STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

In the Matter of the Petition of

**WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO**

Involving Certain Employees of

**THE STATE OF WISCONSIN**

Case 11
No. 50909
SE-12

## Decision No. 11245-U

---

In the Matter of the Petition of

**STATE ENGINEERING ASSOCIATION**

Involving Certain Employees of

**THE STATE OF WISCONSIN**

Case 36
No. 50935
SE-13

## Decision No. 11667-D

---

**Appearances:**

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

Lawton & Cates, S.C., by **Attorney P. Scott Hassett** and **Attorney Lisa Pierobon Mays**, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO.

**Attorney David J. Vergeront**, Chief Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

**ORDER DENYING PETITION FOR REHEARING**

On February 15, 2002, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit with Accompanying Memorandum in the above matters wherein we concluded, *inter alia*, that Barbara Moes-Kleifgen and Duane Nelles were not professional employees and ordered them placed in the Technical employees bargaining unit represented by the Wisconsin State Employees Union.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

On March 7, 2002, the State Engineering Association (SEA) filed a petition for rehearing pursuant to Sec. 227.49, Stats., 1/ asserting that the Commission had committed errors of fact and law and further asserting that changes have occurred regarding the positions of Barbara Moes-Kleifgen and Duane Nelles to which the Commission should respond by modifying Findings of Fact 35 and 36 and Conclusion of Law 4.

---

***1/ Section 227.49(3) provides:***

> ***(3) Rehearing will be granted only on the basis of:***
>
> ***(a) Some material error of law***
>
> ***(b) Some material error of fact***
>
> ***(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.***

---

Wisconsin State Employees Union, Council 24, AFSCME (WSEU) filed a reply contesting said petition on March 21, 2002. The State of Wisconsin advised the Commission that it takes no position on the petition.

Having considered the petition, we conclude that we did not commit errors of law or fact material in our decision.

NOW, THEREFORE, it is

**ORDERED**

The petition for rehearing is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Commission Chairperson Steven R. Sorenson did not participate.

**MEMORANDUM ACCOMPANYING**
**ORDER DENYING PETITION FOR REHEARING**

In support of its petition for rehearing, SEA lists four items as to which it asserts there is no record support. SEA complains that:

> **1) Finding of Fact No. 8 – The Commission's Finding With Regard to the Revisions to the Engineering Specialist Classification Specifications in 1994 and 1997 are Erroneous and Are Not Supported By the Record.**
>
> **2) The Application of Fair Labor Standards Act (FLSA) in Classifying Employees as Professional is a Decision That Is Made By the Department of Employment Relations on Behalf of the State as an Employer. The FLSA Definition of a Professional Employee is Very Similar to That Contained in SELRA and One Cannot, With any Intellectual Consistency Find an Employee to be "Professional" Under FLSA While Not So Holding Within the Meaning of SELRA.**
>
> **3) Finding of Fact No. 6 – The Commission's Finding That Approximately 600 Employees Were Moved From the Wisconsin State Employees Union (WSEU) Bargaining Unit As a Result of or Following the 1990 Engieering (sic) Survey is Erroneous and Is Not Supported By the Record.**
>
> **4) The Commission's Findings of Fact Nos. 35 and 36 Do Not Reflect Changes In Duties and Responsibilities That Have Occurred With Regard to Barbara Moes-Kleifgen and Duane Nelles; This is Not Consistent With the Commission's Decision With Regard to Others Who Have Had Changes In Their Duties and Responsibilities as Described in Finding No. 32. Findings of Fact 35 and 36 and Conclusions (sic) of Law No. 4 Should Be Modified For Consistency Based On the Changed Duties and Responsibilities of these Employees.**

Each item will be considered in the order in which it is listed.

1) SEA asserts that the Commission's Finding of Fact 8 is erroneous and not supported by the record. In support of this assertion, SEA points to the testimony of Judith Burke, who, it contends, was the principal author of the 1994 specifications. SEA argues that Burke's

testimony confirms that ". . . her decision to remove the word 'professional' from the 1994 classification specification was based on her belief that the language in the specification stating that the positions were in the Professional Engineering Bargaining Unit was sufficient to indicate the professional status of those in the Engineering Specialist – Transportation classifications – that there was no need to constantly repeat the professional status as had been done in previous drafts of the classification specifications.

Finding of Fact 8 recites as follows:

> 8. On or about October 12, 1997, DER revised the **Engineering Specialist** – Transportation Series Classification by collapsing it from six levels to four levels, to-wit: (in ascending order): Specialist, Journey, Senior, and Advanced. Existing levels of Entry and Developmental were collapsed into one level simply called **Engineering Specialist**. The existing level of Journey remained as Journey. The existing level of Senior remained as Senior. The **Engineering Specialist** levels of Advanced 1 and Advanced 2 were continued, but no employees were at the Advanced 1 level on the aforesaid effective date and it was deemed discontinued as a practical matter.
>
> As in the revision of the **Engineering Specialist** series in 1994, all references to the term "professional" remained omitted.
>
> The omissions of the term "professional" from the revisions in 1994 and 1997 were deliberate and reflected a belief on the part of the DER revision drafters that the classification specifications within said series were not intended to describe professional positions.

We initially note that as to this objection the issue solely pertains to whether the record supports a factual finding that DER *deliberately* eliminated the term "professional." SEA does *not* suggest that the term was not eliminated from the 1994 and 1997 classification specification revisions. We also note that the challenged Finding of Fact does not suggest whether or not the *deliberate* elimination of the term was or was not appropriate – only that it occurred.

In our opinion, SEA's singular reliance on Burke's testimony for support on its objection to this Finding is simply misplaced. We acknowledge that Judith Burke was significantly involved in the 1994 revision (as well as in the original 1990 drafting effort). But what SEA fails to recount is that Burke was unable to recall the reason for deletion of the term "professional" from the revised 1994 classification specifications. When asked (by counsel for SEA) as to the reason for the deletion of the term "professional" from the 1994 classification specifications, Burke's response was not only speculative, but included a disclaimer as to the extent or accuracy of her own memory:

> Well, if they are included in a professional engineering bargaining unit then that's all you need to say, I guess. I'm not sure I recall exactly." (Tr. 3098)

Burke's limited memory was totally consistent with her earlier response when SEA's counsel questioned her on the same point:

> Q. And why were all the references to the term professional taken out of the 1994 classification specifications?
>
> A. I don't know. I don't recall. (Tr. 3095 – 6)

This testimony falls far short of establishing why the term "professional" was deleted from the 1994 classification specifications. Burke's first response to the question was unequivocal: she didn't know and she didn't recall. Her second attempt was, in her own words, a "guess." Even the "guess" was followed by Burke's acknowledgement that she was uncertain of her memory on this point.

In contrast to Burke's testimony, the testimony of James Pankratz is unequivocal and directly supports the Commission's finding that the elimination of the term "professional" was intended and purposeful.

James Pankratz has been DER's Administrator for the Department's Division of Classification and Compensation since 1991. Judith Burke is a subordinate of Pankratz within the Division.

In his testimony, Pankratz frankly acknowledged that as Assistant Administrator of the Division of Classification and Compensation, he was the person responsible for the use of the

term "professional" within the 1990 Engineering Specialist specifications. (Tr. 3752 – 3) He stated that at the time he made his recommendation that the term be included he did *not* believe the Engineering Specialists were professional employees. Notwithstanding his belief, he ". . . stuck it (the term) in there anyway because they were (in) a professional bargaining unit." (Tr. 3754)

Pankratz had no difficulty in recalling why the term "professional" had been subsequently deleted from post-1990 revisions to the Engineering Specialist classifications:

> We have revised the engineering specialist classifications taking out any reference to professional. We still have them in that [SEA] unit, but the professional 111.81 in those class specs has been removed.
>
> Q. And while you've alluded to it, what's the reason for taking out the professional language?
>
> A. Well, we just don't feel they are professional. They're in the unit and we have to respect the union's designations of what those jobs are. But when we go out and do label market surveys, a lot of other times employers ask us, other states and the private sector, ask us for class descriptions and class specifications. We send these things out and we get a lot of mismatches. (Tr. 3680)

On cross-examination Pankratz was pressed on the same point. His answer remained essentially the same:

> "We followed up a few years later on taking professional out of the class specs because of the preponderance of the individuals in there were nonexempt [under the Fair Labor Standards Act] and were not in any other professional bench mark organization that we could find." (Tr. 3774)

In our opinion, Pankratz is a knowledgeable and credible witness. He had played a key role in the original DER engineering survey in 1990, when he functioned as the project

leader -- and in a supervisory capacity to Burke. 2/ Although still in the same division in 1994, he had by then been promoted to the position of Division Administrator. (Tr. 3775) He conducted discussions with his staff on classification issues, and testified that where the classifications were mixed, "we felt they were nonprofessional." (Tr. 3775)

---

***2/ Burke testified that Pankratz was the project leader of the 1990 engineering survey and had the specific responsibility of approving the classification specifications. (Tr. 3070)***

---

Cornell Johnson, a senior analyst that also played a small role in the 1994 revisions and a major role in the 1997 revisions, corroborated Pankratz's testimony that the elimination of the term, "professional," was deliberate. Johnson explained his own basis for recommending that the term be dropped: "If the position required certification," "I would have used the term ["professional"], and if they didn't require any sort of licensure or certification, and I didn't use the term and it's consistent with all other class standards that I developed." (Tr. 3826)

Based on the foregoing, we believe there is sufficient basis for Finding of Fact 8 made by the Commission and decline to give it further consideration.

2) SEA contends that because the definition of "professional" in the Fair Labor Standards Act (FLSA) and the State Employment Labor Relations Act (SELRA) are very similar, to the extent that Engineering Specialists have been classified as "professionals" under the FLSA it is erroneous to find them not to be professionals under SELRA.

In our decision in this matter we observed the following:

> We acknowledge SEA's argument that the Engineering Specialists have been declared "exempt from the provisions of the Fair Labor Standards Act (FLSA). The exemption of employees from the provisions of the FLSA is a determination by a federal agency. That agency's decision was based on its interpretation of a federal statutory framework rather than the Wisconsin statutory framework that must be followed herein. Hence, each decision is made for separate reasons and stands independent of the other. Inasmuch as we have no standing to resolve FLSA issues we decline to comment further.
>
> (Decision No. 11667-C at 52)

We continue to believe this is a correct statement of the law and dispositive of this issue. Accordingly, we find no material error of fact or law.

3) SEA complains that the Commission's Finding of Fact 6 that approximately 600 employees were moved from the Wisconsin State Employees Union bargaining unit as a result of or following the 1990 engineering survey is erroneous and not supported by the record.

The sentence of Finding of Fact 6 questioned by SEA reads in its entirety:

> Said reallocations resulted in an estimated 600 employees moving from the WSEU Technical unit to the SEA Professional Engineering unit and less than 100 employees moving from the SEA Professional Engineering unit to the WSEU Technical unit.

The hearing transcript reflects the following testimony from Karl Hacker, Assistant Director, AFSCME, Council 24, WSEU since 1974. (Hacker was responding to the question of what had happened as a result of the engineering survey).

> What has happened is that our techs, who we had in numbers of hundreds, as roughly as we can calculate, 600 of our people have been moved from the Technical 1, 2 and 3, the Technical series, into the specialist series and we have lost approximately 600 people.
>
> (Direct testimony, Tr. 21)

> Q. Okay. Are you suggesting that the survey resulted in 600 people going from the WSEU Technical unit into the engineering unit?
>
> A. As of that date, yes, not at the time it went into effect, though. At the time it went into effect we were told by DER not to worry, that there were only going to be a handful of people being moved, but over the past few years now, we have lost roughly 600 people. We have local units throughout the state where hundreds of people in these local units are no longer in there."
>
> (Cross-examination, Tr. 27)

Q. And you're suggesting that there were how many Engineering Technicians in the technical unit prior to 1990?

A. We had roughly 700 throughout the state.

Q. So your testimony is that the number went from something like 700 down to something over 100, and the number of classifications in the series doubled?

A. In the specialist series.

Q. In the technical series as far as your unit is concerned, you now had six classifications rather than three?

A. Uh-huh . . .

(Cross-examination, Tr. 30)

Statewide SEA President Ross Johnson, a Civil Engineer-Advanced employed by the Department of Transportation, testified at the hearing in this matter as follows:

Q. Okay. And were there any other people that were affected by the survey? In other words, were there any additional people aside from the Tech 4's, 5's and 6's that came to SEA as a result of the survey?

A. I believe there were some yes.

Q. Okay. And what's your approximation as to what those two were? The ones going to SEA were approximately how many in number?

A. You mean coming into SEA?

Q. Coming, yes.

A. I'll say – let me think about this for a minute. They were probably something between -- I'd say something between 100 and 200 people. That's about as close as I can judge without getting more data.

Q. And approximately how many that were in SEA prior to the survey went in the direction of WSEU?

A. Boy, not many. I wouldn't say probably more than 50. No way, from what I can recall, would it be more than that, just what I'd call a handful of them.

(Direct testimony, Tr. 3472)

We do not perceive the testimony of Hacker and that of Ross as necessarily being in conflict. Hacker, by virtue of his long-held position of Assistant Director of WSEU and Ross by virtue of his presidency of SEA would have been generally aware of the engineering survey's impact on the entity with which each is associated.

Hacker described two results of the survey were to move approximately 600 positions from WSEU to SEA and approximately 100 positions from SEA to WSEU, but specified that this movement took place *over a period of several years*. In our view, Ross's estimate that the impact of the survey was a flow of 100 to 200 positions from WSEU to SEA and not more than 50 from SEA to WSEU referred to the *immediate* impact on the parties.

In any event, neither the estimate of Hacker as to the losses incurred by WSEU over a period of years nor the estimate of Ross as to SEA's immediate gains were material facts in the Commission's decision.

4. SEA complains that Findings of Fact 35 and 36 do not reflect changes that have occurred with regard to Barbara Moes-Kleifgen and Duane Nelles and are inconsistent with Findings of Fact 32 and 33, which recognized others whose duties had changed.

At the time of their respective testimonies in this matter each of the four employees listed in Finding of Fact 32 was employed by DOT at the classification level of Engineering Specialist – *Journey*. Each submitted his or her then-current respective position description into evidence. That was the only evidence before the Commission that described the duties and responsibilities of those four employees. Since hearing, however, each of these four has been promoted and reclassified to Engineering Specialist – *Senior*.

As noted in Finding of Fact 33, the position description of any DOT Engineering Specialist ". . . whose position has been reclassified is altered to reflect the duties and responsibilities of the reclassified position." Inasmuch as we lacked any testimony or altered position descriptions of the reclassified employees described in Finding of Fact 32, we were unable to determine whether or not they were professional employees within the meaning of Sec. 111.81(15), Stats. We so concluded in Conclusion of Law 2.

Although neither Moes-Kleifgen nor Nelles have been reclassified since the time of their testimony, SEA asserts that the duties of each have changed sufficiently to transform the status of each from "technical" to "professional." In support of this contention, SEA has submitted affidavits from each of the two employees annexed to which are the current position descriptions of each.

We have carefully read each affidavit and position description. SEA does not argue nor do we believe that either constitutes "new evidence" within the meaning of Sec. 227.49(3)(c), Stats. Rather, each is submitted in support of the proposition that (1) there has been a change in circumstance pertaining to the positions of Moes-Kleifgen and Nelles that occurred

following the hearing in this matter, and (2) since the Commission took cognizance of the change of circumstances (i.e., reclassifications) as set forth in Finding of Fact 32, it should do the same with respect to the Moes-Kleifgen and Nelles positions.

But the action SEA requests with respect to Moes-Kleifgen and Nelles stands in a substantially different light than the inaction the Commission took with respect to the four employees named in Finding of Fact 32.

In the latter instance, it appeared that following hearing each of the four had been reclassified from which it necessarily followed that their duties and responsibilities had undergone significant modification. The Commission recognized that under this circumstance the evidence adduced at hearing in connection with their former respective positions was no longer current and declined either to take action on it or speculate on the possible status of the reclassified positions.

Here, evidence was submitted at hearing with respect to the positions of Moes-Kleifgen and Nelles, and the Commission made its determination. Following the issuance of that result, a rehearing is sought as to those positions on the basis that the duties and responsibilities of those positions have been modified.

We offer no opinion as to the merits of that allegation. Procedurally, however, we find a Petition for Rehearing an inappropriate vehicle to trigger a review of that allegation. Inasmuch as the petition seeks clarification of positions neither considered (nor pleaded) in the original action herein, such clarification is properly obtainable only through the filing of a new petition for unit clarification.

Dated at Madison, Wisconsin, this 5th day of April, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Commission Chairperson Steven R. Sorenson did not participate.

rb
11667-D