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KENNETH E. HEIN, \*

Appellant, \*

v. \*

Secretary, DEPARTMENT OF \*

EMPLOYMENT RELATIONS, \*

Respondent. \*

Case No. 92-0583-PC \*

\* \* \* \* \*

DECISION AND ORDER

This matter is before the Commission after a hearing, held on a consolidated basis with Mistereck v. DER, 92-0583-PC, on the following issue:

Whether respondent's decision reallocating appellants' positions to Waste Management Specialist-Senior rather than Waste Management-Advanced was correct.

Appellant had the burden of proof to show, by a preponderance of the evidence that respondent's decision to reallocate his position to the Waste Management Specialist-Senior (hereafter referred to as WMS-Senior) classification was incorrect. Appellant failed to sustain his burden.

The appellant serves as a solid waste specialist in the Southeast District of the Department of Natural Resources. He is one of approximately 17 waste management specialists who are assigned to specific geographic components of the state. The appellant is one of at least four solid waste specialists in the district. The others are Roger Klett, Melinda Carpenter and Scott Lee. Ms. Carpenter and Mr. Lee both perform activities related to the management of the recycling program for the Southeast District.<sup>1</sup>

During the time period relevant to the reallocation decision, the appellant's duties were accurately described in a position description signed by the appellant and his supervisor in April of 1994, which includes the following goals and worker activities:

<sup>1</sup>The WMS-Senior classification identifies District Recycling Specialists as a representative position.

45% A. Accomplishment of field level activities relating to management of the solid and hazardous waste programs. Investigate solid and hazardous waste facilities to determine compliance with state and federal regulations.

14% A1. Inspect the two remaining hazardous waste co-disposal facilities in the state and prepare inspection reports.

22% A2. Conduct announced and unannounced surveillance inspections of waste management facilities to determine their operational status relative to approved plans.

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25% B. Correspondence and review of license applications as well as plans for new or existing waste management facilities.

11% B1. Make recommendations regarding the adequacy, accuracy, and environmental soundness of feasibility studies, engineering plans, financial responsibility proofs, and closure plans relating to solid and hazardous waste disposal facilities.

10% B2. Collect, review, and recommend for approval engineering plans on facilities and grant applications whose approval process has been decentralized.

B3. Review and approve construction projects located on abandoned landfills.

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10% C. Enforcement

10% D. Information and Education

10% E. Administration

E1. Participate in the development, revision, and review of administrative code and program guidelines.

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E4. Provide solid waste representation on interdisciplinary district projects and/or special studies.

The WMS specifications include the following language:

**WASTE MANAGEMENT SPECIALIST, SENIOR**

.... Positions at this level have extensive authority in carrying out their assigned responsibilities. This involves independently implementing the assigned duties and having developed an expertise in the field. The work performed at this level requires a high degree of interpretation and creativity in exercising independent scientific judgment. The Waste Management Specialist at this level may be considered an expert in a segment of the program. Positions at this level typical function as: (1) a senior area/district waste management specialist responsible for developing, administering and evaluating the waste management program in the assigned geographic area/area of expertise; or (2) a senior district waste management specialist responsible for developing, administering and evaluating a major portion of the waste management program being implemented districtwide....

**WASTE MANAGEMENT SPECIALIST, ADVANCED**

.... Positions typically serve as the (1) department or systemwide expert for a significant segment of the waste management program or (2) a districtwide expert with multi-faceted responsibilities (providing district wide expertise and coordination for multiple and significant segments of the waste management 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.

The record does not include a copy of the Klett position description. There is very little evidence relating to the duties performed by Mr. Klett as compared to the appellant, except that Mr. Klett "does not perform hazardous waste activities of the type appellant performs under [activity] A1" of appellant's position description.<sup>2</sup> (Resp. Exh. 3)

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<sup>2</sup>In his post-hearing brief, appellant states:

[T]he Southeast District is unique within the state in that there are no field offices in the Environmental Quality Division, and as such, assignments are typically made throughout the district. For efficiency, there is a division of the District's solid waste management program but it does not have any hard and fast boundaries. (Brief, page 2, footnote omitted)

According to App. Exh. D-4, both the appellant and Mr. Klett are assigned plan review activities in the Southeast District. Of the 143 plan reviews performed statewide in the first 6 months of 1992, 43 were in the Southeast District, 21 were done by appellant, 18 by Mr. Klett and 4 by their supervisor, Frances Koonce.

The appellant's position fits within the parameters of the WMS-Senior allocation for "(2) a senior district waste management specialist responsible for developing, administering and evaluating a major portion of the waste management program being implemented districtwide."<sup>3</sup> It is arguable whether the level of his work exceeds the WMS-Senior definition in terms of its scope and complexity, but even if appellant's position were to appear to be at a higher level in certain respects, it cannot be classified at the WMS-Advanced level unless it meets all the requirements for that classification found in the specifications. The WMS-Advanced definition includes the following requirement: "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." The Commission has consistently interpreted this language, as found in this and various related classifications, as a requirement for classification at the Advanced level. Fitzgerald v. DER, 92-0308-PC, 1/11/94; Edwards v. DER, 92-0423-PC, 11/29/93; Koch v. DER, 92-0555-PC, 8/22/94; Rasman v. DER, 92-0435-PC, 6/21/94; Hutchison v. DER, 92-0577-PC, 10/24/94, petition for rehearing denied, 12/13/94. The conclusion that this language represents a classification requirement, instead of serving merely as one of many factors in determining the "best fit" for a position, is reinforced by comparing another portion of the

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<sup>3</sup>Ms. Steinmetz, respondents classification analyst, testified that appellant met allocation (1) as "a senior area/district waste management specialist responsible for developing, administering and evaluating the waste management program in the assigned geographic area/area of expertise" because appellant's assignment were for a geographic area within the Southeast District. As noted above, there is no suggestion that the responsibilities within the district were divided between appellant and Mr. Klett on the basis of geographic region/area. The evidence suggested that the division was on some other basis.

WMS-Advanced classification: "The areas of responsibility will *normally* cross program boundaries...."

Appellant contends that respondent has interpreted the reference to "statewide" as limiting the Advanced level to central office positions. (Brief, page 1) However, respondent's testimony was not that there was an explicit limitation to central office positions. Ms. Steinmetz testified that there were currently no field/district office positions which had been assigned statewide responsibilities, and that such an assignment would be a significant departure from DNR's current organizational structure. This interpretation is consistent with the presence of allocation (2) at the Advanced level for "a districtwide expert with multi-faceted responsibilities (providing district wide expertise and coordination for multiple and significant segments of the waste management program)."

The record establishes that the appellant has gained experience arising from his work. Appellant has identified two major topics which he feels qualifies him for having statewide programmatic responsibility. The first relates to hazardous waste co-disposal landfills. He describes his responsibility as follows:

There are only 2 (two) hazardous waste co-disposal landfills in Wisconsin. Both are in my area of responsibility. These facilities cross program lines within the Bureau of Solid and Hazardous Waste and also Bureau of Waste Water (WPDES discharges) and Bureau of Water Regulation and Zoning (wetland issues). These are state-of-the art facilities which continually raise innovative design, operational and maintenance issues, and which are complex and typically result in development of program policy utilized throughout the State at other solid waste management facilities. The cross-program and state-of-the-art elements require a broader combination of knowledge than that at the Senior level. The field contact element of my position is a significant department activity used to monitor and evaluate the effectiveness of implemented policies and/or guidelines. Compliance inspections, report reviews, and technical assistance activities identified within the PD all result in direct contact with top officials of the facilities as well as local and State public representatives. (App. Exh. D-5, p. 4)

The issue is whether the appellant can be said to be responsible for developing that policy, or whether he merely has input into the policy, with policy development responsibilities resting elsewhere. As to these two co-dis-

posal facilities, the appellant does a lot of the hands-on inspection work but certain approvals and correspondence still come from central office personnel, who, in the process of reaching their conclusions, will consider and give weight to the appellant's input.<sup>4</sup> But the fact that the appellant's responsibilities include two unique and complex landfill facilities does not mean that the appellant has the responsibility for developing statewide policy in the program areas which he is assigned. The appellant has experience derived from the two co-disposal landfills located in the Southeast District. However, DNR's geographically-based organizational structure indicates that if a new co-disposal landfill was developed in another district, it would be assigned to a waste management specialist in the other district, rather than to the appellant.

The appellant also cites his responsibility to review proposed construction projects to be sited on abandoned landfills. According to the appellant:

Population density and development pressures in the Southeast District are unique to other District offices. As such, the Southeast District is leading the development on this issue. My position has taken the lead and has worked in coordination with the Bureau of Solid Waste to develop program policy. (App. Exh. d-5, p. 4)

The expertise described by the appellant has been developed as a consequence of particular issues which have arisen within his assigned geographic area. If similar problems or proposals arise in another DNR district, there is no evidence that the appellant is assigned the responsibility to review the issue and handle it in the same manner as if it had been located in the Southeast district. This responsibility would remain with personnel in the district which contains the proposed construction project. The appellant's knowledge may be more developed on certain topics than the other 16 waste management specialists in the state, but the record does not support the conclusion that he has statewide responsibility for those topics or for the assigned program area.

Appellant contends that his work as a member of various committees goes beyond "occasional input" because he is "continually assigned to sit on committees and task forces on policy and program development. (Appellant's

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<sup>4</sup>In such areas as yard waste composting facilities (App. Exh. A12b), the appellant can issue approvals, but for other topics involving these facilities, central office personnel play the key role. (App. Exh. A6a and b)

reply brief, p. 3) Position description Activity E1 most clearly relates to this function. However, according the App. Exh. D-5; 9-1, he only spends 2% on this activity. In App. Exh. D-5, page 3, numbered paragraph 3, the appellant also contends that activity D3 ("Attend public meetings and disseminate verbal and written information to out-of-state and local authorities") should also be considered administrative code development, but this activity is separate from being responsible for developing policy. As a general matter, all field inspectors appear to be given an opportunity to offer comments on proposed changes in guidelines (App. Exh. B-8a). The appellant sits on committees but so do the other district employees and the responsibility for actual development of the guidelines/policies to be implemented cannot be assigned to a district employe who merely submits suggestions to a central office employe for consideration. The structure indicates that the central office employe has primary responsibility for the development of the guidelines/policy. The appellant's role in developing procedures for landfill needs analyses is described in a written statement by Charles Leveque of DNR's Bureau of Legal Services:

I feel you played a key role in developing these procedures in connection with your role in evaluating the factors relating to the need for the proposed Emerald Park Landfill in Muskego. In your capacity as SED Solid Waste Investigator, you testified as the Department's expert witness, both during depositions and at the contested case hearing, on issues dealing with the statutory need for that landfill project. In connection with the testimony which you gave during December, 1990, you developed procedures and a methodology for evaluating the existing and potential alternative disposal capacity in the service area for a landfill, and for presenting the information in an understandable manner at the hearing. Although these procedures and methodology have not been formally adopted, I believe they have been generally followed by your counterparts on a statewide basis.

I have routinely suggested to solid waste investigators in other areas of the state that they consult with you to obtain the benefit of your knowledge and experience on this issue. To the best of my recollection, I made this suggestion to [the] Park Falls Solid Waste Investigator and to [the] Horicon Area Solid Waste Investigator, although I believe there were others, as well. (App. Exh. B-10)

The appellant obviously is familiar with landfill needs analysis and various other DNR employes contact him when they need to carry out an analysis. However, the appellant is not assigned such analyses outside his district, and

the record does not suggest that the appellant's procedures and methodologies must be followed by the other employees, or that the other employees are not free to develop their own analytical procedures and methods.

In addition, the record established that the appellant submitted very substantial comments regarding the guidelines, developed out of the DNR's central office, relating to construction on abandoned landfills. (App. Exh. B-7) In App. Exh. D-5, 5a2, the appellant states his position has "taken the lead and has worked in coordination with the Bureau of Solid Waste to develop program policy." Even though the appellant has been active in this area, it is a function of the number of construction requests arising in his district. He neither has the responsibility for developing policy on this topic, nor does he conduct inspections and plan reviews in other districts relating to this topic. In Rasman, supra, the Commission concluded that having some input into statewide policies as a member of a committee falls well short of being "responsible for developing, implementing, monitoring and evaluating statewide policies and programs and... considered to be the statewide expert in their assigned program area."

#### Comparison positions

In his brief, appellant argues that his position is not comparable to other district level waste management positions (Resp. Exh. 5 and 6) because of differences in time allocations:

My position spends 70% on plan review and facility compliance, where as the example PD spent 35%. The most significant activity for the example PD is complaint investigation at 25% where as my PD has identified it as less than 10%.

Respondent's Exh. 6 is the position description for the Nogalski position, which is assigned responsibility for coordinating and implementing "all aspects of the Solid and Hazardous Waste programs in the Marinette Area." Duties include responding to citizen complaints alleging improper or illegal disposal of solid and hazardous wastes (20%), carrying out enforcement procedures until violations have been resolved or defendants have been prosecuted (15%), evaluating facility plans and issuing licenses (15%), conducting inspections at solid and hazardous waste facilities to determine compliance with statutes and rules (20%), providing information to the public and technical assistance to industries and municipalities (10%), providing general administration to the pro-



gram and obtaining training (10%), responding to environmental emergencies (5%), and participating in policy development and special activities (5%). These responsibilities are not identical to the appellant's duties but they correspond strongly. Both carry out enforcement (10% for appellant, 15% for Mr. Nogalski), evaluate plans and issue licenses (25%, 15%), respond to citizen complaints (2%<sup>5</sup>, 20%), conduct compliance inspections (43%, 20%), provide information to the public and technical assistance (10%, 10%), provide administration (10%, 10%) including a role in the development of administrative code and program guidelines (2%<sup>6</sup>, 2%<sup>7</sup>). The facilities within their geographic areas are different and in many situations the issues may be somewhat more complex for the appellant, but the essential program assigned to the two positions is the same.

It appears, based solely upon their position descriptions, that the appellant's responsibilities are more complex than those assigned to the two Senior level recycling positions in the Southeast District. His position appears to be at the top end of the various field positions in Solid Waste. However, that does not mean that the appellant meets the requirements for the Advanced classification.

Because the appellant is not considered the statewide expert in his assigned program area, the respondent's reallocation decision must be upheld.

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<sup>5</sup>This and other time percentages are derived from App. Exh. D-5, 9-1.

<sup>6</sup>Activity E1

<sup>7</sup>Activities F8 and H1. The Nogalski position description does not assign time percentages to either activity but F8 is one of eight activities which total 10%, and H1 is one of 5 activities which total 5%.

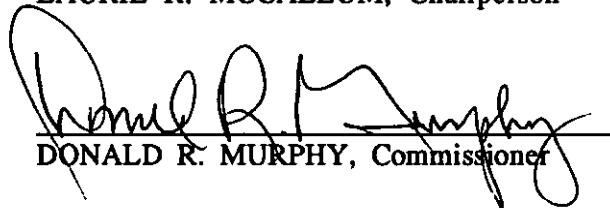
ORDER

The respondent's reallocation decision is affirmed and this appeal is dismissed.

Dated: April 17, 1995 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
K:D:Merits-reall (Hein)

  
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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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. 2/3/95