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RICHARD J. KOCH,  
 Appellant,

v.

Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
 Respondent.

Case No. 92-0555-PC

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FINAL  
 ORDER

This matter is before the Commission following the promulgation of a proposed decision pursuant to §227.46(2), Stats. The Commission has considered appellant's objections to the proposed decision.


To the extent that these objections run to the interpretation in the language of the WRZ S-Advanced definition requiring statewide expertise, these or similar arguments were considered and rejected in Fitzgerald v. DER, 92-0308-PC (1/11/94), and subsequent cases, which constitute controlling precedent at this point. As the Commission has observed, while it may seem incongruous to have allocations for district and departmental experts with an added requirement that all positions at this level "are considered to be the statewide expert in their assigned program area," it is not impossible for a district position to have this kind of expertise, and the Commission cannot ignore the plain language in the class specification.

The proposed decision on the WRZ-Sup. classification rests on the scope of the supervisory authority actually assigned by management. Evidence concerning the dispute between line management and DNR personnel about the district reorganization constitutes background information but does not enter into the decision of the issue of whether appellant's position meets the WRZ-Sup. definition. Therefore, appellant's objections to some of the evidence concerning the interdepartmental dispute have no bearing on the outcome of this case.

ORDER

The proposed decision and order, a copy of which is attached and incorporated by reference, is adopted as the Commission's final disposition of this appeal, which is hereby dismissed.

Dated: August 22, 1994 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:dkd

  
JUDY M. ROGERS, Commissioner

Parties:

Richard J. Koch  
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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. (§3020, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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PROPOSED  
DECISION  
AND  
ORDER

This case involves the appeal of the reallocation of appellant's position from Environmental Specialist 6 (ES 6) to Water Regulation and Zoning Specialist - Senior (WRZS-Sr.) rather than Water Regulation and Zoning Specialist - Advanced (WRZS-Adv.) or Water Regulation and Zoning Supervisor (WRZ-Sup.), effective April 19, 1992.

Appellant's position is located within the Lake Michigan District (LMD) in Green Bay and has the working title of Water Management Coordinator. The position summary on his 1992 position description (PD) (Respondent's Exhibit 3) essentially accurately summarizes his position, as follows:

Administer the District's Water Regulation Program. Assist Law Enforcement personnel with investigation and prosecution of Chapters 30 and 31 violations. Administer all Floodplain activities in the District. Administer all 30.18 water diversion permits in force in the District. Assist and provide technical advice to public agencies such as SCS, USACOE, DOT, FEMA, etc. Provide general administration of Chapters 30 and 31, NR115, NR116, NR117, NR325, NR326, NR349 and DNR policies.

The WRZS-Sr. and WRZS-Adv. definitions are set forth in the WRZS class specification (Respondent's Exhibit 1) and will not be reproduced here in their entirety. The main area of contention between the parties is whether appellant's position meets the following WRZS-Adv. definition:

Positions allocated to this level include advanced Water Regulation and Zoning Specialists. Positions typically serve as the: (1) department expert for a significant segment of the water regulation and zoning program or (2) a districtwide expert with multi-faceted responsibilities (providing districtwide expertise and coordination for multiple and significant segments of the water regulation and zoning program) ... These positions are responsible for developing, implementing,

monitoring and evaluating statewide policies and programs and function under general supervision, work independently, and are considered to be the statewide expert in their assigned program area. In order to be designated at this level, the position must be easily distinguishable from positions at the senior level by the scope and complexity of the responsibilities.

With respect to the WRZ-Sup. classification, the primary question<sup>1</sup> is whether appellant's position meets the following definition found in the WRZ-Sup. class specification:

Under the general supervision of a Water Regulation and Zoning Manager or higher level administrative supervisor, positions at this level typically function as a water regulation and zoning unit leader in the district or central offices of the Department of Natural Resources.

Duties include: effectively recommending the hiring, transfer, suspension, layoff, recall, promotion, discharge, assignment, evaluation, discipline, and adjustment of grievances of subordinate employes....

With respect to the WRZS-Adv. classification, it is undisputed that appellant's position does not meet the definition of the first allocation ("(1) department expert for a significant segment of the water regulation and zoning program"). As to the second allocation, while appellant put in a considerable amount of evidence in support of the proposition that he is "a districtwide expert with multi-faceted responsibilities," this was not disputed by respondent. The key issue with respect to the WRZS-Adv. classification is whether the language in the definition concerning statewide involvement -- "responsible for developing, implementing, monitoring and evaluating statewide policies and programs ... and are considered to be the statewide expert for their assigned program area" -- is applicable to district positions. The resolution of this issue is provided by the Commission's decision in Fitzgerald v. DER, 92-0308-PC (1/11/94), holding that "[t]hose [statewide] requirements must be applied to all positions which are to be allocated to the

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<sup>1</sup> There also is a question as to whether, if the position is considered supervisory, it must be filled by competition. In an interim decision and order dated October 18, 1993, it was decided that this would not be included as an issue for hearing, but that if it were to be found that appellant's position should have been reallocated to the WRZ-Sup. classification, and if DER then decided that competition would be required to fill the position at that level, rather than to regrade the incumbent (appellant), he then could take an appeal of that decision.

Advanced level." (emphasis added) Appellant's only potential claim to statewide responsibilities is with respect to certain committees on which he has served that have had some input into the development of statewide policies. This type of activity is common to many positions in DNR in a wide range of class levels, and falls considerably short of satisfying the Advanced level requirements of having responsibility for "developing, implementing, monitoring and evaluating statewide policies and programs" and "considered to be the statewide expert in their assigned program area."<sup>2</sup>

Turning to the WRZ-Sup. issue, it is undisputed that appellant was considered to be a supervisor by line management. This is reflected in a series of memos in the latter part of 1991 (Appellant's Exhibits 5-7). Management in the LMD originally proposed a reorganization and assignment of supervisory responsibilities to appellant which was to be conducted "on a trial basis for about a year before making it final." (Memo from Ron Fassbender to Bob Roden and Paul Willihinganz dated October 9, 1991, Appellant's Exhibit 5). This proposal included the creation of several work units, including two whose positions would be supervised by appellant. This reorganization went into effect on January 1, 1992.

The evidence presented at the hearing reflected an internal disagreement between DNR personnel and line management (at least through the bureau level) concerning whether or not the reorganization had been implemented on a trial or more permanent basis. The position of DNR personnel is outlined in a memo dated August 9, 1993, from Sue Steinmetz to Bill Selbig, LMD director (Respondent's Exhibit 6), which includes the following:

In October, 1991 we received a memo from Ron Fassbender (copy attached) requesting our review of some proposed organizational changes for the Water Regulation and Zoning Program within the Lake Michigan District. This memo states that if approved the organization would be implemented on a trial basis for about one year. We did have conversations with Ron Fassbender and Marsha St. Louis regarding the proposed reorganization. However, our approval to proceed was on a temporary basis and with the expectation that if a permanent change in the organizational structure was made, the necessary paperwork and employee transactions would be taken.

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<sup>2</sup> Because of the conclusion that appellant's position does not meet the statewide requirements for the Advanced level, the question of whether his position otherwise is "easily distinguishable from positions at the senior level by the scope and complexities of the responsibilities," as set forth in the WRZS-Advanced definition, is moot and will not be addressed.

The information which Mr. Koch has provided to DER states that the organization change was approved with an effective date of January 1, 1992, and that he had no knowledge of this being on a trial/temporary basis. (NOTE: Our office did not receive a copy of the final version of the memo, with your approval. Had we received that memo, we would have contacted you earlier to address whether this was a temporary or permanent change.)

Had we been aware that this was a permanent change in the organization, we would have had your district initiate the paperwork to formalize the needed transactions. When reorganization take [sic] place, it is our role to evaluate the classification impact and the necessary employe transactions. In this particular case, an employe (Mr. Koch) is unable to be identified as a first-line supervisor without competition. The reason being that identification of a position as a supervisor is not considered a logical and gradual change in a position, rather a "new" position is established, which must be filled through a competitive process. (This ensure [sic] fairness to all employes since the supervisory responsibilities will likely affect the classification level.)

As noted above, the regrade vs. competition issue was not included in the issues for hearing, so the evidence and argument on this record concerning this issue was essentially moot. In any event, on the basis of the evidence in the record concerning the scope of the supervisory authority assigned, it must be concluded that appellant's position does not qualify as a supervisor under the WRZ-Sup. definition.

This definition requires that positions at this level have the responsibility for: "effectively recommending the hiring, transfer, suspension, layoff, recall, promotion, discharge, assignment, evaluation, discipline, and adjustment of grievances of subordinate employes." (WRZ-Sup. definition, Respondent's Exhibit 2). According to the Supervisory Analysis Form appellant signed on February 18, 1992, and attached to his PD he also signed that date (Appellant's Exhibit 4), his position does not have the authority to effectively recommend formal discipline such as suspensions and discharges. It also is not identified as the first step in the grievance procedure. Thus the position lacks significant components set forth in the WRZ-Sup. definition, above -- i.e., it does not have authority to effectively recommend suspension or discharge or the adjustment of grievances.

In addition, the Commission notes as dictum that even if this position could have been considered appropriately classified as WRZ-Sup. as of the effective date of the survey implementation, it seems to be an inescapable

conclusion that it would not have been appropriate to have regraded appellant to that level; rather, the position should have been filled at that level by competition, see Sannes v. DER, 92-0085-PC (8/23/93) ("language of §230.15, Stats., as well as of §332.040 of the Wisconsin Personnel Manual, reflect strong policy considerations in favor of using the competitive examination process when there has been an assignment of duties which amount to a wholesale change in a position.") What occurred here when the district was reorganized and the supervisory duties in question were assigned to Mr. Koch's position, appears to have been the creation of a new position. Just as stripping a position of its supervisory duties can amount to a constructive demotion, see Jusch v. Weaver, Wis. Pers. Bd. No. 450 (1/13/72), so the addition of supervisory duties to a position can amount to the creation of a new position and what would amount to an improper constructive promotion of the incumbent, if the position were not opened to competition.

ORDER

Respondent's decision reallocating this position to WRZS-Sr. rather than WRZS-Adv. or WRZ-Sup. is affirmed, and this appeal is dismissed.

Dated: \_\_\_\_\_, 1994      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

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