

GERALD R. MUELLER,
Appellant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,**
Respondents.

**DECISION
AND
ORDER**

Case No. 93-0109-PC

This matter is before the Commission as an appeal from a reallocation decision. The parties agreed to the following issue for hearing:

Was the respondents' decision, effective June 17, 1990, to reallocate the appellant's position from Engineering Technician 6 to Engineering Specialist Transportation - Advanced 1 correct, or should it have been reallocated to Engineering Specialist Transportation - Advanced 2 as of that date?

Three days prior to the scheduled commencement of the hearing in this matter, the respondent moved to indefinitely postpone the hearing so that the Commission could rule on the respondent's motion to dismiss the matter on the basis of claim preclusion and issue preclusion, filed on the same date. The hearing examiner denied the motion to postpone the hearing but did not decide the motion to dismiss.

Respondent has also moved to dismiss this matter "for Appellant's failure to adhere to the [post-hearing] briefing schedule." The merits of both motions to dismiss are analyzed later in this decision.

Respondent Department of Employment Relations (DER) adopted a new classification series entitled "Engineering Specialist - Transportation" effective June 17, 1990, as a consequence of a personnel survey. The specifications read, in pertinent part, as follows:

ENGINEERING SPECIALIST - ADVANCED 1

Positions allocated to this class perform very complex assignments under the general supervision of an architect/engineer, engineering specialist supervisor, or architect/engineer supervisor.

Examples of typical duties of Engineering Specialists at the Advanced level are listed below:

District

Construction

Design/Construction Pool Project Specialist

This is advanced level of design/construction project specialists. These positions are located in the construction and design sections or construction/design pool working the majority of the time in construction and the remainder in design. At this level, the position manages large to complex highway construction projects. The projects at times will involve more than one contract, or the employee may manage two or more highway construction projects simultaneously. The projects involve numerous bid items, large dollar values, complex layout, utility conflicts, numerous subcontractors, and various types of construction such as grading, drainage, structures, granular subbase, base course, erosion control, asphaltic and P.C.C. surfacing, curb and gutter, storm sewer and difficult traffic handling operations

ENGINEERING SPECIALIST - TRANSPORTATION - ADVANCED
2

This is advanced 2 level engineering specialist work in such areas as planning, design, construction, maintenance, traffic, materials and/or operation of highways, structures, and other transportation facilities for which the department may be responsible. Positions allocated to this class perform the most technically complex engineering specialist assignments involving policy, standards, and procedure development, evaluation, budget and administration. Employees at this level may function as the chief technical consultant to engineers, engineering specialists, engineer specialist supervisors, engineer supervisors and engineer managers. Work is performed under the general policy direction of an engineer manager with authority to make statewide decisions on major technical/professional matters.

During the initial implementation of the new specifications, respondent DER instructed the Department of Transportation (DOT) that no employees of the various highway districts should be classified at the ES-Advanced 2 level in light of the last sentence of the definition for that level which DER interpreted as requiring the employee to make "statewide decisions."

After the initial reallocation decisions were made, the employees whose positions were reallocated were allowed to informally appeal the decision. As a consequence of informal appeals pursued by two District 2 employees, Richard Nelson and Keith King, DER performed additional comparisons between positions in terms of relative technical

complexity. DER decided to ignore the "statewide decisions" language and classify the Nelson and King positions at the Advanced 2 level.

DER then delegated authority to DOT to conduct an internal review in order to identify additional District 2 positions that were entitled to the Advanced 2 class level in light of the changes made in classification of the Nelson and King positions. The supervisors at District 2 recommended four individuals for reallocation. All four, Ronald Harder, John Knapp, David Meyer and David Stein, had been classified at the Engineering Technician 6 level before the survey and were initially reallocated to the Advanced 1 level. As a consequence of the internal review, their classifications were changed to Advanced 2.

Appellant worked in the construction/design pool of DOT's District 2. Appellant appealed from the decision to reallocate his position to the Advanced 1 level rather than the Advanced 2 level.

District 2 is organized into approximately eight sections, including the Construction Section. During the relevant time periods since 1988, the section chief for the Construction Section has been Les Fafard. The section consists of seven construction units plus one office unit. Each construction unit is headed by a supervisor who is a civil engineer. These seven units are assigned staff from the construction/design pool to serve as project managers. The pool consists of civil engineers and Engineering Technicians (now Engineering Specialists). Individual employees in the pool are switched from supervisor to supervisor, depending on the particular construction project to which the pool employee has been assigned.

The project manager is the individual assigned by the construction section to oversee the construction of a project.

Construction projects are assigned in the Fall, to commence during the following construction season which runs from approximately March through November. The transition from a project's design phase to the construction phase is when the project has been let, i.e., when the low bidder has been selected as a consequence of the bid process.

In the Fall of 1988 as well as during prior years, the project assignments were made by the chief of the construction section.¹ The section chief assigned the projects to one of the seven construction supervisors as well as to individual engineers or tech-

¹ When project assignments were made in the Fall of 1988, Les Fefard was in the position of section chief, but his employment overlapped that of the previous incumbent who was retained as part of a mentoring program. Therefore, the 1988 assignments reflected the knowledge of both Mr. Fefard and the prior incumbent.

nicians who were then to report to that supervisor for the duration of the project. Assignments to the supervisors were made based on location and reflected an effort to balance the amount of work between the seven supervisors. Assignments to the individual engineers and technicians were made based upon the expected size of the project (in terms of dollar amount), the location of the project, the location of the employee's residence, and the classification level of the employee. Commencing in the Fall of 1989, the construction section chief only assigned the projects as far as the level of the construction supervisors and it was up to the construction supervisors to then meet and divide up the assignments based upon the engineers' and technicians' location of residence and classification level as well as the project's size. It is not always possible to assign employees projects that are consistent with the employee's classification level.

Individual construction projects may last many months and may carry over from one construction season to the next. There is often a lull between the time an engineer or technician ends one project and begins the next project. During these periods, management may assign the employee to an interim small project, to serve as an assistant to another project manager on an ongoing project, or to perform some design work. Some projects are canceled before construction begins but after a project manager has been assigned. The project manager for a canceled project must be reassigned to other responsibilities. It is not always possible to reassign the employee to a project of equal complexity.

Robert Serak was one of the construction supervisors in District 2 during the relevant time period. Appellant served as project manager and assistant project manager for projects assigned to Mr. Serak's unit during the 1988 and 1989 construction seasons. Thomas Kochansky, another District 2 construction supervisor, served as appellant's supervisor from Spring of 1990 through December of 1992.

During the relevant time period, respondent assigned appellant primarily to the following projects:

1988 Construction season

1. State Highway 31. In the Spring of 1988, appellant served as the assistant to John Burkhardt who was the project manager. Appellant left, Mr. Burkhardt took a promotion to a position in Rhinelander and John Knapp assumed Mr. Burkhardt's responsibilities. Project cost was approximately \$5 million. The appellant did not serve as the project manager.

2. Wisconsin Information Center frontage road. From approximately September to mid-November, appellant worked on a new frontage road behind the existing

Tourist Information Center on Interstate 94 just inside the Illinois border. The road provided access to a shopping center, ran through a swamp, included two retention ponds and required grading for a future intersecting road. Project cost was approximately \$425,000.

3. Traffic signal upgrade between US Highway 18 and State Highway 100.

1989 Construction season

1. North-South Freeway. This involved resurfacing of I-94 between Greenfield Avenue and Layton Avenue. Appellant was initially assigned to this project when the project manager, John Schaefer, went on vacation in July. Appellant continued to work on the project after Mr. Schaefer returned from vacation until October or November of 1989. For some of this period, appellant served as the assistant project manager, but he was never the project manager.

2. State Highway 50. Appellant served as a paving inspector. He was not the project manager for the project.

1990 Construction season

1. West Burleigh Street. This was a phased project, 0.74 mi. in length, with approximately 100 bid items. The project included, in some areas, removing the median from a divided roadway and reconstructing the road so it had 2 traffic lanes in each direction. The high traffic road had two cemeteries along one side and apartments and businesses along the other. The initial cost estimates for this project were approximately \$875,000. The actual cost, including change orders, was approximately \$1.2 million. The increase in cost was due to unmapped utilities and an inexperienced traffic control subcontractor. Appellant had to redesign culverts around electric utilities discovered at the site and had to accommodate the removal of an abandoned and unmapped gas culvert. Appellant kept his supervisor informed of what appellant was going to do and how he was going to do it. Appellant was assigned to this project in February or March of 1990. He performed limited preliminary work on it over the next few months. This included reviewing the plans, measuring the sidewalks for removals, preparing sheets for project records, checking the project staking that had been done by a survey crew and conducting a pre-construction conference with the contractor, subcontractors and other interested persons. Actual construction began on June 25, 1990, and continued until November 25th. There was also approximately one week of work performed in the Spring of 1991.

At one point in 1989, appellant had been expected to work on a project to build a new Tourist Information Center along the I-94 Illinois border. This entire project

included a parking lot, bridge, paving ramps in and out of the parking lot, landscaping and a new Information Center building. The expected start date for construction was in September of 1989, with construction of the building projected to occur through the winter months. The project was let in August of 1989 with an anticipated cost of approximately \$1.5 million. The bids exceeded that figure by more than 10% and were rejected in September of 1989. Management decided to break up the project into components and redesign some of them. In February of 1990, the project was re-let. The bids were accepted and the components were reassigned prior to May of 1990. Management assigned two components to John Knapp and one to Dennis Krenz. An outside consultant handled the Tourist Information Center building. The entire project included an exit ramp from I-94 which lead over a bridge and connected to both the Information Center and to Highway 165. Construction began May 2, 1990. As project manager for the landscaping work, Mr. Knapp oversaw a contract which included 50 to 60 bid items. The contract for Mr. Knapp's second component, phased construction of an off ramp, on ramp, parking area and information center roadway, extended over more than a year, included 152 bid items, 6 or 7 subcontractors, and totaled \$1.5 million. Mr. Knapp was the project manager for both components and had to coordinate his work with that of the consultant for the building as well as Mr. Krenz, who was the project manager for the bridge component. Contracts for the bridge totaled approximately \$550,000.

From December 1989 to June 1990, appellant was assigned to process project finals for other individuals. This involved reviewing the written materials prepared by the project manager at the conclusion of the project, processing the materials to make sure all of the numbers were correct, sending them to a typist and mailing them to the contractors so they could review them for final payment.

Three different position descriptions for appellant's position relate to this appeal. The first (Resp. Exh. 3) was signed by the appellant and Robert Serak on April 6, 1990. It reflects an initial class level of Engineering Technician 5 (ET5), but this position description accompanied a successful reclassification request which moved the appellant's position to the ET6 level, effective April 8, 1990. Mr. Serak supported the reclass request. The document does not specify a level of supervision. It states that appellant spent 70% of his time as a project leader for "Major/Complex" projects. It lists David Stein, ET6, and Ronald Kapitanski, ET6, as performing similar duties and states that appellant had performed the work described since May of 1988.

The second position description (Resp. Exh. 5) was signed by the appellant and Mr. Serak on April 16, 1990. It was prepared for purposes of classifying the appellant's position as part of the classification survey. It specifies the position received "limited" supervision, which is the middle of the three levels of supervision. It states that appellant spent 80% of his time managing "very complex" construction projects. The position description also states that appellant had performed the work described since January of 1986 and that L. Kawczynski, ET6, and R. Kapitanske, ET6, perform similar duties.

The final relevant position description (Resp. Exh. 10) for the appellant's position was signed by the appellant and Mr. Kochansky on February 24, 1992.² It indicates appellant received "general" supervision, i.e. the least supervision of the three available options, and that appellant spent 80% of his time managing "large/complex construction projects." It shows L. Kawczynski, ESAdv.1, and R. Kapitanske, ESAdv 1, as performing similar duties, and states that appellant had performed the described duties since January of 1986.

During much of the period that respondents were reviewing the reallocation decisions, there was confusion in terms of the relative complexity of large, major, complex and very complex projects as those terms are used in the class specifications. Ultimately it was agreed that a major project is less complex than a complex project, and that a major/complex project is less complex than a complex project. In light of the confusion that existed throughout the state in these relative levels of complexity, little weight should be assigned to the use of these terms within the position descriptions.

Comparison positions

The record includes evidence regarding number of individuals who were reallocated to the Advanced 2 level.

a. John Knapp. Mr. Knapp's classification at the Advanced 2 level is based on his work on two projects. The first was his role in completing the Highway 31 project when he took over for Mr. Burkhardt from June or September of 1988 until March of 1989. This 3½ mile, 131 bid item project was a major reconstruction of a concrete divided highway. It was approximately 80% complete when Mr. Knapp assumed responsibility. After he had completed the Highway 31 project, DOT assigned Mr. Knapp to two shorter term projects, each of which had cost totals under \$400,000.

² Even though the position description was signed by Mr. Kochanski on line 16b as the "first-line supervisor," the document lists Robert Serak as the first-line supervisor in box 11.

Mr. Knapp began as the project manager on the Tourist Information Center project in April of 1990. This project has already been described above.

b. Ronald Harder. Mr. Harder was project manager for the \$3 million Highway 50 project during 1988 and the first part of the 1989 construction season. The Highway 50 project included some road relocation. From June through late in 1989, he served as project manager for the 4 mile Highway 83 reconstruction project. The project value of more than \$1 million was relatively low in comparison to the average of the other projects typically assigned to Mr. Harder. However, it was still a highly sensitive, high traffic project with an unusual amount of utility work.

c. Richard Nelson. From the Spring of 1988 until the Fall of 1989, Mr. Nelson served as the project manager for the Highway 59 Waukesha By-Pass project. This project entailed the reconstruction of 2 miles of an urban, divided roadway. Project cost was \$4.8 million. It included over 200 bid items and required testing and disposal of hazardous waste. In the three years prior to the effective date of the survey, Mr. Nelson was assigned more than \$14 million in contracts.

d. Keith King. Mr. King was the project manager for Highway 67 in Fond du Lac County. This responsibility extended into 1988, 1989 and 1990. The original bid was for \$1.1 million but the final cost was \$1.8 million. It included relocation and there were 150 affected property owners. Mr. King also was assigned to the Highway 28 project in Washington County. This 7 mile project was let for \$1 million, but 6 other projects were added to it that increased the final cost to more than \$2 million. It included reconstruction of two intersections with Highway 41.

e. David Meyer. The record includes limited information about Mr. Meyer's assignments. He was project manager for a \$500,000 bridge resurfacing (overlay) project in Milwaukee County that began in June of 1989 and ended in September of 1989.

f. David Stein. Information about Mr. Stein's assignments is also limited. He was an assistant to Mr. Nelson on the Waukesha By-Pass project. The duration of that assignment is unknown. From May to October of 1989 he was project manager for a project in Racine that had an initial value of \$1.1 million and a final value of \$1.28 million.

What the specifications mean

Looking just at the language of the specifications, the Advanced 1 level includes positions which manage one or more highway construction projects, where those proj-

ects are “*large to complex*” and involve “numerous bid items, large dollar values, complex layout, utility conflicts, numerous subcontractors, and various types of construction . . . and difficult traffic handling operations.” This description must be contrasted to the lower level Engineering Specialist classification of ES-Senior which includes construction specialists with the following typical duties:

At this level, the position manages the *medium to large* construction projects or assists in the complex construction project. . . . *Typical medium* construction projects may be urban projects of 2 - 10 blocks with the traffic detoured from the area; less than 100 contract items; the construction of curb and gutter, sidewalk, and/or storm sewers; and utility issues. *Medium* construction projects may also include the construction of bridges over an interstate or large river of 100 to 150 feet. (emphasis added)

Certain aspects of the Burleigh Street project relate to this description of a “medium construction project”; Burleigh Street was $\frac{3}{4}$ of a mile in length, and had approximately 100 contract items. However, traffic was not detoured from Burleigh Street during construction, significant utility issues arose and the project included removing a median.

The Burleigh Street project is adequately described by the language at the Advanced 1 level which refers to “numerous bid items, large dollar values, complex layout, utility conflicts . . . and difficult traffic handling operations.” On the other hand, the Advanced 2 specification refers, only in very general terms, to “the most technically complex engineering specialist assignments involving policy, standards, and procedure development, evaluation, budget and administration.”

Respondents ultimately decided to ignore a portion of the last sentence in the Advanced 2 definition when applying the Engineering Specialist specifications.³ That sentence provides that Advanced 2 work “is performed under the general policy direction of an engineer manager with authority to make *statewide* decisions on major technical/professional matters.” It is unclear whether it was intended to impose this requirement on the Engineering Specialist or on the supervisor of that position. In either event, respondents have classified numerous positions at the Advanced 2 level where neither the position nor the supervisor have any statewide authority.

³ Shelagh Cullen, DOT’s classification analyst, testified that DER decided to read the last sentence out of the specifications, once it concluded that there were positions in the district which of the same relative complexity as those in the central office that were described at the Advanced 2 level.

Differences in appellant's position descriptions

Appellant contends the "limited" supervision referenced in his April 16, 1990, position description does not accurately describe the level of supervision he received during the relevant time period. The Commission agrees with this contention in light of Mr. Serak's testimony that he assigned this level of supervision because appellant was serving as an assistant project manager rather than as a project manager. There is no testimony that the time or effort spent by Mr. Serak in supervising appellant varied according to whether appellant was working as a project manager or as an assistant project manager. The distinction between these two capacities is one of responsibility, rather than of the relative degree of supervision received.

At the same time, the Commission agrees with the testimony of respondent's classification analyst, Shelagh Cullen, that working on a highly complex project would not entitle an employe to classification at the Advanced 2 level if that work was performed as an assistant project manager rather than as the project manager. The ES class specifications very clearly make this distinction. A Construction Pool Specialist at the ES-Journey level "*manages* the smaller and less complex construction projects *or assists* in the more complex construction project." The employe at the ES-Senior level "*manages* the medium to large construction projects *or assists* in the complex construction project."

The appellant's first position description, signed on April 6, 1990, is not a reliable basis for classifying the appellant's position in terms of the new Engineering Specialist specifications which were adopted subsequently. The April 6th position description was used to reclassify the appellant's position based on the old Engineering Technician (ET) specifications, which contain different language and different requirements than the Engineering Specialist series. Reclassification for project managers within the ET series was based on a formula which relied primarily on the cost of the project to which the manager was assigned. The ES specifications did not include the same formula.

Appellant also argues that the various "comparable positions" identified in appellant's position descriptions support classifying appellant's position at the Advanced 2 level. Some of these positions did end up at the Advanced 2 level as a consequence of the classification survey. However, this fact does not automatically place appellant's position at the same level because at least some of the position descriptions were premised on different standards, the distinction between the ES Advanced 1 and 2 levels went through a significant evolution after the specifications were adopted and, as is

noted below, the projects actually performed by the appellant can typically be differentiated from various other projects which were ultimately determined to be at the Advanced 2 level.

Relative complexity

Various witnesses identified a variety of factors to consider when assessing the relative complexity of a project assigned to a project manager. Mr. Serak referred to the type of job, size, complexity, area (presumably rural versus urban), number of contract items, whether it was phased construction and whether it ran over more than one construction year.

Mr. Kochansky referenced a 2 page memo, circulated within DOT, for determining the complexity of a project. This memo was *not* offered as an exhibit and was not mentioned in the class specifications. According to Mr. Kochansky, the document spelled out what was a "large" and a "complex" project and included, as factors, the number of items in the contract, number of employees, number of subcontractors, traffic control and types of construction.

Ms. Cullen identified criteria of dollar values, environmental issues, political sensitivity, bid items and utility issues. She testified that typically, Advanced 2 level projects are in the millions of dollars, and contain more than 100 bid items, unless they involve some very odd political sensitivities. She also noted that merely substituting for another project manager who was on vacation would not serve as the basis for a classification decision.

There is no precise formula for analyzing complexity under the 1990 specifications. The Commission has considered all of the various criteria in its analysis.

Appellant offers two key arguments in this matter. The first is based on his (unfulfilled) assignment to the Tourist Information Center project. The second theory arises from appellant's Burleigh Street project assignment.

The first argument raises the question of whether a tentative work assignment which is inconsistent with previous levels of responsibility and which is never carried out by the employe is an appropriate basis for reallocating the employe pursuant to a classification survey. The answer is "no," because it was inconsistent with appellant's previous levels of responsibility. Had the appellant been able to show that during 1988 and 1989, he was assigned (and carried out) projects which exceeded 150 contract items, exceeded \$2 million in value, were phased, had significant political sensitivity, involved significant utility issues and carried over from one construction year to the

next, then the Commission would conclude that an aborted assignment to another project of similar dimensions was another indication that the employee was performing very complex project management work as it related to his classification level with respect to the effective date of the survey.

Part of the difficulty of this case is due to the length of the work assignments that are made to construction pool employees. One hypothetical example is a project manager who completed a 2 year, \$4 million project with 200 contract items on May 1, 1990, and then, while waiting for a similar project which began on August 1st, worked as project manager on a \$250,000 bridge project that lasted only three months. The Commission has previously held that the duties and responsibilities actually assigned to a position during a "discrete and limited period of time immediately prior to the effective date" of a personnel management survey will determine the position's classification. *Nelson v. DER*, 92-0310-PC, 9/17/96. However, it is clear that the hypothetical employee would be properly classified based upon her \$4 million projects rather than based upon the \$250,000 project that occupied the employee on June 17, 1990, when the classification survey was effective. This result reflects the fact that individual projects could last for many months and the fact that the mix of projects and employees at any given time might preclude assigning an employee to a project of similar complexity to those projects normally assigned the employee.

Another question raised by this appeal is whether the Burleigh Street project, on which the appellant did not commence work until approximately June 1, 1990, justifies classification at the Advanced 2 level.

The Burleigh Street project started out well under \$1 million. Because of unexpected difficulties, the final cost exceeded \$1 million. When this project was assigned to the appellant, the assumption was that it would be somewhat more straightforward than it may have turned out to be.

The Burleigh Street project is less complex than a variety of other projects which served as the basis for classifying other positions at the Advanced 2 level. More complex projects include Highway 31 and the Tourist Information Center (Mr. Knapp), Highway 50 and Highway 83 (Mr. Harder), Highway 59 (Mr. Nelson), and Highway 67 (Mr. King). There is insufficient information for comparisons to the Meyer and Stein positions.

Although the terms of relative complexity used in the Engineering Specialist series are somewhat vague, there is still a significant disparity between the project manager work performed by the appellant during the relevant time period and the projects

relied on by the respondent to justify classifying other positions at the Advanced 2 level.

The Commission notes that its role in this matter is not to review the appropriateness of the classification of *other* positions per se. The Commission's analysis is focused on the duties performed by the appellant during the relevant time period as they relate to the class specifications. Comparison to other positions and other projects are helpful in analyzing the classification of the appellant's position. Various documents indicate at least some of the other project manager positions were reviewed in terms of projects managed after June of 1990.⁴ It is typically very difficult to determine whether these other positions were assigned similar projects before or during the effective date of the survey. Even if the Commission concluded that one or more of these other positions did not hold Advanced 2 responsibilities as of June 17th, the Commission could not rely on this conclusion to reallocate the appellant's position where to do so would also be contrary to the class specifications. The Commission will not compound a classification error which might exist as to a comparable position. *Roberts & DeLaMater v. DER*, 92-0481, 0638-PC, 3/9/94.

Although the terms of relative complexity used in the Engineering Specialist series are somewhat vague, there is still a significant disparity between the project management work performed by the appellant and the projects properly relied upon by the respondent to justify classifying other positions at the Advanced 2 level.

Respondents' motion to dismiss based on claim preclusion and issue preclusion

Respondent contends that this case should be dismissed in light of another case brought by the appellant involving the classification of his position. In *Mueller v. DOT & DER*, 94-0567-PC, appellant sought review of respondents' decision to deny his request to reclassify his position from Engineering Specialist - Transportation - Advanced 1 to Civil Engineering - Transportation - Advanced 1, effective March 7, 1993. In a decision dated November 14, 1995, the Commission affirmed respondents' decision to deny the reclassification request and dismissed the appeal.

In contrast to Case No. 94-0567-PC, the instant case arose from a decision by the same respondents to reallocate the appellant's position, effective June 17, 1990.

Respondents contend that the present case should be dismissed because of issue preclusion and claim preclusion arising from Case No. 94-0567-PC. These doctrines are described in *Lindas v. Cady*, 183 Wis. 2d 547, 515N.W.2d 458:

⁴ For example, see App. Exh. 110.

Under claim preclusion . . . a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. . . . Issue preclusion, on the other hand, is designed to limit the relitigation of issues that have been actually litigated in a previous action. Unlike claim preclusion, an identity of parties is not required. 183 Wis. 2d 547, 558

Neither doctrine is applicable to the present circumstances. In Case No. 94-0567-PC, the parties did not litigate the question of whether the appellant's position should have been reallocated in 1990 to the ES-Advanced 2 level. That case 1) reviewed a reclassification decision rather than a reallocation decision, 2) was premised on an effective date of 1993 rather than 1990, and 3) involved a requested classification level of CE-Trans-Advanced 1 rather than ES-Advanced 2. The Commission could not have considered the ES-Advanced 2 classification in the 1994 case because the appellant only requested reclassification to the CE-Trans-Advanced 1 classification. *Kleinert v. DER*, 87-0206-PC, 8/29/88. Respondent appears to base its preclusion argument on one conclusion of law set forth in the decision in *Mueller v. DOT & DER*, 94-0567-PC, 11/14/95: "Mr. Mueller's position is best described by the EST-Adv. 1 Class Spec." However, this conclusion must be read in light of the stated issue for hearing in that case as well as another of the listed conclusions of law: "Mr. Mueller has the burden of proof to show by a preponderance of the evidence that his position is best described by the CET-Adv. 1 Class Spec." The only two alternative classifications in that case were EST-Adv. 1 and CET-Adv. 1, so the decision clearly should have referred to the position being "better described by the EST-Adv. 1 Class Spec.", rather than being "best described" at that level.

Appellant seeks "reasonable attorneys fees" with respect to this motion. Appellant cites no authority for his request and the Commission is unaware of any such authority. Therefore, the request is denied.

Respondent's motion to dismiss based on appellant's failure to adhere to the briefing schedule

By letter dated May 2, 1996, respondent moved to dismiss the appeal, alleging that the appellant had not filed his brief within the agreed upon time period. The post-hearing briefing schedule was established at the close of the hearing and was agreed to by the parties. Because the appellant indicated he wished to purchase a copy of the tape recording of the hearing and because the hearing had covered four full days of

testimony, the briefing schedule called for the appellant to submit his initial brief 60 days after receipt of his copy of the tape recording. The hearing concluded on February 20, 1996. Appellant's brief, dated May 3, 1996, was filed with the Commission on May 6th. Respondent also obtained a copy of the tape recording of the hearing. Respondent received its copy of the tapes on March 1st and bases its motion on the fact that the appellant had not filed his brief within 60 days of March 1st. In his response to the motion, appellant notes:

I note that Appellant's brief was filed on May 3, 1996. To the best of my knowledge, this was 60 days after the Appellant received the tapes and was consistent with the terms of the briefing schedule.

The appellant's brief was served on respondent on Friday, May 3rd⁵ but filed with the Commission on Monday, May 6th.⁶ There is an insufficient basis to conclude that the appellant's brief was due any earlier than May 3rd. A discrepancy of one day is hardly a basis for dismissal of this matter. Respondent has supplied no precedent for its motion to dismiss.⁷ The motion is meritless and it is denied.

⁵ In its letter dated May 6, 1996, respondent states it received appellants' brief on May 3rd.

⁶ In a letter dated July 16, 1996, respondent points out that it had not received appellant's reply brief by the morning of July 16th, even though it was due 10 days after respondent's brief which had been hand delivered to the appellant on July 5th. Nothing in the record indicates when respondent ended up receiving a copy of the appellant's reply brief. Section PC 1.05, Wis. Adm. Code explains that when a party files a brief or other paper on the Commission, it must also serve a copy on the opposing party, and that such service is "complete upon mailing." The appellant filed its reply brief with the Commission by hand delivering it on July 15, 1996. Under the Commission's rules, it would have been appropriate for appellant to have served the reply brief on respondent by mailing it to respondent's counsel. That service would have been complete on the date of mailing rather than on the date of receipt of the brief by respondent's counsel. There is nothing in the Commission's file to suggest that appellant did not timely file and serve its reply brief.

⁷ The Commission's rules indicate that the Commission "may decline to consider any brief that is filed after the brief is due." §PC 1.09, Wis. Adm. Code. However, the delay here was minimal and there is no indication that appellant sought to obtain some sort of advantage by the delay. Under these circumstances, the Commission finds it appropriate to consider the appellant's brief.

ORDER

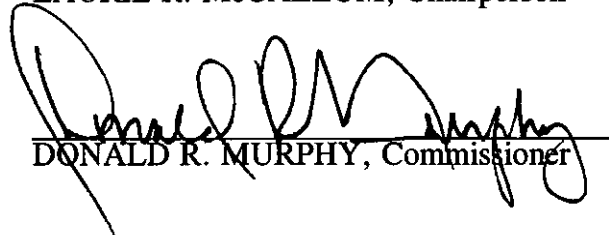
Respondents' decision reallocating the appellant's position to the Engineering Specialist Advanced 1 level rather than the Advanced 2 level is affirmed and this matter is dismissed.

Dated: February 27, 1997

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:930109Adec1.doc


DONALD R. MURPHY, Commissioner

Parties:

Gerald Mueller
8808 West Daphne Street
Milwaukee, WI 53224

Charles H. Thompson
Secretary, DOT
4802 Sheboygan Ave., Rm.
120B
P.O. Box 7910
Madison, WI 53707-7910

Jon E. Litscher
Secretary, DER
137 E. Wilson St.
P.O. Box 7855
Madison, WI 53707-7855

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)