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KAREN FENSTER,  
 Appellant,  
 v.  
 Secretary, DEPARTMENT OF  
 EMPLOYMENT RELATIONS,  
 Respondent.  
 Case No. 95-0160-PC

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DECISION  
AND  
ORDER

This is an appeal of a decision by respondent denying the reclassification of appellant's position from Water Resources Management Specialist - Senior to Water Resources Management Specialist - Advanced. A hearing was held January 16, 1996, and the posthearing briefing schedule was completed on March 28, 1996.

With the exception that appellant spends fifty percent of her work time on Goal A rather than sixty percent, her position description, dated June 11, 1994, is accurate. It is in pertinent part as follows:

- 60% GOALA: Implementation of provisions of the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA), Wisconsin pesticide law and administrative rules under ATPC 29 including providing interpretation of pesticide regulations, guidance for compliance, and development of the landscape pesticide application program.
  - A.1 Develop and implement an annual advance notification program for landscape pesticide applications. Activities include coordination of public notice, development and maintenance of registry database, evaluate application compliance with ATPC 29, coordinate registry distribution, coordinate survey of responsible parties, respond to public comment/complaints.
  - A.2 Respond to pesticide notification complaints. Coordinate tracking of notification complaints and enforcement actions. Refer appropriate complaints to enforcement and compliance section for follow-up.
  - A.3 Promote compliance with pesticide laws and regulations relating to pesticide use, storage, handling and other areas not specifically assigned to other program staff by

development of information materials, presentations to regulated community and responding to technical scientific and general pesticide related inquiries.

- A.4 Recommend and communicate pesticide compliance strategy with the Enforcement and Compliance Section. Review inspection reports prepared by field staff and coordinate tracking of Federal pesticide inspections. Refer appropriate cases to the U.S. Environmental Protection Agency for case development and enforcement.
- A.5 Develop and present training materials for staff and regulated industry to assure compliance.
- A.6 Track pesticide applications not specifically assigned to other staff, which may pose an unusual human health or environmental risks.

30% GOAL B:

Development, coordination and implementation of procedures under ATCP 29 for state and federal permits or pesticide special registrations (Experimental Use Permits, Special Local Needs Registrations (24c) and emergency exemptions section 18 of FIFRA).

- B.1 Develop and implement administrative procedures for special local need pesticide product registration, emergency exemption pesticide product registration, emergency use permits, experimental use permits and prepare or coordinate the preparation of the environmental assessment or impact statements required for those registrations or permits.
- B.2 Analyze information submitted by the applicant/registrant to determine regulatory compliance and potential environmental impacts associated with the action.
- B.3 Provide technical assistance and pesticide risk communication to the Compliance Section field staff regarding state and federal permit/registration procedures and make recommendations to the Compliance Section supervisor on pesticide application monitoring priorities for department approved permits or registrations.
- B.4 Maintain an information retrieval/record system for pesticide and permits and registrations.
- B.5 Act as the Division's liaison with staff from the University, EPA, pesticide manufacturers, applicant, growers, agencies and the public with regard to the permit/special registration application and review process.

B.6 Develop public informational documents on permits and special registrations as needed.

10% GOAL C: Provision of planning, scheduling and participating in the development and coordination of Bureau regulatory objective work of Groundwater and Regulatory Services Section, Program Unit related to proposed legislation and administrative rules.

C.1 Identify and facilitate the development of law and rule changes relative to the regulation of pesticide use, storage, handling and disposal. Research social, economic and environmental impacts of the proposed actions. Prepare department position papers, fiscal estimates and legislative memoranda.

C.2 Prepare environmental impact statements and assessment when required. Prepare other necessary analysis papers.

C.3 Serve as technical advisor to Division management related to pesticide products and issues.

10% GOAL D: Provision of serving as a primary information contact for pesticide program areas, not specifically assigned to other staff, to respond to technical scientific inquiries and general pesticide related inquiries from the public.

D.1 Provide assistance, as requested, in all areas related to pesticide program responsibilities not assigned to other staff. Draft correspondence and other documents as needed.

D.2 Provide technical assistance in specialty areas related to pesticides and the environmental sciences as assigned such as pesticide food safety issues, pest problems, safety related to pesticide use, and pesticide best management practices.

The "Inclusions" section of the classification specification for the Water Resources Management Specialist - Management series, in pertinent part, is:

This series encompasses positions primarily in the Professional Science Bargaining Unit and non-represented management positions, found in the central, district, or area offices of the Department of Natural Resources, or the Department of Agriculture, Trade, and Consumer Protection's Agricultural Resources Management Division. Positions serve as local contacts with the public, other local, state and federal agencies, civil divisions and consultants.

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The Department of Agriculture, Trade, and Consumer Protection's Agriculture Resource Management Division enforces laws related to pesticide manufacture, distribution, use, storage, and disposal, as well as similar aspects of feed, fertilizer, and other agricultural production chemicals. These DATCP programs are aimed at preserving and protecting the State's land and water resources from point and nonpoint source pollution and soil erosion, and from other environmental impacts. The activities also protect the human and animal food chain from agrichemical contamination, and control nonagricultural uses of these regulated products.

Wisconsin's agrichemical laws protect Wisconsin's resources from becoming contaminated with pesticides, fertilizers, animal drugs, and other agrichemicals. Regulation is not limited to agricultural uses of these compounds, but also applies, to commercial, industrial, household, pet care, and lawn and garden uses. Activities include: reviewing and responding to scientific studies and registration data on agrichemicals proposed for use in the state; compiling and analyzing agrichemical use data for Wisconsin to determine trends and potential usage problems, including impacts on water, air, and land resources; coordinating activities and reviewing inspection and investigation data to identify actual and potential agrichemical contamination incidents, and their cause(s) and impact(s); initiating enforcement or regulatory responses to correct or prevent future contamination; regulating or prohibiting agrichemical practices in cooperation with Federal EPA or FDA programs or other state agencies, that may result in contamination of groundwater or other resources, or in unacceptable risks to the human and animal food chain.

The classification specification "Definitions" section describes Water Resources Management Specialist, Senior and Water Resources Management Specialist, Advanced positions as follows:

#### WATER RESOURCES MANAGEMENT SPECIALIST, SENIOR

Positions allocated to this level include senior level Water Resources Management Specialists. Positions at this level differ from lower level positions in that the specialist develops and follows broadly defined work objectives and the review of the work is limited to administrative evaluation by the supervisor.

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

or (2) a senior district water resources specialist responsible for developing, administering and evaluating a major portion of the water resources program being implemented districtwide; (3) a senior central office water resources management specialist responsible for serving as the assistant to a higher-level water resources management specialist/supervisor having responsibilities for a major aspect of the program or (4) as a program specialist responsible for the implementation of a program which is smaller in scope and complexity and does not have the interaction and policy development that is found at higher levels. In order to be designated at this level positions must be differentiated from the objective level by their depth and extent of program involvement, the number and complexity of the program(s) managed, and the complexity and uniqueness of the program in the assigned area.

#### WATER RESOURCES MANAGEMENT SPECIALIST, ADVANCED

Positions allocated to this level include advanced Water Resources Management Specialists. Positions typically serve as the: (1) department expert for a significant segment of the water resources management program or (2) a districtwide expert with multi-faceted responsibilities (providing districtwide expertise and coordination for multiple and significant segments of the water resources program). The area of responsibility will normally cross program boundaries; require continually high level and complex contacts with a wide variety of government entities, business, industry, and private citizens regarding highly sensitive and complex water resources management issues 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. The knowledge required at this level includes a broader combination than that found at the Water Resources Management Specialist-Senior level. Positions at this level develop and follow broadly defined work objectives with the review of work being limited to broad administrative review. Positions have extensive authority to deal with top officials, both within and outside the department, especially in highly sensitive and complex statewide, interstate and/or national issues. These positions are responsible for developing, implementing, monitoring and evaluating policies and programs and function under general supervision, work independently, and are considered to be the statewide expert in their assigned program area. In order to be designated at this level, the position must be easily distinguishable from positions at the senior level by the scope and complexity of the responsibilities.

Appellant Karen Fenster works as a Pesticide Specialist in the Program Unit, Groundwater and Regulatory Services Section, Bureau of Agrichemical Management of the Department of Agriculture, Trade and Consumer Protection. Fenster's immediate supervisor is Edward Bergman, who is the Program Unit leader and supervises twelve people, including environmental specialists in the clean sweep, feed, fertilizer, and pesticide programs.

Bergman's responsibilities include: providing technical assistance to his staff and private citizens, reviewing staff decisions regarding the issuance of fertilizer or soil and plant additions permits and pesticide specialist registrations, interpreting the provisions of the state and federal laws for the assigned program areas, consulting with the section director and the director of the compliance section on enforcement actions resulting from the unit's activities, developing and participating in the hearing process for administrative rule changes relating to the unit's programs, reviewing and interpreting the results of laboratory analysis, and mediating differences of opinion between unit staff to assure program activities are uniform and consistent as possible. (See Respondent's Exhibit No. 5, Goal C.)

Also, Bergman serves as the bureau, division or department representative to task forces, organizations, and other committees at the state, regional, and national level dealing with unit issues related to bureau programs, as appropriate.

Mr. Bergman reports to Paul Morrison, the Director of the Groundwater and Regulatory Services Section. Aside from his overall administration and management duties, Morrison is responsible for more specific duties including: reviewing and making recommendations to division and department management related to statutes, rules or policy changes and serving as the division or department representative on task forces, organizations, associations, and other committees at various levels, dealing with technical issues regarding specific programs, as appropriate. Morrison reports to the Bureau Director, Ned Zuelsdorff.

The classification specification for Water Resources Management Specialist, Advanced includes two allocation patterns. In her brief, appellant acknowledge that her position does not fit allocation pattern "(2)", but claims it fits allocation pattern "(1)", which requires positions to serve as: "department expert for a significant segment of the water resources management program"....

Appellant argues that she functions as the expert in Wisconsin's landscape pesticide prenotification program; that her responsibilities cross program boundaries; that she consults with staff in other program areas in "DATCP, DNR, DHSS, EPA, FDA and with university staff, coop producers, grower groups and other agents;" and that a major portion of her position involves

"policy development, implementation, monitoring and evaluation once a regulation is in effect."

About being the department expert, appellant states:

"I do not dispute that Dr. Bergman formerly had the responsibility for a portion of my current responsibilities, that of the pesticide special registration program. Dr. Bergman's current major responsibilities are supervisory in nature...Dr. Bergman assists in program implementation but he is not considered the program expert. This responsibility remains with the [program] specialist...The specifications do not state that the specialist must be the 'sole' expert in their assigned programs; only that they serve as the department expert. I have been designated to serve the department as the department expert. Dr. Bergman has been assigned to provide technical assistance as needed but he clearly is not the program expert."

It is clear from both testimonial and documentary evidence that policy development in appellant's program area is the responsibility of Bergman, Morrison and Zuelsdorff; appellant's first-, second- and third-line supervisors. It is just as plain, appellant's arguments aside, that Dr. Bergman, not appellant, is the pesticide program expert, whether officially assigned as such or not. Formerly, Dr. Bergman was responsible for the pesticide program and now, as unit head, is still responsible for the pesticide program. Also, if appellant cannot answer questions about the pesticide program, she consults Dr. Bergman. This evidence is inconsistent with appellant's claim that she serves as the department expert in her assigned areas.

Finally, appellant recognized in her brief that respondent could have established her position's current classification at the Senior level under allocation pattern three or four. Also, while serving other programs, the positions of Feed/Pesticide Specialist Eric Nelson and Fertilizer/Pesticide Specialist Michael Koran (Respondent's Exhibits 8 and 9), both at the Water Resources Management Specialist - Senior level, compare favorably to that of the appellant. All three positions are located in the same unit and function under the same supervisory structure.

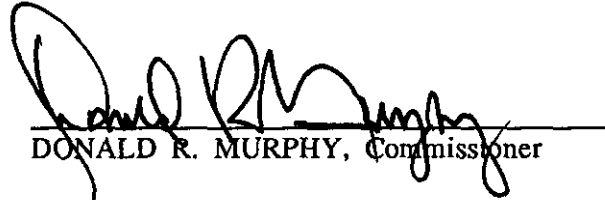
For the reasons stated and based on the evidentiary record, the Commission concludes that appellant's position is more appropriately classified at its current level.

ORDER

The decision of the respondent is affirmed and this appeal is dismissed.

Dated: August 5, 1996 STATE PERSONNEL COMMISSION

DRM:dpd

  
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