

*Brief v. v. v.*

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 13

DANE COUNTY

DONALD K. SANDERS, Jr.,

Petitioner,

MEMORANDUM DECISIONS  
AND ORDERS

vs.

Case No. 94-CV-1407

WISCONSIN PERSONNEL COMMISSION,

Respondent.

**RECEIVED**

ALLEN J. HUBBARD,

Petitioner,

DEC 06 1996

PERSONNEL COMMISSION

vs.

Case No. 94-CV-1408

WISCONSIN PERSONNEL COMMISSION,

Respondent.

Petitioners Donald Sanders and Allen Hubbard have each petitioned this court for review of the Decision and Order of the Wisconsin Personnel Commission (Commission) denying their separate appeals for reclassification to a higher civil service classification. The Commission's Decision and Order dated March 29, 1994, determined that Sanders had been properly classified as an Architect - Advanced 1. A second Decision and Order, issued by the Commission on that same date, concluded that Hubbard had been properly classified as an Air Management Engineer - Advanced 1. Both Petitioners had sought the designation "Advanced 2" before the Commission and both ask this court to reverse the Commission's denial of this designation to them.

The Commission's decision is reviewable by this court pursuant to §230.87, Stats., under the standards set forth in §227.57, Stats. The scope of review, as discussed below, is limited

by the provisions of that statutory scheme. Consistent with this mandate, and for the reasons set forth below, I affirm both of the decisions of the Commission in all respects.

### BACKGROUND

From 1988 through 1990, the Department of Employment Relations (DER) conducted a survey of state engineering and architectural jobs.<sup>1</sup> Twelve state agencies were identified as employing engineers and architects, and the DER worked with those agencies to identify positions in the agencies which were representative of the types of work performed by engineers and architects in those agencies. Seventy-seven positions were identified as representative.

DER convened a Master Rating Panel of thirteen experts chosen for their knowledge of the work done in the twelve agencies that employ engineers and architects. Two panel members were employed at the Department of Natural Resources (DNR), where both Sanders and Hubbard work. The Master Rating Panel designated the seventy-seven representative positions "Benchmark Positions" and the engineers and architects who held those positions were enlisted to complete a questionnaire regarding their job duties.

The Wisconsin Quantitative Evaluation System (WQES) questionnaire asked each incumbent in a Benchmark Position to provide information specific to that position with regard to nine factors: knowledge; complexity; discretion; consequence of error; effect of actions; physical effort; personal contacts; hazards; and surroundings. Each member of the Master Rating Panel utilized the WQES questionnaires, the position descriptions of the seventy-seven Benchmark Positions, and a description of each state agencies' programs in order to score the

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<sup>1</sup> The Commission's uncontested findings of fact one through five are, in large part, the source for this background. These findings are identical in both the Decision and Order of Sanders and that of Hubbard.

complexity factor for all seventy-seven Benchmark Positions. DER staff scored each position for hazards and surrounding factors. The remaining six WQES factors were scored by a subgroup of half the panel, each half of the panel scoring the positions for three of the remaining six factors.

DER arrived at a total score for each of the seventy-seven Benchmark Positions by taking the panel's score for each factor and multiplying it by a set figure to give "weight" or emphasis to the factors. DER listed the resulting scores numerically along a continuum. A number of positions clustered near or at similar scores, whereas a few positions fell between these clusters. DER assigned the between-cluster positions to the cluster immediately above or below it, depending on which cluster was most like the between-cluster position.

Each cluster of Benchmark Positions was the basis for a discrete classification level, and a classification specification was written to describe the level of authority and responsibility the jobs within the class were expected to require. Six classes were established for engineers and architects employed in state agencies: Entry; Developmental; Journey; Senior; Advanced 1; and Advanced 2. Pay range assignments were determined through bargaining with the union which represents engineers in the classified civil service.

After bargaining, all non-benchmark engineering and architectural positions were evaluated by the individual agencies by comparison to the Benchmark Positions. DNR used a method called the "whole-job" analysis in order to evaluate and classify the positions of Sanders and Hubbard within the new scheme. Based on DNR's evaluation, DER classified both at the Senior level. DNR objected to the DER classifications because no DNR architects or engineers had been classified at the Advanced 1 level. With regard to Hubbard, the DNR determined that

the position description relied on by the Master Rating Panel of DER to classify Hubbard was inaccurate. Under a revised understanding of Hubbard's job duties, he was assigned an updated classification of Air Management Engineer - Advanced 1. The reclassification went into effect June 17, 1990.

Both Petitioners filed informal appeals with DER requesting that their positions be classified at the Advanced 2 level. DER considered these appeals, along with the appeals of many other state employed engineers, by convening a second panel of experts. Both men were asked to submit additional information about their jobs for consideration by the Second Panel. The panel also considered their position descriptions, the position descriptions of the Benchmark Positions, and information considered by the Master Rating Panel. In order to evaluate these appeals, the Second Panel reviewed the information relative to the forty appealing employees in light of the WQES factors and assigned each factor a numerical score. Each member of the panel scored for all factors except hazards and surroundings.

The Second Panel raised Sanders' rating from Senior to Advanced 1, but not Advanced 2 as he had hoped. Hubbard's classification did not change as a result of his informal appeal. Both men then filed formal appeals of their classification with DER. The Personnel Commission is authorized by §230.44(1)(b), Stats., to hear appeals of reclassification decisions made by the DER. The hearings before the Commission took place, for Sanders, on February 6 and 17, 1992, and for Hubbard, on February 13, 14 and 27, 1992. A common hearing concerning five appealing engineers was held January 14, 1992. A proposed decision and order was not issued by the Commission until November 22, 1993, more than twenty months later. In both cases, the Commission concluded that the employee had not met his burden of showing that DER's

Advanced 1 classification was incorrect. Petitioners were given an opportunity to respond to the proposed decision and order and both did so through oral arguments to the full Commission. Sanders' oral argument took place on January 19, 1994, and Hubbard's on February 2, 1994. In both cases the full Commission adopted the proposed decision as the Commission's final decision, and added additional comments of their own in response to the oral argument. The final Decisions and Orders were issued by the Personnel Commission on March 29, 1994. These actions followed.

### STANDARD OF REVIEW

With regard to an agency's findings of fact, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact if that fact is supported by substantial evidence in the record. §227.57(6), Stats. Substantial evidence includes such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gilbert v. Wisconsin Medical Examining Bd., 119 Wis. 2d 168, 195 (1984), *citing* Bucyrus-Erie Co. v. DILHR, 90 Wis. 2d 408, 418 (1979). This court cannot substitute its judgment for that of the Personnel Commission with respect to the credibility of a witness or the weight to be accorded to the evidence supporting any finding of fact. West Bend Co. v. LIRC, 149 Wis. 2d 110, 118 (1989).

Questions of law, however, are generally reviewable *ab initio* and are properly subject to judicial substitution of judgment. §227.57(5), Stats.; American Motors Corp. v. DILHR, 101 Wis. 2d 337, 353-54 (1981). Nevertheless, courts accord varying degrees of deference to an administrative agency's interpretation and application of a statute it has been legislatively charged to administer. Carrion Corp. v. DOR, 179 Wis. 2d 254, 264-65 (Ct. App. 1993),

*citing West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 11-12 (1984).

The highest degree of deference should be paid to an agency's interpretation of a statute when that interpretation "is of long standing" or "entails its expertise, technical competence and specialized knowledge," or when "through interpretation and application of the statute, the agency can provide uniformity and consistency in the field of its specialized knowledge." *Id.* Indeed, if the agency's interpretation is one among several reasonable interpretations that can be made which are consistent with the purpose of the statute, a court must affirm the agency's choice. *DeLeeuw v. DILHR*, 71 Wis. 2d 446, 449 (1976). However, courts should not defer to an agency's interpretation of a statute when the agency's interpretation "directly contravenes the words of that statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis." *Carrion*, 179 Wis. 2d at 265, *citing Lisney v. LIRC*, 171 Wis. 2d 499, 506 (1992).

In these cases, the Commission has been entrusted by statute with the authority to review reclassification decisions made by the DER. §230.44(1)(b), Stats. The initial authority to and responsibility for designating classifications to state jobs in the classified civil service is assigned by statute to the Secretary of the DER. §230.09(2)(a), Stats. Courts have traditionally accorded great deference to a civil service commission's classification of positions. 67 *C.J.S. Officers & Public Employees* §56c (1978) at 349-50 (classification decisions only reversed if there is no rational basis, or if arbitrary or unreasonable); 15A *Am. Jur. 2d Civil Service* §22 (1976) at 31-32 (abuse of discretion standard); 3 *McQuillin Municipal Corporations* §12.77 (3d ed. 1990) at 388 (civil service commission exercises wide discretion in classifying positions).

As the submissions made by all parties and the records in these cases reveal, the

Commission has extensive experience in addressing classification disputes. The resolution of the issues central to the disputes requires expertise, technical competence and knowledge in a specialized field. As the following discussion reveals, the Commission's decisions in these cases were consistent with its prior precedents in a field where uniformity and consistency is particularly valuable. It is thus clear that the legal conclusions reached by the Commission in these cases should be accorded the highest degree of deference. Accordingly, those decisions may not be reversed unless they are without rational basis.

### DISCUSSION

The fundamental issues presented by both cases are the same: whether substantial evidence supports the Commission's findings of fact, whether the Commission's conclusion that Petitioners are not entitled to the classification of Advanced 2 is clearly without rational basis; and whether the Commission impermissibly deviated from past agency precedent when it considered the testimony and documentary evidence. Under §227.57, Stats., an agency action may be set aside if it depends on any findings of fact which are not supported by substantial evidence in the record or if the agency's exercise of discretion is inconsistent with an agency rule, or a prior agency practice. §227.57(6) and (8), Stats.

Since resolution of the Petitioners' claim in reference to the latter issue will bear directly on their other contentions, it will be addressed at the outset. Petitioners fault the Commission for relying on written position descriptions rather than on uncontradicted testimony from witnesses with first-hand knowledge of their actual job duties to make the classification decision. They cite Smith v. DER, 91-0162-PC (11/29/93), for the proposition that the testimony of witnesses with first-hand knowledge of the jobs at issue must be weighted more heavily than

written position descriptions. The Smith decision, however, merely holds that the Commission can rely on subject matter experts with first hand knowledge, not that the Commission must do so.

In concluding that the appellant in Smith was entitled to a reclassification from Civil Engineer - Advanced 1 to Civil Engineer - Advanced 2, the Commission compared his job duties and position description to numerous other engineers at both the Advanced 1 and Advanced 2 levels. Two engineers at the Advanced 2 level, who were familiar with Smith's job responsibilities, testified on his behalf.<sup>2</sup> These witnesses were employed in the Facilities Needs Analysis Section of the Department of Health and Social Services. In evaluating their testimony, the Commission in Smith observed:

[T]he Commission places far more weight on the Facilities Need Analysis Section position comparison than on the other position comparisons. This is because of the general similarities between the positions, and because of the particular expertise that can be brought to this comparison by the incumbents, who actually work on a regular basis with appellant. The Commission can place a good deal more confidence in such an assessment than one based on position descriptions and necessarily second hand knowledge. Smith v. DER, 91-0162-PC (11/29/93) at 26.

The above-quoted language does not purport to establish a general rule; rather it explains why, for the purposes of that particular case, the testimony of two subject matter experts with extensive knowledge of the appellant's actual job responsibilities was convincing to the Commission. No general rule of binding precedential effect can properly be derived from this

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<sup>2</sup> Smith was employed by the Department of Industry, Labor and Human Relations (DILHR).



case.<sup>3</sup> This conclusion is supported by the fact that Petitioners fail to cite any case other than Smith, among all those decided by the Commission, which creates the "prior agency practice" they claim was violated in their cases.

The Petitioners also rely on Marx v. DER, 91-0087-PC (2/5/93), for the proposition that class specification definitions, not WQES rating factors, govern the assignment of a position to a particular classification. Based on that purported rule, they charge that the Commission improperly relied on the WQES ratings from the Second Panel in order to classify Petitioners at the Advanced 1 level, rather than applying the class specifications to the actual work performed which, Petitioners assert, would have resulted in a classification of Advanced 2.

Marx does address the process by which job classifications should be assigned, saying:

The Commission has consistently held that classification specifications govern the assignment of a position to a particular classification and that proper classification of a position involves weighing or measuring the actual work performed against the language of the class specification to determine the proper classification...a rating system, however useful, cannot be used to supplement or override the requirements of the classification system. Marx v. DER, 91-0087-PC (2/5/93) at 9-10, *citing Jones v. DNR & DER*, 85-0127-PC.

Later Commission decisions make clear, however, that classification specifications are not meant to be used exclusively. In Smith v. DER, *supra*, also relied on by the Petitioners, the Commission stated that WQES factors may be considered in some instances. "In the event that a position is not specifically identified by one of the class definitions it is appropriate, according to the class specification, to look to the WQES factors to make a final decision on the

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<sup>3</sup> This result is in accord with that of Branches 4 and 14 of the Dane County Circuit Court in cases which arose from the same circumstances as the instant two cases. Those cases are Lulloff v. Personnel Commission, 94-CV-1633 (entered 5/5/96) and Ostenso v. Personnel Commission, 94-CV-1571 (entered 3/18/96).

appropriate classification for the position. Smith v. DER, 92-0162-PC (11/29/93) at 3.

In addition to looking at the class specifications for the Advanced 1 and the Advanced 2 positions, and looking at the WQES scores assigned by the Second Panel to Sanders and Hubbard, the Commission used a third method in this case which was to compare the job duties of the Petitioners to other engineers and architects in state jobs. Using comparable positions is also an appropriate tool for use in classification. "Use of comparable positions as a classification tool is a well-established practice in classification cases. Comparable positions can be useful to demonstrate how [DER] has interpreted or applied the criteria listed in Class Specs." Jacobson v. DER, 94-0147-PC (4/20/95) at 1.

The DER's enabling statute and administrative rules do not constrain it to the use of a single source of information in making classification decisions. Although class specifications are identified as the "basic authority for the assignment of positions to a class," Wis. Adm. Code, sec. ER 2.04(2), class specifications are not identified as the exclusive means for classification.

From a review of these prior Commission cases, as well as the applicable administrative rules, it cannot be said that the Commission exercised its discretion in a manner inconsistent with an agency rule or a prior agency practice when and how it utilized the three methods of evaluation it did in reaching a conclusion in Petitioners' cases. While class specification factors are preferred, it does not appear that they are required to have been used exclusively in these two cases. In order to use class specifications factors exclusively, the position at issue must fit squarely within the confines of one class definition. As will become clear later in this discussion, the job duties of the Petitioners in this case do not fit squarely within a single

definition. Some of their duties meet the definition of the class specification above, and some of the duties meet the definition of the class specification below. Most of the duties, however, meet the class specification of the Advanced 1 classification.

While the Commission's method was well within the boundaries set by past agency precedent, the issue of whether there is substantial evidence in the record to support the Commission's findings of fact remains. In looking to the record, this court reviewed well over four thousand pages of testimony, exhibits and documents in the two cases, in addition to the briefs filed by the parties. Each Petitioner will be considered in turn.

### **Petitioner Sanders**

The Petition for Judicial Review challenges seven of the Commission's findings of fact. Only six of these, however, are mentioned in Sanders' Brief in Support of Petition for Review, and the objection to the other one is deemed by the court to have been waived.<sup>4</sup> The first finding of fact to which Sanders raises an objection is number seventeen, which compares his job duties to those of DILHR Architect James Quast, who is classified as an Architect - Advanced 2.<sup>5</sup> The two are compared with respect to five of the "classification factors" provided in the class specifications for architects: knowledge, effect of actions, complexity, personal contacts, and consequence of errors. The Commission's finding rated Quast higher on those

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<sup>4</sup> McGivern v. Amasa Lumber Co., 77 Wis. 2d 241, 245 (1977)(issues raised on appeal but not briefed are deemed abandoned); Reimann Assoc., Inc. v. R/A Advertising, Inc., 102 Wis. 2d 305, 306 n.1 (Ct. App. 1981).

<sup>5</sup> The Commission adopted the Proposed Decision and Order in full with one correction, which was that, in paragraph 13 of the findings of fact, the gender reference for Quast should be Mr., not Ms. The court presumes that the Quast mentioned in paragraph 17 should also be referred to as Mr., not Ms., and the references to that person in this decision are altered accordingly.

factors than Sanders. Quast is responsible for writing parts of the Wisconsin Administrative Code standards found in the statewide building codes, which the Commission found to be a position with a wide impact on all buildings in the state. The Commission also found the position to be highly complex because Quast was working without codes or standards to guide his decisions, whereas Sanders' work must comply with the standards written by Quast and other DILHR architects and engineers as well as federal rules.

Sanders counters those assertions by pointing to the testimony of Terrance Steiger, an engineer in the Division of Capitol Budget Architectural Engineering Services at the University of Wisconsin System (Tr. of 3/6/92 at 111). Steiger, called as a witness by Sanders, testified that he would have rated Sanders higher on three of the five factors discussed in finding of fact seventeen (Record at 7). Sanders misconstrues the court's role in the judicial review of an administrative agency decision. I do not search for evidence to support a finding not made by the agency or which opposes a finding that was made. As the earlier discussion points out, my role is to look for evidence that supports the agency's findings of fact. Here Steiger himself testified that Sanders probably does not perform the most advanced level of architectural work (Tr. of 3/6/92 at 173). This is the very essence of the class specification for the Advanced 2 category. A second witness, Judy Burke of DER, also testified that Sanders was not involved with the most complex types of architectural projects in the state (Tr. of 3/17/92 at 203). Her testimony was credible and drew upon her extensive experience as a classification analyst. That Sanders disagrees with her opinions does not mean that her opinions are not substantial evidence. Especially is this so when other evidence in the record concerning the nature of Sanders and Quast's job duties was available and supported the findings that if Quast's job involved "the most

advanced level architectural work performing the most complex assignments in architecture for a statewide program," as required by the class specifications for the Advanced 2 level, Sanders job simply did not measure up to this standard. In short, Sanders has failed to meet his burden to show that finding of fact seventeen is not supported by substantial evidence in the record.

Sanders also contends that substantial evidence does not support the Commission's finding of fact nineteen. That finding compares Sanders' responsibilities to those Advanced 2 level architects employed by the Department of Administration (DOA). Several witnesses, including Sanders himself, testified that the DOA architects exercise some oversight over all building projects in the state which exceed a certain expenditure level and that the DOA contracts some major projects out to private architectural firms (Tr. of 3/17/92 at 303). It is undisputed that, except for the very smallest projects, the DOA architects oversee the work that Sanders does, that other state architects do and that is done by private architecture firms. Sanders disparages this oversight work and calls it nothing more than being a "project manager." He claims he does real architecture work; he designs things. It is precisely because of the varied ways in which engineers and architects practice their professions that the involved process using the benchmark positions and culminating in the creation of the six classes for state engineers and architects was utilized. The scoring system that was developed was not the exclusive tool used by the Commission to classify Sanders' position, but it does allow for a comparison of two architectural jobs which do different kinds of architectural work that is more than a "pointless exercise." In this case the results from the Rating Panel provide additional evidence to support the Commission's finding of fact nineteen.

Next, Sanders challenges finding of fact twenty. In this finding the Commission makes

a comparison between Sanders and Joseph Sokal, an Architect - Advanced 2 (Management) with the DOA. Sokal is the project architect for the State Capitol renovation. There is very strong evidence to support the Commission's conclusion that Sokal should be rated at a higher level than Sanders. The project directed by Sokal has a budget of approximately \$45 million dollars (Tr. of 3/6/92 at 52). By contrast, the project which Sanders cites as an example of the most complex work he has ever done, the Devil's Lake Visitor's Center, had a budget of approximately \$183,750 (Tr. of 3/6/92 at 81, 83). Sanders himself testified that the architectural duties and responsibilities which he had with respect to the Devil's Lake project could not be equated to Sokal's duties with respect to the Capitol restoration project (Tr. of 3/6/92 at 81). Moreover, the Devil's Lake project was a one time activity for Sanders and was not characteristic of the usual nature of the work he performed. In contrast, Sokal's work in the Capitol restoration project will extend over a number of years.

Sanders next challenges the Commission's finding of fact twenty-two, twenty-three and twenty-five. The first two, together with twenty-four, represent the Commission's summary findings on the class specification analysis, while twenty-five is the Commission's ultimate finding on "best fit." The class specification for the Architect - Advanced 2, the classification which Sanders seeks through this proceeding, is as follows:

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

All of the Commission's findings in the application of this class specification are amply

supported by substantial evidence in the record.

Sanders does not typically perform the most complex assignments in architecture for a statewide program. He cited two projects as examples of the most significant projects he completed during the time period relevant to the proceeding:<sup>6</sup> the Devil's Lake Visitor's Center and the Milwaukee security project. In terms of budget and complexity, however, there can be no comparison between these projects and the projects undertaken by other state architects with Advanced 2 classifications, such as the State Capitol renovation project. Sanders conceded this fact during the hearing (Tr. of 3/6/92 at 81). As noted earlier, Terrance Steiger, Sanders' own witness, also testified that Sanders did not perform the most advanced architectural work (Tr. of 3/6/92 at 173).

Even if the size of a project, as measured by cost, is ignored as a factor in assessing the complexity of the work performed,<sup>7</sup> the Commission reasonably read into the class specification the notion that complexity must be a regular and frequent feature of an employee's duties. Thus even if the Devil's Lake and the Milwaukee security projects were by some measure considered the "most complex assignments in architecture for a statewide program," they were not typical or regular examples of Sanders' work.

The Commission made no specific finding as to the degree of involvement Sanders has

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<sup>6</sup> The Personnel Commission limited testimony at the hearing to the period between the date on which Petitioner began working for the DNR, November, 1987, to the date on which the engineering survey was implemented, June 17, 1990. That limitation is not an issue in this proceeding.

<sup>7</sup> The Commission made explicit that the dollar amount of a project was not the sole factor in evaluating complexity, but it was one legitimate means of doing so. See Decision and Order (3/29/94), p. 11.

with policy, standards and procedure development. He argues (Sanders' Brief at 17) that he "is routinely involved" in these activities to show that Advanced 2 is the best fit. However, he cites no evidence except for policies, standards and procedures he has developed for the individual projects on which he has worked. These are clearly not the kinds of policies that the specification is concerned with, and it was proper for the Commission to find no positive support for an Advanced 2 status for Sanders in this aspect of the class specification. The Commission found that Sanders functions in certain specialty areas, but it obviously gave this little weight in its overall "best fit" finding. It is not for this court to second guess the weight given evidence by the Commission. Here the Commission's determination is amply supported by the record. Sanders devotes little attention to this factor, but argues it is of great significance because he is the only architect employed by DNR (Sanders' Brief at 17). He makes this argument without any explanation of the special or unique considerations which go into designing a building for that department.

He also stresses that he is the specialist within the DNR on several topics on which he serves as a consultant to others. This may be true, and the Commission did not find otherwise. The Commission was thus faced with one of those instances when one aspect of an employee's job duties matched one aspect of a class specification. As Sanders himself concedes, however, that is not enough. Best fit is measured by assessing within which specification the majority of the employee's job duties fall. It is insufficient to show simply that one matches where it is clear the others do not.

There is no evidence to support Sanders' claim that he has "the authority to make final statewide decisions on major technical/professional matters, including allocating resources for



major projects." It is undisputed in the evidence that Sanders' authority is limited to project-specific matters and that the largest project he has been involved with is the one at Devil's Lake. He fails to point out how the decisions he has made regarding any of these projects have had statewide impact. Moreover, Sanders' decisions have not been shown to be sufficiently "final" to satisfy this factor since he does receive some supervision from his boss, Gerald Dorscheid, and from DOA architects serving as project managers. Finally, there is no evidence that Sanders has ever exercised authority to allocate resources for a major project.

It might be argued that the Commission's finding of fact twenty-five that Advanced 1 is the best fit for Sanders is a mixed question of law and fact, or perhaps even that it is a pure question of law involving the application of a legal standard to a set of facts. Here it is unnecessary to resolve this question. If it is purely an issue of fact, I conclude that there is very substantial evidence in the record to support it. If it is an issue of law or a mixed question of law and fact, I conclude that the Commission's determination has a very rational basis to support it. In short, Sanders has failed to meet his burden of demonstrating that the Commission's decision must be reversed.

#### **Petitioner Hubbard**

At the time this suit was filed, Hubbard was classified as an Air Management Engineer - Advanced 1. Since that time he has been administratively reclassified to the desired Advanced 2 classification. Nevertheless, he seeks a determination from the court that the Advanced 1 classification was originally assigned to him in error because substantial record evidence did not support the Advanced 1 classification. After a thorough review of this lengthy record, I have determined that there is substantial evidence to support the Commission's findings and that its

ultimate best fit conclusion is reasonable. The fact that Hubbard has since been reclassified to the desired position does not dilute this holding; this court has not been apprised of the facts surrounding his administrative reclassification.

Hubbard raises objections to nine of the Commission's findings of fact. Findings fifteen through seventeen are objected to on the general grounds that the Commission improperly relied on WQES factors as the basis for comparing Hubbard's position to that of another DNR engineer, Richard Wedepohl. This argument is an extension of Hubbard's argument, disposed of *supra*, that class specifications are the only factors on which the Commission may base a classification decision. Here, the argument also fails because the WQES factors are essentially coterminous with the class specifications for the position of Air Management Engineer, and therefore it was impossible for the Commission and is impossible for the court to separate the two. The class specifications for Air Management Engineer, as written by DER, include lengthy explanatory material. The WQES factors are incorporated into the class specifications under the name "Classification Factors."<sup>8</sup> It would therefore be a practical necessity for the Commission when it considers whether a particular engineering position's duties match the class specifications for a particular classification to simultaneously consider the nine WQES factors. The Commission's actions in considering these job features are therefore entirely appropriate. Moreover, unlike a case where the WQES factors do not closely align with the class specifications, here the WQES rating panel results are legitimately more useful as evidence in making a best fit determination.

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<sup>8</sup> There are nine WQES rating factors, however there are ten "Classification Factors." The Classification Factors embrace all nine WQES factors and add the factor of supervisory responsibilities.

Hubbard also attempts to cast doubt on findings fifteen through seventeen by pointing out that the Commission's findings about Wedepohl's job duties are based solely on his position description because Wedepohl himself was not a witness in the proceeding. There is no merit to this contention. The position description is an official document that was properly introduced in the proceedings and received as an exhibit. It is therefore part of the official Record and may properly serve as the basis for a finding which is supported by its contents. That Wedepohl did not testify is a factor that the Commission could have used in assigning weight to the documentary evidence of the position description, but this is a matter entirely within the Commission's discretion. The Commission's choice in this regard is not reviewable by this court.

The undisputed circumstances present in this case buttress the reasonableness of the Commission's choice to utilize Wedepohl's, and for that matter Hubbard's, position description as an accurate reflection of what he actually does in his job. As the Background section of this Decision points out, the study undertaken by DER to develop more comprehensive and fair classifications for architects and engineers was very extensive and extremely detailed in its analysis. In the process, position descriptions for every state architect or engineer were worked, reworked and updated so that they provided accurate descriptions of the position's duties. Not only can the Commission not be slighted for relying on position descriptions, it probably would have been subject to criticism for not doing so in this case. Furthermore, the use of a comparison between Hubbard and Wedepohl is especially illuminating in this context because Wedepohl, also classified as an Advanced 1 engineer by the Master Rating Panel, was reclassified by the second rating panel to Advanced 2. He had the lowest score of any engineer

who was promoted to the Advanced 2 level by the second rating panel (Tr. of 2/27/92 at 409-413), while Hubbard, of course, was not so promoted. While not determinative, the results of the second rating panel which utilized factors very similar, if not identical, to the class specification factors would legitimately provide important evidence for the Commission.

Hubbard next objects to findings of fact twenty-three through twenty-five on substantial evidence grounds. Finding of fact twenty-three determined that Hubbard's position meets all the classification specifications for the Advanced 1 classification. The specification for Air Management Engineer - Advanced 1 is as follows:

This is very difficult advanced air management engineering work. Employees in this classification will typically serve as the department expert in a broadly defined segment of the air management program or a districtwide expert with multi-faceted responsibilities. The area of responsibility will normally cross program boundaries, require continually high level contacts with private consultants and engineers in major industries regarding highly sensitive and complex engineering reviews and have significant programwide policy impact. The area of expertise will represent an important aspect of the program, involve a significant portion of the position's time and require continuing expertise as the field progresses. The knowledge required at this level include a broader combination than that found at the Air Management Engineer - Senior level. Assignments are broad in scope and continually require the incumbent to use independent judgement in making professional engineering decisions. Positions at this level make independent decisions and perform work in response to program needs as interpreted by the employe with the work being reviewed after the decision has been made.

The Commission began its analysis by stating that Hubbard performs very difficult advanced engineering work in the air management program. This finding is not disputed. The Commission went on to say, however, that although Hubbard serves as department expert with regard to four issues in Air Management, these areas of expertise are not a broadly-defined segment of the program. Hubbard argues that substantial evidence does not support this finding. The Commission found that Hubbard's duties are only a part of the entire air program, that

matters pertaining to this particular expertise only make up forty percent of his responsibilities, and that his work does not cross program lines. There is substantial evidence in the record to supports these findings.

First, the forty percent figure is confirmed by Hubbard's position description which shows his work in the fields of NO<sub>x</sub>, SO<sub>2</sub>, boilers and Good Combustion technology for wood constitute forty percent of his total goals and worker activities. In addition, this was attested to by Hubbard, his supervisor, and the DNR personnel manager. It was properly relied on by the Commission and serves as substantial evidence with regard to the breakdown of Hubbard's job responsibilities.

Second, the Commission found that Hubbard's work deals with only part of the entire air management program. The testimony of several witnesses supports this finding. According to Donald Theiler, a colleague of Hubbard in the Bureau of Air Management, there are four sections within the bureau: compliance; planning; monitoring; and permits. Hubbard works in the Permit Section, which is further broken down into two units, the existing source review unit and the new source review unit. (Tr. of 2/13/92 at 9-10.) Within the existing source review unit, many engineers serve as specialists in a particular area (or areas) of pollution sources (Tr. of 2/13/92 at 10; Tr. of 2/14/92 at 288). Hubbard is one of those specialists. Based on this testimony, it was reasonable for the Commission to find that his work is only part of one program among many within the Bureau of Air Management.

Third, Hubbard objects to the Commission's finding that his work does not cross program boundaries. This objection also covers his arguments in relation to findings of fact twenty-four and twenty-five, which detailed the Commission's unfavorable comparison between Hubbard and

DNR engineers Wedepohl and Hammers on the factors of areas of expertise and cross-program responsibilities. The Commission found that the responsibilities of Wedepohl and Hammers were far broader in scope than those of Hubbard. This finding was amply supported by documents in the Record which detail the responsibilities of the other two engineers, both of whom are classified at the Advanced 2 level.

Hammers is a Wastewater Engineer - Advanced 2. According to his position description, which is part of the record, he is the department expert on pulp and paper mill discharge. In this respect he oversees the issuance and reissuance of all permits related to that industry, sets water quality-based effluent limits for the industry, works with the industry in reviewing plans for proposed industrial wastewater treatment and disposal facilities, and has a role in the enforcement of permits. In other words, Hammers is responsible for all aspects of the wastewater program as related to a single major industry, not merely permit issues. No testimony or documentation establishes that Hubbard's duties are so broad as to allow him to exercise such control over a single industry with regard to air management. Instead, Hubbard's duties appear to focus on certain areas of air management as they affect permit reviews. At least seventy percent of his areas of responsibility, according to his position description, relate to permits although he has other duties as well, such as code development with respect to his expertise in Good Combustion Technology for wood. Like Hammers, the DNR asks Hubbard to use his expertise outside the department and to work with permit applicants and other state agencies in addition to the engineers in his own bureau, but nonetheless his areas of expertise do not cover the entire field of air management issues as do Hammer's in the entire field of wastewater discharges for one of the, if not the most, important industries affecting Wisconsin

waterways.

Richard Wedepohl is a Water Resources Engineer - Advanced 2 in the DNR's Bureau of Water Resources Management. The Commission found that his duties are broader than Hubbard's based on the fact that he has expertise over an entire program, lake restoration. This is borne out by a review of Wedepohl's position description. According to this document, the employee is intended to be the state's top expert on lake management efforts. The duties include development and implementation of a statewide lake management program, including obtaining federal and private grant monies for the identified projects, providing engineering direction to all actors undertaking lake studies and projects, and serving as the primary state expert and spokesman on complex lake water quality and comprehensive management issues. There can be no doubt that this position is very broad in scope both from an engineering and an administrative standpoint. The area of expertise required is program-wide, whereas Hubbard's expertise relates to only certain aspects of a single section within the air management program. Both Wedepohl and Hubbard are expected to have outside contacts with private industry, consultants, engineers and other government bodies with respect to their areas of technical expertise. Still, Wedepohl's responsibilities in this regard are more frequent and more broad because he serves as the official state spokesman for his program. The Commission's findings that Hubbard's job duties are less broad than those of Hammers and Wedepohl and that Hubbard's duties do not cross program lines are supported by substantial evidence in the record.

Findings of fact twenty-six and twenty-seven address the Advanced 2 class specification factor that engineers at this level continually perform the most complex engineering reviews, that they typically work in uncharted areas, and that they typically provide direction to other

engineers. The Commission found that Hubbard's responsibilities did not rise to this level. The full text of the Advanced 2 class specification for Air Management Engineers is as follows:

This is very difficult, complex professional air management engineer work. Employees in this class continually perform the most complex engineering reviews for the assigned area. The work assigned is typically in uncharted areas with essentially no guidance to follow. Employees at this level typically provide direction to other engineers assigned to the project. Work involves the development of policies, standards, procedure development, evaluation and administration. Employees at this level function as the chief technical consultant. Employees at this level are delegated authority to make the final engineering decision.

The Commission found that Hubbard performs the most complex engineering reviews but only in his narrow specialty areas. Hubbard testified in general terms that he believes his work is as complex as that of Hammers (Tr. of 2/14/92 at 251). He points to his position description which assigns thirty percent of his time to issuing permits which Hubbard baldly claims "constitute the most complex reviews." (Hubbard's Brief at 15.) It is undisputed that these reviews include BACT and LAER analyses. It is likewise undisputed that air management engineers in Hubbard's section who are classified below even the Advanced 1 level also perform such analyses. Indeed, finding of fact twenty in the Commission's Decision and Order explicitly so finds, and Hubbard has not challenged that finding. The Commission acknowledges that Hubbard performs the most complex reviews but it relied on assessments of the credibility and weight it assigned to the testimony of Hubbard and his witnesses to find that these reviews are within a narrow scope of expertise. (See Decision and Order at 3-5.) Its assessment was a product of drawing a reasonable inference from the evidence and is beyond this court's authority to second-guess.

The narrower focus of Hubbard's engineering work is also reinforced by the



Commission's finding that Hubbard's work in uncharted areas is confined to his work in the Good Wood Combustion field. There is clear support in the record for the proposition that Hubbard does not "typically" work in uncharted areas with no guidance to follow. The only specific example of an uncharted area was his development of a policy for Good Combustion Technology for wood (Tr. of 2/13/92 at 15; Tr. of 2/14/92 at 211). Hubbard also testified that his permit work often led him into uncharted areas, however the testimony on that subject was not specific (Tr. of 2/13/92 at 183; Tr. of 2/14/92 at 210-218), and the Commission was obviously not persuaded. According to Hubbard's own position description, he spends only ten percent of his time on issues relating to Good Combustion Technology for wood. Based on this statistic, it was reasonable for the Commission to find that he does not typically work in uncharted areas. There is further support for this finding in the comparison of Hubbard's position description with that of Wedepohl.

With regard to his area of expertise and its value to others, Hubbard clearly provides direction and assistance to other DNR bureau and district staff (Tr. of 2/14/92 at 190), and the Commission so acknowledged. He is also responsible for developing guidelines interpreting the meaning of the term Good Combustion Technology for wood, as used in the administrative code (Tr. of 2/13/92 at 48; Tr. of 2/14/92 at 211), and again the Commission so acknowledged. However, again, the Commission found that the area within which Hubbard performed these activities was narrow in focus and neither typical nor continual. Hubbard does not really challenge these findings as unsupported by substantial evidence. Instead, he argues that the narrowness of his job's focus is not a proper consideration in a classification decision. It needs no extended discussion to simply point out that the class specification for the Advanced 2

classification belies his contention.

To the extent Hubbard does really challenge the evidentiary basis for the Commission's finding as to his development of policies, etc., there is more than substantial evidence in the record to support its finding that Hubbard's role in this area does not rise to the Advanced 2 class specification. Comparison of Hubbard's duties and position description with those of Hammers and Wedepohl again provide that evidentiary support. Hammers testified that he has taken part in drafting actual administrative rules (Tr. of 2/13/92 at 93). There was no evidence that Hubbard had done so. Similarly, Wedepohl is responsible for setting standards and procedures for the statewide program he manages. The responsibilities of Hammers and Wedepohl in terms of developing policies and standards in their particular areas of expertise can reasonably be seen to be both broader and more significant than those of Hubbard.

Finally, Hubbard challenges the Commission's "best fit" conclusion made in finding of fact twenty-eight, which found that his duties and responsibilities "are better described by the specifications for the Advanced 1 classification than those for the Advanced 2 classification." The preceding discussion reveals that there is substantial evidence in the record to support the Commission's findings on the various building blocks that were used to make this more comprehensive and overriding finding, and this alone would require that the Commission's "best fit" finding be sustained. Here there is more. The Commission had the benefit of extensive testimony from Judith Burke, a DER personnel specialist, who expressed an expert opinion that Hubbard's position should be classified at the Advanced 1 level. She conceded her lack of expertise with regard to the technical aspects of engineering, and there is no indication that the Commission relied on her testimony to make findings in this area. However, it was entitled to

consider her opinions in other areas which were explained, dissected, subjected to cross-examination and exposed to a Commission which itself has substantial experience and expertise to utilize in weighing the credentials of Burke and the reasons she gave for her opinions. Contrary to Hubbard's contention that Burke's testimony should be disregarded, that testimony provides further evidence to support the Commission's findings. Further, if finding of fact twenty-eight is deemed to be a conclusion of law, I conclude that Hubbard has failed to demonstrate that the Commission's best fit determination is without rational basis.

### CONCLUSION

These two cases are archetypal examples of why deference is paid to the conclusions reached by administrative agencies. Complex questions are assigned by the legislature to a group with expertise that will, over time, develop experience, procedures and a body of legal principles to assist in answering those questions. If the legislature concludes that the group has generally failed to solve the problem created by those complex questions, it is free to reconstitute the group, draw up new rules for its operation, or abandon the approach in favor of a new method of having the questions answered. When the legislature bestows its blessing on the group by doing none of these things, the legislative will is served only if the group is allowed to do that which the legislature directed them to do, namely answer the complex questions. Where the question presented by a particular case is precisely the kind the legislature entrusted to the group and it devotes itself to answering that question, it undercuts the legislative choice if the person with the question is free to simply go to another group or to a court to seek a different answer. Intrusion by the court must be reserved for those limited occasions when the group has wandered outside of the broad expanse ceded to them by the legislature.

After an exhausting review of the lengthy records developed by the Personnel Commission in answering the complex questions presented to it by Donald Sanders and Allen Hubbard, I conclude that neither case presents one of those limited occasions. For all of the foregoing reasons,

IT IS ORDERED that the Commission Decision and Order of March 29, 1994, concerning Donald K. Sanders, Jr. is affirmed and Case Number 94 CV 1407 be and the same is hereby dismissed.

IT IS FURTHER ORDERED that the Commission Decision and Order of March 29, 1994, concerning Allen J. Hubbard is affirmed and Case Number 94 CV 1408 be and the same is hereby dismissed.

Dated this 27th day of November, 1996.

By the Court:

A handwritten signature in black ink, appearing to read "Michael Nowakowski", written over a horizontal line.

Michael Nowakowski  
Circuit Court Judge