STATE OF WISCONSIN PERSONNEL COMMISSION

NILE OSTENSO,

Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0070-PC

DECISION AND ORDER

A proposed decision and order was mailed to the parties on November 22, 1993. Appellant requested and received an opportunity to present oral arguments to the full Commission. Oral arguments were presented by both parties on January 5, 1994.

The Commission adopts the Proposed Decision and Order as the final decision in this matter, except as follows:

1. In the last paragraph on page 12 of the proposed decision, delete the second sentence and replace it with the following sentence:

> "Therefore, the decision is limited to the more traditional types of analyses such as a comparison of job duties to the class specifications and a comparison to the duties of other positions."

DISCUSSION

At oral arguments, appellant (through his representative) advanced several arguments. The main arguments are discussed in the following paragraphs.

1. Use of Entire Record: Mr. Ostenso faulted the proposed decision for containing background facts about the survey process and panel results. Those facts, however, were derived from testimony elicited by Mr. Ostenso, including a special day of hearing on January 14, 1992. This information was not confined to discovery outside of the record. Rather, it was made part of the

record. There is nothing improper about including those facts in the decision for background information and clarity.

2. Use of Hammers and Wedepohl Positions: Mr. Ostenso said he did not come to hearing with comparable positions because he felt it was clear he met the Advanced 2 classification. He faulted the proposed decision for comparing his position to the positions held by Wedepohl and Hammers on the bases that he did not argue those positions as comparables at hearing and because significant differences exist with those positions as compared to his own.

This argument is surprising. Mr. Ostenso submitted the position descriptions (PDs) of Hammers and Wedepohl as hearing exhibits (App's Exhs. 27 and 28). He also asked his witness, James Schmidt, to compare Mr. Ostenso's job to the position held by Hammers. Further, Mr. Ostenso's initial post-hearing brief argued that the position held by Wedepohl and his own position should be classified the same (App.'s Initial Brief, p. 18). Mr. Ostenso's initial brief also referred to Hammers' position as argument for reallocation of his own position to the Advanced 2 level. (App.'s Initial Brief, p. 19). Even if it were true that Mr. Ostenso did not use Hammers' and Wedepohl's positions as comparables, the information about those positions is in the record and the Commission properly could use such information even if appellant did not. The Commission is not confined to any one party's theory of the case.

3. Appellant's Witnesses: Mr. Ostenso contended at oral arguments that the hearing examiner rejected the testimony of his witnesses. He provided no specific examples to support his claim.

The hearing examiner adopted many aspects of the testimony from Mr. Ostenso's witnesses. For example, the three-step process for setting effluent limitations was taken from James Schmidt. (See par. 16 of the Findings of Fact, section A, second paragraph). The non-prescriptive aspect of appellant's job and the resulting need to exercise professional engineering judgements were taken from the testimony of Charles Ledin and John Sullivan. (See par. 16 of the Findings of Fact, section A, third paragraph). The particular difficulties faced by lack of technology also was based upon the testimony of John Sullivan. (See par. 16 of the Findings of Fact, section A, third paragraph.)

The general approach of the examiner was to assume that Mr. Ostenso had the best insight on the duties he performed, followed by others he worked

with such as his supervisor. Where his witnesses were engineers, the examiner gave deference to the engineering opinions given.

The Commission suspects that Mr. Ostenso feels the examiner also should have given deference to his engineer witnesses' opinion on how his job duties met the Advanced 2 class specifications. The examiner did not give automatic deference to such opinions because expert witness engineers are not uniquely qualified to apply the facts to the class specifications.

4. PDs as Hearsay: Mr. Ostenso argued that reliance on information contained in position descriptions (PDs) without supporting testimony from the incumbent is error. The Commission disagrees.

The hearing examiner could admit PDs into the record even if they were considered hearsay. As noted in PC 5.03(5), Wis. Admin. Code, the Commission is not bound by common law or statutory rules of evidence. However, the Commission could not base a finding of fact on hearsay evidence alone.

The Commission, however, finds that the PDs are not hearsay. Rather, they are an exception to hearsay, under s. 908.03(24), Stats., as regularly-kept business records dated and signed as correct by the incumbent and the incumbent's supervisor. PDs are documents upon which many significant decisions are routinely made such as classification, pay range, inclusion in a bargaining unit, etc. Furthermore, appellant's counsel did not raise a hearsay objection at hearing. Such argument raised after the proposed decision was mailed and at oral arguments before the Commission (and without prior notice to the opposing party) comes too late.

5. Narrow Scope of DHSS Advanced 2 Engineering Positions: Mr. Ostenso faulted the discussion in the proposed decision regarding the narrow scope of his position on the grounds that the positions held by nine DHSS Advanced 2 engineers have an even narrower scope. The DHSS engineers went to the Advanced 2 level based on the second panel scores of their WQES, not based upon a traditional analysis using the class specifications. This difference was discussed in the proposed decision. (See the second paragraph on page 12 of the proposed decision.)

The dual route to achieve classification was a concern identified by the hearing examiner. (See last paragraph on page 12 of the proposed decision.) The appellants in the companion cases (Hubbard, Sanders, Lulloff and Mangardi) were scored by the second panel and those scores were in the

record. This enabled the examiner to review the second panel scores in an attempt to provide those individuals with the same opportunities to achieve the Advanced 2 level as existed for others (such as the 9 DHSS engineers). Mr. Ostenso, however, was not rated by the second panel. The alternative analysis, therefore, was not available for Mr. Ostenso's case. The decision language concerning this argument was amended for clarification.

ORDER

That the Proposed Decision be adopted as the final decision, with the amendment noted above.

Dated April 13, 1994.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, *within 20 days after service of the order, file a written petition with the* Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all

parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

STATE OF WISCONSIN PERSONNEL COMMISSION

NILE OSTENSO,

Appellant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0070-PC

PROPOSED DECISION AND ORDER

The record in Mr. Ostenso's case includes the following: 1) Testimony taken on January 14, 1992, which was common to Mr. Ostenso's case as well as to the following cases: a) Allen J. Hubbard v. DER, (Case No. 91-0082-PC), b) Sanders v. DER, (Case No. 90-0346-PC), c) Allan Lulloff v. DER, (Case No. 90-0347-PC) and d) Mangardi v. DER, (Case No. 90-0335-PC); 2) Ostenso-specific testimony taken over two hearing dates; and 3) Stipulated facts signed by the parties on July 31, 1992. Commissioner Gerald F. Hoddinott presided for all hearing dates.

A status conference was held on October 19, 1993, to resolve remaining procedural matters. Both parties indicated they had no objection to using the portion of Exhibit D attached to the stipulation dated July 31, 1992, even though the exhibit is incomplete. Both parties waived objections to the form of this decision being issued with detailed findings, etc., which otherwise would have been issued in summary form, pursuant to s. 227.47(2), Stats., created by 1993 Act 16, s. 3020.

The hearing issue agreed upon by the parties is shown below.

> Whether respondent's decision to reallocate appellant's position to the Water Resources Engineer-Advanced 1 level rather than the Water Resources Engineer-Advanced 2 level was correct.

Subissue: Whether appellant's position is more appropriately classified at the Water Resources Engineer-Advanced 1 or Water Resources Engineer-Advanced 2 level.

FINDINGS OF FACT

1. In 1988 and 1989, the Department of Employment Relations (DER) conducted a survey for all engineers employed by the State of Wisconsin. DER worked with state agencies which employed engineers to identify positions in the agencies which were representative of the types of work engineers did in each agency. Seventy-seven representative positions from 12 agencies were identified for assessment by a panel of 13 experts (the Master Rating Panel) chosen for their knowledge of the engineering work done in various state agencies, including two panel members from the Department of Natural Resources (DNR). The positions reviewed are hereafter referred to as the "Benchmark Positions".

2. The 77 incumbents of the Benchmark Positions each completed a Wisconsin Quantitative Evaluation System (WQES) questionnaire. The questionnaire asked each incumbent in the Benchmark Position to provide information specific to the Benchmark Position on the following nine factors: knowledge, complexity, discretion, consequence of error, effect of actions, physical effort, personal contacts, hazards and surroundings. Each panel member also had a copy of all 77 positions descriptions (PDs), as well as a description of the related agency programs. All information provided was to be accurate as of June 17, 1990.

3. Based on the information noted in the prior paragraph, each panel member scored the complexity factor for all 77 positions. DER staff scored individuals for the hazards and surrounding factors. The panel members were split into two groups with each group scoring half of the remaining factors for each benchmark position.

4. DER arrived at a total score for each of the 77 Benchmark Positions by taking the panel's score for each factor and multiplying it by a set figure to give "weight" or emphasis to the factors. DER listed the resulting scores numerically along a continuum. Some positions clustered near or at similar scores, whereas other positions fell between clusters. DER assigned the

between-cluster positions to the cluster immediately above or below it, depending on which cluster was most like the between-cluster position.

5. The classification levels were created for each cluster of Benchmark Positions. Pay range assignments were determined through bargaining with the union which represented engineers in classified civil service. DER finalized class specifications based upon the Master Rating Panel results and the bargaining process. After bargaining, all non-benchmark engineering positions were evaluated by comparison to the Benchmark Positions using one of three methods authorized by DER. DNR chose the method referred to as "whole-job analysis."

6. Mr. Ostenso worked at DNR. His position was not a Benchmark Position rated by the Master Rating Panel. Rather, his position was evaluated by a DNR panel using the "whole-job" analysis. DNR sent the results to DER and DER assigned classifications to the results. DER classified Mr. Ostenso's position as a Natural Resource Engineer-Senior.

7. Suzanne Steinmetz, a specialist from DNR's personnel office worked with DER on the DNR positions to determine whether the results which placed no DNR positions above the senior level were correct. After this re-review, about 23 of DNR's 90 engineering positions were placed at the Advanced 1 level, and Mr. Ostenso's position was part of this group which went to the Advanced 1 level.

8. DER convened a second panel in February 1991, to consider the informal appeals which is hereafter referred to as the Second Panel. Mr. Ostenso's position was not included for review by the Second Panel. The Second Panel did not compare positions to the class specifications. Rather, the Second Panel reviewed positions to arrive at a numerical score as did the Master Rating Panel, except Second Panel members evaluated all factors (except hazards and surroundings) for all positions and such evaluation took into account the information considered by the Master Rating Panel (where the position was a Benchmark Position), as well as information submitted by the engineers for their informal appeals. About 30 of the 40 reviewed positions went to the Advanced 2 level as a result of the Second Panel process.

9. The 40 appeals mentioned in the prior paragraph were submitted to the Second Panel in 26 packets, with some packets applying to more than one

position. The resulting total scores were adjusted due to demonstrated bias which panel members from one agency (not DNR) showed to individuals employed by that agency.

10. On May 23, 1991, Mr. Ostenso filed a formal appeal with the Personnel Commission claiming his position should be at the Advanced 2 level.

11. A DNR engineering position held by Richard Wedepohl was evaluated by the Second Panel as meriting the lowest score for qualification to the Advanced 2 level. The Second Panel scores for Mr. Wedepohl are shown in the chart below, as is the average score given for the 26 packets reviewed by the Second Panel.

Factor	Wedepohl	Ave. Score	Weight
Knowledge	6.56	6.64	25
Discretion	3.78	3.68	15
Effect/Acts	3.56	3.79	10
Complexity	4.11	4.18	20
Conseqc/Err	4.89	5.21	10
Phys. Effort	1.11	1.21	5
Pers Contacts	4.47	3.58	10
Hazards	1.77	1.88	2.5
Surroundgs	2.00	1.55	2.5
Total	(446.9)	(433.56)	
Adjusted Total	441.4	437.35	

12. Mr. Wedepohl's position is classified as a Water Resource Engineer at the Advanced 2 level. His position is located in DNR's Bureau of Water Resources Management in the Evaluation and Special Projects Section. He is solely responsible statewide for designing specific controls for lake restoration and protection projects and for setting standards for use by engineering firms retained by individual communities to complete specific projects. Few established criteria or guidelines exist leaving the majority of his work in uncharted areas. The complexity and knowledges required of this position are great as evidenced by cross-program ties involving multiple engineering areas. Specific cross-program ties include: Wastewater (discharge to lakes); Tech Services (laboratory certification), Solid Waste (landfill sitings, hazardous waste cleanup), Air (atmospheric deposition of mercury, PCB's, nutrients); Water Regulation (shoreland zoning and Ch. 30 permits), Parks (management of lake use and park grounds); Fisheries (stocking and habitat

improvement practices), and Wildlife (wetland habitat management, new site construction). Some further details of his position are noted below using the organization shown in section 15 of his PD.

Time %	Worker Activities
35%	A. Direct the development of the technical aspects of a comprehensive, statewide, lake management program and provide guidance on the same to federal agencies. Includes a broad range of duties related to lake restoration and protection projects on a statewide basis.
15%	B. Obtain, manage, and direct the use of state and federal grants for lake protection and improvement projects. Includes supervision of state and federally funded lake projects to ensure use of sound engineering principles and practices.
25%	C. Provide engineering direction and consultative services to lake organizations and their engineering consultants, other department and state agency program staff, and federal agencies for lake studies and implementation projects. Consultation covers all aspects of lake management strategy including study design, monitoring and development of necessary engineering documents for project implementation. Responsible for assisting and guiding other DNR Bureau programs in developing comprehensive and coordinated solutions to lake related problems.
25%	D. Serve as the primary state expert and spokesman on complex lake water quality and comprehensive management issues. Such expertise is provided to lake associations, districts, government units, legislature and consultants to lake communities.

13. The class specifications for Water Resource Engineers (Mr. Wedepohl & Mr. Ostenso) contain the following classification levels listed in order of hierarchy: Entry, Developmental, Journey, Senior, Advanced 1 and Advanced 2.

14. The class specifications for Water Resource Engineers (Mr. Wedepohl & Mr. Ostenso) are based on the following factors: i) knowledge required, ii) job complexity, iii) consequence of error, iv) effect of actions, v) amount of discretion, vi) physical effort, vii) surroundings, viii) hazards, ix) personal contacts and x) supervisory responsibilities.

15. The text from the class specifications for Water Resource Engineers (Mr. Wedepohl & Mr. Ostenso) at the advanced levels is shown below.

Advanced 1: This is very difficult advanced water resource engineering work. Employes in this classification will typically serve as the department expert in a broadly defined segment of the water resource program. The area of responsibility will normally cross program boundaries, require continually high level contacts with private consultants, municipal officials, directors of public works, city administrators, industry officials and engineers for major industries regarding highly sensitive and complex engineering reviews and have significant programwide policy impact. The area of expertise will represent an important aspect of the program, involve a significant portion of the position's time and require continuing expertise as the field progresses. The knowledge required at this level include a broader combination than that found at the Water Resource Engineer-Senior level. Assignments are broad in scope and continually require the incumbent to use independent judgement in making professional engineering decisions. Positions at this level make independent decisions and perform work in response to program needs as interpreted by the employe with the work being reviewed after the decisions have been made.

Advanced 2: This is very difficult complex professional water resource engineer work. Employes in this class continually perform the most complex engineering reviews for the assigned area. The work assigned is typically in uncharted areas with essentially no guidance to follow. Employes at this level typically provide direction to other engineers assigned to the project. Work involves the development of policies, standards, procedure development, evaluation and administration. Employes at this level function as the chief technical consultant. Employes at this level are delegated authority to make the final engineering decision.

16. Mr. Ostenso's position in DNR is located in the same bureau as Mr. Wedepohl's, but in the Surface Water Standards Program Unit of the Surface Water Standards and Monitoring Section. He is a licensed professional engineer with a bachelor and masters degree in geology. A summary of the responsibilities of Mr. Ostenso's position in June 1990, are given below using the organization shown in section 15 of his PD. He functions as the unit's technical advisor in the following specialty areas: wastewater treatment additives, Zone of Initial Dilution (ZID) and Mixing Zone (MZ), as well as liaison with water quality modelling staff. Every permit involves MZ issues to some extent. Mr. Ostenso, however, gets the most complex MZ work and functions as lead technical advisor on MZ issues in the unit.

Time %	GOALS AND WORKER ACTIVITIES

40% A. Independently establishes effluent limitations for controlling conventional, toxic, and organoleptic substances for complex, major, and minor surface water dischargers in accordance with NR 102-106, 207, 210 & 212 , Wis. Admin. Code. In addition, the establishment of discharge requirements for Superfund and groundwater remediation sites is an important part of the effluent limit setting process.

Three basic steps are involved in setting effluent limitations. First, NR 105, Wis. Admin. Code is consulted to determine the primary use of the specific water body class which indicates the aquatic habitats mainly protected. The wildlife and people use of the water body must also be considered. Second, the actual discharge limits are calculated for the substances. The calculations vary based on site-specific information; such as degree of water flow, whether this water body flows into another, etc. The site-specific information is provided by the permit-requestor, staff in the Bureau of Wastewater Management (in the same Division as Mr. Ostenso's Bureau), district office staff or prior in-house studies. Third, look to NR 106, Wis. Admin. Code, to determine permit conditions if water quality concerns exist. Place concerns into written report to include recommendation for permit limitations which do become part of the final permit. The DNR codes provide guidance but professional engineering judgements still are required. The codes are not so prescriptive as to be characterized as a "cookbook". Where the effluent limitations are contested, provides testimony during legal proceedings.

This work is more complex when the technology does not exist to accomplish the standards recommended, in which case alternative solutions must be established. Also, some measurements are at such low levels that laboratory techniques do not exist to measure substances in such small quantities. Alternatives must be developed for those situations as well.

15% B. Development and coordination of the Bureau's statewide program on the decentralized review of water quality based effluent limitations for waste water treatment additives (one area of specialization).

This specialty of cooling water additives involves, for example, zebra muscle colonies attaching to and blocking discharge pipes. The methods used to eliminate the problem without harming the water body (and its aquatic life) are in the developing stages, without much guidance to follow.

10% C. Functions as the section's technical expert on the policy, technology, and procedures for establishing ZID and MZ as applied to the determination of water quality based effluent limitations on a statewide basis.

10% D. Development of procedures for enactment of administrative codes to translate water quality criteria into water quality based effluent limitations.

His only work in this area has been in regard to thermal limits for power plants. DNR's prior administrative code was ruled invalid by Wisconsin courts. Mr. Ostenso participates in a cross-divisional team to develop a new code.

(E: Does not exist in original. See App. Ex. 25.)

5% F. Participates in the formal review process for water quality variances requested under s. 147.05, Stats.

5% G. Develops and revises water quality criteria for fish and aquatic life for each of the stream use classifications.

5% H. Professional development and organizational responsiveness.

5% I. Works with other department staff to achieve water quality management planning objectives. His expertise area of liaison to computer modelling staff is included here.

5% J. Corresponds with professional engineers, technical, municipal and industrial personnel, legislators, state and federal officials, the court and the general public regarding all objectives as the need arises.

17. Mr. Ostenso feels his position is comparable to the position held by Michael D. Hammers who is classified as an Advanced 2 level of the Wastewater Engineer series. Mr. Hammers works in the same Division as Mr. Ostenso, but in the Industrial Wastewater Section of the Bureau of Wastewater Management. Mr. Hammers' work involves difficult engineering tasks often in uncharted areas. Mr. Hammers' duties are summarized below and correspond with the organization used in section 15 of his PD.

Time % Worker Activities

20% A. Coordination of the reissuance of all Pulp and Paper Mill permits. Coordination occurs with section staff, Department staff, industry organizations, other states and the federal EPA.

6% B. Serve as team leader for the Pulp and Paper Industry Technology Team. This is a multidisciplinary team and is comprised of experts in air, land, water and biological resources. The experts are DNR employees from several

bureaus and districts. Includes advising the Division Administrator and Department Secretary on pulp-and-paper-industry issues.

25% C. Development and coordination of toxic pollutant effluent limitations in connection with a variety of activities including the following. Review complex wastewater permits. Participate in writing, promulgating, and reviewing related administrative codes. Serve as the Department expert on toxic effluent limits in the WPDES program. Represent the Bureau in any department-wide effort relating to this topic and wastewater discharge. Requires close working relationships with different Bureaus. Provide guidance to Department staff, industries and the public. Represent the Bureau and Department when working with local or federal agencies, others dealing with toxic pollutants in wastewater discharge.

25% D. Preparation of WPDES discharge permits and evaluation of related data and correspondence.

10% E. Review of engineering plans and specifications for proposed industrial wastewater treatment and/or disposal facilities. Draft plan approvals for section chief's signature.

5% F. Participation in the enforcement of WPDES discharge permits.

5% G. Review of environmental impact reports and preparation of environmental impact preliminary reports and subsequent final statements of major new industrial wastewater sources.

2% H. Representation of Department technical positions and applicable regulations at public hearings and in courts of law regarding work goals A through F above.

2% I. Consultation with professional engineers, other Department staff, public and industrial officials and the general public regarding work goals A through E above.

18. The class specifications for Wastewater Engineers (Mr. Hammers) contain the same hierarchy levels as exist for Water Resources Engineers (Mr. Wedepohl and Mr. Ostenso). The class specifications for the Advanced 1 and 2 levels are similar for Wastewater Engineers as for Water Resource Engineers.

19. Mr. Ostenso meets most of the Advanced 1 text from the class specifications for Water Resource Engineers. He performs very difficult advanced engineering work in the surface water standards program. He is a department expert for the following subjects in that program: ZID/MZ,

additives and (to a lesser degree) his liaison with computer modelling staff; all of which (when combined) involve a significant portion of his time (30%) and require continuing expertise as the fields progress. It would be stretching terms to characterize these expertise areas as a "broadly-defined segment of the program" (language cited from the Advanced 1 class specifications). His work does not cross program boundaries (as would be normal according to the Advanced 1 class specifications), but does require high level and complex contacts regarding highly sensitive and complex engineering reviews which have a significant programwide policy impact (as noted in the Advanced 1 class specifications). His work meets the remaining advanced 1 factors.

20. Mr. Ostenso's position does not compare favorably to Mr. Wedepohl or Mr. Hammers based on a review of the applicable class specifications. His areas of expertise are not as broad in scope as those noted in the positions for Mr. Wedepohl and Mr. Hammers. Mr. Wedepohl has expertise over an entire program (lake restoration) and Mr. Hammers over an entire industry (pulp and paper mill pollution), whereas Mr. Ostenso's focus is narrowed to certain aspects of water pollution. Furthermore, while all three positions provide advice to the industry, outside consultants, outside engineers, etc.; Mr. Ostenso's position focuses on providing consultation to DNR staff at the section and sometimes bureau levels; whereas the in-house consultation provided by Mr. Wedepohl and Mr. Hammers is done on a broader base at the department or division levels.

21. Mr. Ostenso's engineering work involves multiple engineering disciplines, but not on a cross-program basis.

22. Mr. Ostenso performs the most complex engineering reviews but only relating to his specialty areas which are narrow in scope, as compared to Mr. Wedepohl and Mr. Hammers. The work in uncharted areas is limited to the additives specialty area. He provides direction to other engineers but only in relation to his narrow specialty areas. Similarly, his work with policies, standards, etc.; would occur mainly in his specialty areas. He does function as the chief technical consultant in his specialty area, but again, Mr. Wedepohl and Mr. Hammers have broader-based consultation areas.

23. Mr. Ostenso specifically mentioned two examples as involving development of policies, standards, procedure development, evaluation and

administration. First, he is involved with the interdisciplinary team which is rewriting the administrative code for thermal limits for power plants (less than 10% of his time). Second, he processed the second variance request under the new administrative code and thereby helped to establish procedures for future variance requests. The first example concerns a narrow topic which may involve an interdisciplinary team, but does not cross program lines. The second example is more of a procedural byproduct relating to his work than engineering-related guidance as envisioned by the class specifications.

24. Mr. Ostenso claimed he provided direction to other engineers mainly due to the fact that the effluent standards he recommends are included by staff from the Bureau of Wastewater Management as permit limitations. The testimony was not very clear on this claim. It appears that other Bureau staff are somehow obligated to include the effluent recommendations set by staff in Mr. Ostenso's unit. However, it did not appear that such obligation was due to any oversight responsibility which Mr. Ostenso had over a broader segment of the program or over staff in the other Bureau.

25. The class specifications for Water Resources Engineer-Advanced 1 best fit Mr. Ostenso's position.

Conclusions of Law

1. This matter is properly before the Commission pursuant to s. 230.44(1)(b), Stats.

2. The appellant has the burden to show that respondent's decision to reallocate his position to Water Resources Engineer-Advanced 1 level was incorrect.

3. The appellant has not met this burden.

4. The respondent's decision to reallocate appellant's position to Water Resources Engineer-Advanced 1 instead of Water Resources Engineer-Advanced 2 was not incorrect.

Discussion

The evidentiary standard for reallocation cases in a nutshell is as follows: The employe who is asserting that his position should be classified at a higher level has the burden of proof, and must establish the requisite facts by a preponderance of the evidence. Furthermore, if the trier of fact feels the evidence on each side of a disputed issue is equally weighted, or that the respondent's evidence is more weighty, then the appellant cannot prevail as to that factual issue. Tiser v. DNR & DER, 83-0217-PC.

Trying to determine the difference between an Advanced 1 and Advanced 2 engineer might have been easier for everyone concerned if the class specifications had been used for comparison against all engineering positions. Instead, the class specifications were derived from perceived common threads from the Master Rating Panel scores without a later attempt to determine if the score for each individual position was consistent with the class specifications developed. The Second Panel also used the numerical scoring system and, again, there was no attempt to determine if the results were consistent with the class specifications. Thus two potential routes to the Advanced 2 level appeared to exist: those positions which merited a sufficiently high numerical score to warrant the cutoff without strict regard to the class specifications, and those positions which met the class specifications.

The record supports a conclusion that multiple engineering disciplines and multiple program areas appeared as common factors with most Advanced 2 positions. Furthermore, these distinctions made sense in terms of the classification factors common to all engineering positions, as well as in regard to the language used in the Advanced 1 and 2 class specifications. The exceptions to this rule appeared to involve positions which met DER's panel-score cutoff for Advanced 2 without regard to the class specifications.

The record in this case did not enable the examiner to assign a purely numerical score to Mr. Ostenso's position, at least not with a sufficient level of confidence over any resulting numbers. Therefore, the more traditional analysis of comparing PDs to the class specifications was used.

ORDER

Respondent's action is affirmed and this appeal is dismissed.

Dated:_____, 1993 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

JMR

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

cc: Richard Thal
David Vergeront