

11/29/93

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JAMES B. SMITH,

Appellant,

v.

Secretary, DEPARTMENT OF  
EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0162-PC

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INTERIM  
ORDER<sup>1</sup>

This matter is before the Commission to consider a proposed decision and order issued by the hearing examiner. Neither party has filed objections. While the Commission will adopt the proposed decision and order as its disposition of this matter, it adds the following discussion.

The proposed decision engenders concern about the actions apparently taken by respondent in dealing with the Advanced 1 positions as a result of the appeals that ensued after the survey implementation. The proposed decision states that the civil engineer class specification was developed as a result of the Wisconsin Qualitative Evaluation System (WQES) analysis of representative engineering positions performed by the master rating panel. Following the implementation of the survey, respondent convened a second rating panel. The positions the second panel scored higher than average were all reallocated to the Advanced 2 level, notwithstanding that a number of them did not appear on this record to have satisfied the criteria in the Advanced 2 definitions of having "the authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects."

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<sup>1</sup> Pursuant to §227.485(5), Stats., this decision is being issued as an interim or proposed decision, and the prevailing party has 30 days after service in which to submit "an itemized application for fees and other expenses, including a itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." If such an application is submitted, respondent will have 15 working days from the date of receipt of the application to respond in writing.

The parties did not really address at the hearing the analysis DER followed in deciding how to proceed with the allocations following the second rating process. On this record, there essentially are two ways to look at what DER did when it reallocated certain of the Advanced 1 positions following the second rating panel. The proposed decision implies that DER simply ignored the definitional language in the class specifications and reallocated to the Advanced 2 level those positions the second rating panel rated above average. If the positions in question did not in fact satisfy the Advanced 2 criteria contained in the class specifications, DER should not have reallocated the positions to that level without having amended the class specifications, see §ER 2.04(2), Wis. Adm. Code ("Class specifications shall be the basic authority for the assignment of positions to a class."). Under this view of what occurred, appellant would not be entitled to the reallocation of his position to the Advanced 2 level on the basis of a comparison to the Facilities Needs Analysis positions in DHSS, which also were reallocated to the Advanced 2 level, if appellant's position does not in fact meet the Advanced 2 criteria. See Augustine & Brown v. DATCP, 84-0036, 0037-PC (9/12/84) ("To reclassify a position simply because another comparable position is inappropriately classified would compound an error."); Sullivan & Ameson v. DER, 88-0136, 0137-PC (9/13/89) ("If the proper classification level were in doubt, the fact that most of the positions found to be equivalent were classified at the higher level would be relevant to the question of the proper classification of the position. However...where it is clear what the proper classification of the subject position should be, the fact that a number of positions are misclassified, as opposed to a single position, sheds little light.").

However, another way to look at what occurred involves a focus on Section I.A. of the civil engineer class specification, "Purpose of this Classification Specification." That paragraph includes the following:

This classification specification will not specifically identify every eventuality or combination of duties and responsibilities of positions that currently exist, or those that result from changing program emphasis in the future. Rather, it is designed to serve as a framework for classification decision-making in this occupational area.

Section I.F. ("How to Use this Classification Specification") includes the following:

In most instances, positions included in this series will be clearly identified by one of the classification definitions...However, a position may evolve or may be created that is not specifically defined by one of the classification definitions. In classifying these positions, it would be necessary to compare them to the classification factor definitions...to determine the appropriate level of the job.

Reading these two provisions together, it can be concluded that in the event that a position is not specifically identified by one of the class definitions it is appropriate, according to the class specification, to look to the WQES factors to make a final decision on the appropriate classification for the position.

As discussed in the proposed decision, neither appellant's position nor a number of other positions identified on this record satisfy the Advanced 2 criteria of having "authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects." (emphasis added) However, these positions also do not satisfy certain Advanced 1 criteria:

This is advanced level civil engineering work performing very complex technical design, project management, trouble-shooting, and consultation involving civil engineering projects. Positions at this level differ from lower level positions in that the range of assignments is broader, more complex, the level of decision-making is broader allowing positions to make decisions on allocating funds for projects...(emphasis added)

The positions in question are not involved in either project management or allocating funds for projects. Based on these considerations, it could be inferred that respondent turned to more or less exclusive reliance on the WQES class factors following the implementation of the survey and the informal appeal process because of the conclusion that the definitions in the class specifications were inadequate to describe a number of the affected positions.<sup>2</sup> This approach would be consistent with the language in §§I.A. and I.F. of the class specification that the specification "will not specifically identify every eventuality or combination of duties and responsibilities of positions that

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<sup>2</sup> As discussed on ppg. 7-8 of the proposed decision, this aspect of the class specification may reflect DER's apparent interest (at least at one point in the process) to use these classifications for project manager-type positions, which are substantially different in nature from plan review, code development, and other similar positions which figured heavily in this case.

currently exist...In classifying these positions, it would be necessary to compare them to the classification factor definitions..." It also should be noted that, while appellant's position does not satisfy all the criteria at either the Advanced 1 or Advanced 2 level, it is a "better fit" at the Advanced 2 level than at the Advanced 1 level. The proposed decision alludes to this at pages 25-26, where it points out that the appellant's position is better described by the Advanced 2 definition than are the Facilities Needs Analysis positions.

In conclusions, due to the narrowness of the issue for hearing,<sup>3</sup> and the way this case was tried, there was no testimony about how respondent reached its conclusion to reallocate to Advanced 2 all of the positions that were scored above average by the second rating panel, and in so doing how respondent addressed the definitional language in the class specification. The Commission would not condone reallocation of positions (including appellant's) to the Advanced 2 level that do not satisfy the requirements for that level as set forth in the civil engineering class specification. However, since this specification specifically provides for reliance on the WQES factors when a position is not specifically identified by one of the class specifications, and neither appellant's position nor the ones he relies on for purposes of comparison satisfy all of the criteria in either the Advanced 1 or Advanced 2 definitions, the Commission, in the absence of any specific contradictory evidence, concludes that this case does not involve reallocations contrary to the class specifications, and will adopt the proposed decision.


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<sup>3</sup> Whether respondent's decision to reallocate appellant's position to Civil Engineer Advanced 1 instead of Civil Engineer Advanced 2 was correct."

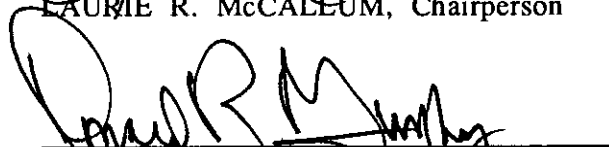
ORDER

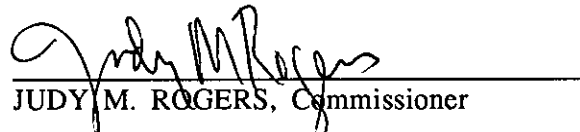
The proposed decision and order, a copy of which is attached and incorporated by reference as if fully set forth, is adopted as the Commission's final disposition of this matter, and respondent's action reallocating appellant's position to Civil Engineer - Advanced 1 rather than Civil Engineer - Advanced 2 is rejected, and this matter is remanded to respondent for action in accordance with this decision.

Dated: November 29, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:dkd:lrn

  
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.)

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JAMES B. SMITH,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
 Respondent.

Case No. 91-0162-PC

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PROPOSED  
 DECISION  
 AND  
 ORDER

This is an appeal pursuant to §230.44(1)(b), Stats., of the reallocation of appellant's position to Civil Engineer - Advanced 1 (CEA 1) rather than Civil Engineer - Advanced 2 (CEA 2). Unless otherwise noted, the facts discussed below are as they existed prior to the effective date of the reallocation in question -- June 17, 1990. This decision will first outline the survey/reallocation process and then discuss the classification issues this appeal raises.

Respondent conducted a survey of engineering positions that culminated in reallocations effective June 17, 1990. This survey covered approximately 1800 engineering-oriented positions. Respondent convened a rating panel of 13 subject matter experts including two from DILHR (Ron Buchholz, Deputy Administrator, Division of Safety and Buildings, and John Eagon, Director, Bureau of Buildings and Structures), who were all engineering supervisors.

The panel evaluated 77 positions which respondent had selected as representative of the positions being surveyed. The panel utilized completed job content questionnaires containing information about each of the representative positions. The panel evaluated the questionnaires with respect to the seven WQES (Wisconsin Quantitative Evaluation System) factors: knowledge, discretion, effect of actions, complexity, consequence of error, physical effort, and personal contacts. The panel was split into two groups. One group evaluated the composites for three of these factors plus complexity. The other group evaluated the positions as to complexity and the other three factors. The positions also were evaluated as to two other WQES factors (hazards

and surroundings) based on respondent's personnel staff's compilations of the multiple choice type answers on the questionnaires.

Following this scoring process, respondent's personnel staff did a "cluster analysis" of the scores to see where the groupings of scores were, and how many levels appeared from this process. Subsequently, the class specifications were developed based on this rating and statistical analysis process. The class specification for the civil engineer series (Appellant's Exhibit 1) included the following under the section "How to Use This Classification Specification."

... In most instances, positions included in this series will be clearly identified by one of the classification definitions which follow below in Section II of this classification specification. However, a position may evolve or may be created that is not specifically defined by one of the classification definitions. In classifying these positions, it would be necessary to compare them to the classification factor definitions described in Section I.E. of this specification and use the Wisconsin Quantitative Evaluation System (WQES), developed for this purpose by the Department of Employment Relations to determine the appropriate level of the job.

The classification factor definitions referred to in this section of the class specification are the same factors used by the master rating panel described above (in addition, this document contains a factor for supervisory responsibilities). The class specification also includes the following CEA 1 and CEA 2 definitions and representative positions:

Civil Engineer - Advanced 1

Civil Engineer - Advanced 1-Management

This is advanced level civil engineering work performing very complex technical design, project management, troubleshooting, and consultation involving civil engineering projects. Positions at this level differ from lower level positions in that the range of assignments is broader, more complex, the level of decision-making is broader allowing positions to make decisions on allocating funds for projects, and the level of direction given to the employe is general policy direction. Work is performed under general supervision.

REPRESENTATIVE POSITIONS

Department of Health and Social Services

Health Facility Engineer - Located in the Bureau of Quality Compliance, Facilities Needs Analysis Section. Under the general policy direction of the Section Chief, these positions are responsible for conducting on-site surveys of hospitals, long-term care facilities,



community based residential facilities and other health care facilities, and evaluations of the physical plant to ensure quality and appropriateness of buildings and compliance with state and federal statutes and regulations; providing expert professional engineering consultation to hospital boards, county agencies, nursing homes, professional architectural and engineering consultants and inter-agency personnel to promote the improvement of the physical plant in long-term care facilities, hospitals and other health care facilities; conducting reviews of new construction plans for approval prior to construction and conducting on-site construction inspections to assure compliance with approved plans and specifications; conducting pre-licensure inspection to assure compliance with state health codes prior to occupancy; analyzing and interpreting existing and proposed federal/state legislation and its requirements, and providing pertinent information and expert testimony in a variety of situations to legislators, legislative committees, public officials, public and private organizations and the general public.

#### Department of Industry, Labor and Human Relations

Building Plan Reviewers - Positions at this level perform the full range of plan review functions performed at the lower levels and, in addition, research and recommend complex petitions for variance, and provide expertise regarding specialty plans or unique conditions presented in plans, such as barrier-free design, controversial or experimental procedures, specialty code application requiring knowledge of the special code provisions, or other highly specialized issues. Positions at this level apply the most complex of engineering principles to situations, presented and are able to resolve the most difficult building plan design problems.

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#### Civil Engineer - Advanced 2

This is the most advanced level civil engineering work performing the most technically complex assignments in civil engineering for a statewide program. Positions at this level are involved in policy, standards and procedure development, evaluation and administration for the specialty area. Employees at this level function as the state chief technical consultant to other architects, engineers, managers and supervisors on assigned projects. Work is performed under general policy direction with the authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects.

Due to the need to implement the survey within a relatively short period of time, respondent was forced to rely heavily on employing agency personnel staff to make the reallocation decisions for specific positions, and respondent's staff was unable to examine each position that was reallocated. Appellant's position in the Plan Review Section, Bureau of Buildings and Structures,

Division of Safety and Buildings, DILHR, was reallocated from Civil Engineer 5 to CEA 1, and he appealed.

With respect to those employees who appealed the initial reallocations of their positions and who were seeking movement from the CEA 1 to the CEA 2 level, respondent's staff made a policy decision that the most overriding difference between positions at these levels is the complexity of the work, and that the evaluation of complexity should be done by subject matter experts. Accordingly, respondent reconvened the master rating panel to review the positions of those employees who were seeking the CEA 2 level.

The appeals panel followed essentially the same evaluation process that was followed before, except that there were only nine raters, and they rated all the factors rather than just four. The panel's ratings of the benchmark positions on each factor were weighted, ranging from 25 for "knowledge" and 20 for "complexity" to 2.5 each of "hazards" and "surroundings." The record does not establish how these weightings, which were not set forth in the class specification, were developed. Mr. Buchholz and Mr. Eagon also were on the appeal panel. Respondent's staff made a determination as a result of a statistical analysis that Mr. Buchholz's and Mr. Eagon's scores reflected a bias in favor of DILHR positions, and their total scores were adjusted to correct for this perceived bias. The appeal panel scores of the 26 composites, adjusted for perceived bias, ranged from a low of 379.1 to a high of 516.7. The average score was 437.35. Respondent reallocated the 14 positions which scored above the 437.35 average score (ranging from 441.4 to 516.7) to CEA 2 (or the equivalent with respect to positions in other classification series). The 12 positions below 437.35 (ranging from 426.6 to 379.1) were kept at the CEA 1 level. The health facility engineer positions located in the Bureau of Quality Compliance, Needs Analysis Section, DHSS, had been scored at about the midpoint of the CEA 1 positions as a result of the master panel evaluation during the survey. These positions had been reallocated to the CEA 1 level, and, as noted above, had been designated as representative positions at that level. The benchmark questionnaire for these positions was augmented by additional detail following the informal appeals, and this benchmark received the highest score (516.7) from the appeal panel, and these positions were reallocated to the CEA 2 level.

Appellant's position had not been one of the benchmark positions which had been evaluated by the survey master rating panel. However, the

position from the other plan review section<sup>1</sup> occupied by Ron Tilley had been evaluated by the master panel and had been designated as a CEA 1 representative position. Appellant's position also was not evaluated by the appeal panel, at least in part because respondent and DILHR management were discussing the option of converting appellant's position to a formal supervisory position and it was believed likely that this would occur and resolve appellant's informal appeal. Also, DER staff was of the opinion that there were other positions before the appeal panel, including Mr. Tilley's, which were similar enough to appellant's position to form a basis for comparison.

Mr. Tilley's position received a score of 396.3 from the appeals panel and remained at the advanced one level. Another position occupied by Gerald Marx in the Uniform Dwelling Code Unit, Local Program Services Section, received a score of 424.5 and also remained at the one level because it was below the 437.35 average score. Appellant's position was retained at the CEA 1 level.

Appellant's, Mr. Marx's, and Mr. Tilley's positions also were evaluated by a DILHR panel consisting of Mr. Buchholz and Mr. Eagon, who utilized the same process employed by the other panels. They rated appellant's position at 484, Mr. Marx's position at 462, and Mr. Tilley's position at 447. DER staff did not rely on these scores because it was thought that they were high in comparison with the scores derived from the master survey panel and the review panel, they were not sure of the importance the DILHR panel gave to leadwork, and because of the perceived bias by the DILHR raters mentioned above. The opinion of respondent's staff with respect to leadwork was that engineers at the senior and advanced level should be able to work quite independently without the kinds of guidance typically provided by a leadworker. They also noted that the master rating panel tended to rate leadwork positions quite closely in score to the positions they nominally lead. Therefore, respondent's staff generally tended to downplay the significance of leadwork functions for positions at the advanced levels.

The Commission will now turn to the classification issues presented by this appeal. This case presents substantial difficulty in decision, due to the complicated nature of the survey and reallocation process involved and the complexities of the numerous engineering positions involved in this record.

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<sup>1</sup> There were two plan review sections in the division during the period in question.

The civil engineer class specifications (Appellant's Exhibit 1) contain the following:

F. How to Use This Classification Specification

... In most instances, positions included in this series will be clearly identified by one of the classification definitions which follow below in Section II of this classification specification. However, a position may evolve or may be created that is not specifically defined by one of the classification definitions. In classifying these positions, it would be necessary to compare them to the classification factor definitions described in Section I.E. of this specification and use the Wisconsin Quantitative Evaluation System (WQES), developed for this purpose by the Department of Employment Relations to determine the appropriate level of the job. (emphasis added)

Despite the emphasis in this section on the primacy of the class definitions, the history of the engineering survey and its aftermath as provided by the testimony of DER's classification analyst, shows that the class definitions appear to have played little, if any, role in the classification process with respect to the Advanced 1 and Advanced 2 levels that were discussed in this record.

The original benchmark positions that were developed during the course of the survey were evaluated by the master panel of subject matter specialists using the WQES system. DER analysts "did a cluster analysis of the benchmark scores to see where the groupings were falling out and how many levels we had." (Judy Burke testimony) The class specifications, including the definitions, were developed as a result of this process. Following the implementation of the survey and the position reallocations, DER utilized another panel to again do a WQES evaluation of positions whose incumbents had appealed their reallocation and were seeking Advanced 2 level classifications. Not all positions were evaluated. Some were represented by positions DER deemed representative. All positions which were scored above average (437.35) were reallocated to the Advanced 2 level; those which were scored below were not.<sup>2</sup> Respondent decided which positions would be upgraded to the Advanced 2 level without any apparent regard to the

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<sup>2</sup> Appellant's position was not a benchmark position, and was not evaluated by the review panel. It was retained at the Advanced 1 level because respondent deemed it more comparable to certain Advanced 1 benchmark positions than to the Advanced 2 positions.

definitional language in the class specification. This point was graphically illustrated by the engineers in the Facilities Needs Analysis Section in DHSS.

These positions had been ranked in the middle of the Advanced 1 scores as a result of the master rating panel evaluation, and had been specifically identified and described in the class specification as a "representative position" at the Civil Engineer Advanced 1 level (Appellant's Exhibit, pp. 7-8). These positions do not meet the Civil Engineer Advanced 2 definition because they do not have "the authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects." (emphasis added) id., p. 9. That is, while these positions (like appellant's) are in a statewide program, their major decisions are made with respect to specific facilities and are not statewide in scope. Also, these positions, like appellant's, do not have the authority to allocate resources for major projects.<sup>3</sup> Both appellant and the employees in the Facilities Needs Analysis Section make decisions that affect the distribution and utilization of resources in the sense that they have the authority to approve or disapprove projects on the basis of code compliance, and, with respect to the latter positions, to certify or not certify payment of federal Medicare/Medicaid payments on the basis of compliance with federal regulations in these areas. However, this is not the same as "allocating resources." While the class specification does not define this term, a commonplace definition of "allocate" is: "to apportion for a specific purpose or to particular persons or things ... to set apart and earmark or designate." Webster's Third New International Dictionary (1981), p. 57. Rather, these positions determine whether projects or buildings comply with certain requirements, which in turn affects how money is spent or distributed.

Furthermore, there were a number of other positions allocated to the Advanced 2 level which do not meet the criteria of having "the authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects." For example, neither Ms. Matteson's nor Mr. Quast's positions in the Office of Division Codes and Applications have this authority. This language in the definition appears to reflect DER's intent to have used the Advanced 2 classification to identify

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<sup>3</sup> This point was admitted by the DER classification analyst, Ms. Burke, but the section chief, Mr. Schlough, testified that in his opinion the Facilities Needs Analysis positions meet this criterion.

positions that fit into the "project manager" concept to which Ms. Burke testified.

There's some other criteria which ... has to be there for the Advanced 2 level. Then we get into the policy, setting the policy for the program. That's the person that's doing it for the state. Not that you still don't have your management flow as you do in the state service, but you're making the decisions, you're deciding what the policies will be for that program. You're having an effect on money somehow, whether it's the budget for that particular program ... [or] authority to add money to a state building project as it's being built.

While this requirement was written into the Advanced 2 class definition, it was not adhered to in the reallocations which followed the informal appeal process.

The upshot of the approach respondent has used to the classification of positions in this area is that, in effect, the determination of whether a position is at the Advanced 1 or Advanced 2 level has turned on whether its WQES score falls within the upper range of WQES scores or can be determined to be comparable to positions in that range if it has not been evaluated by one of DER's panels, and regardless of whether it meets all the criteria set forth in the Advanced 2 class definition.<sup>4</sup> Given this kind of functional interpretation and application of the class specification by respondent, it can be said at a minimum that appellant can establish his entitlement to an Advanced 2 level classification for his position if he can, show by a preponderance of the evidence, utilizing the kind of interpretation and application of the class specification used by respondent, that from a classification standpoint his position falls within the range of positions which respondent has included in the Advanced 2 classification on the basis of their WQES scores. Appellant's position cannot be precluded from an Advanced 2 classification because of its failure to satisfy two criteria from the Advanced 2 definition ("authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects." Appellant's Exhibit 1, p. 9), because in respondent's interpretation and application of these specifications, it has not adhered to these criteria, as illustrated by the DHSS Facilities Needs Analysis Section positions. The Commission will proceed to discuss the

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<sup>4</sup> Overlaying this approach is the testimony of the DER expert that during the informal appeal process DER: "made a policy decision that ... the most overriding difference between the Advanced 1 positions and the Advanced 2 positions is the difference between the complexity of the work."

evidence with respect to the comparability of the positions involved in this record.

Appellant's position involves acting as a plan review leadworker in one of the plan review sections. He performs his work very independently under the general direction of the section chief, Clyde Bryant. The primary function of this section is to review commercial building plans for compliance with the state building code. Appellant's primary area of specialization is reviewing plans for health care and detention facilities. His workload consists of approximately 70% health care facilities, 10-15% detention facilities, and 15-20% of other occupancies. Due to the unique requirements imposed by the security and health-related functions of health care and detention facilities, the plan review process for these classes of buildings is more complex and difficult than other categories of buildings. There are other employees in the section who perform work in this area of specialization, but management considers appellant to be the most expert in this area. The Facilities Needs Analysis Section, Bureau of Quality Compliance, Division of Health, DHSS, has responsibilities which include reviewing building plans of health care facilities for compliance with applicable federal and state code requirements. Because of the overlap of the work performed by the two agencies in this area, DILHR management has deemed it important to have a close liaison between the two agencies to try to prevent inconsistent or conflicting rulings with respect to building plans, and inconsistencies or conflicts in the agencies' rules and policies in this area. Because of appellant's expertise and capabilities, he has performed this role. Two other plan reviewers (Carl Schaefer and Herman Hinrichs), who also have some expertise in health facilities, have been designated as appellant's backup, and Mr. Tilley (another plan reviewer) also has some contacts with the Facilities Needs Analysis Section. However, appellant has been designated by DILHR management as the primary contact person in DILHR plan review for the engineers in the Facilities Needs Analysis Section. See memo from Clyde Bryant dated July 5, 1985 (Appellant's Exhibit 30). Due to his level of expertise and his role in this area, appellant also tends to be the person in his section most frequently contacted by engineers, architects, builders, etc., with inquiries concerning DILHR's role in the plan review process for health care facilities, as well as detention facilities.

Appellant's decisions on plan reviews are not reviewed by upper level management and are normally final, except to the extent that all employees are subject to the chain of command.

Appellant also serves as a leadworker for the section. In this capacity he works with Mr. Bryant to determine workload parameters and plan review assignments. He also performs the role of resolving the other plan reviewers' questions about code interpretation and application, and resolving disputes that arise between plan reviewers and plan submitters. His function in this role contributes to uniformity of code interpretation within the section, and frees management from having to answer these questions. Appellant also assists management in supervisory tasks such as by providing significant input in performance evaluations of other plan reviewers in the section. Due to his leadwork activities, appellant is required to maintain an expertise in the specialty areas of the other plan reviewers -- e.g., HVAC (heating, ventilating, and air conditioning), aging schools, etc. -- as well as his own.

Appellant's work is distinguished from the plan reviewers over which he exercises leadwork responsibility in a number of ways in addition to the leadwork activities mentioned above. He handles all general code questions directed to the section -- i.e., those which do not pertain to a building project already assigned to a particular reviewer. He, along with Mr. Bryant, the section chief, handles preliminary plan reviews (except as to proposals which relate to already-assigned projects). Preliminary plan review is a process by which builders, architects, engineers, etc., can consult in advance of actual plan submission to attempt to determine how to deal with aspects of the proposed project in a way that will be acceptable to the bureau. This can involve engineering consultation on problems, and the binding commitment of the bureau to resolutions of problems determined during this process.

As mentioned above, he is required to maintain knowledge of codes and industry standards on the broadest level, because he has to be familiar with the specialty areas of the other reviewers in addition to his own specialty area. He, along with Mr. Bryant, the section chief, handle petitions for variance. This can involve the determination by appellant that no petition is required, in which case the petition is not further processed. Appellant's actions with respect to petitions for variance are subject to supervisory approval, except to the extent that he decides that a petition is unnecessary. Also, he has primary responsibility for the liaison role with the engineers in the Facilities Needs Analysis Section in DHSS as discussed above. Appellant also has responsibility



for the development of procedures and policies. Examples of this are the development of the procedures used in the expedited plan review program, whereby plan submitters can obtain expedited plan review by payment of an extra fee. He also was responsible for the development of guidelines for determining whether to issue conditional plan approvals as opposed to withholding approval, and policies with respect to double calling in detention facilities.

In addition to activities more or less directly connected to plan review and leadwork, such as communicating with architects, engineers, and other plan submitters, issuing building permits, etc., appellant also has responsibility for field inspection of construction sites and buildings to ensure code compliance and construction in accordance with approved plans, review of petitions for variance (as mentioned above, this work is not performed by the plan reviewers for which he acts as leadworker, except to the extent that a petition is submitted with respect to an aspect of a plan that has already been assigned to the plan reviewer), and serving as an expert in the area of health care and detention facilities, and in that capacity serve on code development committees, present lectures to technically-oriented groups, etc.

While there is a considerable degree of overlap in the categorization of appellant's work as set forth in his position description (Appellant's Exhibit 2), approximate percentages of his time involved in these activities (utilizing the breakdown of goals as set forth in that position description) are as follows (because of the overlap, these percentages do not add up to 100%):

- A. Leadwork -- 15%
- B. Communication with architects, engineers, contractors, etc. -- 15%
- C. Plan review -- 20-30%
- D. Preliminary plan review -- 15%
- E. Permit issuance -- less than 5%
- F. Inspection of construction sites and buildings -- 5% or less
- G. Maintenance of code knowledge - 5%
- H. Petitions for variance -- 15%
- I. Acting as staff resource expert for health care and detention facilities -- 10%

Appellant is a state-registered professional civil engineer. However, this is not a requirement of his position. He does not have a bachelor's degree; this also is not a requirement of this position. Appellant has an associate

degree as an architectural technician awarded in 1974, some post-graduate education, and various military and private sector engineering or architectural related work experiences prior to becoming a plan examiner with the state in 1979. Appellant's work requires extensive knowledge in the field of civil engineering, as well as extensive knowledge of state statutes and codes governing the various building occupancies handled by his section, and particularly in his primary area of specialization (health care and detention facilities). Because many building projects involve alterations of existing facilities that are still governed to a certain extent by superseded codes that were in existence at the time of their construction, appellant is required to maintain familiarity with many superseded codes. Also, DILHR has adopted by reference through §ILHR 51.25, Wis. Adm. Code, 55 standards of the American Society of Testing and Materials (ASTM), which include such things as standards for "Deformed and Plain Billet-Steel Bars for Concrete Reinforcement," "Compressive Strength of Cylindrical Concrete Specimens," etc. Therefore, appellant must be familiar with these standards. Due to the overlap of appellant's work with the engineers in the Facilities Needs Analysis Section, appellant has to have some familiarity with those parts of the Life Safety Code for Health Facilities, in addition to those parts of that code that are more or less directly relevant to ILHR 58, Wis. Adm. Code, which relates directly to health care and detention facilities. Since ILHR 58 has effectively utilized parts of the Life Safety Code, appellant has to have extensive knowledge of those parts of the Life Safety Code that relate to ILHR 58, so that he can make recommendations, where appropriate, for changes in ILHR 58 in response to changes in the Life Safety Code, and can recommend the approval of petitions for variance which are indicated due to the interrelationship of the two codes.

In the course of performing his work, appellant has frequent contacts with architects, engineers, designers and builders. Both in the course of plan review and preliminary plan review, he is called on to assist these individuals in developing acceptable approaches to resolving problems of code compliance that are encountered. There is a particular need for appellant to engage in this collaborative or "trouble-shooting" process because of the fact that the DILHR codes are for the most part performance oriented as opposed to prescriptive type codes. That is, performance oriented codes may not require a particular part of a building to be constructed in a specific manner, so long as it meets certain standards of effectiveness, as, for example, with respect to heat

loss. Such a code permits more innovative construction design solutions than more specification oriented codes. He also is consulted by engineers and design professionals with general questions concerning his field of expertise. He has extensive interagency contacts, most significantly with the Facilities Needs Analysis Section in DHSS, as discussed above. He also has extensive contacts with public officials and the public.

In looking at the Advanced 2 level positions which were part of this record, some of these are stronger in terms of the class criteria than appellant's position. However, this is not fatal to appellant's case because the record clearly establishes, as discussed above, that classification at the Advanced 2 level requires only that a position fall within the grouping of positions at that level -- it does not necessarily have to be at the top.

The Architect Advanced 2 - Management position occupied by Leonard Witke in the Department of Corrections (DOC), Bureau of Budget Development, Facilities Management Section, is responsible for the development and implementation of the DOC construction program. This position is integrally involved in the development of the DOC master building program. It analyzes proposed building construction and modification programs for compatibility with the DOC master plan and departmental objectives, and with respect to budgetary limitations, as well as for technical quality, including code matters. It also monitors the development of plans with respect to the specialized requirements of correctional or other institutional facilities, and verifies the quality of the professional services performed. It monitors projects during construction change orders. This position also is involved in the actual development of plans for DOC construction projects. The incumbent must maintain extensive code knowledge and monitor for code compliance. While this position does not require the same extent of code knowledge as does appellant's, it has more extensive requirements in other areas of knowledge involved in its role with respect to the departmental building program, from creating the general departmental construction program through planning and executing specific projects. This position has a significant role in decisions which allocate resources, and which are statewide in scope, although it cannot be concluded on this record that this position has the authority to make final statewide decisions, as set forth in the Advanced 2 definition. On this record, it appears to be at a higher level than appellant's in terms of knowledge, complexity, effect of actions, and consequence of error.

The Mechanical Engineer Advanced 2 position occupied by Bernice Matteson in the Office of Division Codes and Application in DILHR functions as a leadworker. It is responsible for the development of the most complex codes under DILHR's jurisdiction. It also is responsible for handling petitions for variance and requests for new product approvals. This position requires knowledge of related codes issued by other state agencies, related federal laws and codes, and a broad range of standards, as well as state law provisions governing the rule-making process. This position requires a bachelor's degree in engineering or architecture. Inasmuch as this code development work has significant statewide impact, this position appears to be at a higher level than appellant's from the standpoint of greater impact and consequence of error. It appears to be at a higher level of complexity because of its need for familiarity with all division codes. However, like appellant's position, it does not have "the authority to make final statewide decisions on major technical/professional matters, including allocating resources for major projects," as set forth in the Advanced 2 definition, Appellant's Exhibit 1, p. 9.

The Mechanical Engineer Advanced 2 - Management position occupied by Thomas Schoen in the Division of Facilities Management, Department of Administration (DOA), functions as an Assistant Section Chief in the Mechanical/Civil Engineering Section in the Bureau of Engineering and Engineering Management. This position is involved in all facets of the state building program. This includes the review of design and analysis work by outside consultants and other agency staff for compliance with respect to quality of work, cost effectiveness, code compliance, energy conservation, compliance with division guidelines, etc. This position also is involved in the development of plans and specifications for projects, such as asbestos abatement, which outside consultants refuse to bid because of liability concerns. It also is involved in project management and the provision of various kinds of engineering services to state agencies. This position has a broader scope than appellant's position because it is involved in directing and developing projects, as well as evaluating projects as to technical quality, cost, division goals, etc., in addition to code compliance. On this record, it appears to be at a higher level than appellant's position in terms of knowledge, effect of actions, consequence of error, and complexity. While this position has some responsibility for resource allocation, it has no authority to make final statewide decisions

The Electrical Engineer - Advanced 2 - Management occupied by Stanley White in the Division of Facilities Management, DOA, appears to parallel Mr. Schoen's position in many respects. It functions as an assistant section chief. It is responsible for the review of bidding documents and designs developed by electrical consultants for conformance with divisional guidelines, code compliance, and energy, budgetary and program considerations. It is also responsible for project management, the provision of in-house electrical engineering services, and the preparation of design and bidding documents. This position has a broader scope than appellant's position because it is involved in evaluating or directing large projects with consideration of technical quality, cost, division goals, etc., in addition to code compliance. On the basis of this record, it appears to be at a higher level than appellant's position in terms of knowledge, consequence of error, effect of actions and complexity. This position does not appear to have the authority to make final statewide decisions.

The Architect Advanced 2 position occupied by James Quast in the Office of Division Codes and Application, Division of Safety and Buildings, DILHR, is responsible for code development, conducting pre-hearing, hearing, and post-hearing aspects of the Chapter 227 rule-making process, managing citizen advisory code development councils and committees, and other related duties, as well as reviewing petitions for variance. This position requires knowledges consistent with both a bachelor's degree in architecture or engineering, and licensure as an architect or engineer. This position has no leadwork or supervisory responsibilities. It does not make decisions as to the allocation of resources. While it is involved in code development activities which have a statewide impact, it does not have the authority to make final statewide decisions. On the basis of this record, this position appears to be at a higher level than appellant's from a classification standpoint. This position appears to be at a somewhat higher level in terms of effect of actions because of the statewide impact of codes, and in terms of knowledge because of its broad range of responsibility for familiarity with all codes administered by the division.

The Mechanical Engineering - Advanced 1 position occupied by Ronald Tilley in the other plan examination unit is responsible for plan review, with a primary specialization area of amusement rides and ski tows, as well as acting as a staff resource expert in the areas of HVAC, energy conservation, industrial ventilation and exhaust systems, and health and detention facilities.

As noted above, appellant has the primary responsibility for health and detention facilities, and, in that connection, serving as the primary liaison with the Facilities Needs Analysis Section in DHSS. This position is similar to appellant's position with respect to plan review activities. There is a leadworker position in Mr. Tilley's unit, but Mr. Tilley works virtually completely independently in the area of amusement rides and ski tows. Appellant's position is at a somewhat higher level from a classification standpoint because it is responsible for more extensive preliminary plan review, and also is responsible for petitions for variance, for serving as primary liaison with the Facilities Needs Analysis Section. It also has leadwork responsibilities for the positions in its unit, which involves maintaining a substantial degree of code knowledge of other areas of specialization so as to be equipped to resolve problems and arbitrate disputes. Appellant's position on this record appears to be at a higher level in terms of knowledge required, discretion, complexity, and personal contacts.

The Mechanical Engineer - Advanced 1 position in the other plan review unit occupied by Herman Hinrichs<sup>5</sup> serves as a plan reviewer and leadworker for that unit. It has areas of specialization in HVAC, energy conservation, and health care and detention facilities. Based on this record, it appears that appellant's position is at a slightly higher level from a classification standpoint because of its role as the primary expert with respect to health care and detention facilities, and as the primary liaison with the Facilities Needs Analysis Section in DHSS. Those factors lead to a higher level of personal contacts and complexity.

The Civil Engineer Advanced 1 - Management position occupied by William Moody in the Bureau of Architecture, Division of Facilities Management, DOA, has the working title of roofing specialist. This position is responsible for management of the all-agency roofing program, which involves responsibility for the review of inspection reports, the diagnosing of problems, the preparation of reports explaining problems and recommending solutions, developing, initiating and maintaining guidelines and/or master specifications for roofing and waterproofing projects, etc. This position also is responsible for providing project management and design services for the development of plans and specifications for roofing and waterproofing projects, and the supervision of outside architect/engineers and state agency

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<sup>5</sup> Mr. Hinrichs did not appeal the reallocation to the Advanced 1 level.

staff providing design services for state roofing projects. This includes the evaluation of designs and specifications from the standpoints of code compliance, quality and cost-effectiveness, and overseeing construction projects. This position is also responsible for planning and managing the statewide all-agency preventive roof maintenance program. This position requires registration as a professional engineer or architect. This position is very difficult to compare to appellant's position because of the very different nature of the jobs. However, based on this record it appears they are roughly comparable from a classification standpoint. This position has a much narrower range of focus (roofing) while appellant's position is responsible for a broad range of codes. On the other hand, this position has responsibility for projects from beginning to end, with concerns going beyond code compliance.

The Mechanical Engineer - Advanced 1 - Management position occupied by Milbert Schott in the Division of Facilities Management has the working title of temperature control and energy management systems specialist. It is responsible for the review and approval of construction documents with respect to qualitative, budgetary and code compliance factors. It also is responsible for the development of plans and specifications for in-house projects, providing oversight of the construction process, and providing in-house consultation to state agencies. This position also has responsibility for certain automation/computerization activities within the Mechanical Section. This position requires registration as a professional engineer. Like the roofing specialist position occupied by Mr. Moody, this position is difficult to compare to appellant's position because of the substantial differences in the nature of the jobs. However, based on this record, the Commission reaches the same conclusion as it did without respect to the roofing specialist position -- i.e., they appear to be roughly comparable because of basically the same reasons.

Appellant's position can be distinguished from the Advanced 1 positions in the plan review section because of the facts that it has primary responsibility for the most complex occupancies (health care and detention facilities), it has primary responsibility for liaison with the Facilities Needs Analysis Section, it has more responsibility for preliminary plan review, it is

responsible for petitions for variance,<sup>6</sup> and it performs the leadwork functions of resolving the reviewers' problems of code interpretation, acting as the arbitrator of disputes, etc.

The key position comparison in this case involves the Advanced 2 level positions in the Facilities Needs Analysis Section in DHSS. These positions are in many respects the most similar to the Plan Review Section positions in overall concept, inasmuch as the former positions are responsible for plan review and other somewhat similar code compliance functions. These positions are responsible for surveying health care facilities for compliance with federal and state laws and regulations, including the Life Safety Code, and for certifying eligibility for federal Medicare and Medicaid payments. They also review construction plans to ensure code compliance, provide advice and opinion in their field of expertise, and provide consultative services with respect to their program policies and procedures and as to how facilities can be improved. The performance of this work requires knowledge of relevant state statutes and codes, Federal Medicare and Medicaid Regulations governing the construction, operation and maintenance of these facilities, relevant parts of the Life Safety Code, and other relevant construction standards and guidelines. These positions also require knowledge of outdated codes because older buildings may in some respects still be subject to the codes that existed at the time of construction. These positions require knowledge of medical gas systems and other operational aspects of health facilities. These positions play a role in code development by researching and recommending code changes. These positions require Wisconsin registration as a professional engineer and a bachelor of science degree in engineering.

There was testimony from people with engineering or related backgrounds, as well as from DER's classification analyst, comparing these positions to appellant's position.

James Quast, an Architect - Advanced 2 within the Office of Division Codes and Applications in DILHR, testified that the Facilities Needs Analysis positions do not get involved in the structural analysis that appellant does, but are more involved in the operational aspects of health facilities and that

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<sup>6</sup> A position at Waukesha occupied by Donna Graf in apparently had this responsibility reflected in a September 7, 1990, position description, but according to Mr. Bryant, the section chief, she had not in fact been authorized to perform this function as of the reallocation date (June 17, 1990).



overall the positions are comparable or equivalent in terms of the complexity of their engineering work.

Leonard Wittke, the DOC chief architect, testified that detention facilities overall presented more complex engineering issues than health facilities because of the security issues that are unique to detention facilities. He also testified that, in his opinion, appellant's work was more complex than the Facilities Needs Analysis positions.

Ron Buchholz, Deputy Administrator, Division of Safety and Buildings, and an Architect Manager 3, testified that in his opinion the positions were at least equal in terms of the levels of engineering complexities and competencies required, although the positions had different areas of focus -- structural (DILHR) vs. health care systems (DHSS).

Stephen Schlough, the Facilities Needs Analysis Section chief and an Engineer Manager 1, who supervises the Advanced 2 positions in question, testified that in his opinion, appellant's position does not satisfy the Advanced 2 definition with respect to the requirement that : "[t]his is the most advanced level civil engineering work performing the most technically complex assignments" because "he [appellant] doesn't handle as complex a workload as my engineers." Mr. Schlough provided other testimony running to the complex nature of the work performed in his section. He stressed the required knowledge base with respect to the Life Safety Code, testifying that the part of the entire Life Safety Code represented by Chapter ILHR 58, Wis. Adm. Code, would be about two inches of a total of five feet, and that the employees in his section: "have to have extensive knowledge of all of those things [in the Life Safety Code] in order to make decisions for certification under medicare and medicaid." He acknowledged on cross-examination that while there are only some sections of the Life Safety Code that are directly applicable to health facilities, there are times when they have to consider other occupancies. For example, there are three or four hospitals in the state that have hotel-type facilities and would be subject to the hotel code requirements. He also pointed out the need to know other federal regulations regarding medicare and medicaid. Mr. Schlough also testified concerning the need to be knowledgeable about the myriad kinds of complex systems involving medical technology with which his employees need to be familiar, and stated the opinion that hospitals are the most complex type of building of all.

Judy Burke, a DER classification analyst, moved from DILHR to DER during the survey process, and had some familiarity with the DILHR plan

review positions in her former capacity with DILHR personnel. Her testimony with respect to the comparison of the Facilities Needs Analysis Section positions with appellant's position<sup>7</sup> was that the former positions involved 25% plan review activities, and that while:

There may be some overlap in this area, less than the majority of the job would be the same, and even in this goal C [plan review] there would be some differences in that, while they're both reviewing the plans, they're reviewing them for slightly different reasons and a little bit different perspective, but they have to be aware of what the other one is doing so they don't conflict and they both meet their own standards.

The foregoing individuals had varying degrees of familiarity with the positions in question. The witnesses with the most familiarity with these jobs were James Hafner and Melvin Sensenbrenner, Civil Engineer - Advanced 2's in the Facilities Needs Analysis Section. As incumbents, they obviously have the most familiarity with their own jobs. In addition, they work fairly closely with appellant, and are reasonably knowledgeable about his position from that perspective.

Mr. Hafner testified that the engineering issues he and appellant deal with are of comparable complexity. He testified that appellant is "into more the design aspect and more the complicated building construction things that we don't generally get into." He also testified as follows:

DILHR has a lot broader responsibility in the sense that the things you review on a building, you get the structural aspects that you get into, you've got the energy conservation aspects, plumbing is part of their operations there. We don't get into that at all ... The plan review process as we'd normally do it, I think it's similar in both agencies, but your engineering background is required in your ability to read the drawings, to know and understand what the terminology is, to know and understand the design and construction -- we don't do as much as they do, but we still have to have some knowledge of how it's put together. My background is structural. In a way I'm glad I'm not doing it because I find our aspects of less rigid detail for design to be more enjoyable. Jim's office and Jim too over there is involved more in a nuts and bolts type thing than we definitely are ... A lot of our work is not strictly engineering per se. The engineering background lends itself to knowing and understanding how to put the things together ... The makeup of an operating room, or an operating room suite, is probably a lot of detail involved there. We're involved with the equipment that goes in -- how it's used, how it's checked, how it's maintained. Jim, in

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<sup>7</sup> This position comparison was not found in respondent's written analysis of appellant's informal appeal, Appellant's Exhibit 4.

relative comparison, is looking at the structure, which we don't get into that much detail in. We want to know how the hospital intends to work with its equipment, how, the kind of procedures they intend to get into. Now, that, added to the engineering background, ensues that you're going to get the facility put together right.

Mr. Sensenbrenner testified that with respect to the plan review work performed by the positions, the complexity of the engineering issues encountered are "probably similar in complexity. One area that we don't get involved in to speak of is the structural analysis of the facility itself, that's not in our area at all."

In analyzing these opinions, as well as considering all the evidence and arguments of record concerning the comparison of these positions, the Commission reaches the conclusion that appellant has sustained his burden of establishing by a preponderance of the evidence that his position compares favorably enough to the Facilities Needs Analysis Section positions on the basis of the civil engineer class specification, as interpreted and applied by respondent, to justify his position's classification at the Civil Engineer Advanced 2 level. Appellant's case was supported most significantly by the testimony of Mr. Hafner and Mr. Sensenbrenner that their positions were comparable to appellant's in terms of the complexity of the engineering work involved. Mr. Schlough, the Section Chief, testified that the work performed by the employes in his section was more complex. In comparing his testimony to that given by Mr. Hafner and Mr. Sensenbrenner, there are several factors that give theirs additional weight.

First, as the incumbents actually performing the work in the Facilities Needs Analysis Section, and actually working with appellant in a regular, ongoing manner, they have the better basis of familiarity with the work involved. Second, Mr. Schlough based his opinion in substantial part on the degree of difference in volume between the Life Safety Code as a whole and the amount of that code essentially reflected in Chapter ILHR 58, "Health Care, Detention and Correctional Facilities." However, Mr. Sensenbrenner testified that there were two chapters in the life safety code that applied to hospitals and nursing homes, and a number of chapters that apply to other facilities such as offices, schools and detention facilities. While some health care facilities have detention or hotel-type aspects, there was no indication on this record that these occupancies constituted any substantial portion of the activities of the employes in this section. Also, ILHR Chapter 58 is only a small part of the bulk of the codes, regulations and laws with which appellant needs

some familiarity. For example, §ILHR 51.25 adopts by reference 55 standards of the American Society of Testing and Materials. Third, Mr. Schlough stressed the need for his employees to be familiar with multiple, complex operational hospital systems. However, this must be placed in the context of two other parts of this record.

Ms. Burke testified that as part of the informal appeal process DER:

[M]ade a policy decision that one of the primary differences, probably the most overriding difference, between the Advanced 1 positions and the Advanced 2 positions is the difference between the complexity of the work. And ... that determining what the most complex technical engineering work was should be left to the subject matter experts.

Mr. Hafner, who certainly must be considered a prime subject matter expert with respect to his own job, testified as follows:

A lot of our work is not strictly engineering per se. The engineering background lends itself to knowing and understanding how to put these things together ... The makeup of an operating room, or an operating room suite, is probably a lot of detail involved there. We're involved with the equipment that goes in -- how it's used, how it's checked, how it's maintained. Jim, in relative comparison, is looking at the structure, which we don't get into that much detail in. We want to know how the hospital intends to work with its equipment, how, the kind of procedures they intent to get into. Now, that, added to the engineering background, ensures that you're going to get the facility put together right. (emphasis added)

This testimony, along with other parts of the record, suggests that a good deal of the Facilities Needs Analysis work related to hospital operations, while certainly not insignificant, is not at a higher level of complexity than appellants' code review work.

For example, the Facilities Needs Analysis Section impact statement, which is part of Respondent's Exhibit 11, includes the following:

#### IMPACT STATEMENT

The Facilities Need Analysis Section is responsible for the communication and enforcement of the fire safety requirements based on the federal programs for Medicare and Medicaid regulations and the state program policies and requirements for 494 nursing home providers, 165 hospital providers, 11 ambulatory surgical centers, 70 community based residential facilities, (13 additional under construction) and 35 end-state renal dialysis units. The section is the main source of DOH policy accountability for fire safety review and monitoring of the Medicare and Medical Assistance Programs and state licensure programs

for health care facilities. Compliance with fire safety requirements by the providers is a primary prerequisite under the quality of care and fiscal accountability in the 1.38 billion dollar medical assistance budget (Title 19).

Mr. Sensenbrenner's testimony with respect to his work in connection with hospital operations included the following:

We've got to review pretty much policies and procedures that the facilities operate under and to see that all the equipment is maintained in safe operating condition. Also to review their fire drills and so forth to see that their staff are trained properly to accomplish the handling of the residents and patients in an emergency ... There's requirements that they do preventive maintenance on their biomedical equipment, as well as their ventilation equipment, their filters to be sure they maintain a clean environment within the facility ... some examples of what has happened and what we've got to watch for is if they have any fan coil units within, for instance, the nursery, there have been deaths of infants involved in the nursery from staph infection that has been more or less distributed within the nursery by the ventilation unit ... whether the facility is doing their own testing of the smoke detection system, if they have one, and cleaning and maintaining it properly, and we try to observe whether they have documented that these have been accomplished ...

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... the other testing of the specialized equipment, like your monitoring devices and defibrators and so forth, those we have to rely on certification by the specialists that are trained, and we observe their preventative maintenance scheduling and to see that all the equipment has serial numbers and tags and that they're actually checking all of them.

This evidence also runs to Ms. Burke's testimony, quoted above, which implied that appellant's position is at a lower level than the Facilities Needs Analysis Section positions because of the latter's non-plan review activities. In the Commission's opinion, the record does not support such a conclusion. The position description for the Facilities Needs Analysis Section (Respondent's Exhibit 11) reflects 62% for Goal A, "Survey of Hospitals, long-term care facilities, other health care facilities, and evaluation of the physical plant to ensure quality and appropriateness of buildings and compliance with state and federal statutes and regulations." It is apparent from the testimony of Mr. Hafner and Mr. Sensenbrenner that some of this goal falls within Mr. Hafner's statement that "[a] lot of our work is not strictly engineering per se." Furthermore, appellant's position has certain responsibilities not common to the Facilities Needs Analysis Section that add to its complexity and scope. Appellant has extensive responsibility for detention facilities, which are at a

similar level to health care facilities in terms of engineering complexity. His lead work responsibilities require him to maintain an extensive level of knowledge with respect to other occupancies, so that he can arbitrate differences and answer questions with respect to other plan reviewer's areas of expertise.

Another factor which must be considered in comparing these positions is that the survey questionnaire for the Facilities Needs Analysis positions reflects requirements for a bachelor of science in engineering and professional engineering (PE) registration, which are not required for appellant's position.<sup>8</sup> This point supports respondent's case, but there are certain related matters that have to be considered. Mr. Tilley's survey questionnaire (Respondent's Exhibit 8) reflects that when he was hired in the plan review section, a bachelor's degree in engineering or architecture was required, but that this requirement subsequently was "waived" for "affirmative action" reasons. Pursuant to §230.14(3m), Stats.,<sup>9</sup> "the state may not require as a condition of application that an applicant be a college graduate" unless the degree is required to obtain a necessary license or registration." Since registration as a professional engineer does not require a degree, but permits licensure on the basis of a certain number of years of equivalent experience, §443.04, Stats., this undermines to some extent the significance of the difference in educational requirements between the two positions. In other words, on this record and in light of Mr. Tilley's remarks, there is no reason to infer that the failure to state a degree requirement for the Plan Review Section positions was other than a recognition that apparently the section would be statutorily precluded from requiring a degree as a condition of appointment to these positions.

Respondent relies heavily on the high score given by the appeal panel to the Facilities Needs Analysis Section positions, and particularly stress that it was much higher than Mr. Tilley's position, which DER more or less relied on to represent the Plan Review Section in the appeal panel process. However, appellant's position was never evaluated by either panel, and Mr. Tilley's position cannot be considered an adequate proxy for appellant's position. Mr. Tilley's survey questionnaire materials do not reflect appellant's role as leadworker, the necessity for him to stay familiar with other reviewers' areas

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<sup>8</sup> Appellant is, however, a registered P.E.

<sup>9</sup> This provision was created by laws of 1977, Chapter 196.

of specialization in order to be able to answer questions and arbitrate disputes, his role as the primary liaison with the Facilities Needs Analysis Section, or his role in reviewing petitions for variance. Mr. Tilley's "appeal addendum," which provided additional detail about his job focused almost entirely on the 10% goal in his position description of plan review of amusement rides and ski tows, which is performed for a different bureau (Safety Inspection).

Respondent attempted to downplay the significance of the leadwork distinction between appellant's position and Mr. Tilley's position, pointing out that leadwork positions normally have the majority of their duties and responsibilities the same as the positions below them, and that the WQES scores of leadwork positions involved in the engineering survey tended to be only slightly higher than the positions below them. However, this contention is inconsistent with the fact that appellant's leadwork functions go beyond the traditional leadwork role of training subordinates and assigning and reviewing their work, as Ms. Burke characterized it. Appellant must be familiar with the areas of specialization of the other plan reviewers in order to answer their questions and resolve disputes with plan submitters.

Respondent also attempted to analogize appellant's position to another position that was evaluated by the appeal panel, the leadwork position occupied by Gerald Marx in the Local Program Services Section, Uniform Dwelling Code Unit. However, there was neither a position description nor a survey job content questionnaire for this position in the record, and there is an insufficient basis on this record for a conclusion that these positions are comparable.

To sum up, appellant's position was never evaluated by either of the survey panels of subject matter experts. The two employees in the Facilities Needs Analysis Section who testified are undoubtedly the subject matter experts in the best position to compare the engineering work performed by their positions and appellant's position. Their opinions that the engineering work of these positions is of comparable complexity is supported by substantial other evidence of record. While it appears on this record that the Facilities Needs Analysis positions have more impact and consequence of error, because their Medicare and Medicaid certifications affect large amounts of money, the positions are relatively comparable in other respects. In addition to the foregoing, appellant's position resembles the Facilities Needs Analysis Section positions in that it meets all the criteria contained in the Advanced 2 definition except the requirement of: "authority to make final statewide

decisions on major technical/professional matters, including allocating resources for major projects." As has been discussed above, appellant's position falls within the group of positions doing "the most advanced level civil engineering work performing the most technically complex assignments in civil engineering for a statewide program." Appellant is involved in "policy, standards and procedure development, evaluation and administration for the specialty area," through his leadwork function -- e.g., the development of procedures for the expedited plan review process, the development of standards for conditional approval of plans, etc.<sup>10</sup> Appellant also functions as the state chief technical consultant with respect to plan review of health care and detention facilities, and he works under general policy direction. In light of the fact that the Facilities Needs Analysis positions were rated the highest by the appeal panel, appellant's position must be considered sufficiently comparable to those positions so as to fall within the Advanced 2 level range of positions.

Furthermore, the record supports a conclusion that the majority of appellant's duties and responsibilities are at this higher level. Although actual plan review of health care and detention facilities is not a majority, substantial parts of other areas identified on his position description are closely related to this work and constitute a substantial majority at the more complex level -- e.g., leadwork, communication with architects, engineers and contractors, petitions for variance, etc.

In reaching its conclusion, the Commission places far more weight on the Facilities Needs Analysis Section position comparison than on the other position comparisons. This is because of the general similarities between the positions, and because of the particular expertise that can be brought to this comparison by the incumbents, who actually work on a regular basis with appellant. The Commission can place a good deal more confidence in such an assessment than one based on position descriptions and necessarily second-hand knowledge. Furthermore, such reliance is in keeping with the testimony of respondent's expert witness that respondent:

[M]ade a policy decision that one of the primary differences, probably the most overriding difference between the Advanced 1 positions and the Advanced 2 positions is the difference between the complexity of the work. And ... determining what the most complex

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<sup>10</sup> On this record, appellant's satisfaction of this criterion is more clear cut than the Facilities Needs Analysis positions.



technical engineering work was should be left to the subject matter experts. (emphasis added)

Therefore, while there are arguments and comparisons that support both sides to this controversy, in the Commission's opinion, appellant has sustained his burden of proof and established that the decision to reallocate his position to Civil Engineer Advanced 1 was erroneous, and his position is more properly classified at the Civil Engineer Advanced 2 level.

ORDER

Respondent's action reallocating appellant's position to Civil Engineer Advanced 1 rather than Civil Engineer Advanced 2 is rejected, and this matter is remanded to respondent for action in accordance with this decision.

Dated: \_\_\_\_\_, 1993      STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

AJT:rcr

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner