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JOSEPH A. HERTEL,
 Appellant,

v.

Secretary, DEPARTMENT OF
 EMPLOYMENT RELATIONS,
 Respondent.

Case No. 94-0348-PC

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**RULING ON
 RESPONDENT'S
 MOTION TO
 DISMISS**

A prehearing conference was held in the above-noted matter on August 7, 1995, at which time the Department of Employment Relations (DER) stated an intent to file a motion for summary judgment claiming entitlement to judgment as a matter of law based upon undisputed facts. A briefing schedule was established with the final brief due on October 6, 1995. Both parties filed written arguments.

The hearing issue was agreed to by the parties at a telephone conference held on April 10, 1995, as shown below:

Whether respondent's decision to reallocate appellant's position to the Electrical Unit Supervisor classification rather than the Electrical Engineer Manager 3 classification, was correct.

BACKGROUND

1. Mr. Hertel's position was reallocated effective June 26, 1994, to Electrical Unit Supervisor. The classification specification (Class Spec) text for this classification is shown below in relevant part. (Exh. 2 attached to DER's motion.) The effective date of this Class Spec is shown as June 26, 1994.

Inclusions: This classification was created for the Electrical Unit Supervisor in the DILHR, Division of Safety and Buildings, Bureau of Buildings and Structures, Local Program Services Section. This position devotes the majority of its time and is primarily responsible for the supervision and management of the Electrical Unit, which includes the certification of commercial electrical construction. The position is responsible for all "true"

supervisory functions and the principal work is different from the subordinates. . . .

* * *

Exclusions:

1. All other positions which do not supervise and manage the Electrical Unit in the DILHR, Division of Safety and Buildings, Bureau of Buildings and Structures, Local Program Services Section.
2. Positions which are not a "Supervisor" as defined in s. 111.81(19), Wis. Stats., and as administered and interpreted by the Wisconsin Employment Relations Commission (WERC).
3. "Management" positions as defined in s. 111.81(13), Wis. Stats., and as administered and interpreted by the WERC.

* * *

DEFINITION [format changed here to numbering system for clarity]

1. a) Directly supervise a unit of at least 2 full time equivalent (FTE) permanently assigned employees;
b) develop and implement a statewide program of certification of commercial electrical inspectors and master electricians; and c) perform related duties.
2. Monitor inspections of electrical construction for dwellings and public buildings.
3. Act as the State's consultant on highly technical and complex issues to the entire Division as well as other state agencies, consulting engineers, contractors, municipal electrical inspectors, manufacturers, utilities, attorneys, legislators and the public regarding application, interpretation and enforcement of the National Electrical Code, ILHR 16-Wisconsin State Electrical Code and other Division Administrative rules relating to electrical construction.
4. Develop rules for construction and inspection of electrical construction of public buildings and places of employment per ss. 101.80 through 101.88.
5. Adopt rules for the certification including provisions for suspension and revocation thereof of electrical inspectors.
6. Contract to provide inspection services to any municipality which requests such services.
7. Provide inspection services in those municipalities which have not adopted and enforced ordinances providing for electrical inspection.
8. Adopt rules establishing a uniform examination for statewide certification of master electrician.
9. Respond to requests for consultations or inspections.
10. Respond to complaints.
11. Provide field training to other Department inspectors.

12. Assist certified municipal inspectors when necessary or investigate complaints against them.
 13. Participate in training seminars for other Department or local inspectors, electricians, and contractors.
2. Mr. Hertel feels his position should have been reallocated to the Electrical Engineer Manager Series. The text of the Class Spec is shown below in pertinent part. (Exh. 3 attached to DER's motion.) The effective date for the Class Spec is shown as June 17, 1990.

Inclusions: This series encompasses professional experts in the field of electrical engineering that are predominantly executive and managerial with responsibility for program management planning, policy development and implementation; program budget planning, development and implementation and exercise line responsibility for program management as well as employe supervision.

Exclusions: Excluded from this series are the following types of positions:

1. Positions that do not perform predominantly executive and managerial functions in the field of electrical engineering as defined in s. 111.81 Wis. Stats.;
2. All other positions which are more appropriately identified by other classification specifications.

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DEFINITIONS

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Electrical Engineer Manager 3: This is professional managerial work in the field of electrical engineering. Positions allocated to this class direct major, complex electrical engineering services programs; typically supervise lower level electrical engineer managers, and can function as the State Chief Engineer OR any other comparable electrical engineer manager position.

3. Mr. Hertel's position is located in the Department of Industry, Labor and Human Relations (DILHR), in the Division of Safety and Buildings, in the Bureau of Buildings and Structures, in the Local Program Services Section's Electrical Unit. His working title is: "Electrical Unit Supervisor". The duties of his position are summarized below using the format of his official position description (PD). (Exh. 1 attached to DER's brief.)

<u>Time %</u>	<u>Goals and Worker Activities</u>
35%	<p>A. Engineering and consultation functions related to Electrical Safety Standards and Inspection Programs.</p> <p>Duties here include providing code and policy interpretations (oral and written) and enforcement advice to various entities including professionals, state agency staff and the public.</p>
20%	<p>B. Administration of Electrical Certification and Inspection Monitoring Program.</p> <p>Certification duties include functions such as development and implementation of written exams and training materials. Inspection duties include administer rules for conducting inspections, as well as responsibility to ensure uniform application and enforcement of the rules and standards.</p>
15%	<p>C. Supervision of staff.</p> <p>The supervisory analysis form attached to the PD indicates supervisory responsibility for three positions classified as Electrical Engineer-Seniors and a half-time position classified as a Program Assistant 4.</p>
15%	<p>D. Management of Unit Administrative Functions.</p> <p>Duties here include review of petitions for modifications to administrative rules, decision-making on which violations will be pursued for investigation and prosecution, as well as overall responsibility for the effectiveness and redirection of all program activities.</p>
10%	<p>E. Development of Rules for Electrical Construction and Safety Standards.</p> <p>Functions as DILHR's expert on (state and national) electrical construction and safety codes.</p>
5%	<p>F. Performance of other duties and assignments as directed by the Section Chief.</p>

4. The "Inclusions" section of the Class Spec for Electrical Unit Supervisor, indicates that the Class Spec was created for the position occupied by Mr. Hertel. Reference to his position is by organizational placement and position responsibilities, rather than by reference to his name.

DISCUSSION

Both parties agree that the inquiry in Mr. Hertel's case is to determine which Class Spec is the best fit for his position. The Class Spec choices here

are between Electrical Unit Supervisor and Electrical Engineer Manager at the 3 level.

Mr. Hertel acknowledges that the Class Spec for Electrical Unit Supervisor was created by DER to describe his position. He states in his letter brief:

I can agree with [DER's] statements of uncontradicted facts but have some concern as to how "Exhibit 2" [Class Spec written for his position] was created. Exhibit 2 is as stated: "a newly created class series". There can be no doubt that this classification is newly created nor can it be said that it does not cover all aspects of the position it describes. It is relatively easy to produce the blueprint required when one is looking at the building in question. My concern with this classification is that it is not a series as DER states but rather a single position classification specification that totally ignores any aspect of the professional engineering responsibilities of this position. The qualifications do not even mention skills in the engineering discipline used in the class title. Previously this position was allocated to an Electrical Engineer Supervisor series that generally reflected the nature of the position. DER in their reallocation created an entirely new classification that they believe, by having used the relevant PD for definition is a best fit.

The Commission finds it inconsistent to concede that a Class Spec was written for a particular position based on that position's PD and then to argue that a different Class Spec is a better fit.

Clearly, Mr. Hertel would like DER to include in the Class Spec for his position more emphasis on engineering-related duties performed by his position and to use the term engineering in the class title. The Commission, however, must analyze the Class Specs as written. The Commission lacks authority to rewrite the Class Specs or to direct DER to do so. Zhe, et al. v. DHSS & DP, 80-285, 286, 292, 296-PC (11/18/81); aff'd by Dane County Circuit Court, Zhe, et al. v. Pers. Comm., 81-CV-6492 (11/82).


ORDER

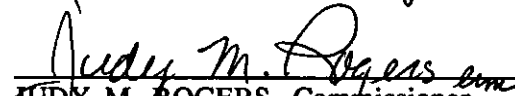
The respondent's motion is granted and this appeal is dismissed. Accordingly, the arbitration proceeding previously scheduled for November 16, 1995, is cancelled.

Dated October 16, 1995.


LAURIE R. McCALLUM, Chairperson

JMR


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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