SMs.

The PMs do not have effective authority to commit department resources. In this regard, WSEU argues that the fact that PMs have duties that are somewhat related to resource allocation is insufficient to grant them a management status. There is no money that the PMs can unilaterally spend; Smith's recommendations regarding staff training were merely advice regarding a purchase of training and thus, insufficient to show managerial authority. Finally, the WSEU asserts that the PMs have no authority to make decisions regarding employee assignments.

WSEU argues that the PMs' interests are not significantly at variance with production staff interests; that the organization and reporting structure at DOC is insufficient to confer managerial status on the PMs; and that the evidence from witnesses Anderson and Draeger is largely irrelevant and failed to support a conclusion that the PMs are managers.

WSEU notes that the grievances filed regarding some PM activities do not constitute an admission by WSEU that the PMs are managers, but rather merely show that it is objecting to or challenging the policies of SMs.

Finally, WSEU urges that no deference is due the agency head's reorganization decisions because WERC must look at the actual duties of employees who are in dispute. The actual duties of the PMs indicate they are aligned more closely with and are appropriately to be placed in a collective bargaining unit.

## **DER**

In regard to PM pay, DER notes that four PMs received pay raises and that the other PMs either received promotions or lateral transfers to their PM positions and that no one lost

pay due to taking a PM position. DER points out that senior management existed before and after the reorganization and that programs headed by the PMs are division-wide and cross bureau lines. DER observes that the PMs have made staff determinations and have made recommendations regarding program support which have been adopted by the agency. The fact that PMs do some bargaining unit work should not require a conclusion that they are employees — the bargaining unit work they perform is essentially sporadic or based on backlog or special circumstances. Even though the format for certain documents may be set by the SMs, DER notes that the PMs provide all of the content for these reports. The fact that the PMs have a cubicle rather than an office is not a significant factor in determining their management status.

The fact that the PMs appeared to be on a similar organizational level as code writers on the organizational chart does not mean that they are on the same functional level as code writers. DER again argues that the code writers report to Section Chiefs who are one level below the PMs. DER notes that the PMs are now performing work formerly done by Bureau Directors. For example, as a PM, Smith now works across bureau lines and division-wide, which he did not do as a lead worker prior to his promotion to a PM position.

The PMs do not share a community of interest with rank and file employees. Code writers and PMs have different functions — PMs are in charge of policy content while code workers are involved in editorial comment applying form to the format — making these two positions distinct. For all these reasons, DER urges that the PMs be found to be management employees.

## SEA

SEA argues that the PMs work at a relatively low level of authority and cannot make policy decisions on their own. In this regard, the SEA notes that the PMs only formulate potential policy and that DER's computation that they are involved in policy for 90% of their work time is incorrect. SEA points out that the SMs also regularly outline, coach and comment on the PMs ongoing work including their preliminary recommendations. The code writing work done the PMs and the code writers also goes through code consultant manager Meyer before those products go before the SMs.

The SEA argues that DER had distorted the record and made mischaracterizations as well as exaggerated statements regarding the record in this case. In this regard, SEA contends that the PMs do not perform Bureau Director work. The SEA also notes that Swaziek stated that his work authority as a PM was not broadened by his move to the PM position. In addition, although there was some evidence that the PMs were involved in the negotiation of memoranda of understanding and changes in the law necessary due to legislative committee action, the PMs were not in charge of this activity. SEA notes that the PMs are not in charge

of and do not manage the Fire Fund. Finally, SEA urges that the PMs have no authority to act on recommendations they make and they have gained no authority from the outcome of their recommendations.

SEA argues that DER's legal analysis includes cases that have been overruled by the Court of Appeals or that support the SEA's analysis. SEA also contends that DER misapplied case precedent and distorted the definition of "effectively" in an effort to show that the PMs have budgetary authority. In the KEWAUNEE COUNTY vs. WERC, 141 Wis. 2D 347 (1987), SEA notes that the Court said that effective budgetary authority must focus on and include the power to determine the manner and method by which the office or agency discharges its budgetary responsibility. In the SEA's view, the PMs responsibilities do not include this power.

The SEA contends that the PMs responsibilities do not conflict with those of SEA professional employees. In this regard, SEA notes that the code consultants and the PMs share a community of interest and that these groups are the only true employees of the Bureau of Program Management. Both have specialized backgrounds in engineering and they work together on the scoping process, advisory councils and public hearings. Both code consultants and PMs use the same guidance handbooks to perform their duties. While DER listed certain jobs that the PMs perform that bargaining unit employees do not perform, these conflicts are noted only with WSEU employees and not SEA bargaining unit members. Therefore, SEA argues that the PMs are not management employees.

## **DISCUSSION**

Section 111.81(7), of the State Employment Labor Relations Act (SELRA) excludes "management employees" from the definition of employees who are eligible for inclusion in a bargaining unit. The sole issue before the Commission at this point in this case is whether the Program Managers (PMs) are "management employees." Section 111.81(13), Stats., defines "management employees" as:

Those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads and employees exercising similar functions and responsibilities as determined by the Commission.

In STATE OF WISCONSIN, DEC. NO. 11640-C (WERC, 1/86), the Commission described the manner in which it determined "management employee" status:

This definition specifically lists certain positions which, by virtue of their placement in the organization structure, are per se management positions. This

listing however is not all inclusive. In previous cases, the Commission has given further meaning to the term “managerial” as that word appears in both SELRA and MERA. Those cases have held that “managerial” functions must be demonstrated by a showing that the occupant of the position in question participates in a significant manner in the formulation, determination and implementation of management policy or that the occupant of such a position has the effective authority to commit the municipal employer’s resources.

Because Program Managers are not specifically listed in Sec. 111.81(13), Stats., it is clear that the Program Managers (PMs) are not per se “management employees.” DER does not contend that the PMs are engaged in “executive functions.” Therefore, the question in this case is whether the PMs are “management” because they are engaged “. . . predominantly in . . . managerial functions . . . .”

Managerial functions are not “predominant” unless they take more time than all other duties. STATE OF WISCONSIN (DER), DEC. NO. 11640-E (WERC, 7/97), at p. 89.

In the instant case, the majority of the incumbents of the PM position were non-represented managerial or supervisory employees prior to their appointment as PMs. Thus, PMs Kaminski, Hertel, Docken, Mattson and Swaziek were previously in managerial/supervisory positions which were eliminated at some point during the DSB reorganization in 1995 and 1996. In 1995, the agency announced that its reorganization had, inter alia, “eliminated two levels of unnecessary management in the policy development area.” At this time, nine supervisory positions were eliminated and eight of nine PM positions were created.

The classification specification (CS) for the PMs indicates that they are primarily responsible for providing “specialized expertise for the analysis and development of policies, procedures, processes and expenditures that define the business operations” of the DOC. These positions are described as “specialized engineering positions . . . which devote the majority of their time and are primarily responsible for the policies, procedures, processes and expenditures of the Division’s programs.” The CS goes on to state that the PMs “. . . have the responsibility to develop, interpret, document and analyze the policies, procedures, processes, revenues, and expenditures involved in the program area” that they are assigned to cover; that the PMs are “to develop policies that facilitate the development of model codes;” that they are to “direct and administer the program development processes;” that they are to “execute the Division’s vision, goals, strategies and priorities;” and that they are to serve on management teams, advise the Bureau Directors and other high level managers on critical issues affecting the Division and help lead in the formulation in strategic direction for Division activities.

The position description (PD) for the PM position in Civil Engineering, Mechanical Engineering and Safety Program areas utilizes much of the language (quoted above) contained in the classification specification. In addition, the PD states the PMs work “in concert as equal



partners with members of the management teams,” providing “managerial liaison services” which “include coordinating policies and spending among bureaus and between Department and its agents” and the position “has a leading role in developing policies and facilitating the development of model codes within the program.” The PD also states that the PMs are to initiate “budget changes and administrative code and statute revisions,” that the PMs will play “a major role in developing policies, processes, procedures and annual budgets” and that the PMs will have frequent contact with high level executives, managers and officials and “may serve as the Division’s representative with consultants, designers, executives, engineering managers and representatives of private concerns to deal with highly controversial and sensitive issues, decisions and other matters. . . .”

We are satisfied that both the CS and the PD demonstrate that the PMs have policy duties at a relatively high level of responsibility and that they spend more time on these duties than on any other duties listed. Most importantly, the testimony and other exhibits presented at hearing persuade us that the CS and PD accurately reflect the duties and responsibilities of the Program Managers and that their policy duties reflected in the PD in Sections A, B and C occupy a predominant portion of their time.

In this regard, we note that many of the PMs duties were formerly performed by Bureau Directors — positions specifically identified in Sec. 111.81(13), Stats., as “management employees.” These functions include participation in industry, citizen and advisory councils and the recommendation of members to those councils, the drafting of rules, code interpretations and revisions, scoping statements, strategic plans, change initiative memos, staffing, biennial and fee change recommendations, environmental scans and quarterly report documents.

It is significant that the PMs have broad authority to decide what information to bring to the SMs from the various councils that they serve on, from some staff members and from bureau chiefs. Some PMs have also received training otherwise reserved only for DSB supervisors.

The fact that the term “senior manager” did not exist before the PM position was created is not suspect, as WSEU has argued herein. Rather, this term was logical and necessary to distinguish the senior managers (who are typically also supervisors) from the PMs, who are managerial only. The DER has correctly pointed out that even the Governor and the DOC Secretary’s decisions can be trumped by the State Legislature so that no manager has the last word on policy. However, the fact that 90% of the PMs’ policy recommendations are followed by senior managers shows that the PMs do in fact function at a relatively high level of responsibility regarding DSB policy.

We also note that the PMs draft code interpretations and revisions which result in policy changes that impact not only DSB employees and customers but the residents of the State of Wisconsin.

Further, some PMs have recommended (and DSB has adopted their recommendations) that unit work be subcontracted, that the time necessary to perform plan reviews be restricted, that certain staff training be purchased and that additional staff be hired in certain areas. These recommendations evidence interest either significantly at variance with the interest of unit employees or demonstrate that the PMs interests are integrated with or more in line with those of management than those of unit employees. Indeed, two grievances have been filed over PM recommendations regarding plan review work time and subcontracting.

The PMs have also been given unrestricted and unfettered responsibilities to represent the DSB with the Legislature and its committees, with the press and with the various councils on which they participate. In contrast, unit employees have none of these responsibilities. Indeed, unit employees do not meet regularly with senior managers as PMs do and unit employees perform unit work for the majority of their time, while PMs normally perform unit work only sporadically. In a 1995 memo regarding the proper role of PMs, the PMs were directed not to do bargaining unit work such as reviewing plans, conducting inspections, delivering credentialing services, answering the telephones on routine matters and conducting routine training sessions. In addition, the PMs and senior managers who testified herein all confirmed that the PMs have not been assigned and have not performed a significant amount of unit work since their appointment as PMs. Further, a 1996 State job announcement for the PM position stated that required knowledge for the position included “general principles of management . . . policy developments and implementation techniques; budget development . . . .” Thus, the PMs involvement in bargaining unit work is de minimus.

Contrary to the assertions of WSEU, the record showed that none of the current incumbents of the PM position took a demotion upon their appointment thereto. In fact, the incumbents who had previously been supervisory/managerial employees not represented by any collective bargaining unit maintained their pay rates upon appointment and the four unit employees appointed as PMs received increases in pay from \$1.54 to \$4.21 per hour upon appointment.

The record makes clear that the PMs spend a vast majority of their time studying, interpreting, developing and disseminating agency code and agency policy and representing the agency at various councils, before the Legislature, with the press and the public. The fact that they do not have separate offices and that they work approximately 40 hours per week does not detract from the managerial nature of their duties. Typically, the PMs work across bureau boundaries usually with Section Chiefs and Bureau Directors to accomplish their tasks. The PMs regularly train unit employees in new code/policy.

Contrary to SEA’s contention, we find that the fact that 4 of 46 work activities in the PM position description use the word “determination” does not mean that the PMs do not in fact determine agency policy at a relatively high level of responsibility. The record fully supports the latter conclusion. Although the PMs do not set the vision, mission statement and goals and objectives of the agency, the record is replete with examples where the PMs have had significant input into all of these areas.

Having found that the Program Managers are management employees based upon their high level role in formulating, determining and implementing management policy, we need not address whether the PMs are management based on authority to allocate resources.

Dated at Madison, Wisconsin, this 20<sup>th</sup> day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner